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The Effectiveness of Compulsory Arbitration in the Settlement of Disputed Marine Insurance Claims: A Case Study of Saudi Arabia

Amer Daoud Marar

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College of Social Science

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ABSTRACT

Arbitration has an effective role in the settlement of commercial disputes. Legal practitioners in arbitration argue that it is more efficient, faster and economical than the litigation system. It is trite that investors gravitate towards emerging economies with effective legal framework. Saudi Arabia being an important shipping hub, its dispute resolution system is of paramount importance to investors particularly in respect of settlement of disputed marine insurance claims. The legal system of Saudi Arabia is principally moulded along the lines of *Sharia* law. There are, however, western-styled legislations regulating specific aspects of the Saudi Arabian legal system. The dual existence of *Sharia* laws and legislations led to the respective creation of *Sharia* courts and administrative committees for the settlement of disputes. This duality creates ambiguity, tension and chaos in the legal system thereby making settlement of disputed marine insurance claims difficult and unpredictable. The author believes in the effectiveness of compulsory arbitration as an efficient tool in resolving complex commercial disputes generally and as a result of the inherent complications of the present Saudi Arabian legal framework. This thesis, therefore, examines the present legal regime for the resolution of disputed marine insurance claims in Saudi Arabia and recommends the introduction of compulsory arbitration in light of the recently enacted Saudi Arbitration Law of 2012, the Enforcement Law of 2012 and the establishment of the Saudi Centre for Commercial Arbitration. The compulsory arbitration suggested by the author is a statutory obligation to arbitrate imposed on disputing parties as opposed to a pre-dispute arbitration agreement entered into by the parties. If introduced,

compulsory arbitration will create certainty in the marine insurance dispute resolution framework, which will invariably boost investors' confidence in the Kingdom. . In discussing the theme of this research, the laws governing marine insurance in Saudi Arabia, the validity of conventional forms of insurance under *Sharia* law and *Sharia* compliant forms of insurance will be considered. A comparison will also be undertaken between the old Saudi Arbitration Law of 1983 and the Arbitration Law of 2012 showing the improvement in the Saudi Arabian arbitration system and the areas where reforms are needed to ensure compatibility with international standards.

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ABBREVIATIONS

AAA:	American Arbitration Association
ADR:	Alternative Dispute Resolution
Arab Convention 1952:	The Arab League Convention 1952
Arbitral Tribunal:	Includes sole arbitrator where the context permits
BIT:	Bilateral Investment Treaties
CCL	Commercial Court Law of 1931
CIETAC	China International Economic and Trade Arbitration Commission
CRCICA	The Cairo Regional Centre for International Commercial Arbitration
DIS	The German Arbitration Institute
ECOSOC	United Nations Economic and Social Council
IBA	International Bar Association
ICC:	International Chamber of Commerce
ICCA:	International Council for Commercial Arbitration
ICDR:	International Centre for Dispute Resolution
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Dispute, 1980
ILR:	International Law Reports
LCIA:	London Court of International Arbitration
Lloyd's Rep:	Lloyd's Law Reports

New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
RCICAL	Regional Centre for International Commercial Arbitration, Lagos
SCAI	Swiss Chambers' Arbitration Institution
SCCA	Saudi Centre for Commercial Arbitration
SIAC	Singapore International Arbitration Centre
UK:	The United Kingdom
UNCITRAL:	United Nations Commission on International Trade Law
WTO:	The World Trade Organization

TABLE OF CASES

- *Gregory v Philip Morris Ltd* [1988] 80 ALR 455.
- *Hainan Machinery Import & Export Corporation v Donald & McArthy Pte Ltd.* [1996] 1 SLR 34.
- *Hall Street Associates, L.L.C v Mattel, Inc* 552 US 576 (2008).
- *Harbour Assurance Co (UK) Ltd. v Kansa General International Insurance Co Ltd.* [1993] 3 All ER 897.
- *Hebei Import & Export Corp v Polytek Engineering Co Ltd.* [1999] 1 HKLRD 665.
- *Intertec Contracting A/S (Denmark) et. al. v Turner Steiner Int'l, SA (USA) et. al.* [2001] YBCA, Vol XXVI, 949.
- *Jadawel International (Saudi Arabia) v. Emaar Property* PJSC (UAE).
- *LG Caltex Gas Co Ltd v China National Petroleum Corporation* [2001] EWCA Civ, 788, [2001] 4 All ER 875.
- *Local 170 v Gadda*, 322 Mich. 322, 34 N.W. 2d 71.
- *Long Island College Hospital v Catherwood* [1967] 287 NYS 313.
- *Lucky Goldstar Int'l (HK) Ltd v Ng Moo Kee Eng Ltd*., YBCA, 1995, Vol XX, 280
- *Marriot Int'l Inc v Ansal Hotels Ltd*. YBCA, 2001, Vol XXVI, 788.
- *Matermaco SA v PPM Cranes Inc and Others* - Decision issued by the Tribunal de Commerce, Brussels of 20 September 1999, 2000, Vol XXXV, 673.
- *McCarthy v Azure* 22 F.3d 351 (1st Cir. 1994).
- *McKnight v Chicago Title Ins. Co.* 358 F.3d 854 (11th Cir. 2004).
- *Northern Ins. Co. of N.Y. v Ekstrom* 784 P.2d 320, 323 (Colo. 1989).

- *Petroleum Dev (Trucial Coast) Ltd v Sheikh of Abu Dhabi* (Award of 28 August 1951), Reprinted in (1952) 1 International and Comparative Law Quarterly 247, [1951] 18 I.L.R. 144.
- *Prima Paint Corp v Flood and Conklin Mfg Co* 388 US 395 (US S Ct 1967).
- *SPP v Egypt* (1983) 22 ILM 752.
- *State (Van Riper) v Traffic Telephone Workers Federation* [1949] 2 NJ 335, 66 A2d 616.
- *Sulamerica v Enesa* [2012] EWCA Civ 638.
- *Texas Overseas Petroleum Co. v The Gov't of the Libyan Arab Republic* [1979] 53 ILR 389.
- The factory at Chorzow (Ger. v. Pol.), 1927 (ser. A) No. 17.
- *Twin City Fire Ins. Co. v Delaware Racing Ass'n* 840 A.2d 624, 630 (Del. 2003).
- *United States Department of Treasury v Fabe* 508 U.S. 491 (1993).
- *Vee Networks Ltd v Econet Wireless International Ltd.* [2004] EWHC 2909 (Comm), [2005] 1 Lloyd's Rep 192.
- *Wise v Pressed Steel Car Company* [1909] 19 Dist. 112.

TABLE OF STATUTES AND STATUTORY INSTRUMENTS

Saudi Arabia

- Approval of the Working Rules and Procedures of the Insurance Disputes and Violations Settlement Committees (issued by Resolution No. 190 dated 9/5/1435H).

- Arbitration Law (issued by Royal Decree No. M/46 of 12/07/1403H (14 September 1983).

- Basic Law of Governance (Royal Order No. (A/91) 27 *Sha'ban* 1412H – 1 March 1992).

- Board of Grievances Procedural Rules (issued by Council of Ministers Resolution No. 190, 16 *Dhu al-Qa'dah* 1409H – 19 June 1989).

- Board of Grievances Statute (issued by Royal Decree No. M/51, 17/7/1402 AH - 11 May 1982).

- Charter of the Saudi Arabian Monetary Agency (issued by Royal Decree No. 23 dated 23-5-1377).

- Code of Practice (issued by Royal Decree No. (M/38) 28 Rajab 1422 - 15 October 2001).

- Commercial Court Law (issued by Royal Decree No. 32 dated 15/1/1350) (1931).

- Companies Law (issued by Royal Decree No. (M/6) dated 23/3/1385H).

- Cooperative Insurance Companies Control Law (issued by Royal Decree No. M/32 2 *Jumada* II1424 – 31 July 2003).

- Foreign Investment Law (issued by Royal Decree No. M/1 5 *Muharram* 1421 – 10 April 2000).

- Law of Arbitration (issued by Royal Decree No. 3/34 dated 24/5/1433H – 16 April 2012).

- Law of Judiciary (issued by Royal Decree No. (M/78) on 19 Ramadan 1428H – 1 October 2007).

- Law of Procedure before Shari'ah Courts (issued by Royal Decree No. (M/21) 20 Jumada I 1421 – 19 August 2000).

- Rules for the Implementation of the Saudi Arbitration Regulation (issued by the Council of Ministers Resolution No. 7/2021/M. dated 8/9/1404).

- Royal Decree of 12/7/1373 AH (1954) (Establishing the Board of Grievances as a Department in the Council of Ministers).

- Royal Decree No. 2/13/8759 dated 17/9/1379 (1955) (Separating the Board of Grievances from the Council of Ministers).

- Royal Decree No. (M/5) of 17.4.1405H (establishing the Company for Cooperative Insurance (*Tawuniya*)).

- The draft Government Tenders and Procurement Law.

- The Law of the Judiciary (issued by Royal Decree No. (M/64) of 14 *Rajab* 1395 – 23 July 1975).

- The Regional Law (issued by Royal Order No. A/91 (27/8/1412H – 1 March 1992).

- The Saudi New Enforcement Law (issued by Royal Decree No. M/53 of 13 *Sha'ban* 1433 *Hejra* - 3 July 2012).

- The Saudi Centre for Commercial Arbitration (issued by Cabinet Decree No. 257 dated 14/6/1435 H – 13 March 2014).

- The Shura Council Law (issued by Royal Order No. A/91, (27/8/1412H - 1 March 1992).

Conventions

- European Convention on International Commercial Arbitration [1961].

- Organisation of the Islamic Conference, Charter of the Islamic Organisation of the Islamic Conference (1 February 1974).

- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards [1958].

- The Convention of Arab League Countries [1954].

- The United Nations Economic and Social Council, Draft Convention on the Enforcement of Foreign Arbitral Awards (UN Doc E/2704 and Corr 1).

- UNCITRAL Model Law on International Commercial Arbitration [1985] (with amendments as adopted in 2006).

CHAPTER ONE

INTRODUCTION

1.1 THE ECONOMY OF SAUDI ARABIA

The petroleum sector in Saudi Arabia consequently became the mainstay of the Saudi Arabian economy. The petroleum sector is said to account for 92.5% of Saudi Arabia's budget revenue, 90% of export earnings, and 55% of gross domestic product.[1] Saudi Arabia holds 25% of the world's oil reserves and is the biggest oil exporter worldwide[2]. With its petroleum windfall, the government of Saudi Arabia developed other industries and infrastructure projects.[3]. The government, however, aims at reducing its over-reliance on oil and diversify the Saudi Arabian economy.

To achieve economic diversification, the government set up a five-year development plan to invest its petroleum revenue into other sectors of the economy, including the shipping industry. The government of Saudi Arabia consequently invested more than US$30 billion in ports projects and the shipping sector in Saudi Arabia. The government also established the National Shipping Company of Saudi Arabia (Bahri) by a Royal Decree in 1978.[4] Alongside the development of a functional shipping industry, the development of an efficient insurance industry, especially marine insurance, is fundamental. Marine insurance is essential because it hedges against the diverse risks and the subsequent impact of large losses inherent in the shipping industry.

1.2 THE IMPACT OF SAUDI ARABIA JOINING THE WORLD TRADE ORGANISATION

As part of its efforts to diversify the economy, the Saudi Arabian government acceded to the World Trade Organization ("**WTO**") in 2005 to boast foreign

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[1]<http://www.sama.gov.sa/sites/samaen/ReportsStatistics/ReportsStatisticsLib/5600_R_Annual_En_48_2013_02_19.pdf> accessed on 17 December 2014.
[2] Marcus Machin, 'Finance and Investment in Shipping' (Maritime Saudi Arabia conference, Jeddah, 30 May – 1 June 2010).
[3]World Trade Organization, Trade Policy Review: Saudi Arabia (January 2012) < https://www.wto.org/english/tratop_e/tpr_e/tp356_e.htm > accessed on 31 March 2014.
[4]< *http://www.bahri.sa/about-us*> accessed on 17 December 2014.

direct investment in Saudi Arabia. Saudi Arabia's membership in the WTO has resulted in improvements and developments of all aspects of the country's economy and also led to stable relations with the other WTO members. Further, progress in the insurance market, evidenced by increase in licensing of insurance companies, became noticeable after Saudi Arabia joined the WTO. The stability of Saudi Arabia's insurance market would endure for many years. Presently, the percentage of foreign investment in Saudi insurance companies is 91%[5].

Since joining the WTO, the government of Saudi Arabia has taken active steps to improve the Saudi Arabia legal and judicial systems as a critical part of its economic development and modernisation efforts geared towards achieving continuous economic growth. Currently, Saudi Arabia is under different stages of legislative reforms to ensure compatibility with the legal framework of other WTO members. The ongoing reformation of the judicial system and the enactment of the Arbitration Law of 2012 are inextricably linked to Saudi Arabia's membership of the WTO. It is a fact that investors are usually interested in the legal system and dispute resolution mechanism of the country they intend to invest in, which made it critical for the government to take steps to mitigate the legal risks in connection with doing business in Saudi Arabia. No doubt, Saudi Arabia's membership of the WTO will lead to expanded trade regime and participation in global economic matters. This thesis will examine the impact of Saudi Arabia's membership of the WTO on the insurance industry.

1.3 THE SAUDI ARABIAN LEGAL SYSTEM

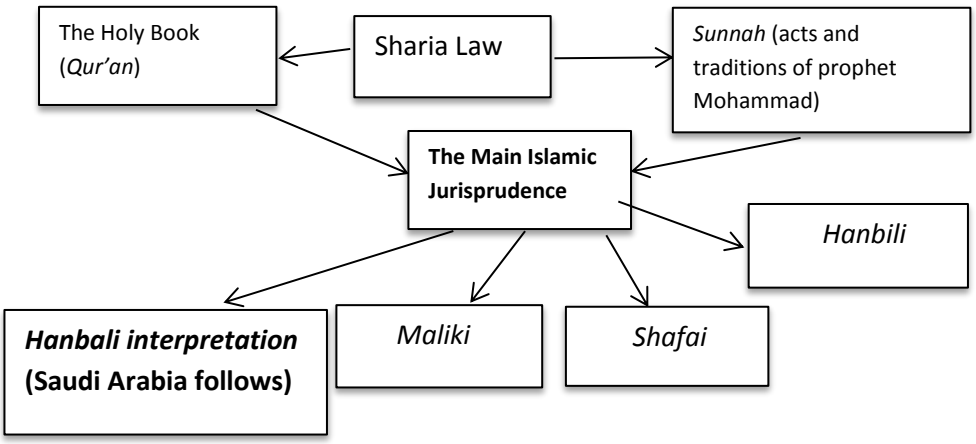
The legal system of Saudi Arabia is based on *Sharia* Law. *Sharia* is considered to be the country's constitution. Article 1 of the Basic Law of Governance states that: "*the Kingdom of Saudi Arabia is a fully sovereign Arab Islamic State. Its religion shall be Islam and its constitution shall be the book of God and Sunnah (Traditions) of His Messenger, may God's blessings and peace be upon him (PBUH*)". *Sharia* law is based on the Holy Qur'an and the *Sunnah* (acts and traditions) of the Prophet Mohammad. Although Islamic law is based on the Holy Qur'an as well as the traditions of the

[5] World Trade Organisation (n 3).

Prophet Muhammad, Islamic jurisprudence has a considerable effect on the interpretation of Islamic laws. The *Hanbali, Hanafi, Shafai and Maliki* schools are the main schools of Islamic Jurisprudence. The courts of Saudi Arabia usually follow the *Hanbali* School.

Sharia law being the grundnorm of the Saudi legal system, issued laws and regulations (whether by Royal Decrees or Ministerial Resolutions) to be valid, must adhere to the principles of *Sharia* law. The King, though bound by *Sharia,* is the apex arm of the legal system. Saudi Arabia is an absolute monarchy with no written constitution defining the limit of the authorities' powers. Political power is Saudi Arabia is exercised according to the Holy Qur'an and the King's decision.[6]

The diagram below shows the origin of Islamic Law:



1.3.1 Implementation of Regulations in Saudi Arabia:

As already noted, Royal Decrees and Ministerial Resolutions are implemented in Saudi Arabia on the basis that they do not conflict with the elements of *Sharia.* The authorities in Saudi Arabia have been outlined and delineated into the judicial authority, executive authority and the legislative authority[7]. However, it should be noted that there is no separation of power

[6] El-Ahdab Abdul Hamid, *Arbitration with the Arab Countries* (Kluwer Law International 2011).
[7] *See* the following: Basic Law of Governance (Royal Order No. (A/91) 27 Sha'ban 1412H – 1 March 1992); the Regional Law (issued by Royal Order No. A/91 (27/8/1412H – 1 March 1992); Shura Council Law (issued by Royal Order No. A/91, (27/8/1412H - 1 March 1992).

between the legislative authority and the executive authority[8]. The separation of power practiced in Saudi Arabia is markedly different from the European model which places the executive powers first, followed by the legislative powers and then the judicial powers. The Saudi model places the judicial authority first, followed by the executive and legislative authorities.[9]

The King, as the supreme power over the kingdom, can amend, enact and approve regulations by issuing Royal Decrees. The Council of Ministers[10] and the Consultative Council[11] are required to review any resolution or decree that seeks to issue or implement regulations, international treaties and conventions, concessions, the budget or taxes before presenting same to the King. The King, however, has the power to either approve or reject any such resolution or decree submitted to him[12]. Should the King neither approve a resolution or decree nor object to it within thirty days, the Prime Minister may take necessary steps to implement the resolution or decree. If the King does not approve the resolution or decree, he may refer it back to the Council of Ministers, giving reasons for his objection(s).[13] Approved resolutions and decrees are published in the official Gazette (*Umm- al-Qura*) stating the commencement date.

1.3.2 Duality in Saudi Arabia:

Duality means a system within a system. The meaning of duality is "*the division of something conceptually into two opposed or contrasted aspects*".[14] There is inherent duality in Saudi Arabia, including the legal system. The legal system of Saudi Arabia is based on *Sharia* law on the one hand and issued decrees and ministerial resolutions or practices of other developed countries provided they are not prohibited by *Sharia* law on the other hand.

[8] Gregory Gause, *Oil Monarchies: Domestic and Security Challenges in the Arab Gulf States* (Council on Foreign Relations Press 1994).
[9] El-Ahdab (n 6) 569.
[10] The Council of Ministers is headed by the Crown Prince who is akin to the Prime Minister. The Council *inter alia* directs the national and foreign policy of Saudi Arabia. It also holds legislative and executive powers.
[11] The Consultative Council has quasi-legislative power. It does not enact laws but studies the laws and upon request makes non-binding opinions on general political questions.
[12] (n 7).
[13] El-Ahdab (n 6) 597-601.
[14] Judy Pearsall, *The Concise Oxford Dictionary* (OUP 1999).

The general issue of duality in Saudi Arabia and in relation to the insurance sector will be considered in chapter six of this thesis.

1.3.3 The Court System:

Prior to the judicial reform in 2007, the Saudi court system consisted of three main parts. The first category and the largest is the *Sharia* courts divided into the Courts of the First Instance or General Guardianship, the Supreme Judicial Council and the Court of Cassation. The *Sharia* courts generally have jurisdiction over all civil claims and criminal matters, except for claims and matters the jurisdiction for which has been reserved to one of the other adjudicatory bodies. The second category is the Board of Grievances (*Diwan-al-Mazaalim*). The Board of Grievances has jurisdiction over all disputes where the government is a party and commercial matters. The Board of Grievances also has jurisdiction over some criminal cases, such as bribery and forgery, and acts as a court of appeal for some non-*Sharia* government tribunals. The third category is the administrative judiciary committees within ministries with quasi-judicial powers that address specific disputes. The jurisdictions of these committees are determined by their constitutive regulations.[15] Basically, the Saudi Arabian court system was divided between *Sharia* courts and governmental boards.[16]

In April 2005, a Royal Decree was approved for the re-organization of the judicial system. On October 1, 2007, another Royal Decree[17] was issued for the judiciary. The decrees essentially re-organised the judicial system in Saudi Arabia based on the nature of disputes. The changes include the establishment of a Supreme Court and special commercial, labour, criminal and family courts.

Presently, the Board of Grievances adjudicates most commercial matters. However, the jurisdiction of the Board of Grievances over commercial matters will be transferred to the commercial courts when they are

[15] *http://www.saudiembassy.net/about/country-information/government/legal_and_judicial_structure.aspx* accessed on 18 December 2014.
[16] El-Ahdab (n 6) 603.
[17] Law of Judiciary (issued by Royal Decree No. (M/78) on 19 Ramadan 1428H – 1 October 2007).

established. In this research, the role of the Board of Grievances in relation to arbitration will be discussed.

In terms of court process, judges apply *Sharia* law. The elements of *Sharia* being fairness and good faith, the courts will not enforce any unjust duties imposed by the parties in their contractual relationship. In effect, although the doctrine of freedom of contract is recognised because contracting parties are free to negotiate the terms of their contracts, the court will not enforce terms that are prohibited and/or relate to activities that are prohibited under *Sharia* law.[18]

Unlike their contemporaries in common law countries, there are no pre-determined principles (except *Sharia*) guiding Saudi Arabian judges when adjudicating cases due to the absence of the doctrine of *stare decisis.* This lack of judicial precedents inevitably results in conflicting decisions and uncertainty in the legal process. Further, judges lack the expertise required to adjudicate cases founded on complex subject matters like marine insurance. The lack of judicial precedents and expertise in handling marine insurance disputes makes a strong case for the introduction of compulsory arbitration in the marine insurance industry as canvassed in this thesis.

1.4 INSURANCE IN ISLAMIC THEORY

Insurance plays a critical role in emerging economies in particular and in the world's economy generally. Stemming from the importance of insurance to economic development, the validity of conventional insurance vis-à-vis the tenets of *Sharia* became a major topic in Islamic Jurisprudence.

Sharia prohibits commercial insurance on the ground that commercial insurance contains the following prohibited elements: *riba*, *gharar* and *maisir*. These elements will be discussed along with the views of the jurists in the sixth chapter.

[18] Marwan Elaraby, Sultan Almasoud, Sanjarbek Abdukhalilov, Alexander Bevan, Iain Elder, Brendan Hundt and Matthew Powell, 'Saudi Arabia: Introduction to the Legal System of the Kingdom of Saudi Arabia' <*http://www.al-maarifa.shearman.com/sitefiles/14111/introduction%20to%20the%20legal%20system%20of%20the%20kingdom%20of%20saudi%20arabia.pdf* > accessed on 14 December 2017.

1.5 INSURANCE IN SAUDI ARABIA

The awareness of commercial insurance in Saudi Arabia was prohibited in the eyes of Islamic scholars. Judges in courts refused and avoided handling insurance cases due to their beliefs that it is against the principles of *Sharia* law. Moreover, the National Company for Cooperative Insurance was also established by Royal Decree in 1986[19]. Thereafter, first Saudi Arabian law regulating insurance was issued in 2003 as the Cooperative Insurance Companies Control Law.[20]

As with its legal system, Saudi Arabia's insurance industry is also based on duality which will be discussed in the six chapter.

1.5.1 Marine Insurance in Saudi Arabia:

Marine insurance is a centuries-old aid to the conduct of sea trade. It relieves the shipowner, buyer and seller of goods from the burdensome financial consequences of their property being lost or damaged as a result of the various risks of the high seas. Marine insurance therefore gives financial security so that the risk of an accident occurring leading to losses is not an inhibiting factor in the conduct of international trade.[21] Generally, marine insurance can be divided into commercial insurance and mutual insurance. Commercial insurance is for profit whilst mutual insurance is for the collective benefit of the members.[22] As noted previously, commercial insurance is prohibited by Islam. Mutual insurance is akin to the *takaful* and *retakaful*. It involves a group of persons or companies agreeing in advance to contribute to offset each other's losses. That is, members of the group act as insurers for themselves.[23]

Saudi Arabia practices the mutual form of marine insurance. The Saudi Arabian law on marine insurance is contained in the Commercial Court Law ("**CCL**") introduced in 1931. Curiously, however, there were no provisions

[19] Royal Decree No. (M/5) of 17.4.1405H (establishing the Company for Cooperative Insurance (Tawuniya)).
[20] <http://www.saudilegal.com/saudilaw/14_law.html> accessed on 22 December 2014.
[21] United Nations Conference on Trade and Development, *Legal and documentary aspects of the marine insurance contract* (United Nations Publication, TD/B/C.4/ISL/27/Rev.1, 1982) <http://unctad.org/en/PublicationsLibrary/c4isl27rev1_en.pdf> accessed on 30 December 2014.
[22] Ibid.
[23] Ibid.

on general insurance practice. It is the opinion of the writer that the provisions of the CCL on marine insurance were introduced as a result of the dual nature of the Saudi Arabian legal system.

A marine insurance contract in Saudi Arabia is required to be in writing, in the form of a policy but need not be in a particular form. The policy must contain details directly relevant to the parties and known to them. This requirement is to prevent the contract being regarded as containing an element of *gharar* (uncertainty).[24] There are different forms of marine insurance contracts and covers available.

On the conclusion of the contract, the insurer is obliged to indemnify the insured in respect of losses which the insured may suffer as a result of the risks covered under the policy.

1.5.2 The Establishment of Regulated Body for Insurance in Saudi Arabia:

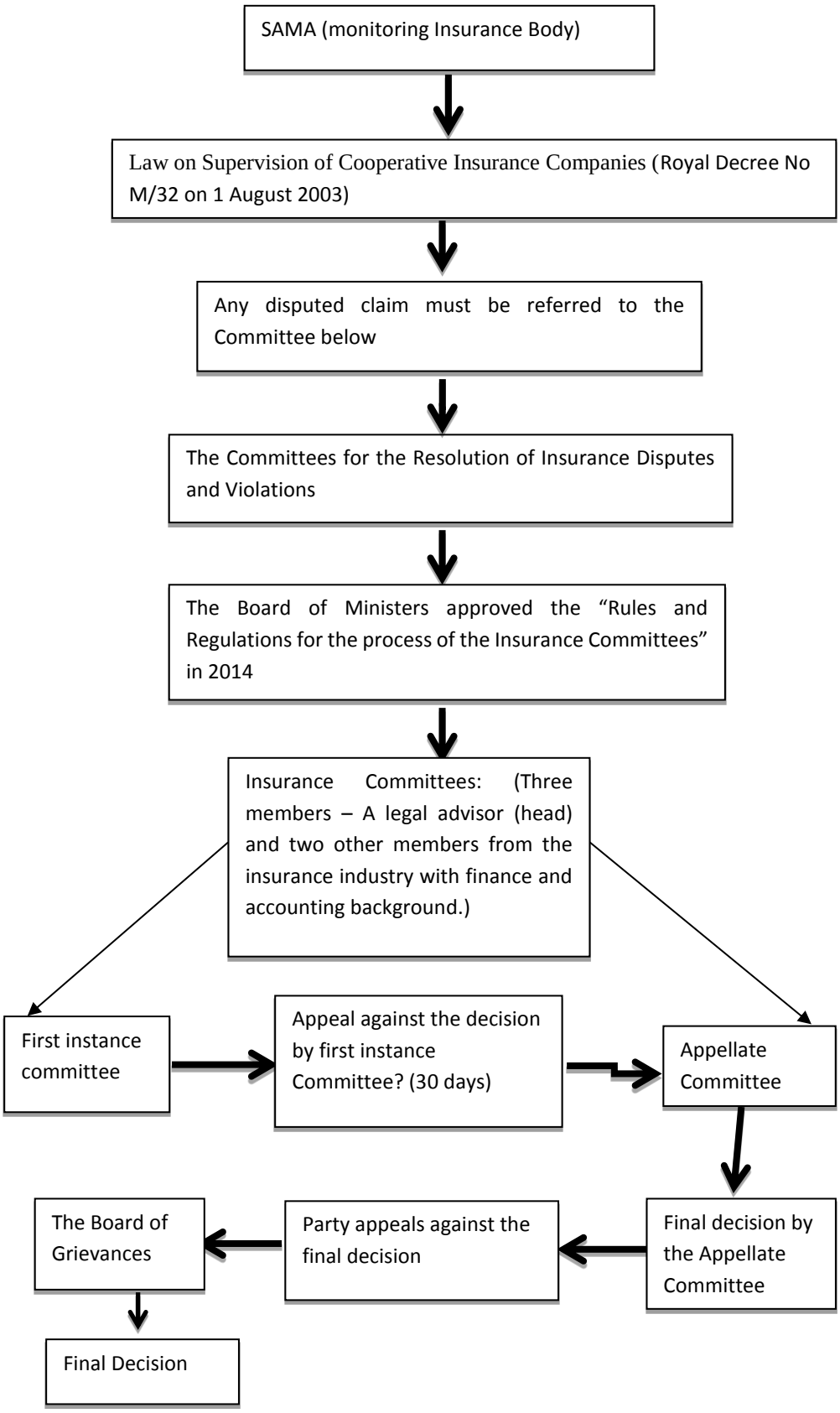
Pursuant to the Cooperative Insurance Companies Control Law 2003, the Saudi Arabia Monetary Agency ("**SAMA**") became the body with the power to supervise the insurance industry in Saudi Arabia.[25] The SAMA in performance of its functions issued regulations to monitor the insurance industry and to control the market in line with the principles of *Sharia* law. This regulation of the insurance industry was a requirement from the WTO. The WTO required intending member states to control certain industries in order to join the organization. With the regulation of insurance, came the need to reform the dispute resolution process to ensure efficient resolution of disputed marine insurance claims. The regulation of the Saudi insurance market has led to critical progress in the Saudi insurance industry. Insurance companies are obliged to be listed on the Saudi Stock Exchange and must comply with Islamic law cooperative insurance model.

[24] Andreas Haberbeck and Mark Galloway, *Saudi Shipping Law* (Fairplay Publications Ltd. 1990).
[25] <http://www.sama.gov.sa/sites/samaen/AboutSAMA/Pages/SAMAHistory.aspx> accessed on 22 December 2014.

1.5.3 The Committee for the Resolution of Insurance Disputes and Violations:

The Committee for the Resolution of Insurance Disputes and Violations (the "**Committee**") was set up to solve any dispute that may arise between parties in the insurance industry. New rules were introduced for this Committee in 2014.[26] These rules explain how the Committee should operate in the adjudication of disputes. Documents to be presented to the Committee, must be written in Arabic[27]. The rules explain the requirements for filing a claim. Article 9 of the rules is a ground-breaking provision in Saudi legal system. As previously noted, unlike common law jurisdictions, there is no doctrine of *stare decisis* in Saudi Arabia. However, Article 9 of the rules gives the Committee power to take into account established comparative jurisprudence in resolving disputes. Therefore, the Committee can refer to its previous decisions or decisions of other jurisdictions provided they are consistent with *Sharia* and the rules of cooperative insurance.[28] Notwithstanding, the Committee's processes are cumbersome and its decisions are not binding and may still be appealed against to the Board of Grievances. This thesis therefore examines the Committee's dispute resolution method and recommends the introduction of compulsory arbitration in marine insurance contracts. The following diagram highlights how disputes are resolved through the machinery of the Committee.

[26] Approval of the Working Rules and Procedures of the Insurance Disputes and Violations Settlement Committees (issued by Resolution No. 190 dated 9/5/1435H).
[27] ibid, art. 3.
[28] Mark Beswetherick and Saud Alsaab, 'The new SAMA Insurance Dispute Committee Rules in the Kingdom of Saudi Arabia' <https://www.clydeco.com/insight/article/the-new-sama-insurance-dispute-committee-rules-in-the-kingdom-of-saudi-arab> accessed on 22 December 2014.


SAMA (monitoring Insurance Body)
Law on Supervision of Cooperative Insurance Companies (Royal Decree No M/32 on 1 August 2003)
Any disputed claim must be referred to the Committee below
The Committees for the Resolution of Insurance Disputes and Violations
The Board of Ministers approved the "Rules and Regulations for the process of the Insurance Committees" in 2014
Insurance Committees: (Three members – A legal advisor (head) and two other members from the insurance industry with finance and accounting background.)
First instance committee
Appeal against the decision by first instance Committee? (30 days)
Appellate Committee
Final decision by the Appellate Committee
Party appeals against the final decision
The Board of Grievances
Final Decision

1.6 THE LINK BETWEEN INSURANCE INDUSTRY AND ARBITRATION

Insurance is essential in the shipping industry, and there are increasing number of risks associated with international trade and additional covers in marine insurance, which in turn provides more grounds and likelihood for claims and subsequent disputes. Arbitration is the most expedient and cost-effective method for resolving such disputes. This is because it encourages fast resolution for the purposes of trade and investment and helps in maintaining good business relations. Arbitration is basically a user-friendly forum for dispute resolution and ensures confidentiality which is appreciated by the investing public. The concept of arbitration is to provide a solution for the parties without involving national courts in order to solve a dispute[29]. The English Arbitration Act, 1996, s. 1(a), for example says that: "*the object of arbitration is to obtain the fair resolution of dispute by an impartial tribunal without unnecessary delay or expense*".

Over the decades, the UNCITRAL Model Law and its Rules were introduced to guide international commercial arbitration and it was subsequently adopted by many nations worldwide. These set of laws defines clearly the procedure for arbitration in order to have a coherently and uniform set of arbitration rules amongst nations. There are also the arbitration rules of the International Chamber of Commerce ("**ICC**"), London Court of International Arbitration ("**LCIA**"), American Arbitration Association ("**AAA**") and International Centre for Dispute Resolution ("**ICDR**"). In addition, the New York Convention was introduced in 1958 to aid enforcement of foreign arbitral awards. Arbitration agreements can follow institutional arbitration rules such as ICC, LCIA, AAA or ICDR as agreed by the parties but there are enforcement difficulties especially in respect to compliance with public policy. The national courts of the country where the award is to be enforced may refuse enforcement on the ground that such an award is contrary to its public policy. A case in point is Saudi Arabia, the enforcement of a foreign

[29] Lew Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003).

arbitral award may be refused on the ground that the award conflicts with the principles of *Sharia.*

Since the Saudi Arabian oil boom in the 1930s, there has been increased presence of international companies in the Saudi economy, particularly insurance companies owing to the insurance and reinsurance of oil facilities and exports. Hence, the author's arguments for the introduction of compulsory arbitration since most investors are unfamiliar with *Sharia* law applied by national courts and the need for such decisions to reflect commercial realities.

