# COMMERCIAL ARBITRATION IN ISLAMIC JURISPRUDENCE:

## A study of its role in the Saudi Arabia Context.

By

MOHAMMED A. H. AL JARBA .

LLB, King Saud University, LLM, The American University
(Washington, D.C) .

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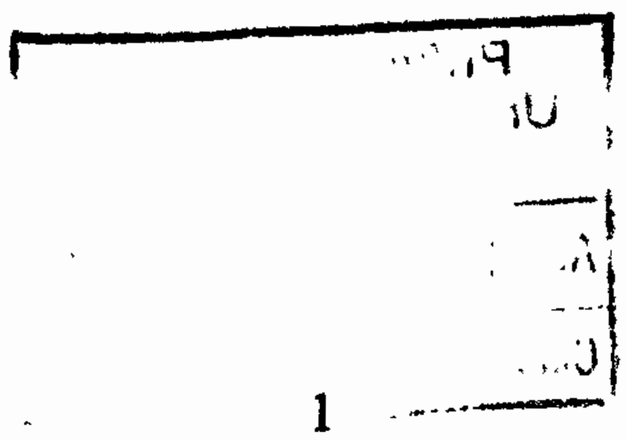

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I declare that this thesis is the result of my own investigations, except where otherwise stated.

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# ABSTRACT

This thesis is an extensive analysis of commercial arbitration within Islamic Jurisprudence, clarifying its rules starting with the fundamentals of its origins which are based on the Quran, Sunna, Consensus and Analogy. The opinions of scholars from various schools of Islamic Jurisprudence are discussed so that the most appropriate ones can be used in support of the thesis in relation to the current epoch. These opinions will be linked to modern arbitration legislation, both international and local, in an attempt to discover the similarities and differences between them and the extent to which international and local legislation is related to the acceptance of arbitration from the perspective of Islamic Jurisprudence.

The thesis will also analyse the legal aspects of the 1983 Saudi Arbitration Law and its 1985 Implementation Rules so as to discover the extent of the role of Islamic Commercial Arbitration in the Saudi Arabian context. It will also show the need for further ratification in this sphere in order to develop the Saudi Arbitration Law so as to encourage more foreign investment and achieve more efficiency and harmony within international commercial arbitration.

Chapter one will deal with the definition of arbitration and its legality within Islamic Jurisprudence. Chapter two will discuss the pillars of the arbitration contract and endeavour to answer the question of women's role in arbitration and also to what extent non-Muslims can be arbitrators in various situations. Chapter three will focus on Islamic arbitration proceedings. Chapter four will deal with arbitral awards, their definitions, interpretations, components and corrections. It will also clarify some misunderstood points and concepts about Islamic Jurisprudence. Chapter five will explain the system of challenging arbitral awards and the extent to which they can be examined within Islamic Jurisprudence. It will also focus on challenges in Saudi Arbitration Law. Chapter six will explain the recognition and enforcement of national and foreign arbitral awards as they pertain to Islamic Jurisprudence and Saudi Arbitration Law. Suggestions resulting from this analysis will be outlined in the conclusion of this thesis.

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## Introduction

Arbitration has been known since the first stages of the legal thinking of mankind. It has developed throughout the urban development of mankind and has now reached the flourishing stages witnessed today both locally and internationally.

The systems of ancient communities were based on the interest of power, but these systems did not last long, they were instead submitted to reconciliation and arbitration. This was due to the authority of various chiefs who realized that it was not in their own interest to use force when solving problems because force generally brought about wars. They decided that they should find peaceful means to settle disputes.[1]

During the first decade of the last century, a stone board was found in the South of Iraq. Texts of a reconciliation pact, written during the thirty-first century B.C. in the Sumari language, were written on the boards. The pact had been concluded between two countries, Lagus and Uma. These two countries had been in constant dispute over identification of borders and seas. Consequently, they decided on arbitration to settle their disputes; the chosen arbitrator was the King of Kabsh City who was neutral. The treaty stipulated that there was an obligation to respect borders between the two countries but that they could go to arbitration to settle any disputes emerging from border problems.[2]

Other nations, such as Greece, Rome and the ancient Egyptians, used arbitration to settle commercial, financial and individual disputes.[3]

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[1] Dr Safi ; AbuTalbe, Mabada Tarik Alganon, Principles of the History of Law, Dar Al Nahzaz, Egypt, 1965, P.70. See also Dr Mohamed Saed, Introduction to the Study of Islamic Systems, College of Shari in Riyadh, Dar Al Qalam, 1984 p.22; also Ibn Khaldoun, Al Moqadima, (The Introduction), 4th Ed, 1981, Beirut p.p.302-303.

[2] Taha Baqer, Moqademah Fi Tarikh Al Hadarat Al Qadima, (Introduction to History of Ancient Civilization), 2nd edn., Sharkat Al tabh Almahdouda, Baghdad, (1370 H, 1949 A.D.) Vol.1, p.107. See also Nariman Abdelqader, Itifaq Al Tahkim Wafqan Liquanoun Al-Tahkim Limmawad Atijaria Wal Madania Al Misri, (Arbitration Agreement Compliant with Commercial Arbitration Law in Egypt 1st Edn., 1996, Dar al Nahdah Al Arabiah, p.33.

[3] John F Philips Arbitration Law, Practice and Precedent ICSA Publishing, Cambridge, England 1988, pp 8-10.

Wise men, in all ages, have generally tried to achieve peace and to settle disputes amicably. These objectives were targeted by the laws of heaven and have constantly been emphasized by Islam since Muslims have used arbitration as a model to settle many commercial and civil disputes.

With the growth of commercial activity, both at local and international levels, there has also been a growth in disputes, therefore there is an even greater need of arbitration to help judicial authorities to settle them.
For example, Professor Hazel Genn says :

> 'There aren't enough courts, there are not enough lawyers to deal with everybody's problems. And basically, at the end of the day, 85% of the problems in this country are forgotten because people just get frustrated and they just don't think it's worth it. Does it matter? Of course it matters, because everybody's problem is important.'[4]

On the same subject Rayneo Hamilton says:

> 'Cross-border transactions are increasing and, when you have these, disputes follow just as certainly as night follows day.' [5]

For this reason, with the growing number of disputes and problems, it is necessary to find ways to co-operate with and support arbitration at both local and international levels, because it is one of the most suitable alternatives to settle disputes. Notable developments have taken place in arbitration, as Baker & McKenzie's London Construction and Project partner Jeremy Winter has claimed:

> 'The volume of arbitration business will keep on rising because it is increasingly common that arbitration is chosen as a method of resolving disputes.'[6]

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[4] Hazel Genn, Paths to Justice, What People Do and Think about Going to Law, Hart Publishing, Oxford, Portland Oregon, 1999, P. 249.
[5] See Elizabeth Davidson, No Dispute over ADR Success, The Lawyer, 25 October, 1999, P. 12.
[6] Ibid. Also, the number of cases presented to the International Chamber of Commerce has reached approximately 400 cases a year. This means that there is a new case every day including weekends and feast days. See Professor Aktham Alkaouli, the lecture: Introduction of First Conference on Arbitration organized by the Board of the Country's Cases in Egypt, 14-19 September 1996.

With more commercial disputes, the jurisprudence of trading and arbitration has developed at both international and local levels. Countries have been keen to issue laws and pass legislation relating to it. Yet, there are differences between national laws in the field of arbitration.[7]

For this reason, countries have made collective efforts to find a unified formula for international commercial arbitration. They have attempted to unify the rules relating to the recognition and enforcement of arbitral awards. These efforts have been exemplified by the adoption of numerous international laws, such as the 1958 New York Convention and the UNCITRAL Model Law of 1985.

Amongst all the efforts that the subject of arbitration has witnessed within today's jurisprudence and modern arbitration laws, at both international and local levels, is the rise of scientific research papers, whose legal opinions are contributing to arbitration development, its justice, and the safety of implementing arbitral awards. These research papers have become an important source for legislative authorities at both the international level and that of the specialized arbitration center.

Nevertheless, there is an important aspect of jurisprudence in the field of arbitration that deserves more scientific research, i.e. Islamic Commercial Arbitration. Through the scientific revolution witnessed today and as a result of the speed and facility of modern communications, the world has become a small village. However, there are differences between national arbitration laws and there is a feeling that the components of international laws do not always comply with the cultures and interests of various countries.

In respect of this, Professor, Abdul Hamid Elahdab has said 'of the Arab countries in particular':

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[7] See the clarifying Memorandum, a Book for The UNCITRAL Model Law, United Nations, 1994, P. 19.

> 'It is often felt that the legal cultures of Arab countries are ignored in international arbitration.'[8]

Redfern & Hunter have also pointed this out; they claim:

> 'The problem is a real one, and one of which the international arbitral institutions have become increasingly aware. Many of the less developed countries lack confidence in international commercial arbitration. This is largely because of the fear that arbitral tribunals, established under the auspices of instructions based in the world's major industrial nations'.[9]

This means that more effort must be made to develop international arbitral agreements and to disseminate knowledge. The necessity to understand other cultures and ideologies becomes increasingly important and persistent efforts must be made to reach an international formula which should take into consideration the basic principles sought by most countries so as to achieve some kind of international compromise.

The importance of investigating the legal aspects of Islamic Commercial Arbitration is now paramount because Islamic Jurisprudence is representative of the basic legal source of more than thirty Islamic States.

Moreover, there are other important factors that make research in the field of Islamic commercial Arbitration more vital.

There is much support in Islamic countries for applying the rules of Islamic Law. There must, therefore, be detailed studies of all legal aspects of Islamic Law in order for its rules to be understood from the basic sources of Islamic Jurisprudence. Among these aspects will be found commercial arbitration, at both local and international levels.

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[8] Abdulhamid Elahdab (Chairman, Arab Association for International Arbitration), Arbitration with the Arab Countries, paper presented to the Seminar of the 'Practice of International Arbitration' at University of Oxford, St. Antony's College, Oxford, July, 1999, P. 2.

[9] Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration, 3rd Edition, Sweet and Maxwell, 1999, P. 207.

On the other hand, it is also considered very important to support commercial activity and attract foreign investments. However, Muslim businessmen show a great desire to settle their disputes in accordance with the rules of Islamic Jurisprudence and insist that their international dealings are regulated by the rules of Islamic Law. In this respect, His Royal Highness, Prince Bander Ben Salman Al Saud has said:

> 'Last year, I was informed by the President of the Chamber of Commerce in Paris at an international meeting that four cases of application of Islamic Law (Islamic Sharia) were requested as compulsory law. In fact, those four cases were treated in accordance with Islamic Law (Islamic Sharia).'[10]

In fact, this orientation is not limited to resolving commercial disputes, that is by means of Islamic Arbitration, it goes beyond that touching financial transactions. For instance, Dr. Hamed AL Majed claims:

> 'The London Islamic Center has gone beyond negotiation with Islamic Banks. to negotiate with famous British Banks in an attempt to find an Islamic contract formula, by virtue of which Muslim customers would buy their houses in accordance with the rules of Islamic Law. It is in the interest of these banks to find this formula even though they deal with caution because these transactions do not exist in their economic context. Nevertheless, there have been successful attempts through which some European banks became convinced to finance investment projects with contracts not violating Islamic law and bringing about financial gains to these banks.'[11]

This shows that there is a need to study the rules of Islamic Jurisprudence and to understand how to deal with many modern economic and legal states. In this sense, Dr. M.J. Noder says:

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[10] His Highness, Prince : Dr Bander Ben Salman Al Saud, The General Manager Assistant of the Arab Arbitration Council, and member of Administrative Board of Provincial Arbitration in Cairo, Specialized in international Arbitration, Author Interview, 22 August 2000.

[11] Dr. Hamed AL Majed, President of Islamic Center in London, Aslamat Albaunok, Islamization of European Banks, Al Thaqafiah Magazine, London, Issue N° 41, Year Seven, March, 2001, P. 89. (emphasis added).

'Some Westerners know that Islamic Law is a huge treasure trove of Jurisprudence and knowledge which organizes the commercial life of local and international dealings. But, I doubt the fact that they understand its enormous means to organize the new humanitarian society in the twenty first century.....it is obligatory to state that Muslim legislators are not making great efforts to clarify this aspect.'[12]

Many researchers have worked on a considerable number of jurisprudence issues dealing with judicial authority, counselling, personal affairs, etc. Benefit should be drawn from these research papers.

However, there are still numerous subjects on which scholars of ancient jurisprudence have had divergent opinions. The subject of arbitration still requires deep research and some scholars have tackled the subject of reconciliation from various different aspects. However, on the whole this subject has been studied only in a general way.

Therefore, it becomes apparent that there is great need to clarify Islamic Jurisprudence from its source, as Salman Alauda says in this regard:

> 'This literature has its short-comings in form and meaning.
> A. The form, classification and division into chapters: In some of these books, subjects interviewed said that it is difficult, sometimes even for specialists, to find the required issues. What makes it even more difficult, is the lack of indices that help the researcher.
> B. The style, albeit suitable for the time that it was written, is difficult to understand even for the contemporaries. This is additional to laconism, conciseness and frequent use of idioms of historical implications, these notes do not aim to devalue this great legacy of jurisprudence as they do not mean generalization.'[13]

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[12] Dr. M .J. Nader, International Commercial Arbitration, Symposium of Commercial Arbitration, Riyadh Chamber of Commerce and Industry, October 1995, P. 6.
[13] Salman Aludah, Dawabet Derasat Alfhqhia, (Islamic Jurisprudence Studied Controls) First Edition, Dar Alwatan Publishing, Riyadh, 1412H, (1992 A.D.), P.23.

The foregoing shows that arbitration within Islamic Jurisprudence requires independent research to clarify various Islamic Jurisprudence opinions, this thesis will attempt to shed light on these opinions and clarify this area of study.

There is also a need, on the part of those dealing with Muslim companies or persons, especially if arbitral awards are sought to be implemented in Islamic countries applying the rules of Islamic Law, to work more specifically on arbitration.

Nicola Graham states:

> 'One of the complaints often heard from overseas offices is that London-based staff do not always have an understanding of global business issues.'[14]

There is generally a lack of knowledge and understanding of Islamic Sharia in Western business circles.[15] This thesis will try to present a step forward in the field of international approximation by clarifying and discussing the rules of commercial arbitration.

When discussing the rules of commercial arbitration within Islamic Jurisprudence, it is also necessary to study Saudi Arbitration Law because Saudi Arabia represents a distinguished Islamic experience in these modern times. Saudi Arabia abides by the rules of Islamic Law and has, at the same time, achieved considerable modern developments in the field of arbitration.

This thesis will attempt to answer and clarify all the issues relating to commercial arbitration from the perspective of Islamic Jurisprudence. It is also hoped that this thesis will fill in the gaps in this field through discussion of the different jurisprudence opinions as stated by the various Schools of Islamic Jurisprudence. The most apt opinions supported by proof from the fundamental sources of Islamic Jurisprudence, which will comply with modern commercial arbitration, will be used to add justification to this thesis.

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[14] Nicola Graham, International Horizons, The Lawyer, 5 March, 2001, P. 30.

Discussion of Islamic Jurisprudence or Islam, must include two important points which must be clarified, these are - first, the religious dimension of Islamic Jurisprudence; second, what are the Schools of Islamic Jurisprudence? It is important to mention that Islamic Jurisprudence is derived from the law of God, in the sense that it must comply with the essential principles of the Quran and the Sunna of the Prophet.

Meaning divine law to Muslims everywhere, God revealed His final law to the prophet Mohammed between 610 and 632 AD. The revelation took the form of the Quran, the 'Book of God', which Muslims believe to be the actual words of God that the Prophet Mohammed transmitted literally to mankind. The Quran is therefore considered to be the first resource of Islamic Jurisprudence. The second resource is the Sunna of the Prophet, the example of the Prophet's lifetime – both his words and his exemplary actions. Because it is considered as a secondary revelation, it is known as the Sunna. The Sunna is known by the transmission from generation to generation of reports about the Prophet. Each report, accompanied by a list of the people who have narrated it through history, is called a 'hadith'. Through the Quran and the Sunna, mankind may learn all that God intended to reveal for the purposes of Islamic Jurisprudence.

N.J. Coulson points out:

> 'For Islam, however, this same question (of the nature of law) admits of only one answer which religious faith supplies. Law is the command of God, and the acknowledged function of Muslim jurisprudence from the beginning was simply the discovery of the terms of that command.'[16]

Or according to S. Ramadan:

> 'The structure of Islamic law, the Shari'ah, was completed during the lifetime of the prophet, the Quran and the Sunnah. This brings us to an important fact which is generally overlooked, it is that the invariable

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[15]George Sayan, Arbitration, Conciliation and Islamic Legal Tradition in Saudi Arabia, Journal of International Business Law, 1987, P.211.
[16]N.J. Coulson,A History of Islamic Law,Edinburgh University Press, 1964, P.75.

> basic rules of Islamic Law are only those described in the Shari'ah (Quran and Sunnah), which after thirteen centuries are very rich and indispensable, they must always be subordinated to the Shari'ah and open to consideration by all Muslims.'[17]

Consequently, anyone trying to fathom Islamic Sharia as an abstract concept, desiring to make reforms and organize dealings with sects within Islamic societies, will, if they have no links to Islam, have an incomplete understanding and will therefore interpret incorrectly. This must be considered as fact because a correct understanding of Islamic law rests upon knowing the origins, the objectives and references of Islamic Law. Anyone attempting to understand without making links to Islam is considered as someone visualizing fruits with no trees, or branches with no roots.[18]

The reliance of Islamic Jurisprudence on religion cannot be described as limited or unable to follow up modern advancements because Islamic Jurisprudence has sufficient flexibility and mechanisms to treat all new cases through stable origins and renewed branches. These stable origins are the Quran, Prophet's Sunna, Consensus and Analogy. Any new case can be treated by virtue of these principles. There is also what is called 'Lawful Politics' within Islamic Jurisprudence, enabling scholars of Islamic Jurisprudence to follow up any new case through perseverance in the light of the basic sources. After the Islamic schools of Jurisprudence were established there were many different opinions, thus, the books of Islamic Jurisprudence have become a huge store of wealth that needs currently to be exploited.

When talking about Islam and Islamic Jurisprudence the following questions arise - what is the difference between Sunna and Shia'a and what is the purpose of the schools of Islamic Jurisprudence?

It would be useful here to point out the types of disagreement that have emerged between the Sunna and the Shia'a schools since they will often be mentioned in this study.

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[17]Said Ramadan, Islamic Law, Its Scope and Equity, 2nd Edn., Kualalumpur, P.36.

a) The schools of Sunna includes the majority of Muslims in Islamic countries they constitute 90% of Muslems all over the world *. These schools encompass the Hanafi, Shafi, Maliki and Hanbali Schools. They are considered the most famous schools with a renowned history in Islamic Jurisprudence. There were other Schools of Sunna that failed to survive, such as Al Awzae and Thawri, but they were more focused on scientific heritage and traditions. All of these schools agree about the origin of faith and they differ only in details of jurisprudence. They contend that these differences in details has lead to the widening of the scope of Islamic Jurisprudence. S. Habachy said:

> 'The principal Sunni Schools are the Hanafi, the Maliki, the Shafii and the Hanbali schools. They do not differ fundamentally but disagree on several points of detail'.[19]

b) The Shia'a includes groups such as Zaidya and the Twelfth Shiit. The Shiit school differs not only in fundamentals but also in jurisprudence details. For example, the Twelfth Shiit School and Zaidya School differ over many issues decided by Abi Baker Al Sadiq and Omar Ibn Al khatab, the Caliph. On the other hand, they approximate with the Zaidya School of the Sunna School and more especially with the Hanafi school on a number of jurisprudence issues.

The Twelfth school differs from the Zaidya School as the latter does not agree on the infallibility of an Imam, whereas the former proclaims that the Twelve Imams -the first of whom is Ali Asskari, The Awaited Al Mahdi, born in 256H/835 A.D. He will appear to bring justice to earth - are infallible for they have committed no sins.[20] This is not believed by the Sunna School. There are also differences in what concerns faith between the Sunna and the Twelfth School.[21]

In this respect Jamal Nasir has said:

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[18]M. Abuzharh, Almelkia and Natherait Alaqd, (Dominion and the Theory of Contract), Dar Alfekr, Egypt, 1976, P.12.

*Jamal J.Nasir,The Islamic Law &Personal Status,Kluwer Law International,London,NewYork,2002,p.17 .

[19]S. Habachy, New York, March 1959. See J.N.D. Anderson, Islamic Law in the Modern World, 1st Edn. New York University, 1959, P. XIV. See also scholars who founded these schools of Jurisprudence, Ian Richard Netton, A Popular Dictionary of Islam, Curzon Press,London, 1922, PP. 17, 23, 159, 228.

[20]Qahtan Dowri, Adq Althkim fi Alfiqh (Arbitration Contracts in Jurisprudence, 1st Edn. Dar Kholoud Press, Baghdad, 1985, P.82. See also M.A.Altamemi, Alrafedah Alshia, Alsunna Magazine, Birmingham , Issue No.106, June 2001, PP 67-76.

[21]Ian Richard Newton, op.cit. P.131. See also Cyril Glasse, The Concise Encyclopedia of Islam, Stacy International, London, 1989, P.384.

'With the Imami Shia we move to an entirely different world vision:They have been the minority of Islamic Umma from the days of Umayyad Empier .They developed an athos 'which sustained them for centuries,aptly described by a modren scholar as 'an attitude of mind wich refuse to admit that majority opinion is necessarily true or right,and –which is its converse-a rationalised defence of the maral excellence of an embattled minority'*

Without going into details of faith, this study aims to give the opinions of all the different schools of jurisprudence. However, it must be realised that giving their opinions does not mean that they are considered correct by the author of this paper. They will be given alongside the legal aspects of jurisprudence in relation to the subject of this study so as completely to cover all aspects relating to arbitration, especially commercial arbitration. The most appropriate opinion suitable for modern times, supported, of course, by evidence from the Quran, Sunna, Consensus and Analogy will be sought. This will be done regardless of the position of any school claiming the origin of the best opinion. This allows for a new and comprehensive study on Islamic Commercial Arbitration through the rules of jurisprudence and not through imitation.

## A. Scope of Thesis

As previously mentioned, since Saudi Arabia is a country that continues to abide by the rules of Islamic Jurisprudence, this thesis will concentrate on discussing commercial arbitration within Islamic Jurisprudence, clarifying its role in the 1983 Saudi Arbitration Law and its 1985 Implementation Rules.

For this reason, many issues will be tackled, which will include the following:

- Opinions of Islamic Jurisprudence related to commercial arbitration from the basic sources of Islamic Jurisprudence, The Quran, Sunna, Consensus and Analogy.
- Discussing opinions of Islamic Jurisprudence found in books of different Islamic Schools of Jurisprudence to opt for the best proved opinion that concords with the modern epoch

* Jamal J. Nasir,Op.Cit,P.20-21.

- Attempts to provide links between these opinions and modern arbitration Laws at both international and local levels so as to ascertain their similarities and differences.
- Answering questions about Islamic Commercial Arbitration and the extent to which international and local legislatures relating to arbitration are accepted from the perspective of Islamic Jurisprudence.
- Discussing the legal aspects in the 1983 Saudi Arbitration Law and its 1985 Implementation Rules to gain an understanding of the degree of Saudi Arbitration conformity to the rules of Islamic Jurisprudence. It would also be pertinent to know whether there is a need to make modifications so as to develop the Saudi Arbitration Laws as a more attractive means to encourage foreign investments, to gain more efficiency and to be in harmony with international commercial arbitration.

There will also be an attempt to discuss international conventions related to arbitration which Saudi Arabia has joined so as to understand the most important principles that affect the course of implementing foreign arbitral awards in Saudi Arabia.

## B. Structure of Thesis

The thesis is divided into six chapters. The first chapter will deal with the definition of arbitration within Islamic Jurisprudence and its legality. Arab arbitration before and after Islam and the transition of the concept of arbitration after Islam will be illustrated.

Clarification of what is meant by commercial arbitration in Islam, including the terminological or scientific meaning of the matter of arbitration and similarities and differences in relation to the nature of arbitration and any similarities and differences with some modern arbitration laws will also be dealt with. The legality of arbitration from the Quran, Sunna, Consensus and Analogy perspectives will also be discussed. This will clarify the distinction between arbitration and similar awards in other Islamic Jurisprudence chapters.

Chapter Two will discuss the pillars of contract within Islamic Jurisprudence in general and then more specifically. Because the contract of arbitration is the source of arbitration in so far as its pillars are concerned, it will yield the expected results for settling all types of disputes.

This chapter will deal with each pillar specifically so as to cover the many issues concerned with them, for example the capacity of arbitratees' and arbitrators', and answering questions about the possibility of a woman arbitrator and the extent to which non-Muslims may act as arbitrators in different situations. Similarities between Islamic Jurisprudence and some modern arbitral laws will also be examined with special reference to Saudi Arbitration Law.

The third chapter will deal with the scope of Islamic arbitration and proceedings and will examine the rules of evidence required in Islamic Jurisprudence. This will be followed by a discussion of possible hindrances to arbitration parties that could ultimately affect the course of arbitration.

Chapter four will discuss the arbitral award and its great importance because this is the objective behind the process of arbitration. For this reason and for the continuity of exploitation of the aspect of Jurisprudence within Islamic commercial arbitration, this chapter will also assess arbitral awards, discussing the perspective of Islamic Jurisprudence and similarities and differences between them and modern arbitration laws, both locally and internationally. This will include discussion of the definition of arbitral awards, their components, corrections and interpretations.

Chapter four will also clarify some misunderstood points and concepts about Islamic Jurisprudence and outline corrections in an attempt to present Islamic Commercial Arbitration, as approved of by the Islamic World, as being suitable to deal with contemporary reality.

Chapter five will focus on challenge to arbitral awards, clarifying its importance because the extent of challenge may affect the arbitration either positively or negatively. This chapter will answer two important questions - to what extent is it possible to challenge arbitral awards within Islamic Jurisprudence and does Islamic Jurisprudence

welcome challenge openly or must there be specific reasons? Challenging arbitral awards within Saudi Arbitration Law will also be examined in this chapter. This will bring the judiciary system clearly into focus because challenging arbitral awards represents an important meeting point between judicial authorities and the arbitration system. The judicial role required to achieve a more efficient method to serve modern commercial life will also be discussed in this chapter.

Chapter six will deal with the final stage of arbitration which is, in fact, the objective behind arbitration itself. This is the phase of arbitral award implementation so that each party obtains its due rights. Therefore, this chapter will discuss the concept of arbitral award validity within Islamic Jurisprudence and the way it is implemented. The obstacles that stand in the way of such award implementation will be raised and discussed from the perspective of Islamic Jurisprudence.

This chapter will also illustrate the Saudi arbitration situation since Saudi Arabia represents a model country applying Islamic Law. It will show the fundamentals upon which Saudi Arabia relies to join international conventions related to arbitration and clarify how arbitral awards are implemented at both international and local levels in Saudi Arabia. Light will also be shed on the broad scope of Islamic Jurisprudence to incorporate the contents of international conventions and laws in the field of arbitration.

The conclusion will deal with the most important results achieved by this thesis and recommendations related to Islamic Commercial arbitration, and the 1983 Saudi Arbitration Law and its 1985 Implementation Rules will be discussed.

The appendices following the conclusion will clarify Conventions and Laws mentioned in this thesis.

The results and recommendations will be provided in the hope that they will provide a positive step in the service of commercial life to achieve international approximation and co-operation for the general welfare of humanity.

# CHAPTER ONE

## Definition of Arbitration in Islamic Jurisprudence and its Legal Basis

As mentioned in the Introduction, this study will focus on the analysis of commercial arbitration within Islamic Jurisprudence so as to learn all its aspects and rules. Thus, it is suitable to define arbitration within the framework of Islamic Jurisprudence and its legality. Therefore, this chapter will deal with this area of research to clarify the definition of arbitration either linguistically or scientificall ie.legal meaning.

The Arab arbitration situation before Islam will be clarified because Arabs have witnessed the mission of the prophet Mohamed (peace be upon him) and the Holy Quran was written in Arabic. Hence, knowing the previous situation of Islam will help us fathom the transition that has occurred to arbitration in the Arab Community after Islam.

Moreover, this chapter will shed light on the nature of arbitration in Islamic Jurisprudence and highlight points of similarities and differences in relation to contemporary arbitration laws.

Furthermore, this chapter will display the legal basis of arbitration in Islamic Jurisprudence with the clarification of proofs from basic sources of Islamic Jurisprudence. These original sources are the Quran, Sunna, Consensus and Analogy.

Finally, this chapter will mention what distinguishes arbitration from what appear to be similar rules in Islamic Jurisprudence, such as Judicial authority, deputization, reconciliation and experience. These important elements will be discussed as follows.

## 1.1 Arab Arbitration Before and After Islam

### 1.1.1 Before Islam

The Prophet Mohammed (Peace be upon Him) came from an Arabic tribe and thus, the Quran was delivered in Arabic. Knowledge and understanding Arab Socity of the texts and awards of Islamic Jurisprudence is therefore of great importance.

Before Islam, Arabic society was generally nomadic, divided into tribes, sub-tribes and families. Parentage and pedigree were the important factors in the constitution of this society. The Arabs had neither an organised government nor kings with the power to punish wrongdoers, there were only tribesmen. However, each tribe had a chief (sheikh) who was responsible for the correct administration of tribal affairs.[1]

Arabs criticised their judicial system at this stage but were able to settle their disputes by going to either the chief or to a wise man. In some cases they would consult fortune tellers or idols.[2] The person chosen to settle a dispute was called Hakam (arbitrator).

At that time Mecca was a holy city of pilgrimage for Arabs but it also constituted an important trading centre since it was a crossroads between various tribes who met there to transact commerce. Additionally it traded (on a modest basis) with Southern Arabia, Byzantia, Syria, Sassaria Iraq. Taif (a city near Mecca) was also a centre for long distance trading.[3]

During that period the Arabs were aware of arbitration and many prominent people were renowned for their skills as successful arbitrators, including such people as,

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[1] S.H. Amin Middle East Legal Systems, Royston Ltd. 1985 P307. J.N.D. Anderson, Islamic Law in the Modern World, 1st Edn., New York University Press, 1959, P.P. 60-81. also see Fred Monner, The Early Islamic Conquests, Princeton University Press, NewJersey, 1981, P. 20.

[2] Dr Jawad Ali, Al Mofasal Fi Tarikh Al Kabl Islam (Details of Arab History Before Islam) 1st Ed. Beirut Dar aI Ilm 1970, PP.5-636. Dr Abudrrahman Al Kasem, Alqada fi Al Islam, [Judicial System in Islam) 1st Ed Cairo, 1973 P.453. Mohamed Al Kanam, History of Judicial Authority in the Era of the Omayads 41-132H. Imam Mohamed Bin Saud, Islamic University 1407.P28. Dr Salama Harfi, Judicial Authority in Islamic Country : Its History and Systems, see also Abdul Hamid Al Hdab, Arbitration with Arab Countires, 1st Edn., Kluwer Law and Taxaron Publishers, Deventer, The Netherland, 1990, P. 13.

[3] Joseph Schact, An Introduction to Islamic Law, Oxford Clarendon Press, 1964, PP.6-7. Also S H Amin op.cit. P.308.

Aktham Bin Sayfi, Hajeb bin Zarara, Al Aqraa bin Habis and Rabia bin Makhsha who belonged to the Tamim tribe. From the Qais tribe there were Amer Al Odwani and Ghilan bin Salma, from the Quraish tribe, Abdelmutaleb, al' as bin wa'il and a'ala bin Al Haritha, from the Kanana tribe, yaamr Al Shaddakh and safwan bin Omaya. Women were also well known in the field of arbitration including Sahar bint loquan, Hind bint Al Hassan, Jamaa bint Habis and Khassila bint Amer.[4]

Arbitrators had to be just and equitable[5] in their judgements. Anyone subject to arbitration had to submit to the judgement whatever the decision. People coming under arbitration conditions submitted to the conventional rules or to public opinion.[6]

As previously mentioned, Arab society lacked any organised judicial system at that time, but to understand the process of Arab arbitration clearly the following cases of arbitration will be presented.

### 1.1.2 Arbitration Before Islam

Arbitration issues cover many areas and aspects of commercial and financial life including punishment for infringement of rules etc. The following will give some idea of how these issues were covered before the coming of Islam.

a) The case of Alqama v. Amer bin Tofail (620 A.D) - The majority of Arab disputes arose from cases of pride. The dispute of these two protagonists was a major case from this era. The disputants belonged to the Amer tribe and quarrelled about the chiefdom. For a period of a year these two men confronted each other but finally they went to see the chief of another tribe who was to be their arbitrator. Both the protagonists were great poets and both were imbued with the courage to recite their poetry in the presence of the arbitrator. The arbitrator was not able to give a sound and final judgement in the case and

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[4] Mohammed Mortada al Zubaidi Taaj Alarous min Jawhir Alaqamouse (Bride's Crown from the Dictionary's Pearls) Maktabat Al Hayat, Beirut , Vol. 8 P252. Also M Shoukri Bulugh Alirb fi Marrifat ahawl Alarb AOUSI, 2nd Ed. Rahmaniya Printing Press, Egypt, 1924 P-308.
[5] Dr Jawad Ali, op. cit. PP 636-637 Hossen Fthie, Althkim fi Alshria, (Arbitration according to Sharia), Journal of Arab Arbitration, Vol. 1, May 1999, P95.
[6] Mahmoud Shoukri Al Aloussi,0p.cit, P. 287.

declared that both the protagonists deserved to be chief of the tribe. Ultimately they went along with his arbitration and shared the chiefdom.[7]

b) The case of Al Shaddakj v. the Quraish and Khozaa tribes - the Quraish and Khozaa tribes were in constant conflict over the administration of Mecca and Al Kaaba. Many people died in the conflict and the tribes needed to be reconciled. They agreed to choose a competent Arabic arbitrator and decided upon All Shaddakh, a famous arbitrator from the Kanana tribe. His decision was to give Al Kaaba to the Quraish tribe and Mecca to the Khozaa tribe. ... The dispute was solved.[8]

c) The case of the Removal of the Black Stone: This was one of the most outstanding issues of Arab arbitration before the coming of Islam. It took place at the beginning of the seventh Gregorian century when Quraich tribes met to discuss the problem of building a new Black Stone in Kaaba in Mecca City. This was a site of great religious significance and pilgrims travelled from Arab countries in order to visit the Kaaba with the Black Stone in the corner of it. When each tribe wanted the honour of removing the Black Stone there were violent clashes between them and they were locked in disagreement for four nights.

Finally they called a meeting and decided to choose the first person entering the Kaaba from the al Salam Gate as arbitrator. The man was the Prophet Mohamed (Peace be upon Him) before he had received the Words of God (Inspiration). The Prophet ordered a piece of cloth on which the stone was to be carried so that it could be removed by all the tribes, thus the dispute ended.[9]

### 1.1.3. Transition of the Concept of Arbitration after Islam

As previously mentioned, the Arabs lacked an organised judicial system before the coming of Islam. They also lacked a fixed source of legislation so people had no

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[7] Mohamed Mortada, op. cit. Vol 1, P 287, also Mohamed Shoukri Aloussi, Op. cit, Vol. 1 P 287.
[8] Abdel Malek bin Hasham, Al Sirah Al Nabawiya (The Prophetic Bibliography), Mecca Printing Press Hadj Abdessalam Shakroun 1971 Vol. 1 PP 123-124.
[9] Abdel Malek bin Hasham, ibid, Vol. 1 PP 1-197, also al mam Ahmed bin Hanbal(deid 241.H.821 A.D), Almusnad May mania Printing ,Egypt,Vol.3,P.245.see also Nariman,Op.Cit, P.36.

recourse to anywhere official for help with disputes. However, when Mohamed (Peace be upon Him) came, the Arabs were surprised by the style and eloquence of the rhetoric of the Quran (in Arabic), although, even at that time Arabs were pioneers of eloquence and rhetoric. Mohamed, however, was illiterate, so the Arabs knew that the Quran could not have originated from a human source. Besides, the Quran dealt with miracles and facts which belonged to the world of the unseen.

When Arabs embraced Islam, a transition occurred in a number of concepts, such as behaviour in dealings, judicial authority and arbitration. Many other things also changed, as J. N.D. Anderson says:

> "Islam is a complete way of life; a religion, an ethic, and a legal system all in one."[10]

Islam came to emphasise justice, to abolish racism and to classify people into those who were trustworthy and disciplined enough for top positions. Pedigree was no longer the criterion used for tribal power or rights. Everything was subjected to the constitution which was based entirely on the Quran and Sunna.

However, even after the arrival of Islam, arbitration was considered to be a correct method of dealing with disputes, the difference being that arbitrators had now to judge using the principles and teachings of the Quran and Sunna. No arbitrator was allowed to consult a fortune-teller or an idol as had been the case in the pre-Islamic era.

Muslims thus became used to having recourse to arbitration when the need arose to settle financial or commercial disputes, knowing that justice would prevail according to the lawful rules of human rights and conflict settlement.

In this manner arbitration in Islam became extremely popular for settling disputes since it brought the conflicting sides to reconciliation.

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Press, Egypt 1313H (1892 A.D.), Vol. 3, P245. Also Narman, op. cit. P 36.

[10] J.N.D. Anderson, Op. cit, P.ix. and see in the same meaning, Herbert J. Liebesny, The Law of Near Middle East, State University of NewYork Press, Al Bany, 1975, PP. 3-4.

## SECTION TWO

### 1.2 Definition of Commercial Arbitration within Islamic Jurisprudence

To give an accurate definition of commercial arbitration within Islamic Jurisprudence, it is first necessary to give a general definition of the term 'arbitration'. Islamic jurisprudence books deal with arbitration in its general sense, they do not focus on a commercial definition because this is encompassed within the non-commercial sense of arbitration. Therefore it is necessary to find out what has been said by Muslim scholars about arbitration in general which will lead to a more specific definition of commercial arbitration.

#### 1.2.1. Linguistic Definition

Traditionally, books of Islamic Jurisprudence have given linguistic meanings and then scientific or legal meaning ones. In Arabic an arbitrator is referred to as Hakam. This is the person chosen to judge between conflicting parties to give sound advice and final judgements in disputes.[11]

The term 'Hakam' is one of God's names – The Almighty said:

> "Shall I seek a judge (arbitrator) other than Allah?"[12]

The meaning of 'arbitrator' is given in the verse as – 'the righteous man seeks no other standard of judgement but Allah's.'[13]

The dictionary, The Arab Tongue, quotes the following: "They made him their arbitrator" and "we made someone arbitrator between us." The former means that they

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[11] Al Mujam Wassit, Arabic Language Complex, Egypt, Qatari Printing Press, Administration of Islamic Heritage Revival, Qatar Vol 1, P 190.
[12] The Holy Quran Surat Al anaml, Verse 114
[13] The Holy Quran, Translation of the Meaning and Commentary, Complex for Printing the Holy Quran, Madinah, Saudi Arabia, 1413H, [1992], P 376.

ordered him to act as arbitrator and the latter that his judgement was accepted by us.[14] The word 'judgement' appears among the meanings of the word 'arbitration', for example,

> "He gave his judgement about the two adversaries he was given judgement and he was judged."[15]

### 1.2.2. Scientific or Legal Meaning

After having arrived at several approximate definitions of the word 'arbitration', Muslim scholars finally defined it as 'Tawliya' which means that 'two adversaries accept the arbitration of an arbitrator'.[16] Ibn Kodama said :

> "If two men agree to make between them an arbitrator and this deed is in the interest of justice, then arbitration is acceptable."[17]

The Code of Judicial Rules (Majallat Al Ahkam Aladliah) claims that arbitration is the act of agreeing about an arbitrator to issue a settlement between disputants.[18] Arbitration was defined as appointing an arbitrator by the adversaries to settles their disputes.[19] Article 2091 of the Code of Legal Rules (Majallat Al Ahkam Al Shariah) stipulates that it is acceptable that adversaries agree upon an arbitrator to decide between them as a judge.[20]

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[14]Jamal Addin Ibn Mandor [(died 711.H, 1290 A.D.] Lissan al Arab ; [The Arab Tongue], 1st Ed. Egypt, 1303H, [1882] Vol.5 P32.

[15]Encyclopaedia of Islamic Jurisprudence, Ministry of AL Awqaf and Islamic Affairs, Kuwait, 1st Edn. Al Safwa Press, 1992 V.10, PP. 233-234.

[16]Zain adin Ibn Najem (died 970 H, 1549 A.D.) Albahar Al Raeq (The Clear Sea) Sharh Kanz Al Daqaiq 2n Ed, Dar Al Maarifa, Beirut, (1333H, 1912 A.D.) Vol. 7 P24. Also the opinion of Sheik Al Azhar, Jad Al Had Ali in his answer to the arbitration question, Al Azhar Magazine, Issue September 1994, Vol. 4, P 441. Also Dr Saleh Al Hassan, The Legal Rules in Arbitration Al Narjis Press ,1417H, (1996 A.D.) P 32. Also Ahmed Alghazali Thahkim Fi Al Fiqh Imam Mohamed bin Saud, Islamic University, Ryadh, 1417H, (1996 A.D.), P25. Dr Qahatan Al Dawri Arbitration Contract in Jurisprudence and Law, 1st Ed.Baghad, Al Khouloud Press, 1985, P 20.

[17] Ibn Kodam, Al Muagn (General Directorate of Printing of Scientific & Economic Research, Saudi Arabia, Vol. 9 P 107.

[18] Article 1790 from the Magazine of Judicial Judgements, this magazine is considered to be the First Civil Codification of Islamic Code following the Al Hanafi School, 1876.

[19] Ali Haidar, Darar Al Hokkam Sharh Majalat Al Ahkam (Explanation of Code of Rules) Al Nahda Library, Beirut, Vol. 4 P 523. See also the same meaning Salim Rostom, Explanation of Rules Magazine, 2nd Ed, House of Islamic Heritage Revival, 1986, P1163.

[20] Ahmd Al Kari, Majalat Alahkam Alashar'a (Code of Legal Rules – Study and Enquiry of Dr Abdewahab bin Sulaiman and Dr Mohamed Ibrahim, Tihama Press, 1st Ed, 1981, P 60.

Some researchers consider arbitration to be a contract between two conflicting parties where they freely choose an arbitrator to end their dispute.[21] It has also been defined as a contract among contracts,[22] and finally it has been defined as "an agreement made by disputants to appoint a qualified person to settle their dispute by reference to Islamic law."[23]

There have been various definitions of 'arbitration' given by different scholars but they have all had only an approximate meaning.

In Islamic Jurisprudence 'arbitration' is the fact of an agreement between two adversaries brought about by an arbitrator who has settled their dispute by virtue of Islamic Jurisprudence rules. The following will explain more clearly the components of the definition of arbitration:

1. The expression 'two adversaries agreeing to the use of an arbitrator' is proof that the two parties are in conflict, which makes the presence of an arbitrator necessary. It is unlikely that arbitration would take place in the absence of one of the parties. 'To their satisfaction' is the term used to signify that the opponents have agreed of their own free will to appoint an arbitrator to finalise their dispute. Arbitration can therefore be considered as a contract between the conflicting parties.

2. The expression 'to settle their disputes' indicates that there is conflict. The necessity of establishing that a state of conflict exists is of paramount importance because without it arbitration becomes meaningless. Additionally, it may not be necessary for a third party to be present as one of the opponents may agree that the other act as arbitrator to put an end to the existing problem.

3. The expression 'by virtue of the Jurisprudence rules' is required for the 'in arbitration' process to be able to proceed, whether used for Islamic Jurisprudence or for

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[21] Mustapha Zarka, The General Introduction to Jurisprudence, Dar Al fikh, 7th Ed. Vol. 1 P 601. Also Hmoud Mahjoub Reconciliation and its impact on Settling Disputes, (Dar el Jil Press: Beirut, P.138

[22] Ibn Kodama op. cit. Vol. 9, P 108.

[23] S H Amin, Commercial Arbitration in Islam and Iranian Law, Billing & Sons, Worcester, 1948, P.31. In this way arbitration is defined in the Shi'I School in a similar way to the Sunni School.

conventional rules. This means that Islamic arbitration must comply with Islamic Jurisprudence rules, although there are of course issues that do not require arbitration, and, in fact, there are issues where arbitration is not permitted (an explanation of this rule will be given later). Laws that must be applied as defined for scholars of Islamic Jurisprudence are known as 'Jurisprudence rules'. Failure to mention these rules of Jurisprudence defines arbitration in general terms, however this could lead to the understanding that arbitration can include all types of quarrels and conflicts.

For this reason, it becomes necessary to clarify the definition so as to understand arbitration within the framework of the legislative rules, in other words, within the general rules of Islamic Jurisprudence. There is widespread support for the idea that the arbitrator should be suitable for the task of arbitration.[24] The arbitrator should not only be knowledgeable in the rules of legislation, with the ability to refer to Islamic Jurisprudence, but should also have dexterity in arbitration, to the extent shown in some definitions. In using the expression "by reference to Islamic Law", it is believed that they mean all rules of Islamic Jurisprudence because there is no codified Islamic Law (such as the rules of jurisprudence), although some attempts have been made to codify them in the Code of Judicial Rules; this was done either by following the AL Hanafi school, as in the Code of Legislative Rules, by following the Hanbali school.

By referring to the previous definition, commercial arbitration within Islamic Jurisprudence can be defined as an act of agreement achieved between two parties to appoint an arbitrator to settle their commercial dispute according to legislative rules.

It is worth mentioning that Islamic Jurisprudence, as with previous legislation and conventional rules, does not set down a clear line between commercial and civil transactions but rather a line between merchant and non-merchant.[25]

Thus the following question arises: since the legislation does not differentiate between commercial work and civil work, why should there be an attempt to define commercial arbitration?

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[24] Ibn Kodama, op.cit,Vol.9, P.107.
[25] Mohamed AL Jabr, The Saudi Commercial Law, 1st Edn, King Saud University Riyadh: 1981, P.6.

The answer to this question will be presented in this study - that is, a new attempt will be made to cover the commercial side of arbitration within Islamic Jurisprudence in the light of the Sunna School and more particularity, the four schools of jurisprudence, i.e. the Al Hanafi, Shafi, Al Maliki and Hanbali schools.

It is necessary also to mention various other laws such as the Arabic, European or American laws in an effort to probe the details within the books of ancient scholars who dealt with the general question of arbitration.

More particularly it is possible to cover all aspects of commercial arbitration so as to present a sample of Islamic commercial arbitration without differentiating between commercial and civilian arbitration, since the majority of issues (in this day and age) deal with commercial disputes.

Returning then to the discussion of commercial arbitration, the following question arises: what is meant by 'their commercial dispute' as given in the definition of commercial arbitration within Islamic Jurisprudence? The expression 'commercial law' or 'commercial dispute' was derived from the word 'commerce', the legal meaning of which is extremely broad.

A lot of commercial legislation differs in its limiting of the scope of commercial law, either from a subjective point of view which takes the characteristics of the performer as a basis to limit its scope, or from an objective point of view which takes the nature of the work itself as a basis to limit its scope.[26]

In reality it is not possible to limit the term 'commercial' to any narrow concept of merchants' transactions. However, a wider concept could be clarified, as shown in the following example:

In the UNICITRAL Model Law on International Commercial Arbitration, the term 'commercial' should be given a wide interpretation so as to cover matters arising from

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[26] Mohamed Al Jabr, Op. Cit. P.10. See also Said Yahya, Saudi Commercial System, Egyptian Modern Office, Alexendria, 1970, P.17.

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 agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement on concession, joint venture, and other forms of goods or passengers by air, sea, rail or road.'[27]

These examples show what can be included within the commercial framework but do not define the word 'commerce' itself.

The French judicial authority has defined the term 'commerce' on the basis of French conservation, vis-à-vis the application of the New York treaty, specifying commercial disputes by virtue of their national Law - *'par Sa Loi Nationale'*. Commercially this does not cover the traditional meaning because people who are not considered by this commercial law as traders clearly contribute to the welfare of commercial life.[28]

On March 24th 1981, the French Court of Revocation ruled on the commercial aspect of farming and contract concerns of food purchasing concluded by farmers. If these contracts follow a systematic method and the purchase is important, they will lose their legal aspect as an agricultural activity which was originally considered to be a civil activity and has now become a commercial one.[29]

England has already established a Commercial Court which deals only with disputes arising out of trading and other commercial relationships. This wide interpretation of the term 'commercial' is adhered to so as to include all aspects of international business. However, the courts can be referred to in the event that it becomes necessary to decide whether or not a particular agreement is commercial.[30]

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[27] Footnote from Article (1), Chapter one from UNCITRAL adopted by the United Nations Commission on International Trade Law on 21 June, 1985, United Nations, New York.
[28] See Muneer Abdel Majed, Judicial Authority of Arbitration in International Contests, University , Judicial Authority Printing House, Egypt, 1995, P.26, and The Legal Organization of International and Internal Arbitration, by Al Maârif Press, Alexendria, 1997, P.30.
[29] Ibid.
[30] Alain Redfern, Martin Hunter and Murry Smith, Law and Practice of International Commercial Arbitration, London (Weet Maxwell, 1991), P.21.

In brief, commercial disputes for the purposes of this thesis means any dispute resulting from a commercial relationship in the wider concept of the word 'commercial'.

### 1.2.3. The Nature of Arbitration

As mentioned in the legal definition of arbitration, arbitration is a contract (as with all contracts - emphasised by Islamic Jurisprudence) which must be respected and loyal to its terms, The Almighty said:

> "O ye who believe fulfil (all) obligation lawful unto you...."[31]

The books of Islamic Jurisprudence dealt with the clarification of correct contracting and the importance of agreement. This agreement should also be free from defects, such as faults, forcing and forgery.

When looking at an arbitration contract, we find that it includes three elements: disputants, the dispute and the arbitrator, who should judge according to the Jurisprudence rules .[32]

Scholars have held different opinions as to the nature of an arbitration contract. Various opinions have emerged, including the following:

1. The Books of schools of jurisprudence, such as those of the Hanafi, the Maliki, the Shafi'i and the Hanbali schools.

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[31] The Holy Quran Surat Al Maedaa, Verse 1.

[32] In this respect there is a similarity between Islamic Jurisprudence and modern ( conventional ) laws, the essential characteristics of arbitration are drawn as a means of settling disputes. In this context, the similarity is consensual and dependent upon the agreement of two or more parties to the disputes, whether arising ad hoc or out of contracts containing a clause requiring disputes to be put to arbitration. For arbitration to exist, there must be three elements present. 1. A dispute between two or more parties; 2. agreement between them [as expressed in the original contract or at the time the dispute arises] to refer the dispute to arbitration for a decision; 3. the fact that parties are legally bound by that decision; see John F. Phillips, Arbitration, Law, Practice and Precedent, ICSA Publishing, Cambridge, 1988, P.7. This is no different from Arabic arbitration laws. see Nareman, op. cit. P. 85.

Scholars from the above mentioned schools of jurisprudence consider arbitration to be included within the judicial authority. They consider arbitration as a part of this area of jurisprudence. The majority of books of the Hanafi Schools of Jurisprudence, such as Al Hidaya written by Al Marghinani (died 593 H./1172 A.D.)[33] and Fath Al Qadir written by ibn Human (died 681 H./1260 A.D.) dealt with arbitration within the book of judicial authority.[34] Other books include Adab Alkda[35] by Al Tabri and Rwdat Alkodat by Samnani (died in 499H/197 A.D.).[36]

The Maliki school was renowned for Almontga Al Baji (died 494H/1073 A.D.)[37] and also for Ibn Farhoun (died 799H/1378 A.D.) who wrote Tabserat Alhokam.[38]

The Shafi'i school was famous for both AL Mawridi (died 450H/1029 A.D.) who wrote Al Hawe[39] and Al -Nawawi, (died 676H/1055 A.D.) who wrote Rwadat Altalebeen[40] (Garden of Demanders ). The Hanbali school was noted for famous authors like Ibn Kodama, (died 620H/1199 A.D.) who wrote The Al Mugni[41] and Ibn Muflih (died 884H) who wrote Almobdea[42] and Al Bahtti, (died 1046H/1625 A.D.) who wrote Kashef Alkinaa.[43]

2. Neo-scholars hold four divergent opinions about the nature of arbitration.[44] They are as follows:

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[33] Ali Al Marghinani, Al Hiday, [The Right Guidance] 2nd Edn. Rar Al Fakir Press, Beirut, 1397 H./1976 A.D.

[34] Ibn Humam, Fath AL Qadir completed by Gadi Ladh (died 988H/1567 A.D.) named the book Ntaiz AL Afkar., 2nd Edn., Bar Al Faker Press, Beirut, 1567, see also S. Hasan, Op. cit. P.22)

[35] Abe Abas Al Tabri, Adab Alkda, (Manners of the Judge), 1st Edn., Al Sadig Library, Saudi Arabia.

[36] Ali Al Marghinani, Rwdat Al Kodat (Garden of Judges) inquiry by Dr Slahaldin Nahi, 2nd Edn. Al Resalh Printing, Beirut 1404h/1983 A.D.

[37] Abo Walid AL Baji, Almontga, (The selector) 1st Edn., Al Sadah Printing, Egypt, 1332H/1911 A.D.

[38] Ebn Frhon Al Malik, Tabserat Al Hokam Fi Aswal Alagdih wa Mnahij Al Ahkam, (Judges, Consideration in the Origins of Cases and Rules), research and study by Taha Saad, First Edn., Alazhar Library College, Cairo, 1406H/1985 A.D..

[39] Abi Al Hassan Al Mawrid, Al Hawe, (The Comprehensive), research and study by Ali Mohammed and Aadl Ahamed, 1st Edn., Rar AlKtab Printing, Beirut.

[40] Yahai Al Nawawi, Rwadat AL Talebeen, (Garden of Demanders), researched by Adle Ahamed Adbulmajod and Ali Mawd, Rar AlKtob Press, Beirut.

[41] Ib Kodam, Op. cit, V. 9.

[42] Brhandin Ibn Muflih, Almobdea Fi Sharh ALMgnea, (The Innovator), Islamic Office Printing, 1394.

[43] Mansor Al Bahoti, Kashef Al Kinda, (Uncovering the Mask), Al Hokoma Library, Mecca, 1394H.

[44] There is also disagreement within legal jurisprudence as within Islamic Jurisprudence, which has brought about considerable debate, one opinion, for instance, contends that arbitration has a contractual nature, another stresses the judicial nature of arbitration. A further opinion argues a purely mediatory attitude to arbitration seeing it as having both a contractual and judicial nature; others claim that arbitration has a specific nature, see details in Legal and Conventional Jurisprudence, Nariman, Op. cit.

Opinion 1: Arbitration is a kind of judicial authority which is special as defined by the schools of jurisprudence, i.e. the Hanafi, Maliki, Shafi'i and Hanbali schools.
This opinion appears to stress the fact that the arbitrator, the procedures of arbitration and the proof of the division resulting from arbitration is what one would find in judicial authority, that is the procedures, justice requirements and neutrality at the moment of settling the dispute. Advocates of this opinion claim that the nature of arbitration, nevertheless, is somewhat less than that of the judicial authority.

Opinion 2: Arbitration is deputisation.[45]
Contractual characteristics dominate arbitration. For this reason, the advocates of this opinion, the Shuch Al Shaia Athina Ashriah School and some members of the Al Hanfi[46] school, take the contract as the basis of arbitration, that is, an agreement between disputants or their authorisation given to an arbitrator to settle their dispute. If the arbitrator then transgresses the borders of arbitration he is liable for the matters for which he is authorised to give his judgement; he is in this case a deputy. Therefore the advocates of this opinion rely on the following:

a) The source of arbitrators' authority in settling disputes as the disputants.
b) Arbitrators are not seen as judges and they are not appointed by Al Imam (the head of an Islamic country).

Opinion 3: Arbitration is Mediatory.
It should unite the disputant opinions but, at the same time, it is generally characterised by its contractual nature. However, concerning the function of the arbitrator and the arbitration procedure, it was found that the judicial nature prevails. Hence, the

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P.P.52-58. See Ahmed Abalwafa, 'Facultation and Obligatory Arbitration', Al Maârif, Alexendria, 5th Edn, 1988, P.18. See also Michael Mustil Stewart Boyd, 'The Law and Practice of Commercial Arbitration in England', 2nd Edn., Butterworths, London Edinburgh, 1989,P 39 and George Elombi 'Arbitration of International Commercial Investment', Ph.d. thesis, University of London, Queen Mary Westfield College, 1996, P.36. See also Ahmed el Ghazi, 'Arbitration in International Contests', Higher Institute for Judicial Authority, Saudi Arabia, 1413H/1983 A.D., P.28. See also Abdel Hamid Shawarbi, Arbitration and Reconciliation, University Printing Press, Egypt, 1996, P. 29.
[45] Opinion Alaa Addin Trablusi, Muain Alhkam Fima Yataradadu Bin AlKasman, (Assistance of Arbatritors) 2nd Edn., Mastapha_AL Babi Company, Egypt, 1973, P.27 and also Ahmed al Ghazali, op. cit. p. 36.
[46] S.A. Amin, Op. Cit. P. 75.

advocates of this opinion consider arbitration as a contract of deputization incorporating judicial authority'.[47]

Opinion 4: Arbitration is neither judicial authority nor deputization because judicial authority is defined as legislation as well as deputization, but it does have a special nature.[48]

In short, it is clear that advocates who consider arbitration as deputization emphasise the formal criterion of contract. This opinion does have some shortcomings since it does not specify the nature of an arbitrator's duty, i.e. the methods of settling disputes and clarifying all facets of truth and justice.

However, all of these opinions have drawbacks. For instance, concerning the opinion that stresses arbitration as being a contract of deputization and judicial authority as a mediatory opinion (Opinion 3), this lacks an accurate description of the nature of arbitration.

Opinion 4 does not consider the special nature of arbitration either, it seems only to explain the word 'water' with using the word 'water'.

Opinion 1, stating that arbitration is a kind of judicial authority which is special, appears to be the most applicable since arbitration is considered as judicial authority where the arbitrator arbitrates between the opponents without being affected by either party. The arbitrator here gives an equitable judgement. This aspect is a reply to those who have maintained that arbitration is a contract of deputization because the deputy does not go beyond the wishes of the authorising party. In arbitration, the arbitrator should arbitrate independently and of his own free will.

The aspect of the 'will' in a contract of arbitration is disappearing gradually leaving behind it the specifics of judicial work.

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[47] Amer Rahaim, Athkem bin Alshria wa Alquanon, (Arbitration between Sharia and Law), 1st Edn. Dar Al Kotab Al Watanih, Bengazi, 1987, P.46.
[48] Opinion of Ebrahim Atta. Althkem, Arbitration, Imam Mohamed Ben Saud University, 1990, P.52.

This opinion has been arrived at in Islamic Jurisprudence and is compatible with our modern legal jurisprudence. Neither arbitrators nor boards of arbitration figure in an Islamic country's organizational judicial chart. It is not considered to be a degree of judicial authority but works in collaboration with it under the umbrella of law organising such arbitration.[49] The following ideas are supportive of this opinion. The spread of arbitration to settle disputes on an international level and the appearance of many organizations, boards and centres specialising in arbitration.[50]

Modern legislation includes detailed procedures of arbitration similar to judicial dispute procedures.[51]

## SECTION THREE

### 1.3 Evidence of Arbitration Legality within Islamic Jurisprudence

Among the constant rules of Islamic Jurisprudence is the facilitating of people towards reconciliation and the urging of them to stay away from disputes and disagreements. As we have seen, arbitration is a means of settling disputes quickly and easily. Arbitration allows no room for disagreement. Even before the coming of Islam, Arabs were aware of the benefits of arbitration, so when Islam prevailed it emphasised arbitration to settle disputes and quarrels.

Thus, arbitration became the preferred method of Islamic Jurisprudence. It was seen as a simplification, since in the case of disputes, instead of forcing people to go through the judicial system, usually a long-drawn-out affair, they could go to arbitration, a shorter and simpler method. Disputants also preferred arbitration because of the greater

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[49] Modern jurisprudence supports the judicial aspect of arbitration, for example, the French Court of Revocation has stressed the judicial aspect of arbitration in a number of its rulings, (French revocation 25/05/1962) and has decided that when disputants come to arbitration, they express the will to give the arbitrator judicial authority. A case in point being that of the Belgian judicial authority, see Professor, Dr. Mahmoud Hashem, The General Theory of Arbitration in Civil and Commercial Matters, Dar Al Fikr Al Arabi, 1990, Vol. 1, P. 215.

[50] Specialised courts have also arisen, i.e. The Arbitration Court of the LCIA - probably the oldest of the major international arbitration organisations, see Adrian Winstanly, LCIA seminar, Jeddah, 24-25th November 1999 P.3. See also the Jordanian Court of Arbitration, Arbitration Court at the Polish Chamber of Commerce. Muneer Abdelmajeed. op.cit,p.3.

[51] See for example Article 6-9-22 from Executive List of the Saudi Arbitration Law issued by Royal Decree No.46/M of 12.7.1403 (25th April, 1983 A.D.) edited in Um al Qura Newspaper, Issue No. 2969 on 22.8.1403 H (5th May, 1983 A.D.). Also Chapter 4 of the Egyptian Arbitration Law on Commercial

confidentiality of the disputes' procedures. Al Imam Tarablusi claimed that arbitration is permitted by the Quran, Sunna and Consensus. He also pointed out:

> 'if we do not permit arbitration, people will have difficulty because it is difficult for them to go to the council of judicial authority, so arbitration is permitted where necessary.'[52]

This was also the opinion of various other Islamic schools of Jurisprudence, such as the Al Hanafi, Al Maliki, Al Shafii[53] and Hanbali Schools, and it was the view of the Shai'a sects, such as Al Zaiydia and some of the Twelve Imamia.[54] The Muslim scholars have given proof about the legality of arbitration from the following:

1. Quran
2. Sunna
3. Consensus
4. Analogy

### 1.3.1 Evidence from the Holy Quran

Many Quran verses give proof of the legality of arbitration, one example of which is as follows:

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and Civil Matters issued by Law No. 27 in 1994 from the Cairo Provincial Centre of Commecial and International Arbitration, Cairo, 1994, P. 21.

[52] Alaa Addin Tarablusi, Muain Alhkam fima Yataradadu Al Kasman, Arbitrators' Appointed for Rules Recurring between Disputants, 2nd Edn. Mustapha Al Babi Library Company, Egypt, 1973, PP. 24-25.

[53] Some Shafii schools do not allow arbitration if a judge is present in the country. They claim that arbitration underestimates state presidents or deputies because they arbitrate between people. This opinion is in line with other opinions which claim that arbitration is not allowed in all rights and that an arbitrator can be present only with the agreement of the disputants. This opinion is thus weakened. Shafii books describe arbitration as being permitted, some even describe it as being the correct opinion, see Shams Addin Al Shraibi, Mughni al Machatjee, (Knowing the Meaning of Approach Terms), House of Arabic Heritage Revival, Beirut, Vol.4, P.378.

[54] The twelfth: the AL SHIA team advocates the Chiefhood of the twelve apostles. The first was Ali Bn Abitaleb. The last, Mohamed Bin AL Hassan Alaskari. was the awaited Al Mahdi. Born in 256 H/835 A.D., he will appear, according to them, to establish justice on earth. They say that regardless of his age, the Al Imam is infallible. To them, the judge is appointed by consent of the Imam so arbitration is allowed in His presence, if the Al Imam is absent, a knowledgeable scholar can perform arbitration. There are two opinions then as to whether arbitration can take place in the absence of the Al Imam. One does not allow it because if the judge reaches the status of Mujtahid – scholars who can exercise Ijtihad, who reason judicially independently - then his judgement is considered without arbitration. The second opinion allows arbitration in the absence of Al Imam. See Qahtan AL dawri op.cit. P.82 and also Amin, S.H, op. cit. ,PP. 28-29 for details. (It is worth noting that all Sunna Musles and some of the Shia' do not believe this).

The Almighty said (the nearest meaning)

> 'if ye fear a breach between them twain. Appoint (two) arbiters, one from his family, and the other from hers. If they seek to set things aright, Allah will cause their reconciliation: for Allah hath full knowledge and is acquainted with all things.'[55]

A group of scholars used the previous verse to give proof of the legality of arbitration. If the verse allows arbitration between husband and wife to preserve the familial relationship with the possibility of solving the problem with no recourses to judicial authority, this shows proof also, that arbitration is permitted to be used to solve other disagreements.

Al Imam Abdullah bin Abass[56] protested during a discussion with Al Karije,[57] and after his protest he claimed - 'Allah made men's arbitration trustworthy.'[58]

Discussion of proof of arbitration using the verse quoted above included the idea that protesting about the verse could encourage belief that the function of the two arbitrators in the verse is that they arbitrate only in special cases and that the origin of authorisation is not the couple, but the attorney general or the judge. This will not be an arbitration as stipulated by scholars. The proof of Abdullah Bin Abass does not necessarily prove the correctness of arbitration because he used the verse to clarify the permission given to men for arbitration. Some scholars contend that the two arbitrators mentioned in the verse are reconciliatory but not arbitrators.[59]

Some scholars maintain that the discourse of the verse is directed towards the married couple, and is thus considered arbitration according to the concept of arbitration as defined by scholars. It seems that if the discourse is supposedly directed to the married

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[55] See the Holy Quran, Nissa Surat, Verse 35 – English Translation, op. cit. P.220.

[56] Imam Abdullah bin Abass Al Qurashi, one of the prophet's (peace upon him) companions. He was called the Sage of Nation. He died in 68 H/647 A.D.

[57] Al Karije : A team that left Ali Ben Abi Taleb, the Fourth of Al Rashidin Califs. Imam Shawkani Said the sect was among the army of the calif, Ali Bin Abi Taleb but they left the army to fight back the calif, see Mohamed Ali Shawkani, Nayl Al Awtar Washarh Muntaqa al Khbar, Principalship of Scientific and Preaching Research Administrations, Riyadh, Vol 7. P. 158. The Calif, Ali Bin Abi Taleb and bin Abass - Fight Back quasi Karije. It is worth mentioning that Al Karije did not deny the origin of arbitration, but they denied the subject of arbitration between Ali and Muawya, many people misunderstood this distinction.

[58] See Ahmed AL Ghazali, op. cit.,P.45 and also Qahtan Dawri, op. cit. P.85.

couple, it is understood that the couple has the legal right to appoint two arbitrators to settle their disagreement because the couple constitutes the core of the subject. Thus, appointing two arbitrators is a kind of arbitration in this case. The Almighty said:

> 'O ye who believe? Kill not game while in the sacred Precincts or in the state of pilgrimage if any of you doeth so intentionally, the compensation is an offering, brought to the ka'ba, of a domestic animal equivalent to the one killed as adjudged by two just men among you, or by way of atonement, the feeling of the indigent....'[60]

The above verse includes the interdiction of killing game if the Muslim is in a state of pilgrimage, and the compensation includes choosing just arbitrators by the one who has done the killing in order to compensate. It thus becomes clear that arbitration is permitted. Although Allah's rights are not disputable, arbitration is allowed for people's rights; people's rights are disputable whether they are commercial, domestic or of any other type. Most of the verses in the Quran indicate preaching good deeds and the interdiction of bad deeds. Among these verses is the following:

> 'The Almighty said "In most of their secret talks there is no good, but if one exhorts to a deed of charity or goodness or conciliation between people..."'[61]

This verse urges reconciliation between people and the doing away with all disagreements and disputes among them. [62] Undoubtedly, the purpose of arbitration is to settle any existing disagreements, thus ending dispute and bringing about reconciliation.

Moreover, the Holy Quran expressly calls upon believers to honour their contracts. It is understood that arbitration is based upon a contract by the conflicting parties to refer their dispute to an arbitrator or arbitrators and under such agreement they accept his or

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[59] Zinddin Bin Najeem, op. Cit. Vol 7, P.25.
[60] See the Holy Quran, Surat Al Ma'ida, Verse 97, [English Translation] Op. Cit. P.317.
[61] Surat Al Nass, Verse 114, Op. Cit. P.252.
[62] Abdurrahman Assadi, Explaining Holy Quran, Almighty Facilitation in Explaining Al Manan Talk, Al Saadiya Est, Saudi Arabia, Vol 2, P.62.

their award in keeping with the famous Islamic ruling that "the contract is the law of the contracting parties."[63]

### 1.3.2 Evidence from the Sunna

The legality of arbitration has been proved by the Sunna in a number of sayings by the Prophet (Hadiths), as follows:

(a) Hadith narrated by Al Nissai upon Sharih Bin Hani upon his father when he came to the prophet (peace be upon him): along with his people, he heard them call "Hani, father, Arbitrator". The prophet called him and said, "God is the arbitrator, so why do they call you, father, arbitrator?" Hani replied:

> "when my people disagree about something they come to me to act as an arbitrator between them. The prophet said, "then, that is good."[64]

This Hadith is a proof of the legality of arbitration since the prophet (peace upon him) acknowledged Hani's deed of arbitrating between disputants. Thus the prophet's acknowledgement is clear evidence of the legality of arbitration.

(b) Hadith narrated by Abu Huraira - "the prophet said: 'a man bought from another man a piece of land where he found a piece of gold. The man who bought the land told the seller to take his piece of gold saying that he had bought only the land and not the gold. The land owner replied that he had sold him everything. They agreed to using an arbitrator who asked them whether they had offspring. One replied that he had a boy

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[63] Shehab Uddin Al Sharif, EURO-ARAB Arbitration System and Islamic Sharia Law, Master of Philosophy Thesis, University of Salford, the International Studies Unit, 199O,P.21. It should be noted that the contract is the legislation of the contracting parties by virtue of legislative rules, see Ahmed Mustapha Zarqaa, Explanation of Islamic Rules Jurisprudence, reviewed by DR. Abdusattar Abu Ghara, Dar Al Qalani, Damascus, 2nd Edn, 1989, P.482, also Ahmed Bin Taymiya, Legal Opinions, enquiry of Abdurrahman Al Qassim, edited by Scientific Researches and Preaching Administrations, Riyadh, Vol 3, P.336.

[64] Narrated by Al Nissai in Judicial Authority Ethics, see Ibrahim Atta, op. cit. P.120 and Hadith narrated by Imam Mohamed Bin Ismail AL BUKHARI, died 256 H, Arab Republic Library, Mohamed Sabih & Sons Printing Press, Egypt, Vol 4 P.212, narrated by Imam Muslim AL NISSABURI (died 261 H) Arab Republic Library, Mohamed Sabiha & Sons Printing Press, Egypt, vol.5, P.133.

and the other that he had a maid. The arbitrator then said – "marry the boy to the maid and grant them gold as expenses...."'[65]

It is clear from the prophet's words in this Hadith that arbitration is indeed permitted. The prophet himself did not give final arbitration, this was given by a third party chosen by the men, thus proving the approval for arbitration.

### 1.3.3. The Consensus

As we have seen, arbitration is permitted in Islamic Jurisprudence with proofs from the Quran and the Sunna. The Prophet's companions applied arbitration in their own lives. Thus it became a consensus, and it is necessary to note here that the Hadith says:

> 'follow my Sunna and the Sunna of the Orthodox Califs after me....'[66]

The following cases have been presented regarding the Prophet's companions:

**First**

The case of Omar Bin Al Khatab (the second Calif after the Prophet) v. Ubai Bin Kaab, who were disputing in a garden. Omar said that Zaid Bin Thabit would arbitrate between them. Zayd was famous for jurisprudence and Islamic knowledge. So Zayd arbitrated that the oath was on Omar, the leader of believers. "If you want me to I will exempt him" he said. Omar swore on that.[67]

Other versions, however, stress the fact that Zayd was a judge and what he did was not a deed of arbitration. It does seem to be possible to answer this opposing view from two perspectives:

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[65] Narrated by Al Bukkari in his correct book, The News, Chapter 1, op. cit. Vol 7, P.327.
[66] Sunan Abe Dawad, Hadith No. 3991 and see Yahya Al Nawaai, Riyad-us-Saliheen, Commentary in English by Hafiz Yusuf, 1st Edn. Published by Darusslam, Saudi Arabia, 1998, Hadith No. 157, Vol. 1. P. 166.
[67] The case of Omer Bin AL Khatab v. Ubi Bin Kaab see Ahmed AL Ghazali, op.cit,P.70.

a) Although Zayd Bin Tabit was a judge during the arbitration process between Omar Bin AL Khatab and Ubai Bin Kaab, this does not necessarily require recourse to judicial authority because they may have accepted Zayd as an arbitrator and not as a judge.

b) When Omar told Ubai Bin Kaab to choose an arbitrator to settle their dispute, he proved that both had accepted arbitration. They wanted to end their dispute by arbitration since they could choose an arbitrator but they did not choose him as a judge. Omar's decision to accept arbitration appears to be clear from the preceding narration.

**Second**

Ibn Abi Malika narrated the following: "Talha Bin Abdullah borrowed money from Othman Bin Affan, (the third Calif after the prophet) Othman was told that he had defrauded and the money was at the kufa city. It was the money of Talha's family. Othman said: I have the choice (to conclude the deal first) because I bought what I did not see."

Thus they chose Jabeer to arbitrate between them; the choice was given to Talha rather than Othman and they accepted the award.[68]

From this case it can be seen that Othman, Talh bin Abdullah and Jeber bin Motam accepted arbitration, which gives an example of permission being granted for arbitration from the Prophet's companions.

**Third**

The case of Muawya Bin Abi Sufian v. Ali Bin Taleb. This famous arbitration case between the Calif, Ali Bin Taleb and Muawya Bin Abi Sufian concerned a matter of succession. They opted for the arbitration of Abu Mussa Al Ashari and Omar Bin Al Aas.[69] At the time a group of the prophet's companions were with the two teams so they

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[68] The case of Othman Bin Affan V. Alqama Al Laithy, see Ibn Qodama, Op. Cit. Vol 1, P.484. and Qahtan AL Dawri, Op. Cit. P.100.

[69] For more information, about this case see Abu Baker bin Alarbi, (died 543 H/1122 A.D.), Alawasem min Alqwasem, (The Protectors from the Death Blow) Study and Inquiry by Mohabdin Al Kateeh, 26th Ed. Rar Al Jael Printing, Beirut P113,. See also Saed Damass, Arbitration Contract between Ali & Muawya M.A Thesis, History & Civilizations Department, Imam Mohamed Bin Saud Islamic University, Riyadh, 1399H/1979 A.D. PP.113-114.

were aware of the arbitration, proving once again that it is permitted. This arbitration was considered as an important historical precedent in Islamic History.

### 1.3.4 Analogy

Analogy is the fourth source of Islamic Jurisprudence and it is the connection of one matter with another as shared cause between them.Thus, when a case arises where a Muslem scholar can find no law from the Quran nor from the Sunna of Prophet no anything issued in its connection by consensus, they can study a similar problem in which a law or evidence has been issued in the Quran or the Sunna or consensus.

The legality of arbitration through analogy can be proved by the following:

According to the general rules of Islamic Jurisprudence, responsible people retain the liberty to stand up for their rights. They may choose other people to stand for these rights whether these rights are concerned with buying, selling or giving up. If this is permissible, people can stand up for their rights by having recourse to arbitration.

Islamic Jurisprudence always aims to facilitate people's affairs, therefore forbidding arbitration contradicts Islamic Jurisprudence because it brings about difficulties causing possible confusion to people.

Arbitration as a contract was considered legitimate by many Arabs before Islam. Islamic texts do not contradict this belief, therefore arbitration is still permissible.

To summarise, it is clear that arbitration is permissible and legal under Islamic Jurisprudence, and proofs can be taken from the Quran, Sunna, consensus and analogy.

## SECTION FOUR

## Distinctions Arbitration from what appear to be Similar Awards in Islamic Jurisprudence

### 1.4.1. Distinctions between Arbitration and Judicial Authority

As previously discussed, the nature of arbitration and its aspects of difference can be seen as judicial authority of a special kind since the judicial aspect prevails. There are various points uniting arbitration with judicial authority but also others which distinguish between them.

Common points between arbitration and judicial authority

1. Each has the power to settle disputes
2. Both an arbitrator and a judge must adhere to and respect the time, subject matter place of arbitration.[70]
3. Both judicial authority and arbitration, judgement is fully legal .[71]

Points of difference between arbitration and judicial authority

1. The will of the disputants is stronger than that of any arbitrators because arbitration takes place only with the agreement of disputants who choose the arbitrators. This is quite different from judicial authority where disputants have no choice in the appointment of the judge.
2. Characteristics and conditions of arbitrator:
   Generally scholars of Islamic Jurisprudence require certain conditions to be fulfilled before a person may be qualified as a judge. However, an arbitrator is not required to fulfil these conditions.
3. The arbitration of an arbitrator does not surpass the disputing parties - judicial authority does.[72]
4. Arbitration is not accepted in Islamic Jurisprudence except in acceptable matters of disputes. It is not permissible in matters where reconciliation is not allowed, such as, punishment, theft, adultery etc. However, judicial authority includes all these matters. This will be shown in more detail when discussing the extent of arbitration within Islamic Jurisprudence.
5. Arbitration takes place in specific circumstances. However, judicial authority is characterised by continuity in covering all cases.[73]

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[70] Encyclopedia Comparing Laws and Arabic legislations, Code of Judicial Rules, Op. Cit. Article 1801, P.1171, see also Saleem Rortum, Op.Cit. P. 1168, and the Code of Legal Rules, Op.Cit. Article 2049, P.599.
[71] See Article 2049 ibid.
[72] Article 1842, Code of Legal Rules, Op. Cit. P.1171, see also Ali Rostum, Op. Cit. P.1194.

### 1.4.2. Distinction between Arbitration and Deputization(Agency)

Scholars have defined deputization as the authorizing of another person to perform a task that the authoriser usually does personally.[74]

Thus, arbitration and deputization are similar in the following ways:
Both take place between two parties, whether between the authoriser and the authorised or between arbitrators and disputing parties.

The matter which the authorised person to deal with is known and specified. The deputy is not allowed to transgress his right of deputization. Additionally the arbitrator should arbitrate within the limits traced by the subject of arbitration.

Although these similarities exist, arbitration and deputization are distinguished by the following:

In deputization, the deputy or agent is bound to execute his authoriser's decision. However, the arbitrator arbitrates according to his own independent will, following the rules of Islamic jurisprudence. The will of disputants should have no effect upon his ruling.

The objective of deputization is the preservation of the agent's interest and the taking care of his affairs on his behalf, but the objective of arbitration is the settlement of an existing dispute through justice.

### 1.4.3. Distinction between Arbitration and Reconciliation

According to scholars of Islamic Jurisprudence, the definition of reconciliation is that arbitration is a contract concluded between disputants.[75] Reconciliation is similar to

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[73] Sale AL Hassan, Op. Cit. P.26.
[74] See Article 1186, the Code of Legal Rules, op. cit P.382 and Articles 1187, 1188, 1189.
[75] Abdelhamid ALShawaribi, op. cit. P.387, see also Encyclopedia of Jurisprudence, op. cit. 27-3234 and Article 1616, Code of Legal Rules, Op. Cit. P.494 and Mohamed Shawkani, Op. Cit. Vol 5, P.376.

arbitration since the disputants agree of their own free will to have a dispute between them settled by a third party or parties, but it differs in the following ways:

1. Renouncement can occur in reconciliation where one of the reconciling parties renounces his rights, whereas arbitration leaves no room for renouncement. Disputants go into the arbitration process with no idea what the arbitration decision will be.
2. If acted upon, reconciliation becomes a compulsory contract which no party can have recourse against. However, arbitration in Islamic Jurisprudence, in the opinion of some scholars, allows the parties to the arbitration to have recourse to the contract before issuing judgement. This will be discussed in more detail in a later chapter.
3. Reconciliation usually takes place directly between the two parties concerned, but arbitration usually takes place through the presence of a third party.

It must therefore be concluded that arbitration cannot be considered as reconciliation within Islamic Jurisprudence [76]

### 1.4.4. Distinguishing between Arbitration and Experience

Scholars have written no independent research papers about experience but they have talked about the subject in different ways. 'Experience' in this context means the scientific or practical capacity that a person acquires in a specific field, such as a merchant's experience in commercial affairs, or a farmer's in his own type of crop.[77] A judge or an arbitrator may have recourse to an expert to assist him in the concerns of the case if he realises that the presence of an expert is necessary to the final judgement. It is therefore possible to distinguish between an arbitrator and an expert. An expert's opinion can be consulted but it is not binding. On the other hand, the decision of the arbitrator is binding. It must also be noted that having recourse to an expert differs according to the intentions of the two parties. It is possible to choose an expert to settle a problem, but in this case the expert must then be considered as an arbitrator. It is also possible to have recourse to an expert as a person knowledgeable in a specific area of expertise in which case he will be considered as a consultant.

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[76] This is similar to the concerns of modern Arbitration Laws, see Dr. Mahmoud Hashem, Op. Cit. Vol. 1, P.34.

## CHAPTER TWO

### The Pillars of Islamic Arbitration

Chapter one dealt with the concept of arbitration within Islamic Jurisprudence and its legality in the Quran, Sunna, Consensus and Analogy. It dealt also with the nature of the arbitration contract, its legal adaptation and what distinguishes it from other similar rules of Islamic Jurisprudence.

In this chapter, the pillars of contract within Islamic Jurisprudence will be discussed in general and then more specifically because the contract of arbitration is the source of arbitration. If the basis of arbitration is complete and correct in so far as its pillars are concerned, it will yield the expected results for settling all types of disputes.

This chapter will deal with each pillar specifically so as to cover everything concerned with it. Similarities between Islamic Jurisprudence and some modern arbitration rules will also be examined with special reference to Saudi Arbitration law.

## SECTION FIVE

### 2.5. Pillars of Contract Within Islamic Jurisprudence in General

#### 2.5.1. Showing different Opinions on Pillars of Contract

Firstly, three important points concerned with the Pillars of Contract in general within Islamic Jurisprudence must be clarified. It will be beneficial to deal with these points before discussing the Pillars of Contract of arbitration. They are as follows:

1. Ancient Muslim Scholars appeared to acknowledge only one pillar of arbitration. They said that the pillar of arbitration signifies itself in the adages –

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[77] Ibn Alqaim, (Alturk Alhakima) The Wise Ways, Research by Dr. Mohammed Jameel, Almadinah Library, Jeddah, P.128.

'arbitrate between us' or 'we make you our arbitrator'.[1] It seems that the scholars took into consideration the need for the necessary qualifications for both the arbitrator and the arbitratees as well as the subject of arbitration. They clarified this point when talking about other contracts; this therefore also applies to the Pillars of Contract of arbitration.

2. It should be noted that there are divergent views among Muslim scholars as to what constitutes the Pillars of Contract, especially between those of the Al Hanafi School and the majority of other scholars. These opinions are as follows:

(a) The Al Hanafi School believe that the Pillar of Contract is the content of its reality, its meaning is not proved except in the presence of offer and acceptance.[2] This means the desire of the contracting parties to issue the contract. However, the contractors and the place of contract are not part of the contract itself, rather they are the necessity of offer and acceptance.

(b) The majority of scholars believe that the Pillars of Contract consist of three things:

(i) Offer and acceptance

(ii) Contractors

(iii) The subject matter

The Pillars, according to the understanding of the majority of scholars, is what is obligatory to visualize the contract.[3]

3. Regardless of the previous divisions of offer and acceptance, contractors and the subject matter of arbitration are seen as being necessary in the formation of a contract within Islamic jurisprudence. There is a wide consensus among scholars about these contract pillars.[4]

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[1] Ibn Najeem, op.cit, Vol 7, P.25 Masad Al Borgani, Al th Kim fi Al Sharia wa Alandemh Alwadiha, 1st Edn, Dar Aleamam Press, Almadinah, 1994, P 129.
[2] Mohamed Abu Zahra, Op Cit, P 182.
[3] Article No. (221) Code of Legal Rules. Op. cit, P 117.
[4] Mohamed Madecor, (Alwjes Umad Kal Li Alfgh Alaslami), Introduction to Islamic Jurisprudence, Dar Al Nahdh Al Arbih Printing, Cairo, 1978, P.160, see also Abdulkarim zeddan, Almad Kal Ldrast Al

## 2.5.2. Showing Pillars of the Contract of Arbitration

Having shown the two perspectives within Islamic Jurisprudence on the Pillars of the Contract, the opinion of the majority of scholars will be adopted for this thesis. Therefore, this study will include the Pillars of Contract. By this method it will also be possible to study the Pillars of Contract according to the opinion of the Al Hanafi school of thought, which, basically, will be observed in obligation and acceptance. The other pillars, contractors and the place of arbitration in addition to offer and acceptance will follow the opinion of the majority of scholars.

It is therefore concluded that there are three pillars of an arbitration contract within Islamic Jurisprudence. These pillars must be fully available with all their conditions before a contract of arbitration can be issued, so as to reach the expected results in settling existing disputes be they commercial or of another nature. These pillars are as follows:

a) Contractors- within Islamic Jurisprudence this means all parties to the arbitration including the arbitratees and arbitrators

b) Offer and acceptance

c) The subject matter of arbitration.

After defining the pillars of an arbitration contract, there is no doubt that there are conditions for each pillar. These conditions must be known in order that an arbitration contract can be correctly issued. For this reason, these pillars, as well as factors that could confront them, will be set out comprehensively. For the purposes of this study, examination of the arbitratees, arbitrators, the obligation and acceptance of abitration, the subject matter of arbitration and a special section for adequate discussion will be included.

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Sharia Alaslami, Introduction to the Study of Islamic Law, 6th Edn, Al Qods Library Press, P.288. Qahtan Dawri, OP.Cit, P .113, Ahmed Al Ghazi, Op cit, P. 35.

## SECTION SIX

### 2.6. Arbitratees

The arbitratees are the parties to the dispute for which the arbitration is being conducted. They are, therefore, considered as a part of the pillars of the arbitration contract because their decision and agreement to settle their dispute by means of arbitration, instead of judicial authority, is the reason behind the issuing of the arbitration contract. However, the question that emerges here is - can all people coming under Islamic Jurisprudence have recourse to arbitration to settle their disputes?

#### 2.6.1. Arbitratees capacity

In reality, special conditions and qualifications are required in Islamic Jurisprudence so that all arbitratees have recourse to arbitration. This is a consideration for all parties to an arbitration and specifically preserves the interests of a person who may lack qualifications. Perhaps the more pertinent question is - what are the qualifications that must be available to any arbitratee within Islamic Jurisprudence? To answer this question, it will be necessary to define Islamic Jurisprudence 'qualifications' and their various types in order to clarify those qualifications needed for arbitration.