1.6.1 ***Shari'a* Law in Relation to Dispute Resolution:**

Sharia law has a significant impact on the role of arbitration.[30]. Islam has inspired parties to utilise amicable settlement when there is a dispute between them, regardless of the dispute. Where a dispute is submitted for litigation or arbitration, the arbitrator or judge has a responsibility to recommend that the parties explore amicable settlement in resolving the dispute. It should be emphasised that amicable settlement is considered to be a significant method for dispute resolution in Islam[31]. Further, it has been argued that arbitration is firmly rooted in the middle east as a means of dispute resolution in the pre-Islamic *jahliyya* period and was reaffirmed by Prophet Muhammad in the Quran as follows:[32] "*No, by the Lord, they can have no real faith until they make you the arbitrator of all their disputes between them and until they find in their souls no resistance to your decisions, but, rather, accept them with their fullest conviction*."[33] The Treaty of Madinah signed in 622 A.D. amongst Muslims, non-Muslims Arabs and Jews called for disputes to be resolved through arbitration.[34]

In resorting to arbitration, non-Muslims have the option to choose *Sharia* law as the *lex arbitri.* Islam does not prevent any party from such a choice.

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[30] Saleh Samir, *Commercial Arbitration in the Arab Middle East* (2nd edn, Lexgulf Publishers Ltd. 2012).
[31] Aseel Al-Rahmani, 'Sulh: A Crucial Part of Islamic Arbitration' (2008) 12 London School of Economics Research Paper 1 < http://ssrn.com.abstract=1153659 > accessed on 14 December 2014.
[32] Jean-Pierre Harb and Alexander G. Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a' (2013) 30 Journal of International Arbitration, 2, 113.
[33] Qura'n, 4:65.
[34] Dale Stepheson, Carol Welu and Paul Oxnard, International arbitration of commercial disputes involving parties from Saudi Arabia and the GCC (Financier Worldwide 2011).

However, such party is required to have the knowledge and background of utilising the rules and laws that are based on *Sharia* law.

Another point to consider is the arbitrators' qualifications. The arbitrators' qualifications remain a thorny issue. The fundamental question is whether the arbitrator has to be a male and a Muslim? *Sharia* law stipulates that the arbitrator must be a male Muslim who has the qualifications of a judge[35]. The requirement that the arbitrator has to be a Muslim will be examined as parties may intend to select an arbitrator who is a non-Muslim with the requisite level of expertise in the relevant sector.

1.7 ARBITRATION DEVELOPMENT IN SAUDI ARABIA

Arbitration has been in use in Saudi Arabia from the inception of the modern kingdom notwithstanding the lack of an arbitration decree.[36] Arbitration was the primary means for the resolution of disputes between the government and the foreign oil companies. In 1963, however, Approval from the Council of Minister of the government of Saudi Arabia must be obtained by the government agencies in order to utilise arbitration as a mechanism, or permission by a legal enactment because of the case of *Aramco v Saudi Arabia.*[37] Arbitration was thus confined to the private sector. In the *Aramco's* case, the arbitrator concluded *inter alia* that the principles of *Sharia* law have their limitation and may not be considered in the resolution of disputes involving complex commercial transactions. The award made the Saudi Government to distrusts arbitration. The government's distrust of arbitration was founded on the belief that the international framework for arbitration as developed does not take into consideration the core religious foundation, cultural values, language and legal traditions of Islam and the Arab world.[38] Furthermore, by the award, non-Muslims became sceptical as to making

[35] This is also reiterated in *The Mejelle*, art. 2092. See Effendi Ismail, CR Tyser DG Demetriades (tr), The Mejelle (Law Publishing Company 1967). However, the Saudi administrative Court of Appeal recently confirmed an arbitral tribunal constituted with a female arbitrator. This is a milestone as the arbitrator became the first Saudi female arbitrator in the field of commercial disputes. This confirms the gender-neutral stance of the Arbitration Law of 2012. See Craig Shepherd, 'Middle East arbitration highlights from 2016 and trends for 2017' < http://hsfnotes.com/arbitration/2016/12/20/middle-east-arbitration-highlights-from-2016-and-future-trends-for-2017/#page=1 > accessed on 2 April 2018.
[36] Saleh (n 30) 114.
[37] (1963) 27 ILR 117.
[38] Dale, Carol and Paul (n 34).

Sharia law the *lex arbitri* when it might not be recognised as applicable to complex commercial transaction.

Arbitration was being used in private transaction in accordance with the CCL. Notwithstanding, the Board for the Settlement of Commercial Disputes[39]continuously nullified any effect of an arbitration clause on the basis of the theoretical aspect of arbitration agreements. The argument was that arbitration clauses and agreements were speculative in nature because they agree on the means of settling disputes before its occurrence. On the other hand, "institutional arbitration occurred through the rules of the Saudi Arabian Chamber of Commerce with no ability to choose an alternate institution".[40] The reasoning of the Board and the mandatory nature of the rules of the Chamber of Commerce essentially curtailed the rights of disputing parties to resort to arbitration as a means of ventilating their grievances. The Arbitration Law of 1983 and Arbitration Law of 2012 were issued to improve the arbitration regime in Saudi Arabia.

Despite the government's distrust for arbitration, Saudi Arabia has been associated with supporting the use of arbitration as a dispute resolution mechanism. The Saudi government has implemented laws and set-out rules governing arbitration. Saudi Arabia is a signatory to the Convention of Arab League Countries 1954 and also approved the convention for International Centre for the Settlement of Investment Disputes (the "**ICSID**") in 1980. However, the government excluded matters in relation to petroleum agreements and national sovereignty. Thereafter, the government signed the Riyadh Convention on Judicial Cooperation in 1983 in order to replace the previous rules for enforcing judgments and awards as an Arab unit.[41]In 1987, the Amman Convention on Commercial Arbitration aimed at facilitating the arbitration process and enforcements of awards between those members in the Middle East was approved by Saudi Arabia. In 1993, GCC Arbitration Centre[42]was established by the GCC member states[43].

[39] The Board is a *Sharia* court established in 1965 with jurisdiction over arbitration.
[40] Saleh (n 30) 114-115.
[41] The Convention of Arab League Countries, 1954.
[42] For more details on the GCC Commercial Arbitration Center, see Muteb Al-Eshiwy, *Arbitration Regulations in the Gulf Co-operation Council (GCC) States* (The University of Exeter 1997) <http://www.gccarbitration.net > accessed on 18 December 2016.
[43] GCC Members are Bahrain, Qatar, Oman, Kuwait, Saudi Arabia and the United Arab Emirates.

The first exclusive Saudi Arabian arbitration law was issued on 25 April 1983[44]. Thereafter, the rules for the implementation of the Arbitration Law of 1983 were introduced.[45]. Saudi Arabia also ratified the New York Convention on 19 April 1994**.** Furthermore, a new arbitration law was issued on 16 April 2012[46]. The Arbitration Law of 2012 which is largely based on the UNCITRAL Model Law resulted in significant developments in arbitration and addressed the shortcomings of the Arbitration Law of 1983.

The reason for the reformation of the Saudi arbitration system can be linked to Saudi Arabia's membership of the WTO and the competition for foreign investment between members of the Gulf States particularly Saudi Arabia and United Arab Emirates. The United Arab Emirates has provided arbitration laws and centres to attract foreign investors. For example, the Dubai International Financial Centre and the London Centre for International Arbitration partnered in the establishment of an arbitration centre in the UAE. The DIFC Arbitration Law 2008 (based on the UNCITRAL Model Law), was also introduced as a legislative platform for comprehensive dispute resolution.[47] Also, the Dubai International Arbitration Centre (DIAC) was created in 1994 "*as a means to supply facilities for conducting commercial arbitration, promoting the settlement of disputes by arbitration, as well as developing a pool of arbitrators in the practice of international arbitration.*"[48] Similarly, Bahrain partnered with the American Arbitration Association to establish the Bahrain Chamber of Dispute Resolution.[49]

In order not to be left behind by its peers in the Gulf region, the Council of Ministers in 2014 issued a resolution establishing the SCCA[50] to administer arbitration procedures in civil and commercial disputes[51]. The establishment of the arbitration centre will provide a forum for the resolution of disputed marine insurance claims if compulsory arbitration is introduced. In relation to enforcement of arbitral awards - particularly foreign arbitral awards - a

[44]Arbitration Law (issued by Royal Decree No. M/46 of 12/07/1403H (24 April 1983).
[45]The Rules for the Implementation of the Arbitration Regulation (issued by Ministerial Resolution No. 7/2021/M of 8/9/1405H – 27 May 1985).
[46]Law of Arbitration (issued by Royal Decree No. 3/34 dated 24/5/1433H – 16 April 2012).
[47]<http://www.difcarbitration.com/law/index.html> accessed on 23 December 2014.
[48] <http://www.diac.ae/idias/services/diac/> accessed on 23 December 2014.
[49] Dale, Carol and Paul (n 34).
[50] <http://www.kslaw.com/imageserver/kspublic/library/publication/ca051914.pdf > accessed on 25 December 2014.
[51]< https://www.sadr.org/about-scca?lang=en > accessed on 19 December 2014.

landmark enforcement decision was handed by an Enforcement Court in Riyadh confirming that an ICC award rendered in London, will be enforced in Saudi Arabia against a Saudi-domiciled award debtor[52]. With this enforcement decision, it is clear that the government is willing to make arbitration an important part of the Saudi Arabian legal system.

1.7.1 The Recent Saudi Arbitration Law (2012):

Saudi Arabia has long been criticised as an unattractive forum for settlement of disputes by arbitration with a reputation for being hostile, slow in process and ineffective in enforcement. The inclusion of the requirement for *Sharia* compliance has also singled out Saudi Arabia as a particularly difficult forum for arbitrating disputes. However, the Arbitration Law of 2012 was issued to improve the unfavourable provisions and shortfalls of the Arbitration Law of 1983. This research will consider the extent to which the Arbitration Law of 2012 addresses the challenges that were inherent in the Arbitration Law of 1983 and how the Arbitration Law of 2012 may be used to improve and encourage the use of arbitration in Saudi Arabia, for both domestic and international disputes within the marine insurance sector. Also, the areas which may still be problematic will be highlighted and solutions proffered.

In addition, the terminologies employed by Arbitration Law of 1983 and Arbitration Law of 2012 will be examined in order to highlight any ambiguity in the Arbitration Law of 1983 and how it has been improved and solved in the Arbitration Law of 2012. Clarifying ambiguous provisions is essential in this research to simplify the Arbitration Law of 2012 for parties interested in choosing Saudi Arabia as the seat of arbitration.

1.7.2 Compulsory Arbitration:

An author described compulsory arbitration as "*any system whereby the parties to a… dispute are forced by the government to submit their dispute to final settlement by some third party."*[53] The submission to arbitration is not

[52] Henry Quinlan and Amer Abdulaziz Al-Amr, 'Landmark enforcement decision in the Kingdom of Saudi Arabia' < https://www.dlapiper.com/en/saudiarabia/insights/publications/2016/05/landmark-enforcement-decision/ > accessed on 19 December 2014.
[53] Williams, 'The Compulsory Settlement of Contract Negotiation Labor Disputes (1949) 27 Texas L. Rev. 587 in Wesley A. Sturges, 'Compulsory Arbitration – What Is It?', (1961) 30 Fordham Law Review 1, 10.

based on the agreement of the parties but on statutory provisions. This subset of arbitration has been criticized as been contrary to parties' autonomy which is the hallmark of "mainstream" arbitration. A writer stated thus: "[*T*]*he value of arbitration consists essentially in it voluntariness, in its being a free appeal to reason by two men or two sets of men. The very term compulsory arbitration almost involves contradiction. When you force men before a tribunal and compel them to abide by its decision you have taken away the arbitral element. It may be justice, but it is not arbitration*"[54]. On the other hand, proponents of compulsory arbitration described it as affording a flexible, efficient, timely, and cost-effective. These arguments will be considered in this thesis.

In this thesis, I argue *inter alia* that with the duality in Saudi legal system and the tension between *Sharia* courts and the committees, resulting in absence of a streamlined procedure for resolving disputed marine insurance claims, compulsory arbitration should be introduced as a tool for settling such disputed claims. The present legal regime is cumbersome, time-wasting, inefficient and characterised by ambiguity in procedure. This has had a negative impact on the development of Saudi's marine insurance industry in particular and shipping sector in general because claims settlements are inevitably delayed by the lack of clarity inherent in the present legal regime which in turn discourages investors from investing in the shipping sector. Further, it is generally agreed that arbitration is preferred in transactions having an international outlook. This has driven most States (including Saudi Arabia) to introduce compulsory arbitration as a means of resolving investment disputes. The shipping sector undoubtedly involves international parties who are naturally sceptical to submit their disputes to domestic courts.

An efficient claims settlement system is therefore paramount to the growth of the shipping sector in the quest towards economic diversification. The introduction of compulsory arbitration will thus go a long way in improving marine insurance claims settlement by providing impartial, speedy, predictable and transparent dispute resolution mechanism with proper

[54] Benjamin F. Trueblood, 'Compulsory Arbitration' (1892 – 1893) 55 American Advocate of Peace 3, 58.

participation by the disputing parties. It will also introduce much needed expertise required in adjudicating marine insurance disputes.

In addition, compulsory arbitration will eliminate the feared biases non-Muslims have towards the present system which is largely *Sharia* driven. Compulsory arbitration will also aid the enforcement of claims in other countries by virtue of the awards being recognised under the New York Convention. This is a better alternative than enforcing a judgment of the Saudi Arabian courts or committees in another country. This will no doubt build confidence in the investing community and help in the overall improvement of the shipping sector towards the drive for economic diversification.

As noted, investors generally drift to emerging economies with an effective legal framework. With the need to diversify Saudi Arabia's economy by developing other sectors (especially the shipping sector) outside the oil industry, the recent reforms introduced in the Saudi Arabia legal system will go a long way in building investor's confidence. The author, however, argues that a further step be taken by stipulating compulsory arbitration as the preferred means for settling disputed marine insurance claims.

1.8 RESEARCH MILESTONES

This thesis will discuss the need for Saudi Arabia to enact a compulsory arbitration law to govern and regulate marine insurance contracts and resolution of disputed marine insurance claims due to the strategic importance of shipping to the economic diversification undertaken by the Saudi Arabian government. Existing governmental procedures in relation to disputed insurance claims have been described as ineffective[55]. The Committee – responsible for the resolution of insurance disputes - focuses on whether disputed claims are in compliance with *Sharia* rather than the subject matter of the dispute. Therefore, the need to have a forum where parties can resolve their disputes based on the merit rather than on the compatibility of their contractual terms with the tenets of *Sharia.*

[55]Abdul Aziz Al-Faki, 'Companies seeking to increase their insurance share in the maritime sector' <http://www.aleqt.com/2013/04/30/article_751875.html> accessed 25 December 2014.

The Committee is also bedevilled by lack of expertise in respect of complex marine insurance issues. In addition, the Committee technically has the same standards as the national courts. The Committee's process is also laborious as the litigation process. Further, the Committee which was created to timeously resolve disputes is synonymous with increased delay in the resolution of disputed marine insurance claims. The foregoing challenges facing the Committee *inter alia* informed the writer's opinion that compulsory arbitration should be introduced to settle disputed marine insurance claims. This will be fully discussed in this thesis.

To support the writer's argument for compulsory arbitration, the Foreign Investment
Regulations[56] in Saudi Arabia and its Executive Rules will be discussed. Article 26 of the Executive Rules introduced compulsory arbitration as a dispute resolution mechanism in respect of disputes arising between a foreign investor and its Saudi partners in respect of investments licensed under the Foreign Investment Regulations. Reference will also be made to Chile. Chile introduced compulsory arbitration for its insurance industry under Article 1203 of the Code of Commerce[57]. In 2016, the UAE established Emirates Maritime Arbitration Centre which specialise in handling maritime and insurance disputes commenced operations.[58]

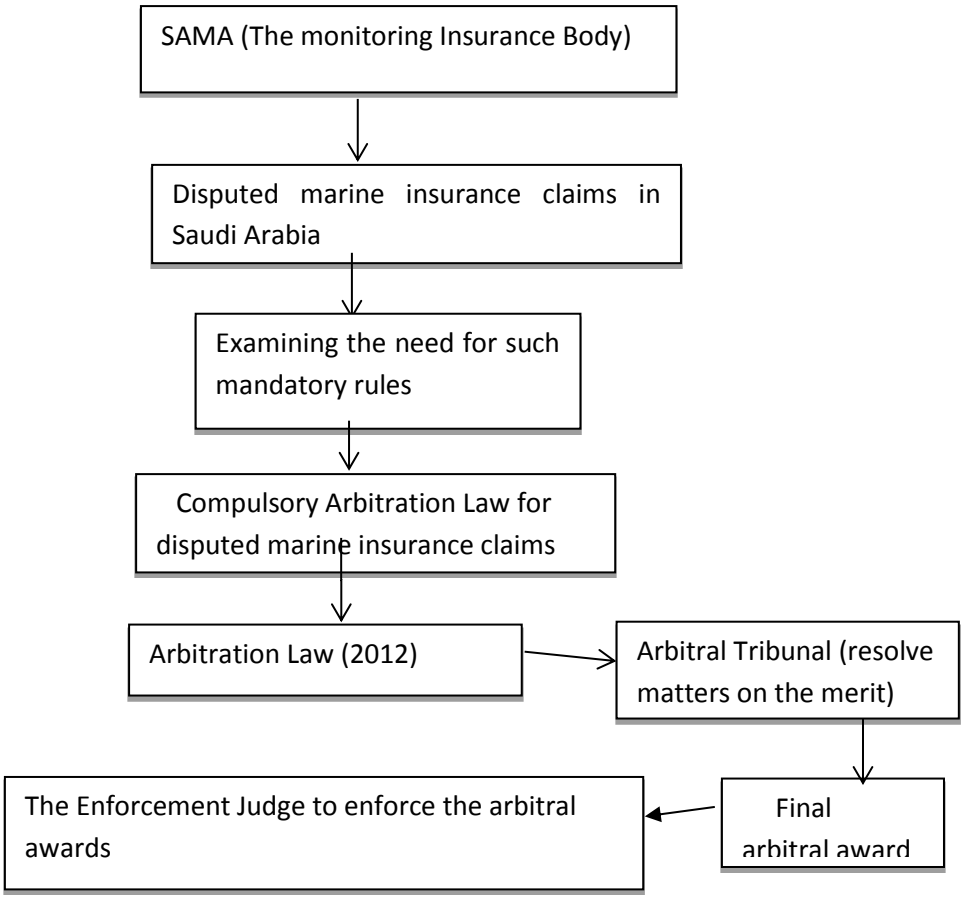
1.9 CONCLUSION

The theme of this research is compulsory arbitration by law as an effective mechanism for the settlement of disputed marine insurance claims in Saudi Arabia. The present system for settling marine insurance claims in Saudi Arabia is unpredictable and uncertain. There is also unwarranted judicial involvement. With the government's plan to achieve economic growth and diversification by developing other sectors particularly the shipping sector,

[56]Foreign Investment Law (issued by Royal Decree No. M/1 5 Muharram 1421 – 10 April 2000).
[57]<http://www.internationallawoffice.com/Account/Login.aspx?ReturnUrl=http%3a%2f%2fwww.internationallawoffice.com%2fnewsletters%2fDetail.aspx%3fg%3daeba9337-83c0-421a-afe4-e3709dc91f5a.> accessed on 25 January 2014.
[58]Gordon Blanke, 'Dubai announces plans to establish Emirates Maritime Arbitration Centre: Do they hold water?' <http://kluwerarbitrationblog.com/blog/2014/10/02/dubai-announces-plans-to-establish-emirates-maritime-arbitration-centre-do-they-hold-water/> accessed on 25 January 2014 and Deborah Ruff and Julia Belcher, 'International arbitration developments in the Middle East' < http://www.nortonrosefulbright.com/knowledge/publications/148976/international-arbitration-developments-in-the-middle-east > accessed on 10 January 2018.

marine insurance claims will be increasingly common. Therefore, the government has to provide a streamlined procedure for settling such claims by the introduction of compulsory arbitration in light of the recently enacted Arbitration Law of 2012. Implementing compulsory arbitration in the marine insurance industry will simplify the process of disputed claims settlement and ensure that disputes are resolved using a uniform set of procedures and based on the merit amongst others benefits of arbitration.

The following diagram below explains how the theme would work if compulsory arbitration is introduced for disputed marine insurance claims in Saudi Arabia



1.9.1 Methodology:

This thesis discusses the mechanism of arbitration for marine insurance disputes and recommends the introduction of compulsory arbitration as a mechanism of dispute resolution in light of the Arbitration Law of 2012. Thus, this thesis proposes that the default position for any disputes between the parties in relation to a marine insurance claim in Saudi Arabia should be resolved by compulsory arbitration with no rights to contract-out of such statutory requirements. . In discussing the theme of the research, reference will be made to the theories of delocalisation and the seat of arbitration. These legal theories are relevant to the author's discussions which relate to the influence of the venue on the arbitration proceedings and in turn the influence of the Saudi Arbitration law. To elaborate, choosing Saudi Arabia as the seat of arbitration any agreement will have a major impact on the arbitration proceedings taking place in Saudi Arabia and/or the enforcement of the final arbitral award outside Saudi Arabia.. Moreover, this thesis will further explain in Chapter Six, that the "duality" in the Saudi legal system is the main reason for the author's recommendation that compulsory arbitration should be the mechanism through which marine insurance claims are resolved in Saudi Arabia. Reference will also be made to the UNICITRAL Model Law, LCIA, ICC and AAA Rules in relation to the effectiveness of arbitration that are used by international parties in marine insurance disputes.

Comparative and analytical research is undertaken in this thesis to clarify the gaps that Saudi Arabia have, in connection with its laws and regulations which govern insurance disputes. The research also examines the practice in developed countries vis-à-vis the practice in Saudi Arabia and how the Saudi insurance and arbitration systems may be further improved to attain international standards. In particular, this research considers, *inter alia*, whether the Arbitration Law of 2012 complies with the international commercial arbitration standards and whether it can be a reliable dispute resolution mechanism for marine insurance disputes. The author will review a wide variety of reliable resources to substantiate this thesis as well as the recommendations presented hereby.

This research contributes immensely to the body of legal knowledge available to legal scholars as well as investors who are interested in the Saudi shipping industry since it discusses the existing laws in the Saudi shipping industry, the ongoing reforms and it recommends further reforms aimed at bringing the practice in Saudi Arabia in line with international standards.

1.9.2 **Research Questions/Points**:

1- To what extent has Arbitration been an effective mechanism as an alternative dispute resolution method?
2- The development of arbitration as the preferred dispute resolution method, particularly in relation to international commercial matters.
3- The differences between Compulsory Arbitration (statutory legislation to enforce parties for Arbitration) and Voluntary Arbitration.
4- The development of Compulsory Arbitration and its impact as a tool for economic development.
5- Looking at Saudi Arabia as a case study, the applicability of *Sharia* Law within the legal framework of Saudi Arabia, underlying principles of *Sharia* Law and their impact on the commercial sector?
6- What are the mechanisms of the Courts system in Saudi Arabia and its speciality?
7- How Arbitration developed in Saudi Arabia, by comparing the current Arbitration Law of 2012 with the previous Arbitration Law of 1985, and how far has the recent Arbitration laws applicable to the international commercial arbitration standards?
8- To what extent has the duality in Saudi Arabia insurance laws caused disputes within the marine insurance sector, and how Compulsory Arbitration can be applied as a tool in resolving these disputes?
9- Why do we need legislation for Compulsory Arbitration within marine insurance sector?

CHAPTER TWO

LITERATURE REVIEW

2.1 Moses, Margaret L, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2012):

This book briefly explains the advantages and disadvantages of arbitration. It also identifies the regulatory framework which governs the arbitral process, the arbitral institutions and provides a brief summary of different types of ADR. It will be valuable to apply it where arbitration is related to my research, to emphasise that arbitration is a recognised dispute resolution method utilised in the international commercial market.

This book supports the contention of my research, where related, that arbitration is an ideal process for the resolution of disputes within the marine insurance market and should therefore be preferred over litigation. It also provides evidence which shows the success of ADR, specifically arbitration, in practice, which could also be replicated in Saudi Arabia if compulsory arbitration is introduced.

2.2 Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge, Taylor & Francis Group 2010):

This book describes the nature, concept and validity of arbitration agreements and the requirements for enforcement of such arbitration agreements. This book is a valid source for my research in relation to arbitration agreements. This is because it covers suggestions that would support the conclusion of my research, as I will be asserting requirements to be recommended for parties for having a valid compulsory arbitration in regards to whether they intend to choose the new Saudi Arbitration Law of 2012 to arbitrate where disputes arise.

2.3 Zekos, Georgios, *International Commercial and Marine Arbitration* (Routledge-Cavendish 2008):

The first chapter[59] describes the arbitration process from a historical prospective. It notes how arbitration has been designated as an independent process and outlines the impact it has put on the courts and instances where the courts have refused to uphold arbitration rulings. It draws a comparison between litigation and arbitration considering the legal rules of both processes, and how arbitration is not grounded on justice unlike the courts. The third chapter[60] describes the codified law of the United States where maritime and commercial disputes have arisen. It outlines the benefits of arbitrating disputes arising from maritime agreements, such as smaller timescale and cost as well providing a straightforward dispute resolution process.

This book is very supportive as it discussed settlement of maritime claims using arbitration. Reference will be made to the book, where relevant, in my research as arbitration is a viable method that can be utilised in relation to the settlement of marine insurance claims in Saudi Arabia and to expand the method further by reference to the new Saudi Arbitration law of 2012 as compulsory mechanism and its applicability towards those claims in Saudi Arabia.

2.4 El-Ahdab Abdul Hamid, *Arbitration with Arab Countries* (Kluwer Law International 1999):

This book explores and explains arbitration and the governing legislation in Saudi Arabia compared with other Arab states. The author presents the differences between other Arab states, the main difference being that Saudi Arabia was alone in applying Sharia law. It purports to be a starting point on the subject of arbitration in Saudi Arabia, however since the publication of

[59] The first chapter of Zekos Georgios, *International Commercial and Marine Arbitration* (Routledge-Cavendish 2008).is titled: 'The Historical Emergence of Arbitration as a Dispute Mechanism and its Characteristics'.
[60] Ibid – 'The Role of Courts in Commercial Maritime Arbitration in US law'.

this book there has not been a large amount of literature to complement this subject of study, and in particular since the introduction of the new Arbitration law in 2012, a complete review of this area is needed because not only has the legislation and policy concerning arbitration been vastly updated, Saudi Arabia's law is now considerably more in keeping with both the region and international regulatory standards. The author's approach provides for a clear comparative and informative assessment of the Saudi Arbitration law, and I am seeking in my thesis to provide an updated assessment in the same way, by introducing the new Saudi Arbitration Law of 2012, with particular reference to marine insurance claims.

2.5 Saleh Samir, *Commercial Arbitration in the Middle East* (2nd edn, Graham and Trotman 2004):

This book, although on the subject of arbitration in the Middle East, examined only countries such as Syria, Egypt and Lebanon. This illustrates how Saudi Arabia has been excluded in many studies of arbitration in the Middle East to date due to the unsuccessful and unpopular previous law. Now, however, the landscape for arbitration in the Middle East has changed, with the LCIA's Dubai court, and Bahrain also seeking to improve their status as an arbitration forum internationally.

This book did not examine arbitration in Saudi Arabia. I will be pursuing to examine arbitration in Saudi Arabia in regards to marine insurance contracts as a case study.

2.6 Baamir Abdulrahman Y, *Sharia law in commercial and banking arbitration, law and practice in Saudi Arabia* (Ashgate Publishing Limited 2010):

This book analysed and produced a clear overview of the arbitration system in Saudi Arabia, under the previous law, with particular focus on the banking sector, as well as the consideration of *Sharia* law in banking and Islamic finance, this is a well-researched area. A study into the regulation of these areas in Saudi Arabia will reveal whether it would make a suitable choice of arbitration forum for parties in marine insurance contracts in the country,

which, with the exception of case studies and commentary, has not been done in a high degree of detail before.

This book has not been updated with the new Arbitration Law of 2012 in Saudi Arabia, and it is more focused on the banking sector, whereas I intend to discuss the new Arbitration law within the marine insurance sector.

2.7 Al- Jarba Mohammad, 'Commercial Arbitration: A Study of its Role in Saudi Arabia within Islamic Jurisprudence' (PhD Thesis, the University of Wales, Aberystwyth, 2001):

This thesis concentrates largely on Islamic jurisprudence. This offers a good insight into Saudi Arabian policy; however, the new Arbitration Law has removed many of the characteristics aligned to Saudi Arabia, yet still imposes Sharia in its regulation, as illustrated by the requirement that arbitrators be educated in *Sharia* law. I wish to build on research such as in this thesis to review the influence of and adherence to traditional Islamic jurisprudence in this area with the passing of the 2012 Arbitration Law in the light of marine insurance contracts**.**

2.9 Al-Subaihi, Abdulrahmam, 'International Commercial Arbitration in Islamic Law, Saudi Law and the Model Law' (PhD Thesis, University of Birmingham 2004):

This thesis highlights the difficulties that arose with the old Saudi Arbitration law, in particular the issues of enforcement, party autonomy, and the role of the courts, examining whether they support or intervene with the tribunal's role and the arbitration process. Interestingly, the thesis also undertakes a comparative study between the 1985 Law and the Model law, something I will be able to do in more detail and accuracy as against the Arbitration Law of 2012, which has been largely based on the same. I will also be able to build upon research studies such as this, by looking at the extent to which the issues raised have been answered by the 2012 Law, and to what extent *Sharia* law and international practices have been reconciled (or, to what degree *Sharia* law principles' remaining inclusions may offer for marine insurance policies).

2.10 Al-Fadhel Faisal M, 'Party Autonomy and the Role of the Courts in Saudi Arbitration Law, with reference to the Arbitration Laws in the UK, Egypt and Bahrain and the UNCITRAL Model Law' (PhD Thesis, University of London 2010):

This thesis stipulates the position of party autonomy under the old Saudi Law with particular attention to arbitration agreement. It was compared with English Arbitration Act 1996, the UNCITRAL Model Law and Egyptian Law. It is a helpful thesis to build up my research in the part that considers the previous Saudi Arabia Arbitration law; however, this thesis does not consider the ideal topic of marine insurance that I intend to include. Although the thesis referred to the party autonomy in Saudi Arabia, reference was not made to the new Arbitration Law of 2012. My research intends to contribute a new knowledge to the new Arbitration Law in Saudi Arabia with reference to marine insurance industry. I do not intend to include Egyptian arbitration law in my thesis, even though reference to the old arbitration law would be essential by comparing it with the new one in order to show how the arbitration framework in Saudi Arabia has developed and apply it to the marine insurance sector as a case study.

2.11 Elshurafa Dina, 'The 2012 Saudi Arbitration Law and the Sharia Factor: A Friend or Foe in Construction?' (2012) 15 International Arbitration Law Review 4, 137:

Dina has introduced an article which considers the developments of Arbitration Law in Saudi Arabia within the construction and infrastructure industry, as due to the unpopular previous Arbitration Law 1983 in Saudi Arabia, the Arbitration Law of 2012 replaced it. She supports that arbitration should replace litigation in that region within the construction industry, as parties are unsure of the litigation process within the country. One of the missing elements that she has highlighted is the expertise within the construction industries in relation to the personnel that deal with disputed claims. She criticises the system as it is complex process in correlated with large projects. She clarifies the system of dispute resolution in the country and the positions of arbitrators. However, she is supportive of the

development of the Arbitration Law of 2012 and encouraging the improvement of the changes comparing to the previous one. On the other hand, my thesis would be within marine insurance contracts specifically, and I will be contending that litigation (Insurance Committee) should be replaced by arbitration in that industry. I will also consider whether the Arbitration Law of 2012 is sufficient to meet the required specification within marine insurance market to solve such disputes.

2.12 Alnowaiser, Khalid 'The New Arbitration Law and its impact on investment in Saudi Arabia' (2012) 29 Journal of International Arbitration 6, 723:

This short paper concerns the advantage of having the Arbitration Law of 2012 for both local and foreign investors in Saudi Arabia. In his introduction, the author argued that the most prospective process to follow is arbitration for settling disputes and he has mentioned maritime as one of his examples. He is supporting the new arbitration law, as it is not exclusive to only one arbitration centre or individual arbitrators inside the country, but rather outside the country as it has indicated under Article 4. He has asserted his opinion by explaining that *Sharia* Law aims for justice and it has been misinterpreted by different nations who applies other laws and rather not to apply Islamic law. He ascertained the similarity of the applicable laws in Saudi Arabia to those in developed counties. An example is that the New Arbitration law in Saudi Arabia in which is based on UNCITRAL Rules. Moreover, it is worth mentioning that this paper is generally applied to all sectors and is aim to promote the Arbitration Law of 2012, my thesis however, would be examining the Arbitration Law of 2012 specifically to compulsory arbitration within the marine insurance industry.

2.14 Newhall Christine L, 'The AAA's War on Time and Cost– The Campaign to Restore Arbitration's Benefits' (2012) 67 Dispute Journal Resolution 3, 20:

The writer researches the effect of using American Arbitration Association (AAA) rules in terms of cost and the period of time to be used in such an

arbitration process. It shows figures collected from lawyers and legal officers in the United States conducting that whether they will be using such arbitration clauses. The author highlights that there are significant issues in connection with using arbitration such as delay and costs element. It has been established programmes that concerns arbitration to build up in terms of its efficiency of time-consuming, cost and to solve the critical issues within that process. Some positive results of these programs include reduced percentage of delays as well as low cost generally in arbitration within different sectors. To conclude this paper, it has been supported that arbitration is a more flexible method compared to litigation, it is a growing method to be applied in contracts generally in relation to the factors of time-consuming and costs for the parties. This paper will support my proposition within my chapter on arbitration, to show that arbitration is the more suitable method to be used within marine insurance contracts rather than litigation.

2.15 Golloway, Patricia D, 'Using Experts Effectively and Efficiently in Arbitration' (2012) 67 Dispute Resolution Journal 3, 26:

This article discusses the arbitration rules regarding the arbitrator's duties in connection with the time and costs of utilizing experts during the process of arbitration. It elucidates the importance of experts whether chosen by the tribunal or by the parties. The writer stated that the responsibilities of tribunal experts are to assist the tribunal and provide directions in connection with technical issues that may not be within the professional ambit of the tribunal members, but the arbitrators are the only decision makers in the arbitration process. This paper will be suitable to refer to in my research, where related, in support of the position that experts have an efficient impact for improving the arbitration process, particularly in relation to technical matters such as marine insurance contracts.

2.17 Andreas Haberbeck and Mark Galloway, Saudi Shipping Law (Fairplay Publications 1990):

This book is a main source and is related to my research. It is a unique book that discusses relevant shipping laws in Saudi Arabia and starts by explaining

the concept of Islamic Law in relation to the shipping industry in Saudi Arabia. It also states the statutes that are in connection with maritime law in that region. The authors briefly discussed the requirements of marine insurance contracts in Saudi Arabia and specified that there are certain issues that are not included in the legislation in terms of subrogation rights. They also explained what is covered in terms of arbitration in connection with maritime claims but under the old law. This book is outdated, however, it would be useful to refer to it in my research, when I will be introducing the mechanism of marine insurance industry in Saudi Arabia, and it also raises critical questions that have not being covered by any author in that industry.

2.18 El-Sayed Hussein M., *Maritime Regulations in the Kingdom of Saudi Arabia* (Graham & Trotman Limited 1987):

This book covers generally the legal framework for the maritime sector in Saudi Arabia in terms of liabilities and rights within that sector. It also covers marine insurance contracts in details and the legal position of such a contract. It identifies the articles of regulation that are related to marine insurance contracts in Saudi Arabia. This is an outdated book. However, reference will be made to this book, where relevant, in respect of marine insurance Law.

2.21 Al-Fadhel Faisal M., 'Legislative Drafting and Law-Making Practices and Procedures under Saudi Arabian Law: A Brief Overview' [2012] International Journal of Legislative Drafting and Law Reform 95:

This article starts with the legal framework that Saudi Arabia is based on, how the regulations and law become binding in the country. It also prospects the decision-making process before the laws become enforceable and to ascertain those laws in the policies of the government of Saudi Arabia. He states what steps the government follow in order to establish a new law in the country. This is a clear introduction that I would be referring to in my research, when in it comes to describing how Saudi Arabia provides its legal system to implement new laws. The recommendation in the article can be a key to suggest ways of improving the legal system in Saudi Arabia.

2.22 Jean-Pierre Harb and Alexander G. Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Sharia' (2013) 30 Journal of International Arbitration 2, 113:

This Article explores the main changes of the new Arbitration Law of 2012 comparing the same to the previous Arbitration Law of 1983. Moreover, it recommends that the Arbitration Law of 2012 has been developed and is more flexible to investors than the previous law.

This article will be viable for my research in terms of the Arbitration Law of 2012. I will be looking at how the new arbitration law facilitates the parties in terms of international trade, and in particular, marine insurance contracts.

2.23 Bob Hepple, 'Compulsory Arbitration in Great Britain' in J J Loewenberg (ed.), Compulsory Arbitration: An International Comparison (D C Health and Company, Lexington, Mass 1966):

This book illustrates the concept of compulsory arbitration and its history in certain countries. The third chapter clarifies the development of compulsory arbitration within the period (1940-59) in Great Britain. The fifth chapter elucidates the history of compulsory arbitration in the United States, the Federal experience, State experience with Private-Sector organisations and the Public-Sector experience. This book is one of the main sources for my research, as it would be utilised in the third chapter of my thesis, to explain the theory of compulsory arbitration and how it has been imposed on certain types of disputes in the previous years.

2.24 Mark Beswetherick, Jodie Adoki and Saud Alsaab, 'Saudi Arbitration Law: A change in approach to insurance arbitration' [2015][61]:

This article highlights that the Saudi Arbitration Law 2012 could be an alternative to resolve disputes within the insurance sector by utilizing arbitration as an alternative dispute resolution mechanism. The authors suggest that there are no laws to prevent parties from utilizing arbitration to settle insurance disputes, however, it stated that the position of the Insurance

[61] < https://www.clydeco.com/insight/article/saudi-arbitration-law-a-change-in-approach-to-insurance-arbitration > accessed 27 August 2017.

Dispute Committee (IDC) in relation to including arbitration clauses in insurance policies remains uncertain. It was described in the Article that the Regulations 2014 for IDC has facilitated resolving disputes by setting rules to settle claims between the parties. However, the authors suggested that the Arbitration Law 2012 has developed arbitration in Saudi Arabia and recommended to be utilized within insurance policies. This article is supportive in relation to impose arbitration within marine insurance contracts, however, the argument that is considered in this research, is highlighting the impact of using compulsory arbitration as an alternative dispute mechanism to resolve disputes and it is highly beneficial for international parties.

CHAPTER THREE

THE EFFECTIVENESS AND DEVELOPMENT OF ARBITRATION

3.0 INTRODUCTION

Alternative dispute resolution (ADR) has developed significantly, as mechanisms or processes have been put in place in countries world over, to foster resolution of disputes between disagreeing parties, in order to reach a settlement. ADR is available as an alternative to the traditional litigation process more commonly used in resolving legal disputes. Arbitration is one of such processes, whereby the disputing parties agree to submit their dispute to an arbitral tribunal and agree to be bound by the decision or 'arbitral award'. This chapter endeavours to discuss advantages and disadvantages of arbitration, and to conclude by recommending arbitration as the most suitable method for resolution of disputes of this kind. As an increasing number of disputes are settled outside of litigation, observing the effectiveness of Arbitration is necessary in order to present a comprehensive view and implement it as a way to solve disputes under marine insurance claims in Saudi Arabia.

The movement of international commercial arbitration can be tested by ascertaining the effectiveness of its objectives. The philosophy of utilising arbitration is to provide a solution for parties that create legally binding decisions without the involvement of litigation, more specifically, national courts. Arbitration is internationally recognized as a "private" alternative dispute resolution mechanism, since it constitutes of a process whereby disputes or differences between two or more parties as to their mutual legal rights and liabilities, are resolved within the confines of the arbitral tribunal and the parties and no other. Arbitral proceedings are determined judicially like the courts of law[62]. Usually, such awards derived therefrom are with binding effect, and are enforceable upon the parties to the arbitral proceedings. The norms of alternative dispute resolution, particularly arbitration, have been developed over the decades. Examining the effectiveness of arbitration would lead to an understanding of whether, and

[62] Lord Hailsham, *Halsbury's Laws of England* (4th edn, Butterworths 1991).para 601.

why, alternative dispute resolution has shifted away from litigation in certain industries. The purposes of addressing why parties are intended to resolve their disputes through arbitration rather than litigation will be examined. The practical efficiency and the nature of arbitration will also be highlighted in order to draw an analysis of whether arbitration is applicable to be used in modern commercial transactions.

This Chapter discusses the object and nature of arbitration; the characteristics of arbitration; the advantages and disadvantages of arbitration; the effectiveness of arbitration; criticisms on arbitration process; solving issues in arbitration procedure; the effectiveness of arbitrators and experts in the process; the seat of arbitration theory and the delocalisation theory; comparison between arbitration and litigation; the development of international arbitration laws and centres; analytical approach to the effectiveness of arbitration.

The fundamental motive behind arbitration is to preserve relations between parties through a peaceable medium for dispute resolution, rather than the antagonistic adversarial practice and procedure of litigation. Therefore, parties rather agree within themselves in the course of contractual agreements, that future disputes would be subjected to arbitral remedies, to prevent any forms of involvement with the judicial systems. Moreover, arbitration represents a procedure which is legally binding, recognised, and enforceable within national courts. This provides a certainty of the rights protected, and grievances remedied through arbitration. Arbitrators are usually appointed by the parties and are tasked with providing an award in order for the rights and responsibilities of the parties to be enforceable. The requirements of arbitration are commonly attached to the parties' decisions, in terms of the choice of international arbitral institution, and also, whether it is ad hoc arbitration[63]. The rules that parties would intend to apply during arbitral proceedings, are most likely the institutional arbitration rules specified within the contract. Those rules would include the language that

[63] This differs from institutional arbitration.

arbitration would be conducted in; the place of arbitration and; the selected number of arbitrators required.

3.1 THE OBJECT OF ARBITRATION

The object of Arbitration was described under the English Arbitration Law 1996 as follows:

"*The object of arbitration is to obtain the fair resolution of dispute by an impartial tribunal without unnecessary delay or expense*"[64].

It was stated that the purpose of arbitration is essentially, to provide a reasonable means of resolution for disputes, and additionally, to stipulate and limit the delay as well as the cost of traditional litigation process.

3.2 DEFINITION OF ARBITRATION

It should be underlined that the term, "arbitration", has not been defined in any of the conventions or any Model law generally.[65] The closest definition to that of the concept of "arbitration" is the arbitration agreement. The Model law[66], under Article 7(1), provides the definition of arbitration agreement as: "*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.*"

The UNICITRAL responded to the definition of 'commercial' since it has not been interpreted in relation to the model law, as well as conventions, to mean that it focuses greatly on international commercial arbitration. However, distinguishing between commercial and non-commercial relationships is still undefinable.

Notwithstanding the lacunae in the Model Law, it is obvious that the motivation behind the law is an effort towards a universal applicability of arbitration regulations, practice and procedure, to cut across boundaries of nationalities.

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[64] English Arbitration Law 1996, s 1(a).
[65] Aron Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law and Taxation Publishers 1990) 21-24.
[66] UNCITRAL Model Law on International Commercial Arbitration [1985] (with amendments as adopted in 2006).

3.2.1 Other definitions within International Jurisdictions

The concept of Arbitration is not elucidated within the conventions and laws internationally.[67] National laws do not specifically provide definitions of general terms as they may vary the term of its mechanism. Consequently, both institutional arbitration as well as *ad hoc,* are considered to be categorised in the Model Law[68]. The nature of the Model Law implements the necessity of providing definitions of arbitration. This is simply to maximise the appreciation of the laws and conventions on arbitration. Therefore, clarifying the definition of arbitration is essential in order to avoid any complexities in its application and distinguishing it from other methods of alternative dispute resolution. For example, the characters of similarity in mediation and conciliation compared to arbitration are accurate but the legal outcomes are varied[69].

Furthermore, arbitration has been defined in different respects, as shown in the following illustrations:

- David explains that "*Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons, the arbitrator or arbitrators who derive their powers from a private agreement not from the authorities of a state and who are to proceed and decide the case on the basis of such an agreement*"[70].

- A judicial phrase has described it as "*The reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction"*[71].

[67] Poudret Jean Francois and Besson Sebastien, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell Ltd. 2007) 1.
[68] Lew Mistelis, *Applicable Law in International Commercial Arbitration* (Oceana Publications 1978) 11.
[69] David St. John Sutton, John Kendall and Judith Gill, *Russell on Arbitration* (Sweet & Maxwell 1997) 21-32.
[70] Rene David, *Arbitration in International Trade* (Kluwer Law and Taxation 1985).
[71] Saunders John, *Words and Phrases Legally Defined* (3rd edn, Butterworths 1988) 105.

- *"The process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially and with binding effect by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law*"[72].

Domke[73] had given an overview on arbitration as "[*A*] *process by which parties voluntarily refer their dispute to an impartial third person, an arbitrator, selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal. The parties agree in advance that the arbitration's determination, the award, will be accepted as final and binding upon them*".

3.2.2 Arbitration and Mandatory Rules by National Laws:

The concept of party autonomy has been highlighted as an important feature of international commercial arbitration. Party autonomy, according to Redfern and Hunter, is "a principle that has been endorsed not only in national laws, but by international arbitral institutions and organisations. The legislative history of the Model Law shows that the principle was adopted without opposition…"[74]. Party autonomy is a well-established principle in all arbitration laws. It provides that parties have the freedom to utilise arbitration procedures by choosing their tribunals, arbitrators, how the process is organised, as well as all the necessary requirements to conduct the arbitration proceedings[75]. However, this freedom is always subject to the limitations of the public policy of the relevant national law.

Despite the freedom which the parties enjoy when they elect to resolve their disputes by arbitration, national laws can still impact the arbitration proceedings through its mandatory rules (which may be found in the relevant arbitration local laws). These mandatory rules could impact the arbitration proceedings directly or indirectly. Direct impact such as in the form and

[72] Lord Hailsham (n 62) 332.
[73] Domke Martin, *Commercial Arbitration* (Englewood Cliffs: Prentice-Hall 1965).
[74] Redfern, Alan and Hunter, Martin, *Law and Practice*, (4th edition, Sweet & Maxwell, (2004), page 315.
[75] Al-Baharma, Dr. Husain M., "International Commercial Arbitration in a Changing World", Arab Law Quarterly, Issue No. 9, (1994), page 144.

validity of the agreement, as well as the parties' capacities which are requirements for arbitration agreements. On the other hand, indirect impact is when national laws could have an impact on appointment and selection arbitrators. This indirect impact would apply in the case of an unfair influence established in relation to the appointment of the arbitrators as stipulated in the agreement by one of the parties.[76]

In addition, one of the most important elements in an effective agreement to arbitrate is the choice of law by parties. While the parties are free to choose the governing law of their agreement, there are still certain restrictions[77] which may be imposed by the national laws. This is the case where mandatory rules and laws from a different jurisdiction may apply their own laws over tribunals other than the choice of law that were agreed by the parties[78]. Also, national mandatory rules may apply in the event that there are contradictions between the governing law of the agreement which was selected by the parties and the national laws. Therefore, national laws may supersede the choice of law by the parties that was in the agreement[79].

It is noteworthy to mention that the connection between national courts and arbitral tribunals under international commercial arbitration is distinguished from one state to another over the decades. The mechanism of arbitration, as a dispute resolution mechanism, has improved efficiently in the recent years[80]. Generally, national courts in most legal juridications have ensured that parties have the freedom to choose the mechanism of dispute resolution including arbitration, without the intervention of the judiciary in the arbitral procedures[81]. With the increased recognition of the principle of party autonomy in international commercial arbitration, the intervention of the national courts in arbitral procedures decreased significantly[82]. In most cases,

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[76] Lew, J.D.M., Mistelis, L., Kroll, S., *Comparative International Commercial Arbitration*, (Kluwer 2003), page 253.
[77] Pryles, Michael, "Limits to Party Autonomy in Arbitral Procedures", (Journal of International Arbitration 24(3) 327-339, 2007), page 328.
[78] Lew, J.D.M., Mistelis, L., Kroll, S., *Comparative International Commercial Arbitration*, (Kluwer 2003), page 420.
[79] Chatterjee, C., *The Reality of The Party Autonomy Rule In International Arbitration*, (Kluwer) Arbitration, www.kluwerarbitration.com.
[80] Sammartano, Mauro Rubino. (2001), International Arbitration Law and Practice, 2nd Edition, The Netherlands: Kluwer Law International, 2001, page 365.
[81] See Reissman, M., Craig L., Park, W., and Paulsson, J. (1997), International Commercial Arbitration, ibid, at page 1215.
[82] See Blanke, Gordon, "Supporting Role: Arbitration and the Courts", In-House Lawyer, 2006, 143, 50-53.

national courts do not interfere in the arbitral process, where parties have chosen arbitration to resolve their disputes other than litigation[83]. Moreover, the intervention of national courts is limited to cases where public policy is an issue, or disputed parties elect to seek the involvement of national courts in the arbitral procedures[84]. This "non-interference" approach is supported by Article 5 of the Model Law which provides that "no court shall intervene except where so provided in [Model Law]".

While the above-mentioned "non-interference" approach is one of the major characteristics of international commercial arbitration, the judicial support of the arbitration process remains an essential element for the success of the arbitration as a dispute resolution mechanism. The courts may intervene in the arbitration proceedings if arbitrators requested for assistance by national courts, for example, in relation to protect evidence or the rights of the parties. Moreover, disputing parties may challenge and appeal against final arbitral awards before national courts[85].

The intervention of national courts is an important matter in circumstances where parties are wishing to enforce arbitration agreements or challenging the jurisdiction, and also a when the arbitral tribunals are being formed.[86]

The national courts will have pivotal role in enforcing arbitration agreements between the parties. For example, if one of the litigant parties attempts to circumvent an arbitration agreement by approaching the national court in lieu of commencing an arbitral proceedings, national courts may decide to enforce the arbitration agreement and direct the parties to proceed with arbitration[87]. The support of the national courts is further highlighted in Article II of the New York Convention and in Article 8 of the Model Law, respectively.

[83] Kirkham, Frances, "Judicial Support for Arbitration and ADR in the Courts in England and Wales", Arbitration Journal Volume 72 (1) (February 2006), page53.
[84] Lew, J.D.M., Mistelis, L., Kroll, S., *Comparative International Commercial Arbitration*, (Kluwer 2003), page 355.
[85] Ibid, page 373.
[86] Redfern, Alan and Hunter, Martin, *Law and Practice*, (4th edition, Sweet & Maxwell, (2004), page 392.
[87] Hoellering, Michael F., International Arbitration Agreements: A Look Behind The Scenes. Dispute Resolution Journal; Nov98, Vol. 53 Issue 4, page 64.

National laws and Model Law have provided the role of national courts and the intervention on arbitral proceedings[88]. For example, a challenge of arbitral tribunal could be required for a national court to interfere in the procedures[89]. In conclusion, this depends on the national laws that are implemented for arbitration proceedings. Arbitration agreement by choice of parties and its features of such agreements will be discussed in the later chapter four along with the concept of compulsory arbitration.

3.3 CHARACTERISTICS OF ARBITRATION

3.3.1 **Power of Parties**:

One of the characteristics of arbitration as opposed to litigation is that parties have the power to control the procedure for settling their disputes. It is indeed a neutral forum; each party would have a level of fair hearing that may not be applicable to some court systems. The outstanding characteristic of arbitration is that the parties have the choice of selecting arbitrators, by appointing experts specialised in the area of the dispute which the parties tend to resolve. Nowadays, arbitration became an effective method to be utilised in international commercial contracts as an alternative dispute mechanism, because parties have the choice of selecting the arbitrators within the expertise of the dispute[90].

A statement as regards the characteristics of arbitration as an alternative dispute resolution method was made by Kaplan, Spruce and Moser[91] to the effect that, ‘‘*In respect of Arbitration, its history may be linked to the genesis of human society itself. Parents are normally arbiters in disputes between their children. Mythological references to arbitration have also been often chronicled. There are mentions of disputes between two gods being submitted to a third for decision in the earliest myths. Stories from Ancient Egypt tell of disputes between Osiris and Seth, Horus and Seth, being decided in that way*

[88] See Grant, Tomas Kennedy, “The Role of the Courts in Relation to Arbitration Awards”, a paper presented at the Arbitration Law Workshop for Pacific Island Nations at Auckland on 11 June 2003.
[89] Hwang, Michael and Muttath, Rajesh, “The Role of the Courts of Arbitral Procedures and Other Asian Perspectives”, Arbitration Journal, Volume 68 Number 3, (2002), page 229.
[90] Moses Margaret, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2012) ch 1, 1.
[91] ‘Hong Kong and China Arbitration Cases and Materials’ (Butterworths (Asia) 1994) in Fiadjoe Albert, *Alternative Dispute Resolution: A Developing World Perspective* (Cavendish Publishing Limited 2004) ch 1, 2.

… The earliest Greek arbitration myth is of a mortal arbiter, Paris, deciding between immortal parties, Hera, Athene and Aphrodite…''

In the terms of commercial arbitration, authors have elaborated the ideology of arbitration clause or agreement within a commercial transaction. It was stated that: "Commercial arbitration must have existed since the dawn of commerce. All trade potentially involved disputes, and a successful trade must have a means of dispute resolution other than force. From the start, it must have involved a neutral determination, and an agreement, tacit or otherwise, to abide by the result, backed by some kind of sanction. It must have taken many forms, with mediation no doubt merging into adjudication. The story is now lost forever. Even for historical times it is impossible to piece together the details, as will readily be understood by anyone who nowadays attempts to obtain reliable statistics on the current incidence and varieties of arbitrations, private dispute resolution has always been resolutely private".[92]

3.3.2 Consent of Parties:

Parties' consent is one of the most effective characteristics that arbitration has, which empowers parties to have the choice and control over selecting arbitrators in their dispute, by a mere consensus. The parties' consent can bind arbitrators to comply with their agreement and also the decision of their dispute by the exercise of their arbitral powers[93]. Most often, parties may consent to arbitration either by way of reference to a clause in their contract which expressly provides for arbitration, or sign another agreement which specifies the rules and procedure of the arbitration. Simply put, parties can agree to arbitrate before or after the dispute has occurred, this constitutes and is known as a submission agreement[94].

[92] Mustil, 'Arbitration: History and Background' (1989) 6 Journal of International Arbitration 2, 43.
[93] Margaret (n 90) ch 1, 2.
[94] Ibid.

3.3.3 Separation of Governmental Bodies from Decisions in Arbitration:

It has been mentioned that arbitrators are separated from governmental entities in making their decision. The decisions may be reached in private, without considering the principles of public interests. The rationale behind this is that, the arbitrator's paramount priority to make a decision upon the issues from the dispute, and nothing else. It should be taken into account that since arbitrators most often are chosen by the parties, they usually have underlying justifications for making such choices. The choices might be based on the norms attainable from the arbitrator's mode of arbitrating in similar disputes.[95] This implication shows that arbitrators are more sympathetic within their positions when deciding disputes. It is noteworthy that, arbitrators could be appointed from any field of industry that they either have a professional background, or are specialised in. It is however, pertinent to note that it is not necessary to be a lawyer in order to be an arbitrator.

3.3.4 The Final Decision (Award):

One of the attractive solutions that arbitration has is, to provide final and binding awards which are, in most cases, unchallengeable in courts. The challenges and appeal against the awards depends on the jurisdictions of the country[96]. However, there are very limited situations where an abuse may occur, in terms of whether powers are overly wielded by the arbitrators, which may cause a grave defect in the process of arbitration[97]. Once the arbitral award has been commenced, the winning party will supplement the award to be recognised within the jurisdiction of country. The award can be tested on a limited basis, by order of the losing party at the court that will be entitled to enforce the award. The merits of the arbitral award cannot be challenged by the court. Even though mistakes of law or facts were made by the arbitrators, they would still not be accepted as grounds for refusal of, or objection to the award, and the court would still enforce it.

[95] Ibid.
[96] Ibid, 3.
[97] Ibid.

3.4 THE ASPECTS OF ARBITRATION

The legal nature of arbitration is proposed to be applicable as it relates to jurisdictional, contractual, and hybrid aspects. Each aspect illuminates arbitration as a viable method within the legal system.[98] Nevertheless, the support of each aspect is not explicitly defined whether in theory or practice.[99] These aspects could be illustrated in detail as the following:

3.4.1 The Jurisdictional Context:

The state controls the jurisdictional aspect as a result of the stipulations set in place to regulate arbitration, which is implemented by the jurisdiction of the state.[100] The basis of the jurisdictional aspect is to simplify the position of the arbitrator in a sense that would replace the role of the judge. The depth of jurisdictional aspect was described by Professor Dr. Lew as follows:

"It follows that the arbitrator, like the judge, draws his power and authority from the local law, hence the arbitrator is considered to closely resemble a judge… The only difference between the judge and arbitrator is that the former derives his nomination and authority directly from the sovereign whilst the latter derives his authority from the sovereign but his nomination is a matter for the parties".[101]

From an international perspective, the aspect of jurisdictional arbitration would be considered to be sufficient where arbitral proceedings have been conducted in a proper procedure. Additionally, the recognition and enforcement of such arbitral awards are ascertained within the concept of jurisdictional arbitration.

3.4.2 The Contractual Context:

The contractual aspect of arbitration can be seen in relation to agreements between the parties. The process of arbitration is generally contractual, since it exists and thrives upon a consensus of both parties, who are subsequently

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[98] Fouchard Gaillard Goldman, *International Commercial Arbitration* (Emmanuel Gaillard and John Savage ed, Kluwer Law International 1999).140- 142.
[99] Ibid 72.
[100] Gurnett Richard et. al., *A Practical Guide International Commercial Arbitration* (Oceana Publications 2000) 6.
[101] Lew (n 76) 66.

bound by the final decision. Arbitration agreements may be subjected to certain restrictions as regards the national law of a country and the importation of the element of public policy. These contradictions within the national law may prevent parties from enforcing arbitral awards. Examples of such contradictions that may arise would be illustrated when the case of Saudi Arabia is highlighted in the subsequent chapters.

3.4.3 Hybrid Mixed Context:

The growth of Mixed or Hybrid arbitration was enhanced by Professor Sauser-Hall[102], who contended that arbitration should be set forward within the legal system to solve disputes. He had also demanded, that the laws that must exist in arbitration, must be in relation to those concerning the bindingness of awards, in order for the arbitration to stand out[103]. The mixed aspect of arbitration has been recognised worldwide, as it combines the aspects of contractual and jurisdictional. Both aspects have been developed in the international commercial transaction within arbitration.

3.5 ADVANTAGES OF ARBITRATION

The practice of arbitration has pervaded the global world. This is so, because of the alluring benefits that accrue from resolving disputes through arbitration. In arbitration ideology mechanism, parties choose arbitration in modern international commercial transactions in order to facilitate resolution of their disputes. The two main highlighted advantages that parties choose arbitration as a mechanism are as the following:

- **Neutrality of the forum**: this means that parties would be able to resolve their disputes outside the process of litigation by shifting away from the court procedure.

- **The effectiveness to attain recognition and enforcement of the award**:[104] arbitral awards can be readily enforced through the New

[102] Lew and Stefan (n 76) 74 – 80.
[103] Ibid.
[104]Margaret (n 90) ch1, 3.

> York Convention, in which more than 145 countries are signatory to compared to enforcing the judgments of national courts.[105]

The flexibility of the arbitration award comes into play where it becomes of necessity, to enforce the award internationally, compared to judgment decisions made by the courts. This is due to the significant role of the New York Convention. The courts must recognise and enforce the arbitral award unless the process of the arbitration had to be considered as irregular, or is in conflict with the national laws[106]. The New York Convention has been validly reflected to be a basis for enforcement of arbitral awards worldwide.

Another advantage that arbitration has is confidentiality. The publicity or otherwise of arbitral proceedings can be determined by an agreement between the parties. Most commonly, businesses would prefer the arbitration procedure to be conducted as discretely as practicable. This is due to the nature of the dispute, and sensitive information that may be contained therein, which may pose a risk if disclosed to the public, or to the routes of the operations of the businesses[107]. Further, the parties will intend to preserve contractual relationship with each other, thereby, resorting to a less antagonistic means of dispute resolution.

In addition, cost of arbitration process has proven to be an incentive, as it seems that the costs are less than litigation. However, some authors and practitioners in the legal field may not agree that the costs of the international commercial arbitration are less. Thus, the recent year's research is to the effect that, the costs of arbitration (costs and arbitral fees) are now equivalent, or even more than the costs of litigation[108]. From a practicable perspective, both arbitration and litigation, particularly in relation to international commercial transactions can involve significant expense. However, the expense incurred may significantly depend, on the country that the arbitration process is submitted. Notwithstanding, affluent business parties still utilise arbitration as a quick, smooth and private resolution method to settle disputes.

[105] Ibid.
[106] Ibid.
[107] ibid 4.
[108] ibid.

Further, issues of competence and neutrality of the arbitrators makes arbitration to be preferred to litigation. In some countries, national courts lack the expertise required to handle technical international commercial disputes and lack of judicial integrity may also be prevalent. Arbitration addresses these issues by giving the parties the choice of involving independent and competent decision makers in the resolution of their disputes.[109]

3.6 DISAVANTAGES OF ARBITRATION

Criticisms of the advantages of arbitration have been raised, when it is viewed from a different perspective. Limited discovery in terms of production of documents and deposition of witnesses has been a major disadvantage in relation to arbitration.[110] However, some disputes which have arisen have attempted a push for the implementation of discovery in areas such as 'antitrust disputes'. The losing party in this situation, whether in antitrust disputes or other disputes, has to provide a large amount of documents to be submitted to the other party, in order to prove their position in the dispute[111].

Another disadvantage of arbitration is that since the arbitral award is binding on the parties, the parties give up their right to appeal which robs the parties of real opportunity to correct what may be an erroneous decision by the arbitral tribunal. Although appeal against a final decision by one of the parties involved in the arbitration procedure could affect the reputation of arbitration as a mechanism, however, it is fair for the parties. This may be due to inaccurate decision made by arbitrators, in which parties have the option to argue on laws and facts which are explicitly wrong. The inability of parties to generally contest erroneous awards can result in dissatisfaction by the parties of utilising the arbitration process as an alternative dispute resolution method.

A solution could be offered, in an attempt to solving this issue in some international commercial transactions, by including in the arbitration agreement a clause to wit: "*Any award would be assessed on its merits in court in order to be enforced*." Conversely, a US Supreme Court had stated that such clause subjects the award to judicial review on the merits of the

[109] Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (3rd edn, Wolters Kluwer 2010).
[110] ibid.
[111] ibid.

award and would not be enforceable[112]. The Federal Arbitration Act constitutes only certain requirements for grounds which parties can bring an action to challenge the award. Grounds such as irregularities based on laws and facts are not admitted to have the right of judicial review for the award. However, it is classified that unfair process or misconduct of the rulings by arbitrators or where it constitutes an element of bias, are grounds to challenge the award and can be permitted[113].

Limitation of arbitrators' power is a disadvantage that may be taken into consideration. In a litigation process, a court may enforce a party's claim, by an order to comply with a certain decision such as a fine. On the other hand, the position of arbitrators are powerless when it comes to enforcing such an awards, and usually, may upon request, make a prayer to the court to provide the parties with the necessary directives, in order to fulfil the decision of the tribunal.

To maintain the privacy of between the contracting parties in an arbitration procedure one must consider the advantage of the duty of confidentiality. However, there are certain situations where confidentiality becomes a disadvantage.

The concept of duty of confidentiality was not mentioned in the laws and rules of international commercial arbitration such as the New York Convention and the UNICITRAL Model Law. The UNCITRAL Arbitration Rules mentions the confidentiality of arbitral awards; however, the duty of confidentiality was not referenced in the procedures of arbitration.

The 2010 International Law Association (ILA) Report speaks on Confidentiality stating that: "while neither statutes, judicial decisions, procedural rules, treaties, not contracts precisely or comprehensively defined the contours and the limits of this confidentiality, there was widespread tacit acceptance of a generalised confidentiality principle. Many have long considered confidentiality to be a desirable feature of arbitration and one that distinguishes it from court litigation. This assumption was called into

[112] Hall Street Associates, L.L.C v Mattel, Inc 552 US 576 (2008). However, the Court did leave the door open for the parties to the effect that the parties may have a contract under state statutory or common law that provide for judicial review of the merits of the award.
[113] Margaret (n 90) ch1, 4.

question by a few highly publicized court decisions in the mid-1990s which promoted considerable commentary and debate."[114]

Arbitration procedures are significantly disadvantaged by the lack of a clear definition of confidentiality. However, the freedom allowed to contracting parties to insert a confidentiality clause in their agreement reflects the assumption of confidentiality being an advantageous feature of arbitration. Moreover, Coleman J. in the case of *Hassneh Insurance Co of Israel v Steuart J Mew* highlighted the matter of the arbitral award and the principle of confidentiality attached to it.

It was further stated by Yu in relation to the case that Colman J. 'distinguished awards from other documents according to three characteristics of an award namely: first, an award is an identification of the parties' respective rights and obligations, secondly it is at least potentially a public document for the purpose of supervision by the courts or enforcement in them, and thirdly awards can be enforced in the English courts by the summary procedures provided by s.26 of the Arbitration Act 1950 or by an action on the award.'[115] He went on to discuss how the issue of confidentiality will be lost when the court has to intervene and the decision may be published publicly[116].

He stated "it follows, in my judgment, that any definition of the scope of the duty of confidence which attaches to an arbitration award, - and I include the reasons —which omitted to take account of such significant characteristics would be defective. Since the duty of confidence must be based on an implied term of the agreement to arbitrate, that term must have regard to the purposes for which awards may be expected to be used in the ordinary course of commerce and in the ordinary application of English arbitration law"[117]. He also commented on the results that may occur on the position of parties' obligations and their freedom of choice for reaching an arbitral award, stating "I conclude that the exception to the duty of confidentiality which has held to apply by implication to arbitration awards applies equally to the reasons. If it is reasonably necessary for the protection of an arbitrating party's rights vis-

[114] Hassneh Insurance Co of Isreal v Steuart J Mew [1993] 2 Lloyd's Rep.243.
[115] Hong-lin Yu, 'Duty of Confidentiality: myth and reality' (2012), Civil Justice Quarterly, 31(1), 68-88.
[116] *Hassneh* [1993] 2 Lloyd's Rep. 243 at 247.
[117] *Hassneh* [1993] 2 Lloyd's Rep. 243 at 247and 248.

à-vis a third party that the award should be disclosed to that third party, so to disclose it, including its reasons, would not be a breach of the duty of confidence."[118]

Thus, it can be argued that confidentiality would be amounted to as a disadvantage for arbitration, in the case of where one party appealed on the grounds of an arbitral award and such results, the arbitral award may become accessible to the public.

3.7 The Impact of the Seat of Arbitration Theory and the Delocalisation Theory:

The seat of international commercial arbitration has been an essential element within the arbitration mechanism. Parties in commercial agreements, tend to state the seat of arbitration location in writing within the agreement. Failure to do so may cause disputes between the parties in regards to which governing law of the arbitral process would be applicable to the agreement. Here, the most important theories must be highlighted within the international commercial arbitration, which is the seat theory and the delocalisation theory. The elemental concern that it should be mentioned in regards to the theories, is the explanation of whether parties have selected a country in their agreement as a seat of arbitration, in which would indicate that parties have chosen to follow the laws of the seat of arbitration of that country, the *lex arbitri*, as laws in order to rule out the arbitral procedure.

It is noteworthy to mention that the seat of arbitration and the *lex arbitri* must be clarified, in order to illustrate the theories. The definition of *lex arbitri* simply is the laws of the state that are in relation to arbitral procedures where the seat is localised in the agreement. It was argued that, to who conform to the delocalisation theory debate, that the *lex arbitri* would not be involved or affect any related matter in the arbitral procedures. On the other hand, others have argued that the seat theory has implications on the arbitral procedures.[119]

[118] *Hassneh* [1993] 2 Lloyd's Rep. 243 at 249
[119] Masood Ahmed 'The influence of the delocalisation and seat theories upon judicial attitudes towards international commercial arbitration' (2011), Arbitration, 77(4), 407.

In the case of Paul Smith Ltd v H&S International Holding Inc[120], the features of *lex arbitri* were illustrated by Steyn J. as the following:

"What then is the law governing the arbitration? It is ….a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration. The law governing the arbitration comprises the rules governing interim measures … the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties … and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitration …."[121].

In *Paul Smith,* the issue was involved is that the parties have included two clauses which concerning arbitration within a licensing agreement, the first clause specified that the governing procedure of arbitration is the International Chamber of Commerce Rules of Arbitration. The second clause stated clearly that the Courts of England is the binding mechanism in which governed the agreement for any dispute arises. Furthermore, it was illustrated by Steyn J. that the first clause is considered to be separate from the other clause, by resolving any dispute between the parties through arbitration as a dispute resolution mechanism. The *lex arbitri* has been referred to it in the second clause as where there is a dispute between parties arises, and the parties resolve the dispute through arbitration, is clearly the law of the English Courts that would override the arbitration process. As a result of the case, England had a jurisdiction to overrides the process as *lex arbitri* in relation to international commercial arbitration. This means that English courts had the right to monitor the procedures of international commercial arbitration and support the parties during the arbitral process if it is necessary within the consent of either party.