##### 2.6.1.1. Defining qualification

In Arabic, 'qualification' means the strict capacity to perform a task. It is said that a person is qualified to judge or arbitrate, which means that the person is capable and qualified to perform such a task.[5]

In legal terminology, qualification is defined as a quality evaluated by Islamic law, in which the person is evaluated to be ready for f the legislative requirement .[6]

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[5] Mohamed Zubaidi, Brides Crown from Dictionary's Pearls , op. cit, (Ahal) Vol. P.57, Al Mujam Al Wassit, Arabic Language complex, Op. Cit, Vol.1, P.31, Encyclopedia of Islamic Jurisprudence, Op. Cit, Vol 1, P .45.

[6] Ibn Hamam (died in 68 H,1282 A.D.) Aldhrer fi Asol Alfigh Aljama (The Origins of Jurisprudence)

There are two types of qualification:

1. Qualification of obligation
2. Qualification of performance

### 2.6.1.2. Qualification of Offer

This is the validity of the person to to get his or her rights.. This includes such things as the right of inheritance or the paying of indemnities from a person's losses.[7]

At the same time, the qualification of offer makes a person liable to legal duties as decided by Islamic law. This includes such offer as alms giving from his own money if he gains a legally decided share after the passage of a complete year.[8] The qualification of obligation is applicable to the young, adults, the sane and the insane. However, this type of qualification is not the concern of this study.

### 2.6.1.3. Qualification of Performance

Under Islamic Jurisprudence, 'qualification of performance' is known as the validity of a person legally capable of saying or of performing a task.[9] The qualification of performance in the subject of arbitration is the concern of this chapter. All parties to arbitration should have the complete capacity to exercise their rights[10] to correct arbitration; arbitratees should have the same capacity to act as the Contractor.

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Al Halabe Library Sons Printing, Egypt, (1351-H, 1932 A.D.) P 267 and Mustapha Zarqa, op. cit, Vol 2 , P 737.

[7] Abdurazaq Fraje (Sources of Obligation, mémoires for students of law, College of Administrative Sciences, Department of Law, King Saud Universit, Riyadh, (1404H 1932 A.D.) P.22.

[8] Almsgiving is one of the pillars of Islam, a specific amount of money is taken after a legal share of the money is received. Alms giving originates from money, gold, silver, camels, cows, or sheep taken from rich people and given to the poor. See Mohammed A.tef, The system of Alms Tax and Income in the Kingdom of Arabia, 1st Edn, Riyadh Press, 1992, P.37.

[9] Hassan Tawfiq, Capacity of Punishment in Islamic law, Al shab printing Press, Cairo, 1964, P. 27, Ahmed Alghazi, OP. Cit. P 38.

[10] Samir Saleh, Commercial Arbitration in the Middle East, 1st Edn. Graham of Trotman Limited, London, 1984, P.27.

Here, the following question emerges - how is a person qualified to act? In other words, what are the necessary conditions for the availability of qualification of performance within Islamic Jurisprudence?

There are differing opinions from various schools of jurisprudence regarding the answer to this question. However, it can be concluded that there are certain necessary conditions to be considered before arbitration can take place. A person is qualified to act when the following conditions have been met:

a) The age of maturity (adulthood) has been reached.
b) The ability to reason is present (i.e. there is no mental disorder)
c) There is no interdiction (i.e. there is freedom of action)
d) Not necessarily a Muslim
e) Not necessarily a Man

a) Reaching the age of maturity (adulthood)

In general, Islamic Jurisprudence divides the behaviour of the young people not having reached the age of maturity into three categories, as follows:

1. Behaviour fully beneficial such as accepting gifts and donations. Such behaviour is correct .
2. Harmful behaviour is not correct even if allowed by the guardian.
3. Behaviour between beneficiality and harm. This is not correct unless allowed by the guardian, if this is not the case, behaviour is considered as null.[11]

From these divisions, it is possible to ascertain that the subject of arbitration is set in the third section because arbitration shuttles between what is beneficial and what is harmful. Judgement may be given in the interest of a person not having reached the age of maturity. However, no person not having reached maturity should enter into arbitration except with the permission of a guardian.

[11] Abdulwahab Kallaf, Elem Asoul Alfegh, (Science of the Origins of Jurisprudence), 10th Edn, Dar Al Qalam Press, Cairo, 1972, P 37.

Some scholars have openly claimed that the young cannot differentiate and therefore are not qualified to make contracts.[12] Neither should anyone whose behaviour is not correct go into the arbitration process.[13]

Some scholars of the Hanafi and Hanbali schools advocate the necessity of reaching maturity in behaviour.[14]

However, schools of jurisprudence differ as to when the age of maturity is reached. Some determine it by the existence of specific signs according to the Almighty who said:

> "If then ye find sound judgement in them, release their property to them."[15]

Others determine this age as fifteen years.[16] The Hanafi school determines it as the age of nineteen and the Maliki School at eighteen.[17]

The rationale is that a person should be an adult and aware of his behaviour. The Maliki school appears to be the most reasonable since they determine the age of adulthood at eighteen, this does in fact seem to be when a person becomes aware of all their acts and the repercussions from those acts.[18]

b) <u>The ability to reason is present</u>

Reaching adulthood or some specific age is not enough for a person to be permitted to enter into arbitration. Reason must also be taken into account. Arbitration offered by an insane person cannot be accepted. The guardian of an insane person, however, may

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[12] Mustapha Zargah, Op. Cit. Vol. 2, P. 737.
[13] Ibn Kodama, Op. Cit, Vol. 8, P. 94.
[14] Ibn Najeem, Op. Cit. Vol. 7, P 24, Ali Haider, Op. Cit, Vol. 4, P 640. See also article 1464, (Magazine of Legal Rules) Op. Cit, P. 455.
[15] The Holy Quran, Surat Nessa (Women) Verse 6, (English Translation), Op. Cit, P.207 see also Articles 985 and 986 from The Code of Judiciary Arbitration, The Encyclopaedia of Legislations and Arabic Systems, Op. Cit. P.128.
[16] Ebrahim Atta, Op. Cit. P. 41.
[17] Samir Saleh, Op. Cit. P.30.
[18] Many Saudi laws advocate this opinion, such as that of Civil Affairs issued by the Royal Decree No.M/49 dated17.10.1397H(30.9.1977A.D).

intervene in arbitration on behalf of that person. If arbitration is offered by an insane person, it is considered invalid.[19]

c) There must be no interdiction

According to Islamic Jurisprudence, an interdicted arbitratee should not perform legal tasks. A person must also not have been made legally bankrupt. A bankrupt under Islamic Jurisprudence is a person whose debts exceed the amount of money held.[20] This is done to preserve the interest of creditors in a way that does not affect the rights of the person who wants recourse to arbitration. To understand the impact of bankruptcy, it is necessary to know the rules of bankruptcy and the money or property in which he is interdicted.

There many opinions about this matter in Islamic Jurisprudence. For example the Hanafi school says that the behaviour of the interdicted bankrupt is invalid if it invalidates the rights of creditors, such as acts of giving gifts or selling property at less than the correct price. However, if selling realises the appropriate price, it becomes acceptable.[21] On the other hand, the Hanbali school and some of the Maliki school maintain that without exception the behaviour of an interdicted bankrupt is invalid.[22]

There is a further opinion in the Maliki and Shafii schools which claims that the behaviour of the person interdicted for bankruptcy is conditioned from the creditors' point of view. If they allow such behaviour, it is executed, and if they refuse it, it becomes null, and if they differ in their opinions, a judge will order its execution or nullification.[23] This appears to be the most suitable method since it unites the preserving of the rights of a proprietor on condition that creditors are not affected. It must also be noted that by applying this opinion to arbitration, a bankrupt should not be allowed to arbitrate in the money or property interdicted to him.

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[19] Ahmed Abu Al Wafa, Op. Cit. P. 52. Ebrahim Alta, Op. Cit. P. 114, see also Kasa Qatura, Arbitration in the Light of Legislation, 1st Edn, Jeddah Chamber of Commerce & Industry, Jeddah, 1994 P.69.
[20] See Article 999 from The Code of Judiciary Rules, Encyclopaedia of Legislations and Arabic Systems, Op. Cit. P. 1129 and article 1458 from the Magazine of Legal Rules, Op. Cit. P 454. Said Sabeg, Fegh Alsonah, Jurisprudence of Sunna, 7th Edn, Dar Al Kitab Alarabi, Beirut, 1985, Vol 3, P. 567.
[21] Ali Al Marghinani, Op. Cit, Vol 8, P 206, Saleh Al Hassan, Op. Cit. P. 45.
[22] Mansor Al Bahoti, Op. Cit. Vol. 3, P. 423.
[23] Ahmed Al Ghazali, Op. Cit. P.186.

From the above, it can be concluded that the qualification of a person to enter arbitration cannot be complete unless it is established that the person has reason, has reached adulthood and has not being interdicted for bankruptcy.

It is worth mentioning here that there is nothing to prevent a bankrupt from going to arbitration under Islamic Jurisprudence if it is in relation to his own personal affairs and unconnected to his interdicted money, which means going into arbitration for non-financial rights unconnected with any creditors.

Islamic Jurisprudence is similar to many modern conventional rules which do not allow a bankrupt to do anything which might harm the creditors.[24]

For example, there is a similarity between English Law and some opinions from the Malki and Shafii School, since a bankrupt cannot submit to arbitration so as to bind his estate, but a trustee, with the permission of the creditor's committee or the courts, may refer any debts to arbitration.[25]

In general, the issue of qualification for the person having recourse to arbitration is a matter that concerns all modern states, where the safety of arbitration must be preserved so as to settle commercial disputes, either on a local or an international level. For instance, the Saudi Law of Arbitration stipulates that arbitration is only acceptable from a qualified person.[26]

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[24] Abdulamid El Ahdad, Op. Cit. P. 34. Samir saleh, Op. Cit. P.31.

[25] Michael Mustill & Stewart Boyd, Op. Cit. P 152. They mention the Insolvency Act 1986, S 314 (1) and Sch. 5 Part 1 (6). See also Anthoug Walton, Op. Cit. P 33.

[26] Its equivalent in Article 501/4 from the Egyptian Law of Pleadings and also Article 233 from the Law of Civil and Commercial Pleading in Bahrain State, issued in Rule N) 12 in 1971 and also chapter 259 from the Law of Civil and Commercial Procedures, Issue no.130, 1959. Also Article 442 from the Law of Civil Procedures in the State of Algeria, No. 60-154, dated June 8th, 1966. Also Article 11 from the Law of Arbitration in Egyptian Civil and Commercial Articles (The New Law of 1994) and paragraph (b) from Article No 52 from the same Law which considers that if one of the parties loses qualification in arbitration it becomes nullified. See the Law of Arbitration from the Printing of Cairo Regional Center For International Commercial Arbitration, Op. Cit. P. 13.

At the international level, Articles 7 and 34/2-a I, of the UNCITRAL Model Law[27] and Article 5/1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, are of great importance.

d) The Arbitratee need not necessarily be Muslim

It is worth noting here that non-Muslims may have recourse to either judicial authority or settle their disputes by means of arbitration whenever they think it appropriate to do so.[28] If a person is legally and morally sane, mature and not interdicted, in other words if they are fully qualified, they may have recourse to arbitration to settle commercial disputes whenever it is possible.

e) The Arbitratee need not necessarily be a man

This point must be clarified so as to avoid ambiguity regarding the extent to which a woman has the right to arbitration under Islamic Jurisprudence. If a woman has the qualification to conduct her own business with her own money, she has the right of recourse to arbitration.

In the Hanafi School, as with the majority of the other doctrines, the fact of being a woman is not in itself grounds for incapacity. Women have the same rights and duties as men; there is no difference between them at this level. The general rule is the equality of both sexes.[29]

To summarise, women may have recourse to arbitration to settle their commercial disputes or related matters whenever they choose to do so.

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[27] Narman, Op. Cit. P. 234, see also Dr M.I Aboul-Enein, Guidelines on Basic Principles to be Adopted in Modern Arab Arbitration Legislation, papers presented to the seminar on the «Practice of International Arbitration» Oxford, July 31, 1999, P2.

[28] The Encyclopaedia of Islam, New Edn, Edited by B. Lewis & Schacht, Lediden E.J Brill London Luzac & Co, 1965, Vol II, P. 228. See also Kasa Qatura, Op. Cit. P.69, Abdulhamid El hadab, Op. Cit P.35, Ahmed Alghazi, Op. Cit. P.39.

[29] See S. Mahmassn, mentioned in Abdulhamid Al Hadab, Op. Cit. P. 35. See also Dr Mohamed Hamidullah, Introduction to Islam, 2nd Edn, I.I.F.S.O, Paris 1970, P.155. Hammudah Abdullatif, Islam in Focus, Falah For translation, Publishing & Distribution, London, Cairo, 1997, P.358 and Following Mohamed Kotb, The Woman's Liberation, Dar Al Watan Press, Riyadh, 1990, P. 48.

### 2.6.1.4. Arbitratees should be of good character

To complete the conditions of qualification, people seeking arbitration must be of good, sound character and fulfil all other requirements (as set out above).

In Islamic Jurisprudence an arbitratee must also have an objective of settling any dispute brought to arbitration. The dispute should not be seen as superficial.

In fact the Books of Islamic Jurisprudence deal with the importance of such characteristics in both the plaintiff and the defendant. The matter is therefore, of concern Judicial authority or arbitration .[30]

Undoubtedly the burden here is on the shoulders of the arbitrator who must investigate the characteristics of the arbitratees in conflict before going into the arbitration process. This is done so that arbitratees, or their representatives, are seen as righteous since judgement cannot be issued in the absence of a righteous person.[31] This draws the attention of the arbitrator or arbitrators to the need to be aware the characters of the arbitratees.

### 2.6.1.5. Eligibility of Legal Personality of Public Sectors

This section continues the discussion about the eligibility of the litigant parties to resort to arbitration. The required eligibility will be examined in cases where parties to the arbitration are members of a profession. However, before going into further details, a question arises: what is meant by a legal personality? It has been defined as follows:

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[30] Mohamed Hashem, Procedures of Judicial Authority and Execution, King Saud University Press, Riyadh, 1989, P.42, Code of Legal Rules, Articles 2125-2131 Op. cit. PP. 617/ 618. Alaaddin Atarablussi, Op.Cit. P.53. Ibn farhon Al Malki, Op. Cit. Vol. 1, P.109. Ali Haidar, Op. Cit. Vol. 4, P 199.

[31] There were really overlaps, e.g. two people could agree to arbitration over a piece of land that does not belong to them, the the arbitrator can, in the absence of the real proprietor, issue notification, when the latter learns about it he may be obliged to spend an astronomical amount of money to get back his piece of land given mistakenly to one of the two people mentioned above. See Ahmed Abu Alwafa, Op. Cit. P. 79.

> 'A group of persons organized in a group or sum of money allocated to specific purposes for which the law offers an independent character, such as, a state, company or society.'[32]

In fact, Islamic Jurisprudence acknowledges the existence of a legal personality for many groups, companies and endowment institutes and other institutions, and those who have studied Islamic Jurisprudence have found that there is a classification - companies do recognize the fact that they are independent and have a legal personality in financial transactions.[33]

Legal personalities within Islamic Jurisprudence and contemporary law may be public legal personalities or private legal personalities. Public legal personalities are ministries and public institutions which perform services for society or part of it by the administration of certain public facilities.

From this, the eligibility of the public legal personality must be ascertained. Does it differ from the eligibility of a private person in arbitration? In answering this question it must be said that it differs in status from one state to another, for example the government of Saudi Arabia does not allow government institutions to resort to arbitration except with the approval of the Prime Minister.[34]

Accordingly, the eligibility of the legal public personality resembles the eligibility of a private person with no legal personality. As previously discussed,[35] actions in regard to benefit and harm depend upon the approval of a custodian. Therefore, the eligibility of the public legal personality is incomplete, it can only be complete after the approval of the President or the Prime Minister has been given, thereby allowing them to resort to arbitration.

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[32] M. Bajad, Althkem fi Almmlakh, Arbitration in the Kingdom, 1st Edn., Institute of Public Administration Research Studies Center, Riyadh, 1999, P. 71.
[33] For more details see, Abdulaziz Kayad, Al Sherkat fe Duo Aleslam, Companies in the Light of Islam, 1st Edn. Dar All Salam Publishing Press, Jordan, 1988, PP. 11-12.
[34] Saudi Arbitration Law, 1983, Article 3, see also award of Saudi Ministers Council, No. 8 dated 17th January, 1383 H/9th July 1963 A.D.
[35] See page 60, Supra.

Some states make no such restrictions on public institutions because they believe in the justice of arbitration and the benefits from its advantages in the settlement of conflicts. Other countries restrict the ability of public legal personalities to resort to arbitration from the point of view of the principle of state sovereignty. This trend has started to vanish as a result of the growth and development of arbitration and the increasing importance of its role in the settlement of conflicts.

Further, regarding private legal personalities, their eligibility will be satisfied according to the formalities and procedures stipulated by law.

From the above it can be seen that eligibility should be required for the legal personality, whether public or private, according to the criteria specified by the law of the state to which the legal personality belongs.

## SECTION SEVEN

### 2.7. Arbitrators

It can now be seen that there are three Pillars of Arbitration contract within Islamic Jurisprudence. They are –

a) The contractors, the arbitratees and arbitrator.
b) Offer and acceptance.
c) The place of arbitration.

The first section dealt with the arbitratees. This showed what is required before it is possible to go to arbitration. In this section, the second party to the contract, arbitrators, will be discussed and the method used to appoint them and the extent of their authority.

### 2.7.1. Importance of Knowing Necessary Conditions for Arbitrator within Islamic Jurisprudence

It has become increasingly important to discuss the necessary conditions that should be met by arbitrators within the Islamic Jurisprudence perspective. At the present time,

with the increasing interaction of commercial activities between countries and individuals, many questions have yet to be answered satisfactorily. One such question is - to what extent is the non-Muslim allowed to arbitrate? To put it another way, what are the necessary conditions of arbitration for non-Muslims? Another question is - to what extent are women allowed to be arbitrators? In finding answers to these questions it will be possible to discover the Islamic Jurisprudence perspective on arbitration.

### 2.7.2. Differences in various Schools of Jurisprudence in their Conditions for Arbitrators

The majority of opinions in Islamic Jurisprudence consider that arbitration is a type of judicial authority. It therefore ensures the necessary conditions for an arbitrator because the task of arbitration is similar to that of the judicial authority as they both lead to settlement of disputes with justice.

An arbitrator must be morally, scientifically and experimentally capable of performing this task.

Careful examination of ancient books of Islamic Jurisprudence shows that great attention was paid to this matter by judicial authorities. It was considered necessary to have the right conditions and a suitable judge for the task of arbitrating between people. From the beginning, the Prophet (peace upon him) said:

> Judges are of three: Two judges in hell and one judge in Heaven.[36]

This is to ensure that there must be justice and righteousness and to warn against wrong doing. The scholars also demanded that a judge should possess certain qualities. For example, a judge must be patient, compassionate with orphans and widows, and should not be influenced by people of authority. A judge must be just in dealing with the strong, the weak, the rich and the poor and must settle disputes among parties in

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[36] Narrated by Abu Dawood, Tirmidi and Nissai, see Siad sabeg, Op. Cit. Vol. 3, P. 398. See also Hadith from the prophet who said that God said *«Oh, my people, I forbid wrong doing by myself and I made it forbidden among you ...»*, see Ibn kathir, Vol. 4, P. 75. See Khaled Aleak, Safwat Al Bayan Lemaani Al Quran 1st Edn, Dar Al Bshaer Press, Beirut, 1994, P.273.

conflict. A judge should not issue a judgement while in anger. Islamic Jurisprudence deals with the ethics pertinent to a judge.[37]

This great interest in the necessary conditions of a judge has been reflected onto arbitrators and their capacity to arbitrate. Disagreement has arisen between the Islamic schools of Jurisprudence at to what are considered the necessary conditions of an arbitrator. This disagreement, for the purposes of this thesis, can be limited to two points of view:

First, the arbitrator should possess all the qualifications required for a judge.

Second, the arbitrator is not necessarily qualified to be a judge.

### 2.7.2.1. First opinion: The Arbitrator Should Possess All the Qualifications Required of a Judge

Some Islamic schools of jurisprudence have accepted the fact that an arbitrator should possess all the qualifications required of a judge. The Maliki[38] and Twelfth Shiit Schools[39] are advocates of this opinion. However, whilst these schools agree on the requirement of the qualifications, they differ in their opinions as to what the necessary qualifications for a judge are.

a) Qualifications agreed upon which must be held by a judge. As an introduction to an understanding of the points of view of these schools, it is important to show the necessary qualifications known to the majority of Islamic Schools of Jurisprudence in a general way. Reasons that have led some of these schools to require certain qualifications in the arbitrator will then be highlighted. These qualifications, i.e. Islam, reason, adulthood, legal knowledge, safety of the senses and the male gender, are set out in more detail below.

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[37] Ebrahim Abi Al Fadel, Lissan Al Hokam fi Marfet Al Ahkam, 2nd Edn, Abab Library, Egypt, 1973, P. 218. See also Ali Rostom, Op. Cit. Vol. 3, P. 288. Slama Al Herfi, Judicial Authority in Islamic Country, Dar Al Nahazah Press, Egypt, 1985, P.28.
[38] Saleh Al hassan, Op. Cit. P. 47.
[39] S.H Amin, Op. Cit. PP. 80-84.

1. Islam: A judge should be a Muslim. This has been agreed by all schools of Jurisprudence, The Shafii school,[40] The Maliki and Hanbali Schools,[41] some of the Hanafi Schools[42] and the Twelfth Shiit school.[43] The opinion of these scholars is supported by the following Quranic verse:

> 'And never will Al"lah grant to the Unbelievers a way to (triumph) over the believers.'[44]

2. Reason: All schools of Jurisprudence agree that a judge should have reason, as should an arbitrator. Neither the insane, nor those suffering from mental disorders[45] are allowed to judge or arbitrate. However, it is not sufficient for a judge (or an arbitrator) to just use his five senses like any ordinary man. He must have the ability to solve intricate problems. It is interesting that the Maliki school, whilst requiring this condition, expresses its distrust of too much cleverness.[46]

3. Adulthood: All schools of Jurisprudence also agree that a judge should be a grown-up, fully capable of judging.[47] A person who has not reached the age of maturity is not allowed to be an arbitrator or judge[48] and none of his decisions[49] are to be considered valid. However, if an adolescent is aware of his acts, some scholars believe that his decisions can be considered.

4. Legal knowledge: Although the majority of schools of Jurisprudence agree about this condition, there is an argument as to the extent of legal knowledge that should be possessed by a judge. Some schools, such as the Hanbali, the Shafii and the Twelveth Shiit, consider this condition one of perseverance.[50] This means an individual's determination and ability to search for a ruling from God's law in order to judge a

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[40] Yahya Al Nawawi, Op. Cit. Vol. 11, PP. 96-97.
[41] Ibn Kodama, Op. Cit, Vol.9. PP. 39-40.
[42] Hanafi School has details about this point, see P.85, infra.
[43] S.H. Amin, Op. Cit. P. 80.
[44] The Holy Quran, Suran Nessa, Verse 141, English Translation, Op. Cit. P. 262.
[45] See Ibn Najeem, Op. Cit. Vol. 6, P.283, Ibn Frhon, Op. Cit, Vol. 1, P. 18, Mansor Al Bohati, Op. Cit. Vol. 6. P. 294, and see Article 2060, Code of Legal Rules, Op. Cit. P. 601.
[46] Samir Saleh, Op. cit, P.37.
[47] Code of Legal Rules, Majalat Alahkam Al Sharia, Article 2050.
[48] Ibrahim Atta, Op. Cit. P. 148.
[49] Saleh Al hassan, Op. Cit. P. 49, Masad Al Borgani, Op, Cit. P. 131.
[50] There are conditions must be reached to make perseverance.

human action in a case where the divine law is not definitively revealed. To be able to do this, the person would have to have a broad knowledge of the rules of Islamic Jurisprudence. However, some scholars and also the Hanafi school dispute this. They stress only the legal knowledge and the legal rules of Islamic Jurisprudence and the capacity of drawing on them correctly.

It appears to be difficult to put the condition of perseverance onto either a judge or an arbitrator because to do so will make things too difficult for many people since only a small number are able to meet this condition. However, it should be considered and given top priority at the time of appointing judges.[51]

The objective of schools of Jurisprudence in placing the condition of perseverance on judges is a priority at the time of appointment; it is therefore suitable to give priority to the knowledgeable person.

5. The safety of senses: Scholars place a special condition on judges which requires them to be capable of hearing, sight and speech.[52] Some of the Hanbali and Maliki schools do not consider hearing and sight as conditions; if they are not available in the judge, the latter may be discarded. On the grounds of scientific reality, blindness does not legally disqualify a judge from practising his role. Indeed, there have been examples of very good, blind judges.[53]

6.a) Male sex: The majority of Schools of Jurisprudence, such as the Shafii, Maliki and Hanabli schools[54] and the Twelfth Shiit School[55] place great importance on arbitrators being of the masculine gender. This opinion is held by the majority of scholars. The Hanafi School and Tahiri School, however, allow arbitration by women in

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[51] Ali Rostom, Op. Cit. P.1163.
[52] Article 2060, Code of Legal Rules, Op. Cit. P. 601.
[53] One example is Shekh Abdulaziz bin Baz, President of the Board of Senior Scholars in Saudi Arabia and President of the Complex of Jurisprudence for the World Islamic League and Head of Administrations of Scientific Research and Preaching. He is considered as one of the greatest modern scholars. He was a judge and did well in this domain. He lost his sight at the age of 16 and died in 1999.
[54] Article 2060, Code of Legal Rules, Op. Cit. P. 601.
[55] Kadem Al hosni, Al Haeri, the Judicial System, 1st Edn, Iran, 1995, PP.68-69, Mohsen Al Moswi, Op. Cit. PP. 126-134. S.H Amine Op. Cit. P.79.

certain matters in which she has the right of testimony. This issue will be treated in greater detail in a section dealing specifically with this subject.[56]

b) Conditions pertaining to a judge about which schools of Jurisprudence disagree: For the purposes of this study these conditions will be limited to the following:

i) Justice

ii) Writing

i) Justice: Firstly, the meaning of justice within Islamic Jurisprudence must be defined. Justice means the religious preservation of righteous living, staying away from cardinal sins such as adultery, theft, drinking alcohol. Lesser sins should also be avoided. People must be trustworthy, just, kind and must stay away from vices that affect human nature.[57]

Disagreement among schools of Jurisprudence about whether being just is a necessary condition of being a judge, stems from their differences of opinion on the impact of corruption on the capacity of a judge to make decisions in arbitration.

All of the Shafii School,[58] the Hanbali School,[59] some of the Hanafi and Maliki schools[60] and the Twelveth Shiit School[61] have said that the testimony of the corrupted is not acceptable, and a person whose testimony is rejected cannot be a good judge. They found proof in the following saying from the Almighty:

> and take for witness two persons from among you, embed with justice,....[62]

They also found proof that judicial authority is a religious post and considered to be a trusted position. So the corrupted are not allowed to take the position of a judge.

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[56] See page 78, Infra

[57] Ali Rostom, Op. Cit. P. 1163. See also Article 1792 from the Code of Legal Rules, Op. Cit. and also the meaning from Ibn Jozea, Op. Cit. P.203.

[58] Mansor Al Bohowiti, Op. Cit. Vol. 6, P. 296.

[59] Ibn Kodama, Op. Cit. Vol. 9, P.40.

[60] Ahmed Al Ghazali, Op. Cit. P. 240.

[61] Mohsen AL Moswi, The Judicial System, Op.Cit, PP. 131-132, S.H Amin,Op.Cit, P. 79.

However, the majority of the Hanafi school[63] see that the corrupted could be allowed to judge on the grounds that their testimony is acceptable. They claim that he is still capable of deciding what is right for parties in conflict and that by doing so he is fit to judge.[64]

They have also discovered that the widening scope of justice and its concept, closes the door on judging.[65] Thus, it seems that justice has the highest priority when choosing and appointing judges. If two judges are equally knowledgeable, the one whose justice is acknowledged by a competent authority is given priority to judge people.

ii.) Writing: Disagreement has also arisen among schools of Jurisprudence concerning writing. There are some who advocate the importance of writing. They claim that people who write know how to read. Literacy is a necessary factor of judges so that parties in conflict should be able to understand any written evidence that may be presented. The Maliki School and some of the Shanfii and Hanbali Schools[66] and the Twelfth Shiit and Zidiya Schools were concerned with written documents.[67]

Nevertheless, there is another opinion advocated by Maliki, some of the Hafii and the majority of the Hanbali Schools. They say that reading and writing are not necessary conditions of a judge or arbitrator. Rather what is important is knowledge and legal science. Their proof of this is that a judge could ask for help from literate people.

c) Judges' conditions as advocated by some Schools of Jurisprudence: Some schools of Jurisprudence advocate extra conditions in order for a person to take the position of a judge which have not been stressed by other schools. For example, the Twelveth Shiit School, in addition to the previous conditions, has added the following:

1. He must be a Muslim from the Shiit group.[68]
2. He must be of legitimate birth The judge should not be the son of an adulterer.[69]

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[62] The Holy Quran, Divorce, Verse 2, English Translation, Op. Cit. P. 1765.
[63] Ibn Najeem, Op. Cit. Vol. 6, P.283.
[64] Alaaddin Al Tarablussi, Op. Cit. P. 240.
[65] Ahmed Al-Ghazali, Op. Cit. P. 240.
[66] Ibn Kodama, Op. Cit. Vol. 9, P.43.
[67] Qahtan Dowri, Op. Cit P.185.
[68] S.H Amin, Op. Cit. P.78, see also Mohsen Al Moswi, Op. Cit. P.139.

This opinion has only been adopted by the Twelveth Shiit School.

In short, there are certain necessary conditions and qualifications that a person must satisfy in order to be fit for the position of judge. According to the first opinion these conditions must also be applied to a person if he is to take the position of an arbitrator.

Adopting this opinion would be difficult, because the point of arbitration, though similar to that of judicial authority, does differ from it in some aspects. In arbitration the parties settle their dispute by mutual agreement, and they are free to choose to their own arbitrators who are qualified and experienced in settling disputes. In judicial authority, the parties do not have right to choose a judge, therefore the judge must satisfy these conditions. Because of the differences between the role of the judge and that of the arbitrator this opinion cannot be adopted.

### 2.7.2.2. Second Opinion: The Arbitrator is not necessarily Qualified to be a Judge

The arbitrator need not have the same qualifications as the judge. This opinion was adopted by the Maliki, some of the Shafii and the Hanbali Schools.[70] There are many qualifications required for a judge, whereas it is possible that the arbitrator may only have knowledge of the subject of his arbitration. Ibn Jozea said:

> 'if two parties make a man as an arbitrator between them, they are bound to this arbitration.'[71]

Ibn Jozea did not put conditions on the arbitrator. In fact he only talked of 'a man', which means that an arbitrator does not need to be qualified as a judge, in order to have his arbitration accepted. This would appear to be proof that it is enough for the arbitrator to have knowledge of the subject of the dispute in order to settle it correctly.

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[69] Kadem Al Haeri, Op. Cit. P.77 and PP. 406-10.

[70] Shamsuddin Al Shrabini, Op. Cit. Vol. 4, P. 479.

### 2.7.2.3. Choosing the Most Widely Held Opinions

It seems that the second opinion is the best because it only ties the arbitrator to having knowledge of the subject of the dispute. This opinion is also approved by modern laws of arbitration. For example, the fourth Article of the Saudi Law of Arbitration stipulates that experience is an important criterion of being an arbitrator. Also, there are laws that stipulate good behaviour, character and qualifications[72] and many arbitrators are chosen because they have special or technical knowledge relating to the dispute in question.

It is the custom in some disputes for an expert arbitrator to look at the matter without the assistance of witnesses or lawyers to help decide the case. Such disputes usually concern arguments over quality. For example, an arbitrator may be asked to decide whether a consignment of coffee beans is of equal, lesser or greater quality than an approved sample.[73]

## 2.7.3. Women as arbitrators

As previously mentioned, there is a certain equality between women and men and their roles in arbitration.The independence of women, their money and commercial activities has already been discussed.[74]

However, questions have been raised as to the extent to which a woman is allowed to arbitrate. In this study, the objective is to show the rules within Islamic Jurisprudence because it is specific to religious law. The author's views on what has been said by the ancient scholars and his understanding of the attitude of Islamic Jurisprudence, and also the attitudes which give the strongest support to these opinions will be discussed and evidence of their validity will be shown.

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[71] Ibn Jozea (died in 741 H/1320 A.D.) Gawanen Alahkam Alsharia, Code of Legal Rules, Dar Al Alem Umalleein, 1994, P. 325.

[72] Saudi Arbitration Laws, Articles 4 and 14 of the Amman Arab Agreement for International and Commercial Arbitration which was signed by a group of Arab countries in Amman City, Jordan on January 11th 1997. See also Hamza Haddad, Journal of Arab Arbitration, Amman Agreement, Vol. 1, May 1999, P.24 and Article (11) of The law of Arbitration, Center for Arab Gulf Countries (GCCC), OP. Cit. P. 8.

[73] Harold Crowter, Introduction to Arbitration, 1st Edn, LL.P Publishing, London, 1998, PP 34-35, see also Ahmed Abdulwafa, Op. Cit. P. 30.

[74] See page 67, Supra. See also Dr Jamal Badwi, The Status of Women in Islam, 1st Edn. Printed by Ain Modern Printing Press, UAE, 1988, P.21.

In reality, some schools of Jurisprudence draw links between occupying the position of a judge and the mission of an arbitrator, as has been shown. Some claim that a woman is not allowed to arbitrate because these schools have widened the scope of arbitration. Other schools have said that arbitration includes everything presented to judicial authority. This makes it clear that the latter schools consider there is an analogy between arbitration and judicial authority.

Opinions relating to women's arbitration will be presented then clarified in the following section.

In fact, there are three different schools of thought on this issue:

1. Women are not allowed to judge in all cases.
2. Women are allowed to judge in all cases.
3. Women are allowed to judge in matters where she can give testimony.

1. <u>Women are not allowed to judge in all cases:</u>

The first opinion in more detail shows that women are not allowed to judge in all cases. This opinion was adopted by some of the Maliki, Shafii, and Hanbali Schools,[75] and by some of the Twelfth Shiit Schools.[76] They support their opinion as follows:

Abi Bakra was told by the Prophet (peace be upon him), when he learnt that the people of Faris had appointed a woman as queen:

> 'A nation appointing a woman to look after its affairs will not triumph.'[77]

This evidence can be objected to on the grounds that the prophet meant the presidency or the ruling of a woman, rather than judging or arbitration.

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[75] Ibn Kodama, Op. Cit. Vol. 9, P. 40. Mansor Albhouti, Op. Cit. Vol. 6, P. 294. Yahya Al Nawawi, OP. Cit, Vol. 11, P. 95, Kasa Qatoura, Op. Cit. P71.
[76] Kadem Al Haeri, Op. Cit. P. 68. Mohsen Al Moswi, Op. Cit. PP. 135-136.
[77] Al Showkani, Op. Cit, Vol. 8, P. 273. Qahtan Dawri, Op. Cit. P. 202.

Secondly, the following Quranic verse is given as proof:

> 'Men are the protectors and maintainers of women.'[78]

A woman taking the position of judge can be seen as a matter of qualification, which contradicts the above verse. In fact, it is possible to object to the fact that women can hold the position of judge even among women only. This means there will be no objection to the verse, according to one's attitude.

Thirdly, on the basis that mixing men and women is illegal in Islam, women cannot be allowed to judge even in cases of giving testimony. If a woman takes the position of a judge she will be obliged to sit with a group of men and she must wear the veil because Islam requires women to wear veils when they are not with their close relatives.

It becomes apparent that this evidence can be opposed because it is not sufficient to prevent women from acting as judges. This has no bearing on the connection with the work of women, but it has a relationship with many things that could be overlooked, things for which solutions could be found. For example, women may play the role of judges among women but precautions should be taken so that they do not to mingle with men.

2. <u>Women are allowed to judge in all cases</u>

This opinion was adopted by the Al Thahiria and the Al Tabari[79] and some of the Twelfth Shiit schools.[80] Advocates of this opinion consider that it has been proved by the following:

(i) They claim that there is an analogy between judicial authority and preaching. Since women are allowed to preach, they should also be allowed to judge and therefore to be arbitrators.[81]

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[78] The Holy Quran, Surat Al Nassa, Verse, 34, English Translation, Op. Cit. P. 219.
[79] Imam Tabari is Mohamed bin jarir Al Tabari (died 310 H/ 923 A.D.) He wrote many books, see Qahtan Douri. Op. Cit. P. 22, 1991.
[80] Opinion of Abdelkarim Al Ardabili (Head of Judges in Former Iranian Republic) see Mohsen Al Moswi, Op. Cit. P. 134.

In reality, this proof can be opposed since there is a difference between preaching and judicial authority. The former informs about legal rules whereas the latter performs the same task but, in addition, obliges the parties in conflict to accept the judge's ruling.

(ii) They also claim that proof is shown by the fact that judicial authority is concerned with ordering the good and warning against evil. This deed can be performed by women. However, this analogy is not accurate because the position of a judge differs from that of a preacher in many areas. All Muslims are ordered to preach good deeds and warn against evil but judicial authority treats disputes in accordance with legal rules.

3. Women can judge only in matters for which their testimony is accepted

The Hanafi School[82] has adopted this opinion on the grounds that where the matter of testimony is accepted, judicial authority is also accepted. The Hanafi school contends that women's testimony is accepted except in cases of severe punishment, including beheading.

It seems that there is a difference between testimony and judicial authority. The witness is required to tell what he has witnessed, but a judge is required to be scientifically qualified to give sound judgement in settling disputes. If the witness presents information giving the right to one of the conflicting parties, his deed is totally different from the task of judging where proofs are deeply investigated before judgement is given.

From the evidence of these three opinions, it seems that women are not precluded from the position of judge within Islamic Jurisprudence. She may take the position of judge in matters that concern women in general because women know each other well in comparison to men. Equally important, the nature of a society in which women hold the position of judge should be taken into account.

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[81] Ibn Hassem, Op. Cit. Vol. 9, PP. 429-430, Amen Ali, Op. Cit. P. 292.
[82] Ebrahim Ali Fadel, Op. Cit. P. 224. Alaadin Al Tarablussi, Op. Cit. P. 25.

The aim of this section has been to come to a conclusion in the matter of whether women can arbitrate or not. The points raised and discussion of all the divergent views on this issue have led the author to the opinion that women can arbitrate. Women are shown to have the capacity to undertake positions such as judges and arbitration is a degree less than that of holding a position within the judicial authority. Disagreement about women being arbitrators is simpler than disagreement about them holding positions as judges.

For this reason, those who claim that women are not allowed to arbitrate, confuse arbitration with judicial authority. They consider judges qualifications to also be necessary qualifications for arbitrators, which is not logical. If women have the legal knowledge of the general rules of Islamic Jurisprudence and have the full capacity to deal with the intricacies of arbitration, they may conduct the task of arbitration and the settlement of disputes.

Supporting this opinion is Omar Ibn Al Khatab, the Second Calif after the Prophet, who authorized a woman to supervise the city market. The woman, Al Shefa, belonged to a group of intellectual women and was the judge of the market.[83] Various historians have also mentioned the life of the prophet's companion, Samra bint Nahik Al Asdya, who was supervisor of the market in the era of the Prophet (peace be upon him).[84]

As previously mentioned, many women[85] were distinguished in arbitration in the Pre-Islamic period. There was no text, at that time, saying that women could not arbitrate.

To summarise, it is possible to say that women can be chosen as arbitrators in subjects where they feel capable of settling disputes in the same way as men.[86] It is worth noting

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[83] M.I.M Aboul Enein, Liberal Trends in Islamic Law (Sharia) On Peaceful Settlement of Disputes, Research presented to the seminar of the Practice of International Arbitration, Oxford, July31st 1999, P. 24. See Ismail Al Astl, Althkim fi Alsharih, 1st Edn, Dar Al tawfiq Press, Egypt, 1986, P. 91.and some researchers said ther is a weakness in narrating this story.

[84] Ahmed Al ghazali, Op. Cit. P. 259.

[85] See page 34, Supra.

[86] In this respect, the decision of the Egyptian Minister of Justice, No. .3771 in 1995 includes a list of arbitators who could be chosen in case parties do not agree on an arbitrator, the decision does not put conditions of arbitration of the male gender but includes the name of ten women. See Nerman, Op. Cit. P. .9.

here that Saudi Arbitration Law does not preclude women from being arbitrators. A woman can arbitrate in Saudi Arabia if she has been chosen by the arbitrating parties.

### 2.7.4. Non Muslim as Arbitrator

One of the most important questions facing modern Islamic arbitration is whether a non-Muslim can arbitrate or not, especially with the interaction of commercial and current economic relationships between countries and transuction companies. Consequently, different arbitration boards consisting of non-Muslim arbitrators were created. Moreover, with the increase of commercial transactions and the great revolution in the world of modern telecommunications and the internet, the world has become a small village. Methods of communication have become easier as have the means of trading exchange.

These advances require us to know the opinion of Islamic Jurisprudence regarding the possibility of arbitration by non-Muslims. The answer to the question involves knowing whether Muslims wish to undertake commercial contracts with Islamic countries and/or Islamic companies. Knowing the role of Islamic Jurisprudence, it is appropriate to prepare suitable formulas for all parties for the future, since Islamic countries have begun to demand that their governments adhere to the rules of Islamic law. This religious dimension has had an impact on much legal behaviour at both international and local levels.[87]

This section has been researched with special care to discover the correct rules of Jurisprudence with the specific aim of answering the question - to what extent is the non-Muslim allowed to arbitrate?

By looking at a number of opinions in books of Islamic Jurisprudence, it is possible to distinguish between the various opinions regarding the following areas:

a) Is arbitration national, inside the country or in an Islamic province?

b) Is arbitration international?

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[87] Mark Tessler, Jodi Nchtwey, Islam and Attitudes towards International Conflict, Journal of Conflict Resolution, 1998, Vol. 42, P. 266. Also, Youssef Al Hossein, The Religeous Dimension in American Politics,U.A.A, 1985, P. 63.

Research shows that these divisions do not exist in books of Islamic Jurisprudence but it should be possible to cover the whole subject with these two divisions.

### 2.7.4.1. Arbitration by Non-Muslims if Arbitration is National

The non-Muslim as arbitrator inside an Islamic province or country - Islamic law allows Jews and Christians (Ahl Al Dhimma) to live in an Islamic country[88] and Islamic law stipulates the preservation of their rights. No wrong must be done to them, they must be offered a peaceful life within the Muslim society.

It is possible to visualize the non-Muslim as arbitrator in local arbitration under three conditions, as follows:

1. If the parties to arbitration are non-Muslims.
2. If the parties to arbitration are Muslims and non-Muslims.
3. If the parties to arbitration are Muslims.

These three conditions will be discussed in further detail below.

1. Firstly, there are many opinions regarding the rule of choosing a non-Muslim to arbitrate for non Muslims.

First opinion - It is claimed that Ahl Al Dhimma may choose an arbitrator whose judgement should be executed.[89] This opinion has been adopted by the Hanafi School.[90] It is possible, according to this opinion, for the non-Muslim to be an arbitrator between non-Muslims.

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[88] The Encyclopédia of Islam, New Edition, Edited by B. Lewis & Schacht, Lediden E.J. Brill, London, 1965, Vol. 1, P. 258. See also Bat Ye or, Djimmitude, Jews and Christians Under Islam, Midstream, a monthly Jewish Review, 1997, Vol. 43, P. 9. Said Ramadan Op. Cit. P. 122 and following. See also Abu Alala Al Mawdodi, Ahl Al Dhimmg's Rights, 1st Edn. Aldar Asaudi Press, Jeddah, 1988, P. 22 and following.

[89] Abdulhamid El Hadb, Op. Cit. P..35, see also the Encyclopaedia of Islam, Op. Cit. Vol. II, P.228. Said Ramadan, Op. Cit. P.152.

[90] Ibn Najeem, Op. Cit. Vol. 6, P. 283, Ibrahim Atta, Op. Cit. P. 113, Samir Saleh, Op. Cit. P. .36, Ismail Al Astal, Op. Cit. P. 89, Masad Al borgani, Op. Cit. P. 154.

Second Opinion - Ahl Al Dhimma are not allowed to arbitrate among themselves. This is the opinion of some advocates of the Shafii School,[91] and the opinion of the Twelfth Shiit School.[92] This opinion is held because a judge is taken for an arbitrator. As already stated, this approach is difficult to uphold.[93]

On balance, the first opinion is considered more appropriate, that is, the opinion of the Hanafi School, that allows the arbitration of Ahl Al Dhimma among themselves and the choice of any arbitrator they see fit for their case. Moreover, most arbitration laws of an Islamic country stipulate the liberty of choosing an arbitrator.

2. If the arbitrator is non-Muslim and the parties to arbitration are Muslim and non - Muslim, there are many points to be considered around this issue.

First Opinion - Some advocates of the Hanafi School claim that if a Muslim and a Dhimme person decide between themselves on a Dhimme arbitrator, this arbitration is applicable only to the Dhimme person and not to the Muslim.[94]

In reality, on looking more deeply into the matter of this issue, it does not appear to be feasible. For example, the Hanafi School allow non-Muslims to arbitrate in cases where a dispute occurs between a Muslim and non-Muslim. They ascertain the correctness of a judgement by its results. However, this attribution is not accepted because sound judgement depends on appointing an appropriate arbitrator. If the arbitrator appointed is correct, in so far as qualifications, are concerned, arbitration will then be correct regardless of being Muslim or non-Muslim. For this reason, this opinion appears to be weak.

Some Hanafi jurists would add that a non-Muslim who satisfies the requirements necessary to be a witness may also be an arbitrator.[95]

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[91] Ahmed Al Ghazali, Op. Cit. P. 235.
[92] S.H Amin, Op. Cit. P.75, Mohsen Al Moswi, Op. Cit. P. 138.
[93] See page 77, Supra.
[94] Ibrahim Atta, Op. Cit. P. 150, Qahtan Dawri, Op. Cit. P. 197.
[95] M.I.M Aboul-Enein, Liberal Trends in Islamic Laws, Op. Cit. P. 22.
It is worth mentioning that the Hanafi School distinguishes between appointing and undertaking directly the position of judge. They proclaimed the capacity of the Non-Muslim to be judge, but his judging is not acceptable, see Ismael Al Astal, Op. Cit. P. 89.

Second Opinion - A non-Muslim is allowed to arbitrate between the Muslim and the non-Muslim.

Professor, M.Abuol Enein has said:

> 'Modern trends in Islamic law expressed by authorities on the subject would not require that an arbitrator be Muslim. Some authorities on the subject reached this conclusion by using the analogy of the case of arbitration between a husband and wife. If the wife is non-Muslim, the Quran states that the Hakam (arbitrator) appointed by the wife - whether a conciliator or arbitrator - be from her family who is supposed to be non-Muslim. Depending on this clear wording of the verse, they have concluded that non-Muslims may be appointed as arbitrators.'[96]

Before agreeing or disagreeing with the above statement, it is important to bear in mind what other ancient scholars have said on the matter of Islamic Jurisprudence, particularly on the subject of two arbitrators between a married couple as stated in the Quranic verse. This issue has brought about two schools of thought from the scholars.

1. The two arbitrators must belong to the family of the married couple: The Maliki,[97] some of the Hanbali,[98] and some of the Twelfth Shiit Schools[99] have adopted this opinion.
2. The two arbitrators, as mentioned in the Quranic verse, need not belong to the family of the married couple, but it is better if they do: This opinion has been adopted by the Hanbali School[100] the Shafii school [101] and the majority of the Twelfth Shiit School.[102]

The second opinion is considered most fitting since the two arbitrators need not necessarily belong to the family of the married couple because Islamic Jurisprudence, in

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[96] M.I.M Abou –Enein, Liberal Trends in Islamic Law, Oxford, Op. Cit. P. 22.
[97] Qahtan Dowri, Op. Cit. P. 414.
[98] Ibn Kodama, Op. Cit. Vol. 8, P. 166.
[99] Zaïnddin Al Ameli, Al roudah Al Bhiba, Dar Al Ketab Al Arabi, Egypt, 1378, Vol. 2, P.133.
[100] Ibn Kodama, Op. Cit. Vol 8, P. 170.
[101] Shameseddin Al Sherbini, Op. Cit. Vol. 3, P. 261.
[102] Qahtan Dowri, Op. Cit. P. 420.

general, aims at achieving reconciliation between husband and wife and the preservation of family unity. For this reason, the more experienced and fair the arbitrators are, the more likely it is that family unity will be preserved. Hence, if no conciliator exists within the families of the couple, it is better to find other arbitrators who will seek to benefit the husband and wife.

It is possible to dispute the views of M. Aboul-Enein on the Quranic verse (given above), which he claims as proof of two arbitrators being required from inside the family, by introducing the following points:

a) The arbitrator mentioned in the holy verse was chosen for a family disagreement. If a non-Muslim arbitrator is allowed here, this does not mean that he is allowed to arbitrate in commercial and financial transactions.

b) The two arbitrators, as we have seen, do not necessarily have to belong to the couple's family. Some authorities would require that non-Muslim arbitration be either Christian or Jewish. According to them, arbitrators of religions other than the three main religions, i.e. Islam, Christianity and Judaism, may not be arbitrators.[103]

This rule apparently only arises when arbitration is international because no book of Islamic Jurisprudence appears to support the issue.. Additionally, Muslims men are permitted to marry Christians or Jews but not members of other faiths. *

This opinion does not allow non-Muslims to arbitrate if the parties in dispute are Muslim and non-Muslim. The Shafii,[104] Maliki and Hanbali schools [105] and the Twelfth Shiit school [106] have adopted this opinion. They found their views expressed in the following Quranic verse:

> 'And never will Allah grant to unbelievers a way (to triumph) over the believers'[107]

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*see P.97-98,infra.[103] M. Aboul-Enein, Liberal Trends in Islamic Law , Oxford, Op. Cit. P. 22.
[104] Yahya Al Nawawi, Op. Cit. Vol.11, P.96.
[105] Ibn Kodama, Op. Cit. Vol. 9, PP. 39-40.
[106] S.H Amin, Op.cit, P.84, Mohsin Al Moswi, Op. Cit. P. 135, Kadem Al Haeri, Op. Cit. P. 68.
[107] The Holy Quran, Surat Al Nessa, Verse 141, English Translation, Op. Cit. P. 262.

Looking at the legislation and laws of other Arab and Islamic countries, it is apparent that they do not stipulate the necessity of Islam in arbitrators. They leave the matter to disputants regardless of their religions. The parties to arbitration choose the most suitable arbitrator to settle their dispute.

3. Non-Muslims arbitrating between two Muslim parties:

As we have seen, the majority of scholars in the various schools of Jurisprudence emphasize that the arbitrator should be Muslim if arbitration takes place between Muslims. However, Abassaoud Al Hanafi[108] has said that the arbitration of a non-Muslim may be allowed between Muslims provided that Islam has been acknowledged in order to accept decisions.

This is the philosophy of the Hanafi School which distinguishes the necessary conditions and appointing of an arbitrator. This point has already been clarified.[109]

The majority of scholars appear to be correct. If arbitration is local, inside an Islamic country and between Muslim parties, the arbitrator must be Muslim.[110]

As previously mentioned, most Arab and Islamic legislation does not stipulate the necessity of Islam in the arbitrator. Freedom of choice remains and it is left to the disputants to choose and agree on their own arbitrator who must be just and fair.[111]

### 2.7.4.2. Non-Muslims as Arbitrators in Commercial International Arbitration

The rule of making a non-Muslim an arbitrator in local arbitration has now been clarified. The next question is - do the rules differ if arbitration is international?

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[108] Mohamed Mustapha Al Hanafi took the position of a judge in Costantinople. He wrote many books, see Ahmed Al Ghazali, Op. Cit. P. 283.
[109] See p. 85, Supra.
[110] S. H Amin said that a number of principles in legislation are proof against non-Muslim arbitration, Op. Cit. P. 78.
[111] For example - The law of Arbitration in Egyptian Commercial and Civil Articles, 40.27 of 1994, The law of Jordanian Arbitration, N° 18 of 1953, The law of Arbitration in the Tunisian Republic, No. 130 of 1959 etc.

It seems that basically arbitration is international if the conflict includes a relationship between foreigners. Nevertheless, the Model law widens the scope of the criterion of arbitration being international. The first article of this criterion places the stress on the site of the agreement of the parties to arbitration. The rules of the Model law take disagreement between two different countries as a criterion to arbitration being international, and not as a warning of nationality differences or similarities. If there are more sites of arbitration, the site which relates most to the condition of the arbitration agreement is relied upon

Before answering the previous question, it is necessary to point out that books of Islamic Jurisprudence appear only to have dealt with the subject of international arbitration in cases of war or conflict between two or more countries. In cases of international commercial arbitration no clear answer can be found as to the legitimacy of a non-Muslim as arbitrator.[112]

This does not imply that there is a legislative gap because Islamic Jurisprudence has fixed legislative origins and the way has been paved for new branches to draw on suitable legal rules either from the Quran, Sunna, or other origins of Jurisprudence.

With regard to this Frank Vogel says:

> 'Indeed, much criticism of Western legal science in this century, by lawyers and social scientists, points out distortions due to this narrow conception of law. Meanwhile, in figh (Islamic Jurisprudence) the theory of Ijthad (a principle of scholarly perseverance in an effort to find a solution to any new case, when the main Islamic resources are not definitively revealed) is a single thread uniting all these acts, re-presenting them all as elaborations or determinations of the law'.[113]

In reality, legislators in Islamic countries always find their needs in Islamic Jurisprudence when conventional rules and systems fail to hit the target.

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[112] As conventional legal thinking did not distinguish between local arbitration and international arbitration, see Dr Ahmed Al Jadawi, International Arbitration, The first Arbitration Conference organized by the Board of State Affairs in Egypt, 14-19th September 1996, P. 3.
[113] Frank E Vogel, Islamic Law and the Legal System, Brill, Netherlands, 2000, P. 31.

A question that may arise here, is - how will this happen? Before answering this question it should be mentioned that from the beginning of Islam in the eras of the prophet (peace be upon him) and the orthodox caliphs and also during the Amawi State, and the Abassi state, Islamic Jurisprudence was flourishing in all aspects, that is in composition and writing, interpretive judgements and conclusions of jurisprudence judgements from the main references, i.e the Holy Quran and Sunna, general consensus and juristic reasoning for all the newly originated cases and conditions which had emerged in society, there was also development of Islamic jurisprudence to cope with the new cases and circumstances.

The history of Islamic jurisprudence then witnessed periods of stagnation or imitation. Scholars tended to imitate preceding scholars and seek their opinions about the newly arising events which resulted in juristic stagnation.[114]

At the end of the Osmani era, in most of the Arabic and Islamic states being influenced by the various western rules, law writings have emerged benefiting from the western experience in codification, although there were attempts at Islamic codification. For example, the Majalat Alahkam Al-Adliyah (Code of Judicial Rules), is the civil codification of the Osmani State, also the Code of Legislative Rules which is edited by the Sheikh (scholar) Al –Gari, according to the Hanbali school. But most of the laws which have been legislated for by most of the Arabic and Islamic states have varied from each other in commitment to the Islamic Sharia.

For example,in Egypt, Syria, Mughrib, Al-Geria, Bahrain and other countries, although the Islamic Shariah is considered the main source for legislation, there are some violations from the Islamic Shariah in criminal and other fields of law. Ernest Kay says:

> 'Saudi Arabia is almost the only country, among Arab and Islamic country States, that bases its government on the Islamic Sharia. This has distinguished Saudi Arabia internationally and assured security, prosperity

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[114] Husnei Abas, Tarik Al Figh, The History of Islamic Jurisprudence, 1st Edn. Cairo, 1993, PP. 12.33, Mohammed Abu Zhara, Op. Cit. P. 3, Abdulwhab Kallaf, Al Siash Al Sharia, Kuwait Kalam Publishing dar Al, 1988, PP. 18-24.

> and stability domestically and thereby attracted attention, esteem and respect'.[115]

In this regard, it is worth mentioning the distinct position of the Kingdom of Saudi Arabia, who is careful enough to make all the regulation and laws in accordance with the Islamic Jurisprudence rules.

Returning to the previous question, some of the Saudi Arabian Articles will be taken as examples to explain how the legislation has benefited from Islamic Jurisprudence in cases of insufficiency of legal provisions. For example, the first article of the basic system for the government of Saudi Arabia stipulates the following:

> 'The Kingdom of Saudi Arabia is an Arabian Islamic state with full sovereignty. Its religion is Islamic, and its constitution is Quran and the Sunnah of the messenger, God, be exalted, praise and peace be upon him, and its language is the Arabic language and its capital is Riyadh.'[116]

Also the seventh article of the same system states:

> 'The government in the Kingdom of Saudi Arabia derives its authority from the Quran and Sunnah of the prophet and they are the governing factors of this system and all the government systems in the state.'

It becomes clear from the foregoing that all the laws of the country should be in accordance with Islamic Jurisprudence and should not be contradictory to it.

From another point of view, if a shortage occurs in some of the laws, the many points of view, in the books and from the schools of Islamic Jurisprudence, will allow the selection of an appropriate opinion. This can be explained from two perspectives.

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[115] Ernest Kay, Legal Aspects of Business in Saudi Arabia, 1st Edn. Graham Tortman Ltd. London, 1979, P.93.

[116] Article 1 of the Basic system of the Saudi government issued by Royal Decree No. A/90 dated 27/8/1412H/1991 A.D. which was been announced by letter of the President of Bureau of the Headquarter of the Council of Ministers, No. 505/8 dated 27/8/1412H/1991 A.D.

The first perspective is from the constitutional stand point - there will not be a legal vacuum upon which procedures could be delayed until the legislation of the appropriate legislation. Rather, the concerned party can immediately refer to Islamic Jurisprudence provisions and execute the procedures until the issuance of the legislation for such an issue.

The second perspective - some implementation examples explaining how to benefit from Islamic Jurisprudence are shown; for example, Article (12) in the Saudi arbitration law includes:

> 'The rejection of the arbitrator is requested for the same reasons as the rejection of the judge and the rejection request will be raised to the party originally concerned to judge the conflict within a period of five days from the date on which the litigant was informed about the appointment of the arbitrator, or from the day on which a reason from the reasons of rejection appears or occurs, and he will issue the judgement on the rejection request after calling the litigants and the arbitrator whose rejection is requested to a session to be held for this purpose.'

This provision contains a reference to the reasons for the rejection of the arbitrator being the same reasons for the rejection of a judge. If reference is made to the reasons for the rejection of a judge to the judicial laws in the Kingdom of Saudi Arabia, it will be found that it contains some of the cases in which the judge has refused to judge the conflict. The laws did not specify the cases in which the rejection of the judge and prevention was made. In the absence of a clear stipulation in the law of the judiciary, the concerned party has no other action than to refer to the rules of Islamic Jurisprudence to find that there are several reasons for the rejection of a judge, using evidence from the books of Islamic Jurisprudence through the various schools of Jurisprudence.

Another example shows that Saudi arbitration law presents the following provision:

> '..Admisson of witnesses and hearing of their statements shall be conducted before the arbitration panel pursuant to Shariah rules, the other party may refute such testimony in the same manner.'[117]

What is the religious procedural law which is stipulated by the previous article? The reply to this question will be explained when reference is made to the Islamic Jurisprudence books which must be considered in order to understand the conditions for accepting and hearing the testimonies of witnesses, as mentioned by scholars in Islamic Jurisprudence books.

A question may arise here as to how to benefit from the various opinions of the scholars on specific issues? To answer this question, it must first be said that Islamic Jurisprudence has provided principles by which to examine the superior opinion in each issue according to time, subject and circumstances. Accordingly, Islamic Jurisprudence actually provides freedom and opportunities for independent opinions rather than stagnation. Hence, the right opinion for each case will be selected according to the correct evidence from the Holy Quran and Sunna and Consensus or juristic reasoning. This actually enhances the development and promotion of jurisprudence to cope with new issues and provide solutions, due to the advantages of constant procedural law in the Islamic Jurisprudence and the updating of lateral points.

It is worth mentioning here that reference will be made to comprehensive Islamic Jurisprudence and not to one specific school. Rather, all the opinions of all the jurisprudence schools with the previous conditions as stated, that is, it must be supported by correct evidence from the Holy Quran and Sunnah, Consensus, or juristic reasoning.

Actually, the selection of one specific school for reference limits the wide field of jurisprudence and reduces the possibility of benefiting from all the other jurisprudence

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[117] Appendix 2, P.392. Article 31 of the regulations for the Saudi Arbitration Law, also Article 32 stipulates that interrogation will be conducted. The reply here will be derived from the provision of Islamic Jurisprudence. Another example is Article of the Civil Service Law which stipulates for the dismissal of an employee who commits a crime affecting honour and honesty, but the law does not explain the issues which affect honour and honesty. Reference here will be the provisions of Islamic Jurisprudence, because of the ambiguity of such matters within the law.

opinions. For example, in the Kuwait State, when the personal status law was limited to the Malki school only, there was a complaint from the judges about the difficulty of being confined to one jurisprudence school. The Kuwait Council of Ministers, therefore, issued a decree on 19th, February 1977 regarding the development and diversification of Kuwait law according to the Islamic Shariah,[118] to cover the shortages in those laws.

In light of the preceding, if it is hypothesized that the arguments about non-Muslims as arbitrators have not been discussed in books of Islamic Jurisprudence, this does not mean that there is no help from these sources. It is still possible, through scientific analogy, to work out the rules of this matter. For this reason, and to find an answer to the preceding question, the same method as that used in discussion on the position of the non-Muslim as an arbitrator in local or national arbitration will be used. This can be done through international commercial arbitration in one of the following cases:

1. International commercial arbitration between two Muslim parties from different countries.
2. The rule of using a non-Muslim arbitrator if there is international commercial arbitration between two Muslim parties.

It would appear that the rule is the same as in the case of all parties to the arbitration being Muslims in national arbitration. According to the best opinion of Islamic Jurisprudence, if arbitration parties are all Muslims the arbitrator must also be Muslim.[119]

In this respect, it may be suitable to find a system of arbitration between Islamic countries, for instance a Board of Arbitration, to settle commercial disputes between parties resident in Islamic countries. The location of this board could be either a branch of the Islamic Conference Organization[120] or an independent Center of Arbitration at the

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[118] Ahmed Algandur, Alhawal Alshagseha, Personal Status Law in the Islamic Shariah, with the Explanation of the Personal Status Law in the Kuwait Juridiciary, 3rd Edition, Maktabat Alftah, Kuwait, 1972, P. 23 Legal and Administrative Affairs of Kuwait No. 2 was issued on 21.1.1978 for the establishment of a committee devoted to setting down the personal status law and law of religious endowments.

[119] See also Esmaïl Al Astal, Op. Cit. P. 89, Ahmed Al Ghazi, Op. Cit. P. 61.

[120] This is an organization, the members of which all belong to Islamic countries. Its pact was issued in the presence of Islamic country representatives in Jeddah on February 29th, 1976. See Dr. Abdullah Al Ahssan, Organization of Islamic Conference, translated by Dr. Abdulaziz Al Fayz, Riyadh, 1990, P. 263.

level of the Islamic World. This Board of Arbitration would help greatly in settling investors' disputes in cases where the parties in conflict are all Muslims.

It may also be suitable to support the suggestion previously mentioned, to submit an invitation to the Islamic Chambers of Commerce Association to prepare a project to create a system of International Commercial arbitration for disputes arising between Muslim investors, with some consideration being given to what has been stated by jurisprudence in different Islamic schools. This project should of course gain the consent of all schools of Jurisprudence.

Also, in the case of the non-Muslim as arbitrator in international commercial arbitration between Muslim and non- Muslim parties, the question arises - to what extent is the non-Muslim allowed to arbitrate?

Before answering this question, some discussion is necessary as to where the arbitration should take place. There are many opinions in conventional jurisprudence. These opinions limit some criteria through which it is possible to determine the country of arbitration.[121]

There are three major criteria used to determine the place of arbitration; they are as follows:

1. The geographic criterion - this is represented as the place of arbitration or the place from which an arbitration rule is issued.
1. The legal criterion - this is represented in the law that must be applied in arbitration procedures.
2. The economic criterion - this is represented by the extent to which the contract subject is related to international commerce or international transactions.[122]

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[121] There are criteria such as a) nationality of arbitration parties; b) nationality of arbitrators; c) the law that must be applied; d) the law of arbitration procedures; e) the place of arbitration procedures; f) the place of issuing or arbitration rule; g) the place of court specialized in conflict settlement; h) the currency agreed upon by the parties; i) the language agreed upon by the parties; j) whether there is a connection or not to the conflict subject, with international commerce and etc; see Ahmed Al Jeddawi, Op. Cit, P.15 and what follows.

[122] Nareman, Op. Cit. P. 50.

On looking at international agreements and systems related to arbitration, it can be seen that some of it depends on the international criterion of the dispute as a basic index considering arbitration as an international one. This can be seen in the first article from the Arbitration Court List of the International Chamber of Commerce in Paris.[123]

The New York Convention relates to acknowledgement and execution of the rules of foreign arbitrators and takes the geographic criterion as a base. For instance, its first article considers the rule of arbitration international if issued in the province of a country other than the one acknowledging the rule and its execution. The New York Convention takes into account the legal criterion since it allows a local judge to refuse orders for executing arbitration awards if he is satisfied that arbitration procedures go against the parties' agreement or the law of the country in which arbitration has taken place in cases of disagreement.[124]

Some arbitration laws rely on economic criterion, such as the Egyptian Arbitration Law of 1994, since it stipulates that arbitration must be international if the conflict subject is related to international commerce.[125]

It seems that basically arbitration is international if the conflict includes a relationship between foreigners.[126] Nevertheless, the Model law widens the scope of the criterion of arbitration being international. The first article of this criterion places the stress on the site of the agreement of the parties to arbitration. The rules of the Model law take disagreement between two different countries as a criterion to arbitration being international, and not as a warning of nationality differences or similarities. If there are more sites of arbitration, the site which relates most to the condition of the arbitration agreement is relied upon.[127]

On the whole, it seems apparent that arbitration is national in the sense that all parties to it are fully national, and the contract is the subject of a specified country, having no

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[123] See Internal list of Arbitration Board, The Law of Arbitration for International Chamber of Commerce, edited by Publishing Unit in the International Chamber of Commerce, Paris, edn. 447 November 1987, P.29.
[124] See Article (4/1D) of New York Agreement.
[125] See Egyptian Arbitration Law NO.27 of 1994.
[126] Moneer Abdulmajid, The Legal Organization of International Law, Op. Cit. P. 317.
[127] Article (1/4/A) Model Law.

bearing on any other country. On this basis, it is reasonable to suppose that a case is of international arbitration if some of its elements or all of them belong to more than one country. With these characteristics, arbitration between countries is considered as arbitration between persons in public international law.

In the light of the preceding, it is necessary to return to the discussion about the characteristics of arbitration between a Muslim and non-Muslim party. It can be hypothesized that each belongs to a different country but have a commercial relationship. These two parties agree to settle a dispute, if any occurs, by arbitration.

What is being dealt with in such a case is international commercial arbitration. Consequently, the answer differs if arbitration is national and not international. An attempt is being made to understand the attitude of Islamic Jurisprudence, which stipulates that *"Necessity allows what is forbidden"* and also that "*there is peace after crisis*".[128] This is a well-known rule in Islamic law and it means that although there may be no legal precedent for a particular action, a solution can still be found. This is because Islamic Jurisprudence endeavours to facilitate the lives of people in times of difficulty.

With the subject of current international commercial arbitration and with the interaction of commercial relationships and financial transactions among individuals and a variety of companies, and also with the increasing number of international commercial centers of arbitration that do not rely most of the time on a specific law, but rather on the principles of justice, the necessity of entering the world of commercial agreements and accepting international commercial arbitration arises.

The Maliki school has, as already noted, said that a non Muslim is not allowed to arbitrate between a Muslim and a non-Muslim, except where necessary.[129] Modern and liberal writers would claim that there can be no condition or requirements on a non-Muslim to be an arbitrator. They see arbitration conditions as a must in modern times and as becoming inevitable in the light of the immense developments that have taken

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[128] Mustapha Zarqa, Explanation of Rules of Jurisprudence, Dar Al Qalam Press, Damascus, 1993, PP. 163-185.
[129] Esmaïl Al Astal, Op. Cit. 258.

place in international relations recently, especially in trade and investments. They even add that it would be more appropriate and more coherent in terms of the real nature of arbitration.[130]

Some have objected to this opinion, claiming that its scope is too wide in so far as necessity is concerned. Ancient scholars, although in favour of necessity, have said it should be estimated and not left to too broad a reasoning.[131]

Some researchers have gone so far as to say – *"A contract is the law of the contracting parties."* Also, the rules governing the structure of the arbitral tribunal procedure, arbitral award, and notification and enforcement, all implement the basic principles which conform to what is valid within Islamic Jurisprudence. Hence, emphasis is placed on the issued award, not the type of arbitrator and whether he is Muslim or not, making it similar to the rules applied in Euro-Arab Arbitration Rules.[132]

A single arbitrator or an entire arbitration panel may be either completely Arab or completely European or mixed. However, although not required by the Euro-Arab Arbitration Rules, if the arbitration panel includes a Muslim, this would add legitimacy ensuring that the arbitral award in question would be in conformity with Sharia rules generally.[133]

Naturally, the contents of Euro-Arab Arbitration Rules are not sufficient proof of the existence of the necessary legislation for the non-Muslim to be an arbitrator, but these contents emphasise the existence of the need to modernise commercial interactions.

Consequently, in different international transactions of commerce, it can be seen that each party desires to choose an arbitrator known to be trustworthy and capable. In such commercial transactions, it is important to have an arbitrator who is of the same

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[130] See M.I.M Abul-Enein, Liberal Trends in Islamic Law, Oxford, pointing to Dr Wahab Al Tarheely, Op. Cit. P. 23.
[131] Esmaïl Al Astal, Op. Cit. P. 259.
[132] Sohehqbqddin Al Sharif, (with few changes) Op. Cit. P. 23 and the Euro-Arab Arbitration Rules are intended to offer any European or Arab individual, as well as other parties, parity in so far as they are directly or indirectly involved with Arab Countries. See Euro-Arab Legal Newsletter, N°.3, published by Arbitration System of the Euro-Arab Chambers of Commerce, Paris, 1990, P. 3.
[133] Shehabuddin Al Sharif. Ibid.

nationality as the arbitratee, whether or not they are Muslim. This is important only to ensure the justice and neutrality of the arbitration.[134]

In brief, it seems apparent that the non-Muslim may be allowed to arbitrate in international commercial disputes on the basis of the known legal rules of necessity.[135]

On the basis of the preceding rule, it is possible to have the assistance of a non- Muslim arbitrator in commercial disputes if judged competent in the domain of settling commercial disputes, be they international or national.

### 2.7.5. Necessity of Appointing Known Arbitrators

In Islamic Jurisprudence, it is necessary for the arbitrator to be well known. It is not correct to agree to an unknown arbitrator, for instance, the parties in conflict cannot say - 'we will make the first person entering this door our arbitrator, or the first person passing by.'[136]

The objective of arbitration is to settle the existing conflict between adversaries. The arbitrator must be known to the adversaries, who trust his ability to sort out their problem. Consequently, the arbitrator must accept the role of arbitrator in the conflict and should make known his acceptance correctly and clearly.

The arbitrator is not necessarily appointed because of his good name, but because of his good character. For example, the parties in conflict may agree about the honesty of a person because he is known to all the adversaries in the case.[137]

#### 2.7.5.1. Plurality of Arbitrators

As pointed out in chapter one, which dealt with the history of arbitration within Islamic law, it is possible to have one or more arbitrators in Islamic Jurisprudence. Their

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[134] See Articles (5.2) and (6-1) London Court of International Arbitration (LCIA), Op. Cit. PP. 5-6, see also Article 346 of the 1983 Civil Procedure Code in Iran, A.H. Amin, Op. Cit. PP. 138-139.
[135] Ibrahim Atta, Op. Cit. P.150. See also The Prophet Hadith No. 2103 in Shek Albakari and The Encyclopaedia of Alhadith, website http://al-islam/display/hier.asp? Do=0£n=3547. (14/5/2001).
[136] Ibn Najjem, Op. Cit. Vol. 7, P.26. Ismail Al Astal, Op. Cit. P. 640.

number can be odd or even. For example, in the case of Omar bin AL-Khatab v. Some People in disagreement over dividing a piece of land in Iraq, the disputants agreed to have ten arbitrators between them.[138]

Also, in the famous arbitration issue between the Caliph Ali Bin Abi Taleb and Muawiya bin Abi Sufian, two arbitrators were chosen to settle their dispute. Article 1843 of the Code of Legal Rules stipulates that 'plurality of arbitrators is allowed.'[139]

If a plurality of arbitrators is allowed, what is the impact of this plurality on Islamic Jurisprudence ?

### 2.7.5.2. Impact of Plurality of Arbitrators

This question must be answered from the point of view of the arbitratees, who must be aware of the rules governing such plurality. Two main issues arise here which are opinions from Jurisprudence:

1. If there are two arbitrators, they must all agree on an award.
2. Judging by the majority is permitted.

1. Agreeing on an award:

If there are two arbitrators, they must agree on an award. If they do not issue a single award, then, it cannot be executed. This opinion was adopted by the Hanafi[140] and the Twelfth Shiit Schools.[141]

They support their opinions by the fact that the Caliph Ali Bin Abi Taleb and Muawiya accepted the arbitration of the two arbitrators, Abu Mussa Al Achaari and Omar bin Aass.[142]

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[137] See in the same meaning M.I.M Aboul Eneim, Liberal Trends in Islamic law, Oxford, OP. Cit, P.22
[138] The case of Omer bin Alkatab v. some people Alaa Addin Al tarablusi, OP. Cit, P.25 Saleh Al Hassen OP, cit, P.75, Masad Al Borgani, OP. Cit, P.202 and the article 1844 of the Magazine of Legal Rules, OP.cit, P.1173
[139] . See the Magazine of legal Rules, Encyclopaedie of legislature and systems, OP. Cit, P.1173
[140] Ibn Najjem, OP. Cit. Vol. 7, P.27. Allaa Addin Al Tarablussi, Op. Cit. PP. 25-26.
[141] S. H. Amin, Op. Cit. P.85.
[142] See fn.69, page 53, supra.

a) The parties to the dispute accepted the judgement of the two arbitrators who agreed on the decision.

2. Deciding by the Majority:

If the number of arbitrators is odd, the parties should be satisfied with the arbitration if the award of the arbitrators is correct and obliging. However there are two opinions on this point.

The first opinion claims that judging by majority[142] is not correct on the basis that judging by the majority of arbitrators is unknown and that the conditions of true arbitrators is that they should be known.

However, it is possible to answer this question by claiming that arbitrators in cases of judging by the known and unknown majority constitute the arbitrators' opinion at the time of issuing the judgment. This is a natural act in every arbitration process, whether in cases of plurality or non plurality of arbitrators.

The second opinion claims that if the parties in conflict accept the arbitration of the majority, then this arbitration is considered as correct and obliging. The arbitratees have the freedom to hold on to their possessions. If they accept arbitration in place of renouncing their rights, they are allowed to submit their rights to arbitration. They also have the right to submit their subject to arbitration by the majority.

The second opinion, that both parties to the arbitration must agree about arbitration and both parties must accept judgement, is more prevalent. If both parties accept judgement, arbitration is considered to have taken place.

Additionally, arbitration by majority is more traditional and better known because the reason behind taking recourse to arbitration is to speed up dispute settlement thus saving time, power and money.

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[142] On this Opinion, Ali Haidar, Op. Cit. Vol. 4, P. 643.

This seems a good reason for the number of arbitrators to be odd. In other words it enables the majority to make its opinion clear. Professor, M. Abou Enein claims:

> "The simple application of the principles of Islam would give the parties the right to choose between the unanimity, majority or any other rule by which arbitrators may issue their decisions."[143]

So the majority of modern arbitration laws within Islamic Jurisprudence are oriented towards this opinion. For example, the Saudi Arbitration Law stipulates that if arbitrators are numerous, their number must be odd.[144]

In the U.K., the Arbitration Act 1996, Article 1s (2)[145] and Article (31) of the Arbitration Law of the People's Republic of China[146] and Article (4) of the United States' Arbitration and Mediation of Arizona, Nevada and New Mexico[147] also state that an odd number is required for arbitration.

### 2.7.6. Authority of Arbitrators and Factors Determining It

After agreement by the parties to arbitration as a means of settling their existing dispute and after their choosing of an arbitrator to conduct their arbitration procedures, a great responsibility falls on the shoulders of the chosen arbitrator or arbitrators. It is the responsibility of an arbitrator to end disputes through justice. Hence, the arbitrator must study the case thoroughly, including the parties, legal documents and evidence presented.

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[143] M. Aboul Eneim, Liberal trends in Islamic Law, Op. Cit. P. 21. See also Article (640) of the Iranian Civil Procedure Code, S.H Amin, Op. Cit. P. 112.
[144] Article 4.
[145] See also Harold Crowter, Op. Cit. P.17.
[146] Ge Liux Alexander Lourie, International Commercial Arbitration China History, New Developments and Current Practice, The John Marshall Law Review, 1995, Vol. 28, P. 553.
[147] Alexander Beran, Alternative Dispute Resolution, 1St Edn, London, Sweet and Maxwell, 1992, PP. 115-116.
There are many laws such as that of paragraph (2) of Article 15 of the Arbitration Law in Civil and Commercial Egyptian Matten, 1994, Op. Cit. P. 15 and Article (10) of GCCC Arbitration Law, Op. Cit. P.6 and article (174) of the Kuwati Law of Pleading, also article (10) of the Model Law and Article 2/5 of the Rules of the International Chamber of Commerce, Op. Cit. P 3.

The arbitrator, to perform this important role, must have the validity and authority through which to carry out his duties and responsibilities to perfection. Although the arbitrator has authority, there are factors that limit their authority which must be taken into account to ensure that arbitration decisions will be accepted within Islamic Jurisprudence. It therefore becomes necessary at this stage to state the limiting factors before discussing the validity of the arbitrator.

### 2.7.6.1 Factors Limiting Authority of Arbitrator

1. The authority of an arbitrator is bound to the dispute that requires arbitration. Thus, the arbitrator has full authority to act only in matters where parties agree to have an arbitrator in order to solve an existing problem as stated in the arbitration contract. The arbitrator cannot then go beyond the subject of the existing dispute.

In this respect, Article (1842) of the Code of Legal Rules stipulates that the arbitrator's decision is applied only to parties involved in the arbitration process, and arbitration here is not concerned with other issues.[148]

2. Being sure the subject of dispute is capable of arbitration in Islamic Jurisprudence since there are things which come only under judicial authority, especially where punishments mentioned in the Quran or Sunna, such as killing, is concerned. The arbitrator must take all this into consideration so as to issue a reliable decision.

3. If a specific time was specified, arbitration must take place with that particular specified period of time.[149]

4. The arbitrator may not authorize someone else to arbitrate without prior consent of the arbitratees. So arbitration by a person other than the arbitrator agreed upon by the parties is not accepted unless the disputing parties allow it.[150]

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[148] Encyclopaedia of Legislations and Systems, Op. Cit. P 1173, Ali Rostem, Op. Cit. P. 119.
[149] Masad Al Borgani, Op. Cit. P. 184.
[150] Ali Haider, Op. Cit. Vol. 4, P. 26.

5. The arbitrator should not reach a decision by virtue only of his personal knowledge[151] gained outside the Board of Arbitration. He must build his decision on the documents and evidence presented to him by the parties during the pleadings. However, some of the Shafii Schools allow the arbitrator to use his personal knowledge[152] because the essence is to reach truth.

### 2.7.6.2. Authority of Arbitrator

Having learnt the factors that limit the authority of an arbitrator, it must nevertheless be pointed out that an arbitrator does have great responsibility and must therefore have adequate authority.

An arbitrator must have full knowledge of all documents relating to the case being presented and the right to listen to witnesses and confirmations. He is entitled to accept or reject testimonies or evidence if they are found to be incorrect or illogical. An arbitrator also has the right to observe the case and call experts if need be to reach a final settlement. In this respect Ibn Al Qayim says:

> If signs of justice appear, it is the law of Allah because Allah wants justice established among His people. So any means of working in the cause of justice belong to religion.[153]

An arbitrator is not limited to a specific area of Jurisprudence but is free to persevere with jurisprudence in judging a case. However, Islamic Jurisprudence must not be strayed from.

The necessary procedures for pleading should be determined if there is no way of determining them by the arbitration agreement. Proof for this can be found in the sayings of the Prophet (peace upon him ) who did not interfere in the case of Saad bin Muad's arbitration [154] and did not counsel him to follow specific procedures.

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[151] Ibn Najeem, Op. Cit. Vol. 4, P. 26.
[152] Ibrahim Attea, Op. Cit. P. 176.
[153] .Ibn Qyim, ( one of the famous Scholars of Jurisprudence ,died 751.H, 1351/A.D.) The Wise Ways, Op. Cit. P.57, See also, Amer Rahaim, Op. Cit. P. 336.
[154] Masad Al Borgani, Op. Cit. P. 182.

An arbitrator may ask arbitratees to produce the necessary documents to prove their characters and capacities in arbitration. This is among the important issues that the arbitrator must be sure of.

Judging the case is undoubtedly the most important area of authority for an arbitrator. It is the stage of decision making or award in settling a dispute and is in fact the objective of the whole arbitration process.

There are two facets to Islamic Jurisprudence:

1. Judging by reconciliation
2. Judging by making an award and thereby ending the dispute.

1. Judging by reconciliation is usually desired by Islamic Law. The Almighty said:

> 'amicable settlements are better themselves and such settlement is best...'[155]

Reconciliation leads to dispute settlement with the consent of the parties and a feeling of fraternity arises between them, which helps in the continuity of their commercial or financial relationship. This will, of course, reinforce the atmosphere of fraternity in society and is reflected in ongoing commercial developments. It is worth noting that the arbitrator cannot conduct reconciliation except by the agreement of the parties in conflict.[156]

The other facet of the award is that the arbitrator should arbitrate by virtue of the documents and evidence available. These documents and evidence will be considered as a means of establishing the notion of justice between the parties.

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[155] The Holy Quran, Suyrat Mnissaa, Verse 128, English Translation, Op. Cit. PP. 256-7.
[156] Amer Rahaim, Op. Cit. P. 319. See also Saudi Arbitration Law which stipulates that arbitrators, if authorised, can bring parties to reconciliation, Article (16).

## SECTION EIGHT

### 2.8. Obligation, Acceptance and Place of Arbitration

The first pillar of the arbitration contract in Islamic Jurisprudence has been discussed. The arbitratees and arbitrators constitute this contract. The facets of the relationship between them and the necessary conditions for each has been clarified. In this section, the second pillar, which is in fact complementary to the first pillar, will be examined.

In addition to the concern of Islamic Jurisprudence for the necessary conditions of arbitrator and arbitratee and their capacities, Islamic Jurisprudence is also concerned with achieving consent in all arbitration contracts and the freedom of the contracting parties to conclude contracts without affecting contracts.[157]

Among those contracts is the contract of arbitration that emphasizes agreement between arbitration parties and arbitrators. For this reason, the Hanafi[158] the Shafii,[159] Hanbali,[160] Maliki,[161] and the Zaydia Shiit Schools and also the Twelfth Shiit School[162] have claimed that agreement among arbitratees and arbitrators is obligatory.[163]

In books of Islamic Jurisprudence, 'by consent' means obligation and acceptance. These are necessary conditions for arbitration. Before stating these conditions it is necessary to define obligation and acceptance.

#### 2.8.1. Defining Offer and Acceptance

What is meant by 'offer'? The offer is the first decision about behaviour expressed by one of the contractors to create behaviour patterns when selling and buying. For

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[157] Abdulhamid El halab, Op. Cit. P. 30.
[158] Ibn Najeem, Op. Cit. Vol. 7, P.27.
[159] Shamsaddin Al Sherbini, Op. Cit. P. 379.
[160] Ibn Kadam, Op. Cit. Vol. 1, P. 483.
[161] Qahtern Dowri, Op. Cit. P. 379.
[162] Zeinddin Al ameli, op. cit, Vol. 1, P.238
[163] Consent is the basis of creating a contract since no contract can be created without the consent of both parties. See S.E Rayner, The Theory of Contract in Islamic Law, Graham Tortman, London, 1991, P. 115 see also Mohamed Abn Zahrah, Op. Cit. P. 182. Abdurazag Fraj, Op. Cit. P. 39. Ali Rostom, Op. Cit. P. 64.

example, if a salesman promises to sell a car for £2000, he must accept the sale of the car when given the £2000. This means that the car is no longer his. Similarly, if a dispute arises when one party says that there is a dispute and they would like it settled by arbitration, this then constitutes an offer.

Acceptance means that the other party expresses the desire to accept the offer. When acceptance of the offer is agreed to, then a contract is established, just as with the sale of the car when the buyer agrees to give the seller £2000.

### 2.8.2. Conditions and Acceptance of Offer

Following on from clarification of obligations and acceptance, the conditions of such obligations and acceptance must be discussed.

#### 2.8.2.1. Offer should Comply with Acceptance

Acceptance and offer must conform, they must be clear with no ambiguity so that both parties know when to attend to the contract of their particular subject. No contract can be created if the seller and buyer of the car have not expressed a desire to enter into such an agreement, so it is with Islamic Jurisprudence. The books state that great attention must be paid to this matter to ensure that both parties are aware of what the contract states.

#### 2.8.2.2. Relationship between Offer and Acceptance

Islamic Schools of Jurisprudence have agreed that offer and acceptance must complement each other so as to achieve consent between the contracting parties. However, how is this achieved?

There are many opinions within Islamic Jurisprudence. For example, the Shafii School contends that there should only be a short time between obligation and acceptance,

because if there is an interval between offer and acceptance, an obstacle to achieving this complement could be created.[164]

The Hanafi School takes a different position. They believe that disturbances arise between the parties if they are made to adhere to offer and acceptance within a very short time. The contracting parties may need considerable time to manage their affairs and come to a final opinion as to whether to establish a contract or not.

It seems that the opinion of the Hanafi School facilitates people's lives and is more suitable for the various commercial transactions currently being carried out.

The essence is that consensus must clearly be achieved. This consensus may either be written or verbal in the Council of Arbitration, or it may come into existence by modern methods of correspondence. This opinion is approved by the modern Laws of Arbitration that stress writing in arbitration agreements.[165]

### 2.8.2.3. Offer and Acceptance Being Free from Defects

In addition to the concordance between parties, it is necessary for them to have the freedom to choose a method of creating the contract of arbitration. For this reason, offer and acceptance must have no defects in their essence in order to create a correct arbitration contract.

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[164] Ibn Najeem, Op. Cit. Vol. 7, P. 26, Kasa Qutora, Op. Cit. P. 67.

[165] See for example Article (5) of Saudi Arbitration Law 1983, Op. Cit. P. 11, Article 5(1) of British Arbitration Act 1996. See also Harold Crowter who said that oral arbitration agreements may still be given some effect as shown in Section 81 (1) (b) which preserves any rules of common law as to the effect of an oral arbitration agreement, Op. Cit, P11. See also, Article (12) of the Egyptian Arbitration Law, 1994 since it considers arbitration agreements null if not written, Op. Cit. P. 13. See also Ian R. Macnell, American Arbitration Law, Op. Cit. P. 87 and the Tunisian Law, Chapter 261 of Civil and Commercial Procedures Law, No 130 which stipulates the writing of arbitration. Also Iranian Civil Procedure Code 1939, and S.H. Amin, Op. Cit, P. 112 which stipulates the necessity of a written contract. See also Florida Arbitration Code, Chapter 682, Section 682 or see http://WWW.adr.org./Law/Statutes/Florida, Statute.html(9/11/1999) and Section 1029 of the New German Arbitration Law, Tenth Book (English Translation). See:

### 2.8.3. Subject Matter of Arbitration

Having discussed the two pillars of the arbitration contract, the third pillar of arbitration will now be examined. This is the subject matter of arbitration. When the three pillars all exist, the arbitration contract is considered as correct from the perspective of Islamic Jurisprudence.

What is meant by the subject matter of arbitration is the subject about which the dispute has taken place which requires settlement. The subject matter of arbitration can vary - it may be commercial, regarding a building or goods exchange, etc.

For this reason, the subject of arbitration should be known, as must the subject matter where the contract is to be created legally within Islamic Jurisprudence. The necessary conditions of the subject matter of arbitration within Islamic Jurisprudence are that it must be acceptable to Islamic Jurisprudence.

It is not permitted, for example, to use money from gambling disputes. A contract cannot stand even in the presence of the other two other pillars, i.e. the contractors offer and acceptance if this is done.[166]

To clarify the issue, as follows: Gambling is prohibited by Islamic Jurisprudence. This is not disputable, so no differences of opinion are allowed. Therefore, if two people are working in the gambling world and a conflict arises between them, they cannot seek to solve their conflict through arbitration. This will not be allowed. Only subjects of conflict falling within Islamic jurisprudence may be presented to arbitration.[167]

As previously mentioned, the performance of arbitration in Islamic Jurisprudence depends upon three elements, which are as follows:

1. Arbitration parties

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http.//www.unimuenster.le/jura.iwr/english/berger/resear/10 zpoe.html (11-1999).
[166] Ibrahim Atta, Op. Cit. 96, Ahmed Al Ghazali, Op. Cit. P. 59, Kasa Qutora, Op. Cit. P. 6.

2. Acceptance
3. Subject matter of arbitration

In the previous example, the first and second elements were found, since the arbitration parties and acceptance of arbitration existed. However, the third element, which is the subject for arbitration, did not exist since the subject of arbitration is legally prohibited, therefore arbitration could not be held despite the existence of the first and second elements.

[167] The scope of arbitration will be discussed in Chapter 3 and will show the difference between subjects of arbitration and the scope of arbitration.

# CHAPTER THREE

## Islamic Arbitration Scope and Proceedings

### 3.9 Scope of Arbitration and its Procedures

The previous chapter identified the principles of arbitration within Islamic Jurisprudence upon which current arbitration is conducted and gave indications as to future policies.

This chapter discusses the scope of arbitration within Islamic Jurisprudence. It is worth mentioning here the difference between the subject matter of arbitration as the third pillar, (see previous chapter) and the scope of arbitration, or, in other words, issues which may be presented for arbitration according to Islamic Jurisprudence.

As already explained in the previous chapter, the subject matter of arbitration should be issues upon which it is possible to reach agreement. In the discussion about the scope of arbitration, it was explained that there are many possible issues upon which agreements can be reached. The various aspects of arbitration are relevant subjects for discussion in this thesis and will be the focus of attention in this chapter. Examination of the subject will enable discovery of the scope of arbitration and the objectives of arbitration from the point of view of Islamic Jurisprudence, with reference to Saudi arbitration laws and other comparable laws.

This chapter will also present arbitration procedures, the principles of just judgements and the rules of evidence in Islamic Jurisprudence. This will be followed by a discussion of possible hindrances to arbitration procedures where the rights of arbitration parties are affected, which could lead to the loss of such rights during arbitration procedures.

The chapter will conclude by showing the opinions of schools of Islamic Jurisprudence which appear to be superior and to present a clearer view of the scope and procedures of arbitration.

It must be noted when discussing the subject matter of arbitration that it must be regulated in the light of the general rules of Islamic Jurisprudence in order to arrive at reliable arbitration. When looking at people's dealings, be they commercial, civil or penal, it must be decided from which field of arbitration within Islamic Jurisprudence they arise.

The question is whether all disputes can be the subject of arbitration. From the Islamic Jurisprudence perspective the answer is similar to modern arbitration laws, i.e. that not all disputes between people can be the subject of arbitration.[1]

However, various schools of Islamic Jurisprudence differ on this subject. Some have enlarged the scope of arbitration to include many issues and some have limited the scope to specific areas.

The concern of this study is commercial arbitration, which appears to have the consensus of all schools. In fact, commercial arbitration in the modern world, at both national and international levels, is a fertile field of research.

Article 1841 of the Code of Judicial Rules stipulates that

> 'arbitration is allowed in money cases related to the rights of people.'[2]

One rule within Islamic Jurisprudence states that 'arbitration is allowed where reconciliation is also permitted.'

This implies that everything that can be reconciled can be subject to arbitration. However, this rule gives rise to the following question: when is it appropriate to use reconciliation?

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[1] See page 114, infra
[2] See Encyclopaedia of Legislation and Systems, Op. Cit. P.1173.

To answer this question it is necessary to know the different types of rights as differentiated within Islamic Jurisprudence so as to be aware of when reconciliation can be used.

### 3.9.1. Division of Rights within Islamic Jurisprudence

Rights are divided into three types:

1) **Rights of God**
2) **Rights of People**
3) **Mixed rights**

#### 3.9.1.1. Rights of God

The rights of God The Almighty include such aspects as legal punishments, as stated in the Quran and Sunna, such as cutting off of the hand of a thief, beheading etc. Also among the rights of God are a person's commitment to religion. If a person vows to perform a task in return for God's blessing him with a good job, for example, the task must be performed because that is God's right. The rights of the community that are related to safety and security are also among these rights.

These rights, all being rights of God, do not permit reconciliation.[3] The people concerned with these matters are the judges. This has been clarified by Al Gorafi who said:

> "The patronising of the arbitrator is weaker than that of the judges; the rights of God, The Almighty, are great and need a great capacity."[4]

#### 3.9.1.2. Rights of People

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[3] Ali Rostem, Op.cit. 1194, Saleh Al Hassan, Op. Cit. P. 33, Esmael Al Astal, Op. Cit.. P.134.
[4] Al Garafi (died 684H, 1263 A.D.), Althe Kerah (Ammunition) 1st Edn. Enquiry Mohammed Bukirah, U.A.E. 1994, Vol. 10, P. 34.

These rights include such things as money, marriage and divorce and can all be subjects of arbitration should two conflicting parties agree to it. Conflict regarding political power, which has often led to civil war, can also be a matter of arbitration, as can the state of war between two nations.

### 3.9.1.3. Mixed Rights

There are rights belonging to God and those belonging to people and there are also rights belonging to both. For example, punishment is the right of God since it preserves the security of societies and corrects criminals. On the other hand, money being claimed from the death of a victim is the responsibility of a victim's guardian.

## 3.9.2. Selection of Predominant Opinion

The rationale behind different types of rights within Islamic Jurisprudence has been agreed upon by the majority of scholars of the various schools of jurisprudence, including the Hanafi School,[5] the Maliki School,[6] the Shafii School,[7] some of the Hanbali School,[8] the Twelfth Shiit School,[9] and the Dahiriya School.[10]

These schools have mostly adopted the second type of rights (as previously mentioned) as being eligible for reconciliation. They can all be considered as part of the field of arbitration within Islamic Jurisprudence.

Modern researchers agree with this opinion, making an analogy with modern laws. They claim:

'Public policy does not constitute a field of arbitration'[11]

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[5] Kasa Qutora, Op.cit. P.75, Hassan Fathie, Op. Cit. P. 100.
[6] Saleh Alhassen, Op. Cit. P.33.
[7] Ali Alsamnani, Op. Cit. Vol.1, P. 79.
[8] Ibn Kodaama, Op. Cit. Vol. 11, P. 484.
[9] Qatan Dowri, Op. Cit. P. 243.
[10] Ibn Hazem, Op. Cit. Vol.. 9, P.435.
[11] M.I.M. Aboul Enein, Liberal Trends in Islamic Law, Op. Cit. P.18.

The Shafii, Dahiriya and the Twelfth Shiit Schools have enlarged the scope of arbitration to include all the rules. This goes back to their opinion that the arbitrator is in the position of a judge and should meet all the conditions of a judge. It does not appear to be reasonable that an arbitrator should necessarily meet all the conditions of a judge. However, the difficulty of adopting this opinion has already been clarified.[12]

Since the rights of God have been treated as special rights not open to arbitration, and the rights of people as being those which are open to arbitration, the question of mixed rights becomes more problematic. There is again divided opinion on this matter. One opinion claims that if the rights are closer to the rights of people then they can be exposed to arbitration. For example, the punishment of a killer is close to both God's and people's rights. God's because they concern the safety of society and people's because the family of a murdered person can forgive the murderer or take money in compensation. Advocates usually are of the opinion that each case must be carefully examined to decide whose rights are paramount.[13] However, if the rights are mixed, then they are in reality God's rights, and are therefore not the concern of arbitration but become the concern of an official judge.

It would appear that the second opinion carries more weight. Safeguards must be made when disputes are the concern of the whole society. Many people work hard to ensure that this problem with the mixture of rights is correctly handled.

To summarise, it is clear that commercial transactions fall within the boundary of people's rights and it is equally clear that God's rights cannot be submitted to arbitration because they are rights concerned with the whole of society. No-one has the right to interfere in God's rights except the judicial authority, which also deals with mixed rights.

### 3.9.3. Similarity Between Islamic Jurisprudence and Modern Arbitration Laws

Modern arbitration laws do not differ a great deal from those of Islamic Jurisprudence. For example, the Saudi Law of Arbitration stipulates that arbitration is not allowed in

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[12] See Chapter two, page 78, supra.
[13] Saleh Al Hassen, Op. Cit. P.38.

matters where reconciliation is not allowed.[14] This is similar to British laws regarding criminals, the family (a custody battle over a child for instance),[15] the armed forces and company matters.[16] The People's Republic of China also adopts this approach. Thus, it has become apparent that these modern laws agree with the Islamic law as to which matters can be subjected to arbitration and which cannot.

An arbitrator carries a great responsibility to know the scope of arbitration to ensure that his work would not be made null and void by arbitrating over a subject that should not be exposed to arbitration. Those seeking arbitration should also be aware of which subjects are relevant to Islamic arbitration and which are not.

## SECTION TEN

### 3.10. Arbitration Proceedings and Rules of Evidence

After discussing the scope of arbitration and its basic elements, this section will consider how the arbitration process is undertaken according to Islamic Jurisprudence. In other words, what processes are required when undertaking an arbitration process so as to arrive at the proper manner in which to achieve the goal of arbitration, which is to reach an award that decides the issue. In order for an arbitrator or arbitration panel to reach a clear-cut decision, it must be aware of the parties to the case. It must listen to them and their witnesses, and carefully review all their relevant papers and documents.

Various proceedings and principles exist which must be followed for justice to be sought and for the above points to be undertaken. However, such proceedings (or procedures) may also be devised for a particular case, based on an agreement between the arbitrating parties. Alternatively, the chosen proceedings may already exist, in which case the parties only have to select those appropriate to their case, or authorize the arbitrator or arbitrators to choose the appropriate procedures. This point is carefully taken into consideration in Islamic Jurisprudence by all schools of Jurisprudence.

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[14] Article (2). However the Saudi Arbitration Law does not specify cases in which there may be reconciliation between litigant parties, although the first article of the Executive Regulations for the law has presented, as an example but not limited to, some of these issues, such as, penalty crimes, (killing, stealing etc.),

[15] See Michael Mustill & Stewart Boyd, Op. Cit. PP.149-150, see also Anthony Walton, Op. Cit. P.30.

Additionally, such points have gained the attention and become the concern of modern arbitration laws in international agreements pertaining to arbitration.

However, regardless of whether it is a commercial contract, national or international, it is a matter of convention to state the procedures that will be followed when resorting to arbitration. In the following discussion, therefore, the Islamic Jurisprudence view–point on arbitration proceedings will be the focus of attention. This will be followed by a demonstration of the methods of proceeding applied within Islamic Jurisprudence where the essence of the arbitrator's job is to reach a fair judgement. This entails knowledge of the facts of the case, its circumstances, and possible methods and means of discovering evidence and rights. In this respect there are agreed-upon rules of procedure laid down by schools of Islamic Jurisprudence, including testimony, acknowledgement, oath taking and written documentation. There are also some controversial rules, such as those regarding witnesses, denial, knowledge of arbitrator and evidence.

The following section will discuss arbitration procedure and means of proceeding, showing the more acceptable Islamic Jurisprudence viewpoint, cases of Saudi arbitration law and, where necessary, comparative laws.

### 3.10.1. Arbitration proceedings

Jurists from all Islamic Jurist schools are concerned about Judicial proceedings and have demonstrated what ought to be provided and presented for the validity of the case being heard, where 'both plaintiff and defendant are competent parties'[17] and the claimed amount is known and can be proved. However, if the claimed is unknown, the case cannot be so regarded.[18] Jurists have also been concerned about what should be allowed in the pleading (presentation) and have established principles that guarantee the justice

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[16] Harold Crowter, Op. Cit. P.3.

[17] See Herbert J. Liebesny, The Law of Near & Middle East, Readings, Cases, & Materials, State University of New York, Albany, 1975, P. 243, Ibn Najeem, Op. Cit. Vol. 7, P.209, Ibn Kodama, Op. Cit. Vol. 10, P.334, Showket Alian, Alsulta'h Algadeah fi Aleslam, (Judicial Authority in Islam) Dar Alrasheed Press, I[st] Edn. Riyadh, P.138.

18 For further details see Melije Aahmed, Al Nedam Algadaefi Al-Islam,(The Judicial System in Islam, 1[st] Edn. Maktabat Whaba, 1984, P. 120. See also Saleh Al Ofei, Limiting the Future of Possible Dispute, Riyadh Newspaper, Issue No. 19135, 24[th] March, 1997, P. 23, in this article he suggests the necessity of including arbitration proceedings in the contract and specifying the place and all other necessary details.

of an arbitration case, and especially of the award. This has been of primary importance in arbitration cases throughout Islamic history.

Accordingly, the following points of arbitration proceedings will be raised during the following discussion:

3.10.1.1. Choosing arbitration proceedings.

3.10.1.2. Choosing arbitration language.

3.10.1.3. Choosing arbitration location.

3.10.1.4. Time - punctuality.

3.10.1.5. Choosing of method of arbitration - case start up.

3.10.1.6. Absence of opposing case.

3.10.1.7. Guarantees of rights of absent opponent in defence.

3.10.1.8. Public knowledge of sessions.

### 3.10.1.1. Choosing Arbitration Proceedings

As previously mentioned, parties to disputes can choose the arbitration proceedings that they see appropriate to settling their case. Modern arbitration laws, in fact, coincide with Islamic Jurisprudence in this respect. [19] In this way arbitration can deliver a quick verdict which is what is required, especially by businessmen who tend to steer clear of ordinary judicial proceedings, which takes so much more time. It is of interest to note that many commercial and trade contracts include detailed articles tackling the procedural side of arbitration.[20]

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[19] See for example, Article 1(6) from British Arbitration Act, 1996, Article 1 from Saudi Arbitration Law, 1983, Samer Saleh, Op. Cit. P.58, Articles 5 and 255 from Egyptian Arbitration Law 1994, Article 264 from Tunisian Civil and Commercial Procedures Act No. 139, 1959, Article 19 from Gulf Countries Arbitration Law (GCC). See also Yossef Zental, Commercial Arbitration in Gulf Co-operation Council Countries, a paper presented to a commercial arbitration conference held in Chamber of Commerce and Industry, Riyadh, 18.10.1995, P. 8. Also Article 14-1 from Rules of London Court of International Arbitration, (LCIA) Op. Cit. P.10 from Investment Disputes' Settlement Agreement 1965. See also Henry J Brown and Arthur Marriott, ADR Principles and Practice Second Edn. Sweet and Maxwell, London, 1999, P.53. Santiago De Nadal and Ignasi Guardans, An Approach to Arbitration in Spain, The Arbitration and Dispute Resolution Law Journal, London, Part 1, March 1997, P. 17.

[20] For example: Japanese Company Contract 1957, Saudi contract with Jete Company, Egypt contract with Pan American 1963 mentioned by Dr Ashoush Ahmed: Arbitration as Means of Settlement of Investment Disputes, Published by Shabab Al-Iamma Est. Alexandria 1990, P. 81. Also see Article 7 from Agreement of Exchange of Encouragement and Investment Protection signed by Egypt and the USA, Washington 29th September, 1983. Also Adel Bolker - Arbitration and Law Magazine, Published Adel Arbitration Centre, April 1997, P. 191.

### 3.10.1.2. Choosing Arbitration Language

Islamic Jurisprudence pays special attention to the Arabic language; it is regarded as Sharia's (Islamic Jurisprudence) vessel. It is also the language of the Quran, by which Islamic Jurisprudence judgements are identified and by which Quran teachings and aims are recognized. For these reasons, defence before arbitration should be in the Arabic language, especially if arbitration is national and between parties fluent in the Arabic language. However, nothing exists in Jurisprudence which prohibits resorting to a translator or interpreter should it be necessary.

Moreover, after agreeing upon arbitration, parties may specify the language in which the defence is to be presented. In fact, if this is not agreed upon between parties during the arbitration agreement, especially in international contracts when languages are different, contentions may occur during pleading. On the other hand, in national arbitration, some arbitration laws state the importance of using the official language of the place of arbitration in the arbitration proceedings, e.g. the Saudi Executive Rules 1985 state:

> 'the Arabic language is the official language which is used before the arbitration panel whether in deliberations or correspondence, however, it is not permitted for the panel or arbitrators or others to speak other languages than Arabic, and the foreigner who cannot speak Arabic has to bring with him a good translator or interpreter with whom he signs the report of the session regarding the translations'[21]

For practical purposes, arbitration documents in the Kingdom of Saudi Arabia in other languages have the Arabic version attached to them. However, if arbitrators are fluent in the language in which such documents are written, then despite the availability of the attached translation the original language can be referred to. This is due to the fact that the reading of the text in the original written language will be clearer to the arbitrator. Nevertheless, an Arabic translation must be available so as to conform to the above-mentioned article.

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[21] Article (25).

Some countries tend to carry out arbitration in their own language unless arbitration parties agree otherwise. For example, Egyptian Arbitration Law 1994 states:

> 'Arbitration is undertaken in the Arabic language unless the two parties or arbitration panel specifies another language(s).'[22]

Most international arbitration rules are couched in these terms, for instance the ICC International Chamber of Commerce:

> 'In the absence of an agreement by the parties, The Arbitral Tribunal shall determine the language of all relevant circumstances, including the language of contract'.[23]

From the above it is clear that Islamic Jurisprudence coincides with contemporary arbitration rules regarding the defence language to be used during arbitration, especially at international level, where, for obvious reasons, the language can be at the discretion of those taking part. This trend is in keeping with the contemporary commercial milieu, especially with the ease of modern communication between countries. It also coincides with the arbitration target which is used as a means for settling disputes in general and commercial disputes in particular.

### 3.10.1.3. Choosing Arbitration Location

Regarding the place of arbitration, Islamic Jurisprudence does not specify a particular place; it leaves the disputing parties free to choose a place they consider suitable. If a location is not agreed upon the matter is left to the arbitrator(s) after they have been selected.

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[22] Article 1/29 and see Sultanate of Oman Arbitration Law issued by Sultanic Decree No. 97/47 dated 28/6/1997, Chapter 4. See "Kamis Alwye" Arab Arbitration Magazine, May 1999, Vol. 1, P. 128. Also Ahmed Abualwafa, Op. Cit. P.226 claims that the arbitral award must be written in the language of the State.

[23] Article 16 of ICC Rules of Arbitration, International Chamber of Commerce, ICC publication No.581, March, 1999, P.24 which equates to Article (17) of LCIA Rules of Arbitration P.12, Op. Cit. also Article (14) of the AAA International Arbitration Rules, and Article 21 of the Model Law and Section 1045 of The New German Arbitration Law, Fourth Book, Op. Cit. P. 7.

However, historically, Islamic arbitration cases were frequently heard in mosques or markets. Disputes were generally settled promptly with both parties being satisfied. Sometimes the two parties would go to the home of the arbitrator, as happened in the case of Khalif Omar Bin Al Khatab v. Ibi bin Kaab, who went to Zaid bin Thabit's home for him to arbitrate between them.[24]

Based on this, it can be seen that Islamic Jurisprudence and modern arbitration laws coincide regarding specifying the arbitration place both nationally and internationally. At national level, for example, the Saudi Arbitration law does not specify a particular place for arbitration sessions but leaves it to the disputing parties to decide. In fact, arbitration can be held in any chamber of commerce or industrial location throughout the Kingdom, e.g. the Riyadh Chamber of Commerce, the Dammam Chamber of Commerce, etc. or the office of the arbitrator himself, or any other place agreed upon.[25]

This does not change at international level as most international arbitration rules give discretion to disputing parties to choose an appropriate location, although this is usually the place or center of arbitration itself.

The choice of venue has widened to London, Paris, Belgium, and Germany and has also spread to developing countries, e.g. Cairo, The Oman (Jordan) and to all the Gulf Arab States, Bahrain for example. As trade broadens its horizons so do such centres.

However, it is customary for arbitration to take place in the area where the dispute has taken place. The (LCIA) Arbitration Rules state the following:

> 'The parties may agree in writing to the seat (or legal place) of their arbitration. Failing in such a choice, the seat of arbitration shall be London, unless and until the LCIA Court determines in view of all the circumstances, and after having given the parties an opportunity to make written comment, that another seat is more appropriate.'[26]

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[24] See page 52, supra.
[25] Salah Salem, Legal Study of Arbitration, Derasat Kanoneya Lindam Al-TH Kimy 1998, P. 31, Chamber of Commerce & Industry, Riyadh, see also M AlBejad , Op. Cit. P. 173.
[26] LCIA Arbitration Rules, Article 16(1), Op. Cit. P.12, see also Chapter 43, Article 16-4304 from District of Columbia Arbitration Law, http://www.adr.org/law/statutes/florida-staste.html 9/11/1999, P.2. See also

In general, parties to arbitration cases should be concerned, when choosing a location, with the reputation of the arbitration centre and the availability of the necessary facilities, its access to transportation and communications etc. In other words, those things required to complete the arbitration process with ease and speed. Much research has already been done concerning the necessary facilities required at arbitration centres.[27]

Based on the above, it is clear that Islamic Jurisprudence coincides with most modern arbitration laws regarding the arbitration location (seat).

### 3.10.1.4. Time - Punctuality of Completion

Article 1846 of the Judicial Rules Magazine - regarded by some people as a codification of all that pertains to the Hanafiya Jurisprudential school[28] states that if arbitration is linked to a specific time, it terminates as that time lapses. For example, if the selected arbitrator has to arbitrate in a case for one month, arbitration has to take place during the specified period. If this does not happen, arbitration will be disregarded. Other articles emphasise this need for adherence to time regarding arbitration proceedings and the necessity to complete during the specified time; no postponement or delay is permitted.

However, it is worth noting here that these rules apply in normal conditions. In general Islamic Jurisprudence rules, it can be seen that if the reason for a delay is legal and justified it is possible to extend the period according to conditions and circumstances.

Evidence is also available from the sayings of the Prophet ( peace be upon him), to show that the necessity of respecting the specified time for arbitration pleading and

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Article 801-581 from Virginia State Arbitration Statutes, http://www.adr.org.law/statutes/virginia-statute.html. 1999.

[27] See Harold Crawter, Op. Cit. P. 115, also J A Kennerly, Op. Cit. PP. 6-7 and John Lockyer, Industrial Arbitration in Great Britain, 1st Ed. London, 1979, PP. 67-68.

[28] 28 M. Hasham, Op. Cit. P11 and Aabdul Hamed Alahdub, Op. Cit. P.45. This view point differs from that of others who consider that Majalat Al-Ahkam Al-Adaleya (Code of Judicial Rules) has put an end to the Ottoman caliphate, it also effects some laws (from that time) which were derived from all Islamic Jurisprudence schools. The Code relates not only to the Hanafiya school, see Malije Ahmed, Op. Cit. P. 105. and see also in this regard, Abdulaziz M. Algasem, Aleslah Altashrei fi Masar., (The legislatoral Improvement in Egypy) ,Albyan magazine, London, Issue No.163, June , P. 19.

procedures, and issuing arbitration can be changed, but only if there is just cause - for instance, if faults can be found according to the following:

> "if promises he does not fulfil, if he speaks he lies, and if he antagonizes, he exaggerates"[29]

Islamic Jurisprudence emphasises that all parties have to respect the specified time for arbitration and, consequently, sessions and pleading sessions.

The Islamic approach conforms with modern arbitration laws regarding adherence to time. For example, the Saudi Arbitration Law states the necessity of issuing arbitrament by the time specified in the arbitration document unless an extension has been agreed upon.[30]

This article specifies a period of ninety days from the date of issue of a decree regarding approval of an arbitration document. Otherwise, any party to the dispute can submit the case to the concerned authority so it can be studied with regard to a postponement of the time scheduled.

In addition, modern arbitration laws and international conventions have been keen to specify time, procedures and the method of notifying disputing parties about arbitration sessions and other details. These features have now been clarified. They were not as clearly specified during the prevalence of Islamic Jurisprudence, although the idea was the same, i.e. specification of pleading time and notification of the disputing parties. However, at that time, procedures were simpler, and access to disputing parties was also easy due to the smaller size of towns and cities and the fact that less complicated evidence was required, thus Islamic Jurisprudence books had no need to cover all details. Modern arbitration laws are concerned with this aspect to ensure that arbitration performs its purpose.[31]

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[29] Hadith is narrated by Abu Harirah, Moktsar Shih Muslem, Faith Book, Al Bakari No 33. Muslem No. 59, Dar Alsalam Press, Saudi Arabia, 1st Edn. 1998, P.25.
[30] Article (9).

### 3.10.1.5. Choosing Method of Arbitration - Case Start-up

Based on the ease and simplicity of Islamic Jurisprudence, it did not stipulate a specific form in which a legal claim should be submitted. This, however, applies only to arbitration claims and cases. Judges, from the beginning of the Islamic state to the present day, would sit to judge either in a mosque or in a country court yard. Opponents would submit their claims verbally.[32] It is worth mentioning, however, the difference that exists between Islamic Jurisprudence and the positive law in this respect. A claim in Islamic Jurisprudence is not required to be made in a specific form, whereas in modern arbitration laws all such claims must be made in written form and according to the provisions of law. This raises the question of whether it is possible in Islamic Jurisprudence to specify a special form to start arbitration cases.

In fact, if we look at the general Islamic Jurisprudential rules, it can be seen that Islamic Jurisprudence is very flexible, to the extent that it satisfies the need and achieves the desired result, i.e. if there exists an advantage by the specifying of a special form for the start of arbitration, then there is no Islamic Jurisprudence law that would prohibit specifying such a form providing that to do so would benefit all parties to the arbitration. Thus, modern arbitration laws in this respect do coincide with the spirit of Islamic Jurisprudence.

For example, Article 5 of the Saudi Arbitration Law states that claimants to arbitration have to submit an arbitration document signed by either themselves or their formal representatives. The subject of the dispute, names of opponents and names of arbitrators must all be specified and included.

Saudi law was basically concerned with the speed of the approval of the arbitration document and of notification of the arbitration panel, which must be done within a period of 15 days.[33] Emphasis was then placed on the date of the session in which the

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[31] See Articles 18 and 19 of UNCITRAL Arbitration Rules , also Article 12 of the Executive Legislation 1985, By–law of Saudi Arbitration Law, 1983. See also Section 1044 of the New German Arbitration Law, Trenth Book, Op. Cit. P.7.

[32] M. Hashem, Judicial Procedures & Execution, typed notes for law students, King Saud University, Riyadh, 1985, P. 106.

[33] Article 7.

dispute would be heard. This had to be within a period not exceeding 5 days from the date the panel was notified of the approval of the arbitration document. This procedure gave a reasonably exact date for the start of the arbitration session.[34]

However, it is worth mentioning that the arbitrator must himself be sure of the opponents' characteristics and eligibility so as to avoid carrying on with procedures that may become void.[35]

It can thus be seen that modern arbitration laws concentrate on this aspect, i.e. knowing the names of disputing parties, their professions, homelands, addresses, etc. before arbitration cases can commence.

Arbitration laws also clarify the beginning of the arbitration case itself, e.g. the ICC Arbitration Rules state the following:

> 'The date on which the request is received by the secretariat, for all purposes, is deemed to be the date of the commencement of the arbitral proceedings'.[37]

This article corresponds to many similar modern arbitration rules on date of commencement of arbitration sessions; the date thereby becomes fixed and known to disputing parties so the case can commence in a correct and fixed manner.

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[34] Article 19.

[35] See for example Award No. 117/T/3 dated 1407H (1986A.D.) in Case No.1185/1/G dated 1406H(1985A.D.) in Saudi Arabia, this staes '...the disputing parties must be notified to attend the hearing and pratice their rights...it is not acceptable to judge in the absence of parties unless they have been informed...' see Fhad Dugether, Judicial Percecution, King Saud University, Law Department, 1993, P.149.

[37] For example, Article 3(2) of ICC Arbitration Rules, Article 2(3) of the AAA International Arbitration Rules and others. ICC Arbitration Rules, Article ( 2 ), and Article 3(2) from UNCITRAL Arbitration Rules, Article 1 of the LCIA Arbitration Rules and Article 27 of Egyptian Arbitration Law 1994.

### 3.10.1.6. The Absence of the Opponent in a Case

The first question that arises after the practical commencement of an arbitration dispute is - what is the position of Islamic Jurisprudence in cases where one of the opponents does not appear before the arbitrator or arbitration panel?

Observation of the actual practice of arbitration and arbitration sessions would show that various issues may arise during arbitration which could hinder the proceedings. Among such issues is the absence of one of the parties to the dispute. Since the purpose of this thesis is to investigate aspects of commercial arbitration within Islamic Jurisprudence, the issue of the absence of one party must also be discussed. The absence of one of the parties can be permitted under the following two conditions:

1) If the disputing parties agree upon certain proceedings which can be referred to in case of the absence of one party then the proceedings will be effective.

2) If the two parties do not agree upon certain proceedings in the case of the absence of one party. This condition is an issue of the previous one.

To answer the question it is necessary to refer to the opinions in Islamic Jurisprudence, of which there are a number. The Hanafi school, for example, advocates the invalidity of adjudication against the absent defendant and that neither the judge nor arbitrator is permitted to appoint an attorney or agent to represent the absentee in such litigation.[38]

The Code of Judicial Rules (Majalat Alahkam aladlia) states that it is permissible and lawful to make the defendant attend court by force of law, if this cannot be achieved then the absentee should be notified by announcement three times on different days. If there is still failure to attend then the judge should appoint an attorney to hear the plaintiff's suit and evidence against the defendant.[39]

On the other hand, the Maliki, Shafiei and Hanbali Schools claim that if the evidence is against the absentee defendant then a verdict against him is lawful. The presence of the

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[38] Alaa Addin Altrablusi, Op. Cit. P. 59, M. Hashem, Prosecution Procedures & Execution. Ali Hider, Op. Cit. P.120, Op. Cit. Vol.4, P. 613.

defendant, therefore, is according to these schools, not a requirement.[40] It worth mentioning that notification to the disputing parties of the date for pleading is a necessary condition.

### 3.10.1.7. Guarantees of rights of absent opponent in defence

From the above, it is evident that, according to the predominant opinion, Islamic Jurisprudence advocates the lawfulness of adjudication against an absentee disputant, plaintiff or defendant. However, it should be noted that Islamic Jurisprudence has adopted a set of warranted regulations that provides protection for the absentee and eliminates any violation of the rights of the defence. These regulations of guarantee are as follows:

1. The failure to attend court by either party 'plaintiff or defendant' is not to be considered as acceptance or consent to the demands of the other party.
2. The attending party is not permitted to present new claims or to modify or change the original claims or accusations in the pleading session in which a disputant is absent. If he wishes to change or modify a claim, the session must then be adjourned until his opponent attends and is informed of the change or modification.
3. If the absent disputant attends after announcement of the verdict, the right exists for such a disputant to take the necessary actions to appeal or contest the verdict but it should be done within the period fixed by law. [41]

From this it can be seen that the concern of Islamic Jurisprudence is the necessity of the disputing parties to attend court, so that commencement of the legal proceedings are clear to all sides. This concern has also been expressed in modern arbitration laws. The Saudi Arbitration law, for example, states the necessity of the attendance of the

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[39] Articles 1833 and 1843 from Code of Judicial Rules (Majalat Alahkam Aladlih), Encyclopaedia of Regulation and Laws, Op. Cit, P. 1173.

[40] Ibn Kodama, Op. Cit. Vol. 9, P. 62-63, Shamsuddin Al sherabini,op.cit,vol.8p.255. See also Articles 2044and 2048 from Legal Rules Magazine (Majalat Alhakam Alshareiah), Op. Cit. P. 597.

[41] See Article 2048 from Majalat Alahkam Al Shareieh, (Legal Rules Code) Op. Cit. P. 598. These guarantees have been adopted in some modern laws, For example, by the Organization of Administrative Actions, which, in front of Saudi Legal Circles issued, by Royal Decree no.109, dated 24/7/1952H/1952A.D. Sections 35, 36, and 39. Sections 83, 86 and 213 were adopted in the Egyptian Law for Pleading also two Sections, 61 and 63, from the Kuwaiti Law of Pleading.

disputants or their attorneys at the arbitration sessions.[42] Article 18 clarifies the procedures when one or more of the disputants are absent. It states that if either party, who has already been notified, fails to attend the first session, the arbitrator can proceed with the case and reach a verdict provided that the disputants have put in the arbitration file their memorandum of pleading, claims and counter evidences. The arbitration award in such a case and according to law, once the suit is complete, becomes ready for adjudication according to the presentation of the parties.

However, if the absent party has not been notified, according to of the Executive Rules 1985 of the Saudi Law of Arbitration 1983, the arbitrator or arbitration tribunal is authorized to proceed with the case and to issue an award, but it has to postpone arbitration to another session so that the absent disputant may be notified.[43]

This rule has been adopted by Islamic Jurisprudence and also by the Saudi Arbitration Law, i.e. in the case of one party being absent without an acceptable excuse, it is still permissible to rule. The aim is to speed up the resolution of the problem rather than taking it further to normal prosecution. Most modern arbitration laws are adopting this understanding, locally and internationally.

The ICC Arbitration rules, for example, state -

> If any of the parties, although duly summoned fails to appear without valid excuse the Arbitral Tribunal shall have the power to proceed with the hearing.[44]

In other countries too the same methods have been adopted; for example in Egyptian Arbitration Law 1994 , if one of the parties has failed to appear at a session or fails to present the documents, the arbitration tribunal has the power to proceed with the hearing and to arrive at a verdict according to the elements of proof available.[45]

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[42] The Saudi Arbitration Implementation Rules 1985, Article 17.
[43] Article (18).
[44] ICC Arbitration Rules, Article 12(20).
[45] Article 35. Similarly Article 21 from Tunisia Rules, Regulation for Mediation, Conciliation and Arbitration. Publication of Tunisia Center for Arbitration (CCAT) P. 19.

Moreover, by agreement, in investment disputes, settlement is assured by the same type of ruling, that is -

> If a party fails to appear or refuses to present his case at any time during the litigation, the other party may request the court to proceed with hearing the issues presented and reach a verdict. The court should, in this case, give the refraining party one last chance unless it is convinced that the latter is not willing to attend the court to present its case.[46]

Commercial contracts often state their own arbitration procedures, which cover absenteeism and determine appropriate solutions. For example, in the agreement between the Government (State) of Qatar and the Qatar Co. Ltd. 1964, the contract states:

> 'absenteeism or a mistake in a part of the arbitration should not be cause for hindrance or delay of the arbitration procedures at any or all stages...'[47]

Arbitration between the Algerian State and a Group of Oil Companies 1964, was considered a practical example of the arbitration procedures practised in the absence of one party.[48] This is also true of the arbitration agreement between Turriff Construction Ltd. and The Sudan 1970.[49]

It can thus be said that there is a similarity between Islamic Jurisprudence and arbitration laws both local and international, with regard to the possibility of a ruling in arbitration in the case of the absence of one party where there has been correct

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[46] Agreement of Settlement of Investment Disputes, Article (2/45). See also Wlaa Refat. The Role of the International Center For Settlement of Investment Disputes to Support the Development of the Way of Arbitration, Kind Fahd University, Conference on Administration Sciences, New Horizen and Role in Development, March, 1998, P. 217.

[47] The contract between Qatar Limited Co. and The State of Qatar (1964) See Ahmed Ashush, OP. Cit. P. 88.

[48] For more details see The Legal proceedings between Algeria and a Group of Petroleum Companies. See Oil and Gas Journal, September, 1965, P. 16.

[49] Award is unpublished but an extensive report of the case by one of the Arbitrators, L. Erades – see Stephen M. Schwebel, International Arbitrator – Three Salient Problems, Cambridge, Grotius Publication Limited, 1987, P.88.

notification. Additionally, the aim of arbitration is to settle a dispute quickly, which is a good reason for businessmen to choose arbitration (which they often do) to settle their disputes.

### 3.10.1.8. Public Knowledge of Sessions

From the previous discussion in this study of Islamic Jurisprudence regarding the evidence of the lawfulness of arbitration and case studies in Islamic history, no binding provision has been found stating that pleading sessions in arbitration should be public.

One example showing that it is not necessary is the case of Calif Omer Bin Al Khattab v. Obi Bin Kaab who were disputing in a garden. They agreed to the selection of an arbitrator, Zaid Bin Thabit and went to his house. The latter listened to them and arbitrated between them and told them of his award and the case was then closed.[50] The case was settled in private, in the presence of the Calif Omar Bin Alkhatab. As previously mentioned, this evokes the Hadith of the Prophet (peace be upon him) which says –follow my Sunna and the Sunna of the Orthodox Califs after me.

It can thus be said that Islamic Jurisprudence allows the parties in disputes to agree upon the nature of the arbitration sessions, whether they are to be public or confidential, whichever is most suitable for them.

In most commercial arbitration cases the parties concerned may wish to have the arbitration settled in closed sessions. There may be a need for privacy, perhaps because of some detailed information to be presented to the arbitration tribunal which means that confidentiality may be vital to their best interests. In fact, the effects of the media and public opinion could be harmful to certain cases.[51]

The above appears to show that rules and agreements for arbitration assume confidentiality to be the rule and publicity the exception. An example of this can be seen in the London International Arbitration Rules which state:

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[50] The case of Omar Bin Alkhatab versus Obi Bin Kaab, narrated by Ebn Hajar, Vol. 4, P. 186 and narrated by Alskawa, No. 750, P. 300, see also A. Alghazali, Op. Cit. P. 70.

1. Unless the parties expressly agree in writing to the contrary, the parties undertake, as a general principle, to keep confidential all awards of their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by any other party in the proceedings not otherwise in the public domain save and to the extent that disclosure may be required of a party by legal duty to protect or pursue a legal right or to enforce or challenge an award in bone fide legal proceedings before a start court or other judicial authority.
2. Deliberations of the arbitral tribunal are likewise confidential; disclosure of an arbitrator's refusal to participate in arbitration is required of other members of the arbitral tribunal under Articles 10, 12 and 26.
3. The LCIA court does not publish any award or any part of an award without the prior written consent of all parties and the arbitral tribunal.[51]

Regarding the statement that confidentiality in arbitration is the rule and publicity is the exception, there is, to some extent, a different view in Saudi Arbitration Law which provides that:

> 'The case before the Arbitral Tribunal should proceed in public unless the Tribunal on its own initiative decides for confidentiality at a request from one party for reason appreciated by the Tribunal.'[52]

This article appears to show that Saudi Arbitration Law adopts publicity in arbitration as a rule unless a party requests otherwise and the arbitral Tribunal appreciates the reasons and agrees to the request.

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[51] See Yeyai Alsamman, Is Arbitration a Better Method? Riyhad Newspaper, Issue No. 1097, Legal Issues Section, dated 7.7.1989, P. 27.

[51] Article 30 (Confidentiality) from LCIA Rules and in conformity with Article(6) of the Statutes of the International Court of Arbitration of the ICC.

[52] Implementation Rules, (1985) of the Saudi Arbitration Law, 1983, Article 20.

Others also appear to argue[53] that the objective of public sessions is to provide the disputants and anyone who may wish to be present, with confidence in the fairness of the system. The presence of spectators ensures that arbitrators adhere to the principles of the process and pursue the legal proceedings properly. Therefore, it is permissible for anyone to attend.

Despite appreciation of the above opinion, judicial and arbitration courts are different. Hence, the provision in Article 20 of the Executive Code of Saudi Arbitration law 1983 is defective or unsound as it makes publicity in arbitration the rule and confidentiality the exception. In practice, businessmen demand strict confidentiality. On the other hand, the provision in Article 20 does not include the right of disputants to request confidentiality. In this regard their wishes do not necessarily have to be respected.

However, since they are the ones concerned with the issue, the appreciation of the Tribunal in this matter should be important to the decision-making procedures. It would, therefore, be appropriate to review the provision of Article 20 and to seek some conformity with Islamic Jurisprudence and modern arbitration rules. The latter implies that confidentiality is the rule and publicity is the exception and the former vice versa. An understanding of this question, where investment and economic developmental progress within the Saudi Arbitration Centers[54] is concerned, will give confidence to foreign investors who will be aware that their commercial disputes can be settled without publicity.

### 3.10.2. Principles of a Fair Trial

In fact, statements in the Holy Quran and from the Prophet's Sunna and also references within Islamic Jurisprudence from different schools are well rooted and confirm principles that should be adhered to in legal proceedings. This applies to judicial courts and to arbitration in an effort to achieve a fair trial, to serve the rights of both parties

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[53] See M. Bajad, OP. Cit. P. 175, Saleh Salem, A Study of Arbitration Rules, Riyadh Chamber of Trade and Industry, P. 30.

54 In Saudi Arabia there are Arbitration Centers in Chambers of Trade and Industry in Riyadh, Jeddah and Dammam, besides the possibility of arbitration where consent of the parties is concerned. This also agrees with the new approach of the new Saudi Foreign Investment Law, Issue by Royal Decree no. M/1 dated 5-1-1421.H/10th April 2000.A.D. Al Jazirah Newspaper, Issue No. 10058, dated 12th April 2000, Economic Section, P. 6.

and to highlight injustices and ensure equal opportunities for the presentation of cases, evidence and documents, in all disputes.

Various Islamic Jurisprudence books discuss these principles and it is possible to examine how commercial arbitration is pursued from their references to jurisprudence. The above principles were stated in books more than fourteen hundred years ago, yet these principles have been re-produced and re-stated in modern laws and rules. These include pleading procedures before a civil judiciary and local and international arbitration rules.

Since commercial arbitration procedures are being considered from the point of view of Islamic Jurisprudence, they are worth clarifying here in order to establish a better understanding of Islamic procedures. The most important of these principles is the establishment of justice between disputants as confirmed by the Holy Quran:

> 'Allah doth command you to render back your trust to those to whom it is due; and when ye judge between people, that ye judge with justice; verify how excellent is the teaching which the he giveth you! For Allah heareth and seeth all things.'.[55]

In this way the verse included binding orders for anybody undertaking the responsibility of adjudication or arbitration to be fair, just and to be aware that God is cognisant of all deeds. This verse implies self-direction and orientation towards justice and justifiable trials.

On the other hand, a large number of Quran verses confirm the seriousness of injustice, stating that those who are not conducting themselves towards justice and fair trials will be punished in life and after death. The Prophet Mohammed (God Bless Him) said that those who undertake the responsibility of justice are either in Al-Ganna (Paradise) or in Hell. This is a warning for those who are not just or fair.

In clarifying this principle it is the intention of this section to focus on the fact that Islamic Jurisprudence, despite setting the necessary procedures to secure a fair trial, will

concentrate on self-control and the concern of the judge to adhere to the rules of justice in the most correct manner.[56] Currently, Islamic Jurisprudence principles are being adopted within modern rules since the ultimate goal is to achieve justice by maintaining rights and resolving disputes.

### 3.10.2.1. Fairness between Opponents

One of the most important principles of a fair trial is the equal treatment of both parties regardless of their social or economic status or any other state of difference between them. Equality should be maintained from the beginning of the proceedings to the announcement of the verdict. No priority should be given to anyone (except possibly travellers who may be harmed by undue delay and to women required to stay at home).[57]

In confirmation of the necessity for equality, scholars have stated that arbitral or judicial tribunals should treat opposing parties equally in all aspects of the tribunal, including seating and speaking. Their confidence and trust must be maintained, they must have a feeling of equality and fairness whilst presenting their cases.

The following case will illustrate this point: During a dispute between the Calif Omer ibn Al Khattab v. Obai Ibn Ka'ab,[58] the Calif asked Obai to appoint an arbitrator. They agreed on Zaid ibn Thabit and went to his house. The Calif told Zaid of their need for arbitration in his house, i.e. Zaid's house. Zaid then asked the Calif to sit with him at the head of the seating place. The Calif Omar said to Zaid "This is you first injustice. Let me and my disputer sit in equal places." After that Zaid arbitrated between them.[59]

It should be noted that the arbitrator Zaid ibn Thabit had not intended to be unjust or partial in his arbitration, he had only meant to show his respect for the Calif (the Head of the State at the time) The Calif, however, did not approve of the attitude of Zaid ibn Thabitat and considered it an unfair start in his own favour and against the interests of

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[55] The Holy Quran surat Al Nessa (The women) Verse 58, English Translation, Op. Cit, P. 228.
[56] For more details see page 71, Supra.
[57] Samir Saleh, Op. Cit. P. 68.
[58] See P.52, Supra.
[59] Ibn Algiam ,Algawanen Alfghiah, The Jurisprudence Laws,Op.Cit, P.75.

his opponent. By voicing his opinion the Calif intended to confirm the principle of equality between the opponents from the start. Indeed, Zaid followed the Calif's directive, seated them equally, heard their pleadings and gave a verdict.[60]

In general, however, the principles of Islamic Jurisprudence confirm the maintenance of equality and justice between disputants and, in this respect, modern arbitration rules conform to the Islamic understanding as they advocate the principle of justice and equality as a basic procedural requirement. In fact, one Saudi Arbitration Rule states:

> 'the Tribunal (for arbitration) should observe the legal proceedings' principles to ensure that confrontation in the procedures enables all parties to be aware of them and to look into documents at the proper times and be given sufficient opportunity to produce their documents, challenges and evidence in writing or verbally in the session and to have them officially recorded.'[61]

The above article includes a basic principle and gives details, i.e. states the adherence of arbitral Tribunals to the principles and also details entailed for the disputers. This is an emphasis on justice and equality.[62]

On the other hand it would appear to be more appropriate for the Saudi law to state clearly and provide for the equality of treatment and justice by the arbitration or the arbitral Tribunal as is the case now in most modern arbitration Rules.[63]

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[60] This incident demonstrated the unassuming character of Khalifa and his adherence to the maintenance of right and justice regardless of his identification as the head of state.
[61] Article 36 from the Executive Code 1985 of the Saudi Arbitration Law 1983.
[62] The article referred to includes the principles of legal proceedings. It should be noted that the article refers to the relevant rules in the Kingdom of Saudi Arabia, e.g. Condensation of the responsibilities of the Sharia Judiciary, issued by Royal Decree No 109 dated 24.1.1372 (1952 A.D.) and Judicial Law issued by Royal Decree m/6 dated 14.5.1397 (1975 A.D.). Also the regulations of administrative works before Sharia Courts. These regulations do not clarify the principles and fundamentals of legal proceedings in detail. This supports the claim made in the previous chapter for the necessity to draw from Islamic Jurisprudence when the law fails to provide adequate details. See supra P.68,in this regard there is a need to review the Pleading Rule Laws issued by Royal Decree No 1 dated H1410 (1999A.D.) which was cancelled by Royal Decree 1 dated H.1411 (1998 A.D.) because of the importance of the provision in other articles in the laws that clarify the fundamentals of proceedings and procedures which contribute to the development of jurisprudence and the improvement of its procedures in the Kingdom of Saudi Arabia.
[63] Section 33 of the British Arbitration Act 1996 and Article (26) of The Egyptian Arbitration Rules in Civil and Commercial Materials 1994. See also Article 15 from UNCITRAL and Article 18 from the Model Law.

An example of rules showing emphasis for equality and neutrality can be seen in LCIA rules which state:

> 'arbitrators must all conduct arbitration under these rules and shall be and remain, at all times, impartial and independent of the parties and none shall act in the arbitration as advocates for any party, no arbitration, whether before or after appointments, shall give advice to any party of the merits or outcome of the dispute.'[64]

According to Egypt's Arbitration Law for commercial and civil matters 1994 as a national legislation:

> 'The opponents in arbitration shall be equally treated and each are to be provided with sufficient and complete opportunity to pursue their case.'[65]

The British Arbitration Act 1996 confirms this by the following provision:

> 'The Tribunal shall act fairly and impartially as between the parties giving each a reasonable opportunity of putting his case and dealing with that of his opponent.'[66]

Harold Crowter says that,

> 'It is generally understood that an arbitrator is bound to apply the rules of natural justice which in summary are that:
>
> - The arbitrator must be and be seen to be impartial and disinterested; and
> - Each party must be given a full and fair opportunity of putting its case and rebutting the case made against.[67]

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[64] The LCIA Arbitration Rules, Article 5 ( 2 )
[65] Article 26.
[66] Article 33.
[67] Harold Crowter, Op. Cit. P. 27. See also J. A. Kennery, Op. Cit. P.157.

From the above statements it appears that the principle of equality in the procedures of arbitration is a fundamental principle that should be given attention. As shown, both Islamic Jurisprudence and various arbitration laws have adopted this concern.

### 3.10.2.2. Substantive Truth

As discussed at the beginning of this thesis, Islamic Jurisprudence is distinguished by being a religious law dictated by God. Therefore, it addresses the human conscience to adhere to the good and refrain from evil even when not being observed by anybody save God and conscience. This has been maintained by dealings and procedures laid down in the Holy Quran and the Sunna.

Therefore, since we are considering the principles of fair trials it must be pointed out that this principle implies that each party has the right to prove their rights or what they believe to be their rights, but skills and abilities should not be used to convince to gain things that do not belong to them. If this is done, perpetrators expose themselves to severe punishment on the Day of Judgement. The Prophet gives this warning very clearly in the Hadeeth:

> 'I am only a man when you come pleading before me. It may happen that one of you will be more eloquent in his pleading and as a result, I adjudicate in his favour according to his speech. If it so happens and I give an advantage to one of you by granting him a thing which belongs to his opponent, he had better not take it because I would be giving him a portion of Hell.'[68]

The above Hadeeth shows that Islamic Jurisprudence considers the spiritual aspects but also gives consideration to other aspects within the law.[69]

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[68] Narrated by Muselm, see Kasa Katwrah, OP. Cit. P. 157.
[69] Samer Saleh, Op. Cit. P. 71.

## SECTION ELEVEN

### 3.11. Methods of Establishing Evidence in Arbitral Tribunals Within Islamic Jurisprudence

After discussing arbitration procedures and identifying the most important principles in Islamic jurisprudence and other rules and regulations in Section 10 above, the methods and means for establishing evidence according to Islamic principles will now be examined. There are two specific questions to be answered from this examination:

1) What are the well-known means or methods of proof of evidence within Islamic Jurisprudence?

2) How far do they comply with the rules of arbitration?

The importance of these questions lies in the methods used in Islamic arbitration by a person who is a partner in arbitration, whether Muslim or non-Muslim, because today business and commercial life is complicated. The answers are becoming progressively more important as demands to implement Sharia laws are increasing in a number of Islamic countries, a matter that necessitates more information. Replies to a number of questions are vital in order that implementation of such laws should be based on knowledge and science compatible with present day requirements. Therefore, in this section, in order to complete clarification of arbitration procedures, the methods used for proof of evidence, which are undisputed, such as giving oral testimony, confessions, and oaths etc. will be discussed. Debatable and controversial methods preferred by some scholars, such as studying the procedures, will be contested and contrasted with more acceptable opinions. Identification of points of agreement between the Islamic views and those in current laws will also be considered.

#### 3.11.1. Conventional Methods of Establishing Evidence

There are number of indisputable methods of proof of evidence among the Islamic schools of thought, these include:

1. Oral Testimony
2. Confession
3. Oath
4. Written documents

### 3.11.1.1. Oral Testimony

In fact, discussion of oral testimony as a means of proof of evidence within Islamic Jurisprudence for problems and commercial disputes emphasises the identifying aspects of commercial arbitration within Islamic Jurisprudence. Testimony, its legality and conditions require it to be defined.

What is meant by testimony in Islamic Jurisprudence? The definition varies in the different schools, but despite the specific differences in wording, all the schools seem to agree generally on the meaning.

According to the Hanafi school the definition is:

> 'Telling a truth to prove a right by the testimony in words before a judicial council even if there is no lawsuit.[70]

According to the Shafi school it is defined as:

> 'Informing about a thing by special wording or telling about the right of some care else with an other one by the word I testify.'[71]

The Hanbali school defines it as:

> 'Legal proof that shows the right but does not realize it. That is informing about what is known by special wording.'[72]

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[70] Ibn. Hamam, Op. Cit. Vol. 6, P. 20, this definition has been adopted by the Egyptian Court of Appeal. 23.3.1966.
[71] Albahote, Op. Cit. Vol.. 3, P. 534.
[72] Code of Legal Rules, (Majalat Alhkam Alshariah) Op. Cit. P. 624.

Finally, in the Shiaa Ithnashria School (Twelfth Shiaa Group) they observe that a witness must be from the Shiaa group; therefore, they do not accept testimony from Sunni against Shiaa persons.[73]

The legality of testimony within Islamic Jurisprudence is very clearly worded in the Holy Quran, which orders Muslims to testify and states that witnesses should be just and that testifying is for Allah.[74] The legality of testimony is also based on the Hadeeth:

> 'Testimony is for the plaintiff and the oath is for the one who denies (defendant).'[75]

The use of testimony has been maintained as one of the most important means of giving proof in the history of Islamic Jurisprudence.

The Holy Quran called for the disclosing of evidence and the establishing of the right and says that those who fail to give testimony are guilty-hearted:

> If ye are on a journey and cannot find a scribe, a pledge with possession (may serve the purpose) And if one of you deposits a thing on trust with another, let the trustee (faithfully) discharge his trust and let him fear Allah his lord. Conceal not evidence; for whoever conceals it his heart is tainted with sin. And Allah knoweth all that ye do).[76]

A question then arises regarding the conditions required for testimony to be valid according to the Islamic point of view. In reply it must first be mentioned that these conditions are in agreement with the current pleading Rules and Procedures. They are as follows:

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[73] Kadem Alhuseini,Op.cit, pp.312 and 323.
[74] The Holy Quran, Surat Al Talaqe Verse No. 2 .,English Translation,Op.Cit, P. 1765.
[75] Ibn Kodama, Op. Cit. Vol. 9, P. 148, Al Bahwite, Op. Cit. Vol. 3, P. 534, Al Shawkani, Op. Cit. Vo. 8, P. 321.
[76] The Holy Quran, surat, Al Bagrah, Verse 238, English Translation, Op. Cit. P. 131.

1. The testimony should be before the judicial council or arbitral tribunal. Witnesses should attend in person to give testimony unless the witness cannot do so in which case a deposition may be taken.
2. The testifying should be verbal, unless the witness is unable to speak[77] or there are other reasons that prevent his presence.
3. The testimony should be clear and detailed on the facts of the case and the witnesses should be sure of the correctness of the information being given.

In addition, there are number of other conditions presented by Islamic schools which should be considered regarding witnesses i.e. qualification, character, being Muslim and being just.[78]

The Hanafi school does not include the condition that a witnesses needs to be a Muslim.[79]

According to Islamic thought there are also causes for witnesses to be disqualified from giving testimony:

1. The witness should be disqualified if he is one of the relations who are not allowed to testify, as per Islamic thought: it is not permitted for the roots to testify for the branches,[80] i.e. the descendants however distant they are. Likewise the descendants are not permitted to testify for their roots, i.e. parents and grand parents however distant they are. Married couples are not permitted to testify for each other. Also blood relations and relations by marriage are not acceptable.

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[77] Conforming to this from the current Arbitration Laws, see for example Florida State Arbitration Law, Article 682(2), Op. Cit. P. 3 and others.
[78] Alaaduin Altrabulsi, Op. Cit. PP. 68-71, Ibn Kodamah, Op. Cit. Vol. 9, P. 164. See also Articles 2160 and 2165 from Legal Rules Code (Mjalat Alhkam Alshriah).
79 See page 84, supra.
80 Al Mawrdi, OP. Cit. P. 101.
81 The Holy Quran, surat Al Bagrah, Verse 282, English Translation, Op. Cit, P.129-130. See also Samer Saleh, Op. Cit. P.163 and Herbert J. Liebensy, Op. Cit. P. 247. With relation to this verse, the comments of Prof.AbdulMajed Alzandani (President of Aleiman-The faith- University inYamen State) are interesting. He has said that modern science has proved that cells memory in the male mind are double that of the female mind. He adds that evidence is provided by The Holy Quran, a book of God, because at that time (fourteen centuries ago) no one knew about these cells!

2. The Quorum: Islamic Jurisprudence has specified the number of witnesses required to testify in various specific cases. Without the number being complete the testimony will not be considered. For example in cases of adultery, the witnesses must be four men. There is also the basic rule that in other cases the Quorum could be two men, or one man and two women according to the directive of the Holy Quran:

> 'And get two witnesses out of your men. And if there are not two men then a man and two women such as ye choose for witnesses.So that if one of them errs.The other can remind her....'[81]

It is worth mentioning that according to Islamic Jurisprudence the testimony of a single woman can be acceptable in matters that concern women or in cases that take place where no men are available.

It seems that Islamic Jurisprudence disagrees with current laws in regard to women's testimony. The Pleading Laws which are often used in arbitration have no conditional quorum; the matter is left to the judge to decide, and he must be convinced by one or more witnesses regardless of the sex of the witness.[82]

From the above it can be concluded that, regarding commercial arbitration within Islamic Jurisprudence it is possible to rely on testimony for proof of rights as stated.

In general testimony as a means of proof is possible within both Islamic Jurisprudence and current arbitration laws. For example, the Saudi Arbitration law approved Article 31 of the Executive Code of Arbitration Tribunal which permits the use of testimony as a procedure for proof.

It should be noted here that the Kingdom of Saudi Arabia considers Islamic Sharia as the general system for the state and accordingly the work is conducted according to what has been established in the different schools of Islamic thought. When controversy

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[82] See for example Article 46 of the Egyptian Law of Proof of Evidence which provides that a witness is not qualified to testify before the age of 15. Also Article (59) of the Law of Proof of Evidence in the Arab Republic of Syria and Article 43/1 of the Kuwaiti Law of Proof.

arises, the Hanbali opinion is adopted. In practice in Saudi Arabia in a number of arbitration cases testimony has been taken according to current arbitration law[83] and also modern arbitration laws have approved the right to take testimony.[84] The question then becomes, how is the arbitration tribunal authorised to interrogate the witness from the Islamic point of view?

The answer to this question can be taken from Professor M. Hashem who says:

> "The witnesses should give answers to questions put to them by the judge."[85]

From this answer, the arbitrator or the Arbitral Tribunal can interrogate witnesses and question them to ensure the correctness of the testimony and the information provided. Here there is a similarity between the Islamic adoption and those states which have adopted a civil law system e.g. France, where it is possible for the judge to test witnesses. It is necessary to mention here that, according to the basic rules of Islamic Jurisprudence, there is no objection to following the steps adopted in the countries following common law systems whereby witnesses can be interrogated and questioned both by the judge and the disputing parties in a systematic way, since the Islamic objective and the objective of the other pleading rules is the establishment of the truth. Here lies the advantage of the Islamic Jurisprudence in making use of both the civil and common law systems.

The role and importance of testimony has now been clarified as a means of proof before arbitration in Islamic Jurisprudence and current laws.

### 3.11.1.2. Confession

The confession is one of the recognized means of proof before arbitration in all Islamic

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[83] See for example Saudi Arbitral Awards issued on 20.11.1410H/1990 A.D. Award issued on 20.4.1406H/1787 A.D., Award issued on 29.11.1419H/1999 A.D.
[84] Article (20) ) from the LCIA Arbitration Rules .See also Section 38(5) from the British Arbitration Act 1996. See Santigo De Nadal Ignasi Guandans, Arbitration Journal, Op. Cit. P. 16.
[85] M. Hashem, System of Proof of Evidence, Op. Cit. P. 306. See also the Organisation of Administration Action in front of the Saudi Legal Circles, Issued by Royal Decree No. 109 dated 1373H/1952 A.D., Articles 18, 19 and 20.

Jurisprudence schools. It is defined as,

> the informing by a person about the rights of another person against himself.[86]

From this definition the nature of confession appears to be mere informing and not a disclosure of a right.

The legitimation of confession in Islamic Jurisprudence is drawn from the Holy Quran, which says:

> 'whereby the believers are advised to be fair and just and to testify for Allah even against themselves.'[87]

Confession in considered to be among the strongest proofs of evidence since it is the confession of a person against himself. The Quran verse explicitly calls for disclosing the truth even if it is against oneself. The philosophy of the Islamic Sharia in this regard is addressing the human consciences, self-monitoring and the fear of God in refraining from injustice and tracing the rights of others. Those who fail to behave so shall be punished on the Day of Judgement.

One the other hand, rules and regulations have been set out for the punishment of the offender when an offence is confirmed or when an attempt to offend has been made. In this respect there is a call for the disclosure of the truth whatever the reward or the cost.

Despite the validity and strength of confession as a tool or means of proof of evidence, its effect is limited to the confessor and can not be surpassed by others.

In cases presented for arbitration, if a party is thought to be guilty and confesses to that effect and the confession is found to be true, i.e. willingly given without intimidation, then the arbitrator has to come to a verdict accordingly. The confession is unanimously

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[86] Athman Zadi (died 743H/1323 A.D.) Proof Ways, 1st Edn. Dar Almarefat for contribution and publishing, reprinted 1313H/1893 A.D., Vol.. 5, P. 52. See also Articles 1572-1573 from Code of Judicial Rules, Encyclopaedia of Systems and Laws, Article 1685, Op. Cit. P. 512.

[87] The Holy Quran, surat Al Nessa (The Women), Verse 135.

agreed upon in both Islamic Jurisprudence and current arbitration laws. It is not considered as a creation but as mere informing of the truth.

On the other hand confessions by those underage, those without legal capacity, or the bankrupt, and those incapable of reason because of mental disorder, are not considered as valid. In fact, although confession is one of the strongest proofs of evidence, it is rarely reverted to these days, especially in trade disputes presented for arbitration where more emphasis is placed on written documents and records. From another angle, if someone intends to confess the truth against himself, then it should be done before going to arbitration. In fact, each party tries its level best to prove the correctness of their own position, which makes the role of the arbitrator or the arbitral Tribunal very difficult and more complicated since they must check the methods of proof, study the documents very carefully and minutely examine all items in order to arrive at a correct and fair verdict.

### 3.11.1.3. <u>The Oath</u>

The third means or method of proof of evidence is one which is also unanimously approved of and recognised by all Islamic schools, i.e. the oath. According to Islamic Jurisprudence an oath means:

> 'to swear by the name of God. Its legitimisation is based on the Hadeeth which states that evidence for the plaintiff and oath for he who denies (defendant).'[88]

Scholars in Islamic judicial schools have given consideration to the oath as means of proof of evidence and have agreed as to its validation and its use in cases connected to money. It can therefore be concluded that it should be used in commercial and trade arbitration, the subject matter of this study.[89]

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[88] Ibn Algaim, Op. Cit P. 110.

[89] See more details about the Oath in Islamic Legal Procedures, Herbert J. Liebesnty, Op.Cit. PP. 350-352. Also M. Mudcor, Op.Cit. P. 45 and following. Regarding the Oath as a means of proof, in the Hudod it is known as the right of God i.e. that which concerns society, there is a controversy among the scholars some agree and some disagree.

It is lawful to take the oath from a Jew who believes that the Torah is the word of God revealed to Moses, and likewise from a Christian who believes in the Bible having been revealed in Jesus. They may all swear in the name of God.[90]

It can be concluded from the above that it is legitimate, according to Islamic thought, to ask a party taking part in commercial arbitration to take the oath. If a plaintiff fails to prove his case and the defendant denies it, then the plaintiff can ask the arbitrator to take the oath to deny the accusation.

### 3.11.1.4. Written Documents

It must be mentioned, while discussing the methods for proof of evidence which are unanimously accepted in the Islamic Jurisprudence, that written documents and records are also acceptable provided that they are genuine.[91]

In ancient Islamic Jurisprudence books, emphasis was placed on testimony, oath and confession because at that time writing was not widely spread as is the case nowadays. Moreover religious deference was very strong, therefore it was very rare for people to take an oath falsely or give false testimony. For these reasons, testimony, oath and confession were predominantly used. Writing, which was scarce, was rarely used. However, it is not true to say that writing was excluded as a means of evidence as has been stated by some researchers.[92] Writing was accepted as evidence in its own right in Islamic Jurisprudence. In fact, the Holy Quran calls for writing to prove evidence:

> 'O ye who believe when ye deal with each other by transactions involving future obligations, in a fixed period of time, reduce them to writing, let a scribe write down faithfully as between the parties, let not the scribe refuse to write as Allah has taught him, so let him write.'[93]

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[90] M.Hashem, Op.Cit. P. 364.
[91] Article 1736 from Judicial Rules Code, (Majalat Alahkam Aladliah), The Encyclopaedia of Rules and Regulations, Op.Cit. P. 1167, also Al Shawkani, Op.Cit. Vol. 6, P. 35. Ibn Algaim, Op.Cit, PP. 80-81 where its mentioned that scholars are in agreement about written documents because otherwise a number would be jeopardised.
[92] Abdulhamed Alahdab's opinion does not seem acceptable, Op. Cit. P. 44. See also Samir Saleh, Op. Cit. PP. 65-66.
[93] The Holy Quran, Surat Al Bagrah, Verse 282, English Translation, OP. Cit. PP. 128-129.

Sheikh Abd Al Rahman Al Sadi, in his interpretation of this Quaranic verse, claims:

> 'This verse includes a number of meanings among which is one that claims that God orders us to write debts... writing is an important means to preserve postponed transactions against failure to memorize and confusion.'[94]

It can be seen from the above that writing is important in this respect and it is endorsed evidence within Islamic Jurisprudence. The prophet said:

> 'A Muslim who owns something to be inherited should not sleep for two nights without writing his will.' [95]

With the development of modern tools for writing and documentation in both public and private hands, certified documents are becoming a reliable and useful means of proof of evidence according to Islamic Jurisprudence. This is also the thinking regarding laws in Islamic countries. Regarding study in the field of arbitration it has been found that Saudi arbitration rules do pay attention to written documents when they include useful evidence for the case under consideration before the arbitral tribunal.

The arbitral tribunal, as an initiative or in response to a request from a party in the case, could compel the other party to produce any written documents relating to the case in their custody. This can be done in the following cases:

1. When a shared document serves the interest of both parties or can prove the exchanged rights and obligation for both of them.
2. If the opponent relies upon it at any stage of the litigation.
3. If it is lawfully permitted to ask him to present it or to hand it over.[96]

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[94] Abdurhaman Alsadi, Interpretation of Holy Quran, Published by H.Q. of the Scientific Research & IFTA, Vol. 1, P. 342.
[95] See M. Muadukor, Op. Cit. P. 35.
[96] The Execution Code 1985 of the Saudi Arbitration Law, 1983, Article 28. See also Article 29-3 of the Egyptian Arbitration Law 1994 and Article 506 of the Syrian Law for Pleading Fundamentals.

Isam Ghanem, discussing Article 2 of the Arbitration Rules in the Yemen Republic, has pointed out that any word could be useful for the acceptance of arbitration, but it has to be written. He also says:

> 'here is an example of the Sharia moving towards documentary evidence.'[97]

This supports the premise that writing, in its own right, is considered as a means of proof of evidence in Islamic Jurisprudence.

It is worth mentioning before concluding this discussion, that it is permissible for the arbitrator or the arbitral tribunal to take advice from experts and make use of their opinions and experience in matters that serve the case and shed light on its features. It is also permissible to conduct field or location visits where necessary, in fact to do anything that will assist the arbitrator or the arbitral tribunal to arrive at the right verdict in the case under consideration.

### 3.11.2. Controversial Means of Proof

These are as follows:

A. Absentation from Oath
B. Arbitrator's Awareness
C. Presumption. (Connections and Inferences)

#### 3.11.2.1. Abstention from Oath

It has already been stated that a non-controversial means of proof in Islamic schools is for an oath to be sworn in the name of God before a judicial or arbitration court.

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[97] Isam Ghanem, Arbitration in the Arab Yemen Republic, 1st Edn. Printed in England by Maslands Ltd. 1988, P.9.

However, if the defendant abstains from taking the oath, the question arises as to whether the judge or arbitrator can rule against him because of his abstinence. Could this abstinence, in fact, be considered as proof of evidence against him?

In fact Islamic Jurisprudence schools have disagreed on this matter. There are three views, as follows:

1) The Hanafi school and some Hanbalists claim that the judge or arbitrator can rule by considering the abstinence as evidence against the defendant abstaining from taking the oath. The third Khalifa, Osman bin Affan and the Judge Sharih also adopted this opinion.[98]

2) The Maliki and Shafiei Schools claim that the defendant should not be prosecuted on the basis of his abstinence but that the case should be returned to the plaintiff. If he swears then they rule for him, if he abstains then no-one has to take the oath. The supporters of this opinion think that the silence or abstinence of a defendant should not be considered an accusation since there could be other reasons for it.[99]

3) This considers forcing the defendant to take the oath when asked to do so, i.e. he does not have the freedom to refuse. No ruling is conducted based on abstinence and no oath is demanded from the plaintiff. This opinion has been adopted by the Al Daherih school.[100]

The second opinion appears to be the most appropriate, i.e. that no ruling is made against the defendant because of abstinence from oath-taking. This opinion is supported by the case as narrated whereby the prophet did return the oath to the plaintiff:[101] An incident took place at the time of the prophet who indicated the difficulty of the third opinion, which is too strict, since the defendant may have abstained for religious considerations or for any other reason, and thus punishment cannot be justified.

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[98] Shwkat Alain, The Judicial Authority in Islam, OP. Cit. P. 247. Judge Sharih was considered one of the most famous Judges in Islamic history, he died in 78H/676 A.D.
[99] M. Madukor, Op. Cit. P. 89.
[100] Ibid.

Despite agreeing with the second opinion, it is also possible for a judge to take abstinence from swearing the oath as evidence, which, although it should not be treated as final, could support other material presented in the case. Saudi arbitration rules, however, do not include this issue, but there appears to be no reason to prevent the judge or arbitrator from making use of this judicial principle since the Shariah is the overall ruling order in the Kingdom.

In practice, generally, in Saudi Arbitration Law, dependence on written documents and material evidences is becoming more normal as a means of proof.

### 3.11.2.2. Arbitrator's Awareness

An arbitrator might have prior knowledge of a case and its circumstances and the evidence being brought to bear. Could he rule in the light of such awareness? What is the opinion of Islamic Jurisprudence with regard to this circumstance?

There is some controversy as to the correct procedure in this matter. Briefly, there are three schools of thought:

Firstly, that an arbitrator cannot rule on the basis of his awareness whether this awareness was gained before or after his appointment as an arbitrator. The Hanbali and Malki schools and Judge Shariah[102] have adopted this opinion. They support their position by the Hadeeth:

> 'I am a human, you come to me for adjudication some of you may be more eloquent that than others, so I rule – adjudicate— for him according to what I hear. If I adjudicate the right of another Muslim for him, then that is a piece of Hell... he either takes or leaves.'[103]

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[101] See Al Hakem fi Almastdrak, he claimed that this is the correct Hadith saying. See also Ahmed Alghazali, Op. Cit. P. 357.
[102] See footnote No. 98 page 149, supra.
[103] See footnote No. 68 page 137, supra.

Those in agreement with this opinion derived from the Hadeeth, claim that the prophet did not rule according to his awareness, but adjudicated according to what he heard and saw.

Secondly, the arbitrator can adjudicate in the light of his awareness. Some Shafiei followers have adopted this opinion.[104] Some go beyond this, believing that it is not only legitimate but obligatory. Ibn Hazm Al Zahiri said:

> 'It is unjust for the judge to be aware that one party in a dispute is an offended and the other is the offender, yet he leaves them alone.'[105]

The followers of this opinion support it by citing an incident that took place at the time of the prophet, when a women named Hind came to the prophet and said that her husband was mean and was not giving her sufficient expenses for herself and her children. The prophet told her to:

> 'Take what is sufficient for you and your children by convention, i.e. commonly known.'[106]

The supporters of this opinion say that the prophet adjudicated for her without evidence or confession from her husband because he was aware of her credibility.

Thirdly, this opinion can be divided in two parts:

1. If the rights are God's rights the judge cannot adjudicate.

2. If the rights are the people's rights the judge can adjudicate. The Ima Abu Hanifa adopted this opinion.[107]

Professor Al Sanhouri claims that:

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[104] A. Atta, Op. Cit. P. 176.
[105] M. Madkuor, Op. Cit. P. 92.
[106] Ibid.
[107] Qahtan Dowrie, Op. Cit. P. 232.

> The judge is not permitted to adjudicate in the light of his awareness, because his awareness becomes evidence so the disputers have the right to discuss it, hence this is permissible.

He also said:

> 'there is nothing against making use of what is known among people but not a private awareness.'[108]

This is also applicable to an arbitrator. From the above it appears that the first opinion, which claims that the judge or arbitrator should not adjudicate on the basis of his awareness but can only adjudicate in the light of the presented evidence during the legal proceedings in the case, is stronger. This opinion conforms to the conventions in current arbitration rules, i.e. dependence on the presented documents and evidence.

### 3.11.2.3 Presumptions (Connections and Interferences)

In the Arabic language there are several meanings for the word 'presumption', among which is the connection of one thing to another.[109] It can also mean 'wife'. From the Islamic judicial point of view, it means the guiding of something.[110]

Regarding its legitimacy as proof of evidence, researchers in Islamic judicial literature will observe that there are two points of view, as follows:

The first is that the use of connections is approved and ruling can be given accordingly as it is a legitimate means of proof. This opinion has been adopted by the Maliki[111] and Hanbali Schools,[112] some Shafiei followers,[113] and some Hanafi followers.[114]

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[108] Abdurzag Al Sanhowri considered to be one of the most eminent authorities on Civil Law in Egypt and the Arab world, Alwsiet (Civil Law Interpretation), 1956, Vol. 2, P. 33.
[109] Ibn Mandor, Arab Tangu, Op. Cit. Vol. 3, P. 336.
[110] Ibn. Alkiam, Op. Cit. PP. 1-5.
[111] Ibn Frhon, Op. Cit. Vol. 2, P. 111.
[112] Ibn Alkiam, Op. Cit. P. 4.
[113] M. Hashem, Judiciary and Evidence, Op. Cit. P. 313.
[114] Alaadian Al Trablsi, Op. Cit. P. 166. See also Article 1741 from the Judicial Rules Code (Mjalat Alahkam Aladliah), The Encyclopaedia of Rules, P. 1168.

The second opinion claims that they do not approve its use of as a means of proof. This has been adopted by some Hanafi followers, some Shafiei followers and the Ga'afari Shiaa.[115]

Despite this controversy, the majority of scholars are inclined towards the first opinion. It is appropriate at this stage to quote Ibn Alkaiam in this regard:

This is a situation in which some sects have misruled and frozen the Hudood and wasted the rights and encouraged the corrupted and made the Sharia limited, this does not serve the people's interests and closes in their faces the right pathways towards knowing the Truth and acting according to it. If signs of justice are exposed by any means then God's Sharia should be applied, God has classified that His aim is to establish justice among his worshipers and that people should maintain justice. Any way that leads to justice is of the religion.[116]

From the above, it appears that the first opinion is stronger, i.e. allowing presumptions as a means of proof. This is in accordance with current laws.

From all the above and in connection with the subject matter under consideration in this study, it can be concluded that in current commercial arbitration it is legitimate, according to Islamic Jurisprudence, for an arbitrator to depend on presumptions (connections and inteferences) that arise during pleadings and proceedings and to adjudicate in the light of these and other proofs of evidence.

## SECTION TWELVE

## 3.12. Contingencies Occurring During Arbitration Procedures to Parties to the Case

### 3.12.1. Emergence of Defect in Arbitratee's Capacity

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[115] Hashem, Ibid, see also The Group of Shia'a (Ethna Ashria) Kadem Al Haaeri, Op. Cit. P. 453.

[116] Ibn Algaim, see M. Madukor, Op. Cit. P.954.

The required capacity available to an arbitratee has already been discussed, as has arbitration proceedings. However, from these discussions further questions have arisen, for example, what if a person considered fit to go to arbitration is proved to be of defective capacity only after arbitration has been arranged? What is the position within Islamic Jurisprudence in such a case?

There are two possibilities:

1) an arbitratee's loss of some qualifying characteristics while still alive.
2) an arbitratee's death.

These two possibilities will be discussed below.

### 3.12.1.1. Arbitratee's Loss of Qualifying Characteristics During Arbitration

Scholars of jurisprudence, when applying conditions to an arbitratee's capacity, wanted to ensure that a contract of arbitration was concluded correctly so that the best results could be achieved. For this reason, some scholars follow the examples of various schools. They maintain that full capacity is necessary for good arbitration. If any defect occurs in this capacity after agreement on arbitration, the latter will be considered as null.[117]

When an arbitratee is informed about his incapacity, if he is unable to give solid proof that such incapacity did not exist at the time that he accepted arbitration and that he had the ability to win the case, then in accordance with the opinion of the advocates, the arbitratee's guardian has the choice to proceed or renounce the case. If necessary the decision will be made by the judicial authority.

Although this opinion appears to be logical, it contains a philosophy which stresses the fact that the contract is considered a matter to be endorsed by power of attorney.

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[117] Ebrahim Atta, Op. cit. P. 119. Ahmed Alghazali, Op. cit. P. 205. See also Article 656 of the Civil Procedures Code, 1939 of Iran, S M Amin, Op. cit. P. 121.

This viewpoint would perhaps be difficult in the world of commerce, which demands speed and prompt execution of contracting engagements. For this reason, it is suggested that an arbitratee's incapacity should not effect or nullify the original contract of arbitration but should be taken over by a deputy or guardian.

Acceptance of this procedure would provide a conducive atmosphere in which to continue with the commercial activity and remain dedicated to any contractual engagements. In this way, arbitration becomes a way of achieving justice and settling disputes, which serves both the parties to arbitration in terms of time, settlement and avoidance of recourse to judicial authority.

### 3.12.1.2 Death of the Arbitratee

However, death of an arbitratee is a different matter. Should this happen, will arbitration be nullified or will the arbitratee's property and rights pass to the heirs?

In Islamic Jurisprudence and according to the opinions of the Al Maliki, Shafii and Hanbali Schools, inheritance includes everything left by the person who has died, including money, property and rights, etc.[118] However, according to the Hanafi and Thahiri Schools, inheritance includes only the wealth of the deceased person.[119] It is clear that there are two opinions on this point:

**First opinion:**

Advocates of this opinion[120] take the position of the ancient scholars which they apply to arbitration. They have come to the conclusion that arbitration is similar to the rules of Alshefaa[121] which claims that there is a moral right related to financial contracts.

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[118] Said Sabeg, Op. Cit. Vol. 3, PP. 604-605.
[119] Ibid.
[120] Ahmed Al Ghazali, Op.cit. P. 206.
[121] Al Shefaa is one of the rules of Islamic Jurisprudence and means that - *it is required that a co-proprietor or neighbour must own what is sold to a purchaser, the price and expense must be given back to the purchaser should damage occur.* Al Shefaa is fixed for Muslims, Jews and Christians, see Siad Sabeg, Op. cit. Vol. 3, P.215. For more details see Al Shefah, Articles 1008 to 1035, Code of Legal Rules and The Encyclopaedia of Legislations and Systems, Op. Cit. PP. 1129-1131, also Mohamed Abu Zahra, Op. cit. P. 125.

Advocates of this opinion differentiate between the two points, i.e. arbitratees' rights in Alshefaa[122] and heirs' rights in arbitration.

There are many opinions as to whether the rights within Alshefaa have been incorporated into Islamic Jurisprudence. Both the Maliki and Shafii schools consider that the rights of Shefaa go to the heir because the origin is inheritance of money and rights.

The Hanbali School, however, claims that that rights of Shefaa is not inheritable unless the deceased has demanded it before dying.

In fact, this thesis is not concerned with the incorporation of Al Shefaa into Islamic Jurisprudence, except in the way advocates of this opinion support it. They hold that the rights of Al Shefaa should be transmitted to heirs. They consider it to be a moral right related to a financial contract. However, issuance of a contract depends on the will of the other contractor associated with the money, on the one hand, and the inheritor on the other.

In light of the foregoing, they have applied this rule to arbitration. Therefore, arbitration becomes the moral right of the arbitratee in which case this right is inherited by the heir after the death of the arbitratee, thus applying not only current jurisprudence but also Al Shefaa rules.

Concerning the second point of the transition of the arbitratee's commitment to the heirs, the advocates of this opinion claim that the contract of arbitration is nullified in the case of death of an arbitratee on the basis that the commitment to arbitration is given by an arbitratee, therefore only the arbitratee can decide whether to proceed with it or not. On the other hand, these advocates place the stress on the incapacity of the arbitratee which nullifies arbitration. On this basis, the heir has the right to proceed with arbitration or not. If the decision is to proceed then the commitment must be made by the heir to abide by the decision of the arbitrators.

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[122] Al Grafi Al Farowg, Op. Cit. Vol.. 2, P. 278 and Ahmed Al Ghazali, Op. Cit. P. 207.

**Second opinion:**

Advocates of this opinion[123] focus on the causes of arbitration failures which was also covered by ancient scholars. However, these scholars have not written about the death of an arbitratee as being a cause for finalising or nullifying arbitration. More recent scholars consider this as proof that arbitration is not nullified by the death of one of the parties in conflict. The heirs therefore automatically take the place of the deceased and arbitration continues without nullification.

The first opinion appears to be incorrect, since drawing an analogy between arbitration and Al Shefaa is an analogy between two dissimilar things. Arbitration is a contract concluded between two parties who are obliged to respect it. However, Alshefaa is concerned with the rights of a person to express consent or to object to selling something in order to purchase something else. If the first opinion is correct then there are no rights in this respect.

It seems apparent therefore, that the second opinion is correct, i.e. that arbitration is not affected by the death of one of the parties in conflict. However, the foundation of this argument is weak, so it would be pertinent to examine the nature of the arbitration contract itself, since, as clarified in the first chapter of this study, arbitration contracts, as with others, must be respected and their conditions should be fulfilled with commitment.

An answer may be arrived at by careful examination of whether arbitration contracts are affected by the death of an arbitratee or whether the deceased may be replaced by the heirs. Should this be correct but the heirs are discovered to be under the age of contractual capacity, their legal guardians act on their behalf. On this basis, the arbitration contract will not cease to exist, and will yield a result if the contracted parties have not agreed to a different course of action.

In support of these conclusions it should be noted that what is stressed by modern legal jurisprudence, and in the majority of arbitration laws, is that the death of an arbitratee

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[123] See Qahtan Dawri, Op. Cit. P. 656.

does not affect arbitration.[124] This also supports the trust put into arbitration as a means of settling disputes, more especially the commercial ones that demand speed of settlement so that no barriers to commercial activities, at either local or international level, are erected.

### 3.12.1.3 Arbitratees Renunciation of Arbitration

Renunciation of arbitration is possible, by either one of the arbitratees or both, and this can be done: a) explicitly or b) implicitly.
These possibilities will be discussed with particular reference to Islamic Jurisprudence.

#### 3.12.2.1. Renunciation of Arbitration by One Party

Does one of the parties have the right renounce arbitration? There are three opinions regarding the answer to this question. They are as follows:

**First:** Any of the conflicting parties is permitted to renounce arbitration before the arbitrator has issued the award. The Twelfth Shia School[125] and the Hanafi School[126] have both adopted this position.
They claim that the proof for this opinion lies in their considering the arbitration contract as a deputation contract which can be renounced any time the authorising party makes such a decision. The differences between a contract of arbitration and that of deputation was clarified in the first chapter of this study.[127]

**Second:** One of the conflicting parties can renounce arbitration if the arbitrator has not yet examined the case. If the arbitrator has begun his duty, however, one of the parties in conflict cannot renounce it alone. Scholars from the Maliki School[128] have adopted this opinion as well as some from the Shafii[129] and Hanabi Schools.[130] Two issues become clear from the second opinion. They are as follows:

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[124] For example, Saudi Arbitration Law 1983, Article 13, The British Arbitration Act 1996, 8(1). See also Harold Crowter, Introduction to Arbitration, 1st LLP, London, 1998, P. 179. Also Article 447 from Algeria Code of Civil Procedures No. 66, 145 for the year 1966.
[125] S. A. Amin, Op. Cit. P. 75.
[126] Ahmed Al Ghazall, Op. Cit. P. 211.
[127] See pp. 56-57, supra.
[128] Ibn Farhon Almaliki, Op. Cit. Vol. 1, P. 44.

1) The possibility of one party being able to renounce arbitration. The proof presented is in the analogy between arbitration and deputation. On this point they are not far from the first opinion.

2) The impossibility of one party being able to renounce arbitration once the arbitrator has begun the procedures.