3.7.1 The Delocalisation Theory

The hypothesis of delocalisation is that international commercial arbitration has no restrictions by national laws. This can be interpreted as the *lex arbitri*. The theory of delocalisation explicates that the procedures of the seat of arbitration should not be relevant to international commercial arbitration and

[120] Paul Smith v H&S International Holding Inc [1991] 2 Lloyd's Rep. 127 QBD (Comm).
[121] Paul Smith [1991] 2 Lloyd's Rep. 127 at 130.

separated from the *lex arbitri*. Moreover, the state where parties wish to enforce and recognise the arbitral award should have the only authority to be in international commercial arbitration.

Furthermore, the hypothesis of the delocalisation theory in arbitration has been illustrated by Jan Paulsson as the following:

"the sometimes- used expression 'floating arbitration' is not entirely satisfactory, because all arbitral awards may, and frequently do, 'float'…. the question is not so much whether an award may float—this seems beyond dispute—but whether it may also drift, that is to say, enjoy a potential for recognition in one or more enforcement jurisdictions without being ultimately anchored in the national legal system of the country where it was rendered."[122]

Party autonomy has been defined within the delocalisation theory, as the freedom of choice for parties to resolve their disputes through arbitration as a dispute resolution mechanism without being interrupted from the state courts. Disputes by parties could be resolved through arbitration as long as public policy or legal matters are in conformity with the laws of that state, to which the arbitral awards are enforced and recognised or within the seat of arbitration.

Some of the cases should be mentioned in order to illustrate the arguments to whose favour the delocalisation theory.

In the case of *Gotaverken Arendal AB v Libyan General National Maritime Transport Co (LG)*[123], according to the arbitration agreement, the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the ICC Rules) was the governing rules for any dispute arises under their agreement, and therefore, the parties have located and handled the dispute in Paris. The tribunal has ruled out that Gotaverken succeeded in their claim over LG for the amount that is payable to the Gotaverken. However, LG has appealed against the award on certain reasons at the Court of Appeals of Paris. One of the grounds that LG has claimed for was that, French courts should have a jurisdiction over the dispute as the result of French law was followed

[122] Paulsson, "Arbitration Unbound" (1981) 30 I.C.L.Q. 358 at 367.
[123] *Gotaverken Arendal AB v Libyan General National Maritime Transport Co* Cour d'Appel de Paris (Feb. 21, 1980), reprinted in (1980) J. Dr. Int. 660 and [1980] *Revue de l'Arbitrage* 524.

in the arbitration proceedings. The ground was dismissed by the Court of Appeal and ruled out that the French courts will not apply their jurisdiction over the dispute as the arbitral award's nature were considered to be "international" and not French by its national.

It was further clarified in the judgment that "the place of the arbitral proceedings, chosen only in order to assure their neutrality, is not significant; it may not be considered an implicit expression of the parties' intent to subject themselves, even subsidiary, to the 'loi procedural francaise'."

The result of this case has been explained by Paulsson as a defined indication of the hypothesis of delocalisation, he stated "the decision of the Court of Appeals of Paris constitutes clear acceptance of the detachment phenomenon. Its underlying thesis is that the legal force of transnational arbitration is founded on the parties' creation of a contractual institution; the effect of the proceedings may be left to be controlled by whatever legal system is requested to recognise the award once it is rendered, and that system need not necessarily be that of the place of arbitration."[124]

Moreover, in the case of *Hilmarton Ltd v Omnium de Traitement et de Valorisation (OTV)* [125], the parties had a dispute concerning a sum of payment that OTV owed to Hilmarton in exchange for consultancy services agreement in order to secure contracts within the construction sector located in Algeria. In addition, the governing law of the contract was under Swiss law and the seat of arbitration in Geneva controlled by ICC Rules. The arbitral awards were decided in the benefit of OTV as the result of Algerian Law which prohibits obtaining government contracts by agents. This decision has considered that the contract was in conflict with Swiss public policy to which the disputed parties had to resolve the dispute by arbitration. It was argued by Hilmarton that the arbitral award was not in conflict with the Swiss public policy in relation to its enforcement, and the Swiss courts had ruled out in this favour. Furthermore, the French courts have recognised and enforced the arbitral award that was brought by OTV, where OTV seek to enforce the first arbitral award. The Cour de Cassation, similar to the Court of Appeals of

[124] Paulsson, "Arbitration Unbound" (1981) 30 I.C.L.Q. 358 at 367.
[125] (1997) XXII Ybk Comm. Arbn 696 (Cour de cassation, June 10, 1997).

Paris, has refused the impact of the seat of arbitration under this arbitral awards as it assumed that the arbitral award has its own international characteristics, the Court has stated that "the award is not integrated in the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy"

The theory of delocalisation argument is empowered by letting other states to review the arbitral award other than the seat of arbitration has chosen within the agreement by the parties. Therefore, the need for justice and value other jurisdiction and their laws to which the seat of arbitration is ruling out its arbitral awards. Moreover, the same ideology could be shared within the seat of arbitration theory, where errors in laws arise by arbitrators which results in wrongness and injustice in the arbitral awards and therefore would harm the position of the parties in the disputes. The *Lex arbitri* is necessary along with the seat of arbitration as the author stated 'as it is during the arbitral process itself that the parties may require the assistance of the municipal courts'[126]. It should be noted that the New York Convention is encouraging the theory of delocalisation as it seeks enforcement and recognition of foreign arbitral awards by any state that is the signatory state to the convention.

3.7.2 The Seat Theory[127]:

The theory of the seat of arbitration within the international commercial arbitration has an impact on governing the arbitral procedures in relation to the state laws to which the parties have chosen the place for the dispute to be resolved through arbitration. This argument could be illustrated as the *lex arbitri* will regulate the arbitration procedure, which means that the place of the seat of arbitration in the context of international commercial arbitration, will automatically apply its national law of that location stated in the

[126] Masood Ahmed 'The influence of the delocalisation and seat theories upon judicial attitudes towards international commercial arbitration' (2011), Arbitration, 77(4), 411.

[127] Section 3 of the Arbitration Act 1996 stated the seat of arbitration definition as "In this Part 'the seat of the arbitration' means the juridical seat of the arbitration designated –(a) by the parties to the arbitration agreement, or (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or (c) by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances." Also, the seat of arbitration was clarified by Professor Goode as "the jurisdictional seat designated by the parties to the arbitration agreement or by any arbitral or other institution or person vested by the parties with powers in that regard or by the arbitral tribunal if so authorised by the parties. The judicial seat is the place whose law is intended by the parties to govern the arbitral proceedings, not the place where the proceedings are actually held or the award given" (R. Goode, Commercial Law, 3rd edn (London: Penguin, 2004), at p.1170).

agreement. This hypothesis was encouraged by F.A. Mann as stated that the *lex arbitri* should be utilised in the context of international commercial arbitration as the parties have the power to select arbitration in any arbitration rules and process that are preferred to be utilised. Mann has stated the effectiveness of the *lex arbitri* as "every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law which may conveniently and in accordance with tradition be called lex for, though it would be more exact (but also less familiar) to speak of the lex arbitri"[128]. Mann has also supported the approach of the decision of the English Court of Appeal in the case of Naviera Amazonica Peruana SA v Compania International de Seguros de Peru[129] where the seat theory applies, Mann stated "the real value of the Court of Appeal's decision lies …. in the opportunity taken by Kerr LJ of explaining that every 'international' arbitration has a seat … it is the seat that determines the courts exercising jurisdiction over, as well as the procedure of, the arbitration …. Moreover the nationality of the award is determined by the lex arbitri, i.e. the procedural law of the seat of the arbitration, rather than by the law of the place where hearings take place or where the award is signed or despatched."[130]

It should be noted that the seat theory applies to most of the states with the effect of national courts have the power to ensure the level of the process of arbitration is applicable.

Moreover, it should be highlighted that the seat theory has been applied or accepted by the certain treaties and rules. The UNCITRAL Model Law[131] on International Commercial Arbitration has specified the state power over international commercial arbitration. Article 1 of the Model Law has highlighted that the connection between the state power over the arbitration proceedings and the international commercial arbitration as "the provision of this Law…. apply only if the place of arbitration is in the territory of this State.".

[128] F.A. Mann, "Lex Facit Arbitrum" (1967) International Arbitration 160.
[129] Naviera Amazonica Peruana SA v Compania International de Seguros de Peru [1988] 1 Lloyd's Rep. 116 CA.
[130] F.A. Mann, " Lex arbitri and locus arbitri" (1988) 104 L.Q.R. 348.
[131] See also the New York Convention 1958 art. V.

In addition, Article 8 and 9 of the Model Law state the position of state courts in relation of the proceedings for international commercial arbitration as article 8 state "(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 no 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 null 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."* (Emphasis added.)

Article 9 of the Model Law state that "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." (Emphasis added.)

Furthermore, there are certain arguments in which have been identified to disagree with the concept of seat theory on international commercial arbitration, even though it is widely accepted as a successful theory internationally. Party autonomy means that parties resolve their dispute through arbitration as an alternative dispute resolution by freedom of choice. This characteristic is one of the reasons that parties are encouraged to utilise international commercial arbitration as a mechanism. It has been mentioned by Masood Ahmed [132] that ' the very essence of international commercial arbitration may be eroded to such an extent that it is in grave danger of becoming a myth if municipal courts are permitted to not only support but unnecessarily interfere in the arbitral process'. Pierre Lalive has opined that parties should have the choice to resolve their dispute by arbitration without the involvement of state over their chosen method, he stated "and it would be a rather artificial interpretation to deem his power to be derived, and very indirectly at that from a tolerance of the State of the place of arbitration."[133]

[132] Masood Ahmed 'The influence of the delocalisation and seat theories upon judicial attitudes towards international commercial arbitration'(2011), Arbitration, 77(4), 415.
[133] P. Lalive, "Les regles de conflit de lois appliquees au fond du litige par l'arbitre international siegeant en Suisse" (1976) 145 Recueil Des Cours 2.

Hong-lin Yu commented on the seat theory that it is not keeping the efficiency with the development of international commercial arbitration, which based on two clarifications. The first clarification is the lack of involvement of the delocalisation theory and the deficiency of illustration of the substantive law of the state in the international commercial arbitration[134]. Yu has stated that " apart from frequently being applied in arbitral awards, the study carried out in the past shows that more and more legal systems take a more liberal attitude towards the application of a-national principles. The arbitration laws of these countries expressly allow the arbitrators to apply a-national principles to decide the disputes. Moreover, arbitrators are sometimes required to take trade usages into account, or, with the parties' consent, decide the cases ex aequo et bono or under amiable composition."

Moreover, as both theories have been explained above, the case of Saudi Arabia which has no written constitution follows the seat theory in terms of the arbitral process, if the disputed parties have chosen Saudi Arabia as a seat of arbitration within the agreement and the governing law of the agreement, the recent Saudi Arbitration Law 2012 would apply accordingly. This means that the Saudi judicial system would have an impact on the arbitration proceedings between the parties in accordance with the 2012 Law. However, if the parties choose Saudi Arabia as a seat of arbitration and the governing law of the agreement is non-Saudi, the non-Saudi law would apply provided that it is not against shari'a law or public policy. Moreover, Saudi Arabia also utilises the delocalisation theory when a winning party in a dispute wishes to enforce and recognise a foreign arbitral award in Saudi Arabia. In this case, the competent court in Saudi Arabia that is authorised to recognise and enforce such arbitral award would look at whether the arbitral award is in conformity with the public policy and *Shari'a* law in order to enforce the award. So even though parties are wishes to choose any arbitration laws which is acceptable by the 2012 Law for arbitral proceedings and any governing law contract, the law cannot contradict the *Shari'a* law and public policy in Saudi Arabia when it comes to enforcing the arbitral award.

[134] Yu, "Explore the void: Part 1" (2004) 7 Int. A.L.R. 180.

3.8 ARBITRATION VS. LITIGATION

Generally, arbitration as an alternative dispute resolution method, can be characterised in the following ways:[135]

- **Speed**: Speedy resolution of disputes depending on the dispute in question and the agreement of the parties.

- **Expert decision-makers**: The choice of experts ranges from those in the field of the dispute to those who have the requisite knowledge, and is usually driven by relevance to the field or subject matter, neutrality and impartiality during proceedings.

- **Informality and flexibility are characteristics which stand out in arbitration processes**: The parties are opportune to settle their disputes in a more flexible manner, and within informal environs, which enables them to ascertain their arguments freely and without the formal restrictions involved in court proceedings.

- **Privacy**: A core reason for opting to alternative dispute resolution mechanisms is the opportunity to have a private means of resolution. Most multinational corporations do not intend to share their private disputes to the public.

- **Finality**: This will act as a res judicata on the parties, and no court will have the jurisdiction to alter the awards of arbitrators, unless due process has not been followed.

- **Parties' driven process**: Arbitration always provides and recognises the requirements of the parties which are usually contained in the arbitration agreement. Arbitration is a parties' driven process and the tribunal utilise the solution(s) proffered by the parties in order to resolve the issues in the dispute.

[135] Fiadjoe Albert, *Alternative Dispute Resolution: A developing world prospective* (Cavendish Publishing Limited 2004).

- **Reduced costs**: One factor that should be highlighted is cost might be reduced, depending on the country in question, elected by the parties to be utilized as their alternative dispute resolution.

- **Business relationship**: Maintaining and preservation of business relationships without undue frictions between the parties. This is contrary to the antagonistic nature of litigation processes.

- The advantage of providing a strong legal system by engaging the experts of the field in the dispute.

On the other hand, litigation processes are usually utilised in circumstances where arbitration will not do substantive justice to the case in question. Some considerations in this regard may include:

- **Matrimonial matters**: Where the disputes involves matrimonial causes, litigation is the more appropriate means of resolution.

- **Crime**: Where the dispute involves the commission of a crime, litigation is preferred to arbitration.

- **Protection of child rights**: Where it involves child's rights and other minor related matters.

- **Declaration of rights and liabilities**: In relation to matters, the subject matter of which is the declaration of rights or liabilities of the disputing parties.

- Where the parties specifically desire that their issues be resolved in the court.

Features of litigation process include:

- **Formality**: The nature of the trial is characteristically formal.

- **Delay**: Delay constitutes a major problem with court processes especially in Saudi Arabia in the writers' opinion, where litigations are extending and extremely time consuming, particularly where the dispute is litigated up to the highest judicial authority.

- **Expenses**: The length of court process has rendered such proceedings exorbitant and unaffordable in the long run. The speediness of arbitral proceedings, in some respect, has assisted in reducing the cost of such proceedings. Also, the fact that the arbitration process is a party-driven system, makes the parties responsible for decisions relating to cost.[136]

Albert,[137] in buttressing the disadvantages of the litigation process in contradistinction with arbitration, stated that, "*Court overcrowding, rising demands on scarce public resources, escalating legal and emotional costs, an increasingly long, arduous process and inefficiency, are popular frustrations with litigation*".

The 21st century which is characterised by a global economy which is increasingly commercial in nature, is also characterised by multiple disputes arising therefrom. It becomes essential, that such disputes are effectively resolved as quickly as they arise through functional alternative mediums, without having any recourse to litigation processes. Since the basis of arbitration was grounded on its access to 'quick' justice, Abraham Lincoln stated his views to this effect:

"*Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time*"[138]

3.9 CRITICISMS AND BENEFITS OF ARBITRATION PROCESSES

An empirical research was conducted in 2015, the '2015 International Arbitration Survey'[139]: Improvements and Innovations in International Arbitration', the research examined the effectiveness of international commercial arbitration and its improvement as an alternative dispute resolution mechanism. The research was conducted for more than six months

[136] Ibid.
[137] Fiadjoe (n 91).
[138] Margaret (n 90) ch1, 3.
[139]Queen Mary University, An empirical research on 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration (2016) < http://www.arbitration.qmul.ac.uk/docs/164761.pdf > accessed 19 November 2017.

and the study was involved with 763 participants who have completed online questionnaire and 105 interviews which were finalised in person. The feedback from 90% respondents on international arbitration is that the utilisation of arbitration was desired as a mechanism for resolution of disputes. It was also noted in the study that the most favourable of the advantages of arbitration is "*enforceability of awards*", and other advantages include "*flexibility, appointment of arbitrators and avoiding specific systems*". The disadvantages that were pointed out are the cost of arbitration which is highly ranked and then "*lack of effective sanctions during the arbitral process, lack of insight into arbitrators' efficiency and lack of speed*". Appeal on the merits as a method whether in commercial or investment arbitration process was not recommended by the respondents.

The research also considered the most chosen seats in arbitration, where the respondents have emphasised that the popular ones are London, Paris, Hong Kong, Singapore and Geneva. This is because of the reputation and recognition of arbitration within these countries and cities. The most highlighted arbitral institutions that respondents will select are the ICC[140], LCIA[141], HKIAC[142], SIAC[143] and SCC[144]. The feedback received from the respondents in relation to arbitral institutions is that publishing of data by arbitral institutions on the length of their cases and the period of time for arbitrators to issue arbitral awards could improve international arbitration.

The research further suggested that in the case of reducing time and cost of arbitration, the solution is the need for tribunals to set a schedule for hearings and issuance of final awards. It was recommended by 92% of the respondents that the rules of arbitral institutions should provide straightforward processes for disputes which fall under a certain threshold. The respondents also mentioned that lawyers, who are representing parties within arbitration, should be more co-operative together to minimise the document production and resolving the issues by presenting the method of settlement.

[140] International Chamber of Commerce.
[141] London Court of International Arbitration.
[142] Hong Kong International Arbitration Centre.
[143] Singapore International Arbitration Centre.
[144] The Arbitration Institute of the Stockholm Chamber of Commerce.

On the other hand, some arbitration institutions were also criticised of being characteristically expensive and prone to delays such as the American Arbitration Association. The figures show that the cost of arbitration proceedings are higher than litigation as notified by 45% of chief legal officers, gathered from litigation/arbitration statistics within corporate America.[145] Moreover, it is suggested that corporate contracts that utilize arbitration clauses will be decreased in the next five years, which has been in fact, predicted by 35% of corporate attorneys.[146]

Another critical aspect against the utilisation of arbitral proceedings is delay. Delay in arbitral proceedings, is attributable to varying causes. A few causes will briefly be outlined.

- Drafting arbitration clauses can cause significant delay to the process of arbitration. This would depend on the quality of expertise of the attorneys within the field of arbitration.

- Due preparation of preliminary hearings by advocates is a factor that has a tendency of speeding up arbitral proceedings. This is however, never duly observed, thus, causing unnecessary delays.

- The mode of management of arbitral proceedings by arbitrators, has a major impact on the speed of the decision-making.

In respect to the mode of drafting of arbitration clauses, lawyers should be confident to set relevant clauses in arbitration agreements which will assist significantly, during the course of arbitration. This may include the following:

- Include the meaning of disputes that are to be arbitrated within the agreement.

- Consider the rules that are in connection to the arbitration proceedings.

- Choose the venue of arbitration.

[145] Newhall, Christine L, 'The AAA's War on Time and Cost – The Campaign to Restore Arbitration's Benefits' (2012) 67 Dispute Journal Resolution 3, 20.
[146] Ibid.

- The jurisdiction of procedure law.
- Drafting terms that are necessary and comply with the agreement, so parties will be bound by it and utilise the method of arbitration[147].

The cure is to resolve those factors which are ambiguous or will cause any unnecessary delays, in order to limit the expenses and time-consumption of arbitration proceedings. It is also important that parties are to be wholly involved in the arbitral proceedings since the entire essence of arbitration in the first place was party driven. In this vein, rather than the parties unnecessarily relying on the services of legal representatives, they should devote their attention into the arbitral proceedings, and constantly participate therein. This will foster a swift resolution of disputes. It is also essential in this vein, that parties must stipulate a time frame within which they seek a final resolution of the disputes. This will also motivate the arbitrator(s) to work towards dispensing his/their award within such a time.[148]

Conversely, the lack of experienced advocates and arbitrators within the arbitration process and the lack of requisite knowledge to distinguish between arbitration and litigation, has lead the procedure to mirror litigation.[149] Notwithstanding, in 2009, certain sets were improved under the AAA Construction Rules. For instance, it introduced three track systems for construction disputes, to minimise the disputes and speed the process.[150]

It can be learned from a developed country like the United States, where the AAA organised a movement called "*Economy, Speed and Justice 2011*", in order to improve the process of arbitration and resolve its issues to encourage the use of arbitration and deter the public from criticising its process. This organisation has many offices all around the country with fundamental objectives, which begin with educating the staff. Lectures and seminars were provided for the staff in the offices, where relevant issues were raised as

[147] Ibid 40.
[148] Ibid.
[149] Scott Kent and Mow Adam 'Creating an Economical and Efficient Arbitration Process' [2012] Dispute Resolution Journal <http://www.babcockscott.com/wp-content/uploads/2014/09/Creating-an-Economical-and-Efficient-Arbitration-Process.pdf > accessed on 28 February 2018.
[150] Ibid 38.

regards learning to utilize the different approaches which are to be considered in order to have viable arbitration proceedings.

The element of management within the proceedings of arbitration is a critical point to be improved. Identifying the root causes of delay early in the process of arbitration is important, to avoid the delay subsequently. Those delays could arise during the appointment of arbitrators, setting dates for hearings, communications with the arbitrators and the attorneys of both parties, and other expenses that may arise including the arbitrator(s) fees[151].

There was also a programme called "*Muscular Arbitration: Trimming the fat out of Arbitration*." This was set out in order to improve the quality of arbitrators and advocates in the areas of case management and provide a precise conclusion.[152] A new method was conducted to speed up the process for those who are willing to choose arbitration as an alternative dispute resolution. This is called "*Rapid Resolution Procedures*". It is intended to minimise the hearing schedule of arbitral processes, and as a result, the likelihood should be three hearings to be heard by one arbitrator in a day.[153] Expert witnesses in arbitration proceedings also have an impact in speeding up the hearing. Another factor that would lead to a swift completion of arbitral proceedings is that arbitrators should set and agree on the expenses of the process, before the beginning of such process. Failure to do so would constitute delay in resolving disputes.

As a result of these programmes, a significant improvement was highlighted as it relates to the elements of time, costs and fairness in the arbitration process. These groups of programmes can be made applicable to a developing country such as Saudi Arabia, which will lead to significant advancement and success of arbitral processes within the country. This will consequently make arbitration a veritable and effective tool. Also, a compulsory arbitral system would be useful in commercial transactions, more specifically, in the marine insurance industry to move farther away from having recourse to the litigation process.

[151] Ibid 23.
[152] Ibid.
[153] Ibid 23.

3.10 THE ROLES AND RESPONSIBILITIES OF ARBITRATORS

Generally, the position of the arbitrator(s) has a grave effect on the arbitration proceedings. "*The arbitrator has a complete discretion to determine how the arbitration is to be conducted …. So long as the procedure he observes does not offend against the rules of natural justice*."[154]

Arbitrators should take fairness and justice as fundamental guiding principles in arbitral proceedings in order to afford both parties an independent, impartial and effective means of settlement. This could be manifested in many ways, including[155]:

- Setting dates in advance for initial preliminary management hearing;
- Preparation for managing such disputes by affording reasonable time and opportunity for pleadings;
- Cultivate a healthy 'note-taking habit' in order to facilitate ease of investigation and consideration of the dispute in advance; and
- Restricting the determination of the disputes to the matters arising from such disputes, and not a broad application of the subject matter of the dispute.

The foregoing points are extremely necessary in order to save time and ultimately, dispense justice on a case to case basis.

3.10.1 Statutory Powers of Arbitrators:

The following are outlined stipulations of the powers of arbitrators in the course of arbitral proceedings to effectively manage the proceedings for optimum result:

- Under the Rules of the Construction Industry Arbitration in R-32(2) of the American Arbitration Association (AAA) stated that "*The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view toward expediting the resolution of the*

[154] Bremer Vulcan v. South India Shipping (H.L) [1981] 1 All ER 289 (Lord Diplock).
[155] Ibid para 143.

dispute …"[156] This rule considerably limits the costs of arbitration to become well-organized.

- Rule R-23 underlines the authority of arbitrator in relation to organising the preliminary hearings, "*issue an agenda in advance*" in relation to the hearings, and finally, outlining the scope of such hearings in an effort to efficiently manage the process and eliminate superfluous issues.

- Under Article 16(1) of the International Arbitration Rules of the International Centre for Dispute Resolution (ICDR)[157] stated "*Subject to these rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate…."* then it continues in Article 16(2) to provide "*The tribunal, exercising its discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute*." It carries on in relation to the management of the tribunal "*a preparatory conference with the parties for the purpose of organising, scheduling and agreeing to procedures to expedite the subsequent proceedings*".

- Under Article 17 of the UNICITRAL Arbitration Rules stated "*subject to these rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate …. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' disputes*".

- It should be emphasised that Article 2(2) of the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration provides that "*The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence,*

[157] The ICDR is the AAA's international division.

including… the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence"

The object of the above stated rules (as articulated in the preamble of the IBA Rules) is to deliberate on likely issues that may arise as it relates to the powers and extent of arbitrators, and to ideally recommend ways of how to tackle issues of formalities and protocols that may be likely involved in arbitral proceedings in order to provide a viable tool of competence and limit the expenses and time spent in connection with the arbitral process.

3.11 EXPERTS IN ARBITRATION AS A TOOL FOR EFFECTIVENESS

It should be emphasised that costs in arbitration may increase, when it concerns the use of experts' evidence and testimony[158]. It is imperative that the reasons for the employment of the services of experts in arbitral proceedings should both be considered and appreciated. Reports made by experts would benefit the arbitrators as it would provide the arbitrators with a high-level knowledge of the technical issues that occurred in the disputes (*e.g.* issues of local law), especially in situations where the arbitrators lack the requisite knowledge in the area of the dispute. The characteristics of experts are independently exclusive from the outcome of the arbitration proceedings,[159] i.e., they are not interested parties in the course of the arbitral proceedings but are only there to develop such proceedings.

It should be pointed out that experts can be either appointed by the parties that have the dispute, or either selected by the tribunal within the country in which arbitration is conducted. Experts that are appointed by tribunals are more concerned and highlighted by the rules of arbitration in most known worldwide nations.

The use of experts that has been mentioned by the international rules[160] provides that are considered in relation to the appointment of experts in the

[158] The ICC Commission on Arbitration in its report: International Chamber of Commerce, *Techniques for controlling time and costs in Arbitration* (2007) stated that in 2003 and 2004, 82% of the total costs incurred by the parties in arbitration directly resulted from the costs of presenting their case.
[159] Golloway Patricia, 'Using Experts Effectively and Efficiently in Arbitration' (2012) 67 Dispute Resolution Journal 3, 27.
[160] Article 29(2) of the UNICITRAL Arbitration Rules (revised in 2010) stated as "The expert shall, in principle before accepting appointment, submit to the arbitral tribunal and to the parties a description

process of arbitration. These rules direct and clarify the roles of experts in arbitral proceedings, and how they should contribute to the expediency of arbitral proceedings by duly providing independent and all-encompassing reports to the parties and the tribunal. It is noteworthy to mention that tribunals may request experts to stipulate certain information in respect to a particular issue. Moreover, it is expected that arbitrators who are conducting the process of arbitration, should have similar knowledge and level of expertise as experts when it comes to the technical issues of the disputes. Experts are not intended to make a decision in arbitration proceedings. They are characteristically neutral and independent, and their involvement in the process is directed at providing reports and answering questions that are unclear to the arbitrators, in order to analyse the issues of the disputes.

Finally, it should be stated that, it is recommended by *International Arbitration Checklists* that "*Experts should be instructed that the purpose of their meeting is to determine areas of agreement and disagreement*"[161]. It also states that "*Experts may make more progress in arriving at agreed joint minutes if their discussions are without prejudice and the only matter that is put before the tribunal is the joint minutes which they ultimately produce*".[162]

3.12 THE DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION LAWS AND CENTRES – INTRODUCTION

The stones of international commercial arbitration experienced its offshoot in the late 19th century and in the early 20th century. The main strength of arbitration was in Europe, as it was a well-known method and could be enforced worldwide. Robert Briner and Virginia Hamilton[163] illustrated that:

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of his or her qualifications and a statement of his or her impartiality and independence. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert's qualifications, impartiality or independence. The arbitral tribunal shall decide promptly whether to accept any such objections. After an expert's appointment, a party may object to the expert's qualifications, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made. The arbitral tribunal shall decide promptly what, if any, action to take."; Art. 22 of the ICDR International Arbitration Rules (2009); Art. 20 of the ICC Arbitration Rules (2012); Art.21 of the LCIA Arbitration Rules (1998).

[161] Grant Hanessian and Lawrence Newman, *International Arbitration Checklists* (Juris Publishing 2009) ch 11.

[162] Ibid.

[163] R Briner and V. Hamilton, 'The History and Purpose of the Convention' in Emmanuel Gaillard and Domenico di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May Ltd. 2008) 3. See also Yasuhei Taniguchi, 'Is There a Growing International Arbitration Culture? - An Observation from Asia' (1996) 8 ICCA Congress Series 38-39.

"*As nations increasingly affirmed their sovereignty and international trade outgrew its former structure, the dispute resolution mechanisms developed within trade associations began to prove inadequate. The group pressure that had formerly been such an effective means of ensuring enforcement of arbitral awards lost its power, and there were no specific legal means of compulsion to take its place*".

During this period, the various institutions of arbitration had strengthened the roots of arbitration. In 1892, the London Court of International Arbitration ('LCIA') was founded and was described by the *Law Quarterly Review* as a Chamber that '*is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife*.'[164] In 1915, the Chartered Institute of Arbitrators was ascertained. Thereafter, in 1916, an edition was first reported by the Institute's Journal of Arbitration and it was created "*at the instance of members of those professions whose services are usually invoked for the purpose of acting as Arbitrators in commercial matters .... With a view to their corporate association, both for their own benefitand the interest of the general public*"[165].

3.13 INTERNATIONAL COMMERCIAL ARBITRATION LAWS

As indicated above, arbitration is a well-known method for the resolution of disputes. The rapid advancement of international commercial arbitration as a preferred means for resolving international disputes between contracting parties was aided by significant treaties that provided the legal framework for international commercial arbitration.

3.13.1 Geneva Protocol of 1923 and Geneva Convention of 1927:

The first international treaty enacted in 1923 is called the "Geneva Protocol on Arbitration Clauses in Commercial Matters", which was adopted by the League of Nations in furtherance of commercial arbitration. This treaty was implemented for arbitration agreement and its awards in order to promote

[164] Edward Manson, 'The City of London Chamber of Arbitration' (1893) 9 Law Quarterly Review 86.
[165] Ibid.

their recognition and enforcement. It was a supplemental method which provided for how to recognise an award that was made within another jurisdiction.

The Geneva Protocol was followed in 1927 by the Geneva Convention on the Execution of Foreign Arbitral Awards. The Geneva Convention was made explicitly to prolong the enforceability of the arbitral awards between the signatory states that have considered it, and also to improve the 1923 Geneva Protocol.[166] It has been argued that the Geneva Protocol and Geneva Convention form a unit and established fundamental principles that were adopted by subsequent arbitration treaties[167]. Nowadays, the influence of both Geneva treaties has been whittled down by the advent of the New York Convention.[168]

The *Abu Dhabi oil* case[169] was during the pre-World War II period. It is an example which caught the world's attention to the concept of international arbitration. This case involved the Sheik of Abu Dhabi and a foreign private company, as parties to an oil concession in 1939. Lord Asquith was selected as an arbitrator by the two arbitrators that were appointed within the arbitration agreement. The question which arose was the extent to which the law would be applicable to the dispute. Lord Asquith recognised the law of Abu Dhabi as the reliable and applicable law. The reason is because the agreement was performed in the Abu Dhabi and signed there. Lord Asquith stated that: "*[the] Sheik, an absolute, feudal monarch …. administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal*

[166] Briner and Hamilton (n 163) 7-8; A Redfern, M Hunter, N Blackaby and C Partasides, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet and Maxwell 2004) paras 1ff; V Petocha, 'Geneva Convention on the Execution of foreign Arbitral Awards' (1986 – 1987) 1 World Arbitration Reporter 11.

[167] Claudia Alfons, *Recognition and Enforcement of Annulled Foreign Arbitral Awards: An Analysis of the Legal Framework and its Interpretation in Case Law and Literature* (Peter Lang GmbH 2010).

[168] The New York Convention, art VII(2) states that: "*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*". For domestic legislation implementing treaties see, as an example, the Indian Arbitration and Conciliation Act 1996, ss 53-60.

[169] Petroleum Dev (Trucial Coast) Ltd. v Sheikh of Abu Dhabi (award of 28 August 1951) reprinted in (1952) 1 International and Comparative Law Quarterly 247.

principles applicable to the construction of modern commercial instruments".[170]

Lord Asquith decided in the favour of the Sheik of Abu Dhabi and dispensed his award to this effect. It appears that the rationale of the learned judge was based on the sanctity of Islamic law, which should govern disputes arising from transactions within Islamic jurisdictions. His contempt for the any other body of "foreign" legal principles applying to a potentially "Islamic based" dispute, suggests that Islamic law will always apply notwithstanding the express inclusion of a governing law by the parties within their arbitration agreement. Nowadays, this decision would not be adequate within the field of international arbitration, since parties are vested with the powers to elect governing laws or rules in favour of any disputes which may arise in the course of a commercial relationship, and such provision is usually binding on the arbitrators.

3.13.2 The New York Convention of 1958:

The most significant development within the history of international commercial arbitration was the New York Convention. The enactment of the New York convention was in 1958, which improved the legal sectors and attracted international businesses to utilize the method of arbitration to settle disputes.

It is worthy of note that in the 1950s, the ICC was actively involved in the positive efforts taken, towards the improvement of the recognition and enforceability of international arbitral awards. They subsequently, presented a 'Preliminary Draft Convention' for the United Nations[171]. However, the majority of states disapproved the ICC Proposals, where national courts within the place of arbitration had no power as regards foreign awards. Moreover, a draft convention for consideration on the enforcement of foreign awards had been provided by the United Nations Economic and Social Council ('ECOSOC')[172].

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[170] Ibid 250-251.

[171] AJ van den Berg, *The New York Convention of 1958: Towards a Uniform Interpretation* (Kluwer Law International 1981) 7; Briner and Hamilton (n 163) 8-9.

[172] The United Nations Economic and Social Council (ECOSOC), Draft Convention on the Enforcement of Foreign Arbitral Awards (UN Doc E/2704 and Corr 1).