**Third:** One of the conflicting parties alone is not permitted to renounce arbitration. The majority of the Maliki School some of the Hanbali school[131] and the majority of other scholars have adopted this opinion.[132] Advocates of this opinion base their ideas on the fact that allowing one party to renounce arbitration omits the original wisdom regarding arbitration, thus making it senseless.

They also claim that a contract of arbitration is similar to any other contract and that once these contracts are issued they must be respected by all parties to them.

The third opinion appears to give the most benefit and to have a more positive effect in settling people's conflicts and ending disagreements as quickly as possible. This is compatible with modern commercial life that demands speed in ending conflicts.

The first and second opinions, would, in fact, lead to the nullification of arbitration objectives because if either party becomes aware of proof against them they would take the initiative in renouncing arbitration, which would then contribute to the loss of rights and add to the complexity of the conflict. Thus, arbitration loses one of its most important aspects, that is, the speeding up of conflict settlement and the preserving of good relationships among the parties to the conflict.

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[129] Yahay Anawawi, Op. Cit. Vol. 11, P. 122.
[130] Ibn Koddama, Op. Cit. Vol. 9, P. 108 and Article 2093 of Code of Legal Rules, Op. Cit. P. 607.
[131] Masad Alburgani,Op.Cit, P .214.
[132] Atta. Op. Cit. P. 130.

To support the third opinion it is possible to quote from Calif Ali Ibn Taleb who, when asked by Al-Khawarij for permission to renounce arbitration before it was issued,[133] replied:

> 'after satisfaction and a pact do we renounce arbitration? Did not Allah say "fulfil the convention of Allah when ye have confirmed them;" Indeed you have made Allah your surety, for Allah knoweth all that ye do.[134]

The Almighty also said:

> "O ye who believe, fulfil (all) obligations lawful unto you."[135]

To summarise, it is concluded that it is not permissible for one party to the conflict to renounce arbitration. Many of the Islamic countries have adopted this opinion.[136]

### 3.12.2.2. Both Parties Renouncing Arbitration either Explicitly or Implicitly

#### a) Both Parties Renouncing Arbitration Explicitly

As has been shown, a contract of arbitration is concluded by both parties to the agreement giving their consent. This being the case, they can renounce arbitration at any time so long as they are in complete agreement on the matter.[137] However, the arbitrator must be paid a fee in accordance with the original agreement.

#### b) Both Parties Renouncing Arbitration Implicitly

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[133] Ahmed Al Balatheri, Anssab Al Ashraf (The Nobility Lineages), enquiry by Mohamed Amar, 1st Edn. Al Alami Co. Press, Beirut, 1974, Vol. 2, P. 352.
[134] The Holy Quran, Surat Alnhail, Verse 91, English Translation, Op. Cit. P. 760.
[135] The Holy Quran, Surat Al Maidah, Verse 1, Ibid. P. 276.
[136] See Article 7 of Saudi Arbitration Law, Op. Cit. P. 12 and Article 6 of Arbitration Law in the Egyptian Civil and Commercial Subjects 1994, Cairo Provincial Centre of International Commercial Arbitration, Op. Cit. P. 15 and Article 4 of Arbitration Law in Jordan State No. 18, 1953, edited in the official newspaper, Issue 1131 on 17.01.1953. See also Article 236 of the Law of Commercial and Civil Pleadings in Bahrain State, issued by virtue of Law No 12, 1971 and Articles 14 and 15 of Systems of Arbitration Centre, of GCC. C.A.C. December 1993, General Secretariat of GCC. C.A.C. Riyadh, 1997, P. 9.

This may happen if both parties, without expressing their intentions explicitly, go to the judicial authority or to another arbitrator, which means that if neither of them desire to adhere to the original arbitration seeking judicial help or another arbitrator, this is tantamount to their rejection of the said agreement. It should be noted that within Islamic Jurisprudence it is not acceptable to have two forms of arbitration for a single case.[138] Once again the arbitrator to the original agreement must be paid the agreed sum.

It can clearly be seen from the above that if both parties agree, then it is permissible for them to renounce arbitration either explicitly or implicitly.

### 3.12.3. End of Arbitrator's Term of Arbitration

After choosing the arbitrator who is required to give his judgement about a case and conclude the contract of arbitration, the following question arises: when is the arbitrator' s task complete, or, when does the agreement expire? This is a complicated question which requires to be divided into two separate answers. Basically they can be presented as

a) natural reasons.

b) extra natural reasons.

#### 3.12.3.1. End of Arbitrator's Term of Arbitration for Natural Reasons

Within Islamic Jurisprudence, it seems that the term of arbitration or validity of the arbitrator ends with either

1. Making of an award, or
2. Expiration of arbitration period if arbitration is provisional.

In the first case, an arbitrator's role of arbitrating comes to an end with the act of issuing his award.[139] In the second case, when arbitration is provisional, the term of arbitration ends at the expiry date of the specified period.[140]

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[137] A. Atta .,Op.Cit,P .133.

[138] Article 1837 of the Code of Legal Rules, Encyclopaedia of Legislation and Systems, Op. Cit. P. 1172. Salim Rostom, Op. Cit. P. 1190.

[139] Some members of the Shafii School have said that the arbitrator's role comes to an end when he is issuing his award and at the same time the place of arbitration has been left by the disputants, but the

### 3.12.3.2 End of Arbitrator's Term of Arbitration for Extra-Natural Reasons

The are also extra-natural reasons, (also termed non-natural reasons) that can lead to the end of an arbitrator's term of arbitration. Taken from books of Islamic Jurisprudence the reasons can be summarised as follows:

1. Loss of arbitrator's capacity to arbitrate.
2. Dismissal of arbitrator by parties in conflict.
3. Resignation of arbitrator.

1. Loss of arbitrator's capacity to arbitrate:

As previously discussed, there are necessary conditions laid down, showing the requirements of an arbitrator's capacity. If there appears to be any anomaly arising from these requirements during arbitration the arbitration must be brought to a close.[141] It should be mentioned here that the obstacles that could come in the way of an arbitrator's capacity to perform arbitration include any form of suffering from a mental disorder or state of loss of mind.[142]

2. Dismissal of arbitrator by parties in conflict:

The existence of an arbitrator, as previously stated, is as a result of the agreement of parties in conflict to arbitration by the appointed person. If the parties in conflict agree to dismiss the arbitrator, the latter's term of arbitration ceases. However, there are cases where only one party wants to dismiss the arbitrator. There are various opinions, according to the nature of the contract within Islamic Jurisprudence, as to what happens in such cases. For example, those who consider the contract of arbitration as being similar in kind to a deputation contract, contend that any of the conflicting parties can dismiss the arbitrator on the basis that the principal may dismiss the arbitrator

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majority of the Shafia School and the Hanfia School disagree, see Hosen Fathie, Op. Cit. P. 102, Ibn Najeem, Op. Cit. Vol. 7, P. 27.

[140] Conclusions can be drawn from Article 1801 of the Majalat Al Hakam Al Adliya, Encyclopaedia of Legislations and Systems, Op. Cit. P. 1171.

[141] See page 154, supra.

authorised in a deputation contract.[143] The difficulty of adopting this opinion was made clear when the differences between arbitration and deputation were discussed.[144] Another opinion claims that it is possible for one party to dismiss the arbitrator on the grounds that the contract was issued between both the parties in conflict on the one hand and the arbitrator on the other.

Therefore, an arbitration contract, as with other contracts, should be respected and adhered to if no defect has appeared in the arbitrator that would necessitate his dismissal. In this respect Ahmed bin Taymiya said:

> "It is ordered in the Quran and Sunna to be loyal to pledges, terms, pacts, contracts and trust preservation, caring about that and warning against betrayal and breaching of pledges."[145]

Arbitrators should not be dismissed if they are carrying out their duties correctly. If one party wants an arbitrator dismissed, the necessary reasons for such dismissal must be given.

3. Resignation of the arbitrator:

The arbitrator may encounter conditions which would make it impossible for arbitration duties to be carried out. Is it then possible for an arbitrator to resign?

Again, there are two schools of thought in this respect in books of Islamic Jurisprudence. One opinion states that the arbitrator cannot resign, whilst the other states that he can. It therefore becomes necessary to discuss these two opinions.

First opinion:

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[142] Esmael Al Astal, Op. Cit. P. 113.
[143] The authority of arbitration for a long time remained revocable under English law, see Vynio's Case, 8c. 80a and 81b(1609), 17ER, 595 & 596, in fact until the beginning of the 19th century when it was abolished by Arbitration Act 1889, Section 1, see George E Lombi, Op. Cit. P. 96.
[144] See p. 56, supra.
[145] Ahmed Ibn Taymiya, Al Qawaed Al Naraniya Al Fiqhiya, Enquiry by Mohammed Al Fage, Riyahd Library Press, Saudi Arabia, P. 214.

The arbitrator cannot resign without the consent of the parties in conflict on the basis that they are bound by a contract and this contract should be respected. In fact, an arbitrator's resignation may cause harm to the parties in conflict in so far as time and money are concerned.

Second opinion:

This opinion states that the arbitrator may resign at any time. This is referred to as 'deputation', when an authorised person may resign without the consent of his principal.[146]

The first opinion would appear to be more relevant, since the second goes against the objectives of arbitration which is to allow more rapid settlement of conflicts.

[146] See Esmail Al Astral, Op. Cit. P. 106.

# CHAPTER FOUR

## The Arbitral Award

In the previous chapter, the scope of arbitration and the necessary procedures of an arbitral case from the perspective of Islamic Jurisprudence were discussed. The equal opportunity given to arbitration parties, in so far as proofs clarifying their rights within the frame of the disputed cases are concerned, was also noted.

There was also discussion regarding the means of proofs and obstacles faced during the process of arbitral cases. On completion of arbitral case procedures, pleading sessions are closed. This is followed by deliberation conducted by the arbitral tribunal. When the arbitrator or arbitral tribunal is completely sure that the case has been settled, the award will be issued. If there is only one arbitrator the award is issued without deliberation. In this way the arbitrator or arbitral tribunal accomplishes the arbitral mission.

This award is of great importance because it is the objective behind the process of arbitration. For this reason and for the continuity of exploration into this aspect of jurisprudence within Islamic Commercial Arbitration, this chapter will assess arbitral awards, discussing the perspective of Islamic Jurisprudence and the similarities and differences between them and modern arbitration laws, whether local or international. This will include discussion of the definition and the purpose of arbitral awards, their components, corrections and interpretations. The final phase of an arbitral award, its aspects and proofs will also be discussed.

This chapter will also clarify some misunderstood points and concepts about Islamic Jurisprudence and outline corrections in an attempt to present Islamic Commercial Arbitration, as approved of by the Islamic world, as being suitable to contemporary reality, particularly in its efforts to achieve coordination with other countries at an international level. This can be done through clarifying similarities of legal points which will harmonize international commerce and economy for the welfare and development of humanity.

## SECTION THIRTEEN

### 4.13. Components and Types of Arbitral Award

The previous chapter showed that Islamic commercial arbitration history is not complicated. The arbitrator was usually able to settle disputes in the presence of the parties in conflict either in the market place or at the mosque, although some cases required greater energy and more time, such as that of the Calif Ali Ibn Talib and Muawiya Ibn Abi Sufyan. However, at that time, there was no need for specific arbitration requirements.

The researcher needs to show awards of Islamic Jurisprudence which have relied on rules of Jurisprudence as accredited by the different schools and to specify the necessary requirements for arbitral awards. These requirements should now be compatible with the contemporary world. Cases have changed and become more and more complicated, therefore more formal requirements have become necessary and this aspect must be considered.

In this sub-section, arbitral awards defined within the scope of Islamic Jurisprudence will be discussed, as will the nature of the necessary form and components as well as the attitude of Islamic Jurisprudence in the required period, the nature of the majority vote within the arbitral award system and other related issues.

#### 4.13.1. Defining 'Arbitral Award'

Before explaining the test of details it will be beneficial to define 'arbitral awards within Islamic Jurisprudence' so as to enable a better grasp of the meaning. The word 'award' in Islamic Jurisprudence refers to the term 'Hukom', which is a shared term.[1] It may mean judicial authority; wisdom; science; or Jurisprudence in the case of a political award.

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[1] Shared terms, known to scholars as 'Islamic Jurisprudence Origins Terms' mean more than one thing. The term can have additional meanings.

### 4.13.1.1. Definition of Arbitral Award in Legal Terms

The scientific or the terminological meaning of award (Hukom) encompasses many quasi-definitions within Islamic Schools of Jurisprudence. For example, in the Hanafi school, 'award' means settling conflicts and disputes in a special way.[2] The Judicial Rules Code defines it as:

> '... award is to conduct the trial, and settle the dispute. It is divided into two sections. The first section engages the arbitrator and arbitrates the award; the second section is the arbitrator's depriving the plaintiff of a dispute by saying: "you do not have the right"... and this is the arbitration of leaving'.[3]

The Al Tarablusi from the Hanafi school, has defined it as 'informing about a legally engaging award'.[4] In the Hanabli School, it is considered as 'engagement into a legal award and settling disputes'.[5] This definition complies with the definition stipulated by the Legal Rules Code.[6] The Maliki School considered it as 'informing about a legally engaging award',[7] but the Shafii school has defined the award as 'putting an end to a disputes by Allah, the Almighty award or making the person adhere to the legal award'.[8] Lastly, the Twelfth Shiit school has defined it as 'settling disputes among people by qualified people'.[9]

### 4.13.1.2 The Chosen Definition of the Arbitral Award and its Purpose

Previous definitions of awards, according to Islamic schools of Jurisprudence, show that there is a difference in expression without a noticeable difference in meaning and

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[2] Ibn Najeem, Op. Cit. Vol. 6, P. 277.
[3] Article 1786, Judicial Rules Code, Encyclopaedia of Legislations and Systems, Op. Cit. P. 1170, see also Ali Rostem, Op. Cit. P. 1162.
[4] Aladin AL Tarabulssi, Op. Cit. P. 6.
[5] Mansour AL Bahowiti, Op. Cit. Vol. 6, P. 285.
[6] See Article 2009, Legal Rules Code (Majalat AL Ahakam AL Shariaya) Op. Cit. P. 590.
[7] Ibn Farhan Al Maliki, Op. Cit. Vol. 1, P. 8.
[8] See M. Hashem, Procedures of Judiciary and Execution, Op. Cit. P. 190.
[9] Mohsen Almoswi, Op. Cit. P. 63.

content. For this reason, it is possible to infer a definition of 'arbitral award' as a saying or deed issued by the arbitrator settling an existing dispute. It has an adhering characteristic in accordance with the awards and rules of Islamic Jurisprudence. From this, one can see that the purpose of the arbitral award is to settle an existing dispute between parties by referring to the arbitration agreement and Islamic Jurisprudence.

Also, from the above definitions, it is clear that the term 'arbitral awards' within Islamic Jurisprudence does not differ from that of 'judicial award' or 'judgement' except in its initiator. Therefore, an arbitral award is issued by an arbitrator and a judicial award is issued by a judge. Previous definitions have been explained to show the components of the definition chosen for the purposes of this thesis.

An arbitral award, as stated above, is therefore a 'saying or a deed stemming from an arbitrator', which shows that there is no specified form of arbitral award within Islamic Jurisprudence. An award can be either oral or written.[10] The expression 'settling the existing dispute' means that the award issued by the arbitrator plays a prominent role in settling conflicts with righteousness and this is exactly what the arbitrator feels and wants to achieve in settling an existing dispute, and it achieves the purpose of the arbitral award. As Boyd and M. Mustill have stated:

> 'The arbitrator should therefore think carefully what form will suit his purpose best and then make sure that the document which he issues is really what he intends it to be.'[11]

The expression 'having an adhering characteristic' (part of the previous definition) means the clarification of the attitude of Islamic Jurisprudence towards arbitral awards, in terms of making the parties in conflict adhere to such an award, whether the award is in favour or against any party. Since the parties have accepted that they have to expose the conflict to arbitration, they find themselves obliged to accept the arbitral award because this is an execution of arbitration contracts agreed to by the litigants. Such a condition of the arbitration process, once engaged upon, is a matter emphasized by Islamic Jurisprudence.

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[10] See page 170, infra.
[11] Michael J Mustill & Stewart Boyd, Op. Cit. P. 371.

It is important to eliminate any misconceptions of considering arbitral awards in Islamic Jurisprudence as having a non-adherence element. However, it must be stressed here that adherence only applies if awards are issued correctly and answer all the necessary conditions.

Islamic Jurisprudence and modern arbitration laws agree on this fact, since the characteristic of adherence achieves the objective of arbitration in quickly settling disputes. Non-adherence would cancel out the interest and objectives of arbitration.

The expression 'in accordance with the award and rules of Islamic Jurisprudence' distinguishes Islamic arbitration from other arbitration processes in modern laws which have been created by human beings. Hence the award must comply with the general rules of Islamic Jurisprudence. Regardless of the chosen procedures on the part of the litigants, attention is given to the award of Islamic Jurisprudence, therefore the conventional origins should be taken into account, and bear the characteristics of jurisprudence and justice[12] for all parties during the process of arbitration.

The above is the definition of arbitral award in Islamic Jurisprudence. The question must then be asked, does it have its counterpart in modern arbitration laws or not? In fact there is no difference between arbitral awards within Islamic Jurisprudence and modern arbitration laws.

Vikram Raghoran states:

> 'The decision of arbitration on a matter is final and conclusive between the parties'.[13]

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[12] There will be more clarification of this point when choosing the applied law on arbitration, see page 191, infra.

[13] Vikram Roghvan, Heightened Judicial Review of Arbitral Award, Journal of International Arbitration, Kluwer Law International, printed in Great Britain, 15, (3), 1998, P. 103. See also John F. Phillips, Op. Cit. P. 28.

It has also been defined as a written work, the writing being seen as a necessary condition for arbitration and described as a 'judicial deed performed correctly by arbitrators'.[14]

Redfern and M. Hunter have said in this regard:

> 'There is no internationally accepted definition of the term 'award'. Indeed, none is to be found in international conventions dealing with arbitration, including the conventional Treaties, the New York Convention and the Model Law. Even though the New York Convention is specifically directed towards the recognition and enforcement of award, the nearest definition is (Article 1-2): [...] The term 'arbitral award' shall include not only awards made by arbitrators appointed for each case, but also those made by permanent arbitral bodies to which the litigants have submitted [...] This is helpful, but incomplete.'[16]

In reality, the definitions given, whether from Islamic Jurisprudence or modern arbitration law, have many features in common. For this reason, it is possible to apply the definitions of arbitral award from Islamic Jurisprudence to its modern counterpart on the condition that it does not violate the general rules of Islamic Jurisprudence.

### 4.13.2. Form of Arbitral Award

It has been shown that there is no specific form to the definition of arbitral award within Islamic Jurisprudence; it may be oral or written. Of greater importance is that it must be clearly manifested in dispute settling procedures.

On the subject of modern arbitration laws, John Phillips has stated:

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[14] M. Abdulmajead, Op. Cit. P. 270.
[16] Alan Redfern and Martin Hunter, Law and practice of International Arbitration, 3rd Edn., Sweet & Maxwell, London, 1999, P. 364.

'Yet the law does not require that the award should be in any special form; indeed, it has been held that an oral award may be made, and, in the case of those commodity arbitrations where the case will be determined by sniffing, taste or touch; an oral award may be effective. But there are of course, good practical reasons, the question of enforceability, for the award to be expressed in proper permanent form. Accordingly, it should be in writing and signed by the arbitrators, whose signature should be attested by a witness, for evidential purposes.'[17]

The question is whether there is a specified form of arbitral award within Islamic Jurisprudence as is the case in modern arbitration laws.

To answer this question, it will be appropriate to quote some modern arbitral articles. For example, The Saudi Arbitration Law stipulates that

'The award document should specifically include arbitration documents, the summary of parties' wordings, their documents, the reasons for the award as well as the issuing date and arbitrators' signatures. If one of the arbitrators refuses or confirms the award, he should prove this deed through the award document.'[18]

The preceding article shows that arbitral awards should have a specific form and must be written. In addition it should include other specified information.

For example ,the German arbitration law stipulates:

'the award should be made in writing and shall be signed by arbitrator or arbitrators.'[19]

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[17] John F. Phillips, Op. Cit. P. 28.
[18] Article, 17.
[19] The New German Arbitration Law 1983, Section 1054 and a number of modern Arbitration Laws, such as Article (527) from the Syrian Trial Origins Law issued by virtue of Decree N° 84 and Civil Issues, 1994. Also LCIA Arbitration Rules, Articles 26-1 and District of Colombia Arbitration Laws, Article 16-4308, Op. Cit. and others.

If it is known that arbitral awards need to be made in writing and if it is also known that written documents become necessary in modern times, then such arbitral awards should undoubtedly be made in writing so as to complement its execution. Therefore, the contents of Saudi arbitration laws and other arbitration laws can be accepted into Islamic Jurisprudence. Consequently, if one wants to execute an arbitral award, the necessary procedures set by law must be followed.

### 4.13.3. Contents of Arbitral Award

In fact, readers of Islamic Jurisprudence books find that the different schools of Jurisprudence have various different components to their decisions when settling an existing dispute. Decisions can be either oral or written.[20]

Judgement award usually includes the following:

1. Preamble: The arbitrator begins his duties in the name of Allah and prayers to his prophet.
2. The name of the arbitrator, his address and the award issuing date.
3. Details of dispute, including names of parties, their characteristics and nationalities. In this respect, Al Tarablussi says: 'The names of the plaintiff and the defendant, both their fathers' and grandfathers' names and the names of any witnesses must all be written.[21]
4. Award reasons: These are the reasons and the grounds, on which the award has been issued which must be clear.[22]
5. Award Result: This is the decision made by the arbitrator in a specific case. This is for the judicial award.

Is it therefore possible to apply to arbitral awards those elements that are normally applied to judgements within Islamic Jurisprudence?

S. Saleh claims:

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[20] Alaadin Altrablussi, Op. Cit. P. 53.
[21] Ibid.
[22] Article 35 of the Saudi Judicial System emphasizes the necessity of clarify award reasons and emphasizes this meaning as does Article No. (42) from The Organizing Administrative Works in the form of Saudi Legislative Constituencies.

> 'The contents of an award do not usually differ from an ordinary judgement.[23]

This opinion would appear to be correct since the contents of judicial awards are similar to those based on arbitral rules. A scrutiny of arbitral issues in Islamic history would show that their awards sometimes include clarification and sometimes do not. For example, Islamic history shows a case between a man v. the Calif Omar bin Al Khatab who disagreed about the purchase of a horse.

Calif Omar bin Al Khatab wanted to consult a man about the purchase of the horse so the man took him on horseback, after which the horse was injured, Omar informed the seller that he had not bought the horse yet. The seller retorted that Omar was now the owner. They agreed to Sharih Al Iraqi as arbitrator between them. They also agreed about the opinion of Sharih AL Iraqi who told Omar that the horse was his property if he had already agreed a price before going with the man on the horse. However, if he was taken on the horse before a price had been agreed then the horse was still the property of the seller. Omar knew that he had lost the case and accepted the final decision.[24]

From the preceding case, it is clear that the arbitrator, Sharih, has clarified the notion of the arbitral award. He said that if the injury occurred after fixing a price for the horse the seller was not responsible. It was possible for the arbitrator to say that the horse was Omar's without giving reasons. Therefore, some Shafii scholars contend that it is necessary to clarify the reasons on which an arbitral award relies.[25]

Nevertheless, a further case is that of Caliph Othman bin Affan v. Talha bin Aabdullah, where a piece of land in Kufa was sold. Othman wanted to renounce the sale, so he claimed that he had the choice since he sold something he had not seen; Talha bin Abdullah said that he had the choice too since he had bought something he had not seen. They had recourse to arbitration and agreed to appoint Jabeer bin Mutiim as arbitrator.

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[23] Samer Saleh, Op. Cit. P. 74.
[24] Case of Caliph Omar bin Khattab v. a man as narrated by Qahtan Dowri; also mentioned by Al Shaabi, Op. Cit. P. 94.
[25] Ahmed Al Ghazali, Op. Cit. P. 370.

The arbitral award went in Talha 's favour.[26] In this case it is noted that the arbitrator gave his arbitral award without clarifying the reasons justifying his decision.

Consequently it could be said that, on the one hand, Islamic Jurisprudence does not require a form or special particulars but only the will of the parties to put an end to their disputes. On the other hand, the President of an Islamic state could advocate a special law [27] or system in appreciation of its benefits.

### 4.13.3.2. Showing the Facets of Agreement between Islamic Jurisprudence and the Current Arbitration Laws

It should be noted here that there is concordance between Islamic Jurisprudence and current arbitration laws since what are included as components of arbitral awards can be accepted in Islamic Jurisprudence. Arbitral awards should be clear,[28] and include essential information to help speed up the execution of the arbitral award.

In practice, in Saudi Arabia, and in all cases of arbitral awards that are considered[29] in the Chamber of Commerce and Industry in Jeddah, it has been noticed that arbitrators usually limit themselves to the requirements of articles (17) and (41) of the Saudi Arbitration Law 1983, and its Implementation Rules of the 1985.

To illustrate this point, there was a disagreement between a Saudi v.a construction company.[30] The parties made a conditional construction contract. The arbitrators in this case made everything clear between the plaintiff and the defendant ; they also clarified the issues of each party. Throughout the arbitration process, arbitrators pointed to a procedural issue related to arbitration on the performance issue of the defendant. The

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[26] Case of the Caliph, Othman bin Affan v. Talha bin Abdullah, mentioned by Ibn Kodamah, Op. Cit. Vol. 11, P.484.

[27] For example, The Syrian Court of Causation in its decision No. 16 dated January 24th, 1983 did not take into consideration the relationship of arbitral award to reason in a family dispute. This is done for the preservation of family unity. See The Magazine of Law issued by The Syrian Ministry of Justice, Issue No. 56 of the year 1983, P. 855.

[28] For example, The Saudi Arbitration Law, Articles 17 and 43, The Egyptian Arbitral Law, 1994, etc.

[29] It is worth mentioning that Saudi arbitral awards are not publicised, which is why they are not aspired to.

[30] In the case of Mr. H.Y.A (S.N.P) v. A. Co. (construction company), The Arbitral Award of the Arbitration Center in the Chamber of Commerce and Industry in Jeddah, was issued on 23-05-1418H /24-09-1997 A.D.

plaintiff said that this condition had pre-existed. The Arbitral Tribunal confirmed that this issue had to be clarified before the subject could be dealt with. They stated:

> '....the Arbitration Tribunal explains that the 5th, 6th and 7th Articles of the Arbitration Law are guiding articles complementing the will of the arbitratees. For this reason, the form of arbitration document is not essential. It is, therefore, not nullified if the parties in question do not adhere to it....'

Additionally, the Arbitral Tribunal emphasizes the necessity of essential information that arbitrators in Saudi Arabia abide by the law of arbitration and its implementation rules which are as follows:

a) <u>The case of A.A. Co. v. E.T. Co.</u>[31]

The two companies disputed the right to use artistic styles and trade marks in the Middle East in return for expenses stipulated by the contact. The defendant company refrained from paying the plaintiff company its due fees and started to deal with other companies, which breached the terms of agreement.

b) <u>The case of T.T. Co. v. T. Z. Co.</u>[32]

When a disagreement arose between an insurance company (the T.T. Co.) and an agricultural company, (the T.Z. Co.), the plaintiff company claimed that it had the right to receive 2.108.610 SR from the defendant company since they had agreed on this sum. But a dispute arose between the two companies when the insurance company (T.T. Co.) asked the agricultural company (T.Z. Co.) to pay the due installments of the insurance, but the agricultural company did not pay on the basis that the insurance contract was not concluded originally and that the matter was a response to a proposal by the insurance company which was not accepted by the agricultural company. The insurance company explained that the insurance contract arose through negotiations between the two

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[31] In the case of A.A. Co. (a commercial company) v. the T.E. Co. (a commercial company) the arbitral award of the Arbitration Center in the Chamber of Commerce and Industry in Jeddah was issued on 27.7.1417.H/8.12.1996. A. D.

parties. After review of the case by the Arbitral Tribunal they found that there was some interlocking between the conclusion of the contract and its cancellation, and it stated that the conclusion of the contract, in view of Article (8) of the insurance policy, included the cancellation of the protection if payment was not effected. In the light of that the arbitration award was issued that each party should bear half the said amount and subsequently both parties accepted the arbitral award of 1.054.350 SR.

From these two cases, it can be seen that the Arbitral Tribunal takes into consideration the required components of the award in a legal sense.

It is undoubtedly helpful to have a clear and complete understanding of all the components of an award for its efficient execution as proclaimed by Saudi Arbitration Law and other local and international arbitration laws. The rationale behind this matter is the achievement of a just and quick dispute settlement.

On the other hand, it has been noted that some arbitration laws leave the parties in dispute free to agree to an arbitral award. However, if they do not achieve a satisfactory result, specific terms can be dictated to them.[33]

At the international level, some arbitration laws stipulate specific requirements for arbitral awards. For example the LCIA Arbitration Rules state:

> 'The Arbitral Tribunal shall make its award in writing, and, unless all parties agree in writing, it shall state the reasons upon which its award was based. The Award shall also state the date when the agreement was made and the seal of the arbitration; it shall be signed by the Arbitral Tribunal or those of its members assenting to it.'[34]

Such statements can be found in Regulations for Mediation, Conciliation and Arbitration Rules in the Centre of Arbitration in Tunis (CCAT) which state:

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[32] In the case of the T.T. Co. v. the T.I. Co. the arbitral award from the Arbitration Center in the Chamber of Commerce and Industry in Riyadh, No. 17.907 dated 05.05.1414 H/1993 A.D.
[33] For example, The British Arbitration Act 1996, Section 52.
[34] The LCIA Arbitration Rules, Articles 26(1).

'The award shall contain the date on which and place where the award was made, the names of the arbitrators who have rendered it, the names of the parties as well as their address....'[35]

The UNCITRAL Arbitration Rules state the same thing:[36]

#### 4.13.3.3. Suggestions as to Contents of Arbitral Awards Within Islamic Jurisprudence

Up to this point, it can be said that there is nothing that could prevent Islamic Jurisprudence from benefiting from the laws discussed above because these laws do not violate general Islamic rules. Thus, arbitral awards within Islamic Jurisprudence may be written and may include the following components:

1. Preamble where the name of Allah and His prophet are pronounced.
2. Arbitration document mentioning the terms on which the parties agree.
3. The names of litigants, their addresses and deputies.
4. Summary of litigants' wording.
5. Summary of litigants' documents.
6. Names of arbitrators, their addresses and characteristics.
7. The presence and absence of parties.
8. Exposing the case events.
9. Exposing parties' demands and defences.
10. Reasons on which the award is based.
11. The final arbitral award should be clearly written.
12. Date of issuing the award.
13. Place of issuing the award.
14. Arbitrator's signature.
15. Proving the incident of an arbitrator refusing to sign the award paper.

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[35] The Regulation for Mediation, Conciliation and Arbitration, Center of Conciliation and Arbitration of Tunis (CCAT) June 23, 1996, Article (25), P. 20.
[36] UNCITRAL Arbitration Rules, Article (32).

The existence of all these components make arbitral awards complementary and clear. Consequently, the concerned authority can execute the award easily.

### 4.13.4. Types of Arbitral Award

When discussing Islamic commercial arbitration, the following question emerges - are there different types of arbitral awards in Islamic Jurisprudence?

#### 4.13.4.1. Types of Arbitral Awards in Islamic Jurisprudence

The answer to this question requires an accurate reading of Islamic Jurisprudence. Concerning arbitral cases in Islamic history, arbitral awards are usually issued as a way of settling an existing dispute.

Nevertheless, there are minor awards relating to the subject of arbitration because the original arbitration contract is an agreement between parties. They may agree with arbitrators or the arbitral tribunal to extend arbitral awards before a final award is declared.

However, concerning judicial awards within Islamic Jurisprudence, it has been made clear that there are many divisions of judicial awards, such as the following:

a) Final awards (the object of the litigation): awards put an end to existing disputes relying on solid evidence.
b) Procedural awards: these awards are issued prior to final awards settling the problems, however, they do not rely on solid evidence when issued.[37]

If this is the case for judicial awards within Islamic Jurisprudence, it can also be applied to arbitral awards, since the award may be the object focusing on the final settlement of the dispute after all the necessary terms of arbitration have been adhered to.

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[37] M. Hashen, Judicial Proceeding and Execution, Op. Cit. PP. 194-5.

On the other hand, an arbitral award may be only procedural focusing on one side of the existing dispute. Therefore, arbitrators or arbitral tribunals may issue awards and call for urgent procedures, such as insisting on observing a subject that bears some relation to the principal subject. When such an award is issued, it is considered as a procedural one.

It is clear now that arbitral awards in Islamic Jurisprudence can be divided into the following:

a) Final objective awards.
b) Procedural awards.

This clarification shows that this division in judicial awards does not differ from the general rules within Islamic Jurisprudence.

#### 4.13.4.2. Attitude of Islamic Jurisprudence Regarding Arbitral Award Divisions in Current Arbitration Laws

In a discussion of the types of arbitral award in Islamic Jurisprudence, the following question arises: what is the attitude of Islamic Jurisprudence towards the existing divisions in current arbitral laws?

To answer this question, it is necessary to discuss these laws. For instance, within Saudi Arbitration Law there is a distinction between types of awards, as follows:

> 'All the awards issued by arbitrators, even if they are issued from investigating procedures, must be left five days to the concerned authority.'[38]

This text shows that Saudi law stipulates that more awards can be procedural, as the text puts it, 'issued from investigating procedures' rather than final awards. There are also some laws specifying other types of arbitral awards, such as the UNICITRAL

[38] Article 18.

Arbitration Rules which state that arbitral tribunals may issue additional, provisional or partial arbitral awards in addition to the final one. The official text puts it as follows:

> 'In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.'[39]

and the British Arbitration Act 1996 says:

> (1) Unless otherwise agreed by the parties, the tribunal may make more than one award at different times on different aspects of the matters to be determined;
> (2) The tribunal may, in particular, make award relating to
> (a) an issue affecting the whole claim, or
> (b) a part only of the claim or cross-claims submitted to it for decision.
> (3) If the tribunal does so, it shall specify, in its award the issue, or the claim or part of a claim, which is the subject matter of the award.'[40]

The same thing is stipulated by GCC commercial Arbitration Rules. The text is as follows:

> 'The Arbitral tribunal has the right to take the necessary initiatives on the basis of a party's demand in what concerns provisional procedures relating to the subject matter. The tribunal follows careful procedures that preserve products, on which conflict is raised.'[41]

It is clear that Islamic Jurisprudence does not contradict these laws and rules since they simplify the task of the parties and tribunal in reaching a final and just award.

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[39] The UNICITRAL Arbitration Rules Article 32 (1).
[40] The New British Arbitration Act, 1996, Section 47.
[41] The GCC Commercial Arbitration Rules 1993, Article 27.

### 4.13.4.3. Extent of Arbitral Tribunal's Competence in Providing Provisional and Preserving Procedures

When discussing the types of arbitral awards issued by arbitrators, it is understood that these include preserving procedures. However, it is necessary to ask what is meant by preserving procedures?

In reality, there is no shared specific definition among countries, due to differences in legal and national systems.

However, they have been defined as a set of procedures taken as a precedent to end the subject matter of dispute, such as signing the preserving seizure on some products exposed to loss.[42]

As shown, arbitral tribunals may take provisional procedures on the request of a particular party. The subject may become more clear in the case of international commercial arbitration. So to what extent do national courts specialize in taking provisional procedures? To answer this question, it is important to distinguish between two hypotheses:

**First hypothesis:** if a party to an international contract requests the judicial authority to take provisional procedures in regard to some products and materials to be preserved from loss, the judicial authority, here, examines this request and orders the concerned authority to take suitable procedures. In this respect, Professor, M. Abdulmajeed says:

> 'The request presented to the judicial authority by a party is not considered by taking provisional procedures contradicting or belittling of an arbitration agreement because this does not affect the arbitration tribunal's original rights, and because the state's judicial authority focuses on the objectives of arbitration neglecting provisional one.'[43]

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[42] Said Araff, Provisional Procedures, Riyadh Commerce Magazine, Issue N. 436, January, 1999, P. 72.
[43] Moneer Abdulmajed, Legal Organisation for International Arbitration, Op. Cit. P. 164.

There is no difficulty in the conflicting parties having recourse to judicial arbitration since the national judicial authority has the monopoly in such provisional procedures.

**Second hypothesis:** One of the parties requests the arbitral tribunal to take such provisional procedures without affecting the subject matter of the conflict.

Is this the arbitral tribunal's responsibility or that of the national authority? In other words, is the arbitral tribunal responsible for taking all procedures when the parties sign the arbitration agreement? Does this mean that an arbitral tribunal settles all the objectives of the existing dispute, i.e. procedural and urgent matters, or, is the national judicial authority's responsibility not affected by adopting these procedures.

Various national laws include texts specifying that the concerned authority should take provisional procedures even if the matter is of specialized national commercial arbitration.

It can be seen, therefore, that there are contrasting viewpoints from those involved, particularly, in international commercial law. There is an opinion that claims that taking provisional arbitration procedures is related to the idea of mandatory execution, which is a matter of concern to the authorities because the mission of an arbitrator or arbitral tribunal is to issue a final award concerning an existing conflict, and not to execute arbitral awards.[44]

The second opinion gives arbitrators the authority to take provisional procedures on the basis of the parties' will because this allows the arbitrator to settle the dispute in question. On the other hand, the arbitral tribunal does not enjoy the authority of obliging the parties to execute provisional procedures. The arbitrator or arbitral tribunal is able to take into consideration that a party refusing to execute the provisional procedures dictated by the arbitration or arbitral tribunal does not have the correct attitude, as shown through a refusal positively to co-operate with it.[45]

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[44] Mouneer Abdulmajed, Op. Cit. P. 166.
[45] Said Arafh, Op. Cit. P. 74.

At the level of international conventions, the 1961 Geneva Treaty stipulates:

> 'requesting provisional procedures directed to judicial authority is not contradictory to arbitration agreement'.[46]

ICSID stipulates:

> 'Nothing in these rules prevents the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to the institution of the proceeding, or during the proceeding sessions, for the preservation of their respective rights and interests.'[47]

Also, it is clear through the following text that provisional proceedings are a matter of the national judicial authority:

> 'It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceeding, from a court, an interim measure of protection and for a court to grant such a measure.'[48]

The list of arbitration procedures from the GCC Commercial Arbitration Center in 1994 stipulates:

> 'the arbitral tribunal has to take necessary measures on the basis of a party's request, taking into account preventive measures on disputed merchandise, such as ordering it to be left with other persons according to procedural rules in the country where the preventive measure is taken'.[49]

It is understood that the arbitral tribunal specializes in taking provisional procedures requested by the dispute parties.However,this GCC list does not mention the potential situation in which one of the disputing parties requests the national court to adopt provisional measures related to the subject matter of the case.

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[46] Geneva Treaty, April 21st 1961, Article 6/4.
[47] ICSID Rules, September 26th 1984, Article 39 (5).
[48] UNICITRAL Model Law. Article 9, also ICC Article 8(5) and Article (4) European Agreement, 1968.
[49] List of Arbitral Measures, GCCC Commercial Arbitration Center, 1994, Article 27.

It seems apparent that the list stipulates generalities existing in most arbitration laws. These generalities allow the parties to request provisional measures without affecting arbitration agreements conducted beforehand.

On the whole, it seems that nothing can prevent a national judicial authority from sharing these procedures with the commercial arbitration. What, in the light of the foregoing, is the attitude of Islamic Jurisprudence to these factors? In other words, to what extent is taking such procedures valid within Islamic Jurisprudence?

In reality, if the general rules of Islamic Jurisprudence are scrutinized, it will be found that the parties in conflict have the freedom to agree to which way the existing dispute should be settled. They may, if they so desire, authorize the tribunal to adopt these measures. On the other hand, arbitration is considered to be of lesser degree than the judicial authority, and it seems apparent, therefore, that it is a matter of judicial authority. Consequently, procedures may be conducted through co-operation between the arbitrators or arbitral tribunals and judicial authority. This, therefore, appears to be a common factor between Islamic Jurisprudence and modern arbitration laws.

## SECTION FOURTEEN

### 4.14. Making the Arbitral Award

After discussing the contents of the arbitral award, its definition, and form, Islamic Jurisprudence and current arbitration laws and their types, this section will discuss the actual process of making arbitral awards through the following:

4.14.1. Deliberation

4.14.2. Choice of Law

4.14.3. Time Limit

4.14.4. Majority Vote

### 4.14.1. Deliberation

If a case is presented to an individual arbitrator, the latter will study the case, examine the evidence and documents and then go to the pleading process. Following this he will issue his personal opinion on the basis of the documents presented, ultimately he will issue his award, thus settling the dispute. In this case, it is hypothesized that the arbitrator will include no other arbitrator nor ask their opinion because the parties have chosen him for his capacity, knowledge and expertise.

However, if an arbitral award is to be issued by more than one arbitrator, (usually an odd number, as stipulated by most arbitration laws) the making of the award is done through deliberation among these arbitrators. After the closure of the pleading session the arbitral tribunal decides whether to deliberate before issuing the final award.

#### 4.14.1.1. Method of Deliberation

This deliberation has to be strictly confidential, attended only by arbitrators, as usually emphasized by arbitration laws. For example, the Executive List of Saudi Arbitration Law of 1985 stipulates:

> 'The moment the case is ready for final settlement, the arbitral tribunal closes the pleading session and goes into deliberation. The latter is conducted confidentially and attended only by the arbitral tribunal treating the pleading'.[50]

LCIA Arbitration Rules state 'the deliberations of Arbitral Tribunals are likewise confidential to its members...'.[51] The GCC List of Procedural Arbitration contends that:

> 'if there are more arbitrators and the pleading session has closed, the arbitral tribunal meets to issue an award in a confidential manner.....'[52]

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[50] Implementation Rules 1985 of the Saudi Arbitration Law 1983, Article 38.
[51] LCIA Arbitration Rules, Article 30 (2).

Since deliberation is confidential, arbitrators may exchange their points of view without external effects since the parties in conflict have exhausted their opportunity to present documents. They cannot take part in the deliberation. When parties choose arbitrators, they are stating that they want their points of view rather than those provided by authorized arbitrators, and the confidentiality of deliberation gives a suitable atmosphere in which an arbitral tribunal can make their final awards.

For this reason, the parties are not allowed to present any documents to the arbitral tribunal during deliberations, the emphasis is now on justice and the neutrality of the arbitral tribunal.

If a party does meet with the arbitral tribunal during their deliberations, this will contribute to the revocation of the award after it has been issued.[53] As already stated, there is concordance between Islamic Jurisprudence and modern arbitration law in this respect.

#### 4.14.1.2. Method in which Deliberation is Conducted

The next step is to discuss the manner in which deliberations are conducted. For example, is it necessary to hold deliberations in the place where an award is to be issued? Islamic Jurisprudence and modern arbitration laws agree on this point - they both state that it is better to have deliberations at the same place as the making of the award with the attendance of all the arbitral tribunal members. In this way, arbitrators can exchange points of view clearly which will allow them to reach conclusions as to the final award.

However, this does not take into account modern methods of passing and collecting information, such as the telephone, fax machines, E-mail, etc. If the objective of the deliberation is to exchange points of view correctly then it seems apparent that such modern means of passing information would seem appropriate and should be taken advantage of. However, this would mean that some members may not be present. In this

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[52] GCC Commercial Arbitration Rules
[53] A. Abu Alwafa, Op. Cit. P. 266.

respect, Islamic Jurisprudence is to some extent in concordance with modern arbitration laws.

### 4.14.1.3. Role of Arbitral Tribunal's Chairman in Deliberation

In any discussion of deliberations, the important role played by the chairman of the Arbitral Tribunal should be noted since the chairman organizes the whole process of the deliberation until a decision as to the final award has been reached.

In short, the role of the chairman of the Arbitral Tribunal is of great practical importance throughout the whole process of deliberation.

### 4.14.1.4. Role of Arbitrator in Deliberations

It is important to talk about the arbitrator because he is chosen by the parties, not as a representative but as a judge who is expected to settle the existing dispute. In this respect John Emmott has said:

> 'It must always be borne in mind that an arbitrator nominated by a party is not considered as that party's representative, but is merely a member of a fair and impartial tribunal seeking justice and truth.'[54]

It has been said[55] that some arbitrators act as representatives of the parties, focusing on the idea that parties in conflict will choose them in the future, because they do not arbitrate against them. In this respect Professor Aktham Kowley said:

> 'Concerning the condition of neutrality and objectivity required in the arbitrator, some writers say the appointed arbitrator must be neutral. But he cannot be completely neutral since he is nominated by a party; in a way he is predisposed to arbitrate for his party because he already knows the subject of conflict and sympathizes with the party

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[54] John Emmott, LCIA Seminan, Jeddah, 24-25 November 1998, P. 10.
[55] Mr Turki Al Shubike (Lawyer) and Mr Saleh Al Koder (Director of Legal Department in Riyadh Chamber of Commerce and Industry) - author interviews 26/8/2000 and 22/9/2000 respectively.

nominating him. So irresponsibility will affect his arbitration process....'

However, he goes on to explain:

'We do not see this opinion as a threat to the system of arbitration since it ignores the nature of judicial role performed by the arbitrator.'

He then asks:

'How do we distinguish between neutrality, which is acceptable in virtue of the original opinion, and bias which is refuted and not acceptable? Moreover, it is not strange to see an arbitrator who has no previous knowledge of the subject in dispute: this is near to the function of the judge's role.'[56]

The opinions of Professor Kowley and John Emmott appear to be correct since the mission of the arbitrator is important and puts to the foreground the finding of justice and the final award.

So what is the attitude of Islamic Jurisprudence in this respect? Does the arbitrator arbitrate positively for the party that nominated him or is there something else?

In fact, the attitude of Islamic Jurisprudence in this respect is compatible with modern arbitration laws. The arbitrator must perform his task in a just and neutral way; he is the judge in this case.

Consequently, Islamic Jurisprudence emphasizes the neutrality of the arbitrator. The arbitrator who arbitrates in the interest of the party nominating him is considered to be a wrong-doer and must be responsible for any damage caused by his unfairness. Additionally, this kind of arbitrator will be severely punished in the life hereafter as threatened by both Allah and His prophets.

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[56] Aktham Kowley, Arbitration Ethics, International Commercial Egyptian Center for Development, Cairo, 1-5 December 1997, P. 97.

In short, an arbitrator should be just and fair during the pleading session and deliberations so as to come to an equitable arbitral award.

#### 4.14.1.5. Refusal of an Arbitrator to Attend the Deliberations

In the case of an arbitrator refusing to attend the deliberations, the following question would arise - what is the attitude of Islamic Jurisprudence in such a case?

It is well known that an arbitrator is obliged to consider the case and take part in deliberations until an arbitral award is issued. If an arbitrator does not attend the deliberations he is considered irresponsible. Islamic Jurisprudence would appear to oblige the absent arbitrator to attend. If the parties do not agree and if the arbitrator continues to refuse to attend another arbitrator is appointed; informing the party of the matter.

However, if this newly appointed arbitrator does not attend the deliberations, another one is nominated after consultation with the party whose arbitrator is absent so as to complement the deliberations and issue the arbitral award.

To some extent this is similar to modern arbitration laws. For example Allan Redfern & Martin Hunter said:

> 'If an arbitrator refuses or fails to participate in deliberations leading to the formulation of an award, the remaining arbitrators normally proceed in his absence, they make the award through a majority vote.'[57]

In modern arbitration laws, the LCIA Arbitration Rules state:

> 'If any arbitration in a three-member Arbitral Tribunal refuses or persistently fails to participate in its deliberations, the two other

[57] See Allan Redfern & Martin Hunter, Op. Cit. P. 377.
[58] LCIA Arbitration Rules, Article 12 (1).

arbitrators shall have the power, upon their written notice of such refusal or failure to the LCIA court, the parties and the third arbitrator, to continue the arbitration (including the making of a decision, ruling or award), notwithstanding the absence of the third arbitrator.'[58]

The 1983 Saudi Arbitration Law stipulates:

'If litigants fail to appoint arbitrators or if any of them fails to appoint an arbitrator or arbitrators, or any one or more of the arbitrators has refused or refuses to act as an arbitrator or has become disabled or has been dismissed, and if the litigants have not agreed otherwise, the Authority having original jurisdiction to consider the dispute shall appoint the necessary arbitrators upon request by expediting litigants providing that it is done in the presence of the other party or if he is absent after he has been invited to attend a meeting to be held for this purpose. The number of arbitrators to be appointed shall be equal to the number agreed upon by the litigants and the decision in this respect shall be final.'[59]

Article (10) states that this is in accordance with the general rules of Islamic Jurisprudence, since the objective of arbitration is speed in conflict settlement.

It has been said [60] that Article (10) of the text of Saudi Arbitration Law stipulates that the concerned authority has to appoint an arbitrator without prior consent of the litigants. This is different from Islamic Jurisprudence, where awards are made on the basis that parties consent to the absence - this forms an essential pillar of arbitration.

The previous opinion appears to be incompatible with Islamic Jurisprudence, it is therefore, possible for the concerned authority to appoint arbitrators if the parties fail to do so on the basis of the following:

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[59] Article 10.
[60] Ahmed Alghazali, Op. Cit. P. 501.

**First:** if there is a clear interest, the president of an Islamic state may apply the necessary procedures through the legislative authority, as stipulated in the clauses of Article (10), as previously mentioned.

**Second:** parties in conflict must be informed beforehand of the award mentioned, before they agree to accept it and not another one, since the text of article (10) comes as an award, it states 'and if the litigants have not agreed otherwise…'

For this reason, the concerned authority appoints arbitrators after obtaining the consent of the parties in conflict because mutual consent is important in legal procedures.

### 4.14.2. Choice of Law

The arbitrator or an arbitral tribunal faces the issue of specifying the law or the legal rules that govern the subject of the conflict when making an arbitral award. This is a basic issue facing the arbitrator or arbitral tribunal for the objective here is to issue a just and final award, Harold Crowter has said:

> 'The case must be decided in accordance with the law chosen by the parties applicable to the substance of the dispute, or in accordance with such considerations as are agreed upon by the arbitral tribunal.'[61]

The parties themselves specify the law applicable to the subject of their dispute. In the light of this the arbitrator or arbitral tribunal issues the final award. The parties may also authorize the arbitrator or arbitral tribunal to apply the law suitable to their dispute including general principals of law and shared commercial conventions.

#### 4.14.2.1. Differences Between Islamic Jurisprudence and Modern Arbitration Laws

[61] Harold Crowter, Op. Cit. P. 127.

What is the attitude of Islamic Jurisprudence on the issue of choosing the necessary law as applied to the process of arbitration?

It seems that there is an essential difference between Islamic Jurisprudence and most modern arbitration laws. The general rule in Islamic Jurisprudence is that within arbitration reference is made only to Islamic Law; in other words referring to Allah's words dictated in the Quran and the prophet's sayings emphasized in the correct Sunna, Consensus and Analogy. From these, essential origins and details of an award are decided.

Redfern and Hunter state:

> '...questions concerning the applicable law do not apply; an arbitration governed by the Shariah is subject to the procedural and substantive laws of Shariah wherever the arbitration is held...'[62]

This type of engagement is not found in most modern arbitration laws. For example, the British Arbitration Act 1996 does not demand that disputes must be decided in accordance with the laws of England and Wales Scotland or Northern Ireland.[63]

However, Egyptian Arbitral Law 1994 stipulates the following:

> 1. The arbitral tribunal applies the rules, agreed upon by parties, to the substance of the dispute. If the parties agree about certain rules of a country, those chosen rules are applied to the substance of the dispute and not other rules not agreed upon by litigants.
>
> 2. If the parties do not agree about the legal rules that must be applied to their subject, the arbitral tribunal applies the most lawful objective rules having relation to the core subject of dispute.[64]

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[62] Alan Redfern & Martin Hunter, Op. Cit. P. 110.
[63] Harold Crowter, Op. Cit. P. 127.
[64] Article (39).

Some countries distinguish between the issue of choosing the applicable law between two litigants of the same nationality or a different one and consider the government as a party of arbitration. For example, Iranian substantive law is applied to all transactions entered into by the Iranian public sector concluded in Iran, but in certain instances, foreign law is accepted in cases of private sector transactions. If a contract between an Iranian and a foreign corporation has been concluded in Iran, the proper law of contract will still be Iranian.[65]

The Jordanian law is nearly the same as that of Iran since a special law is reserved for foreign award execution. This is Law (8) of 1952, and the General Arbitration Law (18) of 1953.[66] In short, it is clear that modern arbitration laws have given freedom of choice to the parties in dispute.

What is meant by Islamic law must now be clarified in reference to the award of Islamic Jurisprudence with no digression from the Islamic rules. In other words, there are forbidden issues within Islamic Jurisprudence and reference to a law allowing these forbidden issues is not permitted.

For example, when discussing the pillars of Islamic Jurisprudence, it was concluded that the subject of arbitration must belong to the issues and that the subject of arbitration must belong to the issues that may be referred to arbitration in accordance with Islamic Jurisprudence.

For instance, usury is forbidden in Islamic Jurisprudence. If a disagreement appears in a commercial contract involving usury, reference cannot be made to any law allowing the exercise of usury because the latter is forbidden within Islamic Jurisprudence. However, it must be realized that Islamic Jurisprudence does not prevent individuals from choosing laws solving their existing disputes on condition that these laws do not contradict those of Islamic Jurisprudence.

It can be seen then, that Islamic Jurisprudence leaves wide scope for parties to choose suitable rules to settle their disputes of commercial or of any other nature. However,

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[65] S H. Amin, Op. Cit. PP. 155-156.

[66] George Hzbon, Foreign Arbitration, Journal of Law, Published by faculty of Law Kuwait University, Vol. 11, December, 1987, P. 75.

once again, the arbitral award should not differ from those allowed by Islamic Jurisprudence. For example, generally speaking, Sheikh Abdulaziz bin Baz has said:

> 'If there exists a system or a law in accordance with the Islamic Jurisprudence in whatsoever legal issue, there is no harm in countries providing laws from which people benefit on the condition that these laws are in accordance with, or do not contradict, Islamic Jurisprudence.....'[67]

From this it can be seen that the final award must comply with awards of Islamic Law. In brief, the arbitrator or arbitral tribunal, at the time of deliberation and in making an arbitral award in an Islamic country, must take into consideration the fact of not choosing a law or legal rules which can be questioned.

### 4.14.2.2. Attitude of Saudi Arbitration Law

When talking about this important point concerning the differences between Islamic Jurisprudence and most modern arbitration laws as regards the choice of law, i.e. that awards must be in accordance with the awards of Islamic Jurisprudence, it has previously been stated that the arbitrator or arbitral tribunal should take into account the place where the arbitral award is applied, such as in the case of Saudi Arabia.

For this reason, this sub-section will include the attitude of the Saudi Arbitration Law which appears to be in accordance with the awards of Islamic Jurisprudence. This is emphasized by general Saudi Laws which also conform to Islamic Jurisprudence.

The Saudi Arbitration Law 1983 does not mention this aspect. It stipulates that the award should not differ from the awards of Islamic Jurisprudence so as to allow the award to be executed in the Kingdom of Saudi Arabia. The text is as follows:

> 'The award of the arbitrators shall be executed when it has become final pursuant to an order by the authority having original jurisdiction

over interested parties after ensuring that it is not contrary to Islamic Jurisprudence principles.'[68]

The Rules of Implementation 1985 of the Saudi Arbitration Law1983 provides:

'.....arbitrators shall issue their awards without being bound by legal procedures except as provided for in the arbitration law and its rules of implementation. Awards shall follow the provisions of Islamic Shariah and the applicable regulation'.[69]

From these articles it is possible to say that the attitude of Saudi Arbitration Law focuses on the final results of arbitral awards that must not be contrary to Islamic Jurisprudence .

These are the aricles of law, but how about the practicality of applying them?

It has been said[70] that rules applying to arbitration in Saudi Arabia is Saudi Law whether arbitration is national or international. In this case, award executions made in Saudi Arabia take into account the public order of Islamic Law.

This opinion requires emphasis on many areas, as follows:

1. Saudi Arbitration Law Articles and Rules of Implementation provide that arbitral awards should not contradict Islamic Law and must be acceptable for implementation in Saudi Arabia. These are clearly articles leading to awards the final results of which must comply with Islamic Law.
2. The Saudi Arbitration Law and its Rules of Implementation do not limit the arbitrator or arbitral tribunal's choice of suitable laws for the existing dispute taking into account the Islamic Jurisprudence principals.

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[67] A senior Islamic world scholar, Abdulazie bin Baz, Islamic scholar and Chairman of Senior Scholars Authority and President of Scientific Research Administration, (died 1999), Muslims Magazine, Issue 813 on 22/08/1411H/1990 A.D. P. 3.
[68] Article (20).
[69] Article (20).
[70] Abdul Hameed EL Hadab, Op. Cit. P. 646 and Dr. Abdulfatah Murad Arbitration Legislations, 1st Edn., Cairo, 1992, PP. 49-50 and S.H Amen, Op. Cit. P. 155.

3. Proving that the arbitral award is not contradictory to Islamic Law depends on the lawyer's skill or his understanding of Islamic awards and his ability to follow the legal procedures stipulated by law and rules of implementation.
4. The novelty of the Saudi Arbitration experience and reference to arbitration outside Saudi Arabia does not mean the concept of applied law, but rather the fame and history of world arbitration centers which have an important role in attracting businessmen to settle their commercial disputes in these famous centers. So distinction should be made.

On the other hand, Abdulhameed El Hadab does not appear to be correct in his assumption that in this respect:

> 'in certain cases, the notion of public order has been defined in a very extensive manner often stating that an arbitration made abroad which applies a foreign law is contrary to public order ipso facto....'[71]

This is, in fact, not accurate and needs to be clarified. The concept of the public order of Islamic Jurisprudence is clear and governed by Islamic Law provisions relying on the Quran, Sunna, Consensus and Analogy. To say that arbitration taking place outside Saudi Arabia, where a foreign law is applied, is contrary to the Saudi general system cannot be accepted on the basis of the following:

a) Saudi Arbitration Law does not stipulate this.

b) the attitude of Islamic Jurisprudence accepts and has room for modern legislation, both internal and external, which above all must not contradict the general principles of Islamic Jurisprudence.[72]

Refusing arbitration because of its external origin is not required by Islamic Jurisprudence. Arbitration may be accepted, whether it is external or internal, provided that it is not contradictory to Islamic Law. This fact is already stipulated in Saudi arbitration law.

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[71] Abdulhameed EL Hadab, Op. Cit. P. 646.
[72] See page 184, Supra.

In short, it is understood that arbitration that takes place outside Saudi Arabia does not breach the general system but can be considered as contradictory to the general system if the arbitral award includes an element contradicting Islamic Jurisprudence.

It would appear that the orientation of Saudi Arbitration law in this respect is to be recommended since it allows the arbitrator or arbitral tribunal to choose the most suitable rules to settle the dispute presented to them taking into consideration the Islamic characteristics of arbitral awards.

Dr. M. Coman has said:

> 'Among the important dangerous issues related to the effectiveness of arbitral awards issued from an International Commercial Arbitration Center is the fact of not taking into account the country where arbitration implementation is taking place, especially in the case of an Arab Islamic country'.[73]

However, if acknowledging an arbitral award and its implementation leads to contradicting the general system, the concerned authority may refuse the award.[74]

It is worth mentioning that finding violations against the general system is done through the New York Convention of 1968 with reference to the required law in a specific country that acknowledges any awards and executes them.[75]

This emphasizes what has already been stated concerning the necessity for the arbitrator or arbitral tribunal to have knowledge of the dimensions of arbitration through mastering the concept of the general system applicable in a specific country. This also emphasizes the importance of knowing Islamic arbitration award systems, especially those of a commercial nature. A clear explanation of such awards with a reliable reference to their arbitration and reference to arbitral tribunals at the phase of preparing

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[73] Dr. M. Coman, International Commercial Arbitration, Markets' Magazine, Issue N° 47, October 1998, P. 32.
[74] R. Dowas, Inspection Arbitration of Arbitral Awards, Public Administration Magazine, Volume 35, No.3, December 1995, P. 490.
[75] The New York Convention, 1958, Article, 2(5).

an arbitral award in the Kingdom of Saudi Arabia and other Islamic countries which apply the Islamic Sharia will be given.

#### 4.14.2.3. Importance of Widening Arbitrators' Horizons Especially in International Commercial Arbitration

It seems that the choice of law that must be applied creates crises in the face of international commercial arbitration. It has been noticed that focus is put on national laws of industrial countries and some of the international concepts they originate.

With national arbitration, it is not unusual for an arbitrator to be familiar with the law of his country, but also at the international level, there must be assurance that arbitrators are very open to what concerns international commercial arbitration. Especially when litigants or companies are from Islamic countries, arbitrators or arbitral tribunals must seek truth and justice at all costs.

In this respect, a famous Islamic arbitrator has said:

> 'It is often felt that the legal culture of Arab countries is ignored in International arbitration.'[76]

This feeling should disappear once all countries acknowledge that arbitration serves people with justice, and that traditions and conventions of different countries must be taken into consideration, especially if these countries have dimensions of faith and legislation such as those found within Islamic Jurisprudence.

This last represents religion and law for Islamic countries and is not the same as regulations applied in certain other Arab countries. Professor Lalve claimed:

> '...International arbitration must show proof of a comparative mind, open to legal pluralism, to various cultures and various political and social systems.'[77]

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[76] Abdulhameed EL Ahdab (Chairman of Arab Association for International Arbitration, the seminar for the "Practice of International Arbitration", Oxford, July 13, 1999, P. 2.

In this respect Yasuhei Taniguchi has stated:

> 'International business society does not belong to any pre-existing national society. The method of dispute resolution in this society should be independent of any national system. Arbitration must not be a private replica of the national court procedure.
> Arbitration aims at what most national courts cannot achieve. There are limitless possibilities. It is here that eastern and western traditions can be welded together to serve a novel system of dispute resolution to serve a truly international business community. It is fair to say that some steps have already been taken in this direction.'[78]

In reality it must be emphasized that people currently are trying to find mechanisms and rules for the understanding that should take place between international legislatures since the world witnesses today great openness through international treaties, such as those engendered by the World Trade Organization (WTO).

As we have seen, little has been written to clarify the attitude of Islamic Jurisprudence towards commercial arbitration. It is therefore necessary to discover and understanding the similarities and differences between Islamic commercial arbitration and mdern arbitration laws. It is hoped that this study will be considered a stepping stone into finding shared arbitral rules which are widely accepted, as already mentioned in the introduction to this thesis.

Various Islamic Arab countries are reforming the formula of their different legislations to accord with Islamic Jurisprudence. Fact-finding visits are taking place between countries. A case in point is that of the regulations provided by the World Intellectual Property Organization (WIPO) and the Cairo Provincial Center of International Commercial Arbitration, since scholars of Islamic Jurisprudence were called upon to contribute to dispute resolutions and to find ways to prevent problems from arising.[79]

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[77] Quoted in Alan Redfern, Martin Hunter, Mary Smith, Op. Cit. P. 216.

[78] Yasuhei Taniguchi, The Changing Attitude of International Commercial Dispute Settlement in Asia and the Far East, Op. Cit. P. 75.

[79] AL Muslimoun New paper, Issue No. 685 dated 23-11-1918 H/1998 A.D. P. 16.

For instance, efforts have been made by Prince Dr .Bandar bin Salman Al Saud, Secretary General and General Secretariat Assistant to Arab Arbitration Centers, who has developed various strategies. His main endeavors have been aimed at getting international tribunals to acknowledge Islamic Jurisprudence so as to contribute to international arbitration and clarify their awards.[80]

Arbitration centers have also made great efforts in this area. It has been agreed that there are many appellations given to international commercial arbitration principles, among which we find Lex Mercatoria,[81] general principles, Lex Fori and others which have been taken into account by arbitral tribunals so as to find final resolutions to existing disputes. The rationale behind this is to save international business from the problems caused by differences in laws but to retain the necessity of resolving disputes through suitable laws.[82]

As already mentioned, some arbitrators depend on invoked 'general principles' without reference to any choice of law rules expressly in order to stress the importance of contractual stabilization, as shown in the Libyan American Oil Company v. the Government of the Libyan Arab Republic.[83]

It is clear that arbitrators have an important role in choosing the applicable law. Redfern and Hunter were correct when they said:

> 'Where the arbitral tribunal is to consist of three arbitrators, at least one member of the arbitral tribunal (preferably the presiding arbitrator) should be a lawyer or at least a qualified arbitrator, having studied arbitration law'.[84]

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[80] See, H.H. Dr. Bandar bin Salam Al Saud seminar in "The practice of International Arbitration" Oxford, July 31, 1999.

[81] See Stephen J. Toope, Mixed International Arbitration, Grotius Publication Limited, Cambridge, 1990, P. 90 and Virtus,Chitoo Igbokwe, Developing Countries and the Law Applicable, P. 107, also Jonathan Hill, The Law Relating to International Commerce Disputes, Lloyds of London Press Ltd. 1994, P. 485 and M. Mustill and S. Boyd, Op. Cit. P. 80 and Michael John Mustill, Arbitration: History and Background, Journal of International Arbitration 6, 1989, P. 51.

[82] Abu Zaid Radwan, International Commercial Arbitration, Conference, organized by Egyptian Arbitral Tribunal, 14-19th September 1996, P. 13.

[83] Libyan American Oil Co. v. the Government of the Libyan Arab Republic, decision 12th April 1977. See International Legal Materials, 1981, 20, P. 42.

To this should be added the consideration that if arbitration is related to an Islamic country or company, the arbitrator or arbitral tribunal must have good a knowledge of Islamic Jurisprudence principles.

### 4.14.2.3. Discussion of Various Arbitral Awards Related to Islamic Jurisprudence

In reality, the purpose of this section is not to give details about these arbitral awards. Rather, it has been designed to show the attitude of Islamic Jurisprudence towards various arbitral issues where it has been claimed that Islamic Jurisprudence is incomplete. This statement has led some people[85] into believing that theories, such as 'Lex Mercatoria' and other expressions, are a means of doing without national arbitration principles, thus allowing arbitral tribunals to proceed with their own familiar methods. This undoubtedly represents a threat to arbitration, especially international commercial arbitration. As previously mentioned, the arbitrator should be knowledgeable and should understand the regulations and traditions of other countries.

The attitude of Islamic Jurisprudence can be shown through the following cases:

a) The case of Petroleum Development Ltd. v. The Sheikh of Abu Dhabi.[86]

The sole arbitrator, Lord Asquith of Bishopstone, gave the arbitral award, issued on August 28th, 1951, which was given in accordance with the opinion of the arbitrator who refused the municipal law of Abu Dhabi. The gist of his award was based on the following :

> 'It would be fanciful to suggest that in this very primitive region, there is any body of legal principles applicable to the construction of a modern commercial instrument.'[87]

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[84] Alan Redfern and Martin Hunter, Op. Cit. P. 206.
[85] Nader Ibrahim, Trans International Rules Center to International Commercial Arbitration, Alexandria, 1998, P. 175, see also Abu Zaïd Ramadan, Op. Cit. P. 14.
[86] Petroleum Development Ltd. v. The Sheikh of Abu Dhabi, 1951, 18 I.L.R. International Law Report, Butterworth & Co. (Publishers) Ltd., London, 1957, P. 144.
[87] Ibid. P. 149.

The arbitrator said that the parties agreed to apply the shared principles known to civilized nations. Thus he took the example of English law because the latter represents the general principles in civilized countries.

The attitude of Lord Asquith rested on the fact that there were few modern books clarifying the awards of Islamic Jurisprudence. This may be correct, but there are experts in Islamic Jurisprudence who could simplify Islamic awards. Counsel and advice could be taken from these experts for arbitral award decisions, such as the in the above mentioned case

b) The case of the Ruler of Qatar v. The International MariCompany.[88]

The arbitrator, Sir Alfred Bucknill said that Islamic law is applied in the Qatar State but it 'does not contain any principles which would be sufficient to interpret this particular contract.'

The arbitrator therefore applied general principles to the case. Sir Bucknill said that Islamic Jurisprudence did not include enough principles that could be applied to that particular contract.

So, to what extent was Sir Bucknill familiar with the principles of Islamic Jurisprudence?

It would be surprising to hear an Islamic Jurisprudence specialist talking about French and British Law whilst, in fact, knowing nothing about them. This would not be acceptable simply because French and British Laws cannot be ignored. This can also be applied to the arbitrator in the Qatar state case mentioned above. The peculiarity of this matter lies in the arbitrator consulting Islamic experts, Mr. Anderson and Professor Millito, who clarified some terms of the Arabic language used in the contract and other matters in the case.[89]

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[88] The case of the Ruler of Qatar v. International Oil Company ( 1953 ), 20 ,International Law Report,I.L.R. Butterworth & Co. publishers Ltd. London,1957,P. 534 .
[89] Ibid, P. 544.

There is no doubt that the arbitrator, Sir Bucknill showed wisdom in not judging Islamic Jurisprudence as incomplete, and in using other specialists. Nevertheless, the general approach to Islamic Jurisprudence was inaccurate, regardless of the advice of previous scholars. The principles of Islamic Jurisprudence are comprehensive, applicable to all new cases through the stability of its legislative origins and the possibility of drawing analogies between new cases and fixed legislative origins. As previously mentioned, in the case of Abu Dhabi, there is a lack of writing in Islamic Jurisprudence at the present time, but this does not mean that Islamic Jurisprudence is incomplete.

c) The Case of Saudi Arabia v. Arabian American Oil company (ARAMCO).[90]

The (ARAMCO) case is considered to be among the most famous cases in Arab arbitration since the dispute arose when the Saudi government requested ARAMCO to comply with the previous rulings of a Saudi Decree under which the 'Onassis agreement' came into force. This agreement was for thirty years and gave A.S. Onassis the right to incorporate in Saudi Arabia a private company under the name of the Saudi Arabian Maritime Tankers Company (SATCO). It contained reciprocal obligations for both parties, e.g. SATCO had to provide tankers with a minimum tonnage and, it was understood, create a Maritime School in Saudi Arabia. SATCO finally undertook to pay the Saudi government one shilling and six pence for each ton transported aboard.

The dispute between the Saudi Government and ARAMCO centred on Article 4 of the Onassis agreement, which provided that 'SATCO has a right of preference for transport of petroleum and its deviate products exported by sea from Saudi Arabia to other countries whether these products were changed in a Saudi Port or from pipeline terminals outside the kingdom and whether they are made by the concessionaire company itself or its subsidiaries or buyers;' ARAMCO refused to apply the provision of the Onassis Agreement and stated that the concession which had been granted to it in 1993 entitled it to choose unilaterally the necessary means of transport, including foreign tankers. Saudi Arabia then proposed to refer the dispute to arbitration after ARAMCO agreed to an arbitration agreement which provided, in Article (4), that the arbitral tribunal would settle the dispute:

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[90] The case of Saudi Arabia v The Arabian American Oil Company (ARAMCO), (1963), 27, International Law Report, P. 117 and PP. 162-163. See also Abdulhamed ELAHADAB, Op. Cit. PP. 599-600 and Abu

i) In compliance with Saudi law indicated in the agreement (namely the Islamic Sharia according to the Hanbali School) if the disputed questions were not within the jurisdiction of Saudi Arabia

ii) In compliance with any law the arbitral tribunal deemed applicable if the disputed questions were not within such jurisdiction.

The award made by the arbitral tribunal held that the law applicable to the concession contract was Saudi Law i.e. Islamic Sharia, but when the arbitral tribunal applied this law, it noted - 'The legal system of concessions is still in embryo form in the schools of Muslim Fiqh even though the totality of the principles laid down by the different schools of Fiqh (Islamic Jurisprudence) would be sufficient if one takes the initiative to collect and unify them in order to lay down the basis of a petroleum law. However, this is beyond the jurisdiction of the arbitral tribunal which has a judicial and not a legislative role.

Moreover, the Hanbali school of Jurisprudence, as applied in Saudi Arabia, contains particular rules which define mining concessions in general and petroleum ones in particular. Thus, the arbitral tribunal held that the applicable law (Saudi Law) was not sufficient and that it should be complemented by other sources of law. The arbitral award was in ARAMCO's favour.

As previously mentioned, there is no intention here to discuss these cases nor the awards issued, their importance is to clarify the fact that choosing the applicable law is still considered to be one of the crises facing international commercial arbitration, pushing an arbitrator to take into account national legislations, especially if it has a particular history as in the case of Islamic Jurisprudence.

It seems that the arbitral award mentioned in the case of ARAMCO was not valid since it discarded the Saudi law and did not include ways to solve the existing crisis. It should be pointed out that the inability to infer awards of jurisprudence from their origins does not necessarily mean that they are non-existent, as with an old adage 'Not knowing

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Zaid Radwan, Op. Cit. P. 17 and Gasemi Abdulhamed, Arbitration, Journal of Arab Arbitration, Vol. 1, May 1999, P. 132.

something does not mean its non-existence'. In other words, if a person does not know of the existence of a small African or Latin American country, this does not mean that the country does not exist, only that the knowledge of the person is limited.

Islamic Jurisprudence principles can be relied on for their flexibility and validity in all cases. Furthermore, its origins are stable and its branches facilitate its reaching suitable awards in new cases. This can be done through analogy and Islamic Jurisprudence inference.

There is an independent study called the 'origins of Islamic Jurisprudence', which includes rules and origins, written in books approximately 1300 years old, enabling an individual to reach original awards for applications on particular facts. The aim is not to accept the fact that Islamic Jurisprudence is lacking in sufficient principles in a particular subject. On the other hand, benefit can be drawn from international laws and modern theories on condition that they do not violate the principles of Islamic Jurisprudence. The arbitrator or arbitral tribunal has to issue an award which does not breach Islamic law.

In the light of the foregoing, it is possible to agree with Stephan J. Joope (and others) who have claimed:

> 'In the absence of specific direction, an arbitrator would be confronted with the following choices which could be applied, either singly or, when not mutually exclusive, in combination:
>
> a) the national law of the state party;
> b) the national law of the state of the foreign private party;
> c) the national law of another 'neutral' state;
> d) more than one system of national law or the principles common to more than one system;
> e) a national law in combination with general principles of law such as 'good faith' or 'justice';
> f) a national law in combination with international law;
> g) more than one system of national law in combination with general principles or with international law;

h) the general principles of law recognized by civilized nations;

i) international law;

j) general principles and usage of international commerce; i.e. Lex mercatoria.'[91]

As previously mentioned, arbitral awards must comply with the awards of Islamic Jurisprudence so as to be accepted and executed in Islamic countries. Therefore the arbitrator or arbitral tribunal should take into consideration the Islamic system

What has been said so far is not intended to create more enthusiasm for Islamic Jurisprudence ,but is, in fact the reality of Islamic Jurisprudence which contain all the necessary requirements. Eenthusiasm for national laws, , may not be beneficial for developing countries especially for example in the field of technology transfer. These laws need to be developed to go hand in glove with international modern affairs.

Some developing countries are enthusiastic in applying their national law to contracts concluded with other countries, including technologically developed countries, believing their national identity would be safeguarded. These developing countries have suffered greatly from spending huge amounts of money on reliable laws. However, it is not sufficient to adhere only to national laws. There are more accurate foreign laws which preserve the rights of both the contracting parties. For example, Article (165) of Egyptian Civil Law stipulates:

'If the individual proves that damage is due to a foreign reason, such as an unexpected event or a force majeure, he is not entitled to make good that damage if there is no agreement to do otherwise.'

This raises questions in the field of specifying the concept of 'foreign reasons' that make the execution of adherence impossible, such as the case of technology transfer for the criterion of specifying this reason as different.

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[91] Stephen J. Joope, Op. Cit. P.62.

It should now be considered whether the providing party should pay compensation to the other party if a new product appears in the field of technology to replace that which the contracting parties have agreed on. If the answer is 'yes', the developing country will sometimes be deprived of indemnity notwithstanding the damage that may ensue.[92]

Consequently, it is clear that adhering to national law is not always in the interest of developing countries. Islamic Jurisprudence differs from Egyptian Civil law because articles of law are fixed and stable, whereas, legislative origins in Islamic Jurisprudence are flexible according to knowledge of Islamic Jurisprudence.

### 4.14.3. Time Limit

Making an arbitral award is among the most important things that an arbitrator or arbitral tribunal must be aware of and should be closely regarded. The arbitrator should take into consideration the time limit agreed upon, either on the part of litigants or on that of arbitrators themselves. This fact is taken into consideration by both Islamic Jurisprudence and modern arbitration laws.

#### 4.14.3.1. Attitude of Islamic Jurisprudence

Islamic Jurisprudence has given freedom to arbitratees or arbitrators to agree on arbitration time limits in which an arbitral award can be decided. This depends on the will of litigants and the complexity of the subject matter. It is generally understood that the length of time spent in arbitration is very important. It should be as short a time as possible. According to the Hanafi School, the arbitrator should issue the award within the set time limit so as to close the litigants' dispute. The Judicial Rules Code stipulates:

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[92] Sameh Gilowbi, The Extent of Applying National Law, Advanced Training Course in International Commercial Arbitration, sponsored by Lawyers' Arab Union, Al Ghardaqa City December 1-5, 1997, P. 158. This states that Italian law stipulates the possibility of resetting contracting terms until litigants have reached a satisfactory solution.

> 'Justice is limited to time and space except for some disputes. If an arbitrator has to issue an award within a year, he should do it in that same specified time, not before and not after.'[93]

An analogy could be made between arbitration and judicial authority as mentioned in the previous article. It is known that it may be specified by a limited time, this is on the one hand, on the other, the Judicial Rules Code stipulates:

> 'if an arbitrator sets a month for issuing an award, he must issue it in a month exactly, not after the expiration period of that month....[94]

It is also obligatory, within Islamic Jurisprudence, to execute the contract agreed upon within the time limit specified by the arbitrator unless there are reasons which make delay of the award unavoidable, which confirms the concordance with modern laws.

### 4.14.3.2. <u>Clarifying Concordance between Islamic Jurisprudence and Modern Arbitration Laws within a Time Limit</u>

As previously mentioned, there is concordance between Islamic Jurisprudence and modern arbitration laws as concerns the time limit specified to issue an arbitral award. For example, the Saudi Arbitration Law of 1983 in Article ( 9 ) stipulates:

> 'The dispute shall be decided within the period to be fixed by the Arbitration Board unless otherwise extended. If the litigants have no fixed date for decision of the dispute in the Arbitration Document, the arbitrators shall pass their award within ninety days from the date of approval of the Arbitration Document. Otherwise, any of the litigants may bring the matter to the attention of the Authority having original jurisdiction to consider the dispute to decide whether to consider the dispute or extend the period.'

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[93] Article 1801 from Judicial Rules Magazine, The Encyclopaedia of Legislations and Regimes, Op. Cit. P. 1171.
[94] Article 1846 from Judicial Rules Code, Op. Cit. P. 1173.

This Article makes it clear that Saudi arbitration law takes into consideration a time limit within which to issue arbitral awards. This is compatible with the objective of arbitration, which is the speeding up of dispute settlement and the avoidance of the normal judicial authority. The period of ninety days is considered sufficient for the deliberation of arbitral tribunal members.

Through careful perusal and deep consideration of this Article, it can be seen, perhaps surprisingly, that it opens the door for an extension to the arbitration period, summed up as follows:

> 'Otherwise, any of the litigants may bring the matter to the attention of the Authority having original jurisdiction to consider the dispute to decide whether to consider the dispute or extend the period.'[95]

Here, the litigants do not specify a specific time and the arbitrator or arbitral tribunal does not issue the arbitral award within ninety days. Hence, the following notes appear:

a) The previous Article does not clarify a specific period that the concerned authority should decide upon when issuing the award.
b) The previous Article gives the concerned authority the validity to treat the core of the subject matter.
c) The Article does not leave the choice for arbitrator or arbitral tribunal to extend the period of issuing the award. The concerned Authority has the validity to act once ninety days have expired.

It could be said that the concerned authority does not itself take the initiative to act by virtue of Article (9), but acts on the basis of litigants' demands. Therefore, the concerned authority may examine the reasons for a delay whilst preserving its validity in treating the subject or extending the award period.

The GCC Arbitration Rules stipulate:

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[95] Article 9.

'If arbitrators are numerous, the award has to be decided by consensus or majority vote. In any case, the arbitral award should be issued within a period of time not exceeding one hundred days from the date of submitting the case to arbitration except when the litigants agree on another period.[96]

ICC Arbitration Rules stipulate:

> 'the time limit within which the Arbitral Tribunal must render its award is six months...'[97]

The Oman Arab Treaty for Commercial Arbitration agrees with this time limit, it says:

> '....arbitral award is issued by agreement or majority vote within a maximum period of six months from the date of submitting the file to the arbitration tribunal.'[98]

This was also adopted by the French Law of Pleading which stipulates that only three months are specified to issue the final award.[99]

Regarding the final award, the British Arbitration Act 1996 does not give a specific time for its issue but leaves it to the litigants and arbitral tribunal agreement.[100]

Florida State Arbitration Law states:

> 'An award shall be made within the time fixed thereto by agreement on provision of arbitration or, if not fixed, within such time as a court may order on application of a party to the arbitration....'[101]

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[96] GCC Arbitration Rules, Article 81.
[97] ICC Arbitration Rules, Article 81.
[98] Oman Arab Commercial Arbitration Agreement accredited by Arab Ministry of Justice Issue No 8/2, dated 14/4/1987, Article 31(2).
[99] Article 1007, extracted from French Law of Pleading, Wala Refat, op.cit, P.182.
[100] Section 50.
[101] Florida State Arbitration and Mediation of Arizona, Nevada and New Mexico. See also Alexander H. Beran, Op. Cit. P. 115.

Some arbitration laws give the arbitral tribunal the validity to set a deadline for award decision making, such as the Arbitration Law in Arizona, Nevada and New Mexico, which states:

> '...The arbitrator shall have full authority to determine the actual length of the arbitration, the relevancy of testimony and evidence, the need for site inspection, the need for a pre-hearing, discovery, motions, etc...'[102]

This discussion has shown that Islamic Jurisprudence has room for all these diverse arrangements. It allows the parties to determine a specific time within which a final award is decided and allows a legislative authority to specify the time of award making. This proves that Islamic Jurisprudence conforms to all modern arbitration laws. It seems that determining a specific time to make awards gives the arbitrator or arbitral tribunal the opportunity to consider the case fairly and quickly. In this respect British arbitration is designed to obtain a fair resolution to a dispute by an impartial tribunal without unnecessary delay or expense.'[103]

In brief, the idea of a time limit in award making is closely observed both by Islamic Jurisprudence and modern arbitration laws.

### 4.14.4. Majority Vote

Majority voting is another important area of arbitral awards when more than one arbitrator is required. It seems to be apparent that arbitrators reach a final unified decision through consensus but, in fact, this is not usually the case[104] since arbitrators may well have different opinions. As previously mentioned, there may be a plurality of arbitrators in Islamic Jurisprudence[105] since this is often the best way to issue an award quickly and efficiently. Most modern arbitration rules advocate a majority vote in cases where there is no consensus to issue an award. For example, the Saudi Arbitration Law of 1983 states:

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[102] United States Arbitration and Mediation of Arizona, Nevada and New Mexico. See also Alexander H. Beran, Op. Cit. P. 115.
[103] The British Arbitration Act 1996, Article, 1(b).
[104] Saleh Alkoder law consultant, author interview 22.9.2000.
[105] See Chapter 2, 2.7.5.1., supra.

'The award of Arbitrators shall be passed by a majority.'[106]

LCIA Arbitration Rules stipulate:

> 'where there are three arbitrators and the Arbitral Tribunal fails to agree on an issue, the arbitrators shall decide that issue by majority....'[107]

From above, it can be seen that there is concordance between Islamic Jurisprudence and modern arbitration laws in this respect.

## SECTION FIFTEEN

### 4.15. Conditions of Arbitral Award Corrections

After discussing the form and components of arbitral awards and gaining an understanding of the method of making them, i.e. through deliberation and choice of the necessary applicable law, this section will be based on the validity of arbitral award corrections from the perspective of Islamic Jurisprudence.

Knowing the conditions of arbitral award validity is of vital importance because, if the award issued is valid, it has gained its objective and should be applied to the case in hand. It becomes necessary to discuss what the required conditions are for their validity within Islamic Jurisprudence.

In reality, there are many conditions in books of Jurisprudence. Some scholars have discussed the issue through looking at arbitration agreements, others have considered the issue of the satisfaction of the parties involved and their acceptance of arbitral awards within the limits of Islamic Jurisprudence. Various conditions will be presented that guarantee the validity of arbitral awards from the perspective of Islamic Jurisprudence.

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[106] Saudi Arbitration Law 1983, Article 16.
[107] ICIA Arbitration Rules, Article 26(3). UNCITRAL Arbitration Rules Article 31(1) also Model Law 1985, Article 29 and GCC Commercial Arbitration Rules, Article 31.

### 4.15.1. First condition - Award Should Be Concordant With the General Rules of Islamic Jurisprudence

Schools of Islamic Jurisprudence generally agree that arbitral awards should conform to Islamic Law known as the Quran, Sunna, Consensus and Analogy. If the arbitral award differs from one of these it will not be executed, and will be considered as null and void.[108]

For example, if two individuals play the lottery, and, as is known, the lottery is forbidden within Islamic Jurisprudence, if then a disagreement arises between them and the case is presented to arbitration, if the arbitrator gives the right to one of the litigants to win the forbidden money, his arbitral award is considered as nullified because the lottery is forbidden within Islamic Jurisprudence.

The Judicial Rules Code states :

> 'if the arbitrator's award is presented a judge is appointed by the sultan, (Head of State) then if the award is concordant with Islamic legislative origins, and it will be considered as valid'.[109]

So, how can arbitral awards be compatible with Islamic legislative origins? To answer this question, the arbitrator should refer to the Holy Quran; if he fails to find a resolution, he should have recourse to the Sunna of the Prophet. If he finds nothing in the Sunna, Consensus can be applied. By Consensus is meant the scholars' opinion on a particular subject. Finally, if the arbitrator fails to conclude an award from Consensus he may try applying rules of Analogy until he reaches a decision that will end the dispute.

This is the rationale behind the Prophet Mohamed asking Muad bin Jabal, when he was sent to Yaman, the way in which he judged; Muad replied that he judged by virtue of

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[108] Ibn Najeem, Op. Cit. Vol. 7, P. 26, see also Masaad Al Borgani, Op. Cit. P. 234.
[109] Article 1849 from Judicial Rules Code, The Encyclopedia of Legislations and Systems, Op. Cit. P. 1173.

the Quran's words. He was then asked if he arbitrated according to the Prophet's way of judging, he replied that if he did not find what was required in the Quran or the Sunna he would judge according to his own opinion and the Prophet accepted this.[110]

In short, the arbitrator should make sure that his arbitral award conforms to the awards of Islamic Jurisprudence because this is among the conditions of award validity.