In 1958, a discussion was made at the 'Conference on International Commercial Arbitration' by delegates of almost 40 countries in relation to ECOSOC's draft[173]. A week after, amendments were made by the Dutch delegation in connection to Articles III to V of the ECOSOC draft. The changes were further deliberated in the conference and several alterations were made during those debates[174]. In 1958, the structure of the proposal was altered further and was approved by 35 votes in the conference.[175]

The latest version of the New York Convention was successfully accomplished globally, within the arbitration sector in terms of the recognition and enforcement of foreign awards. Two main factors which are based on this bias are, firstly, its core idea is "*to encourage and liberalise the process of recognition and enforcement of awards by decreasing the scope for obstruction by national courts and laws*"[176]. Secondly, the principle of accepting jurisdictions is calculated to mean recognising the awards of foreign jurisdictions, other than national laws of states. In the case of *Hainan Machinery Import & Export Corporation v Donald & McArthy Pte Ltd,* [177] Justice Prakash declared that: "*The principle of comity of nations requires that the awards of foreign arbitrations tribunals be given due deference and be enforced unless exceptional circumstances exist. As a nation which itself aspires to be an international arbitration centre, Singapore must recognise foreign awards if it expects its own awards to be recognise abroad*".

Towards the end of 1958, the signatory parties to the New York Convention were raised to 25 states. Over the years, the number of contracting states has

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[173] For the Summary records of the New York Conference, see UN Doc E/Conf26/SR1-25 and for other preparatory materials of that conference, including suggested amendments to the ECOSOC draft and reports of the Working Parties, see UN Doc E/Conf26/7 and L 7-63 reproduced in G. Gaja, *International Commercial Arbitration: The New York Convention,* (Oceana Publications Inc 1978-1980) pt III. See also www.unictral.org.

[174] United Nations Economic and Social Council, *Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Item 4 of the Agenda)* (UN Doc E/CONF.26/L43 – 3 June 1958) < http://newyorkconvention1958.org/index.php?lvl=notice_display&id=3371 > accessed on 7 November 2017.

[175] United Nations Economic and Social Council, *United Nations Conference on International Commercial Arbitration - Summary Record of the Twenty-Fourth Meeting* (UN Doc E/CONF.26/SR.24 – 12 September 1958) < www.newyorkconvention.org/11165/web/files/document/1/5/15860.pdf > accessed on 7 November 2017.

[176] Richard Garnett and Michael Pryles, 'Recognition and Enforcement of Foreign Awards under the New York Convention in Australia and New Zealand' (2008) 25 Journal of International Arbitration 899, 904.

[177] [1996] 1 SLR 34, at para 45; [1997] XXII Yearbook of Commercial Arbitration 771. See also Hebei Import & Export Corp v Polytek Engineering Co Ltd [1999] 1 HKLRD 665.

been increased to 157 up to date[178]. The ideology underlying states to become signatories to the New York Convention is to strengthen the global economy as a whole, in order to cause progress to the economy by involving international investors within their states. It is also, noteworthy to mention that the New York Convention has monopolised international arbitration as it relates to the recognition and enforcement of its awards.[179]

The growth of international arbitration in connection with the New York Convention could be observed from the ICC statistics. In 1960, 29 arbitrations applied in the ICC Court and 56 in the year 1970. In 1980, the number of arbitrations had increased to 152, then in 1990 to 251. It was also significantly boosted in 2000 to 541 and in 2009 to 817. These facts evidence the importance, effectiveness, and also popularity of international arbitration as the most utilised means of alternatively resolving both national and international disputes[180].

Although the New York Convention made a paramount contribution to the growth of international arbitration, other improvements were also experienced in the arbitration sector. For example, the International Centre for Settlement of Investment Disputes ('ICSID') Convention, 1965 made a significant impact in relation to international investment disputes, and the Arbitration Rules of the United Nations Commission on International Trade Law, 1976 ('UNCITRAL') and the UNCITRAL Model Law on International Commercial Arbitration ('Model Law'), 1985 are also accredited for their immense contribution for the successful development of international commercial arbitration.

3.13.3 The International Centre for Settlement of Investment Disputes (ICSID) 1965 Convention:

The 1965 ICSID Convention started within the roots of the World Bank, to assist in solving international disputes in the investment sector. The Convention introduced the investment treaty arbitration. This particular

[178] See < http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed on 7 November 2017.
[179] Greenberg Simon, Kee Christopher and Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2012) ch 1, 11.
[180] Ibid.

convention on arbitration which was followed by the 1965 Convention, involved disputes of private-party states in which concerns arose between a national of a state within a foreign state ('host state'). It should be noted that the host state is the main substance of the dispute, since it houses the national of another state, whose sole purpose is investing in the host state.

Investment disputes had risen from the beginning of the 20th century. This is due to the increase of nationalisations. The increase of socialism, and also, the impact of the First World War contributed gravely to the increase of investment disputes. Moreover, the Second World War constituted a reaction affecting certain industries. For example, the influence of socialism had an impact in relation to France and the United Kingdom, which rendered them municipalised. The independence and diversity of certain colonies and concessions which were established within the petroleum and mining sectors were short-lived as they became nationalised.[181] Foreign investments had appeared in developing countries to strengthen their economy. The ideology of foreign investments had been accepted by developing countries to expand their economy in relation to their natural resources.[182]

The role of World Bank had a significant impact on the development of foreign investments. The organisation was described as being "*highly satisfactory*" in solving issues internationally.[183] In 1962, a draft convention was produced in relation to the process of dispute resolution by the General Counsel of the World Bank. Experts in the legal field were appointed in different parts of world, including Europe, Asia, Africa and America, in order to negotiate the draft convention.[184] Amendments were made to the draft conventions by the World Bank staff with the assistance of specialists within the government. In 1966, the ICSID Convention became effective and states became signatory to it, with up to 144 states in 2010.[185]

[181] See RD Bishop, J Crawford and WM Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* (Kluwer Law 2005) ch 1.
[182] Greenberg, Kee and Weeramantry (n 179) ch 1, 12.
[183] Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2001) 1-11.
[184] Ibid 2-3.
[185] A list of ICSID Convention states is available at < http://icsid.worldbank.org > accessed on 7 November 2017.

One of the unique characteristics of the ICSID Convention (as amended) is the opportunity of one party (investors) to assert claim(s) against a state or its entity in relation to their rights. Previously, only states were able to have standing to assert claims against other states within international courts. Nowadays, private parties are allowed to claim against state parties.[186] The Convention provides an avenue of settling disputes, by rendering arbitration agreements between foreign investors and host states, binding.

3.13.4 The United Nations Commission on International Trade Law (UNCITRAL):

The General Assembly of the United Nations set up the UNCITRAL in 1966.[187] The introduction of the UNICITRAL was to tackle the disunity in international trade. The member states signatories to the law were subsequently increased to 60 states worldwide. One of the impacts that UNCITRAL provided for international trade law, was to deliver and improve conventions and model laws. These conventions and model laws were usually utilized as reference guides to aid due processes and substantive issues within the trade sector, and most significantly international arbitration.[188] In 2000, the activities of the UNCITRAL towards international arbitration deteriorated, paying less attention to the field of arbitration. It further, made some subdivisions within its establishment, vesting matters relating to arbitration to a minute group called the Working Group II.[189] A revision of the UNCITRAL Arbitration Rules was introduced by the Working Group II, which constitutes experts within the arbitration field. As a result, a new version was set up, which is now regarded as the UNCITRAL Model Law on International Commercial Arbitration.

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[186] Greenberg, Kee and Weeramantry (n 179) ch 1, 13.

[187] UNCITRAL was established at the 1497th plenary meeting of the General Assembly of the United Nations held on 17 December 1966 by Resolution 2205 (XXI – Establishment of the United Nations Commission on International Trade Law) < https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/005/08/IMG/NR000508.pdf?OpenElement > accessed on 7 November 2017.

[188] Other than Arbitration, UNICITRAL has other documents related to international trade. See www.unicitral.org.

[189] United Nations Commission on International Trade Law, *UNICTRAL rules of procedure and methods of work – Note by the Secretariat* (UN Doc A/CN.9/676 dated 4 June 2010) < https://digitallibrary.un.org/record/685339/files/A_CN.9_697-EN.pdf > accessed on 7 November 2017.

3.13.5 The UNCITRAL Arbitration Rules of 1976:

The significant impact that was made by the UNCITRAL in relation to international arbitration was the Arbitration Rules 1976. This impact could be shown within arbitration agreements, where parties were required to assert their rights within the contract. These rules have been utilized remarkably in the history of arbitration globally. It has been considered to include bilateral investment treaties as it relates with their arbitration agreement. Most importantly, a significant boost has been shown from the 1979 Rules, with its arbitral tribunal now being the Iran-United States Claims Tribunal. The US and the Iranian government have been involved in several disputes, which constitute thousands of claims. It was stated that "*as of April 2006, the Tribunal had issued over 800 awards and decisions- a total of 600 awards (including partial awards and awards on agreed terms), 83 interlocutory and interim awards, and 133 decisions- in resolving almost 4,000 cases*."[190] The interesting point to be added at this juncture is that the UNCITRAL Arbitration Rules were adopted in all these decisions. Further, these decisions are obtainable and can be easily accessed publicly. Also, valuable materials were introduced to assist legal practitioners in solving disputes[191]. Most of the materials which have cited these decisions are still highly remarkable[192].

3.13.6 UNCITRAL Model Law on International Commercial Arbitration 1985 (the Model Law):

The Model Law plays a key role internationally, with relevance to arbitration. It was to recommend to all jurisdictions to apply arbitration laws within the concept of the Model law. It emphasised that the Model laws should be

[190] Christopher S. Gibson and Christopher R. Drahozal, 'Iran- United States Claims Tribunal Precedent in Investor-State Arbitration' (2006) 23 Journal of International Arbitration 6, 521.
[191] HM Holtzmann, 'Some Lessons of the Iran-United States Claims Tribunal' in Private Investors Abroad: Problems and Solutions in International Business (1987) 16 in Gibson and Drahozal *ibid* 521.
[192] For example, see D Caron, L Caplan and M Pellonpaa, *The UNCITRAL Arbitration Rules- A Commentary* (Oxford University Press 2006); S Baker and M Davis, *The UNCITRAL Arbitration Rules in Practice: the Experience of the Iran-United States Claims Tribunals* (Kluwer 1992); J van Hoff, *Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-United States Claims Tribunal* (Kluwer 1991).

adopted as a basis for nations legislation with minor amendments which are deemed necessary.[193]

The complexity of the Model Law was a 'set up template' to be utilized by the nations where drafting of domestic arbitration law is necessary. It should be noted that the Model law is not an independent law. It is in compliance with the ICSID Convention and the New York Convention as a matter of concern, for states who are signatory as parties to such conventions. The Model Law was described as that, which "*is usually held up as the template signifying ideal balance between arbitral and curial authority*."[194]

It should be noted that some states have not applied the Model Law within their jurisdictions due to certain considerations, including: the strength of their economy, for example, the United Kingdom (excluding Scotland), France and Switzerland. However, inspecting their arbitration laws would bring forth a similarity and the consistency with the Model Law.[195]

After the Model Law was altered in 2006, the feature of the Model Law was described under Article 2A of the 2006 as follows:

> "*In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith."*
>
> "*Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based."*

[193] For more on the background to the Model Law see United Nations Commission on International Trade Law, 'Report of the [UN] Secretary-General: Possible Features of a Model Law on International Commercial Arbitration' (UN Doc A/CN.9/207 - 14 May 1981) < https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL8/102/47/PDF/NL810247.pdf?OpenElement > accessed on 7 November 2017.

[194] Morgan R, 'Abandoning Colonial Arbitration Laws in Southeast Asia – II: Background and Commentary' (2000) 15 Mealey's International Arbitration Report 7, 44. See also Schaefer JK, 'Abandoning Colonial Arbitration Laws in Southeast Asia- I: An Analytical History' (2000) 15 Mealey's International Arbitration Report 7, 30ff - who describes the Model Law as having been "*developed by international experts as a role model for developing countries when modernizing their arbitration law*".

[195] Greenberg, Kee and Weeramantry (n 179) ch 1, 11.

3.14 INTERNATIONAL COMMERCIAL ARBITRATION CENTRES

In addition to the legal framework for international commercial arbitration, the establishment of international arbitration centres strengthened the roots of international commercial arbitration and provided the neutrality, expertise and confidentiality required in the resolution of international disputes.

3.14.1 The International Chamber of Commerce:

The International Chamber of Commerce ('ICC') was founded in 1919, in the aftermath of the First World War when there were no internationally recognised or agreed rules for the regulation of trade, investment, finance or commercial relationships[196]. A group of international businessmen had set up the (ICC) and they were known as 'Merchants of Peace'. They considered such an establishment to be a dispute settlement mechanism, which could be effectively developed and strengthened.

In 1921, the ICC started registering international disputes and raised 15 cases, and before 1923, the invention of the ICC International Court of Arbitration ('ICC Court') came into effect. The ICC Court's was specifically targeted at international trade and resultant commercial disputes. A framework was subsequently set up by the ICC Court's specifically for settling such disputes.[197] In 1920, the ICC had conducted congresses and awareness for a legal movement to recognise the importance of arbitration.

By informing businesses of the benefits of arbitration, the inclination to settle their disputes using arbitration rather than litigation became popular among international businesses.

3.14.2 London Court of International Arbitration (LCIA):

The LCIA is the second most utilized European court of arbitration which was established in 1892. The current amount of cases in the past years was set to be more than 200.[198] In the advent of 2010, 246 were admitted into arbitration. The LCIA's most significant accomplishment is becoming one of

[196] < https://iccwbo.org/about-us/who-we-are/history/ > accessed on 13 March 2018.
[197] Ibid.
[198] Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International 2012) ch 1, 31.

the leading institutions globally in the international commercial arbitration. The percentage of a U.K party involved in a dispute that is submitted to arbitration in LCIA is approximately, less than 20%, while in 2010, the amount of disputes were decreased to 17%.[199]

The LCIA has represented a guide for disputing parties with absolute clarity on arbitration rules which were revised in 1998. The boost of the LCIA Arbitration rules has fascinated disputing parties who signed an agreement that were drafted in the English style, which served as a determiner to utilise the common law jurisdiction for settling disputes by arbitration. The seat of arbitration is most likely to be London. The LCIA Rules also, stipulates certain condition to be met for a third party before such a party may intervene within the arbitration procedure under Article 22 (1) (h). The advancement of the LCIA was dispersed by publishing its decisions of the courts and its arbitrators publicly. It should be noted that there existed no list of arbitrators by the LCIA. In essence, selected arbitrators of the LCIA are usually either retired judges or lawyers, with an extensive experience and who have been admitted to the English bar[200].

3.14.3 American Arbitration Association (AAA):

The AAA is a U.S. arbitral institution but has been significantly involvement in disputes in furtherance of the harmonisation of arbitration globally. The AAA delivered its Commercial Arbitration Rules and has since, been expanded to be utilized domestically and internationally.[201] The AAA Rules is considered to be dedicated to different disputes, for instance, insurance, energy, construction, labour, healthcare and intellectual property. Lately, the strategic movement of AAA has been considered as becoming the topmost arbitral institution. The AAA in 1996 launched a centre called an International Centre for Dispute Resolution 'ICDR' to include all disputes that involve international arbitration. The ICDR has established rules regarded as "International Dispute Resolution Procedures." These rules are adopted in disputes that involve parties' agreement which include the use of AAA

[199] Ibid.
[200] Ibid.
[201] See www.adr.org/sp.asp?id=22440.

arbitration rules internationally. However, identifying the AAA rules in the agreement will be subject to the intention of the parties to be bound by it.

The AAA Annual Report had submitted the progress of the cases which are subject to the (AAA Commercial Rules) with an amount of 11,130 cases in 1997. The increase was highlighted in 1998, where the number of cases increased to 15,232. More significantly in 2007, the AAA admitted 20,711 to be resolved through arbitration. However, from an international perspective, in 1999, the numbers of reported cases considered by the (AAA Commercial Rules) were 453, which subsequently increased in 2012 to 996 cases.[202] No doubt that the UNCITRAL Rules are the roots of ICDR Rules.

The administrative fees under AAA depend on the type of the dispute. Arbitrators' fees are fixed independently by arbitrators. The arbitrators' fees are published for parties with a list of available arbitrators that could be prospective candidates. The AAA/ICDR Rules clarified the selection of arbitrators and left it entirely subject to the agreement of the parties.[203] The ICDR listed over 650 arbitrators and mediators, some not being US practitioners. Even though US practitioners were over the years controlled by the ICDR as it relates to the appointment of arbitrators, the ICDR has however, challenged such procedure by also accommodating arbitrators who gained experience internationally, for disputes that involve international parties.

3.14.4 International Centre for the Settlement of Investment Disputes:

ICSID is the recognised arbitral institution for the resolution of international investment disputes between states and investors with extensive expertise and experience in the settlement of state-investor disputes. ICSID was established in 1966. The existence and availability of ICSID to investors and states promotes the designation of arbitration as the preferred disputes resolution process of international investments. ICSID is also available to state-state

[202] American Arbitration Association, *2010 Annual Report* (2010) <www.adr.org > accessed 12 November 2015.
[203] International Centre for Dispute Resolution, International Arbitration Rules, art 12.

disputes under investment treaties and free trade agreements and as an administrative registry.[204]

From the foregoing, it can be adduced that parties to foreign investments disputes who utilized arbitration as an alternative dispute mechanism, contributed to the development of arbitration, since the awards reached were by the ICSID, and which were concomitantly, duly recognized.

3.14.5 Other Well-Known Arbitration Centres:

Some other well-known arbitration centres that have contributed to the advancement of arbitration as the dispute resolution mechanism for the settlement of international disputes include:

3.14.5.1 *The Arbitration Institute of the Stockholm Chamber of Commerce (SCC)*

The SCC was established in 1917 as part of the Stockholm Chamber of Commerce and provides dispute resolution services for both Swedish and international parties, particularly in connection with east-west related disputes. It is estimated that every year parties from 30 -40 countries use the services of the SCC.[205]

3.14.5.2 *The Swiss Chambers' Arbitration Institution (SCAI)*

The SCAI was established by the Swiss Chamber of Commerce and Industry of Basel, Bern, Geneva, Lausanne, Lugano, Neuchâtel and Zurich and offers arbitration and mediation services based on the Swiss Rules of International Arbitration and Swiss Rules of International Mediation.[206] It has become a main institution for commercial arbitrations seated in Switzerland and it is estimated that parties from more than 100 countries participate in arbitration with 100 new cases administered under the Swiss arbitration rules in 2015.[207]

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[204] International Centre for Settlement of Investment Disputes, 'About ICSID' < https://icsid.worldbank.org/en/Pages/about/default.aspx > accessed on 10 January 2018.
[205] Arbitration Institute of the Stockholm Chamber of Commerce, 'About the SCC' < http://www.sccinstitute.com/about-the-scc/ > accessed on 10 January 2018.
[206] Swiss Chambers' Arbitration Institution, 'About us' < https://www.swissarbitration.org/About-us > accessed on 10 January 2018.
[207] Harold Frey et. al., 'Arbitration procedures and practice in Switzerland: Overview' < https://uk.practicallaw.thomsonreuters.com/5-502-1047?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed on 10 January 2018.

The SCAI established an Arbitration Court as an autonomous body to administer arbitrations under the Swiss rules of international arbitration.[208]

3.14.5.3 *Singapore International Arbitration Centre (SIAC)*

Established as an independent organisation to provide international arbitration services, the SIAC commenced operations in 1991 and is said to have one of the highest administered caseloads in the world and an excellent record of enforcement of its awards in many jurisdictions.[209] In 2011, SIAC received 188 new cases involving parties from 42 countries in Asia, the Gulf, Europe and North America with subject matters spread across difference sectors such as trade, banking, commercial, shipping/maritime, insurance, construction and corporate. It is currently estimated that there are now 200 new SIAC cases commenced each year.[210]

3.14.5.4 *Hong Kong International Arbitration Centre (HKIAC)*

HKIAC was established in 1985 to provide arbitral services in the Asia-Pacific.[211] Hong Kong is said to have strong arbitration friendly legal system and awards made in Hong Kong are easily enforceable in all East Asian jurisdictions.[212] The HKIAC has its own rules - the HKIAC Administered Arbitration Rules and administers arbitration proceedings when requested to do so by the parties.[213] In 2016, a total of 460 new cases were filed at HKIAC, out of which 262 were arbitrations and 94 were administered by HKIAC under the HKIAC Administered Arbitration Rules or the UNCITRAL Rules.[214]

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[208] < https://www.swissarbitration.org/About-us > accessed on 10 January 2018.
[209]Singapore International Arbitration Centre, 'About Us' < http://siac.org.sg/2014-11-03-13-33-43/about-us > accessed on 10 January 2018.
[210] Michael Pryles 'Singapore: The Hub of Arbitration in Asia' < http://siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/198-singapore-the-hub-of-arbitration-in-asia > accessed on 10 January 2018.
[211] Michael J Moser and Teresa Cheng, 'Hong Kong Arbitration 100 Questions and Answers' < http://www.hkiac.org/arbitration/why-hong-kong/hong-kong-arbitration-faqs#017 > accessed on 10 January 2018.
[212] Ibid.
[213] Ibid.
[214] Hong Kong International Arbitration Centre, '2016 Case Statistics' < http://www.hkiac.org/about-us/statistics > accessed on 10 January 2018.

3.15 INTERNATIONAL COMMERCIAL ARBITRATION IN ENGLAND

England is the heart of the economic and financial transactions in the world and is a preferred seat for international commercial arbitrations. The United Kingdom was chosen as a seat for almost 12.39% of all ICC arbitrations filed in 2012, 10.21% in 2011, 8.8% filed in 2010 and 10.1% in 2000.[215] The reason is because the English language has been utilized worldwide, more particularly, in the commercial sector. Moreover, neutrality has a major impact on the United Kingdom to be chosen as a seat for international commercial arbitration. International commercial parties tend to select London as a seat of arbitration in order to resolve their disputes. In addition, domestic and international disputes were resolved largely by English Arbitration[216]. The reason of having a success in neutrality for international commercial arbitration in England is because English courts tend to comply with and utilise the International Bar Association (IBA) Guidelines on Conflicts of Interest which are ethics rules, however, these rules are not compulsory to be used[217]. In 2004, the first Guidelines were established by the IBA in London[218]. As the result, the development of international arbitration has increased with queries in relation to the arbitrators' neutrality and their standards of duty to disclose[219]. This was noticed by the IBA. The Guidelines were very useful for the mechanism of arbitration to the extent that party-arbitrators, tribunal chairs and sole arbitrators were applicable to follow it[220]. On the other hand, the duty to disclose was not considered to be for non-neutrals as indicated by IBA. In other words, a duty of being independent and impartial did not exist for parties who selected their

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[215] Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014).

[216] ANDREA DAHLBERG & ANGELINE WELSH, INT'L BAR ASS'N, ARBITRATION GUIDE: ENGLAND AND WALES
1 (2012), http://www.ibanet.org/Document/Default.aspx?DocumentUid=D49BD82B-83AA-47C3-A238-
F7E165D03891

[217] Id. at 7.

[218] IBA GUIDELINES ON CONFLICTS OF INTEREST IN IN'L ARBITRATION (INT'L BAR ASS'N 2004),
http://www.ibanet.org/Document/Default.aspx?DocumentUid=21D27F55-134B-4791-A01CF8B6658BAB24
[hereinafter IBA GUIDELINES].

[219] Id. intro. 1.

[220] Id. standard 5.

arbitrators, in accordance with their domestic laws[221]. This could be an indication that neutrality and "duty to disclose" features were taken into consideration by IBA. However, the IBA permits a non-neutral arbitrator for parties by other domestic laws. Furthermore, the IBA published amended Guidelines on Conflicts of Interest in International Arbitration in 2014[222]. The amended guidelines tackled disclosure by stating particular rules as the result of its impact on the process of international arbitration[223]. Therefore, the "Scope" provision of the "Duty of Disclose" was amended in the Guidelines by the IBA to reflect and to be applied for all arbitrators[224]. It was illustrated by the provision that a duty to be impartial for any member selected in the arbitral proceedings for the tribunal, irrespective of the purpose for such an appointment[225]. The significance of neutrality was supported from an English perspective and was highlighted in the case of *Sierra Fishing Company*[226]. The court has ruled that impartiality must be established and many acts should be categorised within impartiality[227].

In addition, it was necessary to promote a centre, where disputes could be settled and the choice of having the mechanism of arbitration within the governing laws could be selected. The English Arbitration Act 1996 applies to disputes in relation to which the seat of arbitration in England and Wales. Section 2(1) of the English Arbitration Act 1996 stated that "*provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland*". The grounds of the Act were influenced by the UNCITRAL Model Law. The Act, however, provided for other aspects[228].

The Act focused on arbitration legislation by leaving the philosophy of common law in the past. For instance, by highlighting the issues that arose from judicial decisions and how to tackle and resolve those issues[229]. This can

[221] Id.
[222] Id.
[223] IBA GUIDELINES preface.
[224] *Id.* standards 3, 5.
[225] IBA GUIDELINES, *supra* note 212, standard 1.
[226] *See* Sierra Fishing Co. v. Farran [2015] EWHC (Comm) 140 [81], [2015] 1 All ER (Comm.) 560 (Eng.).
[227] *See* Locabail (UK) Ltd. v. Bayfield Props. Ltd [1999] EWCA (Civ) 3004 [17], [2000] QB 451 (Eng.).
[228] The Act differs from the UNCITRAL Model Law in a number of respect. For a summary of the most important of these, see Robert Merkin, *Arbitration Law* (Informa Law from Routledge 2004).
[229] Ibid s 1.01[b][3].

be shown as an improvement of the Model law[230]. As a result, the English Arbitration Act 1996 can be regarded as an international arbitration law and can be used by countries to update their arbitration laws. No doubt the enactment of arbitration legislation in the year of 1950, 1975 and 1979 had an influence on the English Arbitration Act 1996[231]. As a starting point, the effectiveness of the 1950 and 1975 Acts has reflected the legal sector in relation to arbitration in England. Additionally, the participation of courts was part of enforcing arbitral awards and its procedure[232]. The Arbitration Law Act 1979 perfected the previous English Legislation by providing a remarkable attempt in England for the sector of international arbitration[233]. It should be emphasised that that 1979 Act allowed parties to have rights of entering a contract in which concern exclusions. The effect that should be highlighted is that the right of judicial review were waived, in the event of parties could claim against their arbitral awards on the basis of its merits.[234]

The existence of the English Arbitration Act 1996, has supplemented a sort of guidance for arbitration mechanism, as well as, an advanced material both in England and internationally.[235] It had combined the previous enactments of arbitration which were derived from English legislations and the core of the UNCITRAL Model Law, produced to one statute.[236] One notable requirement that the 1996 Act has provided is the certainty for the validity of arbitration agreements, which must be in writing.

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[230] Samuel Adam, 'Arbitration Statutes in England and the USA' (1999) 8 Arb. & Disp. Res. L.J. 2, 24-32.

[231] See Hunter M, 'Arbitration Procedure in England: Past, Present and Future' (1985) 1 Arb. Int'l 82 (985) and Samuel Adam, 'Arbitration Statutes in England and the USA' (1999) 8 Arb. & Disp. Res. L.J. 2. The historical development of commercial arbitration in England prior to the 20th century is described above.

[232] Samuel (n 230) 19.

[233] See Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (4th edn, Wiley-Blackwell 2007)

[234] See English Arbitration Act 1979, ss 3, 4; Robert (n 228).

[235] See UK Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (1996) and U.K. Departmental Advisory Committee on Arbitration Law, *Supplement to the Departmental Advisory Committee on Arbitration Law Report of February 1996* (1997).

[236] Chukwumerije Okojie, 'Reform and Consolidation of English Arbitration Law' (1996) 8 Am. Rev. Int'l Arb. 21; Mustill, 'A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law' (1990) 6 Arb. Int'l 3, 51.

3.16 THE EFFECTIVENESS OF INTERNATIONAL COMMERCIAL ARBITRATION AND ITS DEVELOPMENT WITHIN THE MENA[237] REGION

In the MENA region, the mechanism of resolving disputes has been utilised by a neutral third party, a tradition that MENA have used in the last decades to overcome with an amicable settlement method[238]. The reason of having a method as amicable and conciliatory in the MENA region is because of the characteristics that the region has such as religious[239] and cultural[240] ethics.

In the last few years, all types of alternative dispute resolution mechanisms have developed and impacted the MENA region[241]. For example, the construction, real estate and energy sectors have continually utilised alternative dispute resolution methods for the resolution of disputes[242]. Also, an increasing number of MENA states are now signatories to the New York Convention.[243]

In addition, the UNCITRAL Model Law has impacted and boost arbitration within the MENA region by providing applicable laws and rules that States may utilise within its own applicable rules such as Egypt, Bahrain, Saudi Arabia and United Arab Emirates, where their international arbitration laws were established and adopted by the UNCITRAL Model Law.

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[237] Middle East and North Africa.

[238] Al Tamimi Essam, International Commercial Arbitration in the MENA: Institutional v Ad hoc: A wealth of choice (Sweet & Maxwell 2017).

[239] Islam is the religion in the largest occupied MENA region. Under *Sharia* law, disputing parties are highly recommended to resolve their disputes by a neutral third party in order to have an outcome of amicable solution. See El-Ahdab (n 6).

[240] Leila Hanafi, 'Improving the Legal Infrastructure in the Middle East and North Africa Region Through Alternative DisputeResolution' < http://webcache.googleusercontent.com/search?q=cache:http://slconf.uaeu.ac.ae/images/%25D9%2585%25D8%25A4%25D8%25AA%25D9%2585%25D8%25B1%252019%2520%2520%25D8%25A7%25D9%2584%25D8%25A7%25D8%25B3%25D8%25AA%25D8%25AB%25D9%2585%25D8%25A7%25D8%25B1/part%25204%2520E/19.pdf> accessed on 11 November 2017. Leila argued that the concepts of both *sulh* (settlement) and *musalaha* (reconciliation) are identified in the Arabic and Islamic traditions as methods of conflict management and control.

[241] Al Tamimi (n 238) 1.

[242] Ibid.

[243] See < http://www.newyorkconvention.org > accessed 11 November 2017. In 1959, the first three states became a signatory parties of the New York Convention in the MENA region Morocco, Egypt and Syria. Tunisia and Jordan became signatories in 1967 and 1979 respectively. In 1978, Kuwait was the first state among the Gulf Cooperation Council (GCC) states to become a signatory to the Convention. In 1994, the Kingdom of Saudi Arabia also became a signatory. In 2002, Qatar became a signatory party of the Convention. In 2006, the United Arab Emirates adopted the Convention. The latest state to join the Convention was Palestine in 2015.

Moreover, the development of international commercial arbitration has grown in the MENA region, in a sense that arbitration institutions have established in certain states, in order to resolve disputes between parties by assisting parties with processes and administrative methods. It was reported that 49 arbitral institution centres been established or under the process within the MENA region[244]. The increases of cases which have exceeded 400 cases that involved arbitration matters within MENA region were reported by the ICC[245]. The recent and rapid development of international arbitration in the MENA region is linked to economic realities which have necessitated governments in the MENA region to seek to diversify their economy, attract foreign direct investment and reduce dependence on oil and gas revenues. To do this, there is need for the states in the MENA region to portray themselves as modern, developed states that are open for business and arbitration is an important factor in this regard.[246]

The main arbitration institutions or centres will be addressed in detail below, while arbitration Saudi Arabia will be discussed in another chapter of this research work. Prior to that, however, it is important to mention the existence of the Commercial Arbitration Center of the Gulf Cooperation Council ('GCC')[247] States established by the Supreme Council of the GCC in December 1993[248] to hear commercial disputes between individuals and companies of the GCC States or between them and others and commercial disputes arising from the implementation of the provisions of the Economic Agreement between the GCC States and decisions issued to implement them.[249]

[244] Mark Beer, 'Keynote Speech at the International Bar Association (IBA) Dispute Resolution in the Arab Region Conference' (Dubai, 12-13 May 2016).
[245] Fourth Annual MENA Conference on International Arbitration (Dubai, 11-13 April 2016).
[246] Sami Tannous and Amr Omran, 'International Arbitration 2017 – Middle East and North Africa Overview" < https://iclg.com/practice-areas/international-arbitration-/international-arbitration-2017/middle-east-and-north-africa-overview > accessed on 10 January 2018.
[247] The Gulf Cooperation Council is a political and economic alliance of six Middle Eastern countries – Saudi Arabia, Kuwait, the United Arab Emirates, Qatar, Bahrain and Oman established in Riyadh, Saudi Arabia in 1981.
[248] < http://www.gcccac.org/ar/ > accessed on 10 January 2018.
[249] G.C.C. Commercial Arbitration Centre, 'Learn about the center – Commercial Arbitration Center of the GCC States' < http://www.gcccac.org/ar/about-centre > accessed on 10 January 2018.

3.16.1 The United Arab Emirates (UAE):

The effectiveness of international commercial arbitration has an impact within the region of UAE and the UAE became a signatory party of the New York Convention in 2006. In Dubai specifically, the UAE has developed arbitration mechanism to resolve international parties' disputes by establishing two outstanding Centres; the Dubai International Arbitration Centre; and the Dubai International Financial Centre- London Court of International Arbitration Centre[250].

3.16.1.1 The Dubai International Arbitration Centre ('DIAC'):

In 1994, the Dubai Chamber of Commerce and Industry (DCCI) established the Conciliation and Commercial Arbitration Centre. In 2004, the DIAC was founded by the DCCI and designated as an alternative dispute resolution institution to the Conciliation and Commercial Arbitration Centre.

Nowadays, DIAC has a wide effect in the MENA region and counted to be one of the outstanding international hubs within the international commercial arbitration sector. The reported cases considered to be 318 cases[251] on an annual average with the period of 2010 and 2015. These cases are mainly within the sectors of construction and real estate[252]. In 2007, a Decree was issued to set the DIAC Rules on the basis of the UNCITRAL Model Law. The Rules of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the Arbitration Institute of the Stockholm Chamber of Commerce Centres were considered and referenced within the DIAC Rules, as these Rules are highly regarded and have positively impacted and aided the development of international commercial arbitration[253].

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[250] Ibid.

[251] Interview with Mohamed Al Ghatit, Registrar of the Dubai International Arbitration Centre (Dubai, 22 May 2016).

[252] The Board of Trustees in DIAC "*discussed the launch of an Islamic Arbitration window to meet the demand of growing Islamic economy users and to promote Dubai Government's initiative of making Dubai the global capital of Islamic economy*". See Dubai Chamber News, 'DIAC Discusses the Launch of an Islamic Arbitration Window' < http://www.dubaichamber.com/whats-happening/c_news/diac-discusses-the-launch-of-an-islamic-arbitration-window > accessed 12 November 2017.

[253] Ibid.

DIAC is considered to be an effective arbitration centre in the MENA Region with an outstanding reputation and is fully active.[254] More recently, DIAC has posted in 2016, that "*obtained preliminary approval to open an office in the Dubai International Financial Centre (DIFC)*", which is a beneficial approach for enforcing arbitral awards by the parties and to be more related to the DIFC courts.