### 4.15.2. Second condition - Issued in Matters Where Arbitration is Allowed

The Award should be issued in matters where arbitration is allowed. The scope of arbitration and rights that can be subject to arbitration from the perspective of Islamic Jurisprudence have already been discussed and it has been noted that there is a great similarity between Islamic Jurisprudence and most modern arbitration laws.

However, not all dealings and cases can be exposed to arbitration since there are issues that do not fall within its scope.[111] Therefore in discussing the conditions of the validity of arbitral awards, the following question arises - what if the litigants and arbitrators have recourse to arbitration in a matter where arbitration is not allowed and in which an arbitral award is issued. Is such an award valid or not?

To answer this question from the Islamic Jurisprudence perspective, it is necessary to clarify two points:

**First** - If the issue of arbitration is the Head of State's responsibility in an Islamic country, the award of the arbitrator is not valid. This fact is generally agreed by scholars.[112]

**Second** - If the issue of arbitration is a judge's responsibility this brings about two differing opinions:

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[110] See S. Aolain, Op. Cit. P. 128.
[111] See page 109, Supra.
[112] Ahmed Al Ghazali, Op. Cit. P. 339.

1. If the arbitrator issues an award on a subject where arbitration is not allowed according to Islamic Jurisprudence, the arbitral award is considered as not valid. This opinion was adopted by scholars from the Schools of Hanafi,[113] Shafii,[114] and Hanbali.[115] Advocates of this opinion say that the validity of arbitral awards depends on the validity of arbitral contract creation. The arbitral contract should not be created in a matter where arbitration is not allowed; if it is then any arbitral award stemming from that contract is considered invalid.

2. If the arbitrator or arbitrators, in a matter where arbitration is allowed according to Islamic Jurisprudence rules, and arbitration is a judge's responsibility, the award issued to settle the existing dispute is valid.

This opinion, adopted by the Maliki Schools,[116] contends that the arbitral award issued to settle once and for all an existing dispute is valid since it is not concerned with things forbidden within Islamic Jurisprudence. When judges deal with such forbidden issues, they arbitrate in order to settle the dispute through issuing an arbitral award.

The first opinion would appear to be valid since it considers that arbitration is not allowed if arbitration is a judge's responsibility. However, arbitral awards of the judges themselves are not valid if they have been deprived of arbitration powers before the litigants.[117]

On the other hand, it seems nowadays that the previous divergence will be of no great importance if modern arbitration laws determine the scope of arbitration. Therefore, if arbitral awards are issued outside the determined scope they would be considered null and void.[118]

### 4.15.3. Third Condition - Arbitrator Should Be Qualified When Issuing Arbitral Awards

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[113] EL Tabri, Op. Cit. Vol. 4, P. 63.
[114] Yahya AL Nawawi, Op. Cit. Vol. 11, P. 121 and Shamsuddin AL Sherbeni, Op. Cit. Vol. 4, P. 373.
[115] Ibn Kadamah, Op. Cit. Vol. 9, P. 104.
[116] Ahmed AL ghazali, Op. Cit. P. 339.
[117] Ibn kodamah, Op. Cit. Vol. 9, P. 105.

As previously discussed, an arbitrator must be qualified and certain conditions must be satisfied for him to perform the arbitral case perfectly. What would happen, then, if litigants chose an arbitrator who did not bear all the necessary conditions stipulated by Islamic Jurisprudence; or if he lost some of these conditions during the process of arbitration. Would this affect the issued arbitral award?

Again, in such an event, two opinions prevail within Islamic Jurisprudence:

1. Arbitral awards are not valid and should not be executed. This opinion was adopted by both the Hanafi[119] and the Shafii Schools.[120]

Advocates of this opinion rely upon drawing an analogy between the award of an arbitrator and that of a judge since the judge's award is not executed if he is not qualified. Therefore, such an arbitral award would not be executed. These advocates acknowledge that if the arbitrator is not qualified or loses some of the necessary arbitration conditions, as with a judge, his arbitration is also considered as nullified and therefore any arbitral award issued by him is also nullified and not valid.

2. An arbitral award from a non-qualified arbitrator is considered as valid provided that it conforms to common sense.

The Malik School[121] has adopted this opinion.

Advocates of this opinion appear to focus on the result of arbitral awards and the need for them to conform to common sense. It is difficult to adopt the second opinion since the operation of determining whether the arbitral award conforms to common sense needs considerable time and requires further arbitration. This would not comply with the objective of arbitration, which is the settling of disputes in a minimum amount of time.

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[118] For example see The Saudi Arbitration Law of 1983, Article 2.
[119] Ibn Najeem, Op. Cit. Vol. 7, P. 24.
[120] Shamsuddin AL Sherbini, Op. Cit. Vol. 4, P.
[121] Ahmed Al Ghazali, Op. Cit. P. 341.

On the other hand, acceptance of the second opinion contradicts the necessary conditions that must exist in the arbitration process which were set up to serve the process of arbitration making it a just arbitration.

For this reason, and on the basis of the following, it would appear that the first opinion is correct. Many modern arbitration laws stipulate general qualifications that must be available in the arbitrator as stated in the 1983 Saudi Arbitration Law, i.e.:

> 'The arbitrator must be experienced, of good character and duly qualified.....'[122]

### 4.15.4. Fourth Condition - Arbitrator Arbitrating for a Person Not Allowed to Give Testimony For or Against

Again Islamic Jurisprudence shows a variation of opinion that can roughly be divided into the following:

1. An arbitral award is not valid:

The Shafii[123] and AL Hanafi Schools[124] have adopted this opinion. They claim that this opinion eliminates any feelings of guilt by not providing fair awards. For example, the testimony of a person for his relatives, such as fathers, grandfathers, sons and grandsons is not allowed because of these family ties which obviously create a bias. So, the advocates of this opinion would prevent an arbitrator from issuing an arbitral award, thereby emphasizing the neutrality of arbitration.

On the other hand, a person is not allowed to testify against his enemy. In such a case an arbitral award would not be permissible. This also proves the neutrality of arbitration.

However, the response to this opinion is that there is a difference between a witness and an arbitrator. Therefore, although testimony is information known only to the witness,

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[122] Article 4.
[123] Shamsuddin Al Sherbini, Op. Cit. Vol. 4, P. 379.
[124] Ibn Najeem, Op. Cit. Vol. 7, P. 28.

the arbitral award is a decision made by the arbitrator on the basis of reason, evidence and the documents presented at a particular arbitral case.

2. An arbitral award is valid for all persons allowed arbitration for or against the person who is not allowed arbitration. This opinion was adopted by Shafii and Hanbali Schools.[125]

Advocates of this opinion base their attitude on the fact that arbitration contracts are created by agreement and the will of the parties in question. They freely agree to appoint arbitrators and refuse them if they sense that they will not arbitrate justly.

The second opinion appears to be more relevant i.e. that arbitral awards issued by arbitrators, regardless of family ties or enmities are valid. On the other hand, if an arbitral award appears to be unjust, any of the disputing parties may criticize it according to the designated procedures. The 1985 Rules of Implementation of Saudi Arbitration stipulate that

> 'The arbitrator having an interest in the dispute is not allowed to arbitrate.'[126]

The question then arises - what is meant by having an interest in the dispute?

In fact, the executive rules do not clarify the meaning. Therefore, the explanation of the text refers absolutely to a material interest, or an interest of family or friendship. It seems that Saudi Arbitration Law emphasizes the neutrality of arbitration and that of the arbitrator. It would perhaps be an idea to clarify these executive rules and provide a comprehensive explanation.

### 4.15.5. The Fifth Condition - Arbitral Award should be Issued within Arbitrators' Authority

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[125] See Ahmed Al Ghazali, Op. Cit. P. 343.

A further conditions of arbitral awards is that they should be issued within the limits of an arbitrator's authority.[127] Judicial Rules state:

> 'the arbitrator's award is applied and executed for the litigants who appointed him in a specific matter. His award is not valid for other litigants.'[128]

This condition is agreed upon by Islamic Jurisprudence and modern arbitration rules, and the arbitral award should not surpass the subject matter on which a dispute is raised.[129]

## SECTION SIXTEEN

### 4.16. Documenting, Correcting and Interpreting of Arbitral Awards

After discussing the form and components, types and conditions of arbitral awards, their documenting, correcting and interpretation will now be scrutinized.

In this respect, it is necessary to invoke the attitude of Islamic Jurisprudence which clarifies the aspects of similarities and differences between the Saudi Arbitration Law and Modern arbitration. The following points will be discussed:

- Documenting Arbitral Awards.
- Correcting and Interpreting Arbitral Awards.
- Pronouncing Awards.
- The Result of Arbitral Awards.

#### 4.16.1.1. Documenting Arbitral Awards within Islamic Jurisprudence

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[126] Article 4.
[127] Ibn Najeem, Op. Cit. Vol. 4, P. 27. Hassan Fathie, Arab Arbitration Magazine, Op. Cit. P. 102.
[128] Article 1842, Judicial Rules Code, Encyclopaedia of Legislations and Regimes, Op. Cit. P. 1173.
[129] For example see Article 37 of the 1985 Rules of Implementation of the Saudi Arbitration Law, see also Article 669 of Iranian Civil Code of 1939.

Throughout Islamic history, as previously discussed in this study, it has been noted that Islamic Jurisprudence has not required a specific form to document arbitral awards. However, when there is a need to document an arbitral award, this can be done through written or oral testimony. The award may be written by an arbitrator with or without witnesses until the award is executed.

Abdulhamid AL Ahdab claimed:

> '...it should be noted that in practice judgements of the state courts were made in writing but writing was not itself sufficient proof and witnesses were needed to validate a particular document to be drafted by the judge. The witnesses were called "witnesses of the judge".'[130]

However, this does not appear to be the case. Throughout previous arbitral cases and awards it has been seen that both ways of documenting arbitral awards are possible, i.e. either through the arbitrator or through witnesses. Writing the award was used by the prophet (PBH) and the Rachidin Caliphs. On the other hand, the same reference by EL Ahdab Aladdin Al Tarablussi, page 118, talks about the book, 'The Judge to the Judge', which stipulates the following:

> 'If a man comes to the judge and asks him to accept his testimony about a man in another country, the judge has to listen to his witnesses in what regards the man's right because the individual finds it difficult to stay before the judge and the witnesses....'[131]

The remainder of articles deal with the same subject, including El Hadab talking about the importance of witnesses at the time of award recognition by another arbitrator or judge but not at the time of documenting the award itself. If the arbitral award, therefore, is correctly issued and answers all the necessary conditions it is considered to be a fruitful award.

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[130] Abdulhamid EL Ahdab, op.cit, P.48.
[131] Aladdin Altarablusi, op.cit,P .52.

So documenting the award should be written by the arbitrator or on the proposal of one party in the presence of witnesses.[132] Consequently, it is clear that arbitral awards within Islamic Jurisprudence come in one of the following forms:

a) Writing - The arbitrator should write the issued award in a clear and neat manner including every detail no matter how small.

b) Witnesses - The presence of witnesses is important to the judge at the time of documenting a particular award. This can be achieved by the will of the judge or that of one or both parties in question.

### 4.16.1.2. Concordance between Islamic Jurisprudence and Modern Arbitration Laws

It is worth mentioning here that Islamic Jurisprudence has room for modern procedures stipulated by modern arbitration laws in the field of arbitral award documentation.

Documenting arbitral awards has become compulsory and should be done in compliance with modern arbitration laws for better execution. In this respect, Saudi Arbitration Law stipulates the following:

> 'Parties disputing shall lodge the arbitration document with the Authority having original jurisdiction to consider the disputes. This document shall have been signed by the litigants or their duly authorized representatives and by the arbitrators and must show the subject matter of the dispute, name of litigants, names of arbitrators and their approval to consider the dispute. Copies of relevant documents must be attached.'[133]

Saudi Law has its counterpart in most other countries, in consideration of the required first step in the arbitration process, i.e. that the parties should submit the dispute document to the concerned authority. This step is an important element in documenting the award. The concerned authority will then accredit a final award on the basis of the arbitration document submitted.

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[132] Ali AL Samani, op.cit., vol .1, P. 80.

The 1985 Rules of Implementation require the concerned authority to issue an award on the basis of the arbitration document within fifteen days.[134] This arbitration document is, as stated, seen as the first step in documenting the procedures of arbitration.

In what concerns the arbitral award itself, the Saudi Arbitration Implementation Rules (1985) stipulate that arbitrators should hand their awards to the concerned authority to settle the dispute within fifteen days.[135]

At this stage, the final award issued by arbitrators is far from complete, although it does emphasizes the issue date. It should be noted that the fact of not submitting the arbitral award does not lead to the nullification of that award as is the case within Islamic Jurisprudence. If the arbitral award is issued correctly carrying out all necessary terms, it is considered as a correct award even if it is not submitted to the concerned authority. It should also be noted that the awards of Article (18) of Saudi Arbitration are not put into effect only in Saudi Arabia but also in other countries and it should be borne in mind that such awards should not be applied to Saudi Arabia because its law system differs from that of the countries in which the awards were issued.[136]

To summarise, it is clear that Islamic Jurisprudence has enough room for the Saudi Arbitration Law and does not contradict it.

Concerning the documentation of arbitral awards, modern arbitration laws differ from one country to another. Some laws stress the necessity of documenting and others do not. For example, at the international level, neither ICIA Arbitration Rules nor UNCITRAL Arbitration Rules stipulate the necessity of documenting arbitral awards.

ICC Arbitration Rules, for instance, stipulate:

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[133] Article 5.
[134] Some Judicial Authorities in Saudi Arabia consider the award of credit as a type of emphasis on some regulations stipulated by law, arbitrators must take into consideration these regulations at the time of dealing with the arbitral case, for instance – 1. The award should be in accordance with awards of Islamic Jurisprudence; and 2. Arbitrators should settle and close the dispute within so many days, see for example, The Board of Grievances (Administrative Court in Saudi Arabia) Judgement No. 70/D/TJ/1, 1414 H/1996 A.D.
[135] Article 18.
[136] M. Bajad, Op. Cit. P. 232.

'the original of each award made in accordance with the present Rules shall be deposited with the secretariat'[137]

The text of the ICC arbitration rules, as stipulated in the previous article, complies with Islamic Jurisprudence so this procedure may also be stipulated in Islamic Arbitration Law providing it is beneficial.

### 4.16.2. Correcting and Interpreting the Arbitral Award

It could be said that if the arbitral award is issued correctly by the arbitral tribunal and if the award is in accordance with the necessary terms, as previously mentioned, the job of the arbitrators comes to end with the issuance of that arbitral award thus putting an end to the existing dispute.

#### 4.16.2.1. Position within Islamic Jurisprudence

The question arises that if there are typing errors in an arbitral award, or that although it seems to be correct, it shows some ambiguity in some paragraphs or some words so that the purpose of the arbitrator or arbitral tribunal may not be clear, what is the attitude of Islamic Jurisprudence to this problem? Can the arbitrators or arbitral tribunal modify or correct their errors, or is their role finished once the arbitral award is issued?

In fact, the general principles of Islamic Jurisprudence necessitate that the arbitral award should not be subject to any typing error or ambiguity any errors or ambiguities should be eliminated by the arbitrator or arbitral tribunal so that it is totally clear to settle any case without further problems. This is part of the general principles of Islamic Jurisprudence which states that anyone who does a job should perform it perfectly without any mistakes or carelessness.[138]

It can thus be deduced that the arbitrator has the possibility of correcting his mistakes as far as he has validity to do so. This is clearly manifest through the speech given by

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[137] ICC Arbitration Rules, Articles 28(4).
[138] Emphasized by Prophet Mohammed (Peace be Upon Him).

Caliph Omar Ibnou El Khatab to Abou Moussa El Ashare, in which he stated that an arbitrator is allowed to rectify an arbitral award even though it had already been issued, especially if his awakened consciousness pushed him to claim the right.[139]

So, the spirit of Islamic Jurisprudence necessitates that the arbitrator corrects his mistakes and clarifies them so that they will be executed in the proper way.

#### 4.16.2.2 Islamic Jurisprudence Concordance with Modern Laws

The majority of Islamic Jurisprudence is on good terms with contemporary laws, which have evolved from man's long experience through history.

An example of this concordance are the 1985 Rules of Implementation. Saudi Arbitration law stipulates:

> 'without prejudice to provisions of Articles 18 and 19 of the Arbitration Regulation, the Arbitration Board shall rectify any material typing or arithmetic errors that may occur in its awards, by virtue of a decision to be issued, or at the request of either party without pleading procedures, such modification shall be made on the basis of the original copy of the award and duly signed by the arbitrators....'[140]

Practically speaking, arbitrators can make some material typing modifications to their awards on the basis of their own remarks or those made by their rivals.

Saudi Arbitral laws allow for arbitral awards to be corrected or modified before being submitted to the concerned party, as their role and validity ends once the award is issued and can never be altered.

In this respect, it would be better to deal with this matter in the light of the Arbitral Law itself and clarify its essential peculiarities, the executive rules or those of the executive

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[139] AL Mawardi, AL Ahkam AL Sultaniya, Op. Cit. P. 71.
[140] Article 49.

board, because, as previously mentioned,[141] the purpose of the executive board in Saudi Law mainly relates to the way in which the law is executed rather than how any new legislative awards are issued.

Moreover, many modern arbitration laws apply, such as the arbitrator being permitted to correct his errors. For instance, the British Arbitration Act 1996 provides:

> 'The tribunal may on its own initiative or on the application of a party:
> (a) Correct an award so as to remove any clerical mistakes or errors arising from an accidental slip or omission; or clarify or remove any ambiguity in the award'.[142]

The District of Columbia Arbitration Law allows:

> '...The arbitrators may modify or correct the award upon the grounds stated in paragraphs 1 and 3 of Subdivision (s) of Section 13 or for the purpose of clarifying the award...'[143]

Another example, that the German Arbitration Law states is:

> '(1) any party may request the arbitral tribunal –
> 1 - to correct in the award any error in computation, any clerical or typographical errors or any errors of a similar nature.
> 2 - To give an interpretation of specific parts of the award....'[144]

This is the same in international commercial law, i.e. The UNCITRAL Model Law[145] and LCIA Arbitration Rules.[146]

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[141] The Saudi Arbitral Law 1983 issued by Royal Decree No . M.46 dated 12-7-1403.H(April 25.1983),but its Executive Rules 1985 issued by award from Saudi Prime Minister No.M/2021/7 dated 10.10.1405H.(1985 A.D )
[142] Section 57(3) a.
[143] District of Columbia Arbitration Law, Section 16-4309, see also Iranian Civil Procedure Code 1939, Article 663.
[144] New German Arbitration Law, Tenth Book, Section 1058, Op. Cit. P. 11.
[145] UNCITRAL Model Law, 1985, Article 33.
[146] LCIA Arbitration Rules, Article 27.

Doubtless, giving this right to the arbitrator or arbitral tribunal has helped considerably in dealing with arbitral operations in a correct manner, which is the purpose of choosing arbitration as a means of settling conflicts. The arbitrators are able to issue awards and can give explanations so far as they are aware of the subject matter, this economises time and effort so the award will be more speedily ready for execution.

### 4.16.3. Pronouncing the Award

#### 4.16.3.1. Attitude of Islamic Jurisprudence

The issue of an award is considered to be the last step in establishing an arbitral award. This has already been explained during discussions about the definition of arbitration and arbitral awards within Islamic Jurisprudence. It has been defined as an announcement issued by the arbitrator that puts an end to conflicts according to Islamic Jurisprudence awards.[147]

There is, therefore, no special term for announcing an arbitral award, any term proving clearly the arbitration of a case which ends the conflict is sufficient.

It is a requirement that the arbitrator or arbitral tribune should issue an award in the presence of the litigants, their representatives or other witnesses chosen by all parties. This is the general basis of arbitration within Islamic Jurisprudence.

#### 4.16.3.2. Attitude of Saudi Arbitral Law

Saudi Arbitral Law has opted for the announcement of arbitral awards, as manifested through the1985 Rules of Implementation of Saudi Arbitration Law, which states:

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[147] See pp. 161-162, supra.

'The director of an arbitral tribunal announces the award during the determined session...'[148]

It seems that the procedure of announcing the arbitral award is considered to be an efficient method for advising the parties in a conflict about the content of the award. However, the presence of the litigants or their representatives during the announcement of the award is not compulsory.[149]

#### 4.16.3.3. Attitude of Some Arbitral Laws Concerning Arbitration Announcements

Most arbitral laws do not consider it obligatory for the announcement of an award to be made publicly. It is considered sufficient to issue the award and have it signed.

LCIA Arbitration Rules for example state:

'The arbitral tribunal shall make its award in writing unless all parties agree in writing otherwise....[150]

This opinion is also held by the Model Law.[151] It seems that pronouncement of the arbitral award is done according to the will of the litigants. This is in fact a reassuring factor for the litigants since it tells them everything relating to their particular arbitral award which is issued and signed by the arbitral tribunal. Pronouncing the arbitral award can therefore be seen as important but not necessarily as part of the terms of its validity.

#### 4.16.3.4. Final Phase of Arbitral Awards

Having discussed the definition of arbitral award, its form, type, the necessary conditions for its effectiveness, also the way to document, correct and explain it, having also consulted the opinions of scholars as well as discovering the attitude of Saudi

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[148] Article 42.
[149] Articles 11, 12, 13 and 15.
[150] LCIA Arbitration Rules, Article 26.
[151] Model Law, Article 29.

Arbitral Law and modern arbitral laws when needed, the ultimate description of the arbitral award has been reached. In other words, the following question must now be answered - can we consider the award final once its form and the necessary components for its effectiveness are completed?

#### 4.16.3.5. Attitude of Islamic Jurisprudence towards Modern Arbitral Awards

There is no doubt that when an award is issued after accomplishing all the required conditions and having been seen by the litigants who have made no objection within the determined limited period, then the award will be final and must be respected by all parties, the winning party can start procedures for execution of the award.

This is similar to Islamic Jurisprudence, where the award may not be considered final until it bears all the necessary conditions and is issued without being subject to any objection within the determined period. Only then can there be consent between Islamic Jurisprudence and contemporary arbitration.

In Saudi arbitral law, for example,

> 'when no objection is made to the award within the limited period for this purpose, which is 15 days from the date of informing the litigants....'[152]

In cases where a litigant presents an objection, the award will not be final unless it is waived.

In this respect, some modern arbitral laws consider an arbitral award final once it is issued. For example the British Arbitration Act 1996 provides:

> 'unless otherwise agreed by the parties, an award made by the tribunal pursuant to an agreement is final and binding on both parties and any other sides...'[153]

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[152] Article 18.

ICC Arbitration Rules state:

> 'all awards shall be final and binding on the parties by agreeing the arbitration under the rules....'[154]

Fixing a definite period, known to all parties, offers anyone wishing to criticize or appeal an arbitral award sufficient opportunity to think about it. They will be aware that it is unfair to present objections, except within the limited period. In fact, parties have opted for arbitration instead of the usual court procedure because of its rapidity in resolving disputes in commercial life.

Before discussing the finality of arbitral awards, their effectiveness should be considered, so as to gain an understanding of the Islamic Jurisprudence viewpoint and the extent of agreement or disagreement with contemporary arbitral laws.

### 4.16.3.6 Arbitrator's Fees

However, before closing this discussion on arbitral awards, it will be useful to examine arbitrators' fees and the way they are calculated, as laid down within Islamic Jurisprudence.

It is, in fact, noticeable from examination of books on Islamic Jurisprudence that scholars have not focused on this subject. It seems that most arbitrations, throughout Islamic history, were made in a quest for reward from the Almighty Allah, because, according to many sayings of the Prophets and in the Quran, settling conflicts between people and solving their problems is one of the major pillars of Islamic Jurisprudence and those who perform such benevolent deeds will be well rewarded on the last day.

However, taking fees for arbitration is not forbidden by Islamic Jurisprudence, so the question which now arises is – by what method is an arbitrator given fees and wages?

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[153] Section 58 (1).
[154] ICC Arbitration Rules Articles 26(9). See also The Republic of China, Gelia and Alexander Laurie, The John Marshal Journal, Op. Cit, P.563.

An arbitrator can request recompense from the litigants as payment for the time and effort used to solve their dispute. He will also gain a reward from Allah on the day after because of his good intentions in achieving consent among people and settling their conflicts.

Accordingly, in response to the previous question, it would appear that an arbitrator can take money as agreed to by the litigants. This sum of money should correspond to the value of the case in dispute as well as to the time and effort used in solving it.

In this sense, the following should be taken into consideration while fixing the arbitrator's fees:

1. Consent between arbitration and litigants regarding the amount of arbitration money should be clear.
2. They must also agree about the way fees should be handed to the arbitrator.
3. In case the consent mentioned in paragraph two is not fulfilled, the arbitrator will not deserve any fees, unless he performs the task agreed upon, i.e. arbitration and issuing the arbitral award correctly.
4. If an arbitrator cannot finish his task by reason of his own unwillingness, he has the right to be rewarded even though the arbitration is not ended.
5. The arbitrator should not ask for payment before finishing his work.

Generally speaking, it seems there is agreement between Islamic Jurisprudence and modern arbitral laws in this sense. Most arbitral laws have dealt with arbitrators' fees and the way they should be calculated. For instance Saudi Arbitration Law provides:

> 'fees of the arbitrator shall be fixed by mutual consent of the conflicting parties and, unless paid to them, shall be submitted within five days from the date of the decision approving of the arbitration document with the concerned authority having original jurisdiction to consider the dispute and shall be paid within one week from the date of the execution order.'[155]

[155] Article 22. Also Iranian Civil Procedure Code 1939, Articles 8 to 84.

Saudi Law also gives an indication in cases where there is no consent regarding arbitrator's fees, it states:

> 'If the arbitrator's fees have not been agreed upon and a dispute arises in this respect thereto, such dispute shall be decided by the authority having original jurisdiction to consider the dispute and its decision shall be final.'[156]

Many international legislations draw attention to this subject. For example, LCIA Rules state:

> 'The LCIA Court may direct the parties, in such proportions as they think appropriate, to make one or several interim, or final payments on account of the costs of the arbitration. Such depositions shall be made by the LCIA and from time to time may be released by the LCIA Court of Arbitration to any expert appointed by the Arbitral tribunal and the LCIA itself as the arbitration progresses.'[157]

There is no doubt that the perfect and clear organization of arbitrators' fees in practice in centers of arbitration, has helped conflicting parties to gain an idea, before commitment, about the cost of arbitration, and to opt for the appropriate arbitrator to settle their dispute. Islamic Jurisprudence insists on the organization of arbitrators' fees so there will be clear mutual consent between litigants and the arbitrator with no misunderstandings. In fact, the basic reasons for opting for arbitration are economy of time and money.

Alan Redfern and Martin Hunter disagree with the idea of arbitration being a less expensive method, they claim:

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[156] Article 23 - organization of arbitration fees has been discussed often, see for example, The British Arbitral Act 1996 Section 58 and Code 1939 Articles 670-371 and Florida State Arbitrate Law Section 682-11, op.cit. P. 3.

[157] LCIA Arbitration Rules, Articles, 24(1) see also ICC Arbitration Rules Articles 30 and 31 and GCC Commercial Arbitration.

> 'Arbitration is not necessarily a cheaper method of resolving disputes than litigation, first, the fees and expenses of arbitration (up to the salary of a judge) must be paid by the parties...'[158]

Grace Xavier has said in this respect:

> 'the popular belief that arbitration proceedings are less expensive than a court action is not always correct. For example, in construction disputes where expert arbitrators are used parties may end up paying much more they would if they had started instead the proceedings in Court; this due to the high fees that one is charged by expert arbitrators. A schedule of maximum fees chargeable is recommended'.[159]

This last sentence is similar to that of one of the scholars of the 'Shafii School' of Islamic Jurisprudence, Almawardi, who stated that

> 'the taken sum of money should not exceed the arbitrator's salary as he has to be given only the value he deserves.'[160]

It can be seen from this that it is necessary to avoid exaggerating arbitration costs, otherwise the parties, in resolving their conflict, will find it no less expensive.

By making people aware of the value and role of arbitration in resolving disputes in general and commercial disputes in particular, it is to be hoped that more people will take advantage of it and that fewer cases will pile up awaiting the attention of normal courts. This will help the courts develop their methods and reduce their formalities so as to become more efficient in settling a variety of daily disputes.

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[158] Alan Redfern and Martin Hunter, Op. Cit. P. 24.
[159] Grace Xavier, Op. Cit. P. 285.
[160] Almawardi, Op. Cit. Vol. 2, P. 298.

# CHAPTER FIVE

## Challenge to the Arbitral Award and the Role of Judicial Authority in Realizing Arbitral Efficiency

This study, in approaching an understanding of the perspective of Islamic Jurisprudence in commercial arbitration, has discussed the similarities and differences between Islamic Jurisprudence and modern arbitration laws (both international and local) in achieving the desired approximation that serves and develops commercial arbitration and promotes conformity with Islamic Jurisprudence. The previous chapter focused on the arbitral award system, its components, types, the way it is issued etc. under both Islamic Jurisprudence and modern arbitration laws, and looked at the many similarities between Islamic Jurisprudence and modern arbitration laws. This chapter will discuss the stage that occurs after an arbitration award has been issued.

This important part of the process is known as the challenge to arbitration awards and its importance lies in the extent to which a challenge may affect the arbitration process either positively or negatively.

For example, if the scope of the challenge is widened, it could affect arbitration negatively because the loser may do his best to impede the enforcement of the arbitral award. The challenge may also be positive, ensuring the justice of the arbitral award if the characteristics of speed and confidentiality of arbitration are taken into account.

Since it is necessary to understand the perspective of Islamic Jurisprudence in commercial arbitration, two important questions arise: to what extent is it possible to challenge arbitral awards within Islamic Jurisprudence, and does Islamic Jurisprudence welcome challenge openly or do there have to be specific reasons?

These questions will be answered through careful interpretation of the most important sources of Islamic Jurisprudence.

The differences and similarities in relation to modern arbitration laws will be noted and then an attempt will be made to clarify the attitude of Saudi arbitration, because this represents the modern experience of Islamic Jurisprudence which is in line with modern arbitration laws. Consideration will also be given to the awards and rules of Islamic Jurisprudence.

For this reason, various aspects of Saudi law, in so far as its judicial system is concerned and the way arbitration stages develop, will be explained because challenging arbitral awards represents an important meeting point for judicial authorities and the arbitration system.

This chapter will also discuss the judicial role required to achieve a more efficient arbitration system to serve modern commercial life.

## SECTION SEVENTEEN

## 5.17. Challenging Awards within Islamic Jurisprudence

### 5.17.1. Preface

There is no doubt that challenging arbitral awards is among the issues that stand in the way of arbitration, since the success of arbitration depends on the extent to which challenge is or is not possible. In other words, the limits of challenge are really important.

As previously stated, speed and confidentiality are important to arbitration and for this reason arbitral awards should be issued promptly. This does not mean that arbitral awards are sanctified, since being issued by man mistakes can be made. Therefore, being certain of the justice of an award lies in the opportunity for control exerted upon it. This control lies in the possibility of challenge before the judicial authorities that clears, once and for all, the existing disputes. As Abraham Lincoln once said:

'nothing is final until it is right...'[1]

The interests of justice means simply that justice must be done, no matter what the cost nor how long it takes. Compromises often only reflect political concerns. Therefore, it is important to set down the rules that regulate challenges to arbitral awards so as to ensure just arbitral awards and at the same time not impede the process of executing these arbitral awards in a general sense.

In this sub-section , and complementing the study of the aspects of jurisprudence of Islamic commercial arbitration, the manner of challenging awards in Islamic Jurisprudence will be discussed under the following headings:

- Meaning and objectives of challenge within Islamic Jurisprudence.
- Reasons for challenge within Islamic Jurisprudence.
- Specialized authority for challenges to awards within Islamic Jurisprudence.
- The effect of challenge.

## 5.17.2. Meaning and Objectives of Challenge within Islamic Jurisprudence

### 5.17.2.1. Meaning of Challenge

Books on Islamic Jurisprudence have dealt linguistically and terminologically with the word 'challenge'. Linguistically, the meaning of 'challenge' is given as the nullification of the thing after it has been confirmed.[3] Terminologically' it is the act of the judge nullifying his award or other the judge's award if there is reason for the said challenge. 'Challenge' is a term that has been found to adequately encompass both 'appeal' and 'recourse', and it is a term that has gained acceptance[4] This definition makes it clear that challenge may be brought to a specific judge's award or to another judge's award .If

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[1] See, W.M. Reisman, W. Lawrence Craig, William Park and Jan Paulsson, International Commercial Arbitration ,Cases, Materials and Notes on The Resolution of International Business Disputes, The Foundation Press ,Inc. Westbury, New York, 1997, P. 966.

[3] Al Waseet Dictionary ,Op.Cit, Vol. 2, P.947.

[4] A. M .Alahem, Ahkam Alnaged fi Alfigh., (Challengeing Judicial Awards in Islamic Jurisprudence), 1st Ed., Dar Eshbilia for Publishing, Riyadh, 1998, P. 7.See also in Meaning of Challenge ,A. Redfern & M.Hunter ,Op.Cit ,P. 416 .and Dictionary of Legal Terms, Brockhampton Press, London, 1997, P. 24.

reasons for a challenge exist, the judge or arbitrator may have recourse to challenge after the given judicial or arbitral award.

Since this study focuses on arbitration and, more specifically, on commercial arbitration, it is necessary to understand the reasons for challenging judicial awards within Islamic Jurisprudence. A transition can be made to the possibility of applying to challenge arbitral awards, since there is a similarity between judicial and arbitral awards. This similarity stems from the fact that they both contribute to the final settlement of disputes.

Undoubtedly, the basis of the arbitral award, whether it is within Islamic Jurisprudence or modern laws, is that the award of the judge should be correct and executable. Even if this is the basis however, there may be exceptions where the arbitrator violates a condition of arbitral award validity. Therefore the loser will look for the means to challenge.

Redfern and M. Hunter claim:

> 'No one likes to lose, so it is not surprising that when a client is disappointed with an arbitral award, the first question he asks his lawyer is "How can I appeal?"'[5]

Having the right to challenge the arbitral award, arbitratees will seek to find a reason to do so, which gives arbitral tribunals an impetus to better master their decision-making, allowing the parties no opportunity to challenge the award.

### 5.17.2.2. Objective of Challenge

It is usually the loser who challenges the arbitral award. The arbitral award may originate from the arbitral tribunal which could be different from the Quran or the Sunna of the prophet or the Consensus if the challenge is submitted to judicial authority. A challenge may also originate from other reasons that combine Islamic Jurisprudence

[5] Alan Redfern and Martin Hunter, Op. Cit. P. 415.

with other arbitration laws, such as the absence of neutrality, a lack of capacity, or the arbitrator transcending the limits of the arbitration agreement.

Challenges, however, should be brought within the period of the arbitral award. This period is stipulated by arbitral law. If this period expires, the arbitratee will find difficulty in challenging the award since it has already become executable. It can be seen from the above that challenges within Islamic Jurisprudence are aimed at cancelling all or part of an arbitral award.

### 5.17.3. Reasons for Challenging within Islamic Jurisprudence

When defining the terminological meaning of challenge, it is understood that judges modify awards because of the existence of some reasons for challenge. What are these reasons? Or, rather, what are the reasons that can force arbitrators to cancel given arbitral awards within Islamic Jurisprudence? To answer this question, it is important to note the difference between Islamic Jurisprudence and modern arbitration rules. As previously mentioned,[6] Islamic Jurisprudence is based on the basic Islamic legislative origins taken from the Quran or Sunna. This, of course, refers to the philosophy of Islam that combines religion with all life matters. Islamic Jurisprudence also regulates the relationship between man and God in every respect.

Consequently, among the reasons that lead to the challenge of an arbitral awards is the Muslim's complete faith that the Quran is the word of Allah. Therefore, disparity between Islamic Jurisprudence and modern arbitration rules is crystal clear.

It is important to clarify the reasons behind challenging arbitral awards. These, therefore, will be discussed below.

Samir Saleh claims -

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[6] See the introduction, pp. 18-30, Supra.

> 'The forms of appeal which can be exercised against an award under Sharia are not substantially different from those exercisable against ordinary judgment...'[7]

This was formerly confirmed by Judicial Rules Code (Majalat Al Ahkam Al Aldeah) which states:

> 'The arbitrator's award, as the judge's, must be accepted and executed if it is not subject to challenge'[8]

Since it is clear that judicial awards within Islamic Jurisprudence are similar to arbitral awards in so far as the necessity to execute it is concerned, the arbitral award, whether originating from an arbitrator or an arbitral award tribunal, is similar to a judicial award provided that it is correct and valid and is not subject to challenge. In this respect, there is a similarity between Islamic Jurisprudence and modern arbitration rules. For example, Anthony Walton says in this regard:

> 'In general, however. there is no appeal, and the award will be binding, unless some grounds for invalidity can be shown...'[9]

It can thus be seen that modern arbitration rules specify special reasons through which challenging arbitral awards can be requested. For instance, the arbitration rules of the Egyptian Civil and Commercial Articles of 1994 limit these reasons.[10] The British Arbitration Act 1996 stipulates that the validity of arbitral awards is of importance. Harold Crowter says:

> 'One of the central planks of philosophy of the Arbitration Act 1996 is that the court should not intervene except as expressly provided in the Act...'[11]

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[7] Samir Saleh, Op. Cit. P. 78.
[8] Article 2093 from Judicial Rules Code, Encyclopedia of Legislations and Systems, Op. Cit., P. 607.
[9] Anthony Waton, Russel on the Law of Arbitration, Op. Cit. P. 421.
[10] See Article 52.
[11] Harold Crowter, Op. Cit. P. 99.

Before discussing reasons for challenge within Islamic Jurisprudence, the case of Alzabih should be mentioned. This case confirms the existence of the principle of challenge within Islamic Jurisprudence. The case was narrated by Samak bin Harb upon Ali bin Abi Taleb who said:

> 'I was sent by the prophet, peace be upon him, to the Yemen tribes. There was a well in which a lion fell. When four men gathered around the well, they fell one by one. So some of them were killed and others saved because a man shot the lion with an arrow. Following the incident three tribes requested payment for the death of the three men. The other tribe said it was not fair and that they would pay for the death of only one man of the tribe. They disagreed so much about this point that they wanted to fight over it. I told them not to fight in the presence of the prophet. I would arbitrate among them if they would accept me. The award was to be considered to be executable, if not, the prophet would judge among them. So Ali arbitrated among them. Some tribes were satisfied with Ali bin Abi Taleb's arbitration and others were not. So he told them to accept the arbitral award until further judgment by the prophet. When the prophet finished praying he sat near Kaaba and the tribes came to him. They told him of their case and the prophet gave the same judgement as Ali bin Abi Taleb. Thus the prophet confirmed the arbitral award given by Ali bin Abi Taleb.' [12]

The central issue here is that the principle of judicial procedural steps exist within Islamic Jurisprudence. It was possible for the prophet to challenge the arbitral award of Ali bin Abi Taleb. However, in this case he approved it. This case constitutes the realm of judicial authority since Ali bin Abi Taleb gave the tribes a choice.

However, Ali bin Abi Taleb also showed that, as with modern arbitration laws, in genral everything may be subject to challenge. The prophet accepted the need to listen to the case from the beginning proving that the right to challenge exists within Islamic Jurisprudence.

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[12] The case of Alzabih (from Islamic Judicial History) see Amer Rehaim, Op. Cit. PP. 359- 360.

With an understanding of this point, it is now possible to clarify reasons for challenging within Islamic Jurisprudence. They are as follows:

- If the challenge is different from the Quran, Sunna or Consensus.
- If the challenge is different from the clear Analogy.
- Discussing the possibility of adding some reasons for arbitral challenge as stipulated by modern arbitration laws which do not contradict Islamic Jurisprudence.

### 5.17.3.1. <u>If the Award is Different from Text in the Quran, Sunna or Consensus</u>

When the arbitral or judicial award differs from the requirements of the Quran, Sunna or Consensus it is considered as null because these three points are essential sources of Islamic Jurisprudence.[13]

a. Among the proofs of challenging the arbitral award, if the latter differs from Quran, Sunna or Consensus, are the following:

(i) The Almighty said – "if any do fail to judge by what Allah hath revealed, they are unbelievers."[14]

(ii) The Almighty also said - "if any fail to judge by what Allah hath revealed, they are wrong doers."[15]

(iii) The Almighty also said - "judge between them by what Allah hath revealed and follow not their vain desires, diverging from the Truth that hath come to thee. To each among you have we prescribed a law."[16]

b. Proof that the Sunna does not allow arbitral award divergence from Quran, Sunna or Consensus is given as follows:

The prophet says - "he whose deeds oppose our order is not accepted"'[17]

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[13] H. Fathe, Journal of Arab Arbitration, op.cit., P.104. See also Kaza Katouh, op.cit., P.92.
[14] Surat Al maidah, Verse 44, English Translation, Op. Cit. P. 298.
[15] Ibid, Verse 45, P. 299.
[16] Ibid, Verse 48, P. 300.

c. Proof from the Consensus: The Islamic Nation agreed that if an arbitral award differs from the Quran and Sunna it is rejected[18]

Moreover ,various scholars have given their ruling in this regard. As case in point, from the Shafia School, Shamsddin Sharbini said:

> ' if a judge issues an arbitral award and it is noticed that the award differs from the Quran, Sunna, Consensus or a clear analogue , the award should be challenged.'[19]

From the Hanbali School, Ibn Kodamah said:

> 'The person is not to challenge the award except if he is invited to do so. And any award diverging from Quran, Sunna or Consensus should be challenged.'[20]

From the Thahirya school, Ibn Hazm said:

> 'if judgment contradicts Consensus, it is not accepted.'[21]

The Judicial Rules Code (Majalat Alahkam Aladlea) stipulates the following:

> 'if the arbitral award is submitted to the judge and the award is in accordance with Islamic origins, it is accepted, if not challenge would be applicable.'[22]

In brief, it is clear that the attitude of Islamic Jurisprudence regarding the arbitral award rests on the fact that it should comply with Quran, Sunna or Consensus. If it is different from these origins, it is then subject to challenge and nullification.

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[17] Saheh Muslim, op. Cit. Vol. 3, No. 1344.
[18] A .M.Lahem ,Op.Cit, P .18.
[19] S.Alsharbini ,Op.Cit, Vol. 4, P.396.
[20] Ibn Kodamah, Op. Cit. Vol. 9, P. 34.
[21] Ibn Hazm, Op. Cit. Vol 4, P. 442.
[22] Article 1849, Legal Rules Code, Encyclopedia of Legislation and Systems, Op. Cit. P. 1173.

It can therefore be seen that the importance of knowing the place of issue of the arbitral award is important - for instance, is it an Islamic country that judges through Islamic jurisprudence?

For example, in Saudi Arabia it is necessary for foreign arbitral awards to comply with Islamic Sharia in order for them to be executed. The conditions of execution include consultation with The Board of Grievance (Administrative Islamic Law).[23]

It is clear that arbitration parties should take into account, when specifying their rights and obligations, the country of arbitration on the one hand and, on the other, as previous clarifications have emphasized, choice of the most qualified arbitrator or arbitral tribunal to conduct the arbitration procedure in a legal and smooth way so as to settle the existing dispute.

Here, the role of arbitrator does not take priority over the idea of settling the dispute by issuing an arbitral award, but the issuing of the award does not bind the role of the arbitrator or arbitral tribunal.[24]

The arbitrator or arbitral tribunal should take into consideration the country where the arbitral award is to be issued and applied. As previously stated, the function of the arbitrator or arbitral tribunal is to settle disputes. However, it seems apparent that the success of the arbitrator or arbitral tribunal depends on the applicability of the arbitral award issued. Excellent knowledge of the country hosting the arbitration contributes greatly to the safe execution of the arbitral award decided on by the arbitrators.

### 5.17.3.2. <u>If Challenge is Different from Clear Analogy or General Scholastic Rules</u>

In discussing the issue of Islamic Jurisprudence origins, it has been discovered that analogy is considered to be one of the sources of Islamic law.[25] However, challenging

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[23] Saudi Arbitration Law 1983 Article 20. Confirmed by Judge, Ibrahim Sweilim who said that the issue of an arbitration award does not differ from the general system and ethics; author interview on 28.08.2000.
[24] Lawer, Mohamed Al Hawshan, mentioned in Abdulhameed Al Ahdab, Op. Cit. P. 706.
[25] See Chapter One, pp. 52-54, supra.

an award on this basis brings about divergent view points from the various schools of Jurisprudence. This can be clarified as follows:

**First opinion** - The award is challengeable if it differs from clear analogy or general scholastic rules.

This opinion was adopted by Maliki, Shafii and some of the Hanbali schools.[26] Advocates of this opinion contend that there is no difference between Quran, Sunna, Consensus and Analogy. If an award differs from only one of these origins, i.e. analogy, it would not be applicable for there is a clear connection between these Islamic sources. Hence, violation of one entails violation of the others.

**Second opinion** - The award is not challengeable if judged differently from clear analogy or general scholastic rules.

This opinion was adopted by the Hanafi School and some Hanbali Schools. Advocates of this opinion basically claim that the confusion arises from an inability to see the difference between the origin and its branch. Some claim that the branch is an extension of the origin and, as a result of this divergence, they contend, it is not possible to challenge an arbitral award on this basis. They therefore limit challenges to matters differing from the Quran, Sunna or Consensus only. Analogy is not, in their opinion, subject to challenge.

It would appear that the second opinion is more accurate because if awards can be challenged on the basis of Analogy there would be too much scope for challenge which would ultimately impede the process of arbitration.

### 5.17.3.3. Possibility of Adding other Reasons to Challenge Award to those known in Islamic Jurisprudence as stipulated by Modern Arbitration Rules

As previously seen, challenges to either judicial or arbitral awards should not deviate from the Quran, Sunna or Consensus..Nevertheless, an important question arises: when

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[26] Ibn Farhon Al Maliki, Op. Cit. Vol. 1, P. 56 and Yahy a Al Nawawi, Op. Cit. Vol.. 8, P. 136.

acceptable reasons are stipulated by modern arbitration rules, are they acceptable in the light of Islamic Jurisprudence?

To answer this question, it becomes necessary to show these reasons or motives, then look at whether they are acceptable within Islamic Jurisprudence.

At the international level it must be noticed that the 1958 New York Convention stipulates the following:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> a) The parties to the agreement referred to in article II were under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> c) The award deals with a difference not contemplated by or not falling within the scope 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 the part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country, which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

a) The subject matter of the difference is not capable of settlement by arbitration by the law of that country; or

b) The recognition or enforcement of the award would be contrary to the public policy of that country.[27]

This is similar to the UNICTRAL Model Law (1985) which stipulates the following:

1. Recourse to account against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.

2. 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; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this state; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or 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 submitted to arbitration, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a

[27] Article 5.

provision of this Law from which the parties cannot derogate, or failing such agreement, was not in accordance with this Law; or

b) The court finds that:

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this state; or

(ii) the award is in conflict with the public policy of this state....'[28]

There is a pleasing symmetry here. The New York Convention, in Article V, sets out the grounds on which recognition and enforcement of an international award may be refused. The Model Law, in Article 34, sets out the same grounds (with slight differences of language) as grounds on which such an award may be set aside. In summary, these grounds are as follows:

- Lack of capacity to conclude an arbitration agreement or lack of a valid arbitration agreement;
- Where the aggrieved party was not given proper notice of the appointment of the arbital tribunal or the arbitral proceeding or was otherwise unable to present his case;
- Where the award deals with matters not contemplated by or falling within, arbitration clause or submission agrreement ,or goes beyond the scope of what was submitted;
- Where the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or with the mandatory provisions of the Model Law itself;
- Where the subject-matter of the dispute is not capable of settlement by arbitration under the law of the state where arbitration takes place;
- Where the award (or any decision) is in conflict with the public policy of the State where the arbitration takes place.[29]

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[28] Article 34.

[29] Alan Redfern & Martin Hunter, Op. Cit. P p. 423–424. See also in this meaning the FAA. Vikran Raghovan, Heightened Judicial Review of Arbitral Award, Op. Cit. PP. 111-112.

It can be seen from the foregoing that there is great similarity between Islamic Jurisprudence, arbitration laws and international agreements in what constitutes a challenge to arbitral awards.

In discussion of the pillars of arbitration contract in Islamic Jurisprudence, Islamic arbitration indicates that great importance is given to the issue of capacity in contracting and focuses on its completeness because strict capacity is essential to the process of arbitration.[30]

Islamic Jurisprudence emphasizes that there should be limits to arbitration agreements with regard to the time and subject matter. Parties should be informed of the sessions of arbitration without discrimination or delay.

It becomes clear that challenging arbitral awards in terms of the New York Agreement and UNCITRAL Model Law is in accordance with the general principles of Islamic Jurisprudence.

At a local level, for example, the German Arbitration law provides:

(1) Recourse to court against an arbitral award may be made aside in accordance with sub-sections 2 and 3 of this section:

(2) An arbitral award may be set aside only if:

1. The applicant shows sufficient cause that:

a) a party to the arbitration agreement referred to in sections 1029 and 1031 has under some incapacity pursuant to the law applicable to him; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under German law; or

b) Proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

c) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or 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, only that part of the award contains decisions on matters not submitted to arbitration may be set aside; or

d) The composition of the arbitral tribunal (or the arbitral proceedings) was not in accordance with a provision of this book or with the admissible agreement of the parties and this presumably affected the award; or

2. The courts find that:

a) The subject matter of the dispute is not capable of settlement by arbitration under German law; or

b) Recognition or enforcement of the award leads to a result which is in conflict with public policy (order public)...[31]

This does not differ from other arbitration laws. For example, the Swedish Arbitration Act of 1999 (SAA) stipulates that:

> The award which may not be challenged in accordance with section 36 shall, following an application, be wholly or partially set aside upon motion of a party:
>
> a) If it is not covered by a valid arbitration agreement between the parties;
>
> b) If the arbitrators have made the award after the expiration of the period decided on by the parties, or where the arbitrators have otherwise exceeded their mandate;
>
> 1. If arbitral proceedings, according to Section 47, should not have taken place in Sweden;
>
> 2. If an arbitrator has been appointed contrary to the agreement between the parties or this Act;
>
> 3. If an arbitrator was unauthorized due to any circumstance set forth in Sections 7 or 8; or
>
> 4. If without fault of the party, there otherwise occurred an irregularity in the course of the proceedings which probably influenced the out come of the case...[32]

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[30] For more details about this capacity in Islamic Jurisprudence, see Chapter Two, pp.58-59, Supra.
[31] Section 1059, Op. Cit. PP. 11-12.
[32] The Swedish Arbitration Act (SAA) 1999, Article 34 enacted on March 4th 1999, International Legal Materials, Volume 38, November P. 1668.

The 1994 Egyptian Arbitration Law in Civil and Commercial Articles is also an approximation concerning the motives necessitating challenge against arbitral awards is as follows:

> (1) The request to challenge an arbitral award is not accepted in the cases here below:
>
> a). If there is no arbitration agreement or the latter being judged incorrect or its validity has expired.
>
> b.) If an arbitration agreement party has no capacity in accordance with the law that goes against his validity.
>
> c.) If a party fails to present his defense following fault of being notified about the appointment of the arbitration proceedings, or due to a motive beyond his ability.
>
> d.) If the application of law agreed upon by parties was too far from the subject matter.
>
> e.) If composition of arbitration board or arbitrator's appointment was not in accordance with the law or the parties' agreement.
>
> f.) If the award deals with a dispute not falling within the terms of the submission to arbitration, or includes matters beyond the scope of the arbitration agreement; if the decisions on matters submitted, or only that part of the award not submitted to arbitration may be set aside.
>
> g.) If a challenge occurs in the arbitral award or arbitral proceedings are challengeable'[33]

In reality, it can be said that there is a great similarity between local arbitration and international law. It is also clear that there exists an accordance between Islamic Jurisprudence and modern arbitration laws about the issue of challenging arbitral awards. It should also be noted that Islamic commercial arbitration should not differ from the Quran, Sunna or Consensus. In this respect challenging the awards may be applicable within Islamic Jurisprudence.

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[33] Article 53, similar to that stipulated by Florida State Arbitration Law, Section 682-20, Op. Cit. P. 6 and also District of Columbia Arbitration Law, Section 16-4311, Op. Cit. PP. 3-4 and Virginia State Arbitration Law, Section 8 – 01 – 581 – 016, Op. Cit. P. 5.

However, challenges may be requested on matters that are rejected by Islamic Jurisprudence such as if the dispute has arisen from gambling or such like interest.

If the objective is to implement the arbitral award in an Islamic country where Islamic law awards are applied, it is necessary to take into consideration the conformity of the awards of the Quran, Sunna and Consensus to implement it, otherwise the award will be set aside and not implemented.

### 5.17.4. Specialised Authority in Challenging Awards

After discovering the motives behind challenging arbitral awards within Islamic Jurisprudence, it is necessary to discuss the specified authority set up to carry out this task. It should be noted that Islamic Jurisprudence books say that challenges may be put into effect through the following three mechanisms:

1. An arbitrator challenging his own award.
2. Challenging of the award by another arbitrator.
3. A judge challenging the award.

These points will be clarified showing the perspective of Islamic Jurisprudence.

#### 5.17.4.1. Arbitrator Challenging His Own Award

An arbitrator, after issuing his final award, does not posses the power to challenge it because, according to Islamic Jurisprudence, his task is finished with the issuing of that award.[34] However it should be noted that nothing prevents the arbitrator from rectifying his award if he notices a mistake, since it could be challenged by another person.

In this regard Ali Al Smanani said:

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[34] See Al Kassani, Badae AL Sanae, (The Excellent Works) 1st Ed. 1374 H./1929 A.D. Vol. 3, P. 57. See also A. Al ghazali, Op. Cit. P. 399.

> 'The arbitrator should not challenge his award except if the latter violates the Quran or the Consensus, and he will not challenge it through a clearer perseverance than his first one.'[35]

In short, it is clear that if the arbitrator has issued his award in accordance with the Quran, the Sunna or Consensus, the arbitrator should not challenge the award himself because his validity expires with the issuance of that award.

### 5.17.4.2. Challenging of the Award by Another Arbitrator

Arbitratees may present their arbitral award case to another arbitrator to confirm or challenge it.[36] This chosen arbitrator is allowed to examine thoroughly the issued award in accordance with Islamic Jurisprudence. Islamic Jurisprudence allows the parties to appoint the arbitrator upon whom they have agreed to settle their disputes, however, if one party does not agree, the arbitral award must be binding on both parties.

### 5.17.4.3. Judge (Judicial Authority) Challenging the Arbitral Award

The parties agree to submit their case to another arbitrator, according to their own decision. However, the matter differs when they have recourse to judicial authority if a reason to challenge exists. Recourse to the judicial authority is the best method of challenging awards in both Islamic Jurisprudence and modern arbitration Laws. In this regard, arbitratees may challenge the awards before the judicial authority, the judge will then decide whether to implement or set aside the issued award.

It is important to mention here that the parties are allowed to agree that the arbitral award is final in which case they are not allowed to challenge it. This is accepted within both Islamic Jurisprudence [37] and modern arbitration laws.[38]

Since Judicial Authority is the important means through which arbitral awards can be challenged, either in Islamic Jurisprudence or modern arbitration laws, it is necessary to

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[35] Ali Al Smanani, (died 499 H./078 A.D. Op. Cit. Vol. 1, P. 319.
[36] Ibn Najeem, Op. Cit. Vol. 7, P. 27.
[37] Judge Abdullh AlMohemeed,Chife of First Commercial Circuit on the Broad of Grievances, Saudi Arabia , Auther interview on 22nd August , 2000.

discuss this aspect of Islamic Judicial Authority and to understand how to challenge arbitral awards before the court.

### 5.17.4.4. Judicial Authority within Islamic Jurisprudence

When discussing the philosophy of judicial authority within Islamic Jurisprudence , the fact that the mission of the Islamic state is the preservation of religion and organizing people's affairs by virtue of the Quran, Sunna or Consensus must be borne in mind. The State President is held responsible for the various affairs of his nation, and he is the judge in his state, although he may also authorize qualified people to perform this difficult judicial task.[39]

The prophet Mohammed, (peace be upon him) and the caliphs used to sit in judicial sessions and authorize qualified people to judge among people. However, they kept for themselves the right to treat the Issues of Grievances. This brought about two kinds of judicial authority:

1- Normal Judicial Authority.
2- Administrative Judicial Authority

#### a.) Normal Judicial Authority

This is known in Islamic Jurisprudence as general judicial authority but not specified through articles.[40] However, Sheikh Abdulwahab Kallaf said in this regard in the era of the prophet and his companions:

> 'The objective field of judicial authority dealing with conflicts does not belong to this "prophet and companions era." There is nothing specifying this field'.[41]

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[38] For example ,UNCITRAL Model Law, see M .Abdulmajed , Op.Cit, p. 268 .
[39] Abdulwahab Kallafe, Legal Policy in Constitutional, Foreign and Financial Affairs, Dar Al kalam, Kwait, 1999, P. 59.
[40] M. Hashem, Judicial Authority and Proof System, Op. Cit. P. 30.
[41] Abdulwahab Kallafe, The Three Authorities in Islam : Legislative, Judiciary, Executive, Op. Cit. P. 51.

It is important to note that there are layers of courts within Islamic Jurisprudence.[42] It is not necessary to go into details on this point - the main concern here is that the judicial system has always dealt with settling civil and commercial disputes and personal issues.

**b) Administrative Judicial Authority (Grievances)**

The Judicial Authority of Grievances forms the framework of the judicial system within Islamic Jurisprudence. This type of judicial authority is given priority since it is in the charge of the heads of States. It is important to note that the Islamic judiciary system is distinguished, in this field of authority, by strict administrative control since the state exerts a power on its officials limiting their validity and liabilities.

Before ending this discussion on Islamic judicial authority, it must be mentioned that judges within Islamic Jurisprudence research the awards of cases presented to them. This happens after examining the proofs submitted to him during the pleading sessions. The arbitrator then issues his final award by virtue of the Quran, Sunna, Consensus or by Analogy; in other words, from the sources of Islamic law. If he fails to find a suitable resolution, he is allowed, through perseverance and personal knowledge, to bring an end to the existing dispute by consulting, the opinions of other scholars. He can thus benefit from previous judicial cases, which brings about a difference between Islamic judicial authority and certain modern judicial systems.

In fact, Ernest Kay claims:

> 'unlike certain legal systems, for example, those of the USA and England, which have to a greater or lesser extent, a system of precedents, the Islamic legal system is not based on case law and a judge is not bound by previous decisions of the high court. Such a system produces divergences of opinion and decision, but a judge in doubt may refer to scholars.'[43]

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[42] M. Mudcor, Op. Cit. P. 69, A. Maleje, Op.Cit. P. 30-31.
[43] Ernest Kay, Op. Cit. P. 89.

However, as previously stated, a judge is not prevented from consulting previous cases. These cases represent an important scholarly and wealthy aspect of Islamic Jurisprudence. So, to what extent it is possible to appoint a judicial body before which arbitral awards can be challenged?

It seems that there is nothing that can prevent the nomination of this type of judicial body within Islamic Jurisprudence. For the growing number of cases and people's commercial transactions and dealings, it is beneficial to appoint this important judicial body for the collective interest. This is confirmed by certain modern applications in some Islamic countries, such as Saudi Arabia, whose 1983 Arbitration Law stipulates that challenges against arbitral awards should be manifested in front of a special authority.

In this respect, we find accord between Islamic Jurisprudence and modern arbitration laws, since there is the possibility of appointing a special authority that would witness challenges against arbitral awards.[44]

### 5.17.5. Effect of Challenge

After dealing with the possibility of challenge within Islamic commercial arbitration, it is necessary to discuss the potential consequences of that challenge. If a challenge request is to be submitted to the special arbitration authority it must be done within the period upon which arbitration agreement was concluded. The concerned authority will deal with the submitted case. If challenge proof and motives are manifested, the special authority may authorize the arbitrator or arbitral tribunal to reconsider the decision taken or it can go through the whole process of arbitration itself.

Although there is a difference here between countries, basically the validity granted to this special authority to supervise sessions of challenging awards for the appropriate authority has the full right to confirm or cancel the award altogether.

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[44] For example, The 1994 Egyptian Arbitration Law in Commercial and Civil Matters, Article 54 (2) See also The English Arbitration Act of 1996, Sec. 105.

In any case, there are many factors to counter in the effect of a challenge. Firstly, rejecting a challenge because of the motives specified by law. Secondly, in the case of accepting a challenge, the special authority decides whether to confirm, cancel or reconsider the entire arbitration procedure. The 1983 Saudi Arbitration Law sets out specifics as have A. Redfern and M. Hunter. They are as follows:

- To confirm the award.
- To refer it to the arbitral tribunal for reconsideration.
- To modify the award; or
- To set it aside, in whole or in part.[45]

It is worth mentioning that there is a similarity between Islamic Jurisprudence and modern arbitration laws in what concerns are manifested by the challenge effect. It would be useful here to look at and clarify the subject of challenge within Islamic Jurisprudence.

Saudi Arabia will be taken as a suitable example because it draws its systems from the Islamic Shariah both for its judicial authority and arbitration.[46] In support of this, Haitham Galiol has said:

> 'It is necessary to say that Saudi Arabia is the leading country among Arab and Islamic countries to have taken the Quran and Sunna as its constitution and applies the Islamic Sharia from its beginning.'[47]

Since Saudi Arabia represents a model of Islamic application[48] and abides by the rules of Islamic Jurisprudence, it benefits from modern experiences through which contemporary countries have gone, either at an international or local level.

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[45] Alan Redfern and Martin Hunter, Op. Cit. P. 441.

[46] See for example the Basic System for Judging in Saudi Arabia, issued by Royal Decree No. A/ 12 dated 1412 H./1991 A.D. Since it stresses in the previous article 'that the award in Saudi Arabia derives its authority from the Quran & Sunna for they are the sources of every system in this country' see also Mohamed Al Adli, Saudi Arabia, The Best Model for Islamic Award, 1st Ed. Cairo, 1995, PP. 40-44, also the former Saudi Minister of Islamic Affairs, Abdullah Turki, The country of Islam whose Convoy is not Interrupted, Al Daawa Magazine, Issue 1677, dated January 28th 1999, P. 51.

[47] Haitham Galiol, Applying the Law, Adawa Magazine, April 15th 1999 Issue 1687, P. 12

[48] The modernity of the Saudi experience from its birth until now ensures that consideration will be given to the fact that lack of experience, sometimes, does not mean that the Islamic principles are a failure because successful implementation requires more time and development. See also Frank E. Vogel, Islamic Law and Legal System : Studies of Saudi Arabia, Brill, Netherlands, 2000, PP. XIV-XV.

To better grasp the Saudi Islamic experience about challenging arbitral awards, be they local or international, a section of this thesis will be reserved to discuss this issue.

## SECTION EIGHTEEN

### 5.18. Challenging Arbitral Awards within Saudi Arbitration Law

As previously mentioned, the similarity between arbitration and judicial authority lies in the challenge to arbitral awards. To understand the method of challenging these awards in Saudi arbitration law, it is necessary to examine its stages of development up to the birth of the 1983 Arbitration Law and its implementation rules. This should lead to clarification of the Saudi situation since there is a defect that needs to be reconsidered, namely with challenging arbitral awards in the hope of reaching just solutions.

#### 5.18.1. Showing the Historical Development of the Saudi Judicial System and its Present Situation

This will be a brief outline of the historical development of Saudi justice. Rather than going into a detailed study, the objective here is to understand the general form of Saudi justice and its historical birth. For this reason, the following points will be discussed:

1. Historical development of Saudi Judicial System.
2. Saudi Judicial system in the present day.

##### 5.18.1.1. Historical Development of Saudi Judicial System

Before being unified by King Abdulaziz Al Saud in 1319H./1901 A.D., the Kingdom of Saudi Arabia was a quasi-island where scattered tribes lived on its dry desert lands. These tribes were not governed by a unified administrative or political unit. When King Abdulaziz came to power and unified the Arab Island in 1343H./1924 A.D.., he was made king of AL Hijaz and Sultan of Najd and its annexes. In 1351H./1932 A.D. the

Kingdom of Saudi Arabia was unified.[49] The King played an important role in the birth of this country and its unification, and contributed to the thriving of its economy and science.

King Abdulaziz began with judicial reforms and the legal systems, the Ottomans systems and laws were disclaimed and cancelled through a senior scholars' board in 1345H./1927 A.D. This was done by referral to Islamic Jurisprudence.

The King's political perceptions and wisdom ensured that no precipitate cancelling of the existing laws took place before new laws had been put into place. For this reason, he decided:

> 'The awards of the Othmans laws were still effective because we did not show our intentions to set them aside and issue new one.'[50]

The legislative courts were also abiding by Islamic law regardless of the ideology of a specific school of jurisprudence. They implement the best opinion according to the existing proof.[51] This was emphasized by King Abdulaziz when he said:

> 'We do not abide by a specific school of jurisprudence. Whenever we find the proof in any of the four schools of jurisprudence (Al Hanafii, Maliki and Hanbali schools), we refer to them. If we fail to find proof the Hanbali school opinions should be applied.'[52]

However, the founder of the Kingdom of Saudi Arabia, King Abdulaziz, said in his sermon given from the royal palace of Makkah AL Mukarrama, on May 11th 1929, that

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[49] See Mustafa Al Dabag, Arab Isle 1st Ed., Dar Altaliah, Beirut, 1322H/1904 A.D. Vol. 1, P. 499.
[50] See Royal Decision No 1166 dated 27/12/1345H./16th June, 1927 A..D. Also S.H. Amin, Middle East Legal System, Op. Cit. P.312.
[51] This Model erases the aspect of imitation and opens the horizon to more assiduity to reach the 'legislative' opinions of different schools of Jurisprudence which gives an impetus to more scholastic research.
[52] See speech of King, Abdulaziz Al Saud, UM AL Qura Newspaper (official state newspaper) Issue No. 484, 8/12/1353 H./24/3/1934 A.D. See also conversation conducted between Sheikh, Abdullh Al Bassam, Head of Court of Distinction in Makkah Al Mukarrama and Member of the Board of Senior Scholars, Judicial Magazine issued by the Ministry of Justice in the Kingdom of Saudi Arabia which dealt with the affairs of jurisprudence and justice, Issue N° 3 1999, P. 198.

Saudi Arabia did not abide by a specific school of jurisprudence. The sermon included the following:

> 'They call us Wahbas and so they call on a 'creed' in the sense that it a special creed and this is a big mistake brought about by mistaken hearsay emphasized by opponents. We do not have a new creed or new belief, Sheikh, Mohamed Bin Abdulwahed did not bring something new. Our creed is in accordance with the Quran and Sunna and the deeds of the prophet's companions. We do respect, the four leaders and there is no difference between Malik, Shafii, Ahmed and Abu Hanifa. We respect them all...[53]

It is clear that King Abdulaziz gave Saudi Arabia a broad framework of Islamic Jurisprudence and gave the judges freedom to issue their awards in accordance with Islamic law.

The King continued his judicial reforms in 1926 when he reserved more time for his countrymen and accepted personally their complaints against administrative authorities. In short, he established certain kind of real justice.[54]

This is proof that the king had decided to build a state of justice where no abuse of power would be acceptable. In this respect he issued a decree regulating justice in the western zone cities of the kingdom of Saudi Arabia. This decree was called the 'system of forming legal courts' and was issued on 4.11.1346H./3 June 1927 A.D. It consisted

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[53] See Um AL Qura Newspaper, Issue No. 229, 6/12/1347H/16th May 1929 A.D. See also press coverage of the occasion of National Day of the Kingdom of Saudi Arabia N° 70 Riyadh Newspaper, Issue No. 11778, September 2000, P. 8. It is important to rectify what Mr. S.A Amin Said in his book, Legal System Middle East when he said 'The right Hanbali School was generally disapproved of by the majority of Muslims but it was revived in the eighteenth Century by the Wahabi movement in Arabia...' This was not accurate because the Hanbali creed is part of the four famous Sunna schools, i.e. the Al Hanafi Shafii, Maliki and Hanbali Schools. For more information see S. Habach who wrote 'the principal Sunni Schools are the Hanafi, Maliki, Shafi and the Hanbali Schools; they don't differ fundamentally but disagree on several points of detail.' - New York, March 1959. See also J N D Anderson, Op. Cit. P.XIV. See also scholars who funded these schools of Jurisprudence, Ian Richard Netton, Op. Cit PP. 17-23-159 and 228 and against this opinion, Mr S.H Amin's description of the Hanbali movement which is not accurate because Hanbali Jurisprudence, like the other schools, is flexible enough in financial transactions and procedures and has a wealth of jurisprudence. Concerning what he called the Whabi creed, the sermon of King Abdulaziz, mentioned above, contains some clarification on this point because Sheikh Mohamed bin Abdulwahab, when deliberating about reforms knew that the people of the quasi Arab Isle we unbelievers and ignorant. So Sheikh Mohamed bin Abdulwahab came to teach people the Quran and Sunna.

of 24 articles. A legal court was also created in Mekkah, followed by small courts in the other cities.

This was the first procedural system for legal courts[55] issued since clarification of judicial proceedings were made and an Award Board was created for reviewing and controlling the judgements issued by legal courts. On 4.1.1357H./6.03.1938 A.D., a system of concentrating on the liabilities of legal justice[56] was issued followed by a system of organizing administrative affairs in legal constituencies.[57] The Royal Decree of 1373H./1954 A.D. was issued and considered to be a source for scholars of Islamic Jurisprudence in the Kingdom of Saudi Arabia.

Then a special presidency for the judicial authority was created. It was developed further and resulted in the creation of the Ministry of Justice in 1390H./1971 A.D. This authority dealt with the affairs of justice and judicial follow up.

### 5.18.1.2. Current Saudi Judicial System

Judicial precedents will now be examined, since it is noted that the Saudi judiciary, from its birth, has adhered to the Islamic approach. When a judge wants to issue a judgement in the case submitted to him, he refers to the sources of Islamic Jurisprudence which are Quran, Sunna, Consensus and Analogy, as well as the general rules of Islamic Jurisprudence. From these sources, any legal judgement can be taken as a basis for any new case but there is no obligation to adhere to any previous judgements.

Mr Carl H. Perdue says on this subject:

> 'Saudi Arabia's judicial system, with an established legal philosophy administrated by a professional judiciary is considered to be generally efficient as a dispute resolution process. One universally recognized element that is considered important to any legal system but absent from Saudi Arabia's, is acceptance of precedent in the formation of

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[54] See Um AL Qura Newspapers (official newspaper) , JUNE 6th, 1926.
[55] Issued in Virtue of Royal order N° 21, 15th JUNE, 1931 A.D)
[56] Published in Um AL Qura Newspaper (official Magazine) issue 560, dated 14/1/1357 H (1938 AD)
[57] Issued by virtue of Royal Order N° 109, 24th January 1372H. (13th October, 1952).

judgements. Reliance upon an analogy to factual circumstances in previous cases and controversies is considered to provide a degree of certainty to individuals in ordering their business and social affairs and to give some assurance that judicial determinations are not made in a more ad hoc fashion'.[58]

There is no doubt that judicial precedents are important and beneficial and there is nothing to prevent Islamic Jurisprudence from benefiting from any judicial case. It is important to mention the role of organizations and to report all judicial judgements since scholars could benefit from this important judicial wealth. Many judges and experts in Saudi Arabia agree that this is an important area within Islamic Jurisprudence.[59]

This is also the concern of the Saudi private sector since the legal Saudi Advisor, Saleh Alkhadir says:

> 'There is a certain organization for the preparing of arbitral awards in the Chamber of Commerce and Industry. This organization is indexed specifically for the benefit of research. Concerning the Chamber of Commerce and Industry of Riyadh, a number of researchers are working on a project to specify a clear mechanism, from which they can find real grounds for arbitral awards.'[60]

To summarise, it is clear that there is a real intention to benefit from previous judgements and cases because they include a huge amount of scholastic wealth although flexibility is allowed since the judge or arbitrator is free to some extent to decide on a case providing that they abide by the Islamic rules of Jurisprudence.

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[58] Mr Carl H. Perdue (Legal Advisor of Saudi Arabian Basic Industrial Corporation in Saudi Arabia) Author Int. Review dated 28 August 2000.

[59] This is the result of interviews with both Prince Bander Bin Salman Al Saud, the Secretary Assistant to the Arab Arbitration Council, and member of the Administrative Council of the Provincial Center for Commercial Arbitration in Cairo, and Advisor in H.R, - interview dated October 7th 2000. Also interviews arranged with his Excellency, the Minister Mohamed Al Jabr, President of Saudi Bureau of Experts and Judge Ali Alsaoui, a judge on the Board of Grievances, former Chief of Commercial Constituency. The Saudi Ministry of Justice issued a Magazine of Justice dealing with jurisprudence and justice where a number of judicial awards were published. This was considered the first step towards publishing judicial awards.

Since examination of the way to challenge arbitral awards before the Saudi Judiciary (both foreign and national), has been carried out, a brief note on the Modern Saudi Judiciary System would now be appropriate in order to ascertain how arbitral awards are challenged. Some points that need reconsideration and rectification will also be discussed in this section.

It is widely believed that the Saudi Judiciary System has followed and is still following Islamic law. This is emphasized by the basic system of government which is stated to be as follows:

> 'Governing in Saudi Arabia is done by virtue of the Quran and the Sunnna of the Prophet (peace be upon him) for they are the two systems that govern the whole country.'[61]

The following is stipulated by Saudi Judicial Law:

> 'Judges are independent with no authority over them in the exercise of their duties except the principles of Islamic Jurisprudence and valid regulations.'[62]

In this respec, Sheikh Abdullh Al Monea has said:

> 'I would not say that the first article of the judiciary system finds this distinction, but I would say that this article expresses the reality of the judiciary system in the Kingdom of Saudi Arabia from its birth when Sheikh Mohamed bin Abdulwahab allied himself to Prince Mohamed bin Saud.'[63]

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[60] The Legal Advisor, Saleh AL Khadir, General Director of Legal Administration in Chamber of Commerce and Industry of Riyadh, Supervisor of Center for Arbitration in the Chamber of Commerce. Author interviewed August 10th, 2000.

[61] Article 7 of the Basic System of Government issued by virtue of Royal Decree N° A/90 dated 27.8.1412H./ March 1st, 1992 A.D. See also S.H. Amin, East Legal Systems, Op. Cit. P. 316.

[62] Article 1 of The Judicial Law of 1975.

[63] Sheikh, Abdulah AL Manea, (Head of Distinction Board in Meccah Western Area) and Member of the Board of Senior Scholars, see Saudi Magazine of Justice, Issue 4, 1999, P. 178.

The most recent Saudi system issued is called the 'system of legal pleadings'.[64] These pleadings contend that:

> 'The courts apply Islamic Shariah to the cases submitted to them. They deal with these cases by virtue of the Quran and Sunna and in accordance with the State President's (the country's leader's) instructions which do not deviate from Islamic Sharia.'[65]

It is worth mentioning here that issuing a new system of legal pleadings has been considered a civilized transition at the level of the Saudi judiciary system. It has really filled in gaps that existed in the old systems and will bring about certain developments in legal proceedings and speed up dispute settlements. It is also of paramount importance to stress the fact that Islamic Jurisprudence welcomes the idea of benefiting from previous cases and modern experiences which civilized, industrial countries have been through. They constitute, in fact, a stepping stone info further development of the judiciary system.

In this sense, M. Bin Jobeer, Head of Saudi Advisory Council, has said:

> 'Implementing Islamic Shariah awards does not mean that we cast away civil achievements in thinking, administration and organizations. If we find true interest in a foreign law that conforms to Islamic Sharia , we adopt it.'[66]

This then is the general aspect of the Saudi Judicial System. As a result, the Saudi Judiciary system, as influenced by Islamic judicial authority, can be divided into three sections as follows:

1. Legal Judiciary System (General Guardianship)
2. Administrative Judiciary System (Board of Grievances)
3. Administrative Judiciary Committees.

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[64] Issued by Ministers Council in July 2000 published in Riyadh Newspaper, Issue 11762 dated September 6th 2000, PP. 32-33.
[65] Article (1)

## 1. Legal Judiciary System (General Guardianship)

First, the legal judiciary system is considered the normal judicial system dealing with all types of disputes and crimes occurring inside the country.[67] This was stipulated by the 1975 Saudi system.[68] The legal judicial authority[69] consists of the following:

1- The Highest Judicial Council.
2- The Court of Cassation
3- The General Courts
4- Particular Courts

Each court has its own field of specialty according to the system of organization.

1. The Highest Judicial Council - This is considered the highest judicial council in the Kingdom of Saudi Arabia. It consists of eleven members, five of whom occupy the position of Head of the Cassation Court and form the permanent Board headed by the most experienced in the judicial cycle.

The highest judicial council has several important jurisdictions, such as dealing with legal issues supervised by the Minster of Justice, reviewing judicial awards concerned with execution and other strong sanctions,[70] including supervising other courts within the limits traced by the system.

2. Court of Cassation - This constitutes a chairman and a number of judges, and consists of three departments as follows:

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[66] Sheikh, M. Bin Jobeer, Head of Saudi Advisory Council, Okaad Newspaper, Issue 10871, 1417H/1996 A.D. P.1.
[67] Emphasized by Committee of Cases Investigation (Board of Grievances) in its decisions N° 7/T, 1399H/1978 A.D. and 400/Q, 1398H/1976 A.D. published in the Group of Systematic and Legal Principles, by the Board of Grievances P. 463, where it was decided that '....legal courts deal with all disputes except those submitted to other judicial authorities...'
[68] Article 26.
[69] Article 5.
[70] See Article 8 of Saudi Judicial Law rectified by Royal Decree N° M/76 dated 14/10/1395H/19th November 1975 A.D. Also Hamed Abu Taleb, Judicial System in the Kingdom of Saudi Arabia, Dar Al Fikr Al Arabi, Cairo, 1984 PP. 12-17. See also The Magazine of Justice, issued by Saudi Ministry of Justice, Issue 4, 1999, P. 206 and Ernest Kay, Op. Cit. P. 89.

a- Penal Cases Department

b- Personal Civil Codes Department

c- Department of other cases.

The judgements of the Court of Cassation, which deals with all cases, are issued by three judges with the exception of cases concerned with executing and beheading which are issued by five judges.[71]

It is worth mentioning that the Court of Cassation engenders certain differences in what concerns the degree of judging. The Court of Cassation may be primary or secondary as is the case for some courts of appeal in other countries.[72]

It appears that the Courts of Causation treat judicial cases thoroughly and accurately. However, if they involve the parties of arbitration they are considered as secondary courts.

3. General Courts – In these courts judgments are issued by one judge, except in important cases that are reserved to more than one judge.

Previously, general courts were called legal courts. When the judiciary system was set up in 1975, the name 'general courts' was coined. This nomination appears to be reasonable since 'legal' courts would imply the existence of non-legal courts in the kingdom and this is not accepted in Saudi Arabia where Islamic law is applied.

4. Particular Courts - These courts are also called 'Precipitative courts'. Laymen only know the name 'Precipitative'. This name has been changed throughout the new system of pleading which stipulates the following:

Partial courts deal with following:

a) Cases of preventing opposition to possession and repercussions.

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[71] See Article 13 from the 1975 Judicial Law.

[72] See interview between lawyer Ibrahim AL Issa and solicitor Abdurrahman Al Qassim, Riyadh Newspaper, Issue 10802, January, 20th 1998 A.D. P. 30. See also S.H. Amin, Middle East Legal Systems, Op. Cit. P. 320, Ernest Kay, Op. Cit. P. 910.

b) Cases whose value does not exceed ten thousand riyals, the list specifies the manner in which this value is estimated.[73]

## 2. Administrative Judicial System (Board of Grievances)

As previously mentioned, the Saudi Judicial system adheres to Islamic Jurisprudence, and dealing with grievances was conducted in the era of the prophet and AL Rashidin Caliphs.[74] For this reason, King Abdulaziz AL Saudi gave much thought to justice. First, he instituted a general administration for Grievances within the Ministers' Council,[75] which became independent and dealt directly with administrative cases. This was called The Board of Grievances and was related directly to the king.[76] The headquarters was established in Riyadh with several branches in Dammam city and the Southern Area. It is still possible to establish other branches in other areas of the kingdom.

The Board of Grievances began its duties with some administrative cases and disputes under its control. Another judicial office was set up within the Board of Grievances by virtue of Ministers Council Decision N° 1467, 27/9/1394H.

When this system of the Board of Grievances was established it was stipulated that

'the Board of Grievances is an independent entity'.[77]

The system includes the specialty fields of the Boards as well as its information and members are considered to be judges. Among the specialties of the Board are the following:

a) Administrative disputes such as cases of government officials related to their service rights and obligations and cases dealing

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[73] Article, 31. from New System for Legal Pleadings, issued by virtue of Ministers' Council decision of July 2000.
[74] See M.A. Jafer, Op. Cit PP. 17-20, also Herbert J. Liebseny, Op. Cit. PP. 254-255.
[75] See Hamed Abu Taleb, Op. Cit. P. 24.
[76] By virtue of Royal Order N° 2/3/8759 dated 17/4/1374 H./1955 A.D.
[77] Article 1 from The Board of Grievances issued by Royal Decree N° 51, 1402H/1982 A.D.

with cancelling administrative decisions and compensation trial cases against government personnel.[78]

b) Trial cases related to falsifications as stipulated by the system of fighting falsifications and crimes stipulated in the law of fighting bribery.[79]

c) Demands for executing foreign courts awards - The Board of Grievances performs this task on the basis of Ministers' Council Decision that stipulates the following –

'The specialized authority to which demands for executing foreign awards issued by Arab League Countries are sent is the Board of Grievances.'[80]

d) The Board of Grievances is the Authority for commercial disputes. Before the establishment of the specialty for the Board of Grievances in 1350H/1932A.D. commercial disputes were the domain of Commercial Tribunals. These bodies and committees for commercial disputes in Saudi Arabia have gone through swift legal developments, their powers were originally shared with other commercial bodies and committees in the cities of Riyadh, Jeddah and Damma[81] but have since been transferred to the Board of Grievances by virtue of a decree by the Ministers' Council.[82]

There were many commercial departments inside the Board of Grievances but our interest here is that these commercial departments represent the authority most exposed

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[78] See Decree of the Board of Grievances N° 7/T/1399H/1978 A.D. Collection of Legal and Systematic Principles, Op. Cit. 463. See also Decree numbers 5/2/1398H/1977 A.D. and 36/T, 1399H/1978 A.D. PP. 25 and 574.

[79] The system of fighting falsification issued by virtue of Royal Decree N° M/53, 15/11/1382H/9th April, 1963 A.D. on the basis of the Decree of Ministers Council, N° 550 dated 3/11/1382H/2nd March, 1963 A.D. and the System of Fighting Bribery issued by virtue of Ministers Council Decree N° 175 dated 3/11/1412H/5.5.1992 A.D.

[80] Decree of Ministers Council N° 250 dated 1379 H/1959 A.D.

[81] Dr Mohamed Hassen AL Jabr, Commercial Contracts and Banks Transactions in Saudi Arabia, Published by Libraries Affairs Deanship, King Saudi University, Riyadh, 1984, P. 14. For more details see the Monograph Judicial Speciality in Commercial Disputes in the Kingdom of Saudi Arabia, by Dr Mohamed Hassan Al Jabr, published by Center of Research, College of Administrative Sciences, 15th Issue, First Year, Rajab 1399 H/1979 A.D. PP. 25-26.

[82] See Ministers Council Decree N° 241, dated 26.10.1407 H/22 June 1987 A.D.

to commercial award challenges. For this reason, we will discuss how such challenges takes place.[83]

### 3. Administrative Judicial Committees

As a result of the speedy development and commercial change which Saudi Arabia has undergone, various types of disputes have occurred, and these require the existence of some administrative committees that would deal with the judicial cases presented.

It is necessary to mention that even if there have been experiences which these committees have already gone through, numerous other problems might arise as a result of their field of specialty disagreement and problems with a possible lack of ability of persons to act as judges. This lack could adversely affect legal case procedures.

There are also legal questions such as what is the nature of these committees? Could they be considered a judicial or simply an administrative authority? They are in fact composed of administrative staff. Without going into detail on this point, it should be noted that the main objective is to present a concise picture of the Saudi Judicial system.

However, to answer the question, two opinions about Saudi Jurisprudence are of great importance. First, these committees are only quasi-judicial committees but they deal with judicial affairs.[84] Second, these committees are considered as judicial authorities, which shows the diversity of judicial bodies in Saudi Arabia.[85]

In this respect, it is necessary to distinguish between the two types of administrative committees.

a. The first type performs judicial tasks, such as settling workers' disputes.

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[83] There are other authorities in front of which a challenge may occur. This will be discussed later.

[84] Abdurrahman Al Qassim, Administrative Quasi-judicial Committees, Riyadh Newspaper, Regimes and Lawyer Works Dept. Issue 10802, January 20th 1998, P.30. See also Suliman Al Salim, Judicial Organization in the Kingdom, General Administration Institute Printings, Riyadh, 1971, P. 35.

[85] Mohamed Abdeljawad, Legislative Development in the Kingdom of Saudi Arabia, Cairo University Printing Press, Cairo, 1977, P. 168. and Hamed Abu Taleb, Op. Cit. P. 122.

b. The second type do not hear legal pleadings. This type of committee oversees violators who are made to pay fines, therefore they cannot be called judicial committees.

However, it would be advantageous to reconsider the whole committee system and create specialized judicial courts, both normal and administrative, such as the Board of Grievances which does not include specialized judges but judges who hold certificates in Islamic Shariah and the Law.[86] This would entail placing judicial authorities under a simple authority.[87] In relation to this, the recommendation of this study would be to unify the Saudi Judicial Authorities.

Following this brief note on the Saudi Judicial Authority and the specialized authority before which arbitral awards are challenged, the following sub-section will give a short history of the stages which Saudi Arbitration has gone through to date.

### 5.18.2. Developmental Stages of Saudi Arbitration

The Saudi Arbitration System went through various stages until the 1983 Arbitration Law was issued. Its development can be divided into four stages:

1. Arbitration according to the law of the Commercial Court.
2. Arbitration according to the law of work and workers.
3. Arbitration according to the law of Chambers of Commerce and Industry.
4. The 1983 current Arbitration Law and its adherence to International Treaties in the field of Commercial International Arbitration.

#### 5.18.2.1. Arbitration in Accordance with Commercial Law Courts

The System of the Commercial Council is considered to be the first project of the Commercial regime in the Kingdom of Saudi Arabia set up in 1945. This system

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[86] This opinion is supported by M. Hashim in his book Judicial Authority and Proofing Op. Cit. P. 49.
[87] Supported by Judge, Ibrahim Swilem, Head of 4th Administrative Department, Board of Grievances in Saudi Arabia, author interviewed 22nd August, 2000.

stipulated the creation of a Commercial Court in Jeddah to deal with commercial affairs.[88]

The applicable law included texts dealing with arbitration in Five Articles, (493 to 498) included in the sixth entry of the law. These articles were taken into consideration with the issuance of the 1983 Arbitration Law. Hence, arbitration was according to the law of the Commercial Tribunal and based on disputants' agreements through a written official document approved by a tribunal official. The law stipulates the following:

> 'If the disputants decide the presence of an arbitrator or arbitral tribunal is necessary, they should agree and appoint a tribunal official through a written official document involving the terms of arbitration, such as validity of period of arbitration and they should sign this document and hand it to an arbitrator.'[89]

Article 394 of the same law obliges the arbitrator or arbitral tribunal to apply the decided procedural rules before the commercial tribunal. However, it should be noted that the law of the Commercial Tribunal does not clarify the extent of the court's control over arbitral awards, since it contends:

> 'If the arbitral award issued by arbitrators conforms to its origins and arbitration document, it is approved by the Tribunal and becomes executable. If this is not adhered to it can be challenged by the commercial tribunal.'[90]

So, does the Commercial Court have the right to review the reasons why the arbitral award was made or the procedural side only? It seems that commercial tribunals' control over arbitral awards is only a formal control. If it is responds to its origins and conditions, the court approves and then executes the award. In reality this goes hand-in-glove with the objective of arbitration, which is the quick settlement of commercial disputes.

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[88] Issued by virtue of decree N° 32, 15.1.1350 H/1st June 1931 A.D. Government Security Press. Also Dr. Mohamed AL Jabre, Saudi Commercial Law, Op. Cit. PP. 17-18 and Wala Refat, Op. Cit, P. 76.
[89] Article 493.
[90] Article 495.

### 5.18.2.2. Arbitration in Accordance with the Law of Work and Workers

Among the laws that have been long preserved is the law of work and workers.[91] This has been done in line with modern developments witnessed in the field of development on the one hand and preserving workers' and patrons' rights through justice in accordance with the rules of Islamic Jurisprudence on the other, because the latter places great importance on workers' rights.

Islamic law has preserved the rights of workers. The law of labour and labourers came to clarify the obligations of workers and patrons and was issued with texts dealing with settling workers' issues. For example:

> 'In all cases the two parties have the right to choose an arbitrator or arbitrators to settle an existing dispute without submitting it to committees stipulated in this chapter.'[92]

The law of work and workers in considered to be a step forward in the field of arbitration since it leaves disputants free to solve their problems through arbitration. In reality this text does not give anything new, since this right had already been stipulated by Islamic law, it only gives further clarification.

### 5.18.2.3. Arbitration in Accordance the Chamber of Commerce and Industry Law

The Chamber of Commerce and Industry in Saudi Arabia was established[93] to represent Commercial and Industrial interests to the authorities and to develop the commercial

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[91] The Law of Work and Workers issued by virtue of Royal Decree N° M/21 dated 6.9.1389 H/15th November 1969 on the basis of the decision of Ministers' Council N° 745 dated 23.8.1389H/3rd November 1969. Published in Um AL Qura Newspaper (official Newspaper of the state), Issue 2299 on 19.9.1389H /28th November 1969 A.D.
[92] Article 183.

and industrial affairs of the country. The concern here is commercial arbitration since the law of the Chamber of Commerce and Industry provides:

> 'disputes of a commercial nature are settled through arbitration if parties agree to submit them to it.'[94]

The system stipulates that the specialties of the Council of the Chamber of Commerce and Industry are as follows:

> 'Practicing arbitration and settling commercial and industrial disputes through arbitration if parties agree to do so, where parties belong to different chambers of commerce and industry or one of them is local while the other is foreign.'[95]

Articles from 49 to 54 stipulate how arbitration proceeds and the way arbitration tribunals and procedures are formed. It is worth mentioning that the law of the Chamber of Commerce and Industry also stipulates the following:

> 'If a party fails to attend an arbitration session the president may appoint a substitute.'[96]

It seems that the litigant is deprived of his right to choose the arbitrator because the basis of arbitration is agreement and free-will for all parties. For this, the arbitration articles should have stipulated the right of a party to choose a substitute themselves for an arbitrator failing to attend an arbitration session.

As the Implementation Rules of the Law of Commercial and Industrial Chamber puts it:

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[93] By virtue of the Law of the Chamber of Commerce and Industry issued by Royal Decree N° M/6 dated 30.1.1400 H/1980 A.D. This Law cancelled the former law of the Chamber of Commerce and Industry. Implementation rules were issued by virtue of Ministerial Decree N° 1871 dated 22.5.1401H /28th March 1981 A.D.

[94] See Article ( 6 ).

[95] Article 37, paragraph 3.

[96] Article 52.

'If disputants belong to different Chambers of Commerce and Industry or one of them is foreign, they must submit their arbitration application form to the president of the Chamber of Commerce and Industry. Hence, arbitration is conducted by virtue of Articles 50, 51, 52 and 53 of these implementation Rules.'[97]

Before closing the discussion on the status of the law of the Chambers of Commerce and Industry, it should be noted that a number of points have been overlooked by these implementation rules.

1. It is understood that the arbitral award issued by an arbitral tribunal is final because the implementation rules do not clarify the challenging of arbitral awards by disputants.
2. Implementation rules do not clarify the possibility of reviewing the arbitral award. It seems that this warranty is important in ensuring that the arbitral tribunal is issued with its necessary conditions.
3. It does not clarify, in the law of the Chamber of Commerce and Industry, the detailed necessary procedures for arbitration in the situation of the death of a party nor outline the necessary qualifications of the arbitrator.

In brief, what has been outlined represents the developmental stages of Saudi arbitration from the time when all Saudi legislative authorities took over and began to deal with its development in all fields. The current Saudi Statute of Arbitration was issued in 1983.

### 5.18.2.4. Current Saudi Arbitration Law 1983 and Adherence to International Treaties in the field of Arbitration

Some aspects of Saudi Arbitration Law were covered when comparisons between Islamic Jurisprudence and modern arbitration laws were outlined.

The country has been applying arbitration since the ARAMCO case in 1958, more especially, international commercial arbitration. However, with the promotion of legislation in international commercial arbitration used by many countries and

[97] Article 54.

companies, arbitration inhibitions have become dissipated. Therefore in 1983 the current Saudi Arbitration rules were issued.

Saudi Arabia has benefited from the issuing of the current statute. Benefits include the following:

1. Islamic Jurisprudence awards are made because Saudi Arabia is a country that applies Islamic Jurisprudence.
2. Arbitration rules from different countries and the experiences through which they have gone have become familiar in Saudi Arabia.
3. Saudi former experience in the field of Arbitration stated in both Commercial Tribunals and the Statute of Work and Workers and the Law of the Chamber of Commerce and Industry, is made use of.

For these reasons, the current Saudi Arbitration Law was issued, this is similar to most modern arbitration laws. So the contents of international treaties can be added to current Saudi Arbitration. For example, the Kingdom's adherence to the 1958 New York Convention[98] and its earlier adherence to the Arab Countries' Leagues to implement the awards agreed by the Arab League Council on 14th September 1952 A.D. It also includes judicial arbitral awards.[99]

To answer the previous question - i.e. how is it possible to challenge arbitral awards within the Saudi Law? - the following points will be discussed:

1. What is meant by the' specialised authority' in disputes under the current Saudi Arbitration Law.
2. How to challenge arbitral awards if arbitration is local, i.e. Saudi Law.
3. How to challenge arbitral awards if arbitration is foreign.

### 5.18.3. Clarifying Specialised Authority in Disputes in Current Saudi Arbitration

[98] The Kingdom of Saudi Arabia joined The New York Convention on the recognition and Enforcement of Foreign Arbitral Awards June 10, 1958 by virtue of Royal Decree N° M/11 dated 16.7.1414H/29th December 1993 A.D. The Decree stipulated that the adherence document to be handed to the United Nations should include the following: 'The Kingdom has declared an equal footing in that it will apply the awards of this convention issued to a province of a contracting state.'

[99] Saudi Arabia, Syria, Jordan, Egypt, Yemen, Iraq and the Lebanon joined this convention.

On going through Saudi Arbitration Law, the term 'specialized authority in disputes' is seen many times. It can be found also in the implementation rules. Law-makers, in fact, did well when they coined the expression 'specialised' because arbitration in Saudi Arabia may be commercial or civil and a special authority would treat each subject differently.

The importance of this expression in Saudi Arbitration Law has become noticeable as a result of Saudi Arabia's modern experiences, since the special authority may be a legal court or the Board of Grievances because the latter deals only with commercial disputes. The special dispute authority may also be the Ministry of Commerce dealing with insurance. Thus, this special authority may be either -

1. A commercial department of the Board of Grievances.[100]
2. A Legal Court if the subject of the dispute is of a civil nature.[101]
3. The Ministry of Commerce which is actually the authority dealing with insurance.
4. Any other specialized authority

The question, is why does the Ministry of Commerce take charge of insurance issues and not the Legal Court or the Board of Grievances? To answer this question, it is necessary to clarify the religious issue since there is an opinion within Islamic Jurisprudence that does not allow insurance upon lives and possessions because this remains abstract. However, such insurance may or may not be taken out. Another opinion sees insurance as a requirement of modern times since it brings social solidarity among citizens.[102] As a result of this divergence of jurisprudence, neither the Legal Courts nor the Board of Grievances has dealt with disputes related to insurance.

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[100] By virtue of awards of Ministers Council N° 241 dated 26.10.1407H./22 June 1987 A.D. which copies the specialties of the Board of Arbitration to settle commercial disputes.

[101] Such as real estate rental issues submitted to Arbitration in front of a Legal Courts, Lawyer Turki AL Shubiki, author interviewed October 2000.

[102] For more details see Dr. Athman, A. Al Hogel, Insurance Transactions in Islamic Jurisprudence, First Edition, Al Firazdaq Printing Press, 1987, PP. 97-130.

It should also be mentioned that the practical reality within Saudi Arbitration has witnessed a noticeable success in what concerns insurance disputes. In this respect, Hassan AL Malla says -

> 'The practical application yields excellent success in disputes over insurance. The objectives of insurance have been met through the Ministry of Commerce that has facilitated the procedures of approving the arbitration document which is in harmony with the objectives of arbitration'.[103]

This was emphasized by the former arbitration Secretary of the Riyadh Chamber of Commerce and Industry who claimed:

> 'The biggest percentage of issues submitted to Saudi Arbitration are related to Insurance disputes.'[104]

Through personal attendance to arbitral issues in insurance disputes, it seems that parties agree to consider the award of the arbitrator or arbitral tribunal as final and compulsory.[105]

In reality, this makes arbitration fruitful and rapid in settling disputes. Before closing discussion on this point it is important to mention the awards of the Ministry of Commerce which is not a judicial authority. It would appear to be necessary is to reconsider the field of the specialty of the Ministry of Commerce dealing with this type of dispute and appoint a specialized judicial authority to perform this judicial task.

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[103] Hassan Al Malla, A Symposium of Commercial Arbitration, Op. Cit P.3, Riyadh Arbitration Chamber of Commerce and Industry. Also his statement from the Arbitration Center of Insurance Disputes in Saudi Arabia, GCC Commercial Arbitration Bulletin, N° 8, April 1998, PP. 13-14.

[104] Turki Al Shubiki, author interview, 17th July 2000. This also was realised when dealing with numerous cases at the Arbitration Center in Riyadh Chamber of Commerce and Industry and the Arbitration Center in the Jeddah Chamber of Commerce and Industry.

[105] For example see Saudi Arbitral Award N° 17/90 dated 5.5.1414 H./2th October 1993 A.D. about insuring crops during transportation - agricultural company v. the Sawami company. Also the Saudi Arbitral Award dated 7.6.1997 in the case of the Saudi Petrochemicals Company v. the National Insurance Company and the sermon of the Minister of Commerce N° 2201 dated 15.10.1420H/21st January 2000 A.D. and sermon N° 1212/11 given on 23.06.1424 H /21st August 2000.

In brief, it is understood that the specialized authorities, in regard to disputes in Saudi Arbitration, are as follows:

1. The Commercial department of the Board of Grievances.
2. The Legal Courts.
3. The Ministry of Commerce.
4. Other specialized authorities such as committees settling worker's disputes.[106]

How to challenge the internal arbitration award with in the Saudi Law will be discussed in the next section.

### 5.18.4. Challenging Internal Arbitration Awards in Saudi Law

In Saudi Law disputants may challenge an arbitral award. This is explicitly stated in the following:

> '...the conflicting parties may, within fifteen days from the date of their notification of the award, submit their objections to such award to the Authority with which the award has been filed. Otherwise, the award shall be deemed final.'[107]

It is now clear that the Saudi Arbitration law has given the right to disputants to object to the issued award on condition that any objection should be manifested within the specified fifteen days. If the objection is not filed within this time period the arbitral award becomes final and there is no further possibility of objecting to it. In this sense the qualified authority makes sure that the award does not contradict Islamic rules and does not bear challengeable features.

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[106] See Article 183 of Saudi and Workers Statute issued by virtue of Royal Decree N° M/21 dated 6.9.1389 H/15th November 1969 A.D. on the basis of Ministers Council Decree N° 745 dated 23rd August 1389 H/3rd November 1969 A.D.
[107] Article 18.

Saudi Arbitration Law stipulates that the arbitration authority must look after the existing disputes at the time of hearing the challenge sessions. The following text stresses this idea:

> 'If any litigants submit an objection to the award within the period provided for in Article 18 above, the Authority, having original jurisdiction to consider the dispute, shall either reject such objection and issue an order for execution of the award or accept the objection and take the action it deems appropriate'[108]

The previous article specifies the role of the concerned authority in cases where objection to the arbitral award has been submitted to it, since it states that the arbitration authority should decide on one of the following:

1. Refuse the objection and issue an order of award execution.
2. Accept the objection and find an alternative solution.

Concerning the first point, the qualified authority should scrutinize the challenge submitted to it. If it is found that it does not conform to Islamic Jurisprudence, it issues a final executable award.

In the implementation rules of arbitration law is the following sentence:

> '...all concerned government authorities and departments shall cause this award to be executed with all legally applicable means if such execution requires application of force by the police.'[109]

The following question arises in regard to acceptance of an objection to an award: what type of judicial review is necessary when considering objection to an award - an objective judicial review or a formal one?

### 5.18.4.1 Type of Judicial Review – Procedural or Case Subject

[108] Article 19.
[109] Article 44, For more details on methods to execute arbitral awards see Chapter six, infra.

The end of article (19) states the following - *'...or accept the objection and take the action it deems appropriate.'* From the previous text, is it to be understood that the relevant authority should review the case submitted to it, but should it perform this task in a procedural way only, or the authority go farther in order to review reasons why the arbitral award was made? To answer this question from the legal Saudi Jurisprudence perspective, there are two points of view that need clarification.

**First Opinion:**

This claims that the qualified authority, as stipulated by article (19), is an authority of appeals in regard to arbitral awards, either in cases where the award is null or there have been negative effects in the arbitral procedures, or there are causes related to the subject matter.[110] It is also emphasized that anything heard before this authority is a kind of appeal.[111] It seems that the advocates of this opinion contend that Saudi arbitration does not clarify specific causes for challenge. Arbitration, therefore, can be described as a stage of Judicial authority and this is a great guarantee of the equitability of arbitration.

**The Second Opinion:**

Even if Saudi arbitration has given the right to a qualified authority to challenge arbitral awards, this clearly is not considered as an appeal but as a challenge of the award within a specified period.[112]

It is important, to those holding this opinion, not to mix the two types of judicial control over arbitral awards, i.e. a legitimate control in the way that the qualified authority makes sure that the award is correct or objective control. If it is a legitimate control based on the procedural, it is accepted, but if this control is based on reviewing the reasons why the award was made , it is considered as a broad concept of challenge.[113] It is also claimed that if the concept of review is too broad, it would lead to a separation from arbitration.[114]

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[110] Wala Refat, op.cit, P.104.

[111] Abdurahman Algassem, Arbitration Deliberations, Riyadh Trade Magazine, issue N°408, September 1996, P.35.

[112] Amaal Jozeri, Faeliat Altahkim..,( The Arbitration Efficieny ), University Press ,Egypt,1998, op.cit., P.210.

[113] Saleh Salem, Discussing Arbitration Concepts, Riyadh Trade Magazine, issue N° 406, July 1996, P.45.

It is further claimed by others of this school of thought[115] that even if there is nothing in arbitration law and implementation rules specifying the type of objections to awards that litigants have the right to bring forward, Saudi Law, nevertheless, gives some such indications such as those in Article (9) which gives the right to the concerned authority to deal with a problem on the demand of one of the litigants, even if the specified challenge period has expired. If we correlate this with the contents of Article (20) it would show that there is the necessity to execute the arbitral award when it is considered as final. This does not violate the principles of Islamic Jurisprudence. Through this correlation, the advocates of this opinion hold that the qualified authority has no right to object to the execution of the arbitral award if it complies with Islamic Jurisprudence, regardless of any kind of challenge.

In brief, the advocates of this opinion consider the judicial review to be a procedural one. As a result of this, and because of the comparative lack of experience of the Saudi Legal Jurisprudence in the field of arbitration, some practicing judges on The Board of Grievances were interviewed. One said

> 'If the relevant authority accepts challenge it must settle the case because it is its original duty.'[116]

This judge makes it clear that if the concerned or specialised authority accepts a challenge to an award, it deals with the case from the beginning, which thus indicates that a challenge is somehow nearer an 'appeal' in Saudi Law. It may also be considered as another degree of appeal, as claimed by those holding the first opinion, where reviewing a challenge is considered to be objective.

In fact, the second opinion appears to be more applicable because it goes hand-in-glove with the objectives of arbitration, which are speed and confidentiality. Since a discussion about the practical reality of challenges will now follow, it seems that the broad concept of challenge within Saudi Arbitration Law also needs to be examined.

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[114] Turki AL Shubiki, lawyer and former Secretary of Arbitration of the Riyadh Chamber of Commerce & Industry.auther interview ,17.Oct.2000.
[115] H. Almalla, 'Commercial Arbitration Symposium' - Riyadh Chamber of Commerce and Industry, op.cit., P. 4, P.9.

### 5.18.4.2. Broad Concept of Award Challenges within Saudi Arbitration Law.

Throughout the previous discussion, it has become clear that the concept of award challenges in Saudi Arbitration Law is wide. In this respect, the concerned authority is responsible for the estimation of award challenges. Thus, this point can be tackled from various viewpoints.

Some say that the existence of this concept reveals the possibility of challenging arbitral awards before the concerned authority. This limits the danger of not reviewing the arbitral award and guarantees the equitability of arbitral award.[117] Others contend that the role of arbitral authority is limited to conflict settlement and challenges submitted to it.[118] Yet others hold that even if disputants agree to appeal, this practice contradicts the general system and the stipulation of Article Eighteen of the Arbitral Law. It does appear from the evidence that appealing is a violation of the constitution because it has been designated so by the country's authority.[119]

Before finishing with this particular area it should be pointed out that the eighteenth article does not disregard appealing, but favors it. It states:

> '...Disputants may challenge in front of the authority of appeal to which the arbitral award has been submitted within fifteen days from the date of being given notice of the arbitral award.'

The content of this text is the emphasis upon which the validity period of challenging an arbitral award lies. If no objection to an award is manifested the latter is considered to be a final award.

It is strange to deduce that this article forbids appealing, which is considered to be a violation of the constitution. In reality this is not accurate since Saudi Arbitration law allows challenge and has been issued by virtue of a Royal Decree as are all the state's

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[116] Judge Ali Al Sawei, Former President of the Commercial Department, member of Investigation Department, The Board of Grievance, Author interviewed on 22nd August, 2000.
[117] M. Koman, Arbitration Al Aswaq magazine, Issue N° 45, August 1998, P. 32-33.
[118] M. AL Malla, op.cit., P.9.
[119] M. Bjad, op.cit., P.237.

statutes. This may be accepted in some countries whose laws and specific arbitral challenges were explicitly specified by the concerned tribunal of appeal, but in the Kingdom of Saudi Arabia and especially in regard to arbitration law, there is silence on the subject. Therefore, challenging arbitral awards cannot be described as a breach of the constitution.

It seems that there are two specific reasons for this difference, i.e.

1- No explicit text about specifying the stage at which a challenge can be made.
2- Not giving specific causes upon which acceptance of an arbitral challenge can be made.

These two points will be examined below:

**1. No explicit text about specifying the stage at which a challenge can be made**

It would appear that this point is the biggest gap in the law of Saudi Arbitration and, because of it, the practical implementation of arbitral challenge represents a step along the path of arbitration development.

In practice, there is no justification in the broadest sense for arbitral challenge. It has been made clear that it is possible to object to arbitral awards before an authority of appeal. As a case in point, if the Commercial Department of the Board of Grievances issues an award, it is possible to challenge it in front of the Investigation Department of this Board.

Recourse to judicial authority would therefore appear to be better than arbitration because the former settles disputes rapidly; whereas the latter is very slow, which does not comply with the objective of arbitration, which is speed and confidentiality.

This matter needs further consideration, as A.Redfern & M.Hunter claim:

> 'Experience has shown, however, that there are serious disadvantages in having a system of arbitration that gives an unrestricted right of appeal from arbitral award. First, decision of national judges may be

submitted for decisions of an arbitral tribunal specially selected by or on half of the parties. Secondly, a party that agreed to arbitration as a private method of resolving dispute may find itself brought unwillingly before a national court that holds their hearings in public. Thirdly, the appeal process may be used simply to postpone the day on which payment is due, so that one of the main purpose of international commercial arbitration the speedy resolution of disputes is defeated.'[120]

Judge Ali Al Sawei says in this respect:

> 'In my estimation, it is necessary to consider appeal as a degree of arbitration by the Board of Grievances and should be stated by law.'[121]

Looking at various legislation from other countries, such as the Kuwaiti, it can be seen that a general rule[122] does not allow appeal except if litigants agree on it. Thus there is little chance for appeal to take place within Kuwaiti Law. Both the Italian and Egyptian law allows no far appeal.[123]

The Kuwaiti attitude is considered suitable because when litigants discard judicial authority they have the right to specify their arbitral award to obtain justice. Moreover, the Kuwaiti Law states cases where appeal is not allowed even if litigants agree to appeal, as shown below:

1. If the arbitrator is authorized to reconcile the parties even if they agree to appeal.
2. If the value of the dispute does not exceed one thousand Kuwaiti dinars (£2000 approximately).

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[120] Alan Redfern & Martin Hunter, op.cit, P. 43.
[121] Judge Ali Al Sawei, author interviewed, 22nd August 2000, also Judge, Huzaa Alissa, author interviewed, 10th October 2000.
[122] Article (186) Kuwait Arbitration Law.
[123] Azme Abdulfatah, The system of challenging Arbitrators, The Egyptian Law, Advanced course in Commercial Arbitration, Organized by the Egyptian International Center for Development, Al Ghardaga city, 1st to 5th September 1997, P. 117.

It is difficult to specify the intention of the legislator in Saudi Arbitration where the word 'appeal' has not been mentioned either in the law or its implementation rules. The only expressions found in Saudi arbitration law are 'challenge' and 'objection' which are subject to special authority decision. This authority decides whether the issued award conforms with Islamic Jurisprudence. If it conforms it is accepted and becomes executable as emphasized by Article (20) of Saudi Arbitration Law.

In reality, a return must be made to the opinion of the Board of Grievances that allows challenges in front of its Commercial Committee and the Investigation Committee. In principle this does not correlate with the objectives of arbitration, i.e. confidentially and the speedy resolution of disputes, nor is it a helpful factor to the judicial authority.

In addition, this does not follow the economic growth of the Kingdom of Saudi Arabia which requires a general amendment of the old laws to keep up with the current renaissance and attract more investment.

Since arbitration law does not mention a specific degree of judicial authority, the following points will have to be examined:

a. Conducting an amendment in arbitration law by specifying only one authority in front of which challenges can be made.
b. Can the Board of Grievances specify either commercial departments or investigation departments to look after the issue of challenging arbitral awards?

If it is supposed that the Board of Grievances opts for this trend, there would appear to be no disadvantages. It is therefore worth mentioning that nothing could prevent litigants from discarding appeals and submit freely to the final award which would quickly settle their existing dispute.[124]

## 2. Not giving specific causes upon which acceptance of an arbitral challenge can be made

[124] The Judge, Abdullah Al Mohaimed, Head of the Fourth Commercial Department in the Board of Grievances, Author Interview, 19 August 2000.

Undoubtedly, there are reasons that may allow arbitral awards challenges within Islamic Jurisprudence, as already mentioned at the beginning of this chapter. It is also contended that most of the reasons stipulated by arbitration laws do not violate the principles of Islamic Jurisprudence.

Consequently, there is a need to specify these reasons in Saudi Arbitration Law since they have already been specified within the contents of Saudi Arbitration. An amendment to the law is recommended. This would limit the possibility of broadening award challenges and adds much to the efficiency of arbitration in performing its task successfully.

It is said[125] that amending Saudi Arbitration will take time and lead to monotony. In order to avoid this waste of time, the concerned authority could form a separate branch of its department that would carry out the mission of executing arbitral awards leaving no chance for objection.

In reality, it would be difficult to believe that such a quick solution would fill the gaps in the existing statues for the reasons given below:

1. Constitutionally speaking, the 1983 Saudi Arbitration Law was issued by virtue of Royal Decree[126] i.e. the Saudi award challenge in front of an arbitration authority. However, the Law does not specify challenge reasons. So how can an arbitration branch department manage essential arbitration issues? To accept this, it is necessary to create this department by Royal Decree and if this was to be the systematic process it would follow the same path needed to issue royal decrees needed to rectify the law.
2. Adopting this trend would lead to numerous orders and Royal Decrees organizing people's affairs. Hence, the executive authorities would find

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[125] M. Al Malla, Op. Cit P. 13.

[126] Article (70) of the Basic System of Government issued by Royal order N° A/90 on 27.8.1412 H/1st March 1992 A.D. stipulates - 'International regimes, treaties and conventions are issued and can be modified by Royal Decree'. Also Article (18) of the Advisory Council, issued by Royal Decree N° A/91 dated 2./8.1412 H /1st March 1992A.D. - 'International regimes, treaties and conventions are issued by Royal Decree and are modified after being revised by the Advisory Council'. Also Article (20) of Ministers issued by Royal Decree N° A/13 dated 3.3.1414 H/20th August 1993 A.D. which stipulates the following – 'International regimes, treaties and conventions are issued by Royal Decrees and modified after being studied by the Ministers' Council'.

themselves facing a number of laws and organizing orders which would create objections and a lack of cohesion. In Saudi Arabia, even though Saudi arbitration experience is recent, Saudi legislations are considered to be excellent, even distinguished, since they combine the conservation of the principles of Islamic Jurisprudence with the benefits accrued from advanced countries and keeps pace with modern laws and legislation at both national and international levels. Therefore it is considered that following the constitutional systematic paths to amend laws, even though this takes time, is the best and correct way of holding on to the continuity of the distinction of Saudi Law.

3. It should be noted that amending laws does not necessarily take time, this depends on the importance and necessity of the amendment. Some amendments require speed and can be arrived at quickly.

To summarise, it is necessary to keep up with the pace of development and to amend laws accordingly. For this reason, when talking about challenge reasons, the law should be reconsidered and the possibility of specifying the reasons for arbitral challenges should be dealt with. In this way, there will be no room for further objection to arbitration, which impedes the arbitration process.

### 5.18.5. Challenging Foreign Arbitral Awards in Saudi Law

After discussing the methods of challenging national arbitral awards within the Saudi law and understanding the attitude of Saudi Arbitration in this respect, the question becomes - how is it possible to challenge a foreign arbitral award inside the Kingdom of Saudi Arabia?

It is generally known that the judgement issued by a judicial court in any country represents the sovereignty of that country. Therefore, it is impossible to challenge such an award in another country. Does this principle also apply to arbitral awards?

In reality, although arbitration differs from judicial authority[127] since arbitrators or arbitral tribunals derive their validity from arbitration agreement, unlike judges who

[127] The difference between judicial authority and Arbitration has already been clarified, see page 54, supra

derive their validity directly from the state, the arbitral award is generally issued in accordance with state law. The origin of arbitration is its parties and the country where arbitration takes place which issues a law organizing these affairs.

Thus, the execution of judicial awards, as with arbitral awards, happens in accordance with procedures specified in the international conventions which organize it. In other words, challenging foreign arbitral awards takes place if the reasons stipulated by the state's law or international law exist.

Since researching the subject of challenging foreign arbitral awards that could be implemented in Saudi Arabia, it has been discovered that in 1983 the Saudi Arbitration Law gave attention to internal arbitration but neglected international arbitration. In fact, nothing has been found concerning the execution of international arbitral law except what has been stipulated by Article (20), which insists that the concerned authority consider the dispute and make sure that the arbitral award does not violate the principles of Islamic Jurisprudence. Indeed, Saudi Arabia is among the countries that adheres to international conventions, such as the New York Convention on Recognition of Arbitral Awards 1958.[128]

Saudi Arabia joined the Washington Convention on the settlement of Investment Disputes between States and nationals of other States in 1965.[129] It also joined the Arab Countries' League Convention to execute awards. This was the Convention, signed on 4th September 1952, where Arab league councils made an agreement regarding the execution of awards both judicial and arbitral.[130]

Saudi Arabia appoints a Board of Grievances to look after foreign arbitral awards. This means that the Saudi system covers both national and international arbitration viewed within the framework of international conventions.

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[128] Issued by virtue of Royal Decree N° M/11 dated 16.7.1414 H/29.12.1993 A.D.
[129] Kingdom of Saudi Arabia signed the Washignton convention of 1965 on 28.9.1979 A.D and ratified it on 8.5.1980 A.D. See also in this regard M. Nader Op. Cit. P. 12.
[130] Saudi Arabia, Syria, Jordan, Egypt, TtheYemen, Iraq and many other Arab countries also joined this convention.

In Article 5, the New York Convention clarifies the reasons for allowing arbitral challenges. In this respect, the Washington Convention of 1965[131] created an internal center for settling investment disputes. The awards of this convention are applied to all contracting countries since this convention allows both parties to reconsider the arbitral award if they discover a fact not known to the arbitration tribunal prior to issuing a final award.

This convention has also allowed the cancelling of an arbitral award at the request of one of the parties, with the existence, of course, of specific reasons as stipulated by Article (52). Article (53) however, contends that arbitral awards are binding on disputants and are by no means challengeable as decided by this convention. This means that the convention does not allow the challenging of arbitral awards before any judicial authority in any of the countries which are a party to the convention. This has limited the means of challenging to reconsideration or cancelling in accordance with the texts of the convention.

The Commercial Arbitration Center of the GCC Member States' Council declared its laws by means of the Supreme Council of Cooperation Council at the fourteenth summit.[132] Saudi Arabia is one of the GCC states.

The list of Commercial arbitration procedures of GCC Arab countries[133] includes the following:

1. An award passed by the Tribunal pursuant to these rules shall be binding and final. It shall be enforceable on GCC Member States once an order is issued for the enforcement thereof by the relevant Judicial Authority.
2. The relevant Judicial authority shall order the enforcement of the arbitration award unless one of litigants files an application for the annulment of the award in the following events:

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[131] Held by the International Center Bank for Construction and Population, see also Appendix No. (7) infra.
[132] In September 1993 A.D.
[133] Declared by Commercial Cooperation Committee of GCC in Riyadh in November 1994 A.D. see Appendix (4).

a. If it is passed in the absence of an arbitration Agreement or in pursuance of a null Agreement, or if it is prescribed by the passage of time or if the arbitrator goes beyond the scope of the Agreement.
b. If the award is passed by arbitrators who have not been appointed in accordance with the law, or if it is passed by some of them without being authorized to hand down a ruling in the absence of others, or if it is passed pursuant to an Arbitration Agreement in which the issue of dispute is not specified, or if it is passed by a person who is not legally qualified to issue such an award.

Upon occurrence of any of the events indicated in the above two paragraphs, the relevant judicial authority shall verify the validity of the annulment petition and shall pass a ruling for non-enforcement of the arbitration award'.[134]

Before leaving this article of the Arbitration Procedures list in the GCC, it should be pointed out that this article has clarified the reasons allowed for objecting to arbitral awards in paragraphs (a) and (b). It would have been necessary to add a third paragraph that would read - '(c) If the award is not in accordance with the rules of Islamic Jurisprudence' because Saudi Arabia, among other GCC states, applies the rules of Islamic Jurisprudence. The procedural list of arbitration should have been in accordance with the grounds on which they can be applied successfully. Saudi Arabia would never accept a judicially issued award violating Islamic Jurisprudence. For this reason paragraph (c) above should be added to article (35) of that list.

With reference to challenging foreign arbitral awards in Saudi Law, and after showing international conventions that Saudi Arabia has joined, it can be said that these conventions have specified the reasons for which a challenge may occur, or may not be executed by the local judiciary, taking into consideration the essence of not violating the rules of Islamic Jurisprudence.

### 5.18.5.1. Discussing the Possibility of Challenging Foreign Arbitral Awards on the Basis that the Arbitrator is Non-Muslim

[134] Article (35).

After examining the general situation of the way to challenge foreign arbitral awards and international conventions which Saudi Arabia has joined, and through reading the contents of the 1985 Implementation Rules an important question arises. The rules state the following:

> 'Arbitrators may be nationals or Muslim foreigners.'[135]

With Saudi Arabia's adherence to these international conventions, such as the New York Convention, it is likely that arbitral awards would be issued by non-Muslim arbitrators. So these conventions are complementary to the rules of internal law and even rectify it. But, since the general system in Saudi Arabia is Islamic Sharia and judges have recourse to Islamic Sharia awards, is it possible to challenge an arbitral award just become it is issued by a non-Muslim?

In fact, this question was asked of one of the Board of Grievance judges, who replied:

> 'The general system in Saudi Arabia is Islamic Sharia ; hence the whole Saudi System confirms such an arbitration System. So the arbitrator as the judge must be Muslim. but challenging foreign arbitral awards does not require Islam and execution requests are different from arbitration principles.'[136]

On the other hand, this question could produce a revolution in Saudi Arbitration Law:

> 'The award of the arbitration shall be executed when it has become final pursuant to an order by the Authority having original jurisdiction to consider the dispute. This order shall be passed upon request by an interested party after ensuring that it is not contrary to Islamic Sharia principles.'.[137]

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[135] Article 3.
[136] Judge Ali Al Sawei, former President of Fourth Trading Committee of the Board of Grievances, Member of the Board of Investigation, auther interviewed on 17th October 2000.
[137] Article ( 20 ).

To ensure real answers, the former question was put to a judge; his answer was as follows:

> 'Article (20) of the Arbitration System is special to Saudi Arbitration and has nothing to do with foreign arbitral awards.'[138]

It has been made clear that it is not possible to challenge foreign arbitral awards within Saudi Law on the basis that the arbitrator issuing the award is not Muslim.

In fact, this seems advisable for the following reasons:

1. The two former answers from the judge because his answers are in accordance with the actual practices of the Board of Grievances which is specialized in the execution of foreign judicial and arbitral awards.
2. Saudi Arabia's adherence to the New York Convention is considered as the Kingdom's consent to execute foreign arbitral award regardless of the creed of its author, but the award should not violate Islamic Jurisprudence.
3. Argumentatively, if Article (20) includes both national and foreign arbitration, the adherence of Saudi Arabia to international conventions is considered as an implicit amendment of the rules of the arbitration law in this respect.
4. The difficulty in accepting foreign arbitral challenges on the basis that the arbitrator is not Muslim because in reality most foreign arbitral awards are issued by non-Muslims, so it lessens the strength of the arbitration process and Saudi Arabia could well lose the opportunity of foreign investment.
5. The modern trend in the Kingdom of Saudi Arabia encourages the facilitation of an investment atmosphere. Undoubtedly, facilitating the execution of foreign arbitral awards is considered an important factor in this respect.

Previous discussion has also brought to light another question, i.e. are Saudi parties allowed to agree to settle their existing disputes through arbitration outside the Kingdom of Saudi Arabia, for example at the London Court of International Arbitration (LCIA) or the International Chamber of Commerce (ICC)?

There appear to be two fundamental points regarding legal and Islamic Jurisprudence, since this is the general system of Saudi Arabia. From the legal point of view it seems that although the 1983 Saudi Arbitration Law and its 1985 implementation rules have organized internal arbitration, it does not deal with the issue of preventing Saudis from using foreign arbitration.

Hence, if Saudi parties agree to submit their cases to foreign arbitration, such as the International Chamber of Commerce (ICC), they may do so because Saudi Arbitration Law does not oppose it. However, Saudi Arbitration Law addresses the Saudi people through the following text:

> 'The litigants submit the arbitration document to the specialized Authority, and this document should be signed by the parties or their authorized parties.'[139]

Nevertheless, the article is binding only if Saudi parties choose Saudi Arbitration. If not, they are not bound by this article.

From the Jurisprudence point of view, as has already been seen in the leading case with a non-Muslim,[140] the best opinion allows non-Muslim foreign arbitration if it is necessary on the basis of the well known necessity rule within Islamic Jurisprudence.

Since the general system in the Kingdom of Saudi Arabia is Islamic Law the answers to the previous questions are as follows:

(a) If the arbitration subject is artistically or technically accurate and there is no Saudi or Muslim arbitrator to deal with it, having recourse to foreign arbitration is necessary; hence, this is acceptable in Islamic Jurisprudence.

(b) If the subject matter can be dealt with by an experienced Saudi arbitrator, recourse to foreign arbitration is not allowed, as stipulated by Islamic Jurisprudence.

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[138] Judge Ali AlSawei see footnote 136, supra.
[139] Article 5.
[140] See Chapter Two, 2.7.4, P.83, Supra.

In this respect, Sheikh, A.M. Al Koneen says:

> 'Not allowing contracting in a cause wherein a party is Muslim choosing an Arbitration Authority not applying Islamic rules inside or outside the country; and if that happens on a condition, it is considered as null.
>
> It can be seen that the case must be rendered to a Muslim arbitrator who understands perfectly the Islamic rules in a Muslim country.'[141]

However, the 1985 Implementation Rules stipulate the following:

> 'The arbitrators shall issue their awards without being bound by legal procedures except as provided for in Arbitration Law and its Rules of Implementation. Awards shall follow the provisions of Islamic Shariah and the applicable regulations.'[142]

It is therefore understood that Saudi litigants should not agree to apply foreign rules to arbitration procedures. The Ministry of Commerce has refused the terms of arbitration set up as the basic system by companies established in the Kingdom. The system advocates arbitration in accordance with UNCITRAL Arbitration Rules. The refusal of the Ministry of Commerce is based on the fact that there is no need to ask for the assistance of foreign rules since the Saudi Arbitration Law includes rules capable of organizing arbitration procedure.[143] This refusal may be just a matter of policy on the part of the Ministry of Commerce to encourage Saudi Commercial arbitration, but this does not mean legal support. Because the Ministry of Commerce had previously stipulated recourse to Saudi arbitration only, foreign companies objected so it was cancelled. Litigants may now choose either Saudi or foreign arbitration.[144]

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[141] A.M. Al Koneen, (Judge of the General Court of Riyadh) Saudi Arabia, Arbitration in Alshariah, Fawaed Press, Riyadh, 2000, P. 71.
[142] Article (39).
[143] Yhai Alsmaan, Foreign Investment, Conference at Institute of Diplomatic Studies, Minstry of Exterior, Riyadh, 24-25th November, 1997, P. 14.
[144] Saleh Al koder, Advisor and General Director of Legal Administration in Riyadh Chamber of Commerce and Industry, Supervisor of Arbitration Center, author interview on 23rd September, 2000

From the theoretical point of view, Saudi parties may opt for the arbitral rules that they see as being suitable for their existing dispute. If they choose foreign arbitration, such as the London Court of International Arbitration (LCIA) or the International Chamber of Commerce (ICC) or the Provincial Center of Commercial Arbitration in Cairo, their arbitral award is considered a foreign award.

The Board of Grievances considered as the Authority that executes foreign arbitral awards does not intervene in the way that an award is issued but makes sure it issued correctly and should not be subject to challenge stipulated by international conventions and does not breach the rules of Islamic Jurisprudence. If this is the trend of the Board of Grievances, it can be said that it goes hand-in-hand with the practical reality of facilitating the procedures of arbitration in not allowing judicial control over arbitral awards.

It can also be said that since there is nothing that prevents Saudi nationals from using foreign arbitration and the Board of Grievances does not object to this practice, it is possible to deal with foreign arbitration.

For this reason it is necessary to strengthen and develop Saudi Commercial arbitration so as to make it more appealing, not only to Saudi nationals, but to foreigners as well. It is worth mentioning at this point the growth of international transactions in commercial fields, which pushes Saudi Arabia to reconsider the current law of arbitration to do away with any ambiguities and clarify it at both international and local levels. What has been exposed in this study represents perhaps the stepping stones to future acts of perfecting the system of arbitration.

### 5.18.5.2. Similarities and Differences of Challenge between Islamic Jurisprudence and Modern Arbitration Laws

With reference to what has been shown in this thesis, the differences noticed in the legislation and laws of countries in regard to the issue of challenging arbitral awards will illustrate the aspects of similarities and differences between Islamic Jurisprudence and modern arbitration law.

For example, the 1994 Egyptian Arbitration Law gave the disputants the right to challenge arbitral awards by virtue of various clauses and specified motives.[145]

Moreover, some arbitration legislation does not allow any challenge or objection to the arbitral award from any of the disputants on the basis that they have waived the right to challenge.

The ICC Arbitration rules explicitly stipulate that 'litigants have waived the right to challenge'. They state:

> 'Every Award shall be binding on the parties by submitting the dispute to arbitration under these rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made'.[146]

In the same trend , the LCIA Arbitration rules stipulate:

> 'All awards shall be final and binding on the parties, by agreeing to arbitration, under these rules the parties undertake to carry out any award immediately and without any delay (subject only to Article 27);[147] and the parties also waive, irrevocably, their right to any form of appeal or other judicial authority, is so far as such waiver may be validly made.'[148]

Previous arbitration norms have stipulated that arbitral awards are final and cannot be challenged in the case of commercial disputes which must be immediately settled. However, there are some arbitration laws that make no mention of this aspect, such as the (AAA) arbitration rules.

This states, on the one hand, the possibility that arbitral awards can be challenged and that disputants are given the right do so, and on the other hand it ignores the motives

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[145] See Article 53 of Egyptian Arbitration Law Civil Commercial Matters 1994.
[146] Article 24 (2).
[147] Note Article 27 for Correction of Award and additional

specifying challenge seeing it as a case for Saudi Arbitration law. As previously explained at the beginning of this chapter, some legislations give the right to challenge yet give no specific prerequisites.

Consequently, as previously stated, it has been agreed that most modern arbitration laws regard challenge as consisting of three trends, the first one allows absolute challenge as in the case of the Saudi law of 1985, (see earlier explanations). The second, instead, permits challenge but within particular confines, this applies to the Egyptian law of 1994 and various others.[149]

The third does not give the right to disputants to challenge arbitral awards, the ICC and LCIA Arbitration Rules are clear examples of this third trend.

After this brief explanation of the divergences, the main questions to be answered are - what is the position of Islamic Jurisprudence about most modern arbitration laws; does Islamic Jurisprudence prevent disputants from appealing; and, what are the similarities and differences between Islamic Jurisprudence and these laws?

In order to respond to the first question, it must be stated that Islamic Jurisprudence does not prevent disputants from challenging if they agree to appeal, and if, according to them, it is the quickest way to settle their disputes.[150]

To answer the second question regarding challenging arbitral awards, Islamic Jurisprudence involves all these trends and it wisely chooses one trend and neglects the others because of the advantages that can be obtained for commercial arbitration.

If abstaining from appeal is advantageous to them, then it should be overtly stated by the law, however, even when appealing is advantageous, certain conditions must apply as permitted by Islamic Jurisprudence.

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[148] Article. 26 (9).

149 The UNCITRAL Arbitration Rules .Article 34 ( 1) .see also The Model Law Article (34) (2) (A). See also New York convention 1958 Article 5(1) and Santiago De Nodal and Igrasi Gardams, An Approach to Arbitration in Spain, Op. Cit. P.19.

Eventually, all these trends can be followed as per the advantage of time and place in which these rules are applied and follow the principle of "scholar perseverance" in order to affirm which of these rules remain the best and most convenient for both contractors.

## 5.19. Role of State Judicial Authority in Achieving Arbitration Efficiency

Previous analysis has shown that the judicial authority does have a very important role to play in effecting arbitration according to the extent to which the specialized courts intervene in arbitration procedures or review challenging arbitral awards.

As seen already, the right of recourse to arbitration stems from the fact that disputants agree to submit their cases to arbitration and not to a judicial authority.

Thus, submitting a case to arbitration must depend on the agreement of disputants, which is not the case for the judicial authority because the latter need not have the agreement of disputants. Any litigant has the right to resort to judicial authority, as stipulated by all constitutions and confirmed by Islamic Jurisprudence, because in this way rights are preserved and equilibrium and security are maintained in society, which leads to economic, cultural and scientific developments.

Moreover, not only does arbitration depend on the agreement of disputants but also on its confirmation by the legislative authority.

In other words, Government permits arbitration by issuing legislation on a law through which the procedures and conditions are clarified in order to ensure that arbitration has the basic guaranties to achieve justice.

To illustrate this point of view, W Michael Reismen says:

> 'Arbitration is delegated and restricted power to make certain types of decisions in certain prescribed ways. Any restricted delegation of power must have some system of control. Controls are techniques or

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[150] Emphasized by Judge,Abdullah Al Mohammed, President of First Trade Department of The Board of Grievances, author interviewed 22nd August, 2000.

mechanisms in engineered artifacts, whether physical or social whose function is to ensure that an artifact works. In social and legal arrangements, in which a limited power is delegated, control systems are essential; without them the putative restrictions disappear and the limited power may become absolute.'[151]

Government control over arbitration differs from one country to another.[152] All countries use arbitration statutes for different reasons. Some seek to impose public standards on the arbitral process and substantive disputes are resolved through it.[153]

In connection with the aspect of the development or otherwise of arbitration, this section will endeavor to shed light on judicial control so as to make it more efficient and give it a positive role in the process of arbitration. This will better serve the commercial side of arbitration and eliminate any obstacles that might face it.

The following points will be the basis of this analysis:

- former Judicial control.
- forthcoming Judicial control.
- factors effecting arbitration efficiency.

### 5.19.1. Former Judicial Control

Some arbitration laws have been using former judicial control over arbitration in other areas to achieve a certain kind of stability within the disputants' center and desire to accomplish more arbitration efficiency, avoiding disputes that might occur at a later date.

In this respect, Saudi Arbitration stipulates the following:

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151 See W Michael Reisman, W Graig, William Park and Jan Paulsson, Op. Cit. P. 965
152 M.J. Mustill and S C Royal, Op. Cit. P.432. See also Nduka Ikeye, The Court of Arbitration Process in Nigeria, The Arbitration and Dispute Resolution Law Journal, London, Part 4, December 1997, P. 362.
153 Adam Samel, Arbitration in England and the USA, The Arbitration and Dispute Resolution Journal, London, Part 1, March 1999, P. 3.

'Parties to a dispute shall lodge the arbitration document with the authority having original jurisdiction to consider the dispute. This document shall have been signed by the litigants or their duly authorized representatives and by the arbitrators and must show the subject matter of dispute, names of litigants, names of arbitrators and their approval to consider the dispute. Copies of relevant documents must also be attached.'[154]

It is clear that the authority having original jurisdiction makes sure that various factors exist before issuing the final award, as stipulated by Islamic Jurisprudence and by arbitration laws already discussed. For example, all necessary arbitration conditions, such as consent, capacity and arbitration subject should be present.[155]

It is also claimed that original jurisdiction authority is also concerned, sometimes, with arbitrators' validity and capacity. So an arbitration document has been refused for this reason and litigants have been requested to choose a different arbitrator.[156]

The Board of Grievances in Saudi Arabia, when dealing with an arbitration document, by virtue of Art.5 of the Saudi Arbitration Law, makes certain that the authority having original jurisdiction ensures that it is its judicial duty of arbitration prior to further steps being taken.[157]

For this reason, the concerned authority plays an important role through controlling arbitration documents and making sure arbitration is conducted correctly from the start. In this way, Saudi arbitration will achieve efficiency. However, there are those who contend that this control is only additional and consider it to be wide open to the opportunity to intervene in the process of arbitration knowing that Saudi Arbitration Law does not specify to the concerned authority a specific time to issue a credible decision.

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[154] Article 5

[155] See Chapter Two, pp.58-9 , Supra

[156] Judge, Abdullah, Al Mohameed, Judge on The Board of Grievances, President of the Fourth Commercial Department, author interview, 20th September, 2000.

[157] See award of The Board of Cases Investigation – Fourth Department - The Saudi Board of Grievances N° 1000/T/4, 1412 H/1992 A.D. in case N° 453/2/ Q, 1409 H/1998 A.D. See also Award N° 369/D/T/T/G/11, 1412 H, issued by the 11th Commercial Department in Case N° 926/2/Q, 1411 H./1991 A.D. The said Department has credited the Arbitration Document

Through the follow-up to both Chambers of Commerce and Industry in Riyadh and Jeddah and through examination of a number of cases, no problem was seen to be caused by the Arbitration Authority dealing with the accrediting of arbitration documents. The concerned authority is rather conscious of the importance of time in arbitration cases. Nevertheless, this step is considered to distinguish Saudi Arbitration Law through the following different angles:

1. Arbitration should be conducted correctly from the beginning and the concerned authority should ensure that it is.
2. Starting with an arbitration document by an official arbitral tribunal or authority facilitates the task of arbitration when it needs to communicate with official agencies.[158]
3. At the final stage of arbitration, the concerned authority will have already credited the arbitration document by ensuring that it complies with Islamic Shariah.

In the light of these advantages, no one can prevent the specifying of a definite period of time, not to be exceeded, in which to issue the decision of the arbitration document approval.

### 5.19.2. Judicial Control Over Arbitral Award

As previously stated, arbitration is based on agreement between the parties involved. It is presumed that litigants accept the arbitral award issued because they have agreed to it beforehand. However, the losing side usually objects to the arbitral award.[159] Michael Mustill says:

> 'Sadly, in so many cases (or at least the cases that reach the public eye) the picture is very different, many proceedings do not look for the prompt and speedy resolution of the dispute by economical means, in as harmonious a manner as possible. He would prefer it not to be

[158] Judge Hazza Al Essa, Member of First Commercial Department, The Board of Grievances, author interviewed on 12th September, 2000.
[159] See A .Redfern and M. Hunter, Op. Cit. P. 415.

> resolved at all, or if it is resolved for this to happen at as distant a date as possible.'[160]

Consequently, the winning side requests the immediate execution of the award. Here, the role of the judicial authority appears, since most compared judicial laws state that the authority having legal jurisdiction must issue an executable award by virtue of state law. In this sense, arbitration resembles the general judicial authority[161] because in order to issue an execution order for the arbitral award, the judicial authority has to make sure that the arbitral award was issued correctly. This is of course, the role of the judicial authority controlling the issued arbitral award.

The fact of issuing an execution order for arbitral award by the concerned authority is considered as proof of the validity of the arbitral award.

In fact there is no relationship between the judicial authority and award validity because the arbitrator or arbitral tribunal is considered to be the authority settling the dispute and if the award is issued correctly, it is legally valid. Most of the time, the litigants accept the award without having recourse to a judicial authority.

Additionally, the authority issuing an execution order to an arbitral award shows the proof of its validity. In this respect, Professor, A .Abu Alwafa says:

> 'The arbitrator's award is considered issued from the date it was written and signed; hence it becomes effective from that date as is the case for normal award.'[162]

The validity of the arbitral award only derives its strength from the issuing authority. For this reason a distinction should be made between the validity of the arbitral award issued by the arbitral tribunal and its executive powers. They are two independent stages.[163]

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[160] Micheal Mustill, Comments on Fast Track Arbitration, Journal of International Arbitration, Op. Cit. P. 25.
[161] See Amal Fzaire, Op. Cit. P. 100.
[162] A. Abu Al Wafa, Op. Cit. P. 112. See also A. Al Koneen, Op. Cit. P. 143.
[163] Moner Abdulmajed, Op. Cit. P. 260.

To summarise, it is clear that the judicial authority has an important role in issuing the execution order of the arbitral award. As previously mentioned, this role of the judicial authority is limited and should not go beyond the reasons of the subject matter.

In general, however, there is no appeal and awards are binding unless grounds of invalidity can be shown.[164]

One of the central planks of the philosophy of the British Arbitration Act of 1996 is that the court should not intervene except as expressly provided for in the Act.[165] If things happen in this way, it can be said that arbitration achieves its efficiency, which confirms its continuity and development.

### 5.19.3. Factors Affecting the Efficiency of Arbitration

Undoubtedly, there are many factors that could affect arbitration efficiency. These factors may originate from the following:

a) Factors of arbitration parties.
b) Factors of legislators' philosophy.

#### 5.19.3.1. Effect of Arbitration Parties on Efficiency

In fact, these factors have already been discussed in detail and the attitude of Islamic Jurisprudence in this regard has already been noted during the displaying of the components of arbitration contract and its conditions, as have those of the arbitrator.

This section will concentrate on some points and factors that lead to arbitration efficiency which endeavours to surmount all obstacles in settling disputes. Arbitration parties play an important role in this since they should formulate the arbitration agreement contract correctly from the beginning. It may well be beneficial at this initial

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[164] Anthony Walton, Russel on the Law of Arbitration, Op. Cit. P. 421.
[165] Harold Growter, Op. Cit. P. 99.

stage to appeal for legal advice because a well formulated contract states the obligations and rights of the parties clearly. In this respect, the following points should be considered:

1. Avoiding numerous causes leading to nullification of arbitration agreements, such as absence of capacity and making sure that all arbitration pre-requisites are complete and the subject matter refers to an Islamic issue that may be submitted to arbitration as set out by Islamic Jurisprudence; also avoiding the problem of executing the arbitral award outside an Islamic country.

2. Excelling at formulating the contract of arbitration to avoid any problems in its interpretation of terms.[166]
   The rationale behind this example is the careful choice of clear expressions at the time of writing the arbitration contract to specify the demands of the litigants and to avoid any kind of disagreement in interpreting the agreement contract.

3. The best choice of arbitrator or arbitral tribunal contributes to the success of the arbitration process. In this respect, Professor Al Jaber contends that
   'it is necessary to have a party knowledgeable in law keeping the arbitral tribunal to the correct arbitration procedures as dictated by law.'[167]

A. Redfern and M.Hunter state:

> 'here the arbitral tribunal consists of three arbitrators, at least one member of the arbitral tribunal (preferably the presiding arbitrator)

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[166] For instance to show the importance of contract formulation, the American Courts consider the expression 'any dispiute arising under...' as a narrow expression not including imposture, whereas the expression 'any question or dispute arising or occurring under...' as a broad expression that includes imposture. Similarly the American Courts considered 'all claims and disputes of whatever nature arising under this contract...' as the best expression for all criminal disputes. See Abdulhammed Al Ahdab, International Arbitration, Dar Al Maarif Publishing (in Arabic) Vol. 2, P. 135.

[167] Mohamed AL Jaber, Minister and President of Law Dept. in King Saud University, and President of Bureau of Experts in Saudi Ministeral Council, author interview on 22nd August, 2000.

should be a lawyer or at least a person specifically qualified as an arbitrator, having studied arbitration law...'[168]

Undoubtedly, choosing the best arbitral tribunal contributes to the success of arbitration and the quick resolution of disputes.

### 5.19.3.2. Effect on Efficiency of Arbitration of a Country's Legislative Policy

Undoubtedly, arbitration in its modern form cannot be visualized without the consent of the state's legislative power through issuing of the law organizing arbitration affairs. For this reason, arbitration laws, in any country, define the course of arbitration either negatively or positively.

It is generally understood that all countries try to arrive at really efficient arbitration laws, but man is usually subject to gradual development, and experience is needed to reach the required level of arbitration.

On this point Adam Samual says:

'It is surprisingly difficult to draft an arbitration statute which covers all available options in a clear way...'[169]

Legislative power in any country can achieve efficiency of arbitration through various methods:

a) Accepting the idea of arbitration as a means of resolving commercial disputes. All countries appear to realize the importance and effect of arbitration on commercial life and, as already noted, Islamic Jurisprudence cares about arbitration.
b) It is necessary to create co-operation between arbitration and judicial authority in regards to procedures when the arbitrator or the arbitral tribunal requests assistance of the authority in order to obtain proof, such as obliging

[168] Alan Redfern and Martin Hunter, Op. Cit. P. 206.

a witness to attend arbitration sessions[170] or to conduct some provisional procedures which are outside the scope of the arbitrator. It should be known that the extent of this co-operation may affect positively or negatively the process of arbitration.

It is necessary to find conducive grounds on which to maintain cooperation and the readiness to assist of the judicial authority.[171]

c) Within the context of judicial control, arbitration must play its important role not extensively to guarantee the equitability of the arbitral award and not considering it within normal judicial authority.

G. Xavier says in this regard:

> 'Any control and regulation is necessary and desirable, but it must not be such as to affect the practical usefulness of arbitration by making it too rigid and formal, neither should an arbitration proceeding be so informal as to assume the guise of a 'coffee party!'[172]

In reality, in most countries the legislative authorities deeply concern themselves with the success of their arbitral laws through simplifying arbitration procedures and winning the confidence of businessmen and investors.[173] Arbitration law must be clear and inclusive of all arbitration matters so as to achieve a just and quick arbitration, harmonious with the speed of commercial life.

d) Another important point affecting arbitration positively on the part of legislative authority is constructive and fruitful cooperation at the international level.

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[169] Adams Samual, Arbitration Statutes in England and the U.S.A, Op. Cit. P. 32.

[170] For example in accordance with the 1994 Egyptian Arbitration Law in Civil and Commercial matters. The President of the Court of Appeal deals with International Commercial Law, if not litigants agree on another Court of Appeal in Egypt upon the Arbitral Tribunal's request of a judge to witnesses, if they fail to comply with the request, they are penalized, see Articles 78 and 80 of Proofing Law in Commercial Civil Matters

[171] Saleh Hujelan, Riyadh Trade Magazine, Interview on Arbitration, Issue N° 395, August 1995, P. 47.

[172] Grace Xavier, Op. Cit. P. 285.

[173] Saudi Arabia's desire to develop performance and facilitate Judicial Authority. See meeting with Saudi Minster of Justice, Dr. Abdullah Al Sheikh, Middle East Newspaper on October 4th 1999 and also His Excellency's declaration on Legal Practice, Al Hayat Newspaper dated October 6th 1999.

Undoubtedly, there has been great progress at the international level of commercial arbitration. This progress is represented in international conventions, such as the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, the European Treaty for International Commercial Arbitration concluded in Geneva in 1961, and the convention for settling disputes in host countries. Additionally there is the Model Law on International Commercial Arbitration which was adopted by the United Nations Commission on International Trade Law on 21st June 1985 and also the 1976 UNCITRAL Arbitration Rules, all strong proof that there is an international drive to find vital cooperation among all countries.

Consequently, the role of the legislative authorities in different countries is to recognize these conventions and apply them on real grounds. This role leads to the discovery of similarities among these legislations which require knowledge of Islamic Jurisprudence especially on the part of specialized commissions in the United Nations. Obviously, Islamic countries are among the countries that have Islamic Jurisprudence as their source.

To summarise, it is hoped that that this study can be considered as a stepping stone towards further research in the field of commercial arbitration. The rationale behind it is to find a unified arbitration law since the concept of cooperation among countries already exists.

## CHAPTER SIX

## Recognition and Enforcement of Arbitral Awards

Discussion of the issue of challenging arbitral awards and the attitude of Islamic Jurisprudence towards such challenges and also the points of similarities and differences between it and modern arbitration laws (local and international) in the previous chapter, has clarified that there are great similarities between Islamic commercial arbitration and modern arbitration laws.

The previous chapter was devoted to the challenge of arbitral awards and the reasons upon which that challenge could be based. This chapter will continue the discussion to the final stage, which is the stage of enforcement of arbitral awards which endeavours to give each disputant his due rights. Harold Crowter said:

> 'If arbitration awards could not be enforced, the whole system of arbitration would collapse.'[1]

If the arbitral award is not linked to enforcement it is just words written on paper, and in the case of unenforcability, arbitration would lose its objective of serving commercial life.

Owing to the importance afforded to the recognition and enforcement of arbitral awards and to avoiding the obstacles facing their enforcement, it has been claimed by some people that:

> 'The usual problem with arbitration is enforcement.'[2]

Because of this importance, this chapter will be devoted to the clarification of the attitude of Islamic Jurisprudence in this respect, and also to clarifying the aspects of differences and similarities among some modern arbitration laws, both local and international, to discover the extent to which Islamic commercial arbitration is accepted

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[1] Harold Crowter, op.cit., P. 139
[2] I. Ghanan, The Role of Islamic Law in Commercial Litigation in North Yemen, op.cit., P. 300.

at the international level. In other words, the extent to which international laws are accepted from the Islamic Jurisprudence perspective. There will also be discussion on the status of international arbitration Convention in the kingdom of Saudi Arabia, considering that Saudi Arabia represents the model of applying Islamic Sharia at this time.

For this reason the following points will be reviewed:

1. Validity of the arbitral award in Islamic Jurisprudence.
2. Recognition and enforcement of arbitral awards in Islamic Jurisprudence.
3. Recognition and enforcement of arbitral awards in Saudi Arabia.
4. Possibility of widening the scope of Islamic Jurisprudence to include the content of international conventions related to recognition and enforcement of international arbitral awards.

## SECTION TWENTY

### 6.20. Concept of Recognition and Enforcement of Arbitral Awards

#### 6.20.1. Introduction

In reality, the recognition and enforcement of arbitral awards means that the arbitral award has reached its final stage whether it is within the set time limit reserved to place a challenge, or whether the challenge has already been requested, which means that it remains enforceable.

It has been made clear through the previous chapters that the arbitral award within Islamic Jurisprudence is enforceable if it is correct and free from challenge reasons after being revised by the concerned judicial authority. In this respect, Vincent Powell-Smith says:

> 'The majority view of the (Islamic) schools is that the award has the same binding effects as the judgement of the judge and it becomes binding as soon as it is made by the arbitrator...'[3]

[3] Vincent Powell-Smith,, Aspects of Arbitration Common Law Shari'a Compared, Printed by Success Label Enterprise, 1995, P. 60

This trend has been agreed with by Islamic Jurisprudence and most modern arbitration laws. For example German Arbitration Law as an example of national legislation, stipulates the following:

> 'The Arbitral award has the same effect between the parties as a final and binding court judgement...'[4]

Also, in the District of Columbia, the Arbitration Law stipulates:

> 'Upon granting of an order conforming, modifying or correcting an award, judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree...'[5]

It is clear from the foregoing that an arbitral award has the validity of executive power. Since the object of this discussion is to clarify the scholastic aspects of Islamic commercial arbitration, the following questions arise: What is the concept of arbitral award validity within Islamic Jurisprudence and is this validity different or similar to the situation within modern arbitration laws?

It seems that in order to understand the validity of an arbitral award within Islamic Jurisprudence, it is necessary to know the validity of a judgement award within Islamic Jurisprudence. Only then can the possibility of applying it to an arbitral award be understood.

### 6.20.2. Concept of Recognition and Enforcement of Judgement Award

As previously stated, it is necessary to show the validity of a judgement (award) within Islamic Jurisprudence as an introduction to the study of the validity of arbitral awards within Islamic Jurisprudence. This must be done to show the dimension of that validity and its concept which will then allow the discussion to move on to the possibility of applying it to the arbitral award.

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[4] Section 1055 (Effect of Arbitral Award)
[5] Section 16-4313 see also Section 8.01-581.012 from Virginia State Arbitration statute.

Undoubtedly, of greatest importance is that the judge or arbitrator should arbitrate fairly between disputants up to the final settlement of the dispute, in accordance with the rules of Islamic Law. This is in fact the rationale behind both justice and arbitration. Hence, the judicial or arbitral award should be respected and should be enforceable on realistic grounds.

Consequently, it must be noted that Islamic scholars emphasize the factors of enforceability and engagement of the award when defining the judicial award.

Here, it should be noted that judicial and arbitration authority differs from an authority that acts as an advisory service, giving opinions from Islamic Jurisprudence. Such an advisory may clarify the legal aspects of an award in a specific matter, but it is not binding, whereas judicial and arbitration authority acts on the issuing of a binding award or decision meant to settle an existing dispute.

However, the fact of emphasizing the validity of the award for its beneficial properties and the stability of rules in different transactions in people's lives does not mean that the award is absolute and final because the award of Shari'a in previous cases was usually based on scholastic knowledge which came from perseverance in learning the rules of Islamic Law.

Conversely, an award is made in the light of the situation of the disputants and their proofs. Hence, sometimes an award may be issued in accordance with righteousness and justice but it may be technically incorrect and unjust. Therefore, the rationale is not the award itself but rather the justice stemming from that award.'[6]

How it is possible to compromise between the power of an effective award and the factors affecting justice? What is the attitude of Islamic scholars of law in this matter? How do they achieve compromise between these considerations?

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[6] See pp. 223-4, supra.

To answer these questions it is necessary to understand that the effective arbitral award is given from a human agency, and there is, therefore, potential for mistakes being made for one of he following reasons:

a) A mistake can occur following the process of setting two legal awards from the sources of Islamic Jurisprudence. The Judge or arbitrator may base his decision on proof from the Quran or Sunna in the wrong situation.
b) A mistake could arise from following the estimation process of events proclaimed by disputants.

As a result of the possibility of such mistakes arising, Islamic scholars have said that the aspects of validity and enforceability prevail on judicial awards if no accepted proof appears which would necessitate a reconsideration of the case.[7]

It is clear that there is a difference in the concept of the validity of judicial awards between Islamic Jurisprudence and modern procedural laws. The judicial award in Islamic Jurisprudence is not considered as absolutely holy; therefore, this difference can be clarified in the following sub-section.

### 6.20.3. Difference in Concept of Recognition and Enforcement between Islamic Jurisprudence and Modern Procedural Laws

It seems that there is a difference between Islamic Jurisprudence and modern procedural laws in what concerns the concept of judicial award validity. In Islamic Jurisprudence the judicial award is given the power of enforceability and appeal is not accepted unless there is adequate proof of fresh evidence which would then lead to treating the case anew.

Although Islamic Jurisprudence gives strong validity to a judicial award, its validity would cease if the award appeared to be invalid or incorrect.

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[7] M. Yassen, Hojeyat al hokem at Qadai in Islamic Jurisprudence (Validity of Judicial Award in Islamic Jurisprudence) 1st Edn., Dar Al farqan Press, Jordan, 1984, P. 10.

In modern conventional laws, both disputants may challenge the award within a specified period. However, after a final award has been issued it cannot be nullified even if it is proved not to be valid.

In this way, the judicial award system is seen as being stable since the disputants must accept the final award after the expiration of the challenge period as this puts an end to the dispute and arbitration procedures. However, the spirit of Islamic Jurisprudence contradicts this trend since it contends that even a final award can be reconsidered if it is proved invalid and considered as an unsound award.[8]

It appears that if there is a clear interest in specifying the judicial procedures and periods so as to achieve stability for people in their dealings, this interest should be issued within the systems of the legislative power which will bring about the general welfare of people.

Notwithstanding this contrast between Islamic Jurisprudence and modern conventional laws, there is a similarity in what concerns respect for and execution of true judicial awards. Hence, the judicial award in Islamic Jurisprudence has differing aspects as discussed below.

### 6.20.4. Aspects of Judicial Award Validity in Islamic Jurisprudence

In all Islamic Jurisprudence books, there appear to be five aspects of judicial award validity. If an issued judicial award is complete and complies with legitimate rules it acquires the following aspects :

1. A judge should not deal with judicial awards issued by another judge.
2. A judge should not give his judgement in a case then renounce it on the basis of his own perseverance with the case.
3. A judicial award should not be challenged if it conforms to the Quran, Sunna or Consensus.
4. Respect should be shown to former judicial awards and they should be considered in current cases.

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[8] Shawkat Alian, op.cit., P. 443

5. Judicial awards not conforming to the principles of validity should be nullified.

These aspects will be discussed in detail in the following sub-section.

### 6.20.4.1. Judge is Not Allowed to Modify Judicial Awards Issued By Another Judge

The above aspect is especially important if a judge is particularly knowledgeable and just.[9] This opinion was adopted by the Hanbali School. In this respect Sheikh Ibn Kodamah said:

> 'The arbitrator should not follow the decisions of his former judges or arbitrators because those decisions are true and correct.'[10]

This opinion has been adopted by most Shafii School Scholars and all Maliki School Scholars. They claim that the judge is not allowed to consider the awards of former judges and they base their arguments on the following:

1. A judge is not allowed to concern himself with past cases. He should rather focus on the current case.
2. Examining former judges awards is considered an affront to those judges and this should not occur within the board of justice.[11]

### 6.20.4.2. No Renunciation of Judges' Awards on the Basis of Their Own Continuing Experience in the Subject Matter

In Islamic Jurisprudence, a judge should not issue an award in a case and then renounce it on the basis of his own perseverance. However, scholars contend that if a judge does so, it would have been done by taking into consideration the fact that he should not renounce his own award even if he realizes a mistake has been made or it has deviated from the basic rules of Islamic Jurisprudence.

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[9] Ibn Farhan, op.cit., Vol. 1, P. 74, see also Hossen Fathi, The Concept of Award Validity, Journal of Arab Arbitration, op.cit., P. 103.
[10] Ibn Kodamah, op.cit., Vol .9, P. 58.
[11] M. Yassen, op.cit., P. 15.

### 6.20.4.3. No Revocation of a Judicial Award if it Complies with the Quran, Sunna or Consensus

If a judicial award related to a specific case is issued and is then submitted to another judge, the latter should respect his colleague's award. He should not challenge it if it complies with the Quran, Sunna or Consensus. Thus the award becomes enforceable even if the second judge does not approve of the first judge's award because matters of perseverance usually bring about divergent points of view, which should be avoided. The prophet (Peace be upon Him) said:

> 'If the judge judges and issues good judgment, he has two rewards (from Allah), but if he judges and then issues a failing award he has one reward.'[12]

If the judge gives accurate awards in accordance with the legitimate sources, he will have accomplished his duty fairly.

### 6.20.4.4. Respecting Former Awards and Taking Them Into Consideration in Modern Cases

If a judge must respect the awards of others judges, he should request their implementation and take them into consideration at the time of issuing new awards[13] so as to benefit from their perseverance in similar cases.

### 6.20.4.5. Cancelling Judicial Awards if They Differ from the Concept of Recognition and Enforcement

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[12] Hadith Prophet saying as narrated by Muslem from The Book of Judging, Vol. 2, P. 60.
[13] M. Yassen, op.cit., P. 21. There is a similarity with conventional Laws, see Harold Crowter op.cit., P. 135.

If a judicial award is issued on the basis of a judgement by a judge and the award answers the necessary conditions of conformity (to Quran, Sunna or Consensus), it cannot be challenged. If a judge challenges this award and submits it to a third judge, the latter should credit the award of the first judge because the second judge's award is not correct.

In this respect, Al Samnani says:

> '...If an award is challenged by a second judge, then raised to a third judge, the award of the first one is applied and the award of the second judge is nullified.'[14]

As mentioned earlier in this thesis, 'perseverance' is understood to mean the individual's search for a ruling from God's law in order to govern over a human action for which there is no explicit reference in the divine law. Perseverance therefore requires the individual to have very broad and detailed knowledge of the law and of the rules of Islamic Jurisprudence. Al Qrafi explains the reasons for abstaining from challenging matters of perseverance, saying:

> 'When Allah, the Almighty made arbitrators arbitrate through perseverance, their issued awards stem from Allah, the Almighty in those cases.'[15]

This emphasizes the validity of the judicial award and the fact of not challenging it unless there is solid proof for doing so. However, if it is a question of divergent points of view because of perseverance, the judicial award cannot be nullified.

These aspects make it clear that the concern of Islamic Jurisprudence is with the judicial award, because of its validity and its power to settle people's disputes.

This view point is also found in modern laws since judicial awards must have their immunity and the powers of implementation so as to arbitrate fairly among people.

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[14] Al Samnani, op.cit., P. 323.
[15] Cited from M. Yassen, op.cit., P. 92.

### 6.20.5. Validity of the Arbitral Award in Islamic Jurisprudence

After having defined the concept of the validity of the judicial award in Islamic Jurisprudence, the importance of its validity must be noted; that is, in its aspects of correctness and the power of enforceability if there is no clear proof requiring a challenge to it. The difference between Islamic Jurisprudence and modern laws in what concerns the concept of judicial award validity has also been shown.

The former discussion was introduced to explain the validity of judicial awards within Islamic Jurisprudence. However, two points, or questions, arising from this discussion must be answered. The first is related to the possibility of applying the concept of judicial award validity to arbitral awards within Islamic Jurisprudence. The second deals with the possibility of broadening the scope of Islamic Jurisprudence to take modern arbitration laws into consideration. The following sub-section will endeavour to address these two points.

#### 6.20.5.1. Extent to Which Concept of Recognition and Enforcement of Judicial Award May Be Applied to Arbitral Awards

It is worth mentioning that according to the most scholarly opinions, arbitral awards in Islamic Jurisprudence are binding on the disputants. If disputants find it necessary to choose arbitration as a mean of settling their disputes, they must then abide by the issued award providing it is correct and conforms to the necessary conditions stipulated by Islamic Jurisprudence and upon which disputants have already agreed.[16]

On the other hand, through answering the former question, it can be inferred - from the words of scholars - that the concept of judicial award validity can also be applied to

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[16] See Chapter One, section 1.2.3., Supra. See also Vincent Powell-Smith, op.cit., P. 60. This complies with modern legal opinion stating that the arbitral award is binding, Henry J. Brown and Arthur L. Marriott claim: '*it is a principle feature of commercial Arbitration that the award should be binding*,' op.cit., P. 54. This is overtly stipulated by most arbitration Laws

arbitral awards, even after being revised by the concerned judicial authority. If an arbitral award is issued in accordance with the specified terms of Islamic Jurisprudence and is revised by the concerned judicial authority, the same concept of validity can be applied to it as in the case of judicial awards. It should be mentioned here that the arbitral award acquires its validity after being revised by the concerned judicial authority so as to be final and enforceable.[17]

There is a similarity between Islamic Jurisprudence and most modern arbitration laws. Of the latter Mustill and Boyed say:

> 'The award does not immediately entitle the successful party to levy execution against the assets of the unsuccessful party... It is first necessary to convert the award into a judgement.[18]

As already pointed out, the validity of judicial awards in Islamic Jurisprudence makes it an executive power. It cannot be challenged unless solid challenge proof appears. Ismail Atlas says:

> 'We notice that the expressions of scholars are different even though they mean the same thing. The award is considered explicitly correct and this is the rationale behind validity in Islamic Jurisprudence.'[19]

The following quotation from Professor S.A Mahamoud emphasizes that the arbitral award takes the form of the judicial award:

> '...Hence Islamic Law decides that the arbitral award takes the form of the judicial award since it is executed by the judge issuing it taking into consideration the formal aspect of the arbitral award through examining its formal conditions.'[20]

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[17] See A. Alkonen, op.cit., P. 143, A. Abualwafa, op.cit., P. 286, see also A.M Hassen, The executive Power of Arbitration Award. Dar Alnhada, Egypt, 2000, P. 42 etc. E.mail AL Stal, op.cit., P. 188

[18] Mustil & Boyed, op.cit., P. 416 see also John F. Phillips, op.cit., P. 32, some countries like Iran, have no specific provisions concerning the enforcement of foreign arbitral Awards. Accordingly, foreign awards must be treated under the same rules as for foreign judgment, see S.H. Amin, op.cit., P. 194

[19] E.mail Al Stal, op.cit, P. 183

This is also emphasized by Saud Al Duraib, who stated:

> 'Arbitral awards are valid whether they comply with the award of the local judge or not, since they do not differ from the Quran Sunna, and consensus.'[21]

To sum up, it can be said that it is possible to apply the concept of judicial award validity to the arbitral award in Islamic Jurisprudence, especially when the arbitral award is thoroughly revised by the concerned judicial authority.

### 6.20.5.2. Broad Ability of Islamic Jurisprudence to Incorporate Modern Arbitration Laws and Issues

During the discussion on the concept of the judicial and arbitral award, it was observed that if an award acquires validity, it becomes enforceable if there is not sufficient proof calling for its challenge.

It has also been noted that modern arbitration laws specify a period for challenge, only on expiration of that period of time reserved for challenge does an award become final, it should then be enforced or executed. This appears to take into consideration the Islamic Jurisprudence point of view.

In reality, throughout Islamic history, it can be seen that arbitral cases have been limited and people have adhered to the executing of the arbitral award immediately without wasting time. However, with the growing number of today's commercial dealings and their complexity, the idea of giving disputants some time to challenge an arbitral award is regarded as beneficial. According to Islamic law, its general rules aim at organizing people's affairs and preserving their rights. Hence, a mechanism of flexibility exists in Islamic Jurisprudence through which new legal principles can be taken into consideration in the light of the stable rules and sources of Islamic jurisprudence.

Ahmed Yaman[22] says in this respect:

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[20] S.A. Mahmmoud, Arbitration System, Aleman Press, Egypt, 2000, P. 76
[21] Saud Al Duraib, op.cit., P. 579

'Select principles from the various justice schools without bias such countries can then legislate new solutions for novel problems by deriving their solutions from the general principles of Islamic Shari'a and in consideration of public interest and communal welfare.'[23]

In brief, it is possible to set a specific time to challenge the arbitral award. Challenges then become ineffective when the challenge period expires, especially if there is public interest and the need for conformity to the requirements of modern commercial life.

In all, it is understood that Islamic Jurisprudence respects arbitral awards and grants them the same validity as judicial awards if they are revised by the concerned judicial authority.

An arbitral award issued by an arbitrator or arbitral tribunal is an award settling an existing dispute. It is a binding award; therefore, arbitrators and arbitration tribunals may satisfactorily perform their task of contributing to the settlement of the growing number of disputes.

After clarifying the validity of the arbitral award and its aspects within Islamic Jurisprudence, the important issue of implementation of arbitral awards arises. This will be discussed in the following section of this study.

## SECTION TWENTY ONE

### 6.21. Enforcement of the Arbitral Award

If the arbitrator or arbitral tribunal issues an award relating to an existing case and the award is in accordance with the rules of Islamic Law after being revised by the

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[22] The Former Saudi Minister of Petroleum and Mineral Resources, Saudi Arabia.
[23] Cited from George Sayan, Arbitration, Conciliation and Islamic Legal Tradition in Saudi Arabia, Journal of International Business Law, 1987, P. 239.

concerned authority, the award must be binding and executed.[24] The implementation phase should be in accordance with one of the following :

a) Willing acceptance of the arbitral award by the disputing parties.[25]

b) If the award is not voluntarily implemented, the winning party should go to the concerned authority to ask for enforcement of the award.[26]

Here a question arises - which is the concerned authority holding the power to enforce arbitral awards within Islamic Jurisprudence? To answer this question, the following points will be clarified in the next sub-section.

### 6.21.1. Specialised Executive Authority

As already shown, in Islamic history the arbitral award has been automatically and optionally executed as soon as it is issued - with some exceptions. However, with the complexity of commercial transactions, the losing party may be able to find ways of escaping the execution of the award. Is it possible, therefore, to make the execution of the award compulsory, as is the case for modern arbitration law?

To clarify this subject and to answer the question, other issues will first have to be clarified. To begin with, the winning party should apply to the concerned authority to implement the award.
In this respect, Ahmed Algazali says:

> 'If one party abstains from executing the award and the unsuccessful party requests that the President (of Islamic State) execute the contract of Arbitration, the latter should be submitted to the concerned judicial authority to ensure that the terms of the arbitration contract are correct and contain no defects prior to its final implementation.'[27]

This is emphasized in the Code of Legal Rules which states:

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[24] Ibn Najeem, op.cit., Vol. 7, P. 26, see also Masad Al burgani, op.cit., P. 258. and Powell-Smith, Vincent, op.cit., P. 60.
[25] Ali Abderrahim op.cit., P. 200.
[26] Ibid.

> 'The award of the arbitrator is like that of the judge. So the judge is bound to accept and implement it as long as it is not challengeable.'[28]

It can thus be seen that the first step to be taken in the procedure of executing the arbitral award in Islamic Jurisprudence is to have recourse to judicial authority to get approval for the arbitral award to be executed. Then the executive body of the state must execute the award.

Here a question could arise. For example, it is widely known that Islamic Jurisprudence contains various scholastic schools and opinions, so it is possible to hypothesize that the arbitrator or arbitral tribunal has chosen a specific scholastic opinion upon which his arbitral award was based. So can the losing party protest against this opinion and claim another one? In reality, the scholars of Islam have already tackled this issue, as Sheikh Ahmed bin Tyimyah said:

> 'If two people agree to submit their case to arbitration and a fair arbitration award has been issued between in accordance with Allah and his prophet's requirements, the losing party is bound by the issued award to which he should not object.'[29]

The Magazine of Judicial Rules also emphasizes the binding nature of arbitral awards and closes the door in the face of challenging them if they conform to legitimate sources. The Magazine stipulates the following:

> 'As the judge's award has a binding nature, the arbitral award also has a binding nature in the sense that disputants do not have the right to reject the issued award if the latter is in accordance with legitimate Islamic sources.'[30]

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[27] Ahmed Al gazali, op.cit., P. 390.
[28] Article 2094, Code of Legislative Rules (Majalat Alahkam Alshariah), op.cit., P. 607, see also Powell-Smith, Vincent, op.cit., P. 63.
[29] Ahmed bin Tyimyah, AL Fatawa, Preachings, op.cit., Vol. 35, P. 360.
[30] Article 1848, Code of Judicial Rules, Encyclopedia of Systems and Legislation, op.cit., P. 1173.

In brief, it has been made clear that it is not possible to object to the execution of the arbitral award in Islamic Jurisprudence on the basis that the arbitrator or arbitral tribunal has not chosen the right and most suitable final award for the parties.

### 6.21.2. Implementing Internal Arbitral Awards

Firstly, it is important to define what is meant here by the use of the term 'internal arbitral award'. This is, basically, an award issued according to, or made under, the Islamic Sharia specifically, with the intention of implementing it within the Islamic State.

The concerned authority executing the arbitral award, as shown in the previous sub-section, should follow the same pattern, especially if the award is internal. As already mentioned, the executive order of the award stems from the judicial authority that ensures that the award does not deviate from the rules of Islamic Jurisprudence. Recourse is then made to the Executive authority for execution procedures. It is worth mentioning that there is a similarity here between Islamic Jurisprudence and modern arbitration laws.[31]

It seems that Islamic Jurisprudence has enough room to incorporate the contents of modern arbitration laws, since it clarifies the detailed procedures that must be followed to execute the arbitral awards in the clear interests of people in general.

The importance given to scientific research to draw on the aspects and scholastic procedures followed in Islamic countries throughout the era of the prophet's companions, and also the Omayad and Abassid dynasties should be noted. However, as already noted, scholastic opinions are numerous and all have been preserved, therefore there are many procedural aspects that need deep research and clarification. For this 'reason there is a need to protect these aspects and to bring them to light at the present

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[31] See A.M. Hashesh, op.cit., P. 93. For example see Articles 509 of Egyptian Pleadings Law N° 13of 1968 and also Articles 56 and 3/1/58 of 1994 Arbitration Law, Article 6 of 1983 Saudi Arbitration Law and Article 765 of Civil and Commercial Pleadings Law in Lybia of 1954 published in the official newspaper on 20/02/1954.

time because it is important to benefit from the experiences of these scholars, especially in the procedural legislations of Islamic countries.

### 6.21.3. Recognition and Enforcement of Foreign Arbitration Awards

Among the important questions aimed at finding suitable answers in this study, is the question of the attitude of Islamic Jurisprudence towards recognition and enforcement of foreign arbitration awards inside the Islamic State. In other words, can a foreign award be accepted, recognized and executed?

As is already understood, international relations can make arbitral awards in one country and have them executed in another. However, a foreign arbitral award cannot be executed except in the country issuing that award because each country has its independent sovereignty and forbids any kind of foreign award enforcement within its own territory.[32]

Besides achieving perfect justice, national tribunals in countries where a foreign arbitral award is to be executed, are required to make sure that foreign arbitral awards are free from essential defects and do not breach the general system of the particular country wherein the award is to be issued.

It is perhaps necessary to clarify what is meant by 'foreign award' from the perspective of Islamic Jurisprudence. Samir Saleh says:

> 'A foreign award is basically an award made under a law other than that of Islamic Shari'a'.[33]

The attitude of Islamic Jurisprudence towards recognition and enforcement of foreign arbitration awards will be further clarified here. The question put to Judge Ali Alsawei was - Is it possible to recognize and execute foreign arbitration awards even though most arbitrators are non Muslims? His reply was:

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[32] A.M. Kair, Validity and Implementation of Arbitrator's Awards, Magazine of Kair Center for Commercial Arbitration AL Nahada Press, Cairo, 1st Edn., March 1995, P. 44.
[33] Samir Saleh, op.cit., P. 92.

'Principally, requesting the execution of an award differs from the arbitration process.'[34]

Therefore, the pragmatic reality of the Board of Grievances in the Kingdom of Saudi Arabia is that this country makes it possible to recognize and enforce foreign arbitral awards on the condition that they are in accordance with the rules of Islamic Jurisprudence.

From the arguments above, we can see that it is not possible to challenge the execution of the foreign Arbitral Award on the basis that arbitrator is non-muslim. As we have seen in previous discussions, non-muslim can be arbitrator between two muslim parties according to the 'necessity rule' which is well known in Islamic Jurisprudence. Therefore, if the non-muslim arbitrator has been appointed under this rule, no-one can accuse his arbitration of being contrary to Islamic Jurisprudence. Also, we can see this in practice in the Board of Grievances in Saudi Arabia which recognises and enforces foreign arbitration awards towards the final stages, i.e. it looks to the arbitral award itself and if it is not contrary to Islamic Jurisprudence then it will be possible to give it recognition and enforce it.