3.16.1.2 The Dubai International Financial Centre- London Court of International Arbitration (DIFC-LCIA):

In 2008, the DIFC-LCIA was founded as partnerships between the Dubai International Financial Centre and London Court of International Arbitration (LCIA). The LCIA Arbitration Rules has significantly basis of the DIFC-LCIA Rules which established a mechanism and procedure to resolve disputes between parties, in relation to the appointment of tribunals, its costs, and arbitrator's roles. Even though LCIA Rules has a major input within DIFC-LCIA Centre within the experts of the field and its administrative impact, DIFC-LCIA has been well recognised within the MENA region for international parties. It was stated by the registrar[255] that the case in DIFC-LCIA has increased in the last 2 years, and also 16 cases were registered at the centre with various fields of sectors such as energy, commercial, finance and media[256].

3.16.2 <u>The Kingdom of Bahrain:</u>

Arbitration was established in the Kingdom of Bahrain[257] within the culture of the society. Bahrain has signed the New York Convention in 1988, then an international commercial arbitration law introduced in 1994, on the basis of the UNCITRAL Model Law.

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[254] <http://www.dubaichamber.com/whats-happening/chamber_news/dubai-international-arbitration-centre-opens-an-office-in-dif> last accessed 19 November 2017.

[255] Interview with Mohamed Al Ghatit, Registrar of the Dubai International Arbitration Centre (Dubai, 16 June 2016).

[256] The DIFC-LCIA has an outstanding record in the region as an arbitration centre in relation to disputed parties within the media sector.

[257] A member of the Gulf Cooperation Council (GCC).

3.16.2.1 *The Bahrain Chamber for Dispute Resolution-American Arbitration Association (BCDR- AAA):*

The BCDR-AAA is the link between the American Arbitration Association (AAA) and the Bahrain Ministry of Justice which established in 2008, thereafter, in 2010 it became effective. The BCDA-AAA provides alternative dispute resolution solutions to local, regional and international parties and governments and also administers cases within the Free Arbitration Zone[258]. It has been reported that since 2010 quite a lot of cases are registered on a yearly basis[259].

3.16.3 <u>The State of Qatar:</u>

The growth of arbitration in Qatar is relatively recent and commenced with the ratification of the New York Convention in 2002, with no declarations or notifications.[260] The Qatar Financial Centre ('QFC') was established in 2005 and the QFC enacted the QFC Arbitration Regulations in 2005 for QFC seated arbitrations.[261] Following the establishment of the QFC, the Qatar Chamber of Commerce and Industry in 2006 established the Qatar International Centre for Conciliation and Arbitration ('QICCA'), which is Qatar's first arbitral institution.[262] The rules governing the arbitrations in the QFC and the QICCA are based on the UNCITRAL Model Law.[263] To further show its credibility as an appropriate venue for international commercial arbitration, on February 2017 Qatar issued a new arbitration law in civil and commercial matters, which is closely based on the UNCITRAL Model Law.[264]

3.16.4 <u>The Arab Republic of Egypt:</u>

Although Egypt ratified the New York Convention in 1959 and the ICSID Convention in 1971, the use of arbitration as a means of settling commercial and investments disputes in Egypt became popular with the enactment of Law No. 27 of 1994 on Arbitration in Civil and Commercial Matters, which is

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[258] See Bahrain Chamber for Dispute Resolution, 'Why BCDR-AAA' < http://www.bcdr-aaa.org/why-bcdr-aaa/ > accessed on 10 January 2018. The Free Arbitration Zone guarantees jurisdictional and legal certainty to arbitral awards in Bahrain as the awards are not subject to challenge in Bahrain.
[259] Interview with Registrar of BCDR-AAA (24 May 2016).
[260] Sami and Amr (n 246).
[261] Ibid.
[262] Ibid.
[263] Ibid.
[264] Ibid.

primarily based on the UNCITRAL Model Law and provides a comprehensive legal framework for arbitration in Egypt.[265]

3.16.4.1 *The Cairo Regional Centre for International Commercial Arbitration (CRCICA)*

The CRCICA has been operating in Egypt since 1979[266] and administers domestic and international arbitration in the Afro-Asian region. The CRCICA also provide advice to disputing parties, promote the use of arbitration in the region and assist with the enforcement of arbitral awards.[267] It is estimated that the total number of arbitration cases filed before the CRCICA until 30 June 2016 reached 1109 cases.[268]

3.17 CONCLUSION

Jan Paulson in describing arbitration as a universal subject involving diverse parties that are non-nationals of the forum stated as follows: ‘‘*sociological, namely the convergence of the way disputes are resolved, so that disputants and advocates and arbitrators of any nationality can be found everywhere, doing the same thing in the same way- with an ever-decreasing number of linguistic barriers’’*[269].

It has become imperative to introduce such publications as to the importance and necessity, of the practice of arbitration as “the” dispute resolution mechanism. Notwithstanding, the need to adopt a compulsory arbitration system will be emphatically discussed in the later chapters of this case study of Saudi Arabia. For the betterment of developing countries, it is essential to impose arbitration “first” in the event of disputes between parties, in order to breed a system where disputes are resolved immediately they arise. This

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[265] George Sadek and Mohamed Oweis Taha, ‘Egypt: Legal Framework for Arbitration’ < https://www.loc.gov/law/help/arbitration/egypt.php > accessed on 10 January 2018.

[266] Cairo Regional Centre for International Commercial Arbitration, ‘About Us’ < http://crcica.org/AboutUs.aspx > accessed on 10 January 2018.

[267]Cairo Regional Centre for International Commercial Arbitration, ‘Services’ < http://crcica.org/Services.aspx > accessed on 10 January 2018.

[268] Cairo Regional Centre for International Commercial Arbitration, ‘Arbitration – Statistics’ < http://crcica.org/Arbitration_Statistics.aspx > accessed on 10 January 2018.

[269] Paulsson Jan, ‘Universal Arbitration- what we gain, what we lose’ in Julio Cesar Betancourt and Jason A. Crook, *ADR, Arbitration, and Mediation: A Collection of Essays* (Chartered Institute of Arbitrators 2014) 535.

reasoning is further inspired by the shortcomings of litigation processes which have hardly constituted a swift dispute resolution mechanism.

CHAPTER FOUR

COMPULSORY AND VOLUNTARY ARBITRATION AND THEIR IMPLICATIONS

4.0 INTRODUCTION

This Chapter discusses the relevant issues contained within the theory of Compulsory arbitration. Compulsory arbitration is now largely recognised by various countries. The benefits of compulsory arbitration within an economy will be highlighted in great detail in this chapter. It is pertinent that the historical antecedents of compulsory arbitration be evaluated, as only then can the essence of compulsory arbitration be duly appreciated. Further, this chapter undertakes to clarify the confusions that have arisen between the practices of compulsory arbitration and mandatory arbitration. This is also important because virtually every economy practices both systems concurrently.

While the previous chapter analysed the effectiveness of utilising arbitration in international commercial industries, this chapter goes further to require States to adopt a system of compelling arbitration in certain circumstances before any recourse is made to litigation. Since arbitration has been internationally recommended in the last few decades as a successful dispute resolution mechanism, it becomes essential that States take arbitration to the next level. The object of this chapter is to highlight the evolution of compulsory arbitration, as well as distinguishing between mandatory and compulsory arbitration, and providing an analysis of why compulsory arbitration should be imposed in certain industries.

4.1 WHAT IS COMPULSORY ARBITRATION (FORCED ARBITRATION)?

Where two parties agree on a systematic means, with the sole purpose of resolving a dispute, it easily, can be identified as arbitration. Such a system is usually motivated by, and concluded upon the agreement of the parties. The identification of compulsory arbitration on the other hand, is not as easy. It is,

in fact, elusive.[270] An author described compulsory arbitration as "*any system whereby the parties to a… dispute are forced by the government to submit their dispute to final settlement by some third party."*[271] The submission to arbitration is not based on the agreement of the parties but on statutory provisions. This subset of arbitration has been criticised as being contrary to parties' autonomy which is the hallmark of "mainstream" arbitration. It therefore, raises the question, "What is the point of arbitration when it has to be imposed on its participants?" The sanctity of arbitration rested on the power of the parties to resolve a dispute based on a mere agreement. Another writer stated that "[*T*]*he value of arbitration consists essentially in its voluntariness, in its being a free appeal to reason by two men or two sets of men. The very term compulsory arbitration almost involves contradiction. When you force men before a tribunal and compel them to abide by its decision, you have taken away the arbitral element. It may be justice, but it is not arbitration*"[272]. The state, in its infinite wisdom, must have had good intentions as to a more crystallised method of resolving disputes by restricting, or rather, taking away the validation of the parties through consent to arbitration. It nevertheless, defeats the purpose of arbitration. On the other hand, proponents of compulsory arbitration have described it as affording *"*a flexible, efficient, timely, and cost-effective method for dispute resolution and assists businesses competing in uncertain markets"[273].

4.1.1 The History of Compulsory Arbitration in the United States:

The socio-economic structure of the motivation and development of compulsory arbitration in the United States is rather an interesting one, the impact of which has been felt globally. Indeed, the United States is one of the exponents of compulsory arbitration, and its practices in this respect, has been recognised and adopted in several jurisdictions world over. The evolution of compulsory arbitration has its roots in the labour and trade tussle prevalent in America after World War II, and the advent of the Taft-Harley Act. Since it became pertinent to demobilise the labour movement by restricting employees right to strike and other ancillary privileges, it also became of

[270] Wesley (n 53) 1.
[271] Ibid.
[272] Benjamin (n 54).
[273]Ibid note 1.

necessity to compulsorily resolve attendant disputes through a stipulated means. To the writer, the compulsion attributed to the resolution of labour disputes, immensely contributed to the functionality of America's trade and labour force today. It created an avenue where parties to a labour contract came together in order to reach an agreement on a range of disputes relating to employment.

From the foregoing, it becomes necessary that the evolution of compulsory arbitration be explicated illustratively, and in greater detail. For this purpose, it will be viewed in three different perspectives: (1) the federal experience; (2) compulsory arbitration legislated by the states to enforce on private sector entities; and (3) the utilisation of compulsory arbitration and its effectiveness in the public sector.

4.1.1.1 *The Federal Experience*

The impact of compulsory arbitration was noticeable in the context of resolving disputes in the period of the First World War. A conference was set by President Woodrow Wilson, which considered the movement of goods without any disturbance during the period of the World War. In 1918, The National War Labour Board was founded as a direct result of the conference. It identifies the issues with the economy and then provides procedures in order to resolve them. Whilst this was introduced as the concept of compulsory arbitration, some may argue that it was not imposed as the context of arbitration[274]. The National War Labour Board consisted of a collection of members. Thus, the number of members that are considered are five members from unions, five to be in the industry, and two included from the public. The context of the issues that were considered to be resolved is within the labour-management. The results of the decisions by the board were set to be final and enforceable.

During World War II, procedures were conducted based on the previous principles that had been utilised. However, employers were concerned about the rise of the National Labour Relations Act and emphasised the compliance with it. In 1942, an Executive order 9017 was passed by President Roosevelt

[274] Loewenberg, J. Joseph, *Compulsory Arbitration* (Lexington Books 1976) ch 5, 142.

to initiate the National War Labour Board. This was conducted for the Board to supervise and monitor the wages control programme. The War Labour Disputes Act was passed by the United States Congress in 1943, granting authority to the board. In 1947, the board authority was ended. However, more than twenty thousand disputed claims were conducted by the board before its termination. The impact of the National War Labour Board of World War II has left its milestones within industries in the United States, by developing dispute resolution claims theories.

The board imposed arbitration provisions in the agreements in order to resolve disputed claims. These have supported the positions of the parties in terms of negotiations processes followed, by submitting their evidence on the basis of the facts and the law.

Compulsory arbitration was imposed by the Railway Labour Act where negotiations of the parties had an effect under the contract. The National Railroad Adjustment Board has the power to hear any disputes and enforce such decisions. The Board was selected by employers of the industry which consisted of members of arbitrators that are supported by major unions. Furthermore, legislation was passed in relation to compulsory arbitration by Congress in 1963 and 1967. The legislation required a mandatory arbitration process to be imposed on disputes occurring from firemen on diesel trains and crew size claims.[275]

4.1.1.2 *Compulsory Arbitration Legislated by the States to be Enforced on Private Sector Entities*

Many US states have contemplated the method of compulsory arbitration as a means to settle disputes in the labour industry. This is due to the impact and success of the War Labour Boards and their effects of decreasing the number of disputes, and promoting the method of arbitration.

In 1893, compulsory arbitration was imposed in Pennsylvania and was organised by a nine member board of arbitration[276]. A reachable decision

[275] Ibid.
[276] Ibid.

would be submitted and filed by the majority of the members. However, in 1909, compulsory arbitration was deemed to be unconstitutional[277].

In 1920, Kansas approved compulsory arbitration within labour disputes in the state statute and it was considered to be the first general state[278]. The reason of having such a compulsory arbitration is because the state had various strikes in regards to coal. By introducing compulsory arbitration, the state sought to ensure that all industries would function effectively. It should be noted that the U.S Supreme Court has ruled in a suit to seek the challenge the Kansas statute, as the statute required to adopt of compulsory arbitration. The statute remained unconstitutional due to the Fourteenth Amendment of the Constitution. The reason for the violation is because statute must not interfere with the rights of private property and the freedom of contract. This has reflected with the civil rights subject to the due process of law[279]. In 1925, the Kansas court was ended, its focus moved to the state Public Service Commission[280]. The roots of revised Act is proceeded to be at issue in terms of its constitutionality.

Some states had imposed compulsory arbitration to resolve disputes in their last stages. For example, Pennsylvania, Nebraska, Minnesota, Michigan, New Jersey, Florida, Indiana and Wisconsin.

Grounds were made for judicial review of the arbitration awards in most laws as in the case of Wisconsin of the following:

(1) That the parties were not given reasonable opportunity to be heard, or
(2) That the arbitrator exceeded his powers, or
(3) That the order was not supported by the evidence, or
(4) That the order was procured by fraud, collusion, or other unlawful means[281].

[277] Wise v Pressed Steel Car Company [1909] 19 Dist. 112.
[278] Laws of Kansas 1920 ch. 29.
[279] 262 U.S 522 (1923), 267 U.S 522 (1925).
[280] Law of Kansas 1925 ch 258.
[281] 17 S.W.A. 111.60.

In the period between 1947 and 1953, a report has shown that 107 cases in five states have been presented subject to compulsory arbitration[282]. Gas, urban transit, communication, electric light and power were the main industries that were considered to be subject to compulsory arbitration in Indiana, New Jersey and Wisconsin. It should be emphasised that compulsory arbitration was not limited to these states, as other states had an impact on it as courts interfered in its final awards. Although compulsory arbitration was imposed, legislation was not provided to guide arbitrators. This resulted in an interference with state courts and the legality of compulsory arbitration was challenged[283]. The state supreme court of New Jersey questioned the legality of compulsory arbitration[284], while compulsory arbitration was abolished in Michigan, where the arbitration board consisted of circuit judge to be a chairman. The state court held that compulsory arbitration was inconsistent with the doctrine of separation of powers[285]. Interference from the courts was not caused in compulsory arbitration legislation statutes in other states and thus, deemed to be constitutional.

In 1963, legislation was implemented to ban any strikes held by employees in regard to residential care centres and non-profit hospitals. During that period, disputes that occurred within the strikes would be directed to compulsory arbitration[286]. The arbitration procedure rules and a guide of how to find arbitrators were stated in the act. The process of arbitration was managed by the New York State Board of Mediation and the industrial commissioner[287]. Furthermore, the legislation was criticised on the basis that it has been specifically directed to one group of employers. The arbitration guidelines were ambiguous and its principles were not explicitly significant and considered to be an illegal process. However, all these challenges were considered to be null and void. The number of disputes that were engaged in the arbitration process was sixty-two[288]. It should be pointed out that

[282] Herbert Northrup and Richard L. Rowan, 'Arbitration and Collective Bargaining: An Analysis of State Experience' (1963) 14 Labor Law Journal 2, 178.
[283] State (Van Riper) v Traffic Telephone Workers Federation [1949] 2 NJ 335, 66 A2d 616.
[284] ibid.
[285] Local 170 v Gadda, 322 Mich. 322, 34 N.W. 2d 71.
[286] Laws of New York, 1963 ch 515.
[287] Long Island College Hospital v Catherwood [1967] 287 NYS 313.
[288] Loewenberg (n 274) ch 5, 150.

compulsory arbitration had an effect on strikes which had been terminated as the result of final arbitration awards that were delivered in these disputes.

Arbitration may have a significant and successful approach towards developing countries due the ambiguity and complexity of rules contained within the litigation process in these courts. Compulsory arbitration can be a factor of globalisation and facilitated the methods to be associated with the developed countries.

4.1.1.3 *The Utilisation of Compulsory Arbitration and its Effectiveness in the Public Sector*

Employees in the public sector that were in positions of government organisations were not given the right to strike. Instead, compulsory arbitration was the choice submitted by the government in order to resolve their issues. The convenience of compulsory arbitration was considered in disputes that involved labour management by the federal government and certain municipalities[289]. The value of its procedure became approved. However, it was still unclear under the law which group of employees were entitled to compulsory arbitration. Compulsory arbitration was concerned with resolving disputes that had an impact on police, firefighters and guards in mental hospitals[290]. The main reason behind compulsory arbitration was to safeguard the public sector and keep it under control. Police and firefighters complied with the mechanism compulsory arbitration, compared to teachers in public organisations.

On the other hand, teachers in the state of Nevada sustained the strength of compulsory arbitration in order to resolve disputes[291]. During that period, the method of compulsory arbitration was widening as a concept in the United States. For example, Alaska statute covered compulsory arbitration for hospital employees to prevent them from strikes. Public sector employees in the state of Minnesota were subject to compulsory arbitration by statute. A single arbitration award in Minnesota concerned thirty-five state

[289] Vallejo, Oakland, San Francisco, California, Denver and Boulder, Colorado, Washington, D.C., New York City, New York; Dayton, Ohio, Eugene and Oregon - cities that are considered the compulsory arbitration for public employees' disputes.
[290] Loewenberg (n 274) ch. 5, 152.
[291] Ibid.

employees[292]. Arbitration was also recognised in Oregon as compulsory for Police, firefighters and guards. Legislature in the state of Nevada considered compulsory arbitration for teachers and municipalities' employees. Moreover, both the Iowa and Connecticut statutes stated that arbitration must be utilised as a last method for all disputes that involved municipal employees[293].

Furthermore, in the case of bargaining, impasse situations came into consideration by public employees, compulsory arbitration was the only solution. In 1970, the public postal system was established as a public corporation and independent from the federal government. Under these conditions, employees had the choice to negotiate over their wages and the permitted hours of work. Therefore, it was a high possibility for postal workers to commence strikes. The Congress was under pressure by denying employees of such strikes, and ruled compulsory arbitration for negotiating impasse where it concerned terms of the contract.

The first law by congress was stated as binding compulsory arbitration to be utilised as a method was in the Postal Reorganization Act[294], which reflected mainly for public employees and other disputes that do not involve *ad hoc* grounds. In conclusion, compulsory arbitration was followed in the United States in certain periods of years. The focus was intended to regulate disputes that had arisen by public employees who utilise the method of compulsory arbitration as a binding procedure.

Generally, most of the disputes was settled by the mechanism of compulsory arbitration in the United States, were in relation of the labour sector.

4.1.2 The History of Compulsory Arbitration in the United Kingdom:

Compulsory arbitration is also a veritable tool that has been implemented in the United Kingdom from some time. The practice of arbitration has been recognised and duly adopted in the United Kingdom, which was manifest in several interrelations between persons. It only became necessary to mandate its compliance within the labour force. Like America, the abuse of the right

[292] Ibid 153.
[293] Ibid 154.
[294] Postal Reorganization Act, P.L. 91-375, August 12, 1970; 39 U.S.C 1207 (1970).

to strike by employees led the government to institute a system where disputes arising therefrom, was compulsorily resolved statutorily. The historical background of the employment of this system dates back to the period of the First World War, where it was imposed on parties as binding implementations on dispute resolution, in order to constrain the unnecessary powers of unions and other trade associations to strike. It was also, mentioned in the Munitions of War Acts[295] as an enforceable procedure to be used for disputes. The long period of war, led the government to prepare for the resolution of these disputes that were caused by employers. A Committee on production were selected by the Prime Minister Asquith in order to find a solution. The Committee had opined that "*during the present crisis employers and workmen should under no circumstances allow their differences to result in a stoppage of work … In the event of differences arising which fail to be settled by the parties directly concerned or by their representatives, or under any existing agreement, the matter shall be referred to an impartial tribunal*"[296]. Thereafter, in 1915 compulsory arbitration was introduced by a Treasury Agreement, signed by thirty-five workers' organisations. The Treasury Agreement was mainly grounds for the Munitions of War Acts, also to avoid and prevent the motivations of strikes[297].

It was noticed that compulsory arbitration could have been an ideal solution to resolve disputes within labour industries. However, the acts that were imposed to provide compulsory arbitration were not achieved in certain disputes. For instance, there was a case where 200,000 South Wales Minors, had their responsibilities to their employments terminated, thirty days after the Munitions of War Act became enforceable. Even though strikes were recognised as such an offence, tribunal were introduced in the South Wales that specifically for arbitration to resolve disputes. At that period of time, it was described as "the striking increased rather than lessened and on 20 July the Minister of Munitions and the President of the Board of Trade went down to Cardiff and ended the dispute by granting practically all the claims of the

[295] 5 and 6 Geo. V, c.54 (1915); 5 and 6 Geo.V, c.99 (1916); 7 and 8 Geo. V, c.45 (1917).
[296] Twelfth Report of Proceedings under the Conciliation Act 1896, 1914-18 [185] 1919, 12. Detailed accounts of this period will be found in Amulree William W, *Industrial Arbitration in Great Britain* (Oxford University Press 1929) ch XIII-XVI, and Ian G Sharp, *Industrial Conciliation and Arbitration in Great Britain* (The Blackfriars Press Ltd 1950) ch III.
[297] Ibid.

strikes, leaving only nominal and technical matters to arbitration".[298] It was proposed that compulsory arbitration was not an ideal mechanism to resolve disputes that involved strikes as it was stated that it "was not a successful method of avoiding strikes." However, it was introduced in the proposal that arbitration should be a choice rather than compulsory to resolve issues that arise within the agreement "where the parties wish to refer any dispute to arbitration," with a formality of existing a "standing arbitration council".[299]

In 1919, the Industrial Courts Act came into existence.[300] The Act had recognised the Industrial Court to be a standing arbitration entity. In 1971, the Industrial Court was renamed to "the Industrial Arbitration Board" and thereafter became known as "the Central Arbitration Committee" in 1975.[301] The function of this entity was to cover all the disputes that arose by trade to be resolved through arbitration by reference from the minister of labour. However, the consent of both parties was required in order for the minister of labour to transfer the disputes through arbitration process. Theoretically, the view of arbitration in that period was not considered to be compulsory arbitration as binding process, due to the consent of both parties. The effectiveness of arbitration procedures was rarely involved in disputes between the period of 1919 and 1939.[302]

It was advised by a committee of the advisory council that to encourage utilising the mechanism of arbitration, conciliation should be imposed on disputed parties as a choice. However, if parties cannot agree on resolving the dispute and do not reach a solution, alternatively, compulsory arbitration should be obligatory as a provision with particular disputes that causes strikes and lockouts.[303] From the foregoing, it should be pointed out that the consent of both parties is invaluable and constitutes a condition precedent before either arbitration or conciliation is actually adopted. Compulsory arbitration was however, fortified by the unions as it was believed to be a reasonable

[298] Sharp (n 296) 318.
[299] Cmd. 9099 of 1918.
[300] 9 and 10 Geo. V, c.69.
[301] This change was created by the Industrial Relations Act 1971, s 124, and then sustained by the Trade Union and Labour Relations Act 1974, sch 3, para 2 (in which replaced the 1971 Act).
[302]Hepple (p 46) ch3, 85.
[303] This is highlighted in Sharp (n 296) 420-21. Bevin's reasons for making the order are described in Alan Bullock, *The Life and Times of Ernest Bevin* (vol. II Heinemann 1967) 266 ff.

resolution rather than strikes after 1946.[304] Employers were also interested in the objective of compulsory arbitration and duly advocated for it.[305] Indeed, the benefits of compulsory arbitration began to showcase during this era, and it was rightly exploited. Gradually, the need to strike became a thing of the past, since issues were statutorily resolved.

The acceptance of compulsory arbitration continued to manifest in 1951 when the Royal Commission on Trade Unions and Employers' Associations mentioned that the existence of compulsory arbitration should still remain as a tool for collective bargaining machinery as it developed and had impact on the sector.[306] The Industrial Relations Act 1971 had also, provided statutory arbitration as a last action in the circumstances where employers refuse to acknowledge union.[307] The Act ascertained the process of compulsory arbitration. It was not described explicitly in agreements that involved disputed parties and that led to ambiguous or defective procedures[308].

It is worth noting that, in these periods when compulsory arbitration was utilised, a party would also be able to direct the dispute for arbitration by reference to the suitable government minister without the approval of the other party. Final awards derived in the course of the arbitration without the consent of the other party would be enforceable. Compulsory arbitration consequently, became recognised as "unilateral arbitration".[309] The significance of unilateral arbitration in this era became the privilege and right of a party to refer a dispute to arbitration process without interference from the other party, especially through by not obtaining the party's consent. This was mentioned in the Combination Act of 1800.[310] This Act has guidelines for unilateral arbitration to be utilized as a mechanism to resolve disputes. Unfortunately, unilateral arbitration was utilized specifically as a process for only disputes that occurred by the termination of the work.[311]

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[304] Jean Trepp McKelvey, 'Legal Aspects of Compulsory Arbitration in Great Britain' (1952) 37 Cornell Law Review 3, 415.
[305] Ibid.
[306] Royal Commission on Trade Unions and Employers' Associations, *1965 – 1968 Report (Cmnd. 3623)* (H.M.S.O. Publication 1968) paras. 267-75.
[307] Industrial Relations Act 1971, ss 55 (1), 105 (5) and 125.
[308] Ibid ss. 37-42.
[310] 39 and 40 Geo.III, c.106.
[311] Ibid.

At this juncture, it can be noticed that there was a fundamental shift from the usage of compulsory arbitration to unilateral arbitration. Although, the concept of unilateral arbitration was at the instance of one party, the practice of unilateral arbitration had a substance of mandatoriness, as the final award derived therefrom, was binding and enforceable on both parties. Moreover, legislations made efforts to introduce the theory of resolving disputes by arbitration, subject to the parties' consent[312]. Subsequently, the concept of compulsory arbitration was re-introduced in 1889. This fostered the creation of the "Royal Commission on Labour."[313] It can be observed that the economy during this period, operated several forms of resolution systems in a bid to ensuring a functional system. When it was considered that a particular dispute resolution system was dysfunctional or incapable of meeting the socio-economical demands, another was immediately adopted. The legislative enactments also responded to the changing economy, since every resolution reached was stipulated in an enactment. The proactive nature of this system has greatly influenced the economies of developing systems globally.

Flowing from the detailed historical background of the practice of arbitration in the United Kingdom, it has been observed that both voluntary arbitration, as well as compulsory arbitration were alternatively used. Unilateral arbitration, to the writer, is a fall out from voluntary arbitration since it was at the instance of a party. There are certain distinguishable rules between voluntary and compulsory arbitration. The characteristics of voluntary rules are based on two categories. Firstly, by its very nature, the core of voluntary arbitration rested on the consent of both parties.[314] Usually, such parties upon anticipation of entering into commercial relations, make provisions for governing body charged with resolving disputes which may arise in the course of such commercial relationship. Such provisions are usually within clauses[315] in the contractual agreement or are independent agreements of their own. These were not compulsory rules to arbitrate which the parties were

[312] Lord St. Leonards' Councils of Conciliation Act 1867 (30 and 31 Vict. c.105) and A.J. Mundella's Arbitration (Master and Workmen) Act 1872 (35 and 36 Vict., c.46). See also Hamish Fraser, *A History of British Trade Unionism 1700 – 1998* (St. Martin's Press 1999) 111ff and Amulree (n 296) 99.
[313] Royal Commission on Labour, *Fifth and Final Report - Cmnd. 7421* (H.M.S.O. Publication 1894).
[314] It is arguable if the consent of both parties is a condition precedent for unilateral arbitration as practiced in the United Kingdom in the 18th century.
[315] Incomes Data Services, *Conciliation and Arbitration - Study No. 35* (London August 1972).

required to follow. It was at their instance. [316] Secondly, the effect of such consent by the parties, renders such a clause as the 'governing clause' during the determination of the dispute, and all the terms agreed upon within the clause binds the arbitral tribunal. Further, the consent of both parties is deemed to be an implied consent to be bound by the award reached by the arbitrator(s). Under no circumstance, will any of the parties be precluded from being bound by such award. Voluntary arbitrations were indiscriminately used in Great Britain especially in collective agreements. At that period, the most utilized format for drafting arbitration clauses within such collective agreements was:

> If no settlement is reached between the company and district union officials, the dispute will be referred forthwith for conciliation by the [Advisory, Conciliation and Arbitration Service]. Failing all other settlement including conciliation, the parties will meet to discuss whether the issue should be submitted to arbitration. If this is agreed an arbitrator acceptable to both sides will be appointed and his decision will be binding. [317]

Compulsory arbitration on the other hand, was at the instance of the state. Whenever it was deemed that the recourse to arbitration should not be left to the discretion of the parties. It was mostly prevalent in employment enactments and other commercial and trading statutes. The object here, was to create a stable workforce which was characteristically predictable and effective.

The limitation of the subject matter of arbitration was not only focused on disputes that concerns wages, hours, holidays. However, it tackled disputes that concern the issue of making decisions as to whether a person would be selected into an employment or not. This was provided for in Order 1305 (the voluntary jurisdiction of the Industrial Court)[318]. The grounds of disputes within employments would specifically, cover discrimination against trade union members, replacements of workers and other issues that would ordinarily cause a strike. The process that was conducted as regards the

[316] Hepple (p 46) ch3, 91.
[317] Ibid 13.
[318] Ibid 94.

resolution of disputes using compulsory arbitration, was that the tribunal's decision was subject to the minister of labours' permission.[319]

Finally, compulsory arbitration was the corner stone of dispute resolution within the United Kingdom's economy in earlier years. A statistical analysis to this effect, stated by Reiss is that within the period of 1951 to 1959, the Industrial Disputes Tribunal issued 1,277 awards[320] and the number of industries that were involved in these awards was 29.[321] This succinctly shows the implementation of compulsory arbitration within industrial relations in United Kingdom. As a result, compulsory arbitration was described by the 'National Association of Local Government Officers' as a "charter for trade unionism" and they subsequently, incorporated provisions for compulsory arbitration within the agreements of local authorities in order to stabilize their dealings, and enforce a uniform dispute resolution system.[322] Health services had also, utilized the practice of compulsory arbitration and a great number of health services had recommended arbitration for resolving the disputes, within which they expressed their consent to be bound by the awards. In the modern day, compulsory arbitration within the United Kingdom still subsists within certain governmental agencies, as well as commercial and trading fields. Where disputes are required to be resolved speedily, and in an organized manner void of publicity, arbitral clauses are statutorily incorporated within the statutes creating such agencies or other commercial obligations. This, to the writer, is one of the antecedents of the development of the economy.

4.1.3 The History of Compulsory Arbitration in Australia:

Australia has implemented the concept of compulsory arbitration in certain sectors. According to the constitution of Australia[323], the right for the national government to establish and implement laws in relation to arbitration within the sectors of interstate industrial disputes[324]. It was described that imposing

[319] Ibid 95.
[320] See W.E.J, McCarthy, 'Compulsory Arbitration in Britain: The Work of the Industrial Disputes Tribunal' in Royal Commission on Trade Unions and Employers' Associations, *Research Paper 8* (H.M.S.O. Publication 1968).
[321] McCarthy (n 320) 36.
[322] Alec Spoor, *White Collar Union* (Heinemann 1967) 193.
[323] The Commonwealth of Australia Constitution Act 1900. This was the Act of the Parliament at Westminster, which took effect from 1901 and established Australia as a federal nation-state.
[324] The Commonwealth of Australia Constitution Act 1900 s 51(xxxv).

compulsory arbitration within Australia in certain disputes, may cause a limitation of power, which means that such legislation body in the parliament would have limited actions on certain disputes such as industrial and labour[325].

The introduction of compulsory arbitration as a dispute resolution mechanism during the nineteenth century in Australia was based on the growth of the industrial sectors in Australia. In 1890s, Australia had faced a pressure with its economy and as a result, such economy was collapsed which followed by lots of strikes. The effectiveness of settling disputes within the industrial relations[326] through voluntary arbitration and conciliation, were considered to be unsuccessful. Therefore, introducing compulsory arbitration was necessary as a resolution to settle these disputes. As the result, regulation was implemented by the unions within the sector of industrial procedures. The outcome of imposing compulsory arbitration showed a robust economy and strength in its development for the country.[327]

Compulsory arbitration as a mechanism was not an alternative to any remaining law within the industrial sector. The mechanism was applicable within contract and torts and had established by the elements of common law. In addition, arbitration statutes were founded and stand as a basis rules within industrial sector. Australian labour law within most of that century became controlled by compulsory arbitration[328].

It is necessary to highlight that the effect of compulsory arbitration and has provided within the labour sector. The outcome impact of compulsory arbitration as a role, has organised the terms and conditions within the employment contracts from its legal aspects. This has showed that nearly 80% of the staff stated that the economy had improved of both private and public sectors[329]. The arbitral awards were in relation to wages, work organisations holidays, leave and the employment contracts and its conditions in regards to

[325] Richard Mitchell and Richard Naughton 'Australian Compulsory Arbitration: Will It Survive into the Twenty-First Century?' (1993) 31.2 Osgoode Hall Law Journal 265-295.
[326] See generally R. Mitchell, 'State Systems of Conciliation and Arbitration: The Legal Origins of the Australasian Model' in S. Macintyre and R. Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration, 1890-1914* (Oxford University Press 1989).
[327] Ibid 268.
[328]See R. Simpson, 'The Future of Law in Industrial Relations' in E. Kamenka & A. Erh-Soon Tay (eds) *Law and Social Control* (St. Martins Press 1980).
[329] Australian Bureau of Statistics, *Award coverage Australia* (catalogue no. 6315.0, May 1991).

the termination. The arbitral awards as the outcome of employment contracts had a successful effectiveness within private legal actions by allowing employees regain their rights[330].

In conclusion, at that time, the effectiveness of compulsory arbitration was provided in Australia to reduce the disputes within the industrial sector by compulsory settlement mechanism[331].