A foreign arbitral award may not conform to Islamic Jurisprudence in its entirety and partial conformity creates a problem of whether it is required to consider the award or reject it altogether. This question was also put to a judge from the Board of Grievances who said that if a part of the award contains elements conforming to Islamic Law, the concerned judicial authority must execute that particular safe part of the award.[35]

In this sense, the arbitral award may include, as a result of a specific contract, a sum of money as well as an interest rate of usury. When the judicial authority treats this case it should allow the execution of the contract sum of money and reject the usury because the latter is forbidden within Islamic Jurisprudence.

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[34] Judge Ali Alsawei, Former President of Commercial Department, member of Investigation Department on the Broad of Grievances (Administrative Court) Author interviewed 22nd August 2000.
[35] Judge Hazza Alissa, Member of fourth Commercial Circuit, The Broad of Grievances Saudi Arabia, Author interviewed 24th August 2000.

What proves the possibility of recognizing and enforcing arbitral awards is the Kingdom's adherence to international conventions, which require the recognition and enforcement of foreign arbitration awards, such as the 1958 New York Convention, to which numerous Islamic countries have adhered.

It should be noted that it is important to know the arbitrator or arbitral tribunal's attitude to some scholastic aspects of Islamic Law if the enforcement of the award is going to be performed in an Islamic country, such as Saudi Arabia, that observes the rules of Islamic law. This is because they are totally familiar with the arbitral awards' system and the extent to which they are executable on real grounds.

Alan Redfern and Martin Hunter claim:

> '...it also depends on the relevant provision of the law at the place of intended enforcement ('the forum state'). On this aspect, it is usually essential to obtain advice from experienced lawyers in the forum state.'[36]

Knowledge of the rules of Islamic law is constantly growing among the public in Muslim countries. People request the application of rules of Islamic law rather than laws taken from either the East or the West.[37]

Since the enforcement of foreign arbitral awards is under discussion, it is necessary to clarify any hindrances facing this enforcement from an Islamic Jurisprudence point of view, this will be discussed in the next sub section.

### 6.21.4. Obstacles Hindering Enforcement of Arbitral Awards

There are many obstacles standing in the way of the execution of arbitral awards. These have to be taken into consideration by the arbitrator or arbitral tribunal so that they are

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[36] Alan Redfern and Martin Hunter, op.cit., P. 451.
[37] For example see efforts deployed by The Union of Islamic Commercial Chambers in the search for restructuring markets from Foreign Ministers' conference of Member states at the Organization of Islamic

able to issue correct and enforceable awards. As is already known, final arbitral awards constitute the objective of arbitration since this is the means through which each party is given its rights.

Even if these obstacles have already been invoked, as with discussion of the causes of challenging the arbitral award in the previous chapter,[38] they can be considered, in reality, to be steps against enforcement of arbitral awards. To avoid repetition, these obstacles will be shown in brief below:

1- The arbitral award should not differ from the Quran, Sunna or Consensus.[39]
2- It should not differ from clear analogy in Islamic Jurisprudence.
3- Other reasons, as stipulated by modern arbitration laws,[40] are implicit in Islamic Jurisprudence rules, such as the lack of capacity at the time of issuing arbitration contracts or failure to implement them, or when disputants are not mature enough. If the concerned authority realizes a lack of any of the above mentioned elements, it has the right not to issue an executionary order of the award.[41]

The following will show that there is a great similarity between Islamic Jurisprudence and modern arbitration laws. Islamic law is considered to be the normal regime of Islamic countries, therefore implementation of arbitral awards will not be authorized if they do not conform to its general system. For example, the arbitration law in Egyptian Civil and Commercial Articles stipulates:

> 1- arbitral award enforcement cannot happen if the challenge period has not expired yet
> 2- arbitral award enforcement by virtue of this law cannot be allowed except after certainty of the following:

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Conference, Istanbul, 1976, See also the Economist Newspaper, issue N° 2550 dated 27 September 2000, P. 3.

[38] See Chapter five, section ; 5.17.3, supra.

[39] See also Shawkat Alian, op.cit.m P. 443 and see also Vincent Powell-Smith, op.cit., P. 63 and Abdulhamed El ahdeb, op.cit., P. 50.

[40] See for example, M. Althwei, Arbitration Civil and Commercial Articles and Administrative contracts, Dar Aljamia for Publication, Alexandria, 1999, P. 261.

[41] M. Aboul-Enein, Guideline on Principles To be Adopted in Modern Arbitration Legislations, The Seminar (The Practice of International Commercial Arbitration) Oxford, op.cit., P.9.

a) It should not contradict any award of the dispute already issued by an Egyptian Court

b) It should not deviate from the general regime of the republic.

c) It should be announced correctly to the unsuccessful party'.[42]

## SECTION TWENTY TWO

### 6.22. Recognition and Enforcement of Arbitral Awards in the Kingdom of Saudi Arabia

#### 6.22.1. Introduction

As previously mentioned, Saudi Arabia is a pure modern model in applying and abiding by the rules of Islamic Jurisprudence in all its affairs be they judicial or social.[43] It is therefore suitable to show aspects of the Saudi experience in arbitration in Islamic Jurisprudence taking into consideration modern experiences so as not to leave any ambiguity.

George Sayan says:

> 'The Shari'a is not well understood in western business circles'.[44]

Therefore, in this section, the way in which national or foreign arbitral awards are enforced will be discussed. Various facets of similarities and differences between Saudi arbitration legislation and some modern arbitration legislation will then be clarified, including the most important principles upon which arbitral award enforcement is based in the Kingdom of Saudi Arabia. Finally, the most important international arbitration

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[42] Article 58, see also A. Morad, op.cit., P. 187. A.M Hashesh, op.cit., P. 92-99 and Stephen J. Toope, op.cit., P. 113. Fathi Walli Enforcement of Arbitration Awards, First Conference in Arbitration organized by The Board of the State Cases, Egypt, 14-19th September 1996, P. 4, also Articles 35-36 of Model Law.

[43] See speech of King Abdulaziz Al Saud (Founder of the kingdom of Saudi Arabia) Um Al qura Newspaper 4/5/1345 H (3 August 1935 A.D).

[44] George Sayan, op.cit., P. 211.

conventions that Saudi Arabia has joined will be discussed, so as to present a complete picture of enforcing of foreign arbitral awards in the Kingdom.

### 6.22.2. Enforcing Local Arbitral Awards in the Kingdom of Saudi Arabia

In reality, it must be noted that Saudi Arabia adheres to the principle of applying Islamic Shari'a. It manages to issue many different laws in all areas of its affairs taking into consideration two factors:

1. The fact of not going astray from the rules of Islamic Shari'a, started when the Kingdom of Saudi Arabia was founded.[45]

This was emphasized by King Fahed bin Abdul Aziz Al Saud, King of Saudi Arabia, in his speech addressed to the Minister of Justice wherein he stressed his focus on judicial authority and Islamic Shari'a.[46]

It was also emphasized by His Highness the Saudi Minister of the Interior, Prince Naif bin Abdulaziz when he met a member of the Board of Investigation and Attorney General. He said:

> 'Our responsibility is to give the real image of Islamic Justice.... and the application of Islamic Shari'a remains a stable issue in this country (Saudi Arabia) until the last days of our lives.'[47]

It seems that applying Islamic Sharia and abiding by it in the Kingdom of Saudi Arabia is a stable issue. No legislation or regime should deviate from the Quran and Sunna. This is strictly emphasized by the basic government system in the Kingdom.[48]

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[45] See Dr. Mane Aljuhani, Islamic and Intellectual Solidarity, Published by King Faisal Center for Research and Islamic Studies, Riyadh, 1999, P. 61-86. See also Mohamed Ahmed Mufti and Sami Al Wakil, Legislature and Legislation Making in the Islamic State, Research Center, College of Administrative Sciences King Saud University, Riyadh, 1990. PP. 15-16

[46] See speech N 4356 of the king dated 8/4/1412H. (9 July 2000 A.D.) see also speech N 4355 of H.R.H Saudi Crown Prince dated 8/4/1421 H. (9 July 2000 A.D.) published in the Magazine of Justice, issued by the Saudi Ministry of Justice, issue N 6, 2000, PP. 244-245. see also his emphasis in Althqafiah Magazine, London, Issue N 41, 3-2000, P. 2-3.

[47] The words of H.R.H. Minister of the Interior, published in Riyadh Newspaper, issue N 11923 dated 14th February 2001, P. 8. see also Dr. Abdullah AL Sheikh, Saudi Minister of Justice "Saudi Arabia adopts Islamic Shari'a in all its affairs and from which it derives its legislation." See also Althqafiah Magazine London, Issue N 27, 7-2000, P. 46.

2. Taking benefit from different countries, especially modern ones. Of this Ernest Kay says:

> 'Saudi Arabia is almost the only country among Arab and Islamic states, that bases its government on the Shari'a. This has distinguished Saudi Arabia internationally and ensured security, prosperity and stability domestically and thereby attracted attention, esteem and respect.'[49]

In the light of these two issues, i.e. in so far as applying Islamic Sharia and benefiting from the experiences of other countries, the Kingdom of Saudi Arabia has become a distinguished nation.[50] It has enacted numerous legislations. However, this study is concerned only with the 1983 Saudi Arbitration Legislation. This legislation has stipulated the enforcement of arbitral awards in Article (20) which states:

> 'The award of arbitrators shall be executed when it becomes final pursuant to an order by the authority having original jurisdiction to consider the dispute. This order shall be passed upon request by an interested party ensuring that it is not contrary to Islamic Shari'a principles.'

The arbitral award is considered to be final in three cases:

1. If no party objects to the award within fifteen days starting from the date of announcing it to parties.[51]
2. If one party objects to the award in front of the authority having original jurisdiction but the challenge is refused. This entails that the award is final.

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[48] See Articles 1-7 of Saudi Basic government system issued by Royal Decree N A/90 dated 27/8/1412 H. (31 March 1992).

[49] Ernest Kay, op.cit., P. 93.

50 It should be noted here that it is important in the Kingdom of Saudi Arabia today to avoid the concept of ambivalence between Islamic Shari'a and new legislation being taught in Islamic Shari'a Colleges. For further on this subject see M. Aljarba, Teaching Laws in Islamic Shari'a, Al Riyadh Newspaper, dated 22.9.1416H (22nd February, 1996 A.D.) Legal Section, P.3. See also Dr Mutleb Al Nafisa:...'future ulama (scholars) and gadis (judges), while learning figh (Islamic Jurisprudence) should also learn about related legal concepts, institutions and problems..." cited from Frank E. Vogel, op.cit. Pp.356 and 308.

[51] Article 18. See also George Sayan, op.cit., P. 221.

3. If the award is challenged through a party of dispute and is then accepted. The authority of original jurisdiction will settle the subject.

The question then arises as to whether, upon request of an interested party or an order pursuant to the arbitral award, can the authority having original jurisdiction issue the order to execute the award at a party's request?

Some people[52] see that this authority is not allowed to do so by itself because this overtly violates the text of Article (20) already mentioned. If no interested party requests the order to execute the award from the concerned authority, the award is not considered as null.

It seems that the Saudi legislators, in this article, have adopted the opinion of most scholars of the Shafii and Hanbali schools which is that the winning party can request the special right[53] but if the unsuccessful party is unable to express itself, the concerned authority may execute the arbitral award itself.[54]

It is important to mention here that the Saudi legislators have employed the expression *'Interested'* in Article (20), as already mentioned, but do not use the expression *'disputant parties'* as an example. It seems that the Saudi legislators are correct since they formulate the problem in a broad sense so as to include any one having an interest in executing the award. Hence, the authority having original jurisdiction has to treat the subject of dispute and ensure that the party requesting enforcement of the award has an interest before issuing the execution order.

It should be noted that the Saudi Arbitration Legislation is distinguished from other legislations since it allows the conditions of not accepting an award which is contrary to Islamic law. As seen at the end of Article (20), the award should conform to Islamic law in order to be executed correctly.

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[52] M. Bajad, op.cit., P. 240.
[53] Ibn Kodamah, op.cit., Vol. 11, P. 407.
[54] A. ALKonen, op.cit., P. 354

In a practical sense, there is a clear attachment to this article since the concerned authority treats the dispute before issuing an executionary order to the arbitral award after ensuring its compliance with Islamic law.

It is noted that the 1983 Arbitration Legislation does not require a specific time during which the winning party may submit his request to execute the award to the concerned authority. It seems that this gives the opportunity for the winning party to request execution of the award in his favour. The 1985 Implementation Rules stipulate:

> 'whenever an order is issued for execution of an arbitration award, the latter becomes an executionary instrument and the clerk of the authority originally competent to try the case shall give the winning party the execution copy of the arbitration award containing the order for execution ending with the following phrase - All concerned governments shall cause this award to be executed with all legally applicable means if such execution requires application of force.'[55]

By virtue of previous articles, the executionary rules of Saudi Arbitration Legislation give a clear picture to any concerned authority to execute arbitral awards, this has been adopted.[56]

It is worth mentioning at this stage that the authority having original jurisdiction on reviewing the arbitral award does not need to treat the case anew but only consider the challenge itself. If a challenge is refused, the concerned authority issues a executionary order as understood from Article (19) of Arbitration Legislation. The concerned authority should not interfere objectively in the method and reasons embedded in the arbitral award.

In brief, Saudi Arbitration Legislation is eager to execute arbitral awards through clarifying a number of partial details and the executionary formula which is written into the award. This emphasizes the understanding of the Saudi Legislator in executing

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[55] Article (44).

[56] For an example see arbitral award issued on 27/7/1417 H. (8/11/1996 A.D.) from Arbitration Center in Jeddah Chamber of Commerce and Industry, also arbitral award issued from Arbitration Center in Jeddah Chamber of Commerce and Industry dated 29/11/1419 H (17 March 1999).

arbitral awards. It is the final arbitration and is expected to serve modern commercial life.

These facts have caused some people to emphasize that the Saudi arbitration legislation has performed its role as it relates to local arbitration. Carl Perdue, for instance, says:

> 'It is my understanding that Saudi Arbitration has generally worked well in the domestic context.'[57]

### 6.22.3. Recognition and Enforcement of Foreign Arbitral Awards in the Kingdom of Saudi Arabia

In fact, like other countries, Saudi Arabia is trying to take care of all its international ties both economic or political with all Arab, Islamic and other world countries.[58]

At the economic level, Saudi Arabia gives much concern to arbitration as a means of settling commercial disputes since an investor does not usually care to go through local legislations to settle disputes but rather prefers arbitration for speed and confidentiality. Henry Brown and Arthur Marriot claim:

> 'The use of arbitration in international trade and business has expanded substantially and has become the norm of commercial disputes.'[59]

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[57] Carl H. Perdue, Legal Advisor at Saudi Basic Industrial Corporation author Interview, 22 August 2000.
[58] See M. Soleyman, Diplomatic Protectorate for Foreign Investments in the Kingdom, - symposium of Foreign Investments in Saudi Arabia, Ministry of Exterior, Diplomatic Institute, Riyadh, 24-25 November 1997, P. 2. In 1999 Saudi Arabia was at the top of the list of Arab countries experiencing an in-pouring of direct foreign Investment with 45.7% of gross investments with the value of 4.8 billion dollars, see Shlman AL Dawsri, Foreign Investment in Saudi Arabia in 1999, The Economist Newspaper, issue N 2623 dated 9 December 2000, P. 3. See also Mahdi Foteem, according to International Bank report, Saudi Arabia achieved the first place among Arab countries attracting foreign investments from 1984 to 1995 to the value of 10.71 billion dollars which is 35% of gross cumulative value for all Arab countries throughout that period, shown in International Bank Report of 1997. See also Riyadh Newspaper, issue N 11031, of the year 35, 6th September 1998, P. 25.
[59] Henry J. Brown and Arthur L. Marriott, op.cit., P. 67. See also B.K Sayid , Al Mohami Magazine, Issue N 6, 5/5/1421 H. (5 August 2000), P. 34, and Santiago De Nadal & Ignasi Guardans, op.cit., P. 23.

In reality, the issue of recognition and enforcement of arbitral awards is very important at a commercial international level since the efficiency of arbitration as a means of settling disputes rests on the fact of recognition and enforcement of arbitral awards.

For this reason, international arbitration rules and the different legal systems of the word cause grave concern. There is a difference in various national legislations as to the necessary conditions needed to recognize and enforce arbitral awards. Most countries of the world, therefore, make collective efforts to agree on a unified international formula to recognize and execute arbitral awards.

These efforts were represented by the passing of various international legislations and conventions aimed at executing foreign arbitral awards. The United Nations has shown prominent concern for the practical application of executing foreign awards at the level of international trade. Modern rules therefore, have appeared alongside various types of international commercial transactions and other hitherto unknown types of trade relations. In fact, the United Nations took the initiative in 1966 to establish a special system fortifying its rules. Among research subjects the committee focused on was the subject of international trade arbitration for which it set some international rules called the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL). These rules took approximately three years to evolve and were credited by the General Association of United Nations in December 1976.[60]

Following this discussion on enforcement of foreign arbitral awards in the Kingdom of Saudi Arabia, it is perhaps suitable to say what is meant by recognition and enforcement. Recognition of the arbitral award means that the authority having original jurisdiction recognizes the award issued by the arbitrator or arbitral tribunal considering the award to have the degree of *res judicata* in the case submitted to arbitration.

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[60] See Walla Refat, Commercial Arbitration, op.cit., P. 133. A Group of countries have adopted Arbitration Laws based on the UNCITRAL MODEL Law including Bahrain, Egypt, Canada, Germany, India, Tunisia, Nigeria et al. see http://www.UN.or.at/Uncitral.

An award may be recognized without being enforced. However, if it is enforced then it is necessarily recognized by the court (competent authority) which orders its ultimate enforcement.[61]

The party in whose favour the award was made may claim that the dispute has already been determined. To prove this, that party will seek to produce the award to the court (competent authority) and ask the court to recognize it as a valid and binding award upon the parties in respect of the issues having been dealt with.[62]

It can be seen from this that recognition differs from enforcement because enforcement of the arbitral award is the objective behind the process of arbitration. Without enforcement, arbitration has no role in settling trade disputes.
At this stage, the importance of recognizing foreign arbitral awards on the part of the concerned authorities of the country wherein arbitral awards are sought to be enforced becomes crystal clear.

The status of Saudi Arabia and the way in which foreign arbitral awards are enforced will now be discussed, as Saudi Arabia is considered to be a model country that applies the rules of Islamic Jurisprudence.[63] It should also be noted that Saudi Arabia, like other countries, had been extremely interested in international commercial arbitration and has consequently joined numerous international conventions. Even if Saudi Arabia continues to adhere to applying the rules of Islamic Shari'a, it has still managed to secure international stability in relation to international commercial arbitration.

To illustrate how foreign arbitral awards are enforced in the Kingdom of Saudi Arabia, the most important principles organising that enforcement will be discussed in the next sub-section.

### 6.22.3.1. Most Important Principles Organizing Enforcement of Foreign Arbitral Awards in the Kingdom of Saudi Arabia

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[61] Alan Redfern & Martin Hunter, op.cit., P. 448.
[62] Ibid.
[63] See H. Gallul, op.cit., P. 12 and George Sayan, op.cit., P. 213.

It should be noted that Saudi Arabia bases enforcement of foreign awards on three important principles to wards foreign arbitral awards, they are as follows:

a) The principle of not differing from Islamic Jurisprudence.
b) The principle of reciprocity.
c) The content of international conventions to which Saudi Arabia has agreed.

These three points will be clarified as follows:

a) **Principle of Conformity to Islamic Shari'a**

Among the stable principles of Islamic Shari'a is the fact of not executing any arbitral or judicial award inside an Islamic state if it violates the rules of Islamic Law.

Since Saudi Arabia abides by the rules of Islamic Shari'a, this noble principle is manifest throughout the authority having original jurisdiction which does its best to enforce foreign arbitral and judicial awards. This authority is called The Board of Grievances. This comes from the 1983 order of Saudi Arbitration Law that stipulates the following:

> 'The award of the arbitrators shall be executed when it has become final pursuant to an order by the authority having original jurisdiction to consider the dispute. This order shall be passed upon request by an interested party after ensuring that it is not contrary to the Shariatic principle'.[64]

It should be noted that every country has its own general system that is taken into consideration when executing foreign arbitral awards. Karen Tweeddale & Andrew Tweeddale in this respect have said:

> 'The requirement that the award not be contrary to public policy is a requirement that appears also within the UNCITRAL Model Law and the New York Convention. It is easy to see that no country would wish

[64] Article (20).

> to enforce or recognize an award which offended certain minimum standards.'[65]

Equally important, is that some arbitral awards may be partially contrary to Islamic law. This does not mean refusal of the award in its totality. However, the part of the award which conforms to Islamic Law should be enforced and the non conforming part to be avoided.

In this respect, Dr. Bander Bin Salman says:

> 'Among the advantages of applying Islamic Sharia in the kingdom of Saudi Arabia is that foreign arbitral awards to be enforced in the K.S.A. should not be contrary to Islamic Sharia. If a part of that award proves to be contrary to Islamic Sharia, the award can be executed at the exception of putting aside the part not conforming to Islamic Sharia.'[66]

A case in point is case N° 1903/1/9 of 1414 H (1994 AD) and also case N° 1851/1/9 of 1414 H (1994 AD), both of which entailed awards having one part conforming to Islamic Sharia and the other denoting usury. Thus an order was issued to execute the parts of the awards having nothing to do with usury and to put aside those parts containing usury.

This makes it clear that foreign arbitral awards should not be contrary to the Rules of Islamic Sharia if they are to be executed in the Kingdom of Saudi Arabia.

**b) <u>The Principle of Reciprocity:</u>**

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[65] Karen Tweeddale & Adrew Tweeddale, <u>A Practical Approach to Arbitration Law,</u> Blackstone Press Limited, London, 1999, PP. 265-74.

[66] H.R.H Prince Bandar Bin Salman Al Saud, The General Manager Assistant of the Arab Arbitration Council, and member of Administrative Council of Provincial Center for International Commercial Arbitration in Cairo, specializing in International Arbitration, from second author interview dated 21 January 2001.

Among the principles to be adhered to in executing foreign arbitral awards in the Kingdom of Saudi Arabia is the principle of reciprocity, since it is believed to be among the most important conditions to be recognized and enforced in a foreign arbitral award.

This principle was emphasized by Royal Decree [67] when the Kingdom of Saudi Arabia joined the 1958 New York Convention. The Kingdom declared, according to the contents of paragraph (3) of the first article of the convention, that the basis of reciprocity will apply to what the convention regards as recognition and enforcement of arbitral awards in another contracting country.

This was also generalized by the Chief of the Saudi Board of Grievances. This generalization embodied the following:

> 'The party requesting enforcement of the foreign arbitral award must prove that the country to which he belongs abides by the principle of reciprocity as Saudi Arabia...'[68]

With the support of the principle of reciprocity, the Saudi Board of Grievances has implemented three judicial awards issued from the United Kingdom by the High Court of Justice. The Board of Grievances issued the executionary order to these awards with the support of the Testimony of The English Lord Chancellor's Department which emphasized the possibility of executing awards issued by Saudi Arabia's Courts of Justice. Additionally, the Attorney General also presented proof that a British Court, in 1985, implemented an award issued by Saudi Arabia.[69]

The principle of reciprocity was stressed by the Procedural Rules before the Board of Grievances.[70] It stipulates the following:

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[67] Royal Decree N M/11 dated 16/7/1414H. (29 January 1993) based on Ministers' Council N°(78) dated 14/7/1414H. (27 January 1993)

[68] Order of the President of the Saudi Broad of Grievances, issued on 5th May 1985, 15/8/1405 H. See M. Al Magsudi & A. Alamer, Conditions of Executing Arbitral Awards, King Abdulaziz University, College of Economy and Administration Jeddah, 1998, P. 7.

[69] See Y. Alsmaan, The Role of Arbitration in Settling Investment Disputes, Ministry of Exterior, Symposium of Foreign Investment, op.cit., 33.

> 'Raising cases requesting enforcement of foreign arbitral awards in accordance with the procedures of raising administrative cases stipulated in the first article of these rules. The concerned authority issues its decision after completion of case documents..... on the basis of reciprocity principles in matters not contrary to Islamic Law.'[71]

In brief, it is important to take into consideration that the awards should not be contrary to Islamic Shari'a and that the country where the award was issued deals with Saudi Arabia in reciprocity.

### c) Content of International Conventions to which Saudi Arabia has Agreed

There is another important issue organizing the enforcement of foreign arbitral awards in the Kingdom of Saudi Arabia. This is the totality of rules put together by international conventions relating to arbitration which Saudi Arabia has joined. These rules are binding. For further clarification, these international conventions and the necessary conditions required to execute foreign arbitral awards in Saudi Arabia will be discussed.

Throughout this research it has been found that the most important conventions are:

1. Convention approved by the Council of the Arab League Countries on 14/9/1952.
2. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
3. The 1965 Washington Convention.
4. The 1983 Riyadh Convention for Judicial Cooperation.
5. The 1987 Aman Convention for International Commercial Arbitration.
6. The 1993 International Commercial Arbitration System in Arbitration Center for GCC.

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[70] Issued by the Council of Ministers Resolution N 190 dated 16.11. 1409 H. (19 July 1989 A.D.) published in Um Al Aqura Newspaper, (official state newspaper) issue N 3266 dated 4/12/1409 H (7 August 1989 A.D.)
[71] Article (6).

These conventions and clarification of the attitude of the Kingdom of Saudi Arabia will be discussed below.

## 1. The Convention approved by the Council of Arab League countries on 14/09/1952

This convention came into being as a result of Arab governments who signed it so as to facilitate the enforcement of arbitral awards among themselves and as an achievement of the Second Article of the Arab League Countries' Convention.[72]

Saudi Arabia joined this convention on April 5th, 1954. It emphasizes that a final award designed for civil or commercial rights, issued by a judicial authority in one of the Arab League countries, should be enforceable in accordance with this convention.[73]

The convention also stresses that the concerned authorities are not allowed, in the country where an award enforcement is required, to look into matters of the case and also not allowed to refuse enforcement of the award except in specific cases as follows:

a) In cases where the judicial board who issued the judgement is not competent to look into the suit due to its illegality and not absolutely competent or as per the International competence rules.
b) In case the opponents were not properly notified.
c) If the judgement contradicted public order of morals in the country of implementation of judgement which has the authority to consider it so and not to implement it as it was seen as contradicting public order or public morals or if the judgement contradicted a principle considered to be a general rule.
d) In case a final decision was made between the same opponents on the same subject by one of the courts of the country asked to implement or if those courts have a suit under consideration on the same subject as that raised before bringing suit to the court who had issued the judgement to be implemented...'[74]

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[72] See preamble of the convention at appendix ( 5 ) The convention was signed by Jordan, Lebanon, Kuwait, Syria, Saudi Arabia, Egypt, Iraq, Yemen and the UAE. See also Samir Saleh, op.cit., P. 325.
[73] Article (1)
[74] Article 2, there is also a Reservation by the Yemen Motawakil kingdom.

Paragraph (c) of the above articles includes the stable rule in a similar convention. This rule is exemplified by the possibility of refusing the arbitral award if it is contrary to the general public order or general morals of the country asked to implement the award by virtue of its national law. In other words, the concerned authority is the only body which can decide whether an award is contradictory to public order or not. For instance, if the award is to be implemented in the Kingdom of Saudi Arabia, it should not contradict its public order, which is based on Islamic Law.

This convention also makes it explicit that all documents are to be provided with an implementation order. This requires that the following documents should be attached to the implementation order:

> 1 An official true copy certified by competent directives, of the decision to be implemented appended to the executive form.
> 2 The original of the announcement of the judgement to be implemented or an official copy certified indicating that the judgement was properly announced
> 3 A certified copy by a competent director to indicate that the judgement to be implemented is final and should be implemented.
> 4. A certificate evidencing that opponents were informed and requested to attend in front of the competent director or in front of the arbitration board correctly in case the judgment/decision by the arbitrators to be implemented was issued as a judgment by default'.[75]

This convention also includes a rule of equality between a foreign award and a local one in what concerns fees since it stipulates the following:

> 'It is not permitted to ask the citizens of the country asking for the implementation in any of the league countries to give a fee, a trust or a guarantee not enforced on the country's citizens and also they should

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a. Regarding Para a) of the second article which says*: 'currently there are no competent courts in Yemen other than the Islamic lawful courts in all cases.'*
b. Regarding Para c) of article two which says*: 'The non implementation if it was contradicting any of the general rules of the Islamic Shari'a.*
[75] Article (5).

not be deprived from that privilege enjoyed by its own citizens as a right to the judicial help on the exemption from judicial fees.'[76]

It is noted that this rule is set out in the 1958 New York Convention for Recognition of Foreign Awards but does not stress the condition of equality, it focuses, rather, on reasonable fees related to implementation of foreign awards.[77]

The convention of implementing awards among Arab nations stipulates that each country should appoint a specialized judicial authority before whom implementation orders of the awards and their procedures can be raised, all contracting countries should be informed about this issue.[78]

Saudi Arabia has in fact issued, as execution of Article (8) (already mentioned above) Ministers' Council Order N° 256 on 28/12/1379 H. (9th December, 1977 A.D) clarifying that the authority having original jurisdiction to implement foreign arbitral awards is The Board of Grievances (The Administrative Court).

On the whole, this convention is considered to be an important step taken by Arab League Countries to organize judicial and arbitral awards' implementation among member states in encouraging the development of investments. Saudi Arabia's early joining of this convention highlights its eagerness to follow up all new legislation and to fortify its economic ties with other nations. At the same time, it preserves its own model of abiding by Islamic Jurisprudence in all its affairs.

## 2. The 1958 New York convention on the Recognition and Enforcement of Foreign Arbitral Awards

International efforts continued until the birth of 1959 New York Convention.[79] This convention created a revolution in consensus of recognition and enforcement of arbitral awards and in strengthening the globalisation of International Commercial Arbitration.[80]

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[76] Article (7).
[77] Wall Refat, op.cit., P. 212 and George Hezbon op.cit. P. 168.
[78] Article (8) of the convention
[79] See Appendix (7). Held in New York on June 10, 1958 and entered into force on June 7, 1959, ( the United States on December 29, 1970). The 83 Parties to the convention are - Algeria, Antigua and

Karen Tweedale and Andrew Tweedale claim:

> 'This convention is perhaps the most widely used convention in relation to international arbitration, (82) countries are now signatories to the New York Convention.'[81]

The Kingdom of Saudi Arabia is among the countries which joined this convention,[82] and as it is important to the aims of this thesis, it will be discussed more fully below. The basic points are:

a) Scope of applying the convention.
b) Recognition of arbitration agreement and arbitral award.
c) Procedures of recognition and enforcement of arbitral award.
d) Cases of refusing implementation of arbitral award.

The attitude of the Kingdom of Saudi Arabia to these points will be taken point by point.

## a) Scope of applying the Convention

The Convention has stipulated the following:

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Barbuda, Argentina, Austria, Bahrain, Belgium, Benin, Botswana, Bulgaria, Burkina Faso, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Canada, Central African Republic, Chile, China, Colombia, Costa Rica, Cuba, Cyprus, Czechoslovakia, Denmark, Djibouti, Dominica, Ecuador, Egypt, Finland, France, German Democratic Republic, Germany (Federal Republic), Ghana, Greece, Guatemala, Haiti, Holy See, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kenya, Korea, Kuwait, Lesotho, Luxembourg, Madagascar, Malaysia, Mexico, Monaco, Morocco, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Peru, Philippines, Poland, Romania, San Marino, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Tanzania, Thailand, Trinidad, and Tobago, Tunisia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republic, United kingdom, United States, Uruguay, and Yugoslavia. See Barry E. Carter and Phillip R. Trimble, International Law Selected Document, Little, Brown and Company printed in U.S.A., Second Edition, 1991, P. 135. Saudi Arabia can also be added to this list of Countries.

[80] F.M Samy, New York Convention and Awards Enforcement, Arab Arbitration Magazine, Vol. 1, May 1999, P. 65. See also Geo. Lin & Alexander Lourie, op.cit., P. 547-8 and George Hozban, op.cit., P. 173. See Micheal John Mustill, op.cit, P. 43 and Authority Walton, op.cit., P. 415. Alan Redfern & Martin Hunter, op.cit., P. 67.

[81] Karen Tweedale and Andrew Tweedale, op.cit., P. 293.

'This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the state where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. The term 'arbitral award' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted. When signing, ratifying or acceding to this convention, or not trying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the convention to the recognition and enforcement of awards made only in the territory of another contracting State. It may also declare that it will apply the convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such declaration.[83]

From this text, it is clear that this convention applies to arbitral awards issued in one State needing to be recognized and enforced in another. Arbitral awards are also considered to be international even if issued in a State from which a recognition and enforcement order is requested.[84]

On the other hand, the New York Convention does not place conditions on recognition and enforcement of awards of a country which has not joined the convention. The arbitral award may be issued in a state that has not joined the convention and recognized in another member state. In this case, the rules of the New York Convention may be applied.

It should be noted that paragraph three of the first article, previously mentioned, gives to each member state, at the signing ceremony, the right to place reservations by virtue of

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[82] By virtue of Royal Decree N M/11 dated 16/7/1414 H (29/1/1993 A.D.) based on Ministers Council Decision N 78 dated 14/7/1414 H (27/1/1993 A.D.).
[83] Article I.
[84] See A. Moner, op.cit., P. 273.

which it can limit the application of the convention's wording to arbitral awards issued in a member state respecting the principle of reciprocity.

Regarding Saudi Arabia's thinking on the New York Convention, it is of paramount importance to mention that Saudi Arabia has declared its reservation relating to reciprocity as stipulated by paragraph three of the convention.[85] In fact, the importance of the reservation clause has dwindled because most countries have now joined this convention.

On this subject, A. Redfern and M. Hunter say:

> 'The limiting effect of the first reservation should not be exaggerated. The number of states that make up the international network for the recognition and enforcement of arbitral awards established by the New York Convention grows year by year. The convention now links the world's major trading nations - Arab, African, Asian and Latin American, as well as European and North American. As more countries become convention countries, the reciprocity reservation becomes less significant. Indeed, it is becoming a relic. The Model Law, for example, in Articles 35 and 36, requires the recognition and enforcement of an award irrespective of the country in which it was made.'[86]

The third paragraph of the first article of the convention contends that New York Convention Rules should be applied to arbitral awards involving trade and civil matters, but this paragraph also stipulates the right of a State to declare its intention to apply this Convention to disputes arising from trade relations in accordance with its national law. In other words, the State involved would apply only foreign arbitral awards related to trade transactions and the law of the state which is asked to recognize and enforce the award in its province that specifies the criteria of trade work.[87]

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[85] See paragraph ( 2 ) of Royal Decree N M/11 dated 16/7/1414 H.(29/1/1993) A.D. There are countries that have announced this reservation, including - Bahrein, Turkey, China, Syria and others.
[86] Alan Redfern & Martin Hunter, op.cit., PP. 456-7
[87] There is a group of countries declaring reservation, such as Argentina, Bahrein, Poland, U.S.A and others, See F.M Samy op.cit., P. 69

**b) Recognition of Arbitration and Arbitral Award**

The first paragraph of the second article of the Convention stipulates that – the convention states should recognize the written arbitration agreement - by virtue of which opponent parties adhere to the submitting of their case. The second paragraph clarifies the meaning of the written agreement. It sets out the fact that it is an arbitration condition in a contract signed by opponent parties or that agreement should be included in reciprocal terms because agreement on arbitration is usually achieved through international modern trade transactions.[88]

The Convention also makes its state members recognize the validity of arbitral awards and orders their implementation in accordance with the pleading rules followed in the province of that state and the conditions stipulated by this convention, which are as follows:

'Each contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules or procedures of the territory where the award is relied upon under the conditions laid down in the following articles. These shall not impose substantially more onerous conditions or higher fees or charges on the recognition or the enforcement of arbitral awards to which this convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.'[89]

It has been made clear that the convention makes contracting states adhere to the principle of not imposing tighter conditions or higher fees upon recognition and enforcement of foreign arbitral awards than for those imposed for domestic arbitral awards. In fact, this contributes to the encouragement of enforcing international arbitration awards and in facilitating their implementation procedures.

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[88] See Article (2) of the Convention. See also and A.Morad, op.cit., P. 190.
[89] Article (3).

Some people[90] have realised that the expression of this paragraph is not accurate. However, it does bring to the foreground the fact that procedural fees and conditions should not be exaggerated. It would have been better if this paragraph had stipulated the factor of equality relating to fees and conditions between domestic and foreign arbitral awards.

This appears to be a better option since equality encourages implementation of International Arbitration Awards which is the target of modern trade life.

It should be noted that the Convention of Implementing Arbitral Awards by the Arab League Council in 1952 stipulated the factor of equality relating to fees at the time of executing national and foreign awards.[91]

**c) Procedures of Recognition and Enforcement of Arbitration Award**

The New York Convention has clarified the way the order of arbitral awards recognition is to be done in the concerned state. It has also specified the documents required in this respect:

> 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 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 shall be implemented a translation of these documents into such language shall be produced. The

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[90] Walla Refat, Commercial Arbitration, op.citt. P. 220.

[91] See article (7) of the convention of Implementation Rules issued from Council of Arab League Countries in 1952.

translation shall be certified by an official or sworn translator by a diplomatic or consular agent.'[92]

The recognition and enforcement application should be submitted to the concerned authority. In the case of the Kingdom of Saudi Arabia the Authority of original jurisdiction responsible for recognition and enforcement of foreign arbitral awards is called the Board of Grievances.

**d) Cases of Refusing the Enforcement of the Arbitral Award**

The New York Convention has clarified cases where opponents can refuse the enforcement of an arbitral award until the concerned authority is able to issue a refusal order to the implementation of such award.

1. Recognition and enforcement of the award may be refused at the request of the party against whom it is invoked, only if that party furnishes the competent proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

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

(c) The award deals with a difference not completed by or not failing 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, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties,

[92] Article (4).

or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

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

3. Recognition and enforcement of an arbitral award may be also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject 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.'[93]

The above text makes it clear that it is necessary, at the time of requesting refusal of recognition and enforcement by a party, that proof should be shown to ensure whether the factor of capacity exists or not. For this reason it has been important to give the texts of these articles. However, explaining the texts in the light of the meanings of the conventions presupposes that a lack of capacity may be among the reasons for refusing award implementation because it would make an arbitration agreement incorrect.[94]

There is similarity in this paragraph between Islamic Jurisprudence and the New York Convention since lack of capacity in Islamic Jurisprudence is considered to be among the most important reasons contributing to incorrect arbitration.

Additionally, it would appear that the contents of the 5th Article agree with the rules of Islamic Jurisprudence because proper notification of arbitrator and arbitral proceeding is considered among the most important matters upon which justice and fairness of the arbitral award rely. Moreover, the 5th Article has given the authority of the country where recognition and enforcement of the award is sought, wide powers to refuse arbitral awards if the law of that country does not allow settlement of disputes by means of arbitration or if recognition and enforcement of the award is contrary to its public order.

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[93] Article (5) for more details see also Alan Redfern & Martin Hunter op.cit., PP. 461-71.

With this broad sense of authority, at first sight it could appear that the concerned authority could be criticized for limiting or belittling the recognition and enforcement of foreign arbitral awards. However, deeper examination shows that it gives different countries of the world a secure atmosphere in which to join the convention, thus serving the implementation of international arbitration awards from another angle.

Undoubtedly, the New York Convention is of paramount importance since it is open to the inclusion of all countries of the world. It is a step forward in the field of implementing international arbitral awards and in the service of modern commercial life that has witnessed the interaction of affairs and investments in all corners of the globe.

## 3. The 1965 Washington Convention

Saudi Arabia ratified the Washington Convention on the settlement of Investment Disputes between States and Nationals of other States in 1980.[95] Undoubtedly, international efforts have been carried out to find permanent mechanisms to settle investment disputes in a just manner to achieve an equilibrium between the interests and rights of the opponents.

The International Bank for Construction and Population had the project of building this permanent mechanism to achieve the objective of encouraging investments in developing countries to improve their standards of living. This Convention was signed in 1965 by International Bank member countries in Washington.[96]

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[94] Walla Refat, Commercial Arbitration, op.cit., P. 222.

[95] This Convention is less formally known as « The ICSID Convention » see Alan Redfern & Martin Hunter, op.cit., P. 54. This Convention was held in Washington on March 18, 1965 it entered into force on October 14, 1966. The 92 parties to the convention are - Afghanistan, Austria, Bangladesh, Barbados, Belgium, Benin, Botswana, Burkina Faso, Burundi, Cameroon, The Central African Republic, Chad, China, Comoros, Congo, Cote d'Ivoire, Cyprus, Denmark, Ecuador, Egypt, El Salvador, Fiji, Finland, France, Gabon, Gambia, Germany (Federal Republic), Ghana, Greece, Guinea, Guyana, Iceland, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kenya, Korea, Kuwait, Lesotho, Liberia, Luxembourg, Madagascar, Malawi, Malaysia, Mali, Mauritania, Mauritius, Morocco, Nepal, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Papua New Guinea, Paraguay, Philippines, Portugal, Romania, Rwanda, Saint Lucia, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Solomon, Islands, Somalia, Sri Lanka, Sudan, Swaziland, Sweden, Switzerland, Togo, Trinidad & Tobago, Tunisia, Uganda, United Arab Emirates, United Kingdom, United States, Western Samoa, Yugoslavia, Zaire, and Zambia. See Barry E. Carter & Phillip R. Trimble, op.cit., P. 140.

[96] Walla Refat, The Role of International Center for Disputes Settlement, Conference Administration Sciences New Horizons and Roles in Development, Vol.. 2, P. 847.

Article (25) has stressed that the dispute is legal and arises from investment concerns but the convention does not clarify the meaning of 'investment'. This may have been deliberate when drawing up the convention so that the parties would be free to specify the concept of the dispute and determine whether it was related to investment.

The concept of the word 'investment' differs from one country to another in accordance with national legislation, since a contracting country is not allowed, at the time of approving or accrediting the Convention, to dictate to an arbitration center the type of disputes to be displayed according to that center's speciality. In this respect, Alan Redfern and Martin Hunter state:

> 'The term 'investment' is not defined in the Washington Convention, but in practice it has been taken to cover the investment of services and technology, as well as more traditional forms of capital investment.'[97]

Since the Saudi Arabian case is being dealt with here in relation to these international Conventions, it is important to mention that Saudi Arabia has declared to take petroleum disputes away from the frame work of this convention.[98]

The Washington Convention includes rules emphasizing the seriousness of settling disputes. For instance, if parties agree to subject their case to arbitration, they are not allowed to withdraw their agreement to arbitration nor to submit their subject matter to other judicial authorities, this applies to both domestic and international arbitrations.

The Convention has stressed that the issued award should be binding on the parties to the dispute however, it can be subject to appeal except in cases as mentioned in the convention. In this way, the award is considered as final.[99]

In general, the Washington Convention is considered an important step towards international efforts contributing to the development and reciprocal respect of arbitration at the international level. The Kingdom of Saudi Arabia is among the

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[97] Alan Redfen & Martin Hunter, op.cit., P. 55.
[98] Samer Saleh, op.cit., P. 324.
[99] Article (50).

countries that joined this Convention in 1980. This confirms Saudi Arabia's eagerness to preserve and abide by these Conventions in matters relating to implementation of arbitral awards. It should also not be forgotten that to achieve its implementation in the Kingdom it should comply with Islamic Jurisprudence.

## 4. The 1983 Riyadh Convention for Judicial Co-operation.

To maintain continuity in an understanding of the general situation of Saudi Arabia's enforcement of arbitral and judicial foreign awards, the 1983 Riyadh Convention for Judicial Cooperation will be cited here. This Convention was among those concluded within the framework of the Arab League Countries on 23/6/1403 H (April 6, 1983 A.D).[100] It concentrated on developing judicial cooperation among Arab countries and dealt with the implementation of arbitral awards and ensuring that contracting states were abiding by this convention in so far as executing arbitral awards in accordance with the law of the state where implementation procedures were sought.

This convention was called the Riyadh Convention since it was held in Riyadh and Saudi Arabia expressed its agreement in this respect.[101]

The Convention emphasized that the concerned authority is not allowed to issue the executionary order, look into the subject of the dispute nor refuse implementation of the award except in cases as mentioned in the convention. The following text, which is of great importance, illustrates this point:

> a. If the law of the contracting party, for which arbitral award recognition and implementation are requested does not allow settlement of the dispute by means of arbitration.

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[100] Article (72) stipulates that the solutions of this convention were for countries approving and superceded the three conventions concluded in 1952 which dealt with announcements and judicial deputizations, awards' implementations and the handing over of criminals. Saudi Arabia has signed this convention, see AL Smaan, op.cit., P. 43. See also A.A. Salama, The Legal System and Judicial Deputizations. Al Taawen Magazine issued by The General Secretariat for GCC Council, Issue N° 52, Year 15, October 2000, P. 15.

[101] By virtue of Royal Decree N° M/14 dated 12/8/1420 H (November 1999 A.D) see Um AL qura Newspaper, (official newspaper) issue N° 3775 dated 20/9/1420H. (10-12-1999 A.D.),. See also The Legal Buletin issued by General Secretariat of GCC Council, Issue N° 73 dated 1/7/2000, PP. 73-74.

b. If the award is issued as execution to a term of incorrect arbitration or is not valid.

c. If arbitration is not competent in accordance with the arbitration terms or contract in accordance with the law, by virtue of which the law, by virtue of which the arbitral award is to be issued.

d. If arbitrators were not given proper notice to attend the case.

e. If the arbitral award is contrary to the rules of Islamic Law, public order or to the general morals of the contracting party, for whom implementation is requested.[102]

It is clear that the Riyadh Convention for Judicial Co-operation is similar to the 1958 New York Convention in that it is also concerned with cases upon which reliance can be placed to refuse implementation of foreign arbitral awards.

However, unlike the New York Convention, it contends clearly that the award should not be contrary to Islamic Law as stipulated by paragraph (e) of the above text. This would appear to prove that there is a general desire on the part of Arab and Islamic countries to apply the rules of Islamic Law. If the 1952 Convention of awards' implementation among Arab League States is compared with that of the New York Convention, it will be found that there is a difference in the formula, since reservation[103] is related to conformity to Islamic law when dealing with arbitral award implementation, this is overtly stated in the wording of the former convention.

In reality, this confirms the importance of studying the rules relating to Islamic commercial arbitration so as to understand the attitude of Islamic Jurisprudence in arbitration matters and also the way to challenge implementation procedures, which allows for optimism since research is considered an important step towards clarifying aspects of Islamic commercial arbitration.

It also contributes to the clarification of similarities and differences between international and local arbitral legislatures. A clear picture of awards implementation in Islamic countries applying Islamic Law is now emerging.

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[102] Article (37) of the Convention.

[103] At the Convention of Awards' Implementations of 1952, Yemen made reserve on the third paragraph of the Second Article – 'Not implementing the award if different from general sources of Islamic Law'.

Before closing this discussion on the Riyadh Convention, it is important to mention the importance of this Convention. It presented a positive step towards serving economic commercial exchanges between and amongst contracting Arab states.

## 5. The 1987 Amman Convention for Commercial Arbitration

This Convention was concluded during the 5th holding session of the Council of Arab Ministers of Justice in Amman, Jordan during the period 11-14/4/1997. This convention is composed of 42 articles divided to six chapters.[104]

The Amman Convention is considered among the most important Arab conventions in the field of arbitration since it is the only convention that has organized arbitration in a specific way for commercial relations on the basis of institutional arbitration starting with a unified Arab Arbitration Center and ending with issuing an arbitral award. It has also adopted methods to challenge and implement an award.

This convention undertook to study and hold discussions with the Council of Arab Ministers of Justice.[105] A group of Arab countries, including Saudi Arabia, joined this convention.[106] Since this study is concerned with discussing foreign arbitral awards implementation in the Kingdom of Saudi Arabia, it also necessary to discuss the contents of this convention.[107]

The Amman Convention contends that the award to be issued, must have reasons; include arbitrators and arbitrates names; the date; the place; a general view of case reasons; and any requests. However, the convention does not evoke the final stage of the award, which brings about the following question: If an award is issued from a commercial arbitration center in the light of the Amman Convention of International

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[104] See Appendix ( 6 )
[105] See Decision of Council of Arab Ministers of Justice N° 162 dated 19/10/1412H. (19 April 1992.
[106] See Y Al Smaan, Symposisium of Foreign Investment, Riyadh Diplomatic Saudi Institute, op.cit., P. 43.
[107] For more details about the convention see Hamza Hadad, Arbitration Award in accordance with Amman Convention Arab Arbitration Magazine, 1st issue, May 1999, P. 53. See also Adil Belkhir, Validity and Implementation of Arbitral Awards, op.cit., PP. 171-172.

Commercial Arbitration, is it considered as final? In other words, can this award be challenged by ordinary means of challenge or not?

It seems that this convention and its objective, i.e. to strengthen commercial arbitration among Arab countries, agree that the award issued in its light is considered as final if it answers all the necessary conditions embedded therein. This is confirmed by the following two points. First, the Convention stipulated the following:

> 1. Both parties may apply to the Chief of the Arbitration Center to challenge the award if one of the following reasons is provided:
>
> a) The authority has exceeded its speciality directive.
>
> b) If, even though a judicial award has been decreed, a new case is shown to affect substantially the award and on the condition that the challenge applicant ignores this new case.
>
> c) In a case where an incidence of illegal influence on the arbitrator has influenced the arbitral award.
>
> 2. Challenge application must be submitted within 60 days from the date of award reception....[108]

It is clear that this convention has laid down specific reasons for challenge other than the usual means of challenging arbitral awards, proving that the convention considers awards issued under its law as final.

Secondly, additional proof that awards issued in the light of the Amman Convention are final is that no convention country is allowed to refuse arbitral awards in its territory unless the awards are contrary its public order.[109]

This clearly answers the question of whether Arbitral awards issued by virtue of this convention are considered final awards. Since the answer has to be that they are then it becomes obligatory to implement them.

Since this study is concerned with Saudi Arabia in relation to implementation of foreign arbitral awards, the contents of Article (35) of the convention should be noted here. This

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[108] Article (34)

Article contends that refusing the award if it is contrary to public order in Saudi Arabia is primordial and that arbitral awards should conform to Islamic law so as to ensure correct implementation.[110]

The Amman Convention clarifies procedural stages and supports implementation of awards in the signatory countries and was considered to be a positive step in the field of arbitration among Arab countries.

## 6. 1993 System of International Commercial Arbitration in the Arbitration Center of Gulf Co-operation Countries

Saudi Arabia has been eager, with its neighbouring Gulf countries - The United Arab Emirates, The Sultanate of Oman, Bahrain, Qatar and Kuwait - to establish a cooperation council as a result of the existence of wide similarities in their economic, social and cultural lives. For this reason, these countries agreed to establish an Arab Gulf Cooperative Council within approximately seventeen years.

The GCC has met with wide support from the kings and Heads of State and has carried out its role enabling a number of economic, security and administrative conventions to come into being. It has also facilitated movement among member states.

The GCC council has also issued numerous projects on informative law through which similarity among the six countries, in what concerns local legislation, can be examined.[111]

In 1993 and throughout the fourteenth GCC summit, the leaders of GCC states laid down the first fundamental brick of the GCC commercial Arbitration Center by being gracious enough to adopt the Charter of the Center.[112] Although this law is not under discussion it is interesting to note in passing that there have been legal abligation to

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[109] Article (35)

[110] This has been confirmed by practical reality, see for example the Decision of The Board of Grievances in Saudi Arabia N°2/20/26 dated 1399 H (1978 A.D.) in case N° 73/q dated 4/1/1399 H (4-12-1978 A.D.) when an Executionary order was issued after ensuring that the award did not contradict the rules of Islamic Shari'a.

[111] See legal Bulletin issued from GCC States council, Issue N° 73, on 01/7/2000.

implementing arbitral awards in Saudi Arabia. It also leads to the question of whether there are legal obligations as a result of issuing the law of implementation of arbitral awards in Saudi Arabia.

The procedural list of GCC commercial arbitration stipulates the following :

> 1. An Award passed by the Tribunal pursuant to these Rules shall be binding and final. It shall be enforceable in the GCC member states once an order is issued for the enforcement thereof by the relevant judicial authority.
> 2. The relevant judicial authority shall order the enforcement of the arbitration awards unless one of the litigants files an application for the annulment of the award in the following specific events:
>
> a) If it is passed in the absence of an Arbitration Agreement or in pursuance of a null Agreement, or if it is prescribed by the passage of time or if the arbitrator goes beyond the scope of the Agreement.
>
> b) If the award is passed by arbitrators who have not been appointed in accordance with the law, or if it is passed pursuant to an Arbitration Agreement in which the issue of the dispute is not specified, or if it is passed by a person who is not legally qualified to issue such award.
>
> Upon the occurrence of any of the events indicated in the above two paragraphs, the relevant judicial authority shall verify the validity of the annulment petition and shall pass a ruling for non-enforcement of the arbitration award....[113]

This article does not differ much from other articles in other arbitration laws. It should be noted that in order to achieve the enforcement of the arbitral award in the kingdom of Saudi Arabia, it must not be contrary to the rules of Islamic Jurisprudence.[114]

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[112] See Charter of Arbitral Rules of Procedure, GCC Commercial Arbitration Center, Bahrain, General secretariat of GCC States, 1997, P. 3. See also appendix (3)
[113] Article (36)
[114] We have already clarified our suggestion about this article by adding a new paragraph that should not be contrary to Islamic Law, see chapter Five, 15.8.5., Supra

It would appear that the GCC Commercial Arbitration Center is considered to be a positive step in supporting and strengthening commercial arbitration in the Gulf area.

it is clear that enforcement of foreign arbitral awards in the kingdom of Saudi Arabia is possible in the light of the Saudi stable law principles and the convention procedures related to Saudi Arbitration. Undoubtedly, this trend has been adopted by most modern countries for the importance of providing a conducive atmosphere in which to attract more foreign investments.

After discussion of the manner in which local and foreign arbitral awards are implemented in the Kingdom of Saudi Arabia, the question to be asked is - is it possible to reformulate the 1983 Saudi Arbitration Law since Saudi Arabia has now joined numerous other international conventions?

This questioning can be answered by illuminating two points of view. The first deals with the fact that the Saudi Arbitration Law of 1983 still performs its role effectively, especially at the national level but also in international commercial matters. The conventions which Saudi Arabia has joined are considered as complementary to 1983 Arbitration Law and go hand-in-hand with the conventions of international commercial arbitration. The second point of view claims that the 1983 Saudi Arbitration Law was created to organize and treat issues subjected to internal arbitration and arbitral rules for internal commercial arbitration.[115] Saudi lawyer, T. Alshubaki has supported this second opinion. He claims:

> 'As a continuity to developments witnessed in Saudi Arbitration, there is international commercial arbitration system to be issued compatible with the rules of Islamic Law as harmonious with the model International Commercial Law accredited by UNCITRAL committee of United Nations.'[116]

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[115] M. Coman, op.cit., P. 33.
[116] Turki AL Shubike, Lawyer and Former Arbitration Secretary in Arbitration in Riyadh Chamber of Commerce and Industry, Specialized commercial arbitration, Second author interview in London, dated 19 march 2001.

It seems to have been suitable, at the time of ratification of the 1983 Saudi Arbitration Law, to clarify all the rules relating to international commercial arbitration that must comply with Islamic Jurisprudence and also the International conventions which Saudi Arabia has joined, which provides a propitious atmosphere for foreign investment in Saudi Arabia.

### 6.22.4. Possibility of Broadening Scope of Islamic Jurisprudence to Incorporate International Convention Issues in the Field of International Commercial Arbitration

Through the discussion so far, it has become clear that there are many similarities among the conventions and Islamic Jurisprudence since they all emphasize the importance of arbitration safety from its conception to its culmination in implementation.

The scope of Islamic Jurisprudence appears to be broad enough to consider international conventions on the condition that the issued arbitral award should not be contrary to rules of Islamic Law.

In reality, Saudi Arabia's adherence to the majority of these international conventions can be considered to be a step towards greater globalisation since the rules of Islamic law do not come into conflict with those international conventions stemming from the United Nations.

# CONCLUSION

This conclusion will present a review of the foregoing chapters incorporating the most important results achieved through discussion and analysis. Recommendations that have occurred throughout the writing of this thesis will also be given. The conclusion will cover the following points:

a) Summary

b) Most Important Results

c) Recommendations:

   1. General Recommendations
   2. Recommendations Relating to Islamic Commercial Arbitration
   3. Recommendations Relating to Saudi Arbitration Law 1983 and its Implementation Rules 1985.

## a) Summary

This thesis has examined commercial arbitration within Islamic Jurisprudence and its role in the Saudi Arbitration Law 1983 and its Implementation Rules1985. Commercial arbitration rules within Islamic Jurisprudence have been discussed from the perspective of the basic sources of Jurisprudence, i.e.the Quran, Sunna, Consensus and Analogy. Opinions from various schools of Jurisprudence were discussed, as well as their solid proofs, so as to select the opinions that are best supported by proofs from the Quran, Sunna, Consensus and Analogy. At the same time concordance with today's arbitration processes was also shown.

The Saudi arbitration experience was discussed since Saudi Arabia applies Islamic Law. However it has also followed international developments in the field of international commercial arbitration.

Furthermore, the religious dimension within Islamic Jurisprudence or Islamic law has been examined since Islamic law relies on religion. Islamic law was delivered from the Law of God and must comply with the Quran and Sunna. The divisions of thought within Islamic Schools of Jurisprudence have been clarified.

This thesis was divided into six chapters. The first one dealt with the definition of arbitration and its legality within Islamic Jurisprudence. Reference to Arab arbitration before and after Islam has also been made, showing the substantial change in the concept of arbitration, since the latter relies on stable bases from the Quran and Sunna. The linguistic and scientific meanings of arbitration within Islamic Jurisprudence were also considered in this chapter, as was the nature of arbitration as a binding contract on disputants. Here, it has been shown that there are many similarities between Islamic Jurisprudence and modern arbitration laws.

This chapter additionally clarified the legality of arbitration which is acceptable within Islamic Jurisprudence through proofs from the Quran, Sunna, Consensus and Analogy. Mention was also made of other concepts of arbitration, such as deputisation, reconciliation, experience and Judicial authority.

Chapter two discussed the pillars of contract within Islamic Jurisprudence generally, and then more specifically, because the contract of arbitration is the source of arbitration if its basis is complete and correct in so far as its pillars are concerned. This chapter also explained each pillar more precisely so as to cover all its aspects and answered many questions arising from this perspective. Similarities and differences between Islamic Jurisprudence and modern arbitration processes were similarly highlighted.

Chapter three discussed the scope and proceeding of arbitration including rules of evidence within Islamic Jurisprudence. The causes affecting arbitration parties during the arbitration process and other related issues were examined.

The arbitral award was the major concern of chapter four. Its importance was shown because it represents the final settlement of arbitral cases. Hence, reference to the definition of arbitral award within Islamic Jurisprudence, its components, form and the way it is interpreted were dealt with in depth. This chapter also clarified some misunderstood points and concepts about Islamic Jurisprudence. Additionally, the necessary conditions for arbitral awards to be correct and enforceable were clarified and the attitude of the Saudi Arbitration Law to some arbitration related issues was shown.

Chapter five explained the challenge of the arbitral award, clarifying its importance and the extent to which a challenge could effect arbitration either positively or negatively. This chapter was concerned with the challenge of arbitral awards within Saudi Arabian Law; the judicial system was, therefore, also discussed because arbitral awards represent an important meeting point between judicial authorities and the arbitration system. The role of the judiciary was discussed to clarify how judicial authorities could be more efficient in achieving progress in arbitration in an effort to better serve commercial life, international commercial arbitration and to engender enough flexibility to enforce both local and foreign arbitral awards.

Chapter six concentrated on the ultimate phase, i.e. when the arbitral award becomes final and enforceable. Recognition and enforcement of the award within Islamic Jurisprudence was exhaustively discussed. This chapter also dealt with the concept of the validity of arbitral awards within Islamic Jurisprudence, clarifying the most important causes which have hindered their implementation.

In this sense, the Saudi Arbitration Law was analysed and various points needing modification to develop the Saudi Arbitration Law were also discussed as a way of implementing foreign arbitral awards in Saudi Arabia because the latter abides by the rules of Islamic law. The most important principles upon which Saudi Arabia relies were clarified either from the perspective of the principles of Islamic Jurisprudence or from those of the international conventions that Saudi Arabia has joined, such as the 1958 New York Convention, the 1961 Washington Convention, the 1983 Riyadh Convention for Judicial Co-operation, the 1987 Amman Convention for International Commercial Arbitration and the 1993 System of Arbitration at the International Commercial Arbitration Center of Arbitration and the International Commercial Arbitration Center of the GCC. Equally important, the chapter focused on the stable attitude of Saudi Arabia in abiding by the rules of Islamic Jurisprudence, keeping pace at the same time with modern development in the field of arbitration.

## b) Most Important Results

Through analysis and discussion in this thesis, a number of results have emerged. These include the following:

1. The existence of a huge wealth of jurisprudence within Islamic Jurisprudence both in the field of arbitration, judicial authority and in advisory or financial dealings. These results require more research and require to be catalogued and classified in a new index which would be of benefit to all future researchers.

2. There is a need for Islamic Governments, businessmen, Muslim companies and those who deal with them, to know the rules of Islamic Commercial Arbitration. This is so that when an arbitral award is sought to be implemented in a state abiding by the rules of Islamic law, those organising the processes of international commercial arbitration, and drafting conventions of international legislation, are aware of what is required. This thesis is considered to be an important step towards this objective.

3. Even before Islam, arbitration was known to Arabs but they lacked a regulatory judicial system. The arbitrator was usually chosen from among the wise of a community. Sometimes fortune-tellers and pro-idols were chosen. At that time there were many known arbitrators both male and female.

4. There was a considerable change in the concept of Arab arbitration after Islam, since after the Prophet's (peace upon him) mission and the coming of the Quran, many ideas of conduct, dealing, judicial authority and arbitration were transformed. Islam came to emphasize justice and the equality of the races. Arbitration came to rely on stable principles derived from the Quran and Sunna.

5. Many people consider that an arbitration contract within Islamic Jurisprudence is a kind of judicial authority. It is seen as special arbitration because the arbitrator wants to achieve justice and allocate the parties their due rights without being affected by any party. However, an arbitration contract, is, like all other contracts, binding on the litigants and must be respected.

6. There are differences between the Islamic schools of Jurisprudence as to the necessary qualifications of an arbitrator. Some contend that the arbitrator must bear all the qualifications of the judge. Others claim that this is not necessary. From discussion and analysis the second opinion would appear to be the most correct.

7. Arbitration cases within Islamic Jurisprudence stress the importance of arbitration as a means of settling disputes and also the need for neutrality and equality among parties in all arbitration procedures from the start to the issuance of the arbitral award.

8. Doubt has arisen as to whether women are allowed to act as arbitrators. This thesis has shown that those who deprive women from being arbitrators confuse arbitration with judicial authority. Discussions, as shown in this thesis, make it clear that if women have enough legislative knowledge of the general rules of Islamic Jurisprudence and the subject matter submitted to arbitration, they may arbitrate. Both men and women, in fact, may carry out arbitration tasks.

9. An answer has been provided as to the possibility of accepting non-Muslims as arbitrators. Discussion on this topic was divided into two cases:

a) First case: If arbitration is local, i.e. within the territory of a Muslim State. This case has also been divided into three different sections:

1. If arbitration parties are non-Muslim it is possible to choose "Al Aldhima" as arbitrators. This is the view of the Hanafi School.

2. If arbitration is between a Muslim and non-Muslim, many opinions of jurisprudence appear. However, it seems that the arbitrator should be Muslim.

3. If arbitration is between two Muslim parties, the majority of scholars insist that the arbitrator must also be Muslim.

It was pointed out that most arbitration Laws in Arab and Muslim countries do not stipulate that the arbitrator should be Muslim. They leave parties free to choose a capable arbitrator to settle their dispute.

b) Second case: Discussion has shown that If arbitration is international there are different opinions on this point. However, in the last analysis it seems that it is possible to choose a non-Muslim arbitrator if there is a necessity to do so. This is true in both local and international arbitration.

10 There is a need for the existence of an Islamic Commercial Arbitration Center. The law of this center should be by virtue of the rules of Islamic Jurisprudence. This means that it should take into consideration the opinions of schools of Jurisprudence. It would be a good opportunity if it was created through the Organization of Islamic Conferences which includes all Islamic states. This would be considered a positive step towards organizing Islamic commercial relations but it could also be independent.

11 Islamic Jurisprudence does not allow all issues to be subjected to arbitration. For instance, issues relating to the general system of society and criminal issues come under the domain of the judicial authority. In this there is a similarity between Islamic Jurisprudence and the modern arbitration laws.

12 Islamic Jurisprudence has been concerned with pleading procedures to guarantee justice and the principles of a fair trial from the judicial authority. These principles may be applied to arbitration where equality between parties takes place in all areas of dispute. There is also concern with methods of providing proof, such as testimony, declarations, pledges and written documents. Again this shows a similarity between Islamic Jurisprudence and current arbitration methods.

13 Within Islamic Jurisprudence, women are completely independent. They are able to conduct their own commercial transactions and be responsible for their own money.

14 There is concern on the part of Islamic Jurisprudence in the case of a defect shown in an arbitrator's capacity, either from lack of some capacity characteristics or in the case of death of an arbitratee. Many opinions were discussed, but it was made clear that the death of an arbitratee does not affect the course of arbitration. Yet again this shows a similarity between Islamic Jurisprudence and many modern arbitration laws.

15 The arbitrator should not deal with other issues for which there is no requirement to provide a judgement. Awards issued in these circumstances are considered null and void.

16 No single litigant is allowed to renounce arbitration, because an arbitration contract within Islamic Jurisprudence has a binding nature like all other contracts. However, if both parties agree to renounce arbitration and submit their case to judicial authority instead they can do so.

17 There are many definitions of 'arbitral award' within Islamic Jurisprudence. Although they have different expressions, they have the same meaning. Arbitral awards are considered as a word or deed issued by an arbitrator. The arbitral award aims at settling the existing dispute and has a binding nature in accordance with the rules of Islamic Jurisprudence. The arbitral award does not have a specific form, and it may be oral or written. However, this does not prevent the determining of a special form to an arbitral award. The content of Article (17) of the Saudi Arbitration Law complies with Islamic Law in this respect. There is a similarity between some international and local laws in the field of arbitration

18 There is an essential difference between Islamic Jurisprudence and most modern arbitration laws in what concerns the choice of the necessary applicable law because the general rule within Islamic Jurisprudence is that only Islamic law is applicable. In other words, the arbitral award should not differ from the principles of Islamic law. This point has been confirmed by the Saudi Arbitration Law, Article (20), which ensures that, before being issued, an arbitral award is not contrary to Islamic Jurisprudence principles.

19 It is the case for most modern arbitration rules, that an arbitration contract may be concluded within Islamic Jurisprudence if consent is overtly expressed, either orally, written or through modern reliable means of correspondence.

20 There is a similarity between Islamic Jurisprudence and some modern arbitration rules in preventing a bankrupt from taking steps that bring harm to creditors. For instance, there is a similarity between the English law in this respect and the opinions of Shafii and some scholars of the Maliki School. At the international level, there is a similarity also with UNCITRAL Model Law.

21 Islamic Jurisprudence allows a specific time to be set in which to consider the arbitral case and issue an arbitral award. Islamic Jurisprudence and modern arbitration laws converge on this point. Among these laws, the 1983 Saudi Arbitration Law can be cited as an example since Article (9) stipulates that a period of 90 days can be specified if parties fail to set a specific period. However, there are some shortcomings to this article since it does not clarify the specific period within which the authority having original jurisdiction must either hear the case or report on it.

22 The arbitral award must meet some conditions from the perspective of Islamic Jurisprudence. In other words, the award should comply with the general rules of Islamic Jurisprudence and should be issued on a matter that can be subject to arbitration. The arbitrator must also have the reliable capacity to issue an arbitral award.

23 In what concerns ratification and interpretation of the arbitral award, there is again similarity between Islamic Jurisprudence and modern arbitration laws, in that Islamic Jurisprudence stresses that arbitration fees should not be excessive. They should be suitable to the efforts deployed in the arbitration process. This is in order to better serve arbitration and provide assistance in settling disputes It has been hypothesized by Islamic Jurisprudence that the

arbitral award, if issued by an arbitrator or arbitral tribunal is correct and enforceable. Nevertheless, it may be challenged if it lacks one condition of arbitral validity, such as the lack of capacity, an incorrect announcement etc...

24 There are valid reasons for challenging a judicial award within Islamic Jurisprudence. Among the most important reasons is the case wherein the arbitral award is contrary to the Quran, Sunna or Consensus.

25 Through discussion of the 1983 Saudi Arbitration Law of challenge, the following points were clarified:

Absence of clear text specifying reasons by virtue of which the arbitral award can be challenged.

This text does not overtly stipulate a special degree for the authority having original jurisdiction to consider the dispute. Thus, it can said that there is a wide gap in Saudi Arbitration Law since its actual application bears the widest scope for challenge, which does not serve the arbitration process. For example, at the Board of Grievances, if the dispute subject is of a commercial nature, challenging the arbitral award may be submitted to a commercial department. If the latter accepts the challenge of the award, it issues its ultimate decision relating to the award. This award may also be challenged in front of the Department of Investigation at the Broad of Grievances. Having recourse to arbitration leads to three degrees or stages but having recourse to judicial authority leads only to two stages. Consequently, this point needs reconsideration and some modification.

26 In the light of the 1983 Saudi Arbitration Law it is not allowed to challenge foreign arbitral awards on the basis that the arbitrator issuing these awards is non-Muslim. The possibility of whether Saudi litigants can agree to settle their existing dispute by means of arbitration outside Saudi Arabia has been fully discussed. It has been made clear that there are two important points:

(i) The legal side.

(ii) The religious side.

From the legal side, the 1983 Saudi Arbitration Law and its 1985 Implementation Rules do not state in this respect the words, "prevention" or "ban". However, as shown, the best opinion within Islamic Jurisprudence is that a non-Muslim may arbitrate if it is necessary. Nevertheless, if there is no necessity to do so, the person choosing a non-Muslim would be considered as acting inappropriately.

27 Islamic Jurisprudence is in line with modern arbitration laws. If the arbitral award is correctly issued and becomes final, it is binding on both parties and becomes enforceable. If this is not accomplished, the award is implemented by the proper authorities.

28 The Kingdom of Saudi Arabia is distinguished by its adherence to the rules of Islamic Law and at the same time follows up modern development in the field of arbitration both locally and internationally. It has been seen that Saudi Arabia has joined many international conventions, such as the New York Convention of 1958, the 1981 Washington Convention, the 1987 Aman Convention for International Commercial Arbitration and the 1983 Riyadh Convention for Judicial Co-operation.

29 The important principles that govern the implementation of foreign arbitral awards in Saudi Arabia are first, the principle of not being contrary to Islamic Law, secondly, the principle of reciprocity and lastly, the International Conventions that Saudi Arabia has joined.

30 Within Islamic Jurisprudence, there is a possibility of flexibility through which Islamic Jurisprudence can be compared to conventions and international laws in the field of international commercial arbitration.

31 In nearly all its aspects, commercial arbitration resembles the contents of modern arbitration laws both international and local. For this reason, Islamic Jurisprudence cannot be considered to be a hindrance to international cooperation through which it is possible to find more ways to collaborate at the international level.

32 There is a need to go through many modifications of the Saudi Arbitration Law of 1983 and its 1985 Implementation Rules.

## c) Recommendations

After pointing out the important results of this thesis, there are certain recommendations which it is hoped will be beneficial and present a positive step in the field of Islamic commercial arbitration and Saudi arbitration law at both local and international levels. These recommendations have been divided to three sections :

1. General Recommendations.
2. Recommendations relating to Islamic Commercial Arbitration.
3. Recommendations relating to the Saudi Arbitration Law of 1983 and its Implementation Rules of 1985.

## 1. General Recommendations

a. Universities and specialized research centers of legal and religious affairs in Islamic States should be called upon to encourage more research into Islamic Jurisprudence. New entries and indexes should be set up using modern scientific methods - either manually or electronically - so as to benefit from them and have easy recourse to them.

b. Scholars of Jurisprudence should be called upon for more perseverance in all new cases, since within Islamic Jurisprudence a mechanism exists for this perseverance. Scholars have a great role to perform in this area.

c. The importance given to scientific research to discover aspects and scholarship procedures followed in Islamic countries throughout the era of the prophet and his companions and throughout the Omayad and Abassid dynasties should be noted here. The many different opinions have all been preserved and the various procedural aspects need deep research and clarification. It is important in the current climate to bring their many aspects to light, especially the procedural legislation of Islamic countries, so that benefit may be obtained.

d. It is suggested that all Islamic States should take the initiative in setting up committees to conduct ratification of local legislation within the Islamic States so that these laws will comply with the rules of Islamic law and follow up the requirements of Islamic societies.

e. There is a need to widen arbitrators' horizons especially in the field of international commercial arbitration. They should not be limited to cultures and legal systems they have been accustomed to, they should widen their knowledge of the places where arbitral awards are to be implemented. Cases where the application of rules of Islamic Jurisprudence have been ignored without good reason have been discussed. Cases in point being the case of the Petroleum Development Ltd. v. The Sheikh of Abu Dhabi, Saudi Arabia v. Arabian American Oil Company (ARAMCO) and the case of the Ruler of Qatar v. International Maritime Oil Company.

f. There is not a wide difference between the rules of Islamic commercial arbitration and the majority of international and local arbitration laws. For example, UNCITRAL Model Law, LCIA Arbitration Rules, ICC Arbitration Rules and other modern arbitration laws.

g. There is a need to unify the judicial authorities in the Kingdom of Saudi Arabia and limit the existence of judicial committees, such as the committee of Commercial Disputes' Resolution and the Committee of Financial Dispute Resolution. The judicial authority should perform their tasks.

h. In Saudi Arabia, as in most countries, it is recommended that judges should go through different legal positions before becoming independent judges. They should first work on the Board of Investigation and the Bureau of the Attorney General, then go to the Ministry of Justice for a period of time. They should then work at the Tribunal. Going through these stages the judge will accumulate more experience and increase his personal knowledge. This will increase a judge's efficiency and productivity.

i. It is recommended that the Ministry of Justice and the Board of Grievances should publish detailed judicial decisions in an indexed and modern way, because this would be considered beneficial and add to the wealth of jurisprudence knowledge for judges and researchers.

j. It is recommended that Chambers of Commerce and Industry in Saudi Arabia should publish arbitral awards after gaining litigants' consent.

k. It is recommended that a scholarly journal be issued from legal departments and that they should be used as a meeting point with Islamic Sharia for debate and exchanges of opinion since Saudi Legal Jurisprudence needs such an initiative.

l. It should be emphasized that Saudi Arabia is distinguished for its adherence to the rules of Islamic Law and at the same time follows modern developments in the field of international arbitration.

m. It is necessary to recommend that the study of systems, laws and Islamic Jurisprudence should merge in colleges of Islamic Law in Saudi Arabia to limit the binary system of teaching, in a sense that graduates would be knowledgeable about the Islamic Law. This will have a positive role because graduates of these colleges are the future judges, advisors and legislators.

n. It is recommended that arbitration be taught as a separate course for students of Law and Islamic Sharia since it is so important for settling disputes and alleviating judges' tasks.

o. Reconsideration of the 1983 Saudi Arbitration Law and its 1985 Implementation Rules are highly recommended. They should also go through modification as stated in this thesis so as to be more suitable for international commercial arbitration and in an attempt to attract more foreign investments.

## 2. Recommendations Relating to Islamic Commercial Arbitration

There is a need to update and develop commercial arbitration laws within Islamic Arab States so as to be more suitable to international changes in the field of arbitration and yet to allow these states to abide by the rules of Islamic Law, especially if there is similarity between them.

The Islamic Conference Organization should issue a law for Islamic Commercial Arbitration in Islamic countries, taking into consideration scholars' opinions provided they are supported by solid proofs from the basic sources of Islamic law, i.e. the Quran, Sunna, Concensus and Analogy, and are in concordance with modern commercial arbitration. This thesis has set out the benefits of such action being taken. Further recommendations are as follows:

a. More approximation with international arbitration must be achieved, however, it is necessary to take into consideration Islamic Commercial Arbitration through legislation and international conventions issued by the United Nations, especially if there isgreat similarity between Islamic Commercial Arbitration and local and international laws. Islamic commercial arbitration cannot be considered as an obstacle to the realizing of approximation and international cooperation in the field of international commercial arbitration. However, it is flexible and has room for the various scholastic opinions that would follow from any changes.

b. An arbitration contract within Islamic Jurisprudence as with other contracts is binding. This should be respected and all its binding terms should be implemented

c. It is recommended that Islamic Jurisprudence, arbitration, reconciliation, deputization, judicial authority and experience should not be confused with each other.

d. It is recommended that the necessary conditions of judges and arbitrators are not confused with each other. Each role has specific conditions.

e. Women may act as arbitrators within Islamic Jurisprudence if they are knowledgeable about the general rules of Islamic Jurisprudence and the matter subjected to arbitration.

f. The Non Muslim may arbitrate both locally or internationally according to the rule of necessity.

g. If arbitration is sought inside an Islamic country and all parties are non-Muslims from "Ahl Aldhimma", according to the opinion of Hanafi School it is still possible for one of them to be chosen.

h. If arbitration is sought inside an Islamic state and both arbitration parties are Muslims and non-Muslims, many opinions arise as to whether the arbitrator should be Muslim. However, basically it is considered suitable for the arbitrator to be Muslim.

i. The subject of arbitration should be among the issues legally accepted by Islamic Jurisprudence.

j. It is important that the arbitrator or arbitral tribunal take into consideration that if the arbitral award is sought to be implemented in an Islamic state where Islamic Law is applied, such an award should not be contrary to the rules of Islamic Law.

k. Litigants should be allowed to make the arbitral award settling their existing dispute unchallengeable.

l. Challenging the arbitral award within Islamic Jurisprudence is allowed if such an award is proved to be contrary to Quran, Sunna or Consensus.

m. Islamic Jurisprudence can agree with most modern arbitration laws as to the clarifying of reasons to challenge an arbitral award. This is broadly because arbitration is a suitable means of settling commercial disputes.

n. Islamic Jurisprudence stresses the necessity to implement arbitral awards at their final stage and to give parties their full rights without delay.

o. Legislators in Islamic countries may choose the most suitable from a wide range of opinions according to the conditions and commercial conventions of each state observing the rules of Islamic Jurisprudence.

## 3. Recommendations Relating to the Saudi Arbitration Law 1983 and its Implementation Rules 1985

It is probably inevitable that any law which is man made must be incomplete and has to be developed and ratified so as to come into line with modern changes. In this respect, A. Samuel claims:

> 'No statute can prescribe the answer for every eventuality' and 'It is surprisingly difficult to draft an arbitration statute which covers all available options in a clear way.'[1]

It can be seen, through the discussions and analysis of this thesis, that there are recommendations relating to the Saudi Arbitration Law 1983 and its Implementation Rules 1985 which might practically fill some of the gaps referred to above. They are as follows:

a. Emphasis should be placed on the important constitutional area, i.e. the Implementation Rules, so as to enforce the contents of the Arbitration Law. However, they should not include new rules as is the case with the Third Article of the Implementation Rules.

b. Some articles of the Saudi Arbitration Law1983 and the Implementation Rules1985 are of an organizational but not a legislative nature. It would have been more suitable if they had been issued by an independent decision from the

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[1] Adam Samuel, Arbitration Statutes in England and USA, The Arbitration and Dispute Resolution Law Journal, London, March 1999, Part 1, PP. 4 – 32.

Council of Ministers. For example, Article (8) of Implementation Rules states the following:

> 'In disputes where a government authority is a party with others, such government authority shall prepare a memorandum with respect to arbitration in such disputes, stating its subject matter, the reasons for arbitration and the names of the parties. Such a memorandum shall be submitted to the President of the Council of Ministers for approval of arbitration. The Prime Minister may, by prior resolution, authorize a government authority to settle the disputes arising from a particular contract, through arbitration. In all cases, the Council of Ministers shall be notified of the arbitration awards adopted.'

c. Article (4) of the Saudi Law states that the arbitrator should be experienced and have full arbitration capacity. It would be more suitable if this article had placed emphasis on the neutrality of the arbitrator from the beginning to the end of the arbitration process.

d. Saudi Arbitration Law and its Implementation Rules do not clarify their attitude concerning Saudi nationals submitting their cases to foreign arbitration bodies, such as the LCIA or the ICC. Since there are obstacles at the implementation stage, it is recommended that a Saudi Legislator should state his attitude in respect of modern commercial arbitration.

e. Article (7) stipulates that if the litigants agree about arbitration prior to dispute and if a formal declaration, accepting the arbitration documents relevant to a particular dispute has been made, the subject matter of the dispute shall not be considered except in accordance with the provisions of these regulations. It would be beneficial to add the expression «Unless the litigants agree otherwise» because it is only through the agreement of the parties that arbitration can take place.

f. There are many opinions within Saudi Jurisprudence about the nature of judicial control over arbitral awards. This nature can be procedural or the

subject of the case (i.e. reasons why the arbitral award was made). However, it would appear to be that the spirit of Saudi Law considers this control to be a procedural one, the proof of this lies in the link between Articles (9) and (20) of the law. However, it is recommended that this should be clearly stated in the statute.

g. In practice, failure to mention specific reasons for challenging arbitral awards results in leaving the door wide open to the challenge of awards. For this reason, it is recommended that the permitted specific reasons for challenges be set down. As discussed in this thesis, reasons are clarified in modern arbitration laws and some are already clarified within Islamic Jurisprudence.

h. Among the wide gaps found in the practical reality of Saudi arbitration procedures, especially those held by the Commercial Departments of the Board of Grievances, is the possibility of challenging the arbitral award before those Departments. If one of these departments performs its task and issues the award it may be challenged by a third authority, that is the Investigation Department of the Board of Grievances. An award issued by the latter is considered final. Consequently, arbitration passes through three stages. The first is the Arbitration Board; the second is the Commercial Department; the third is the Investigation Department. However, if the case is submitted to a judicial authority before the Board of Grievances, it goes through two stages only. This is a practical reality because Saudi Arbitration law and its Implementation Rules aim at speed and confidentiality. This practical reality comes as a result of many matters, including the following:

(i) Absence of a clear text in the law specifying a special degree of arbitral award challenge.

(ii) Confusion that arises from the practical reality of the Board of Grievances between awards issued from commercial departments in arbitral cases whether or not an award is issued.

Thus, it is necessary to fill in these gaps quickly and stipulate a special degree of award challenge in the statutes.

i. Article (9) gives the authority to those holding the original jurisdiction and therefore they have right to decide whether to treat the case or report it at a later date.

j. In fact, a specific period should be clearly specified for such authority to show its willingness to deal with the subject matter.

k. Article (10) of Saudi Arbitration Law is not contrary to the Rules of Islamic Jurisprudence as shown by discussion in this thesis.

l. Discussion has also shown that women may act as arbitrators within Islamic Jurisprudence if they have knowledge of the rules of Islamic law and the subject matter of the arbitration. The Saudi Statute does not clarify this point more elaborately, but there appears to be some opinions that put women's capacity as arbitrators into doubt. Thus, it is recommended that Saudi Law clearly shows its attitude on this matter in accordance with the rules of Islamic Jurisprudence.

m. Article (3) of the Implementation Rules needs reconsideration since it generalises the status of non-Muslim arbitrators, giving rise to many questions. For example, if the subject of arbitration is accurate and there is no specialized Muslim arbitrator to deal with the subject, what is the attitude of the article towards this problem, also what is the attitude if the arbitration subject is international and commercial? It can be seen that this article needs clarification by Saudi legislators.

n. Article (20) of the Implementation Rules overtly stipulates that cases should be treated in front of the Board of Arbitration overtly. This required ratification because of the confidential nature of arbitration and the competitiveness of commercial life. It also appears to give greater validity to the Arbitration Board than the litigants themselves. For this reason it is recommended that this article be amended in accordance with the objectives of arbitration.

o. Article (13) states that if no agreement is achieved on arbitrators' fees and a dispute arises as a result, the authority having original jurisdiction should settle the problem. Article (46) of the Implementation Rules states, concerning arbitrators' fees, that parties are allowed to complain about the assessment of arbitrators' fees for eight days from the starting date of announcing the award by the authority of original jurisdiction. It is recommended that this be amended in the two articles in such a way as to ensure that their awards adequately meet.

p. Neither Saudi Arbitration Law nor its Implementation Rules include a list of arbitrators' fees. At the same time, fees should not be excessive in relation to the demands of the case. For this reason, it would be more desirable to list arbitration fees in the Implementation Rules.

q. Article (42) of the Implementation Rules gives the Board of Arbitration the validity to correct its written mistakes. It would be desirable if this authority was given a specific time in which to perform this task. This would accord with the policy of the Kingdom of attracting investments and development.

r. It would also be suitable to reconsider the Saudi Arbitration Law and benefit from modern statutes in the field of arbitration, such as the British Arbitration Act 1996, since it includes many subjects and details relating to arbitration.

Finally, it is to be hoped that this thesis and the recommendations it has suggested have been successful in presenting a positive step towards international cooperation and approximation through clarification of the rules of Islamic Commercial Arbitration and has brought forward the possibility of adopting them internationally. It is also to be hoped that points of similarity and difference between local and international arbitration laws have been made clear. Moreover, recommendations to amend the Saudi Arbitration Law 1983 and its Implementation Rules 1985 are proposed as positive steps to serve Saudi arbitrations and to bring them into line with international commercial arbitration. The modern world could then advance positively in the direction of approximation and shared co-operation for the benefit and general welfare of humanity.

# APPENDICES

APPENDIX (1) Saudi Arbitration Law 1983

APPENDIX (2) The Implementation Rules 1985 of The Saudi Arbitration Law 1983

APPENDIX (3) The GCC of Commercial Arbitration Center Law 1993

APPENDIX (4 ) Arbitral Rules of Procedure , adopted by Commercial Co-operation Committee (Ministers of Commerce in the GCC States) in Riyadh, Saudi Arabia , November 1994

APPENDIX (5) Judgement Implementation Agreement: The Council of the Arabian Countries League approved it on 14/9/1957 in the session of its sixteenth general meeting

APPENDIX (6) Amman Arabian Agreement For Commercial Arbitration 1987

APPENDIX (7) The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10,1958)

APPENDIX (8) United Nation Commisson on International Trade Model Law (As adopted by the United Nations Commission on International Trade Law on 21 June 1985)

APPENDIX (9) United Nation Commission on International Trade Law Arbitration Rules Resolution 31/98 adopted by General Assembly on 15 December 1976

# APPENDIX (1)

## Kingdom of Saudi Arabia

## Saudi Arbitration Law 1983*

Royal Decree : M 46
Date : 12-7-1403
(April 25th 1983)

**We Fahad Bin Abdul Aziz Al Saud, King of the Kingdom of Saudi Arabia.**

After having reviewed Article (19) and Article (20) of the Council of Ministers Resolution issued by Royal Decree No. 38 dated 22-10-1377H.

And, after having reviewed the Commercial Court Regulations, issued by Royal Decree No. 32 dated 15-1-1350H and the Council of Ministers Resolution No. 164 dated 21-6-1403 H.

**Hereby issue the following Decree:**

**First:** Approval of Arbitration Regulations in the form hereto attached.

**Second:** Deletion of the provisions relating to Arbitration contained in the Commercial Court Regulations, issued by Royal Decree No. 32, dated 15-1-1350H.

**Third:** His Royal Highness the Vice-President of the Council of Ministers, and the Ministers, each within his jurisdiction, shall cause this Decree to be implemented.

**(Sgd.) Fahad Bin Abdul Aziz**

* Information provided by: Saudi Chamber of Commerce and Industry, Eastern Province, Legal Department, published in official; Gazette (Umm Al Kurraa), Issue No. 2969 dated 22.08.1404H (03.06.1983 A.D.)

**RESOLUTION NO. 164**

**The Council of Ministers,**

After having reviewed the attached documents which were originally attached to the letter by the Presidency of the Council of Ministers, No. 7/Y/12084 dated 29-5-1399H, addressed to His Majesty the King with the letter of His Excellency the Minister of Commerce No. 410/F dated 11-5-1399, including the draft of Arbitration Regulations which has been prepared by their honors, the Minister of Justice, the Minister of Commerce, the President of the Grievances Board and the President of the Board of Experts;

And after having reviewed the Commercial Court Regulations which was issued by Royal Decree No. 32 dated 15-1-1350H.

The Labor Law issued by Royal Decree No. M/21 dated 6-9-1389H, the Council of Ministers Resolution No. 58 dated 17-1-1383 and the Memorandum of the Board of Experts No. 40 dated 25-4-1403.

**Resolves as follows:**

1. Approval of Arbitration Regulations in the form hereto attached.

2. Deletion of the provisions relating to Arbitration contained in the Commercial Court Regulations issued by Royal Decree No. 32 dated 15-1-1350H.

3. Preparation of a draft Royal Decree in the form hereto attached.

**Signedby**
**Vice-Presidentof**
**the Council of Ministers**

## ARBITRATION RULES

**Article (1)**

An agreement may be made to refer any existing dispute to arbitration. It may also be agreed, in advance, to refer to arbitration any dispute which may arise as a results of performance of any particular contract.

**Article (2)**

Arbitration shall not be accepted in matters in respect of which settlement is prohibited. An agreement, with respect to arbitration, shall not be valid unless it is made by the person enjoying legal capacity.

**Article (3)**

Government agencies may not have recourse to arbitration for settlement of their disputes with third parties except with the approval of the President of the Council of Ministers. This provision may be amended by a resolution of the Council of Ministers.

**Article (4)**

The arbitrator must be selected from amongst experts and must be of good conduct and of full legal capacity. If more than one arbitrator is appointed their number must be odd.

**Article (5)**

Parties to a disputed shall lodge the arbitration document with the Authority having original jurisdiction to consider the dispute. This document shall have been signed by the litigants or their duly authorized representatives and by the arbitrators and must show the subject matter of the dispute, name of litigants, names of arbitrators and their approval to consider the dispute. Copies of relevant documents must also be attached.

**Article (6)**

The Authority having original jurisdiction to consider the dispute shall cause the application for arbitration to be entered into the proper register and make a formal declaration accepting the arbitration document.

**Article (7)**

If the litigants have agreed to arbitration prior to the dispute and if a formal declaration, accepting the arbitration documents relevant to a particular dispute, has been made, the subject matter of such dispute shall not be considered except in accordance with the provisions of these Regulations.

**Article (8)**

The Clerk of the Authority, having original jurisdiction to consider the dispute shall issue all summons and notices herein provided for.

**Article (9)**

The dispute shall be decided within the period to be fixed by the Arbitration Board unless otherwise extended. If the litigants have not fixed a date for decision of the disputes in the Arbitration Document, the Arbitrators shall pass their award within ninety days from the date of approval of the Arbitration Document. Otherwise, any of the litigants may bring the matter to the attention of the Authority having original jurisdiction to consider the dispute to decide whether to consider the dispute or to extend the period.

**Article (10)**

If the litigants fail to appoint the arbitrators or if any of them fail to appoint its arbitrator or arbitrators, or if any one or more of the arbitrators has refused or is stopped from acting as an arbitrator or has become disabled or has been dismissed, and if the litigants have not agreed otherwise, the Authority having original jurisdiction to consider the dispute shall appoint the necessary arbitrators upon request by the expediting litigant provided that it be in the presence of the other party or, if he is absent after he has been invited to attend a meeting to be held for this purpose. The number of arbitrators to be appointed shall be equal to the number agreed upon by the litigants or complementary thereto and the decision in this respect shall be final.

**Article (11)**

The arbitrator shall not be dismissed except with the consent of litigants. An arbitrator who has been dismissed my claim compensation for any work done by him prior to his dismissal, provided that the cause for dismissal was not attributed to him. He may not be prevented from giving his award except for events which happen or appear after the submission of the Arbitration Document.

**Article (12)**

The arbitrator shall be stopped for the same reasons of estoppel of the Magistrate. The application for estoppel shall be addressed to the Authority having original jurisdiction to consider the dispute within five days from the date of notifying the other party of the appointment of the arbitrator or from the date of the event or the occurrence which justifyies the estoppel. A request for estoppel shall be decided upon after the litigants and the arbitrator to the estopped have been called to a meeting to be held for this purpose.

**Article (13)**

The arbitration shall not be terminated by death of one of the parties but the period fixed for the award shall be extended by 30 days unless the arbitrators decide to extend this period further.

**Article (14)**

If an arbitrator has been appointed in place of the arbitrator who has been dismissed or who has declined to act as an arbitrator, the date originally fixed for the award shall be extended for a period of thirty days.

**Article (15)**

The arbitrators may by a resolution adopted by majority vote extend the date originally fixed for the award for circumstances relevant to the matter in dispute.

**Article (16)**

The award of the arbitrators shall be passed by majority vote, but if it is within their authority to reach settlement, the award shall be passed by unanimous vote.

**Article (17)**

The award shall, in particular; include the Arbitration document, a summary of the examination of the parties, the evidence submitted by each of them, reasons for the award, the date on which the award is passed, the signatures of arbitrators and the dissent of any one or more of the arbitrators.

**Article (18)**

All directives to be issued by arbitrators, even if relative to investigation procedures, shall be submitted within five days to the Authority having original jurisdiction to consider the dispute with a copy thereof to the conflicting parties. The conflicting parties may, within fifteen days from the date of their notification of the award, submit their objection to such award to the Authority with which the award has been filed. Otherwise, the award shall be deemed final.

**Article (19)**

If the litigants or any of them submits an objection to the award within the period provided for in Article 18 above, the Authority having original jurisdiction to consider the dispute shall either reject such objection and issue an order for execution of the award, or accept the objection and take the action it deems appropriate.

**Article (20)**

The award of the arbitrators shall be executed when it has become final pursuant to an order by the Authority having original jurisdiction to consider the dispute. This order shall be passed upon request by an interested party after ensuring that it is not contrary to Shariatic principles.

**Article (21)**

When the order for execution of the award has been passed pursuant to the provisions of Article 20 above, such award shall have the same force and effect as if it has been passed by the Authority which passed the order for execution.

**Article (22)**

Fees of the Arbitrators shall be fixed by mutual consent of the conflicting parties and, unless paid to them, shall be deposited within five days from the date of the decision approving the Arbitration Document with the Authority having original jurisdiction to consider the dispute and shall be paid within one week from the date of the execution order.

**Article (23)**

If the arbitrators fees have not been agreed upon and a dispute arises with respect thereto, such dispute shall be decided by the Authority having original jurisdiction to consider the dispute and its decision shall be final.

**Article (24)**

Decisions necessary for the implementation of these Regulations shall be issued by the President of the Council of Ministers upon a recommendation by the Minister of Justice in consultation with the Minister of Commerce and the President of the Board of Grievances.

**Article (25):**

These Regulations shall be published in the Official Gazette and be implemented thirty days after the date of publication thereof.

# APPENDIX (2)

# THE IMPLEMENTATION RULES (1985) OF THE SAUDI ARBITRATION LAW (1983)*

## CHAPTER ONE

## ARBITRATION, ARBITRATORS AND PARTIES

**Article (1)**

Arbitration in matters wherein conciliation is not permitted such as Hudoud (1) Laan (2) between spouses, and all matters relating to the public order, shall not be accepted.

* Information provided by: Saudi Chamber of Commerce and Industry, Eastern Province, Legal Department. Published in Official Gazette (Umm Al Kurraa) Issue No. 2969 dated 22.8.1404H.(3.6.1983 A.D.)

**Article (2)**

An agreement to arbitrate shall only be valid if entered into by persons of full legal capacity. A Guardian of minors, appointed guardian or endowment administrator may not resort to arbitration unless being authorized to do so by the competent court.

**Article (3)**

The arbitrator shall be a Saudi National or Muslim expatriate from the private Sector or others. The Arbitrator may also be an employee of the State, provided, approval of the department to which he belongs is obtained. In the case of more than one arbitrator, the Chairman of the arbitration panel shall have knowledge of Shariah rules, commercial regulations, customs and traditions applicable in Saudi Arabia.

**Article (4)**

Any persons having an interest in the dispute or having being sentenced to a (HUD)(3) or penalty for a crime of dishonour, or being from a public position following a disciplinary order, being adjudicated as bankrupt, unless being relieved, shall not act as arbitrator.

**Translator's Notes:**

(1) Hudoud are the crimes of - murder, injury, adultery, drunkenness, theft and robbery which are specifically provided for in the Muslim Holy Book, the Quran.

(2) Laan is a court procedure under which a confrontation between spouses takes place and through which they terminate their marital relationship after either spouse directs an accusation of adultery against the other.

(3) Hud is the singular of Hudoud (1) above.

**Article (5)**

Subject to the provisions of Articles (2) and (3) above, a list containing the names of arbitrators shall be prepared by agreement between the Minister of Justice, the Minister of Commerce, and the Chairman of the Grievance Board. The Courts, Judicial Committees and Chambers of Commerce and Industry shall be informed of such lists and the respective industry shall be informed of such lists and the respective parties may select arbitrators from these lists or from others.

**Article (6)**

The appointment of an arbitrator or arbitrators shall be completed by agreement between the disputing parties in an arbitration instrument which shall sufficiently outline the dispute and the names of the arbitrators. Agreement to arbitration may be concluded by a condition in a contract in respect of disputes that may arise from the execution of such a contract.

**Article (7)**

The authority originally competent to hear the dispute shall issue a decision for approval of the arbitration instrument within fifteen days and shall notify the arbitration panel of the same.

**Article (8)**

In disputes where a government authority is a party with others, such government authority shall prepare a memorandum with respect to arbitration in such a dispute, stating its subject matter, the reasons for arbitration and the names of the parties, the reasons for arbitration and the names of the parties. Such memorandum shall be submitted to the President of the Council of Ministers for approval of arbitration. The Prime Minister may, by prior resolution, authorize a government authority to settle the dispute arising from a particular contract, through arbitration. In all cases the Council of Ministers shall be notified of the arbitration awards adopted.

**Article (9)**

The clerk of the authority originally competent to hear the dispute shall act as secretary for the arbitration panel, establish the necessary records for registration of the arbitration application and shall submit the same to the concerned authority for approval of the arbitration instrument. Such a clerk shall also be in charge of the summons and notices provided for in the arbitration regulations and any other assignments as may be decided by the relevant Minister. The concerned authorities shall make the necessary arrangements regarding the above.

**Article (10)**

The arbitration panel shall fix the date of the hearing for consideration of the dispute within a period not exceeding five days from the date on which approval of the arbitration instrument had been notified to the arbitration panel and shall notify the disputing parties of the same through the clerk of the authority originally competent to hear the dispute.

## CHAPTER TWO

## NOTIFICATION OF PARTIES, APPEARANCES, DEFAULT AND PROXIES IN ARBITRATION

**Article (11)**

Every summons or notice relating to the subject matter of arbitrations made through the clerk of the authority originally competent to hear the dispute, shall be made through the messenger or the official authorities, whether the said proceeding is requested by the disputing parties or initiated by the arbitrators. Police or Mayors are required to assist the relevant authority in performing its duties within their prescribed jurisdiction.

**Article (12)**

The summons or notice shall be written in the Arabic language and shall consist of two or more copies, according to the number of disputing parties and shall contain the following:

a. The date, day, month and year in which the summons of notice was made.

b. The first name, surname, title, profession and domicile of the party requesting the summons or notice, and the first name, surname,

title, profession and domicile of his representative, if he is working for another person.

c. The name of the messenger who forwarded the summons of notice, his employer and his signature on the original and copy of the summons of notice.

d. The first name, surname, profession and domicile of the person to be summoned or notified, and if his domicile is not known at the time of issuance of the summons, then his latest, domicile.

e. Title of the person to whom copy of the summons has been served, and his signature on the original indicating receipt, or indication of his refusal to take receipt of the summons when returned to the concerned authority.

f. Name and place of the arbitration panel, the subject matter of procedure and the date specified therefore.

**Article (13)**

The papers to be served on summons shall be delivered to the respective person, or to his place of domicile, and my be delivered to a chosen place of domicile determined by the concerned parties.

In cases where such a person is not present at their place of domicile, the summons' papers shall be delivered to any person who declares that he is an agent or responsible for the business of the person to be summoned, or his employee or that he or she is living with him, such as spouses, relatives or others.

**Article (14)**

If the messenger did not find the proper person to whom the papers are to be delivered pursuant to the preceding section, or it the person mentioned therein refrained from accepting the papers, the messenger shall state that in the original copy and deliver the same that day to the Police Commissioner or Mayor or the representative of any of them, if the residence of the person summoned falls within their authority. Also, the messenger shall within twenty four (24) hours send the person summoned at his original or chosen domicile a registered letter, informing him that the copy was delivered to the administration and stating all such details in the original copy of the summons. The summons or notice shall be valid and effective from the time of delivery thereof as aforementioned.

**Article (15)**

Except as provided for in special regulations, the copy of the summons or notice shall be delivered in the following manner:

a. In matters relating to the state, it shall be delivered to the Ministers, District Governors, Directors of Government Departments or their representatives.

b. In matters relating to public persons, it shall be delivered to the person acting on his behalf according to the law, or to his representative.

c. In matters relating to companies, societies and private establishments, it shall be delivered to the head offices, as indicated in the commercial registration, to the Chairman, Managing Director or his representative, from among the employees. With respect to foreign companies having branches or agents in Saudi Arabia, the papers shall be delivered to the branch or the agent.

**Article (16)**

The official in charge shall submit the arbitration file to the authority originally competent to hear the dispute, for approval of the arbitration instrument. The clerk of such authority shall notify the parties and the arbitrators of the decision taken with respect to approval of the arbitration instrument within one week from the date of adoption of such decision.

**Article(17)**

On the day fixed for arbitration the parties shall appear by themselves or through their representatives, by virtue of a notarized power of attorney, or by proxy issued by any official authority or certified by one of the Chambers of Commerce and Industry. A copy of the power of attorney shall be kept in the file of the claim after the original has been reviewed by the arbitrator, without prejudice to the rights of the arbitrator or arbitrators to require the personal appearance of the respective party if the circumstances so require.

**Article (18)**

In the event of default by one of the parties in appearing at the first hearing, and if the arbitration panel is satisfied that such defaulting party had been properly served notice, the arbitration panel my decide on the dispute as long as the respective parties have filed their statements of claim, defenses and documentation. The award adopted shall, in such cases, be considered a decision made in the presence of the parties.

However, if the defaulting party was not property served a summons, the hearing shall be adjourned to another hearing so that the defaulting party can be properly notified. If the defendant parties are many and are only partially served a personal summons, and if they have all, or those who are not served notice, defaulted to appear, the arbitration panel in other than urgent matters shall adjourn the hearing so that the defaulting parties are properly served notice, and the award adopted in such other

hearings shall be deemed as if made in the presence of all defaulting parties.

Also, the award of arbitration shall constructively be deemed made in the presence of the party who appears personally or by proxy in any of the hearings, or filed his statement of defense in the claim or a document relating thereto. However, if the defaulting party appeared prior to the end of the hearing, any award or decision adopted therein shall be deemed null and void.

**Article (19)**

If the arbitration panel discovers that a summons published to a defaulting party in a newspaper is not proper, it shall adjourn arbitration of the dispute to another hearing and such defaulting party shall be properly served a summons in respect thereto.

## CHAPTER THREE

## HEARINGS, TRIAL, AND RECORDING OF CLAIM

**Article (20)**

The claim shall be tried openly unless the arbitration panel decides, by its own motion, or if one of the parties requests that the hearing be held in camera for reasons appreciated by the arbitration panel.

**Article (21)**

The arbitration of the claim shall not, without an acceptable reason, be adjourned more than once for a reason attributed to one of the parties.

**Article (22)**

The arbitration panel shall reasonably allow each party to make his remarks and defense either orally or in writing in the time specified by the arbitration panel. The defendant party shall be the last to make his submission and the panel shall complete the case and prepare the award.

**Article (23)**

The Chairman of the arbitration panel shall control and mange the hearings, direct questions to the parties or witnesses, and shall have the right to dismiss from the hearing any one in contempt of the hearing. However, if any one present commits a violation, the Chairman of the arbitration panel shall record the incident and transfer it to the concerned authority. Each arbitrator shall have the right to direct questions and examine the parties or witnesses through the Chairman of the arbitration panel.

**Article (24)**

The parties may request the arbitration panel at any stage of the claim to record their agreement in the minutes of the hearing as related to admission, conciliation, waiver or otherwise, and the arbitration panel shall make an award of the same.

**Article (25)**

The Arabic language shall be the official language to be used before the arbitration panel, whether in discussion or in writing. The arbitration panel and the parties may not speak other than the Arabic Language and any party who does not speak Arabic shall be accompanied by an accredited translator who shall sign with him the minutes of the hearing, approving the statements made.

**Article (26)**

Any party may request adjournment of the proceeding for a reasonable period, that period to be decided by the arbitration panel, so that such a party can submit any documents, papers, or remarks which may be productive or have a material effect on the case. The arbitration panel may allow further adjournments if there is justification therefore.

**Article (27)**

The arbitration panel shall record the facts and proceedings which take place at the hearing in minutes written by the secretary of the arbitration panel under its supervision. The minutes shall contain the date and place of the hearing, names of arbitrators, the secretary and the parties. It shall also contain statements of the respective parties, the minutes shall be signed by the Chairman of the arbitration panel, arbitrators and the secretary.

**Article (28)**

The arbitration panel may, by its own motion, or pursuant to a request from one of the parties, require the other party to produce any document which he may possess and which may have material effect on the proceedings, in the following cases:

a. If such document is a joint document between the parties. Such document will be deemed joint if in particular, it is in favor of both parties or if it proves their mutual rights and obligations.

b. If one of the parties invoked such document in any phase of the claim.

c. If the Regulations permit demand for delivery or release of such a document.

**The application must state the following:**

1. Description of the document requested.

2. Contents of the document, with as much detail as possible.

3. The fact under issue for which such document is called.

4. The evidence and circumstances proving that the document is in the possession of the other party.

5. The reason for obligating the other party to present the said document.

**Article (29)**

The arbitration panel may designate the effective means of inquiry in the claim whenever the facts to be proven proximate to the dispute and are admissible.

**Article (30)**

The arbitration panel may disregard the evidentiary procedure it has ordered, provided that reasons for such disregard shall be stated in the minutes of the hearing. The arbitration panel may not consider the result of such procedures and shall state its reasons in the award.

**Article (31)**

They party requesting testimony of witnesses shall specify the facts to be proved in the testimony either orally or in writing, and shall accompany his witness to the specified hearing. Admission of witnesses and hearing of their statements shall be conducted before the arbitration panel pursuant to Shariah rules, the other party may refute such testimony in the same manner.

**Article (32)**

The arbitration panel may cross-examine the parties at the request of either party or on its own motion.

**Article (33)**

The arbitration panel may, if necessary, seek the assistance of one or more experts to provide a technical report regarding technical or material matter which may have effect on the claim. The arbitration panel shall mention in its award an accurate statement of the expert's mission and the urgent arrangements which he is permitted to take. The arbitration panel shall estimate the fees of the said expert, the party who shall pay them and the deposit which is not made by the party required to do so or by the other parties to the arbitration, the expect will not be bound to perform his duty, and the right to adhere to the decision made for the appointment of the expert shall be void, if the arbitration panel finds that the reasons given are unacceptable. In performing his duty, the expert may hear the statements of both parties and others and shall submit a report of his opinion on the specified date. The arbitration panel may

cross-examine the expert at the hearing concerning the results of his report. If there is more than one expert, the panel shall specify the manner of their performance whether severally or collectively.

**Article (34)**

The arbitration panel may request the expert to provide a complementary report to overcome any default or omissions in his previous report and the parties may submit advisory reports to the panel. However, in all cases the arbitration panel shall not be bound by the expert's opinions.

**Article (35)**

The arbitration panel may, on its own motion or at the request of either party, decide to move for inspection of some facts or matters which were disputed and have material effect on the claim and shall make a report of the inspection proceedings.

**Article (36)**

The arbitration panel shall observe the principles of litigation, so as to include confrontation in proceedings, and to permit either party to take cognizance of the claim proceedings, to have access to its material papers and documents in reasonable periods of time, and to give him a sufficient opportunity to present his documentation, defense and arguments at the hearing, either orally or in writing, and to record them in the minutes.

**Article (37)**

If a preliminary issue of a matter falling outside the jurisdiction of the arbitration panel arises during the process of arbitration, or if a document has been claimed to have been forged or if criminal proceedings have been instituted for the forgery or for any other criminal act, the arbitration panel shall suspend proceedings and the date fixed for the award until a final decision is issued from the concerned authority in relation to that matter which had arisen.

## CHAPTER FOUR

## AWARDS, OBJECTIONS AND EXECUTION

**Article (38)**

When the arbitration panel is ready to render a decision the panel shall close the case for review and deliberations. Deliberations shall be held in

camera and shall only be attended collectively by the arbitration panel which attended the hearings. The panel shall fix, at the time the case is closed or at another hearing, a date for issuance of the award subject to the provisions of Articles (9), (13), (14), and (15) of the arbitration regulations.

**Article (39)**

The arbitrators shall issue their awards without being bound by legal procedures except as provided for in the arbitration regulations and its rules of implementation. Awards shall follow the provisions of Islamic Shariah and the applicable regulations.

**Article (40):**

When the case is closed for review and deliberation, the arbitration panel may not hear further submissions from either of the parties or their representative except in the presence of the other party, and shall not accept any memoranda or document without the document being reviewed by the other party; if such explanation, memoranda or document is deemed material, the panel may extend the date fixed for the award and reopen the proceedings by virtue of a decision stating the reasons and justifications therefore, and shall notify the parties of the date fixed for continuation of the proceedings.

**Article (41)**

Subject to Articles 16 and 17 of the arbitration regulations, awards shall be adopted by the opinion of the majority of the arbitrators. The award shall be pronounced by the Chairman of the arbitration panel at the specified hearing. The award shall contain the names of the members of the respective panel, the date, place, and subject matter of the award, first names, surnames, description, domicile, appearances and absences of the parties, a summary of the facts of the claim, requests of the parties, summary of their defense, substantial defense, and the reasons and text of the award. The arbitrators and the clerk shall, within seven days from the filing of the draft, sign the original copy of the award which comprises the above contents and which shall be kept in the file of the claim.

**Article (42)**

Without prejudice to provisions of Articles 18 and 19 of the arbitration regulations, the arbitration panel shall certify any material typing or arithmetical errors that may occur in its awards, by virtue of a decision to be issued on its own motion, or at the request of either party without pleading procedures. Such ratification shall be made on the original copy of the award and duly signed by the arbitrators. The decision for

rectification of the award may be objected to by all possible means of objection if the arbitration panel exceeded its rights of rectification as provided for in this section. The decision issued against a request for rectification may not be objected to independently.

**Article (43)**

The parties my request the arbitration panel which has issued the award to interpret any ambiguity in the text of the award. The interpretation shall be deemed complementary in all respects to the original award and shall be subject as well as the rules relating to means of objection.

**Article (44)**

Whenever an order is issued for execution of the arbitration award, the latter becomes an executionary instrument and the clerk of the authority originally competent to try the case shall give the winning party the execution a copy of the arbitration award, containing the order for execution and ending with the following phrase:

"All concerned government authorities and departments shall cause this award to be executed by all legally applicable means if such execution requires application by force by the police."

**FEES OF ARBITRATORS**

**Article (45)**

If both opponents fail to agree on the fees, a decision may be issued for division of fees between them at the discretion of the authority originally competent to try the case; a decision also may be issued for payment of all such fees by one of the parties in dispute.

**Article (46)**

Any party may object to the estimate of the arbitrators' fees to the authority which issued the decision, the objection to be made within eight days from notification of the fees; the authority's decision on the said objection shall be final.

**Article (47)**

The concerned authorities shall execute these rules.

**Article (48)**

*These rules shall be published in the Official Gazette and shall be effective from their date of publication.

**The rules were published in the Official Gazette on 10-10-1405 corresponding to 28th June 1985.*

# APPENDIX (3)

## The GCC of Commercial Arbitration Center Law

Adopted by the GCC Supreme Council

(Leaders of the GCC States)

During the 14th Summit in December 1993 in Riyadh, Saudi Arabia.

In December 1993, during the 14th GCC Summit in Riyadh, Saudi Arabia, the Leaders of the GCC States laid down the first fundamental brick of the GCC Commercial Arbitration Centre by being gracious enough to adopt the Charter of the Centre.

The Charter of the Centre came into effect three months after being adopted by the Supreme Council of the Co-operation Council of the Arab States of the Gulf (the Summit).

Based on the basic principles of the Charter, the "Arbitral Rules of Procedure" for the Centre were prepared by legal experts from the GCC States.

The said rules came into effect immediately after being ratified by the GCC Commercial Co-operation Committee (Ministers of Commerce in the GCC States) in November 1994.

In March 1995 it was officially announced that the Centre had become fully functional and ready to fulfill its duties.

## Chapter One

## ESTABLISHMENT OF THE CENTRE, ITS POWERS AND HEADQUARTERS

### Article 1

A commercial arbitration centre shall be established under the name of the "Commercial Arbitration Centre for the States of the Co-operation Council of the Arab States of the Gulf" (the Centre) shall be independent and shall be a separate juristic entity.

### Article 2

**Powers:**

The Centre shall have the power to examine commercial disputes between GCC nationals, or between them and others, whether they are natural or juristic persons, and commercial disputes arising from implementing the provisions of the GCC Unified Economic Agreement and the Resolutions issued for implementation thereof if the two parties agree in a written contract or in a subsequent agreement on arbitration within the framework of this Centre.

### Article 3

**Centre's Headquarters:**

The Centre's headquarters shall be situated in the State of Bahrain.

## Chapter Two

## CENTRE'S BODIES

### Article 4

**The Centre shall consist of the following:**

1. Board of Directors.
2. Secretary General.
3. Arbitral Tribunal.
4. Arbitral Tribunal Secretariat.

### Board of Directors

### Article 5

The Centre shall have a Board of Directors which shall consist of six members. The Chamber of Commerce and Industry in each of the GCC States shall nominate one member. The Board shall convene a meeting at least once every six months or whenever such a meeting is deemed necessary. Chairmanship of the Board of Directors shall be in rotation in keeping with the practice followed at the GCC meetings. The Board of Directors shall appoint from its members a Deputy Chairman.

### Article 6

Membership of the Board of Directors shall be for a three-year term of office which is renewable once only. Meetings of the Board of Directors shall be held in the host country or in any of the GCC member states, if necessary, upon the summons of the Chairman or Deputy Chairman in the case of the absence of the former. A Board meeting shall not be validly convened except in the presence of at least four of its Members including the Chairman or his Deputy. Resolutions of the Board of Directors shall be adopted by majority vote of the Members present. In case of an equality of votes, the Chairman shall have the deciding vote.

### Article 7

### Powers of the Centre's Board of Directors:

The Board of Directors shall seek to realize the Centre's objectives and carry out its duties. In particular, the Board shall do the following:

1. Approve the Centre's financial and administrative regulations.

2. Appoint the Centre's Secretary General.
3. Approve the Centre's annual budget.
4. Approve the annual report on the Centre's activities.

**Article 8**

**Centre's Secretary General:**

The Centre shall have a Secretary General who shall be a GCC national and shall be appointed by the Board of Directors. The Board of Directors shall determine his service conditions, duties and entitlements provided that he shall enjoy the required expertise and have specialized knowledge in this field. The Secretary General shall be the Centre's legal representative in all relations before the law courts, public agencies and private entities.

**Article 9**

The Secretary General shall be assisted by a sufficient number of employees who shall be appointed in accordance with the employment provisions stipulated in the organizational rules to be issued by the Board of Directors.

**Article 10**

**Arbitral Tribunal**

An Arbitral Tribunal shall be formed by appointing a single arbitrator or three arbitrators as may be mutually agreed upon by the parties under an Arbitration Agreement or Contract. In case there is no Agreement, the *Rules of Procedure* issued by the Board of Directors shall be applicable.

**Article 11**

The Centre shall maintain a panel of arbitrators to be prepared by Chambers of Commerce and Industry in the GCC member States and the concerned parties may have access to such a panel to select arbitrators therefrom or from elsewhere. An arbitrator shall be a legal practitioner, judge or a person enjoying a wide experience and knowledge of commerce, industry or finance. He must be reputed for his good conduct, high integrity and independent views.

**Article 12**

**Applicable Law:**

The parties shall have the liberty of deciding the law, which the arbitrators shall apply to the issue in dispute. In case the parties do not stipulate the applicable law in the Contract or Arbitration Agreement, the

arbitrators shall apply the law determined by the rules of the conflict of laws which they deem appropriate whether it is the law of the place where the contract was made, the law of the place where it is to be performed, the law of the place where it must be implemented or any other law subject always to complying with the terms of the contract and rules and practices of international law.

**Article 13**

**<u>Centre's Arbitration Rules:</u>**

1. Arbitration shall take place in accordance with the Rules of Procedure (the Rules) of the Arbitration Centre unless there is a contrary provision in the contract.

2. The Rules applicable to arbitration shall be the prevailing rules at the time of the commencement of Arbitration unless the parties agree to the contrary.

3. Save for the arbitrators Panel, the Centre's papers and documents shall be confidential and no one, other than the parties to the arbitration case and the arbitrators, may have access thereto or obtain copies thereof except by the express approval of the parties to the dispute or if the Arbitral Tribunal feels such action necessary for passing a ruling in respect of the dispute.

**Article 14**

The two parties' agreement to refer the dispute to the Centre's Arbitral Tribunal and the ruling of this tribunal in respect of its competence shall preclude the reference of the dispute or any action pursued upon hearing it before any other judicial authority in any state. It shall also preclude any challenge against the arbitration award or any of the actions required for hearing it before any other judicial authority in any state.

**Article 15**

The award passed by the Arbitral Tribunal pursuant to these proceedings shall be binding and final upon the two parties after the issuance of an order for enforcement by the competent judicial authority in the states that are parties to this Charter.

**Article 16**

The Arbitral Tribunal shall refer to the Centre's Secretary General a copy of the award passed and he shall provide the possible assistance in depositing or registering the award whenever necessary in accordance with the law of the country where the award is to be enforced.

**Article 17**

**Arbitral Tribunal Secretariat**

The Arbitral Tribunal Secretariat shall be part of the Centre's General Secretariat and work under the supervision of the Secretary General and shall be administratively affiliated thereto.

**Article 18**

The Secretariat shall have the duty of receiving all the arbitration applications referred thereto by the Secretary General and receiving all papers, correspondence and documents submitted by the parties to the dispute in accordance with the Arbitral Rules of Procedure and provided for in this Charter. It shall be responsible for recording minutes of the Arbitration Tribunal hearings and implementing its resolutions adopted in the course of hearing the case prior to the final judgement thereon.

## Chapter Three

## CENTRE'S BUDGET

**Article 19**

The Centre shall have a temporary budget to be drawn up from the date of its establishment until the beginning of the following first financial year. The Bahrain Chamber of Commerce and Industry shall finance the Centre's budget until the end of the third financial year. The Chambers of Commerce and Industry in the GCC member States shall equally finance the Centre's budgets in the following years.

**Article 20**

The Centre shall have an annual budget the revenues of which shall consist of the following:

1. Fees received by the Centre in consideration of its services and the expenses incurred for this purpose.

2. Grants and donations received by the Centre and accepted by its Board of Directors.

3. Proceeds from the sale of the Centre's publications and periodicals.

4. Payments equally made by the Chambers of Commerce and Industry of States which are members of this Centre.

## Chapter Four

## ADDITIONAL ASSISTANCE PROVIDED BY THE CENTRE

### Article 21

1. In case of authorizing the Centre to select arbitrators in accordance with the Rules of Procedure, the Centre's Secretary General shall undertake such task in accordance with the provisions of the said rules.

2. The Centre shall charge fees to be determined by the Rules of Procedure. In determining the amounts of such fees, the Centre's administrative expenses, volume of work and actual costs incurred shall be taken into account.

### Article 22

If the two parties mutually agree on settling their dispute by arbitration but not through the Centre, the Centre's Secretary General may, upon a written application from the parties, provide or arrange the necessary facilities and assistance for the arbitration proceedings requested by the two parties. The necessary facilities and assistance may include providing an appropriate place for holding the Arbitral Tribunal sittings and assisting with secretarial duties, translations and filing documents and papers.

## Chapter Five

## ARBITRATION COSTS

### Article 23

1. The Centre's Secretary General shall prepare a list containing a provisional estimate of arbitration costs and shall instruct each of the parties to the dispute to equally deposit a certain sum as an advance on account for such costs. He may instruct the parties to make supplementary deposits during the course of the arbitration proceedings.

2. If the required deposits are not made within thirty days from the date of receiving the instruction, the Secretary General shall notify the remaining parties of this failure pursuant to the provisions of the Rules of Procedure.

3. Following the issuance of an award by the Arbitral Tribunal in respect of the dispute, the Secretary General shall deliver to the parties to the dispute a statement of the deposits made and

expenses incurred with a view to making a final settlement by refunding the surplus amount of the deposited sums or collecting the balance remaining for the costs pursuant to the provisions of the Rules of Procedure.

## Chapter Six

## IMMUNITIES AND PRIVILEGES

### Article 24

The Chairman and Board Members, Centre's Secretary General, members of the Arbitral Tribunal and members of the Tribunal Secretariat shall enjoy the following immunities:

1. Immunity against any legal action upon the exercise of their duties unless the Centre decides to relinquish such immunity by a resolution of the Board of Directors.

2. Prescribed immunities and prerogatives for members of the diplomatic corps whilst travelling. Further, they shall be exempted from currency restrictions, if any.

The provisions of Paragraph (2) shall not be applicable to the citizens of the host country.

### Article 25

The Centre and all its properties and funds shall enjoy immunity against any legal or administrative action upon carrying out its duties in accordance with this Charter.

### Article 26

The Centre's papers, documents and archives shall enjoy immunity against any action of any kind whatsoever.

## Chapter Seven

## TAX EXEMPTIONS

### Article 27

The Centre, its properties, funds, resources and financial transactions which take place in accordance with the provisions of this Charter shall be exempt from all kinds of taxes, if any, and custom duties.

Further, the Centre may not be subject to any claims in this respect. Any payment made by the Centre to the Secretary-General shall not be subject to any tax that may be imposed.

Such tax shall not be imposed upon salaries, expenses or any other payments made to the Arbitral Tribunal's Secretariat staff. This exemption shall not be applicable to the citizens of the host country.

The preceding provisions shall be applicable to the arbitrators' fees and expenses upon the performance of their duties in accordance with the provisions of this Charter.

## Chapter Eight

## GENERAL PROVISIONS

### Article 28

The Arbitral Rules of Procedure shall be prepared by legal experts from the member States within three months from the date of approving this Charter. The Rules shall become effective and enforceable upon their ratification by the GCC Commercial Co-operation Committee.

### Article 29

Any GCC member State may seek the amendment of this Charter. An amendment shall be effective three months after its ratification by the Supreme Council.

### Article 30

The Charter shall come into effect three months after the date of its ratification by the Supreme Council of the Co-operation Council of Arab States of the Gulf.

# APPENDIX (4)

# ARBITRAL RULES OF PROCEDURE

Adopted by the GCC Commercial Co-operation Committee

(Ministers of Commerce in the GCC States) in November 1994

in Riyadh, Saudi Arabia

## Preliminary Provisions

### Article (1)

In the application of the provisions of these Rules, the following terms and expressions shall have the meanings assigned to them herein unless the context otherwise requires:

| | |
|---|---|
| Centre: | The Commercial Arbitration Centre for the States of the Cooperation Council for the Arab States of the Gulf. |
| Rules: | Arbitral Rules of Procedure for the Centre. |
| Secretary General: | Centre's Secretary General. |
| Tribunal Rules: | Arbitral Tribunal formed in accordance with the Rules. |
| Arbitration Agreement: | Agreement made by the parties in writing for reference to arbitration whether prior to the dispute (arbitration clause) or thereafter (arbitration stipulation). |
| Panel: | List of the names of arbitrators at the Centre. |

### Article (2)

1. An Arbitration Agreement made in accordance with the provisions of these Rules before the Centre shall preclude reference of the dispute before any other authority and it shall also preclude any challenge to arbitration award passed by the Arbitral Tribunal.

2. In case of reference to arbitration, it is proposed that the following text be included in the Arbitration Agreement:

   All disputes arising from or related to this contract shall be finally settled in accordance with the Charter of the Commercial Arbitration Centre for the States of the Cooperation Council for the Arab States of the Gulf.

### Article (3)

All agreements and stipulations referred to arbitration before the Centre shall be presumed valid unless evidence is provided establishing the invalidity thereof.

**Article (4)**

Arbitration before the Centre shall take place pursuant to these Rules unless there is a provision to the contrary in the Arbitration Agreement. The parties may select further procedural rules for arbitration before the Centre, provided that such rules shall not affect the powers of the Centre or Arbitral Tribunal provided for in these Rules.

**Article (5)**

The Centre's Tribunal shall ensure all rights of defense for all parties to the dispute and shall treat them on an equal basis. The Tribunal shall ensure that each party in the proceedings has the full opportunity to present his case.

**Article (6)**

1. The Arbitral Tribunal shall determine the place of the Arbitration unless agreed upon by the parties.

2. The Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any place it considers appropriate unless otherwise agreed by the parties.

3. The Arbitral Tribunal may hold the deliberations in any place it deems appropriate.

4. In all cases, the award is considered passed in the place determined for arbitration and on the date mentioned therein.

**Article (7)**

In the absence of an agreement by the parties, the Arbitral Tribunal shall determine the language or languages to be used in the proceedings of arbitration taking into account the conditions of arbitration including the language of the contract.

## Arbitral Tribunal

**Article (8)**

The Arbitral Tribunal shall be composed of a single arbitrator or three arbitrators as mutually agreed upon between the parties. In case there is no agreement, the Secretary General shall form the Tribunal with one arbitrator, unless he finds that the nature of the dispute requires it to be formed by three arbitrators.

## Submission of Applications and Reference to Arbitration

**Article (9)**

An applicant for arbitration shall submit a written application to the Secretary General containing the following:

1. His name, surname, capacity, nationality and address.
2. Name of the other party against whom arbitration reference is made, his surname, capacity, nationality and address.
3. Statement of the dispute, its facts, evidence thereof and specified claims.
4. Name of the elected arbitrator, if any.
5. A copy of the Arbitration Agreement and the documents relating to the dispute.

The Secretary General shall ensure that all the necessary documents are available for pursuing the arbitration proceedings. In case the required documents are not complete, the concerned party shall be given notice to produce them.

**Article (10)**

Upon receipt of the arbitration application and payment of fees, the Secretary General shall notify the applicant, acknowledging receipt of his application, and shall notify the other party against whom arbitration reference is made by registered letter, with a copy thereof within seven days from the date of receiving such application.

**Article (11)**

The party against whom reference to arbitration is made shall submit, within twenty days from the date of being notified of the application, a reply memorandum containing his defense pleas, counter claims, if any, and the name of his elected arbitrator supported by the documents available to him. The Secretary General may give him, upon his request, a grace period not exceeding twenty days for this purpose.

**Article (12)**

1. If the Arbitral Tribunal consists of a single arbitrator, the parties shall agree on his appointment within the period fixed in the preceding Article, otherwise the Secretary General shall appoint an

arbitrator from among the Centre's Arbitrators' Panel within two weeks from the expiry of such period. The Secretary General shall notify all parties of such appointment.

2. If the applicant for arbitration fails to nominate the arbitrator he wishes to elect in his application, the Secretary General shall appoint the arbitrator within two weeks from the date of receiving the application.

3. If the party, against whom arbitration is referred, fails to nominate the arbitrator of his election during the period stipulated in the preceding Article, the Secretary General shall appoint an arbitrator within two weeks.

4. The Secretary General shall invite the arbitrators nominated by the two parties to elect a third arbitrator who shall be the chairman of the Tribunal. However, in case of failure to reach agreement within twenty days from the date of the invitation, the Secretary General shall appoint, within two weeks, the third arbitrator.

**Article (13)**

Where there are multiple parties, whether as claimant or as respondent and where the dispute is to be referred to three arbitrators, the multiple claimants jointly, and the multiple respondents jointly shall nominate an arbitrator.

If the parties fail to appoint arbitrators as mentioned hereinabove, the Secretary General shall appoint all the arbitrators including the Chairman of the Tribunal.

**Article (14)**

If either party disputes the validity of appointing one of the arbitrators, the Secretary General shall settle such dispute within two weeks by a final decision provided that this dispute on the validity shall be presented before holding the hearing fixed for considering the dispute.

**Article (15)**

If an arbitrator dies, declines appointment, or force majuere prevents him from carrying out his duties or the continuation thereof, a substitute shall be nominated in his stead in the same manner in which the original arbitrator was appointed.

**Article (16)**

The Secretary General shall refer the dispute file to the Tribunal within seven days from the date of forming it in the above said manner. The Tribunal shall proceed with carrying out its mandate within fifteen days from the date of notification thereof.

## Challenge of Arbitrators

**Article (17)**

Either party may challenge the appointment of an arbitrator for reasons to be set out in his petition. The challenge shall be submitted to the Secretary General.

**Article (18)**

1. In case one of the parties seeks to challenge an arbitrator, the other party may agree to such challenge. Further, the arbitrator sought to be challenged may relinquish the hearing of the dispute and a new arbitrator shall be appointed in the same manner in which the said arbitrator was nominated.

2. If the other party does not agree to the plea for challenging the arbitrator and if the said arbitrator sought to be challenged does not relinquish the hearing of the dispute, the Secretary General shall settle the issue of the challenge within three days from receiving an application in this respect.

3. If the Secretary General decides to challenge the arbitrator, a new arbitrator shall be appointed in accordance with the Rules. The challenged arbitrator as well as the parties shall be notified of such decision.

## Plea for Jurisdiction of the Arbitral Tribunal

**Article (19)**

Unless there is an express agreement to the contrary, an Arbitration Agreement shall be deemed as independent from the contract subject to the dispute. If the contract is invalidated or terminated for any reason, the Arbitration Agreement shall remain valid and effective.

**Article (20)**

The Arbitral Tribunal shall have the power to rule on the issue relating to its non-jurisdiction. This shall include pleas based upon lack of an Arbitration Agreement, nullity of such Agreement, lapse thereof or its non-applicability to the issue in dispute. The said pleas shall be presented at the first hearing prior to examining the merits.

## Hearings

**Article (21)**

The Tribunal shall hold, at the request of either party, at any stage of the proceedings, hearings for verbal pleadings or for hearing testimony from witnesses or experts. If neither party makes such a request, the Tribunal shall have the option either to hold such hearings or to go ahead with the proceedings on the basis of the papers and documents, provided that at least one hearing has already been held.

**Article (22)**

1. In case of verbal pleadings, the Tribunal shall notify the parties, within a sufficient period of time before the pleading's hearing, of the date, time and place of hearing.

2. In case of providing proof by testimony of witnesses, the party upon whom the onus of proof rests shall notify the Tribunal and the other party, at least seven days before the testimony hearing, of the names of witnesses whom he plans to call to the witness stand, their addresses, the matters in respect of which the said witnesses shall testify and the language to be used for such testimony.

3. The Tribunal shall make the necessary arrangements for translation of verbal statements made at the hearing if such statements are in a language other than Arabic and the Tribunal shall prepare minutes of the hearing.

4. Pleading and testimony hearings shall be held behind closed doors unless the two parties agree to the contrary and the Tribunal shall be at liberty to decide the method of questioning the witnesses.

5. The Tribunal shall decide whether to accept or reject evidence and the existence of a link between the evidence, the issue of the case or lack of such linkage and the significance of the evidence provided.

**Article (23)**

1. If either party alleges that the documents submitted to the Tribunal have been forged, the Tribunal shall temporarily suspend the Arbitral proceedings.

2. The Tribunal shall refer the alleged forgery to the competent committee for investigating it and take a decision in respect thereof.

3. If the forgery incident is proved to be true, the Tribunal shall pass a ruling for cancellation of documents proved to have been forged.

**Article (24)**

The Tribunal may, at any stage of the arbitration, request the parties to produce other documents or evidence, conduct an inspection of the premises subject to the dispute and make investigations it deems fit, including assistance by experts.

**Article (25)**

The parties to the dispute may authorize the Tribunal to settle the dispute between them by means of reconciliation. They may also request the Tribunal at any stage to confirm what has been agreed upon between them by way of a reconciliation or settlement, and it shall pass a ruling to that effect.

**Article (26)**

The Tribunal may, ex-officio or at the request of one of the parties to the dispute, decide at any time, after closing of the pleadings and prior to rendering the award, to open pleadings anew on the merits for material reasons.

## Failure to Appear

**Article (27)**

If either party fails to appear at the hearings after receiving notification to appear from the Tribunal, and does not provide, during a period of time fixed by the Tribunal, an acceptable excuse for his absence, such absence shall not bar proceeding with the arbitration.

## Interim Measures

**Article (28)**

The Tribunal may take, at the request of either party, interim measures in respect of the subject matter of the dispute, including measures for preservation of the contentious goods, such as ordering the deposit of the goods with third parties or sale of the perishable items thereof in compliance with the procedural rules in the country where the interim measure is adopted.

## Applicable Law

**Article (29)**

**The Tribunal shall settle disputes in accordance with the following:**

1. The contract concluded between the two parties as well as any subsequent agreement between them.
2. The law chosen by the parties.
3. The law having most relevance to the issue of the dispute in accordance with the rules of the conflict of laws deemed fit by the Tribunal.
4. Local and international business practices.

**Article (30)**

The GCC regulations and resolutions as well as provisions of the Unified Economic Agreement and their interpretations shall be applicable to the disputes arising from the enforcement thereof.

## Deliberations and Award

**Article (31)**

If there are several arbitrators and the pleadings have ceased, the Tribunal shall meet for deliberations and passing of award. The deliberations shall be held behind closed doors. However, if there is a single arbitrator on the Tribunal, he shall pass the award after ceasing the pleading.

**Article (32)**

If there are several arbitrators, the award shall be passed by a unanimous or a majority vote. In all cases, an award shall be passed within a maximum period of one hundred days from the date of referring the case file to the Tribunal unless the parties agree on another period for passing the award. The parties convenant with each other to enforce the award with immediate effect. In case an award is passed by a majority vote, the dissenting arbitrator shall note down his opinion in a separate paper to be attached to the award but the dissent shall not be deemed as an integral part thereof.

**Article (33)**

The period referred to in the preceding Article may be extended by a decision made by the Secretary General upon a grounded request from the Tribunal. If the Secretary General is not convinced of the reasons given by

the Tribunal for the extension request, the Secretary General shall fix a deadline in consultation with the parties to the dispute and the Tribunal shall pass its ruling within such deadline and its mandate shall be ended upon the expiry of the said deadline.

**Article (34)**

The award shall be grounded and must contain the arbitrators' names, their signatures, names of the parties, date of the award, place of issue, facts of the case, litigants' claims, a summary of their defense pleadings, their defenses, replies thereto and the party who shall incur the costs and legal fees either in full or partially.

**Article (35)**

1. The Tribunal shall send a copy of the award to the Secretary General for the purpose of deposit and registration, if required, under the law of the State in which the award shall be enforced.

2. The Tribunal Secretariat shall send a copy of the award to each of the parties by registered letter with a note of receipt within three days from the date the award is passed.

**Article (36)**

1. An award passed by the Tribunal pursuant to these Rules shall be binding and final. It shall be enforceable in the GCC member States once an order is issued for the enforcement thereof by the relevant judicial authority.

2. The relevant judicial authority shall order the enforcement of the arbitration award unless one of the litigants files an application for the annulment of the award in the following specific events:

   (a) If it is passed in the absence of an Arbitration Agreement or in pursuance of a null Agreement, or if it is prescribed by the passage of time or if the arbitrator goes beyond the scope of the Agreement.

   (b) If the award is passed by arbitrators who have not been appointed in accordance with the law, or if it is passed by some of them without being authorized to hand down a ruling in the absence of others, or if it is passed pursuant to an Arbitration Agreement in which the issue of the dispute is not specified, or if it is passed by a person who is not legally qualified to issue such award.

Upon the occurrence of any of the events indicated in the above two paragraphs, the relevant judicial authority shall verify the validity of the

annulment petition and shall pass a ruling for non-enforcement of the arbitration award.

**Article (37)**

The Tribunal may, ex-officio or at a written request from either party to be submitted through the Secretary General, correct any material and similar errors in the award after giving notice to the other party with respect to such request, provided that the correction request shall be submitted within fifteen days from the date of receiving the award. The correction shall be done and considered as an integral part of the award and notice thereof shall be given to the parties.

**Article (38)**

Either party may request the Tribunal, within seven days from the date of receiving the award, to interpret any ambiguity which may arise therein, provided that the other party shall be given notice of such request. The Tribunal shall provide the interpretation in writing within twenty days from the date of receiving such application. The interpretation shall be deemed as an integral part of the award in all aspects.

## Fees and Costs

**Article (39)**

The Centre shall charge a fee of (BD 50) or the equivalent thereof for every reference to arbitration.

**Article (40)**

1. The Centre shall charge fees for the services provided to the parties but such fees shall not, under any circumstances, be more than 2% of the amount in dispute.

2. The Secretary General shall propose a scale of fees for its services pursuant to the preceding Paragraph (1) and such scale of fees shall be effective upon approval by the Board of Directors of the Centre.

**Article (41)**

1. The Secretary General shall prepare a statement of temporary estimate of the arbitrators' fees and other arbitration costs such as the travel expenses of the arbitrators and witnesses, fees of experts and translators and fees for the Centre's services. Each of the parties to a dispute shall be instructed to deposit a certain equal amount as an advance on account of such costs. The parties may be instructed to make supplementary deposits in the course of arbitration proceedings.

2. If the required deposits are not made within thirty days from the date of the instructions, the Secretary General shall notify the

parties in this respect so that one of them shall pay the required amounts. In case the amount is not paid, the Tribunal may order the suspension or termination of the arbitration proceedings.

3. Once the Tribunal's award is passed, the Secretary General shall submit a statement of the deposits and expenses and make a final settlement by refunding any surplus amount or collecting the amounts outstanding.

## Final Provisions

**Article (42)**

The GCC Commercial Co-operation Committee shall have the right to amend these Rules and the Board of Directors of the Centre shall have the right to interpret them.

**Article (43)**

These Rules shall come into effect immediately upon their ratification by the GCC Commercial Co-operation Committee

## APPENDIX (5)

# JUDGEMENTS IMPLEMENTATION AGREEMENT*

*The Governments of:*

- Hashemite Kingdom of Jordan.
- Syrian Republic
- Kingdom of Iraq
- Kingdom of Saudi Arabia
- Republic of Lebanon
- Kingdom of Morocco
- Yemen Motawakel Kingdom

In order to facilitate the implementation of Judgments between its countries for realizing the provisions of article two of the Arabian Countries League Charter.

* (a) This is not an official translation

(b) The council of the Arabian Countries League approved it on 14/9/1957 in the session of its sixteenth general meeting.

(c) It was signed by:

The Hashemite Kingdom of Jordan – 17/2/1953
Republic of Lebanon – 18/2/1953
Syrian Republic – 19/4/1953
Kingdom of Saudi Arabia – 23/5/1953
Egyptian Kingdom –1/6/1953
Kingdom of Iraq – 27/7/1953
Yemen Motawakel Kingdom – 2/11/1953
United Arab Emirate – 6/7/1953

(d) Its approval documents were deposited with the Secretariat Generality of:

Kingdom of Saudi Arabia – 5/4/1954
Republic of Egypt – 25/2/1954
The Hashemite Kingdom of Jordan-28/7/1954
Syrian Republic – 29/9/1956
Lybian Kingdom (Joining) – 19/5/1957
Kingdom of Iraq – 3/1/1957
State of Kuwait (Joining) –20/5/1963
United Arab Emirates (Joining)-1/7/1982[1] Reservations by the Yemen Motawak Kingdom – (a) Regarding the first paragraph 'a' of the second Article which states "Currently there are no competent courts in the Yemen other than the Islamic

**They agreed as follows:**

**Article 1**

Every final judgment that decides civil or commercial rights or new stating a compensation from the criminal or penal courts or relating to the personal status issued by a judicial board at one of the Arabian County's Leagues, shall be enforceable in all the league countries according to the provisions of this agreement.

**Article 2**

The competent judicial authority in the countries who are asked to implement are not allowed to look into the subject case nor to refuse the implementation of the judgment unless in the following cases:
(a) In case the judicial board who issued the judgment is not competent to look into the suit due to its illegality and not absolutely competent or as per the International competence rules.
(b) In case the opponents were not properly notified.
(c) If the judgment was contradictory to the public order of morals in the country asked to implement and who has the authority to consider it so and not to implement that which is contrary to public order or public morals or if the judgment was contradicting to a principle that is considered as an International general rule.
(d) In case a final decision was made between the same opponents in the same subject by one of the courts of the country who is asked to implement or if those courts have a suit under consideration between the same opponents in the same subject that was raised before bringing suit in front of the court who issued the judgment to be implemented.

**Article 3**

In consideration of the first article of this agreement, the authority who is asked to implement an arbitrator's judgment issued in one of the Arabian League Countries is not allowed to reconsider the suit subject for which the judgment issued by the arbitrators is to be implemented, but it might refuse the order for implementing the arbitrator's judgment forwarded to it in the following cases:

a. In cases where the law of the country asked to implement the arbitral award does not allow the solving of the dispute subject through arbitration.
b. In cases where the arbitration award was not issued in implementation of a proper arbitration condition or agreement.
c. If arbitrators were not competent according to the arbitration agreement or conditions or according to the law upon which the arbitrators award was issued.
d. In cases where the opponents were not properly announced to attend.

e. If the arbitrators decision included something contradictory to public order or the public morals in the country asked to implement, which has the authority to consider it so and not to implement that contradicting its public order or its public morals.
f. In cases where the arbitrators decision was not final in the country in which it was issued.

**Article 4**

This agreement is not valid by any means on the decisions issued against the government of the state which is asked to implement it or against any of its employees for activities done due to his job only and it is also not enforceable of decisions, the implementation of which contradicts International agreements and covenants adopted in the country asked to implement.

**Article 5**

**The following documents must be attached to the implementation order:**

1. board correctly in case the judgment/decision by the An official true copy, certified by the competent directions, of the decision to be implemented appended to the executive form.
2. The original of the announcement of the judgment to be implemented or an official certification indicating that the judgment was properly announced.
3. Certification by competent direction to indicate that the judgment to be implemented is final and should be implemented.
4. A certificate evidencing that the opponents were announced to attend in front of the competent directions or in front of the arbitration arbitrators to be implemented was issued as a judgment by default.

**Article 6**

The judgments that are to be implemented in one of the League Countries should have the same executive power they have in the courts of the country asking for the implementation.

**Article 7**

It is not permitted to ask the citizens of the country asking for the implementation in any of the League Countries to give a fee, a trust or a guarantee not enforced on the country's citizens, they should also not be deprived from that enjoyed by its citizens to the right of judicial help or exemption from the judicial fees.

**Article 8**

Each country will appoint a competent judicial board to whom the implementation applications, its procedures and methods of contesting the order* decisions issued in this regard and to notify this to all other contracting countries.

**Article 9**

This agreement is to be certified by the countries signing it according to their legislative regulations as soon as possible and the certification documents to be deposited with the Secretariat General of the Arab Countries League who will prepare minutes for each certification document of each country and notify this to the other contracting countries.

**Article 10**

It is allowed for League Countries not to sign this agreement to join it through an announcement sent by them to the Secretary General of the Arab Countries League who will notify the signing countries about its joining.

**Article 11**

certification documents of three of the countries who signed it and will This agreement will be effective one month after the depositing of the become effective for the other countries one month after depositing its certification document or its joining.

**Article 12**

Each country connected with this agreement is allowed to withdraw therefrom through an announcement to the Secretary General of the Arab Countries League and the withdrawal will be effective after the lapsing of six months from the date of sending the announcement provided that the provisions of this agreement shall remain valid on the judgment to be implemented before the end of the said period.

* Board of Grievances in the Kingdom of Saudi Arabia.

In support of these proceedings, the authorized representatives, whose names are shown below, have signed this agreement on behalf of their governments and in its name.

This agreement was made in the Arabic language in Cairo on Monday twenty second of Safar in the year 1372H. corresponding to the tenth of November 1952. One original to be kept by the Secretariat General of the Arab Countries League and a true copy to be delivered to each of the countries who signed or joined the agreement.

# APPENDIX (6)

## Amman Arabian Agreement

## For Commercial Arbitration 1987*

**The governments of:**

- Hashemite Kingdom of Jordan
- Republic of Tunisia
- People's Democratic Republic of Algeria
- Republic D'Jeboute
- Republic of the Sudan
- Syrian Arab Republic
- Republic of Iraq
- Palestine
- Republic of Lebanon
- Lybian Great Arabian Public Socialist Republic.
- Kingdom of Morocco
- Mauritanian Islamic Republic
- Yemen Arab Republic
- Yemen Public Democratic Republic

In faith of the importance of giving rise to a unified Arabian regulation for commercial arbitration to take its place among the international regional arbitration regulations.

*** This is not an official translation**

In observance of realizing a fair balance in the field of dispute settlements that might be generated from International Trade Contracts and to find a fair solution thereto.

In order to realize the objectives of the Arab Ministers' of Justice Council in Integrating Arabian legislations keeping pace with civilized development.

## CHAPTER 1

## GENERAL PROVISIONS

**Article 1**

The expressions mentioned in this agreement mean that which is given alongside:

a. The agreement: Means Amman Arabian agreement for commercial arbitration.
b. Contracting country: The member country to this agreement.
c. The Council: Arab Ministers of Justice Council.
d. Head of Department: Head of the general department for legal affairs.
e. The Center: The Arabian Center for Commercial Arbitration.
f. Board of Directors: The board of directors of the Arabian Center for Commercial Arbitration.
g. The Office : Center's Office
h. Authentication Manager: The manager appointed for authentication in the center.
i. Arbitration agreement: The written agreement by parties having recourses to the arbitration whether before or after the rise of the dispute.
j. The list: The list of the names of arbitrators.

**Article 2**

This agreement applies to Commercial disputes that arise between natural or moral persons whatever their nationalities who are joined in a commercial dealing with one of the contracting companies or one of its citizens or they have a workplace therein.

**Article 3**

1. Submission to arbitration will be by any of the following two methods:

**First -** By including the arbitration conditions in the contracts concluded between the concerned parties.

**Second -** Through agreement after the origination of the dispute.

2. It is suggested to include the following wording in the contracts that are subject to arbitration – 'All disputes arising from this contract shall be

settled by the Arabian Center for Commercial Arbitration according to the provision of Amman Arabian agreement for commercial arbitration.

## CHAPTER TWO

## ARABIAN CENTER FOR COMMERCIAL ARBITRATION

### Article 4

According to this agreement, a permanent establishment will be set up to be called the Arabian Center for Commercial Arbitration that will enjoy a (nominal) independence and be administratively and financially attached to the Secretariat General of the League. The Secretary General will appoint the center staff according to the provisions of the article of associations of the league staff and its executive bylaw.

### Article 5

1. The center will have a board of directors from Arabian personalities who are well experienced in the field of law and arbitration, each contracting country will choose one of them for three years (renewable).
2. The board of directors will select from among its members, through confidential voting, a chairman for the center and two deputies for him for a period of three years (renewable). The chairman will be the Head of the Board of Directors.
3. The head of the board of directors and his two deputies will be devoted. to their work in the center.
4. The center will have an office comprised of the chairman and his two deputies.

### Article 6

1. The board of directors will hold an ordinary session each year and it might hold an exceptional session if necessary, the bylaws of the center will determine the dates of holding such session and the manner of its holding.
2. The meeting of the board of directors will be legally held in the presence of the majority of the members and decisions will be taken by the majority of two thirds of the votes of the current members.
3. The head will manage the meetings of the Board of Directors and call for the holding of meetings.

### Article 7

The functions of the Board of Directors will be:

1. Attending to the implementation of the provisions of this agreement.

2. Setting the bylaws of the center.
3. Reviewing the annual report about the center's activities and forwarding it to the Council for approval.
4. Setting up a list with the names of arbitrators.
5. Practicing its other responsibilities provided for in this agreement.
6. Setting a bylaw for fees, expenses and charges.

**Article 8**

The office will organize the commercial arbitration process, establish its basis, formulate model contracts for international trade cases, set up fixed rules for commercial dealings and summarize, classify, divide, print and publish arbitrational decisions.

**Article 9**

The head of the board of directors of the center will be its legal representative.

**Article 10**

1. The agreement of the advantages and immunities of the Arabian Countries League will apply to the center and all these who are appointed as members of staff and it will also apply to the parties of the dispute, their consultants, lawyers, witnesses and experts to the limits required for the good performance of their tasks.
2. The provisions of the documents and records of the league will apply to the documents and records of the center.

**Article11**

The council will determine the remunerations of the head of the center, his two deputies and members of the board of directors.

**Article 12**

The place of the center will be the Secretariat General of the League in Cairo.

**Article 13**

1. The secretary general of the league will appoint a documentation manager who will obtain at least a license in law and have experience in his field of work.
2. The documentation manager will work under the supervision of the head of the center.
3. The documentation manager will undertake the function of giving the official character to arbitration resolutions and evidence the correctness of each of its copies and take the official procedures

provided for in the this agreement that are necessary for implementing its provisions.

## CHAPTER THREE

## ARBITRATION BOARD

**Article 14**

1. The board of directors will annually prepare a list of the names of arbitrators comprising senior law men, judges or those who have vast experience and extensive knowledge in Trade, industry or finances and who enjoy high morals and a good reputation.
2. The oath taken by arbitrators before the President of the Centre is: "I swear by God to judge fairly, to abide by the law to be applied and to perform my function honestly, virtuously and objectively".

**Article 15**

1. The arbitration board will be composed of three members and both parties should agree on one arbitrator.
2. The function of the arbitrators will not cease before resolving the dispute of the arbitration subject in observance of the provisions of article (33) of this agreement.

## CHAPTER FOUR

## ARBITRATION PROCEDURES

**Article 16**

Applicant to arbitration must:

1. Submit a written application to the head of the center to include:
   a. His name, title, capacity, nationality and address.
   b. The name, title, capacity, nationality and address of the opponent.
   c. Present the dispute and its facts.
   d. Requests
   e. Name of the proposed arbitrator.
2. Attach to his application the arbitration agreement and all the documents and records relating to the dispute.
3. The arbitration application will only be accepted after payment of the fixed fees.

**Article 17**

1. On receiving the application, the head of the center will notify the applicant of it's receipt and will send a copy thereof to the opponent.
2. The opponent should, within thirty days from his notification of the application, submit an answering note to include his counter defenses and requests (if any) and the name of his chosen arbitrator supported by the evidencing documents. The office might give him an additional time limit upon his request which will not exceed thirty days.

**Article 18**

1. In case the applicant for arbitration did not nominate his arbitrator in his application, the office will nominate the arbitrator from the list within one week from the date of receiving the application.
2. In case the opponent did not nominate his arbitrator during the thirty days provided for in the previous article, the office will nominate one from the list.
3. The head of the center will ask both parties to agree on a third arbitrator from the list to be Head of the Arbitration Board after nominating the two arbitrators this should be within thirty days from the date of the request and in case of their disagreement, the office will appointment the third arbitrator from the list.
4. The arbitrators appointed by the office should not be of the same citizenship as any of the parties.
5. In case either party disputes the correctness of nominating one of the arbitrators, the office should settle such a dispute with an immediate and final decision.
6. If any of the arbitrators die or there is a force majoure preventing him from performing his task a substitute may be nominated in the same way as the substituted was nominated.
7. The arbitrator is not allowed to resign after taking up his task. In case of any serious reasons arising that prevents him from continuation, he might be allowed to resign after obtaining approval from the Center's office.

**Article 19**

1. Either party has the right to reject any arbitrator for reasons he shows in his request.
2. The office will decide on the rejection request in a period not exceeding seven days from the date of receiving the request.
3. In case of accepting the rejection request, an arbitrator will be nominated in the same way the rejected arbitrator was nominated and the rejected arbitrator and both parties will be notified about the decision by the office once it has been issued.

**Article 20**

After forming the board, the head of the center will refer the file to it in order to take up its task.

**Article 21**

1. The board will settle the dispute according to the contract concluded between the two parties and the provisions of the law which both parties have agreed to (whether expressly or implicitly (if any)), otherwise, according to the law which is most relative to the dispute subject observing the rules of the stable International Trade customs.
2. The board should settle the dispute according to the rules of justice Two parties expressly agree on that.

**Article 22**

The arbitration procedures will be performed in the center unless both parties agree to perform it in another country to be approved by the board after counseling the office.

**Article 23**

1. The Arabic Language will be the language for the procedures and defense for judgement.
2. The board might decide to hear the evidence of the parties, the witnesses and the experts who do not know Arabic, in such a case the help of a translator, who must perform the oath in frnt of the board, should be asked for.
3. The board might allow the submission of memos, statements the defence to be in a foreign language provided that it is accompanied by an Arabic translation.

**Article 24**

The objection of non-competence and formal objections should be started before the first meeting and the board should settle it before beginning the subject matter, the board's decision in this regard will be final.

**Article 25**

The board might, at any stage of the suit, ask the parties to present another document or more evidences and to inspect the place of the dispute subject and to take the investigation where it deems appropriate.

**Article 26**

The board might either automatically or upon request of the disputing parties, decide at any time after closing of pleading and before announcing the decision, open the pleading anew for a sound reasons.

**Article 27**

The agreement on arbitration, according to the provisions of this agreement, prevents the presentation of the dispute in front of another judicial direction or appeal of the arbitration decision.

**Article 28**

1. In case either party non attends without an acceptable excuse at any stage of the arbitration stages, the pleading will go on in his absence.
2. The absence of a party or his not presenting his defense in front of the board will not be considered as acceptance of the other party's claims.

**Article 29**

The board might- according to a request by either party- take any temporary or precautionary measures it deems necessary.

**Article 30**

Any party who violates any provision of this agreement or any of its conditions, and despite that carry out any of its conditions, and despite that carry on the arbitration without protest will be considered as assigning his rights.

## CHAPTER FIVE

## The Decision

**Article 31**

1. After closing the pleading, the board will meet for deliberation and issuance of the decision.
2. The decision will be issued by agreement or by majority within a maximum period of six months from the date of referring the file to the board.
3. Upon a causative request by the board, the office might extend the period referred to in the previous paragraph.
4. If the office was not convinced by the reasons presented by the board for extending the period, the office will fix a period and the

board should issue its decision within such a period and its task will be at an end.

5. In case of distracted views, the decision will be issued upon the view and signature of the head and to evidence in the decision the scattering of views.
6. The contradicting member should write his view on a separate sheet and attach it to the decision.

**Article 32**

1. The decision should be causative and include the names of the arbitrators, the two parties date of decision, place of issue and full presentation to the proceedings, the litigating parties' requests and a summary to their pleadings and defense and the answer to it and also the party who will bear the expenses and fees in whole or in part.
2. The authentication manager will send a copy of the decision to each party with a registered letter and receipt notification within three days of its issuance.

**Article 33**

1. In case of any material written or arithmetical error, the board might automatically or upon request by either party, correct it after notifying the other party about the request, the correction request should be submitted within fifteen days from the date of receiving the decision.
2. The board's decision to correcting the error should be written in the margin of the decision and to be considered as part thereof and to notify the parties of the correction.

**Article 34**

1. Upon a written request, either party might present a request to the head of the center to invalidate the decision for any of the following reasons:
   a. In cases where the board has clearly exceeded its competence.
   b. If it was evident through a judicial judgment that the existence of a new reality might affect the decision substantially provided that its ignorance was not due to the failure of the invalidation request.
   c. The invalidation request should be submitted within sixty days of the date of receiving the decision, but if the invalidation request was based on the two reasons mentioned in the paragraphs (b) and (c), it should be submitted within sixty days from the date of discovery of the reality and in all

cases the request for invalidation will not be accepted after the lapsing of one complete year from the date of issuing the decision.

2. The office will appoint a board consisting of a head and two members from the list to review the request and give a decision therein as soon as possible but it should not look into reasons other than those mentioned in the request for invalidation.

3. No member of the board should be one of the arbitrators who issued the decision or a citizen of either of the disputing parties.

4. The board has the right to invalidate the decision as a whole or in part based on the soundness of the reason on which the invalidation was based.

**Article 35**

The supreme court in each contracting country has the competence to give direction to the executive character of the decisions made by the arbitration board and it is not allowed to reject the execution order unless the decision was contradictory to public regulation.

## Interim Provisions

**Article 36**

As an exception to the provisions of the second paragraph of the fifth eleventh and thirteenth articles of this agreement, the secretary general of the league will appoint a head of office or someone entrusted to this task, to be assisted by two employees from the Secretariat General of the League, and he will also entrust another employee to undertake the tasks of the authentication manager of the center provided that be obtains a license in law. The center get sufficient financial capabilities to cover these expenses.

## Chapter Six

## Final Provisions

**Article 37**

This agreement will be subject to approval, acceptance or ratification by the signing parties and the approval, acceptance or ratification documents

are to be deposited with the Secretariat General of the Arabian Countries League in a maximum date of thirty days from the date of approval, acceptance or ratification and the Secretariat General should notify all the member countries depositing such documents as well as the Secretariat General of the League and the Headquarters of the Center..

**Article 38**

Each concerned direction of the signing parties should take its necessary internal procedures in order to implement this agreement.

**Article 39**

This agreement will be valid after thirty days from the date of the seventh depositing of the documents for its approval, acceptance or ratification.

**Article 40**

1. It is not allowed for any country from the Arabian Countries League who has not signed the agreement to join it through an application sent to the Secretary General of the League.
2. The country requesting to join will be considered as correlated with this agreement as soon as depositing its approval, acceptance or ratification document and after the lapsing of thirty days from the date of depositing.

**Article 41**

None of the parties is allowed to show any reservations that include expressly or inclusively a contradiction to the provisions of this agreement or egression from its objectives.

**Article 42**

1. Any contracting or joining party might withdraw from the agreement by giving a written causative request to the Secretary General of the Arabian Countries League.
2. The withdrawal will only be effective after one year from the date of sending the request.

This agreement was made in the Arabic language in the city of Amman/ Hashemite in the Kingdom of Jordan on the sixtieth day of Shaban in the year 1407H (corresponding to 11/1/1987 A.D.)

# APPENDIX (7)

## THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

**(June 10,1958)**

**Article I**

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

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying of extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

**Article 2**

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the

meaning of this article ,shall at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

**Article 3**

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

**Article 4**

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.

**Article 5**

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

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

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions

on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

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

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

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

**Article 6**

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

**Article 7**

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

**Article 8**

1. This Convention shall be open until 31st December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any

other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

**2.** This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

**Article 9**

**1.** This Convention shall be open for accession to all States referred to in article VIII.

**2.** Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

**Article 10**

**1.** Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

**2.** At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

**3.** With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

**Article 11**

In the case of a federal or non-unitary State, the following provisions shall apply:

[a] With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

[b] With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative

action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

[c] A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

**Article 121.** This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

**Article 13**

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition and enforcement proceedings have been instituted before the denunciation takes effect.

**Article 14**

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

**Article 15**

The Secretary-General of the United Nations shall notify the States contemplated in Article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under Articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with Article XII;

(e) Denunciations and notifications in accordance with Article XIII.

**Article 16**

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in Article VIII.

# APPENDIX (8)

# UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

## MODEL LAW ON ITNERNATION COMMERCIAL ARBITRATION

**(As adopted by the United Nations Commission on International Trade Law on 21 June 1985)**

## CHAPTER I - GENERAL PROVISIONS

### Article 1 - Scope of application[1]

1. This Law applies to international commercial[(2)] arbitration, subject to any agreement in force between this State and any other State or States.

2. The provisions of this Law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

3. An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

4. For the purposes of paragraph (3) of this article:

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[1] Article headings are for reference purposes only and are not to be used for purposes of interpretation.

[2] 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.

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

5. This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

## Definitions and rules of interpretation

### Article 2

**For the purposes of this Law:**

(a) "arbitration' means any arbitration whether or not administered by a permanent arbitral institution;

(b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(c) "court" means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except Article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties; such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25 (a) and 32 (2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defense, it also applies to a defense to such counter-claim.

## Receipt of Written Communications

### Article 3

**1. Unless otherwise agreed by the parties:**

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

2. The provisions of this article do not apply to communications in court proceedings.

### Waiver of right to object

**Article 4**

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object.

### Extent of court intervention

**Article 5**

In matters governed by this Law, no court shall intervene except where so provided in this Law.

### Court or other authority for certain functions of arbitration assistance and supervision

**Article 6**

The functions referred to in Articles 11(3), 11(4), 13(3),14,16 (3) and 34 (2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.

## CHAPTER II

## ARBITRATION AGREEMENT

### Definition and form of arbitration agreement

**Article 7**

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

2. The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements

of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

### Arbitration Agreement and Substantive Claim Before Court

**Article 8**

1. A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is real and void, inoperative or incapable of being performed.

2. Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

### Arbitration agreement and interim measures by court

**Article 9**

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

## CHAPTER III

## COMPOSITION OF ARBITRAL TRIBUNAL

### Number of arbitrators

**Article 10**

1. The parties are free to determine the number of arbitrators.

2. Failing such determination, the number of arbitrators shall be three.

### Appointment of arbitrators

**Article 11**

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

2. The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

3. Failing such agreement,

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

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

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

(a) a party fails to act as required under such procedure; or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure; or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in Article 6 to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.

5. A decision on a matter entrusted by paragraphs (3) and (4) of this Article to the court or other authority specified in Article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

## Grounds for challenge

### Article 12

1. When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

2. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

## Challenge Procedure

### Article 13

1. The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

2. Failing such agreement, a party which intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in Article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

3. If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this Article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in Article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

### Failure or impossibility to act

**Article 14**

1. If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in Article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

2. If, under this Article or Article 13 (2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this Article or Article 12 (2).

### Appointment of Substitute Arbitrator

**Article 15**

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

## CHAPTER IV

## JURISDICTION OF ARBITRAL TRIBUNAL

### Competence of arbitral tribunal to rule on its jurisdiction

**Article 16**

1. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a Contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is

raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

### Power of arbitral tribunal to order interim measures

**Article 17**

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

## CHAPTER V

## CONDUCT OF ARBITRAL PROCEEDINGS

### Equal treatment of parties

**Article 18**

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

### Determination of rules of procedure

**Article 19**

1. Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

2. Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

### Place of Arbitration

**Article 20**

1. The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

2. Notwithstanding the provisions of paragraph (1) of this Article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

## Commencement of arbitral proceedings

**Article 21**

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commences on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

## Language

**Article 21**

1. The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

2. The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

## Statements of Claim and Defense

**Article 23**

1. Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defense in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

2. Unless otherwise agreed by the parties, either party may amend or supplement his claim or defense during the course of the arbitral

proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

## Hearings and Written Proceedings

### Article 24

1. Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

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

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

## Default of a party

### Article 25

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with Article 23 (1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defense in accordance with Article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

### Expert appointed by arbitral tribunal

**Article 26**

1. Unless otherwise agreed by the parties, the arbitral tribunal may

(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

2. Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

### Court Assistance in Taking Evidence

**Article 27**

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

## CHAPTER VI

## MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

### Rules applicable to substance of dispute

**Article 28**

1. The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

2. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

3. The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

4. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

## Decision-Making by Panel of Arbitrators

### Article 29

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

## Settlement

### Article 30

1. If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

2. An award on agreed terms shall be made in accordance with the provisions of Article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

## Form and contents of award

### Article 31

1. The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitrator proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

2. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30.

3. The award shall state its date and the place of arbitration as determined in accordance with Article 20 (1). The award shall be deemed to have been made at that place.

4. After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this Article shall be delivered to each party.

## Termination of Proceedings

### Article 32

1. The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this Article.

2. The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

3. The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of Articles 33 and 34 (4).

## Correction of interpretation of award; additional award

### Article 32

1. Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

2. The arbitral tribunal may correct any error of the type referred to in paragraph (1) (a) of this Article on its own initiative within thirty days of the day of the award.

3. Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

4. The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this Article.

5 . The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

## CHAPTER VII

## RECOURSE AGAINST AWARD

### Application for setting aside as exclusive recourse against arbitral award

### Article 34

1. Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.

2. 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; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or 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, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) The court finds that:

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) The award is in conflict with the public policy of this State.

3 . An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received that award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal.

4. The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

## CHAPTER VIII

## RECOGNITION AND ENFORCEMENT OF AWARDS

### Recognition and enforcement

**Article 35**

1. An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

2. The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in Article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.[3]

### Grounds for Refusing Recognition or Enforcement

**Article 36**

1. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes, to the competent court where recognition or enforcement is sought, proof that:

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[3] The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the Model law if a State retained even less onerous conditions.

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

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

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) If the court finds that:

(i) The subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii)The recognition or enforcement of the award would be contrary to the public policy of this State.

2. If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v) of this Article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

# APPENDIX (9)

# UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ARBITRATION RULES

**Resolution 31/98 adopted by the General Assembly on 15 December 1976**

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## RESOLUTION 31/98 - ADOPTED BY THE GENERAL ASSEMBLY ON

## 15 DECEMBER 1976

31/98. Arbitration Rules of the United Nations Commission on International Trade Law

### The General Assembly

Recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations,

Being convinced that the establishment of rules for ad hoc arbitration that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations,

Bearing in mind that the Arbitration Rules of the United Nations Commission on International Trade Laws have been prepared after extensive consultation with arbitral institutions and centers of international commercial arbitration,

Noting that the Arbitration Rules were adopted by the United Nations Commission on International Trade Law at its ninth session[1] after due deliberation,

1. Recommends the use of the Arbitration Rules of the United Nations Commission on International Trade Law in the settlement of disputes arising in the context of international commercial relations, particularly by reference to the Arbitration Rules in commercial contracts;

2. Requests the Secretary-General to arrange for the widest possible distribution of the Arbitration Rules.

## Section I.

## Introductory rules

### Scope of application

**Article 1**

1. Where the parties to a contract have agreed in writing[2] that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.

2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Notice, calculation of periods of time

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[1] Official Records of the General Assembly, Thirty-first Session, Supplement No. 17(A/31/17), Chapter. V, Section. C.

[2] MODEL ARBITRATION CLAUSE

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

Note: Parties may wish to consider adding:

a. The appointing authority shall be... (name of institution or person);
b. The number of arbitrators shall be ...(one or three);
c. The place of arbitration shall be ...(town or country);
d. The language(s) to be used in the arbitral proceedings shall be...

**Article 2**

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at his habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressees last known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.

2. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non business days occurring during the running of the period of time are included in calculating the period.

## Notice of arbitration

**Article 3**

1. The party initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party (hereinafter called the "respondent") a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:

*(a)* A demand that the dispute be referred to arbitration;

*(b)* The names and addresses of the parties;

*(c)* A reference to the arbitration clause or the separate arbitration agreement that is invoked;

*(d)* A reference to the contract out of or in relation to which the dispute arises;

*(e)* The general nature of the claim and an indication of the amount involved, if any;

*(f)* The relief or remedy sought;

*(g)* A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.

**4. The notice of arbitration may also include:**

*(a)* The proposals for the appointments of a sole arbitrator and an appointing authority referred to in Article 6, paragraph 1;

*(b)* The notification of the appointment of an arbitrator referred to in Article 7;

*(c)* The statement of claim referred to in Article 18.

## Representation and Assistance

### Article 4

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance

## Section II.

## Composition of the arbitral tribunal

### Number of arbitrators

### Article 5

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within 15 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

### Appointment of arbitrators (Articles 6 to 8)

### Article 6

1. If a sole arbitrator is to be appointed, either party may propose to the other:

*(a)* The names of one or more persons, one of whom would serve as the sole arbitrator; and

*(b)* If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.

2. If within 30 days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within 60 days of the receipt of a party's request therefore, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.

3. The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

*(a)* At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;

*(b)* Within 15 days after the receipt of his list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;

*(c)* After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

*(d)* If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

4. In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

## Article 7

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:

*(a)* The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or

*(b)* If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within 30 days after receipt of a party's request therefore, the first party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under Article 6.

## Article 8

1. When an appointing authority is requested to appoint an arbitrator pursuant to Article 6 or Article 7, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The appointing authority may require from either party such information as it deems necessary to fulfill its function.

2. Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.

## Challenge of arbitrators - (Articles 9 to 12)

### Article 9

A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

### Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrators impartiality or independence.

2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

### Article 11

1. A party who intends to challenge an arbitrator shall send notice of his challenge within 15 days after the appointment of the challenged arbitrator has been notified to the challenging party or within 15 days after the circumstances mentioned in Articles 9 and 10 become known to that party.

2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.

3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in Articles 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party has failed to exercise his right to appoint or to participate in the appointment.

### Article 12

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:

*(a)* When the initial appointment was made by an appointing authority, by that authority;

*(b)* When the initial appointment was not made by an appointing authority, but an appointing authority had been previously designated, by that authority;

*(c)* In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in Article 6.

2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in Articles 6 to 9 except when this procedure would call for the designation of an appointing authority, then the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

## Replacement of an arbitrator

### Article 13

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in Articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced.

2. In the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.

## Repetition of hearings in the event of the replacement of an arbitrator

### Article 14

If under Articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is

replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.

## Section III.

## Arbitral proceedings

### General Provisions

### Article 15

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.

### Place of Arbitration

### Article 16

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.

2. The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.

3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

4. The award shall be made at the place of arbitration.

## Language

### Article 17

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defense, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defense, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

## Statement of Claim

### Article 18

1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

The statement of claim shall include the following particulars

*(a)* The names and addresses of the parties;

*(b)* A statement of the facts supporting the claim;

*(c)* The points at issue;

*(d)* The relief or remedy sought.

The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

## Statement of Defense

### Article 19

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defense in writing to the claimant and to each of the arbitrators.

2. The statement of defense shall reply to the particulars *(b)*, *(c)* and *(d)* of the statement of claim (Article 18, paragraph 2). The respondent may annex to his statement the documents on which he relies for his defense or may add a reference to the documents or other evidence he will submit.

3. In his statement of defense, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

4. The provisions of Article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

## Amendments to the claim or defense

### Article 20

During the course of the arbitral proceedings either party may amend or supplement his claim or defense unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

## Pleas as to the jurisdiction of the arbitral tribunal

### Article 21

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction over, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of Article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.

4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

## Further written statements

### Article 22

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defense, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

## Periods of time

### Article 23

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defense) should not exceed 45 days. However, the arbitral tribunal may extend the time-limits if it concludes that an extension is justified.

## Evidence and hearings

### Article 24

1. Each party shall have the burden of proving the facts relied on to support his claim or defencs.

2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts of issue set out in his statement of claim or statement of defense.

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

### Article 25

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

2. If witnesses are to be heard, at least 15 days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony.

3. The arbitral tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least 15 days before the hearing.

4. Hearings shall be held *in camera* unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.

5. Evidence of witnesses may also be presented in the form of written statements signed by them.

6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

## Interim Measures of Protection

### Article 26

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

## Experts

### Article 27

1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the experts terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

3. Upon receipt of the expert's report the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.

4. At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of Article 25 shall be applicable to such proceedings.

## Default

### Article 28

1. If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his statement of defense without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.

2.If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

## Closure of hearings

### Article 29

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

## Waiver of rules

### Article 30

A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

## Section IV.

## The award

### Decisions

**Article 31**

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

### Form and Effect of the Award

**Article 32**

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.

2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.

5. The award may be made public only with the consent of both parties.

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.

### Applicable Law, Amiable Compositeur

**Article 33**

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the

parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

2. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

## Settlement or other grounds for termination

### Article 34

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of Article 32, paragraphs 2 and 4 to 7, shall apply.

## Interpretation of the award

### Article 35

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.

2. The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award and the provisions of Article 32, paragraphs 2 to 7, shall apply.

## Correction of the award

### Article 36

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.

2. Such corrections shall be in writing, and the provisions of Article 32, paragraphs 2 to 7, shall apply.

## Additional award

### Article 37

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within 60 days after the receipt of the request.

3. When an additional award is made, the provisions of Article 32, paragraphs 2 to 7, shall apply.

## Costs

### Article 38

The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:

*(a)* The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with Article 39;

*(b)* The travel and other expenses incurred by the arbitrators;

*(c)* The costs of expert advice and of other assistance required by the arbitral tribunal;

*(d)* The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

*(e)* The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

*(f)* Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

**Article 39**

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.

3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.

4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

**Article 40**

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in Article 38, paragraph *(e)*, the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in Article 38 and Article 39, paragraph 1, in the text of that order or award.

4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under Articles 35 to 37.

## Deposit of costs

### Article 41

1. The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in Article 38, paragraphs *(a), (b)*and*(c)*.

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

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