4.2 VOLUNTARY ARBITRATION (BEFORE AGREEMENT)

Voluntary arbitration involves a process where an arbitral provision within an agreement is imposed on parties who sought to be bound by such an agreement and then becomes mandatory. The arbitration is referred to as voluntary, because of disputed parties have the choice and the right to utilise arbitration as alternative dispute resolution mechanism other than litigation, before parties enter into an agreement. Here, both parties agree to resort to a governing body upon any dispute. The "mandatoriness" of arbitration, stems from an agreement between the parties to be bound by the arbitral clause or agreement stated before, during or after the contract was made, and thereafter, seek the intervention of the arbitrator(s) agreed upon. One party cannot thereafter, unilaterally opt out of the agreement, as the clause is deemed as binding on him. The effect of mandatory arbitration is that the arbitration process is binding on the parties whether they have agreed to submit to arbitration before or after signing the contract. [332]

An obvious advantage of voluntary arbitration is that the parties get to choose who decides the dispute, and there is also the possibility of avoiding the consequence of unpredictable decisions that are made in courts[333]. Professor Scott Baker has highlighted the aspects of mandatory arbitration in insurance in respect to the employment field. He stated:

"The [insurance] model is used to highlight problems of asymmetric [ally-held] information. These problems arise under three conditions: (1) one party

[330] See, for example, *Gregory v Philip Morris Ltd* [1988] 80 ALR 455.
[331] Australian Bureau of Statistics (n 281).
[332] Stephen J. Ware, 'Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements' (2001) J. Disp. Resol.) 6, 90–91.
[333]Linda Demaine and Deborah Hensler, 'Volunteering to Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer's Experience' (2004) 67 Law & Contemp. Probs. 55.

agrees to bear a risk, (2) the probability that the risk will materialize depends on another party's actions or latent characteristics, and (3) information asymmetries make it hard to contract on these actions or latent characteristics. With insurance, for example, the insured pays a premium and transfers the risk of the insured-against event to the insurer. The insured's actions and latent characteristics influence the chance that the insured-against event will take place. And, finally, it is sometimes hard to write a contract whose payment is contingent on the insured's actions and latent characteristics".

In the case of mandatory arbitration in respect to employment disputes, both the employer and the employee are accountable to the terms of the agreement.[334]

As alluded to the above, arbitration becomes mandatory at the instance of the parties. This means that when consent of the parties is derived to show an intention to be governed by the rules of arbitration, and by specified arbitrator(s), such parties are bound by their agreement and any award derived therefrom is legally enforceable. The presence of an arbitral clause or arbitral agreement implies mandatory arbitration, which becomes as automatically binding. Since the arbitration agreement is a contract, it therefore, must contain both elements of a legal intention by the parties to contract, and the obligation to fulfil the terms of the contract.[335] It follows that parties to arbitration agreements must be vested with the legal capacity required in order to enforce an arbitration agreement.

The elements of an arbitration agreement which renders such arbitration mandatory (capacity and intention of the parties), will be briefly discussed.

4.2.1 The Capacity of the Parties in the Contract:

Since the parties are the instigators of the agreement to be bound by arbitration, it becomes necessary that they are endowed with the capacity to

[334] Scott Baker, 'A Risk Based Approach to Mandatory Arbitration' (2004) 83 Or. L. Rev. 861, 874–75.
[335] Onyema Emilia, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge, Taylor & Francis Group 2010) ch 1, 9.

contract. Capacity means the right to sue and be sued which is an essential element by the parties in order for the arbitration contract to be enforceable. Therefore, parties can be defined either as legal entities such as corporations or natural persons that elect to utilise arbitration as an alternative dispute resolution rather than resorting to litigation processes. The idea of entering into an arbitration agreement by the parties is to minimise the mechanisms of resolving disputes to arbitration in which becomes mandatory and its awards enforceable.[336] The main difference between mandatory and compulsory arbitration is that the concept of mandatory arbitration suggests a freedom for the parties, to choose or utilize arbitration as a viable dispute resolution method, whereas in the case compulsory arbitration, parties are automatically, bound to utilize the already stated dispute resolution within a clause or agreement, which they had no hand in drafting. Therefore, such contractual agreement incorporates both the terms of the contract and a governing body for resolution of disputes arising therefrom, and the parties duties are simply to comply with the stated provisions.

If the issue of parties' incapacity exists, the arbitration agreement will be null and void. This is provided for in the Model Law[337] and the New York Convention[338] and where it mentioned that such an agreement must satisfy the element of capacity for parties when they entered the contracts, otherwise the contract will be considered as invalid[339].

Parties' identities, like in any other contract, is a significant element in an arbitration contract. The identities of parties would be disclosed when such a dispute occurs and thereafter, the arbitration agreement is inspected. The rationale for specifying the identities of the parties is to be particularly vast with the description of the persons who are to fulfil obligations within the contract especially in cases which involve multi-party relations or in terms of non-signatory parties in an agreement. The existence of an arbitration agreement can resolve major issues in times of disputes. In the case of no such identity of parties in the arbitration clause as contained in the contract, the

[336] Ibid.
[337] UNICTRAL Model Law on International Commercial Arbitration [1985].
[338] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards [1958]
[339] New York Convention art V(1)(a); Model Law art 36(1)(a)(i).

identities of the parties will be derived from the names utilized or agreed upon during the course of the contractual transaction.

To have a valid arbitration agreement, only parties who signed such an agreement will be bound by it. For example, in a dispute involving a French Manufacturer and a German distributor, the arbitrator denied in its ICC final award, to apply the jurisdiction due to the non-existence of a contractual relationship between the parties. The reason is because one party had signed on behalf of the distributor-company. The arbitration signed by the parties, was also, considered to be inapplicable under German Law. Therefore, the arbitration agreement was stated to be void and not enforceable[340].This is therefore, a clear requirement: that parties' identities are explicitly considered in the arbitration agreement, to avoid further complications, and also, in order for mandatory arbitration procedure to be complied with.

On the other hand, there are exceptional circumstances where arbitration agreements will be applicable and bind parties who have not signed the agreement.[341] For instance, in situations where parties are subject to a merger between two companies, the arbitration agreement in the previous corporation will be binding on its successors as a party in such an agreement. An explicit example regarding this issue is found in the case of Dentirol AB v SwissCo Services AG[342]. This dispute was controlled by the SCC Arbitration Rules; and the issue here, was that SwissCo was signatory to a contract which contained an arbitration clause with Dentirol. The original company had merged with SwissCo, but this was neither specified, nor identified to Dentirol. Nevertheless, the Arbitrator denied the argument by Dentirol who claimed that SwissCo was not entitled to the arbitration proceedings. It was however, concluded by the arbitrator that due to the fact that the merger arose between the SwissCo and the original corporation, SwissCo will be subject to the arbitration agreement due to its legal predecessor. An award was issued by the arbitrator against Dentirol. An appeal was submitted against the award

[340] French Manufacturer v German Distributor, Final Award in ICC Case No. 6850 of 1992, YBCA, 1988, Vol XXIII, 37.
[341] Dentirol AB v SwissCo Services AG, Case No T 4805-3 - Decision of the Court of Appeal of Western Sweden of 30 September 2005.
[342] Ibid.

to the Court of Appeal of Western Sweden, who denied the appeal and upholding the merit of the award dispensed.[343]

As regards third parties within an arbitration agreement, the doctrine of privity of contract precludes a third party from claiming, being bound by or generally asserting any rights relating to an arbitration agreement.[344] According to Gary Born,[345] a binding arbitration agreement is a matter that concerns only consenting parties and no other. In conclusion, the doctrine of privity of contract would not allow a party to be involved in the arbitration agreement, if the party has not previously agreed to the agreement notwithstanding that such a party is deemed an "interested party" to the agreement, it will not be considered as a part of the arbitration agreement[346].

4.2.2 The Intention of the Parties:

Generally, intention of parties to incorporate an arbitration agreement within a contract is a valid presumption that parties intend to be governed by the rules of arbitration and be bound by the award rendered[347]. The rationale for this is that such parties will not take out the time to agree on all the relevant terms in the arbitral clause or agreement if they did not want to be bound by such terms. Even where all the terms of the arbitration agreement are not concluded, the fact that a governing law was elected is deemed to be sufficient intention to be bound by that law. A party that refuses to arbitrate after signing the arbitration agreement may ground his refusal on the argument that his legal intention was never to arbitrate. For instance, where an arbitration clause is contained within the underlying contract, and one of the parties refuses to arbitrate, the remedy for the other party, in order to bind the objecting party to the terms in the contract, lies in an application for an anti-suit injunction.[348]

[343] Onyema (n 335) 11.
[344] See Daniel Busse, 'Privity to an Arbitration Agreement' (2005) 8 IALR 95-102.
[345]See Born (n 198) 1137-212.
[346] In Intertec Contracting A/S (Denmark) et. al. v Turner Steiner Int'l, SA (USA) et. al. [2001] YBCA, Vol XXVI, 949.
[347] Onyema (n 335) 16.
[348] See E. Gaillard, 'Reflections on the Use of Anti-suit Injunction in International Arbitration" in L.A. Mistelis and J.D.M. Law (eds), *Pervasive Problems in International Arbitration* (Kluwer International Arbitration 2006).

4.2.3 The Characteristics of the Arbitration Agreement:

The essence of arbitration, in contradistinction to litigation, is to implement a systematic dispute resolution system at the instance of the parties. In *Fiona Trust v Privalov,* Lord Hoffman illustrated the fundamental object of the arbitration agreement as one where 'the parties have entered into a relationship, an agreement …. which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen….'[349] This means that arbitration agreements only geared towards the resolution of disputes which have been explicitly stated and envisaged by the parties. Conversely, it is an exchange of a promise that either party will be entitled to choose arbitration where a dispute occurs, subject to the terms and conditions agreed upon. The advantage of the arbitration agreement is that any liability which arises, will be funded by the parties jointly. For instance, if a party fails to fulfil his obligations within the arbitration agreement and the claimant brings the dispute to the arbitration process, the respondent party will be compelled to contribute to fulfil his own obligation and other liabilities may occur as a result of these obligations, such as paying arbitrators' fees.[350]

4.2.4 Authentication of Arbitration Agreements:

It is necessary for arbitration agreements to be authenticated in a way that it meets the parties' intentions as to what was agreed upon. The validity of arbitration agreement is also, required within the jurisdiction that the parties elected to be subject to. This is a valid prerequisite for arbitration agreements in order for the arbitral procedure to become mandatory. Both the existence of arbitration agreements and terms and conditions upon which parties agreed, are to be critically considered in order for the arbitration agreement to be authenticated. Where the terms are contrary to the provisions of the law which is to be applied, such arbitration agreements are not authenticated[351] or where the terms surpasses the extent of the jurisdiction stipulated in the main contract.[352] The rationale for authentication therefore, is to sort out those terms which are either unlawful, contradictory or simply ambiguous. Where

[349] Fiona Trust & Holding Corporation and Others v Privalov and Others [2008] 1 Lloyd Rep 254, 256.
[350] Onyema (n 335) 16.
[351] In accordance with the New York Convention, art V (1) (a). See also the European Convention, art VII and Arbitration Act Sweden, s 48.
[352] See the Federal Arbitration Law Switzerland, art 178 (2).

the arbitration agreement does not state which law will be governing the arbitral process, the intention of the parties will be taken into account.[353]

Another critical part of authenticating the arbitration agreement is determining the nature of the consent of the parties. Evidence of consent by the parties must be provided in writing. In certain circumstances, signature by the parties is required to enforce the agreement. Generally, a legal relationship between the parties must exist and there must be an explicit inclusion by both parties of the intention to arbitrate upon dispute. It is also very advisable that such parties must stipulate all the terms and conditions necessary for the arbitral proceedings in order to avoid instituting other interpretative actions and other misunderstandings, and ultimately, to preserve friendly relations. For example, such terms must expressly stipulate the arbitrators' jurisdiction and powers, the extent and limits of their capacity, *inter alia*. Also the arbitration agreement should specify whether the arbitration will be an ad hoc or institutional.[354]

4.2.5 Form of Arbitration Agreements:

For Arbitration to become mandatory, the arbitration agreement must be in writing. This fact is stated under most arbitration laws worldwide. The rationale for the element of 'writing' of any arbitration agreement is to show that the parties are legally accountable to the terms and conditions of their promises made under the agreement and will be bound by it whenever a dispute arises, and further agree to resolve such dispute through arbitral mechanisms rather than the national courts procedures. Under Article II (1) of the New York Convention, it is stated that:

"Each Contracting State shall recognise 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."

[353] See Arbitration Law of France, art 1494.
[354] Onyema Emilia, 'Drafting an Effective Arbitration Agreement in International Commercial Contracts' (2003) 7 Vindobona Journal of International Commercial Law 2, 277-286.

Article II (2) of the New York Convention goes on to further describe the meaning of agreement in writing. It states that "[T]he term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams".

The current situation regarding an "agreement in writing" as provided, has been developed since the 1958 Convention especially in view of the communication developments in the international commercial trade. Thus, the amenability of arbitration laws and its development internationally has simplified the obligation of providing an arbitration agreement in writing. This can be illustrated under Option I of Article 7 of the Model Law which has been amended as the following[355]:

"(3) An arbitration agreement is in writing if its consent is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages, magnetic, optical or similar means, including but not limited to electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claims and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing provided that the reference is such as to make that clause part of the contract.[356]"

[355] Option II of the 2006 version of the Model Law highlighted the obligation of writing. The definition of the arbitration agreement is stated as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".

[356] An agreement in writing has been stated under Article 7 (2) of the Model Law (1985) as "contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of

In conclusion, it is consequently more than necessary to evidence the arbitration agreement in writing or other electronic and technological means provided by the Model law.[357] The flexibility of the requirements is geared at affording the parties the opportunity of compliance with the provisions of the law, and also, in a bid to conforming to contemporary trends.

4.2.6 The Element of Signature in Mandatory Arbitration:

One of the elements of mandatory arbitration agreements is the condition of signature. This requirement may depend on the national laws. The arbitration agreements are bound to be signed as a condition precedent before enforceability under the New York Convention. In the case where the arbitration clause is incorporated within the contract, the signature by the parties to that contract would adequately satisfy the requirement of the signature.[358] Under the 1985 Model Law, the validity of an arbitration agreement rests on the existence of a signature within the agreement. Article 7 (2) of the Model Law (1985) states that 'an agreement is in writing if it is contained in a document signed by the parties….' The import of this provision therefore, renders an arbitration agreement valid if: firstly, it is in writing contained in a document, and secondly, if it is duly signed by both parties.

Moreover, as earlier stated, both parties are required by law, to be in an extant legal relationship of which an agreement is made to that effect providing for terms regulating disputes that may arise and also, referring such disputes to arbitration.

4.2.7 Arbitrability:

Here, mandatory arbitration will only be resorted to, if the subject matter that the parties agreed upon is within the concerns of arbitration. This in essence, means that not all disputes are subject to arbitration, and therefore, those that

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telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another".

[357] For arbitration laws, see Arbitration Law (Brazil), art 4 and Arbitration Law (China), art 16 which states that writing is an essential element for arbitration agreement. However, the definition of writing is not covered by the law. See also Arbitration Act of England, s 5. The Federal Arbitration Law (Switzerland), and art 178 states the concept of writing for arbitration agreement but does not show further that it has to be signed in order to be authenticated; Arbitration Law (France), arts 1443 and 1449 and Federal Arbitration Act (US), s 2 states that the arbitration agreement must be in writing but do not cover the elements of signature or the meaning of writing. The Arbitration Act (India), s 7 and Arbitration Act (Nigeria), s. 1 cover both the meaning of writing and the need of signature.

[358] Ibid.

do not fall within the bounds of arbitration cannot be resolved by arbitration. Article II (1) of the New York Convention provides for the "arbitrability" of disputes as to "…. Concerning a subject matter capable of settlement by arbitration'". Since the recourse of arbitration is not in all situations, different views have arisen in respect to the issue of arbitrability of disputes under different national laws. There is no treaty that has successfully tackled the arbitrability question[359]and therefore, this question remains unanswered in relation to the principle of arbitrability, as the result of non-existence uniformity of treaty in all jurisdictions. Thus, it is necessary to study carefully the provisions of the national law that are concerned with the subject matter, in order to identify whether or not the subject matter can be resolved through arbitration. This is because, the governing law that is elected by the parties will resolve the dispute, and consequently, it becomes an essential that the dispute is considered as arbitrable within the essence of such law.[360] According to Article V (2) (a) of the New York Convention[361], and based on the above, the question of arbitrability could be reconsidered at the process of enforcement or annulment procedures. Moreover, different laws have regulated the questions of arbitrability, it is a possibility that the law chosen for arbitration agreement by parties, consider the question of arbitrability. This has been highlighted in the outcome of Matermaco v PPM Cranes[362] by the Tribunal de Commerce of Brussels, in which tackled Article V (2) (a) of the New York Convention within the decision. Thus, other laws that consider the question of arbitrability, are the following:

(a) The law of seat of arbitration.
(b) The law of the place in which the parties agree where to conduct the agreement.
(c) The law that governing the contract between the parties.
(d) The disputed party each its own law and jurisdiction.

[359] Stefan M Kroll, 'Arbitration and Insolvency Proceedings- Selected Problems' in L.A. Mistelis and J.D.M. Law (eds), *Pervasive Problems in International Arbitration* (Kluwer International Arbitration 2006).
[360] K.W. Wedderburn and P.L. Davies, *Employment Grievances and Disputes Procedures in Britain* (University of California Press 1969) chs. 8 -11.
[361] National laws shared the same characteristics. See Arbitration Law of Brazil, art 38(1); Arbitration Act of England, s 103(3); Arbitration Act of India, s 48(2)(a); Arbitration Act of Nigeria, s 52(2)(b)(i).
[362] Matermaco SA v PPM Cranes Inc and Others - Decision issued by the Tribunal de Commerce, Brussels of 20 September 1999, 2000, Vol XXXV, 673

(e) The law in which parties intend to recognise and enforce the arbitral awards[363].

4.2.8 Arbitration Clause and its Autonomy:

It should be explicitly emphasised that there should be a distinction between the main contract and an arbitration clause incorporated within the main contract. This point of distinction is called the "doctrine of separability" or "autonomy of the arbitration agreement."[364] Arbitration clause is a proviso within a contract which either generally or specifically, provides for the settlement of disputes arising from the main contract by a particular authority, at a particular place and within a specified time.[365] The doctrine of separability or autonomy of the arbitration agreement is usually applicable to only arbitration clauses within agreements and not independent arbitration agreements. It is to the effect that such arbitral clauses within contracts are treated as independent from the contract notwithstanding that it is a part of the contract. Consequently, the legal effects of the arbitral clause is treated differently with that of the main contract. Therefore, where a governing law is elected within the arbitration clause, such law will be deemed as binding notwithstanding that another law was elected in the main contract.

Furthermore, even though the main contract is considered to be illegal or invalid, the doctrine of autonomy of the arbitration clause would apply and therefore, its legal independency would render the agreement valid and enforceable.[366] A combined reading of Articles II (1) (2) and Article V (1) (a) of the New York Convention and Articles I (2) (a), V and VI of the European provide for instances where the arbitration clause will be deemed as independent and autonomous from the main contract.[367] This was also outlined in the case of Fiona Trust v Privalov[368]. This case involved a dispute

[363]On the question of arbitrability see Enforcement of Arbitration Agreement and International Awards, pp. 503-94; J.D.M Lew, L.A Mistelis and S.M. Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 187-221; Fouchard (n 98) 330-59.
[364] See Born (n 198) 312-15ff and Fouchard (n 98) 47ff.
[365] See Vee Networks Ltd v Econet Wireless International Ltd [2004] EWHC 2909 (Comm), [2005] 1 Lloyd's Rep 192; LG Caltex Gas Co Ltd. v China National Petroleum Corporation [2001] EWCA Civ, 788, [2001] 4 All ER 875.
[366] Onyema (n 397) 20.
[367]See the Model Law, art7(1); Arbitration Law of Brazil, art 8; Arbitration Law of China, art 19.
[368] Fiona Trust and Holding Corporation and others v Privalov and others [2007] UKHL 40, [2008] 1 Lloyd's Rep 254. See also the Court of Appeal decision in Harbour Assurance Co (UK) Ltd. v Kansa General International Insurance Co Ltd. [1993] 3 All ER 897.

between Fiona Trust and eight charterparties. In the main contract, all charter parties has included clauses to the effect of identifying the jurisdiction governing the arbitration agreement. It had further stated that in the event of any dispute occurring between the parties, London will be the place of arbitration. Upon the event of an actual dispute, the charterers applied for arbitration in London, but the other party however, refused to comply with the process of arbitration. This was grounded on the fact that the agreement in fact, was invalid as it was made by reason of bribery. Lord Hoffman in seizing jurisdiction of the matter within the England, stated that:

> "The Principle of separability enacted in section 7 [of the English Arbitration Act 1996] means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a 'distinct agreement' and can be void or voidable *only* on grounds which relate directly to the arbitration agreement".[369]

From the foregoing, it is clear that a party cannot at his own instance, plead the invalidity of the arbitration agreement simply because the main contract is in itself invalid. The party has to go further to show that the invalidity of the arbitration agreement stems not from the invalidity of the main contract, but from the arbitration agreement itself. This goes to show the effect of the doctrine of separability of arbitration clause. Another example is seen in the case of *Prima Paint Corporation v Flood and Conklin Manufacturing Co*, where the US Supreme Court had expressly stated that the effect of such an arbitration clause should not to be attached to that of the main contract and it must be treated separately,[370] and also stated in the case of *Buckeye Check Cashing Inc v Cardegna*[371] where the US Supreme court concluded that where the underlying contract was constituted on the basis of illegality and which would be considered as void, it will have no effect on the arbitration clause therein.

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[369] Fiona Trust v Privalov [2008] 1 Lloyd's Rep 254, 257.
[370] Prima Paint Corp v Flood and Conklin Mfg Co 388 US 395 (US S Ct 1967).
[371] Buckeye Check Cashing Inc v Cadegna, 546 US 440 (US S Ct 2006) - This case concerns a loan agreement which incorporated an arbitration clause. The loan agreement did not comply with Usury laws of the state of Florida. The agreement was thus considered illegal. The arbitration clause was, however, deemed as valid.

On the other hand, where both the main contract and the incorporated arbitration clause have the same identical legal subject matter, then the arbitration clause will have the same effect as the underlying contract. This has been highlighted by Lord Hoffman in Fiona Trust v Privalov in the following words:

"Of course there may be cases in which the ground upon which the main agreement is invalid, is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties' claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. *But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a 'distinct agreement', was forged"*[372].

4.2.9 The Doctrine of Separability of the Arbitration Agreement and its Governing Law:

The issue of the law applicable to the arbitration agreement has constituted a prevalent issue in arbitration clauses where the doctrine of separability of arbitration agreement invariably applies.[373] Nonetheless, where the arbitration agreement specifically provides for a governing law in the event of dispute, such law is usually the law applicable. Where however, the laws provided for in the arbitration clause is different from that within the main contract, it may pose a different problem. Gary Born illustrates the doctrine of separability as "of central significance in international commercial"[374]. The essence of the doctrine of separability resolves this problem, since the arbitral clause is regarded as independent from the main contract, it will therefore follow, and that the law provided for within the contract should apply notwithstanding that another has been provided for in the main contract. It is therefore pertinent to emphasise that for parties to avoid being governed by the law provided for in the main contract by operation of law, they should expressly stipulate the terms that should guide the process of arbitration,

[372] Fiona Trust v Privalov [2008] 1 Lloyd's Rep 254, 257.
[373] See Lew, Mistelis and Kroll (n 68) para 6.23.
[374] Born (n 198) 313, 316-44.

especially the applicable law. This is further provided for in Article 178 (2) of the Swiss Federal Arbitration Law which emphatically states that 'an arbitration agreement is valid if it conforms to the law chosen by the parties.'[375]

In practice however, the choice of law clause is usually difficult to recognise within the arbitration clause, or is most commonly incorporated as a term within the main contract.[376] If the law of arbitration agreement has not been selected, and the main contract is governed by Swiss law, the provision of the Swiss Federal Arbitration Law would apply.[377]

It should be noted that a conflict of laws situation may arise especially where the applicable law is not stated in the arbitration agreement. The conflict of laws rules would presumably, adopt the law of the place that is relates to, or the law has been referred by the parties within the arbitration agreement.[378]According to Article 1 of the Model Law[379] stated that in case of the national law it is possible to be applicable where " if the place of arbitration is in the territory of this State". On the other hand, under Article 20.1 of the Model Law has stated that "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"[380]

In the case of **Sulamerica v Enesa** [381], the Court of Appeal had highlighted guidelines in regard to the issue of the governing law. By looking at the English common law principles, when an issue consider an arbitration agreement and involve the matter of the governing law, three stages should be taken into account as the following:

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[375] The Arbitration Act (Sweden), s 48 states the same provision that "*Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties*".
[376] Onyema (n 335) 22.
[377] Federal Arbitration Law of Switzerland, art 178(2). The Arbitration Act (Sweden), s 48 state that in a situation where the arbitration agreement does not provide for the applicable law, it will "*be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place*".
[378] See Julian DM Lew, 'The Law Applicable to the Form and Substance of the Arbitration Clause' [1998] 9 ICCA Congress Series 114, para 136.
[379] UNCITRAL Model Law on International Commercial Arbitration [1985] (with amendments as adopted in 2006).
[380] Ibid.
[381] [2012] EWCA Civ 638.

(a) Express choice.

(b) Implied choice.

(c) Closest and most real connection.

On the other hand, the issue on the doctrine of separability was not tackled specifically within the New York convention. However, in the case of a contract where it has a separate arbitration agreement, it considered to be that it has its separate legal significances. This could be found under Articles II (1) (2) and Article V (1) (a) of the New York Convention. [382]

Moreover, the question of the applicable law within arbitration agreements was examined by the European Convention. It enjoined member States to inspect the laws that would be applicable to arbitration agreements by (a) the selected laws that were agreed to govern the arbitration by the parties; (b) the jurisdiction in which the award is to be issued; and (c) the conflict of laws rules that would be applicable and examined by the courts. Where the arbitration agreement is questioned in terms of its validity, the applicable law would be the jurisdiction of the court that raised the questions as to its validity.[383]

4.2.10 Termination of Mandatory Arbitration Agreements:

Every arbitration agreement reached at the instance of the parties involved, can similarly, be terminated at the instance of the same parties. The question of termination of the arbitration agreement would not arise if the parties consent cannot be implied either from the terms and conditions of the agreement (which automatically renders such an agreement null and void), or where either of the parties deny consent.[384] In other cases, ambiguity and imprecise drafting of the conditions and terms of arbitration agreement could

[382] In regards to the national law see the Model Law, art 7(1); Arbitration Law of Brazil, art 8; Arbitration Law of China, art 19; Arbitration of Act England, s 7; Arbitration Law of France, art 1442; Arbitration Law of Germany, s 1040(1); Arbitration Act of India, s 16(1)(a); Arbitration Act of Nigeria, s 12(2); Arbitration Act of Sweden, s 3; Federal Arbitration Law of Switzerland, art 178(3).

[383] European Convention on International Commercial Arbitration 1961, art VI <https://treaties.un.org/doc/Treaties/1964/01/19640107%2002-01%20AM/Ch_XXII_02p.pdf > accessed 24 January 2017.

[384] See R.D. Bishop, W.M. Coriell and M.M. Campos, 'The "Null and Void" Provision of the New York Convention' in Emmanuel and Domenico (n 163) 275-98.

also be grounds for terminating such agreement, even though there exists an intention of consent to be bound by both parties.[385]

It is however worth noting that even though the main contract has been terminated, arbitration agreement will still be enforceable.[386] In the instance where one party has repudiated the contract, specific performance is an available remedy for the aggrieved party seeking that the defaulting party be compelled to comply with the terms and conditions of the contract. However, specific performance must be an available remedy within the jurisdiction agreed by the parties.[387]

There also exists other forms of termination of an arbitration agreement. Termination could be by operation of law which is usually implied when one or both parties resort to litigation rather than arbitration. In such a situation, it will be deemed that the arbitration agreement has been waived.[388] Abandonment of the arbitration agreement by both parties would also be deemed as a termination of the agreement. This could either be in the form of a recourse to litigation rather than arbitration, or the provision of another arbitration agreement with similar terms with the former agreement or where both parties consent in the abandonment. Here, it will be deemed that the latter agreement is to replace the former, and the former will be deemed to be abandoned. However, it should be noted that the main contract would not be terminated even though the parties have abandoned the arbitration agreement.[389] Other vitiating elements such as fraud, misrepresentation, mistake, duress and undue influence have the effects of terminating the arbitration agreements.[390]

4.2.11 Ad-hoc Arbitration vs. Institutional Arbitration:

While ad-hoc arbitration clauses regarding choice of law is left entirely to the parties choice who can agree on the application of any laws or rules to the

[385] See C.B. Lamm and J.K. Sharpe, 'Inoperative Arbitration Agreements under the New York Convention' in Emmanuel and Domenico (n 163) 297-322.
[386] The doctrine of separability as stated above.
[387] Onyema (n 335) 24.
[388] See Arbitration Act of England, s 9(3); Arbitration Act of India, s 8(1); Arbitration Act of Nigeria, s 5(1); Arbitration Act of Sweden, s 4.
[389] See Downing v Al Tameer Establishment [2002] EWCA Civ 721, [2002] 2 All ER (Comm) 545; Delta Reclamation Ltd v Premier Waste Management Ltd [2008] EWHC 2579 (Comm).
[390] See Fouchard (n 98) 437-46.

arbitral proceedings without being particularly bound by the rules of an institution, institutional arbitration occurs where the parties simply elect an institution which will be responsible for the implementation of the arbitral proceedings. In effect, the proceedings become governed by the rules and practices of that institution. In the case of *Bovis v Jay-Tech*[391], the arbitration agreement was separated from the main contract, and the latter provided that the SIAC Arbitration Rules would be the applicable institutional rules during arbitral proceedings. It was held that parties were bound to be governed by the arbitral procedures of the SIAC Arbitration Rules[392]. However, the arbitration agreement did not provide further for the institution that parties were be subject to. Therefore, the parties had to choose to be governed by either the rules stated within the agreement or by an institution of their choice. As the result, it could be seen that parties had the ultimate choice of applicable law to the agreement, for example, the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules of 1976. Where there is no arbitral rules agreed upon by the parties within the arbitration agreement, the arbitral tribunal can on its own motion, choose the arbitral rules to apply so far as the consent of the parties are duly expressed.[393]

Ad hoc arbitration has its own rules that it governed in a sense that it would not be directed to institution for the parties to arbitrate. This shows that fees are not required for ad hoc arbitration as in the case of institutional arbitration where parties were intended to administer their dispute in a particular institution. On the other hand, it could be seen that institution may interfere and be part of the process in *ad hoc* arbitration. For instance, when it concerns that parties are intend to pay fees in relation to their administration fees for both amenities and contribution for limited support in the dispute[394]. Ad hoc arbitration in that case, still remains unaffected, even though institutional arbitration may observe that it has such an involvement. It is also the arbitral tribunal has the authority to select a secretary in exchange for a fee in order to assist administrative process that concerns intensive disputed claim

[391] Case No O/S77/2005, 166/2005 - Decision of the High Court (Singapore) on 6 May 2005.
[392] *Supra.*
[393] This is referred by the power of arbitrator.
[394] Services can be offered by various centres such as the LCIA, Cairo and Lagos Regional Centres, SIAC, HKIAC, and SCC.

between parties[395]. Arbitration laws and rules has mandatory provisions in nature as it would be binding on parties, this depend the jurisdiction arbitration laws or rules that parties referred to in *ad hoc* arbitration[396]. These national mandatory provisions may only apply to its country or bind the parties' position in the arbitral proceedings[397]. The reason for having an arbitration agreement is for the parties to clarify the conditions and terms by including specifically, a certain law to be referenced to, during the arbitration procedure once a dispute arise to avoid any complications[398]. The seat of arbitration would be imposed in the case of the absent law in the arbitration agreement[399].

On the other hand, institutional arbitration as explained above consists of rules within a specific institution which concerns international commercial arbitration. Once the parties have agreed to arbitrate, reference will be made to a particular institution in order for arbitration rules held by the institution to be analysed and applied to the instant dispute.[400]. Therefore, the role of the institution during the arbitration process would be to essentially implement the arbitration proceedings by applying its rules to the terms of the contract. For example, in matters relating to selecting arbitrator(s) where absent in the arbitration agreement,[401] or managing the powers of the arbitrator(s) or removing arbitrators if necessary.[402] It should be mentioned that reference to an identified arbitration institution in the arbitration agreement by the parties as governing the arbitration proceedings, does not mean that the arbitration hearings and the processes must be in the same location where the arbitration institution is situated.[403]

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[395] See Onyema Emilia, 'The Role of the International Arbitral Tribunal Secretary' (2005) 9 VJ 99 and C. Partasides, 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration' (2002) 18 Arb Int. 2, 147.
[396] For instance, Arbitration Act of England, sch 1. See also M. Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Arbitration' (1997) 14 JIA 4, 23.
[397] In Marriot Int'l Inc v Ansal Hotels Ltd, YBCA, 2001, Vol XXVI, 788.
[398] The North American Free Trade Agreement, art 1117; ICSID Arbitration Rules; ICSID Additional Facility Rules or UNCITRAL Rules can be referred to where there are occurred disputes by the parties.
[399] Dr Mann discussed the delocalisation of international arbitration in regard to the law of the place of arbitration and the applicable courts. See Mann Francis, 'Lex Facit Arbitrum' (1986) 2 Arb. Int. 3, 241.
[400] See Lucky Goldstar Int'l (HK) Ltd v Ng Moo Kee Eng Ltd., YBCA, 1995, Vol XX, 280 (Judge Kaplan).
[401] For instance see AAA Rules, art 6(3); ICC Rules, art 9(4); LCIA Rules, art 5(5); SIAC Rules, arts 6(2) and 7(2); SCAI Swiss Rules, arts 7(3) and 8(5).
[402] Such AAA Rules, art 9; CIETAC Rules, art 26(6); DIS Rules, s 12(2) and s 14; ICC Rules, art 11(3); RCICAL Rules, art 15 (1); LCIA Rules, art 10(4); SIAC Rules, art 12(1); SCAI Swiss Rules, art 11(1).
[403] This has been shown in the International Chamber of Commerce, *2008b ICC 2008 Statistics* (ICC Bulletin June/July 2009).

Finally, it is very much advisable that the terms of the arbitration contract be expressed without ambiguity and in clear terms. Where the parties are not certain as to the laws or rules to be bound by, it is always a safer bet to employ the rules of an institution as applicable. Therefore, two contracting parties may elect to be bound by (AAA) institutional rules, or (CIARB) institutional rules. In such a case, they need not go ahead to provide for other ancillary terms as this will be implied from the rules of the institution. It makes the drafting of arbitration agreements easier and less problematic.

4.3 RECENT DEVELOPMENTS ON COMPULSORY ARBITRATION

In the last few years, some nations (including Saudi Arabia) has imposed compulsory arbitration in particular industries in order to settle disputes between parties. The implementation of compulsory arbitration in these countries shows the indication of compulsory arbitration as an effective mechanism for resolving disputes rather than litigation procedures. This impression demonstrates that the outcome of utilising arbitration for disputed claims, may distinguish from the result that stated by litigation process. International commercial transactions may involve that parties have different jurisdictions and rules governed by contracts.

There are certain examples of different jurisdictions that adopted the utilisation of compulsory arbitration mechanism to settle disputes in specific sectors. In Saudi Arabia, Article 26 of the Executive Rules for the Foreign Investment Act[404] introduced compulsory arbitration as a dispute resolution mechanism in respect of disputes arising between a foreign investor and its Saudi partners in respect of investments licensed under the Foreign Investment Act. Article 26 provides as follows:

"The Board of Directors, in accordance with the second paragraph of Article XIII of the law, would establish a Committee composed of a chairman and at least two members to be called (Committee for the Settlement of Investment Disputes), to consider disputes that arise between the foreign investor and his

[404] Foreign Investment Law (issued by Royal Decree No. M/1 5 Muharram 1421 – 10 April 2000).

Saudi partners regarding investing issues licensed under this law, the committee would work to settle the dispute amicably, If this is not possible, then it will resolve the conflict once and for all by arbitration in accordance with the arbitration system issued by the Royal Decree No. (46) dated 12/07/1403 AH, and it's implementing regulations, this committee is intended originally to settle the dispute set forth in the arbitration system."

The introduction of compulsory arbitration for the settlement of investment disputes is indeed a major stride by the Saudi government and should be replicated for the marine insurance sector, which is no doubt an important sector that attracts foreign investments. However, unlike in the case of investment disputes which are required to be submitted to the Committee for the Settlement of Investment Disputes before reference to arbitration, in the case of disputes marine insurance claims, it is the writer's position that disputed marine insurance claims should go directly to arbitration. Submitting such disputes directly to arbitration will streamline the dispute resolution process, which will save time and costs for the parties.

Norway also introduced compulsory arbitration to settle disputed claims in the Oil industry[405]. The ideology was to utilise arbitration and be imposed to prevent employees from the strikes. Strikes were a major issue in 2012, oil companies were disturbed by it in the North Sea. The fact that strikes were lasted for almost 14 days and the employers reacted with a lockout, the government had to interfere as most workers in most of the companies accept the idea of strikes. Therefore, it was necessary for the government to implement compulsory arbitration as an alternative dispute resolution for settling disputes, in which an impact on their transporting its oil and gas overseas. Compulsory arbitration was obliged in the private sectors where it engaged strikes by employees such as security guards and private nurses. In Norway, the potential awareness was to provide compulsory arbitrations is because to prevent embarking on strike whether in public or private sectors.

[405] See Nergaard Kristine, 'Extensive use of compulsory arbitration to settle conflicts' <http://www.eurofound.europa.eu/observatories/eurwork/articles/industrial-relations-working-conditions/extensive-use-of-compulsory-arbitration-to-settle-conflicts> accessed on 16 September 2015.

Another example can be found of introducing the methodology of compulsory arbitration is in Chile. The Chilean Commerce Code[406] provided that as a general rule, compulsory arbitration must be imposed to resolve disputes that occurred in the context of maritime and marine insurance sectors[407] a. In other words, Litigation process would not be an option for parties and only an arbitrator would be entitled to resolve the disputes. The Code[408] did not elucidate the types of maritime and marine insurance disputes in particular, however, exceptions can be made for the courts to hear the disputes in maritime and marine insurance; 1) if it involves a term contained in the agreement by the parties in which specified that any disputes may arise, would be subject to civil courts; 2) if the disputes contained criminal acts arising from the same agreement, in which could be referred either to an arbitrator to resolve the dispute or criminal courts; 3) Disputes that are signifying issues of oil pollution, in which considered within Paragraph 4, Title IX of the Navigation Law. 4) Disputes that are in relation to customs agencies or dealing with states ports. Moreover, parties will oblige to law and rules of the arbitration procedures that has been set up by the agreement. Failure to do so, the parties would be governed by the arbitration laws in reference to the Tribunal Code and the Civil Procedure Code[409].

Bahrain has introduced a concept of statutory arbitration as considered to be another meaning of compulsory arbitration, by Bahrain Chamber for Dispute Resolution ("BCDR") which was established in 2010. Disputes that occurred and exceed the amount of (USD 1, 300, 000) will be referred to arbitration, subject to the law above, unless parties intend to refer the claim to the Courts of Bahrain and have included this as a condition within their agreement. Additionally, disputes that have the same amount in the context of international commercial transactions or concerns a party who registered by the Central Bank of Bahrain as a licensed party, will be subject to compulsory arbitration by law assuming that met the criteria as set out under s. 1 of the Decree. Disputes that have been covered within the decree are relevant to

[406] The Chilean Commerce Code, art 1203.
[407] See < http://www.internationallawoffice.com/newsletters/detail.aspx?g=73563059-b25d-431b-ae19-2a4ec67bdfd8 > accessed on 3 September 2015.
[408] The Chilean Commerce Code.
[409] Ibid.

commercial sectors such as supply goods and or services, insurance, finance, advices services, investment and construction[410] .

The concept of 'statutory arbitration' in Arabic version of the decree[411] was published as a term of 'judicial dispute resolution'. The reason for this requirement is because it was demanded by the Bahrain Constitutional Court to avoid the agree content between parties to arbitrate within the New York Convention. In the nature of the legal concept or the term that Bahraini Constitutional Court described statutory arbitration or by other means, it can be concluded that the process of settling the disputes above will be subject to compulsory arbitration. Furthermore, the nature of statutory arbitration under S.1 of the BCDR intended to facilitate resolving disputes as an alternative disputes resolution without the involvement of Bahraini courts except when it comes to enforce the arbitral awards.

In addition, compulsory arbitration in Nigeria is presented in the context of foreign investment disputes. The reason is because of the difficulty of the litigation processes in developing countries and moreover, it is more advisable for an international party who is signatory to a contract subject to the jurisdiction of Nigeria to resolve such disputes speedily as prescribed by the statute. Ironically, "mandatory arbitration" as provided for in various Nigerian statutes, are employed as compulsory arbitration which are imposed on the parties to the contract without having a hand in the incorporation of the arbitral clause. Under Section 26(3) of the Nigerian Investment Promotion Commission Act[412], it provides that Parties would be obliged to be referred to the International Centre for Settlement of Investment Disputes, if disputes occurred between the investor and the Federal Government. In addition, Section 11 of the Nigerian Petroleum Act[413] statutorily encourages investors in the Nigerian oil and gas sector to settle their disputes through arbitration.

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[410] See Norton Rose Fulbright, 'Dispute resolution developments in Bahrain: Creation of a New Arbitral Institution and Introduction of a Form of Statutory Arbitration' < http://www.nortonrosefulbright.com/knowledge/publications/30151/dispute-resolution-developments-in-bahrain-creation-of-a-new-arbitral-institution-and-introduction-of-a-form > accessed on 10 August 2015.

[411] Legislative Decree No. (30) for the year 2009 with respect to the Bahrain Chamber for Economic, Financial and Investment
Dispute Resolution.

[412] Cap N117 Laws of the Federation of Nigeria, 2004.

[413] Cap P10 Laws of the Federation of Nigeria, 2004.

Section 11(1) provides that "where by any provision of the Petroleum Act or any regulations made under the Petroleum Act a question or dispute is to be settled by arbitration, the question or dispute shall be settled in accordance with the law relating to arbitration in the appropriate State and the provision shall be treated as a submission to arbitration for the purposes of that law"[414].

Professor M Sornarajah stated that such compulsory arbitration provisions in statutes provide assurance for foreign investors to settle their disputes by the mechanism of arbitration[415] and described it as "*are mere devices to attract investment*"[416]. In the case of **SPP v Egypt**[417] (it should be highlighted that the case involved compulsory arbitration under the Egyptian Investment Law of 1988 which provides that " *Investment disputes in respect of the implementation of the provisions of this law shall be settled within the framework of International Centre for the Settlement of Investment Disputes ("ICSID") between the State and the National of other countries to which Egypt has adhered by virtue of law No. 90 of 1971, where it applies*"), reference was made to the above provision by the foreign investor who referred the dispute to the ICSID International Arbitration Tribunal in Washington. However, the Egyptian government argued that the requirement of parties' consent to arbitrate must be satisfied in addition to the compulsory arbitration provision that is provided in the Egyptian Investment Law of 1988. The ICSID panel has objected to the argument proffered by the Egyptian government as unattractive and stated that the provision of compulsory arbitration was considered to be an offer from the Egyptian government, which the foreign investor had accepted. Therefore, the parties' consensual principle was assumed by the provision of compulsory arbitration law. This means that element of consent for parties to agree to arbitration for settling their disputes, could be tackled by imposing the compulsory arbitration, with the argument that it is an offer for parties, and once the parties utilise arbitration as compulsory by law, the principle of consent will be reached.

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[414] Ibid.
[415]See Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 1994) 9.
[416] ibid.
[417] (1983) 22 ILM 752.

In Portugal, The Law No. 62 (2011) has provided compulsory arbitration in a sense that is now described to be compulsory upon the parties to resolve their disputes in respect to industrial property rights which mostly involve medicines and other generic medicines. Under Article 2 of the Law No. 62 (2011) it is stated that mandatory arbitration are imposed on disputes that are subject to industrial property rights which considers injunctions. In a Constitutional Court's Decision No. 123/2015, the case involved a party seeking a preliminary injunction against another party at the Intellectual Property Court, to have a decision entered in their favour on the basis of patent rights. The court had rejected the claim even though it considered the injunction, due to the provision of mandatory arbitration under Article 2 of the Law No. 62.[418]

4.4 CONCLUSION

The effects and benefits of compulsory arbitration has been evaluated within this chapter, and it is argued by the writer that the ideology behind the practice of compulsory arbitration within a particular economy will be geared towards the development of such an economy. In the subsequent chapters, recourse will be made to the arbitration system in Saudi Arabia, in contradistinction with the legal/*Sharia* processes. The duality of the Saudi legal system and the tension between *Sharia* courts and the committees, resulting in absence of a streamlined procedure for resolving disputed marine insurance claims, has rendered it absolutely necessary, in the writer's opinion, that compulsory arbitration should be introduced as a tool for settling such disputed claims. The present legal regime is cumbersome, time-wasting, inefficient and characterised by ambiguity in procedure. This has had a negative impact on the development of Saudi's marine insurance industry in particular, and the shipping sector in general, because settlement are inevitably delayed by the lack of clarity inherent in the present legal regime, which in turn discourages investors from investing in the shipping sector. Further, it is generally agreed that arbitration is preferred in transactions having an international outlook. This has driven some States (including Saudi Arabia) to introduce

[418] See Baptista, Monteverde & Associados, 'Portugal – Patent Enforcement' < http://www.bma.com.pt/news/bmaNewsMar2015.pdf > accessed on 25 August 2015.

compulsory arbitration as a means of resolving investment disputes[419]. The shipping sector undoubtedly involves international parties who are naturally sceptical to submit their disputes to domestic courts. An efficient claims-settlement system is therefore, paramount to the growth of the shipping sector in the quest towards economic diversification. The introduction of compulsory arbitration will thus go a long way in improving marine insurance claims-settlement by providing impartial, speedy, predictable and transparent dispute resolution mechanism with proper participation by the disputing parties.

In addition, compulsory arbitration will eliminate the feared biases non-Muslims have towards the present system which is largely *Sharia* driven. Compulsory arbitration will also aid the enforcement of claims in other countries. This is a better alternative than enforcing a judgment of the Saudi Arabian courts or committees in another country. This will no doubt build confidence in the investing community and help in the overall improvement of the shipping sector towards the drive for economic diversification.

Lastly, as noted, investors generally drift to emerging economies with an effective legal framework. With the need to diversify Saudi Arabia's economy by developing other sectors (especially the shipping sector) outside the oil industry, the recent reforms introduced in the Saudi Arabia legal system will go a long way in building investor's confidence. The author, however, argues that a further step be taken by stipulating compulsory arbitration as the preferred means for settling disputed marine insurance claims.

[419] Article 26 of the Implementing Regulations for Foreign Investment Law (issued by Royal Decree No. M/1 5 *Muharram* 1421 – 10 April 2000) which provides that if any disputes arises between a foreign investor party and a partnership Saudi party, it would be resolved through amicable settlement by the Committee for investment disputes settlement. In the case of the disputes will not be resolved by amicable settlement, the dispute shall be subject to arbitration in accordance with the Saudi arbitration law 2012- Royal Decree No. M/34 Dated 24/5/1433H -16/4/2012. See < https://www.moi.gov.sa/wps/wcm/connect/8c126680412b47e3a76dff7cbefa8a99/SAFIU_Money+Laundering_6.pdf?MOD=AJPERES > (Arabic Version) accessed on 27 November 2017.

CHAPTER FIVE

CASE STUDY: THE IMPROVEMENT OF DISPUTE RESOLUTION IN SAUDI ARABIA AND ITS LEGAL REGIME

5.0 INTRODUCTION

Saudi Arabia being an Islamic monarchy is generally governed by the doctrines of the Sharia law. Sharia constitutes the primary source of legislation in Saudi Arabia. Article 7 of the Basic law states that the 'government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the Sunna of the Prophet (PBUH), which are the ultimate sources of reference for this Law and the other laws of the State.' [420] Consequently, the legal system is geared at ensuring the conformity to, and compliance with, the tenets of Sharia law and the teachings of Prophet Mohammed (Sunna).

Saudi Arabia during the pre-modern era, was characteristically, a conservative state which sought to involve only in those practices which were expressly subscribed to by the Prophet, Muhammad, and stated within the Qur'an. Foreign laws and practices were outrightly unrecognised and unenforced, except if they fell within the purview of Islamic law. In 2005 however, the Kingdom of Saudi Arabia formally gained accession into the World Trade Organization. This strategic decision was geared towards acquiring more benefits from perceived globalisation and trade opportunities. The beneficial impacts of a global liaison have been conceived to be far reaching and proceed beyond mere market openness and other measures of international competition. Therefore, the motivating factor that influences Saudi to accede to the WTO agreement is in order to fundamentally alter existing domestic Market systems into material market systems and affect a global trade and production system in Saudi Arabia that can meet international best practices. The affluence of the petroleum-based economy of Saudi Arabia is perpetually attracting international commercial relations.

[420] Basic Law of Governance (Royal Order No. (A/91) 27 Sha'ban 1412H – 1 March 1992) ch 1.

It is trite for such relations to result in disputes. It is important to point out that one of the many benefits of the accession to WTO agreement is the protection of the Kingdom of Saudi from discriminatory policies of other countries, securing the independence of the Kingdom, and proffering the use of settlement procedures to resolve trade disputes with other nations.

Most of Saudi Arabia's domestic legislations, as well as other international conventions the Kingdom is signatory to, are embracive to the concept of alternative dispute resolution mechanism, particularly arbitration, as a valid means of dispute resolution. The shift to Arbitration as the dispute resolution mechanism has without a doubt, undergone a series of restraints on grounds of incompatibility with *Sharia* law. Yet, there is evidence of validation of arbitral intervention in *Sharia* law. Prior to the enactment of the Arbitration Act of 1983, arbitration was reliant on the stipulations in the Code of Commercial Court, which dates back to 1931. These remained without any forms of development, until the emergence of Saudi Arabia's transformation into one of the largest exporters of oil, 'a preferred destination for international contractors and the largest economy in the region.'[421] Subsequently in 2012, Saudi Arabia marked another significant legislation: The Arbitration Law of 2012, which modifies certain major aspects of the preceding Law, and constitutes the existing Law in Saudi Arabia till this day.

Although the system of arbitration within the Kingdom of Saudi Arabia has been prevalent since time immemorial (as will be subsequently illustrated within the chapter), compulsory arbitration is not a system that is very prevalent. It follows thus, that certain sectors, for example, the marine insurance sector, require the compulsoriness of arbitration as a dispute resolution mechanism, in order for such sector to operate effectively and functionally. The system prevalent in Saudi Arabia in this day, relies more on litigation, i.e., an unusual dependence on the Sharia Courts in circumstances where such issues will be more effectively resolved using arbitration. This has consequently, inspired the writer's need to advocate for compulsory arbitration to not only be substantially recognised within Saudi Arabia, but

[421] Abdulrahman Y. Baamir, 'The New Saudi Act: Evaluation of the Theory and Practice' [2012] Int'l ALR 4.

also, to be incorporated within the appropriate sectors in order promote predictability and certainty within those sectors. Further, such statutes stipulating the compulsoriness of arbitration will be applied in line with the UNCITRAL rules, so that these new enactments conform to international trends.

This chapter evaluates the impact of *Sharia* law on the Saudi Arabian legal system and economy, the development of arbitration and the evolutionary stages Arbitration laws have undergone, and the enforcement of arbitral awards.

5.1 SHARIA LAW IN SAUDI ARABIA

Article 1 of the Basic Law states: "The Kingdom of Saudi Arabia is a sovereign Arab Islamic state. Its religion is Islam. Its constitution is Almighty God's Book, the Holy Qur'an, and the Sunna (traditions) of the prophet (PBUH)…" *Sharia* is deep-rooted in Islam, that any attempts at distinguishing may render such distinction an anomaly. Islam is a 'complete way of life: a religion, an ethic, and a legal system all in one."[422] The essence of *Sharia* becomes a thrust at the universality of the Islamic doctrine, however, a plethora of Muslims worldwide, do not act or practice their faith in accordance with *Sharia*. 'Those who practice Shariah have grounds for arguing that their version of Islam is the authoritative one. And those who claim that there is no single *Sharia* – a narrative that has recently emerged from representatives of Muslim and Arab-American groups and their non-Muslim apologists – are either ignorant of the facts about *Sharia*, or are deliberately dissembling…'[423] Nonetheless, the rationale of *Sharia* principally, is to be regarded as the perfect expression of divine will and justice therefore, "constituting the supreme law that must comprehensively,

[422] All'amah Sayyid M.H. Tabataba'i, *The Qur'an In Islam: Its Impact and Influence On The Life Of Muslims* (Zahra Publications 1987) 86 and Amir Khoury, 'Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks' (2003) 43 IDEA: The Journal of Law and Technology 151, 199.

[423] Center for Security Policy, *Shari'ah: The Threat to America Report*: *An exercise in competitive analysis – Report of Team B II* (Center for Security Policy Press 2010).

govern all aspects of Muslims' lives irrespective of when or where they live".[424]

As alluded to earlier, *Sharia* law has certain principal sources, with its primary source being the Qur'an.[425] The Qur'an becomes the constitution of such state specifying the moral, philosophical, political, social and economic basis upon which a country should be constructed. The Qur'an is infallible, thus, acts should either directly or by implication, be in line with the stipulations of the Qur'an. Sunna constitutes another core source of *Sharia*. It represents the key to understanding the Qur'an. Sunna comprises of the practices and decisions from the narratives of "*hadith*", which are statements, actions, and tacit approvals of the messenger, Prophet Mohammad, Peace Be Upon Him (PBUH).[426] The fundamental purpose of Sunna as a source of law, is to 'clarify what the Qur'an leaves ambiguous or difficult to understand, qualify what the Qur'an leaves unqualified and bring up issues that the Qur'an does not mention'.[427] For example, the Qur'an does not provide for what a grandmother is entitled to as a share of inheritance. Prophet Mohammad, however, ruled that the grandmother receives one-sixth of the estate. Islamic Law is also characterised by different schools of thoughts including, the *Hanafi* School, the *Maliki* School, the *Shafi* School, and the *Hanabali* School, just to mention a few. These Schools are critical to legislation processes in the Islamic Middle East, as a competent court is permitted to rely on any of these schools of thoughts during determination of cases. The basic principle of the Islamic judiciary allows a judge to directly resort to any school of Islamic jurisprudence to find the applicable principles on the subject matter of the given dispute.[428]

Although, the concept of law of Saudi Arabia is synonymous with Sharia law, it is not Sharia law. It has been submitted by a learned writer[429] that whereas, Sharia on the one hand, refers to the holy sources of Islam, which include the

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[424] Ibid.
[425] Albert Hourani, *A History of the Arab People* (Vol. 1, The Belknap Press of Harvard University Press 1992).
[426] Ibrahim Warde, *Islamic Finance in the Global Economy* (Edinburgh University Press 2000) 32.
[427] 'I Found Islam, Now What?' < www.ifoundislam.net/revert-supports/articles-by-subject/145-Shari'a-islamic-law/289-islamic-Shari'a-law-.html?start=5 > accessed 20 October 2015
[428] Yahya Al-Samaan, 'Dispute Resolution in Saudi Arabia' (2002) 7 Yearbook of Islamic and Middle Eastern Law 79.
[429] Abdulrahman (n 421).

Quran (the holy book of Islam) and the Sunna (collection of prophet Muhammad's saying, judgments, teachings and practices), Saudi law on the other hand, constitutes a varied and more flexible version of the Sharia law. 'It consists of two different legal systems at once. The first governs the whole political, social and legal order which is the application of Sharia under the Hanabali School of jurisprudence. The second body of laws is a set of codes and acts copied mostly from the Egyptian law; the Egyptians themselves, copied it from the French or from American financial regulations.'[430] Ultimately, two likelihoods can be deduced. One, either patterns of behaviour are modified to conform on some international level, with the religious texts or, two, the comprehension of the provisions of such religious texts are interpreted liberally to suit societal trends. This, however, does not translate to mean the validation of any practice which either directly or indirectly, contravenes with the provisions of Sharia law. 'This set of codes and acts, if it does not violate Sharia, can be considered a sort of restricted or selective codification of Sharia.'[431] Richard Clark[432] posits that "unlike Sharia which is founded in Islam itself, Saudi Regulations are usually enacted or promulgated as Royal Decrees or Ministerial Resolutions which consist of specific rules promulgated by the government authorities to supplement and elaborate on the Sharia in respect of the conduct of day-to-day activities in Saudi Arabia…No regulation is deemed lawful if it violates a tenet of the Sharia."

5.2 THE SAUDI ARABIAN LEGAL SYSTEM

The evolution of the legal system in Saudi Arabia has its outgrowth from the influences of the different approaches of the traditionalist and the modernist movements. 'The opposition of these two movements has strongly affected the development of the existing laws, inconsistency of people's attitudes toward Sharia and enacted laws, diversity within the system of legal education, and confusion in the judicial system.'[433]

[430] Ibid.
[431] Ibid.
[432] Richard Clarke, *The Dispute Resolution Review* (4th edn, Law Business Research Ltd. 2012).
[433] Ayoub M. Al-Jarbou, 'The Role of Traditionalists and Modernists on the Development of the Saudi Legal System' (2007) 21 Arab Law Quarterly 192.

5.2.1 The Traditional Movement:

According to Ayoub Al-Jarbou, the traditional movement is well established from the history of Saudi Arabia. It originates from the *Wahhabi movement*, founded by Muhammad Ibn Abd al-Wahhab in 1971, primarily espoused for the purification of worship from all sorts of paganism. The Wahhabi movement arose in the heart of Saudi Arabia, and was subsequently diffused into other Islamic states worldwide. Notably, the Wahhabi movement did not have any influences on the *Mu'amalat* field, which constituted social affairs involving transactions among people. Consequently, the *Mu'amalat* field was ignored, so to speak, and left isolated until the discovery of oil in Saudi Arabia after the World War II. This spurred the development of the kingdom and the abrupt declination of the Wahhabi movement. The opposite direction influences of both the Wahhabi movement and the modernization of Saudi Arabia, creates a deep sense of enquiry as to the resultant effects if the influences had occurred congruently.

The traditional movement is still in effect in contemporary times, and is regarded very highly since it anchors Islamic tenets. it is principally represented by the "*ulama*"[434] at Sharia universities; Sharia Court Judges; the Board of the Senior "*ulama*" charged with the dispensation of fatwas in all ramifications of life affairs including worship and legal transactions; the Higher council of Justice occupying the summit of the Sharia judicial structure; and finally, by independent "*ulama*", who are generally, not within the structure of the government.[435]

The major ideologies of the traditional movement include:

1. The general application of Sharia, i.e., the applicability of the Holy Qur'an and the Sunnah, through explanations in medieval jurisprudence books.
2. A firm resistance to the codification of the rules of Sharia. The movement posits that an attempt at codifying the principles of Sharia will constitute an abuse of the opinion of the State, evident from the initial attempts at codifying Sharia which were either blatantly ignored by individuals or voluntarily carried out. Furthermore, they

[434] A learned man of religion or a jurist.
[435] Ayoub (n 433) 193.

contend the movement opposes that the process of repealing codified rules is characteristically difficult and not guaranteed as a result of the time-consuming legislative protocols and procedures to be followed, before such rules can be amended. It is however, arguable to the writer, if the traditional movement would have opposed to the codification of the Sharia if it had been practiced in the early era of Islam, rather than being a relatively new concept.

3. The traditional movement regards the teaching and studying of man-made laws as allowable if, and only if, it is targeted at either making a comparison between the laws and the Sharia or, for the purpose of exemplifying the value and advantages of Sharia.[436] "…And if any fail to judge by what Allah hath revealed, they are unbelievers."[437]

Lastly, up to this day, traditionalists are still unwilling to acknowledge the necessity of the codification of the rules of Sharia. The peculiar simplicity of life then, is incomparable with the complexities characterised by life now. For example, contractual transactions of the past which could easily be effected by a shake of the hands, are now affected by several extremal factors including regularity of market, market value and money rates, which continually vary with applicable market trends and international financial system. Criminal behaviour has also become a constant in today's contractual world, which never existed in the early periods of Islam.[438]

5.2.2 The Modernization Movement:

This movement is furthered by erudite scholars, technocrats and legal professionals. Most of the members of the skilled elite groups derive their knowledge, skills and expertise from studying in Western countries, which is subsequently, directed towards the development of the country, especially its legal system. The council of Ministers and the Consultative Council *(Shura Council)* are the main governmental institutions that are making the effort to modernise. The *Shura Council* plays a primary role in the modernisation

[436] Ahmad Aldiweesh, *Fatawa Alagnah Aldaimah Lilbohooth Alehmih Wa-alifa* (1st edn, Riyadh, AH 1412) 548.
[437] The Qur'an 10, 5:44.
[438] Ayoub (n 433) 196.

plans. Article V of the Shura Council's law vests the Council with rights to discuss and give opinions regarding the general plans for social and economic development, and also, present suggestions regarding laws and international treaties. The intellectuals were charged with the responsibility of bringing to light, what they considered the 'grey areas' in the country. For example, they called upon the government of Saudi Arabia to 'pay more attention to the practical demands for growth and survival in a complex commercial world. They argue that the impact of globalisation and international trade and relations will not allow Saudi Arabia to remain isolated from the rest of the world by relying only on traditional ideas; therefore, it is necessary to issue laws dealing with such critical issues.' [439]

A notable ideology of this movement is the necessity of taking into consideration, the standpoints of other legal system especially when dealing with relatively contemporary matters that either, were not in existence during the early years of Islam, or were in fact in existence, but in other forms, and consequently, not appropriately dealt with. Another notable ideology of the Modernization movement is the adoption of the vitalness of the codification of Sharia. Today, in every Islamic nation, there exist codifications in varying aspects, including, civil, commercial, criminal and administrative fields. According to the movement, the rationale behind the codification of legal rules governing individuals in all aspects of life include:

1. Definition of law: - where the law is definitive, it ensures and encourages compliance. They disapproved the applicability of Islamic jurisprudence by Judges on grounds of disparity, based on the existence of different schools of thoughts. Each school of thought had varying valid legal opinions on a single legal issue. This accords individuals opportunities to elect a law from the plethora of available options, to be applicable to him, and such cannot be invalidated for another valid law. This worked a hardship on the courts resulting in difficulties, and the consequent resolution by the movement to reject the codification of Islamic jurisprudence.

[439] Ibid 197.

2. Complexities of life: - The modern day is characterised by complexities, ranging from multilateral commercial contracts, to trans-boundary disputes. Judges, during the early Islam era, were faced with a handful of simple cases and so, could adjudicate based on known facts. The necessity for the codification of rules cannot be overemphasised in this modern era, especially where the areas of transfer of technology or international commercial transactions is the order of the day.

3. Uniformity of Legal system: - Inconsistencies of laws will be avoided since there will be a uniform body of enacted rules binding on all, and from which the judiciary will decide cases brought before them. Therefore, similar fact cases will be treated similarly, and there can be a high level of certainty that courts' decisions will be the same or at least, not fundamentally altered. The variations of Sharia court decisions as regards *Ta'zir* crimes have spurred a feeling of bafflement on the modernists. Generally, crimes under the Sharia are divided into three, namely: *Hudud* offences, *quisas* offences, and *Ta'zir* offences. The Sharia provides for the sanctions of the first two, but not the third. This leaves specifications of sanctions of *Ta'zir* crimes to the discretion of the judges, but not *Hudud* and *Quisas* crimes. The sanctions may include the payment of fines, imprisonment, flogging or even death, while the discretionary powers of the judges are exercised on the basis of the severity of the offences and the public interest of Saudi Arabia.[440]

In conclusion, it is not only essential, but necessary, for Saudi Arabia to strike a form of balance between the dire need for traditional adherence to religious tenets, and the pragmatic need for societal development to conform to contemporary trends. In order to do this, jurisprudential works and other heritable resources from the ancient past, should act as the foundation, which will be fortified by other considerations including inspirations from other

[440] Ayoub (n 433) 199.

legal systems, and also, modern-day improvements. The codification of these reformed laws, will, in the writer's opinion, do more good than harm.

5.2.3 The Judicial and Court System:

In Saudi Arabia, disputes are resolved through outlined judicial systems just like most civil and common law jurisdictions. The courts, usually referred to as Sharia Courts, are courts of general jurisdiction over all judicial matters such as civil, criminal, property, successive and matrimonial claims. Therefore, it is uncommon for Sharia Courts to decline to adjudicate on judicial matters on basis of jurisdiction, except when those matters are exempted by special codes. There are several disputes that are precluded from the Sharia courts' jurisdiction. They include: labour, commercial and administrative disputes. These disputes are handled either by the Board of Grievances or by special committees, for example, the Customs Committee, the Committee for the Implementation of the Sea Port Code, the committee for implementing the Copyright and Trading Code, or the Committee for Claims Related to Commercial Deception. Within this system, there is the existence of quasi-judicial committees. They include: Commercial Papers Committees, the Committee for the Settlement of Insurance Disputes, the Committee for the Settlement of Banking Disputes, and the Committee for the Settlement of Labour Disputes.[441]

It should be noted that the doctrine of *stare decisis* common in both civil and common law jurisdictions, is not recognised in Saudi Arabia. '…Saudi Arabian legislation such as Royal decrees, Royal Orders, Ministerial Resolutions and other legal pronouncements having the force of law – for example, the decisions of the various Saudi Arabian courts – are not generally or consistently indexed and collected in a central place or made publicly available at present (although there have been recent reforms regarding such collection and on the publication of decisions of certain administrative or judicial bodies).'[442]

[441] Yahya (n 428).
[442] Richard (n 432) 662.

From the foregoing, it becomes pertinent to discuss about the Sharia Courts, as well as the Board of Grievances. This will be explained below.

5.2.3.1 *The Sharia Courts*

> *"The [c]ourts shall apply the provisions of Islamic Sharia to cases brought before them, according to the teachings of the Holy Koran and the Prophet's Sunnah as well as other regulations issued by the head of state in strict conformity with the Holy Koran and the Prophet's Sunnah".*[443]

Therefore, no court will either adjudge or validate any act that either directly or by implication, violates any principles contained in the Sharia. These judges connote representatives, charged with the enforcement of the divine will of God.

By virtue of the Law of the Judiciary[444], the Ministry of Justice administers the Sharia Courts. 'The supervisory powers of the Ministry of Justice are limited to administrative and financial affairs.'[445] Also, Article I of the judicial code states that: "Judges are independent and not subject to any authority in rendering judgment, except as provided in the Sharia and applicable regulation. No person shall have the right to interfere in the judicial process." A Sharia court judge is required to be a Saudi national, of good character and must have attained a degree in Islamic Sharia. Also, judges are expected to carry on their judicial duties independently and free of all forms of impartiality. Judges are therefore, required to apply the Sharia in accordance with the *Hanbali School of jurisprudence.* However, in a situation where the judge is unable to find a rule applicable to the case with which he is dealing, or where the application of a certain rule of the *Hanbali school* would result in a contravention of the public interest, he is authorised and permitted to resort to the doctrinal writings of the other three schools of Islamic jurisprudence, which are, *Hanafi, Shafi'i* and *Maliki*, to find the applicable rule. [446]

[443] Basic Law of Governance (Royal Order No. (A/91) 27 Sha'ban 1412H – 1 March 1992), art 48.
[444] The Law of the Judiciary (issued by Royal Decree No. (M/64) of 14 Rajab 1395 – 23 July 1975).
[445] Yahya (n 428).
[446] Ibid.

Finally, proceedings are always in Arabic, and all documents tendered must be in Arabic, or duly translated in Arabic.

The Sharia courts consists of general courts, summary courts, courts of cassation and the Supreme Judicial Council.

1) General and Summary courts (First instance courts)

The mechanism of the General courts and the Summary courts has been identified under Article 22-35 of the Law of the Judiciary, as it could only have one judge or more if the facts of the case are needed. General courts covers civil cases and criminal cases such as the death penalty. On the other hand, Summary courts permitted to hear cases such as *Had* crimes (fixed punishments set down in the Koran), *Tazir* crimes (those established by statute – usually minor offences), cases for monetary damages and compensation for crimes, and civil cases involving smaller sums of money."[447]

2) Courts of Cassation (Courts of Appeal)

Article 12 of the Law of the Judiciary provides for two courts of appeal in Saudi Arabia, strategically located regionally. The *Makkah* Court of Appeal adjudicates on appellate cases from lower courts located in the Western province, while the *Riyadh* Court of Appeal adjudicates on appellate cases from lower courts located in the Central and Eastern provinces. 'These courts do not reverse lower court decisions. Rather, in the first instance, they either affirm the lower court's decision or send it back to the trial court for modification or reconsideration. If the lower court's decision is maintained by the judge, the Court of Appeal has the power to overrule this decision and appoint another judge or panel to review the case.'[448]

3) Supreme Judicial Council

The status of this Council considered to be the highest judicial authority within Saudi Arabia. The Supreme Council executes administrative, consultative, legislative and judicial roles. As regards

[447] Richard (n 432) 663.
[448] Ibid.

its judicial functions, The Supreme Council reviews all courts judgments involving severe sanctions especially death sentences. The council is constituted of 11 members.

5.2.3.2 *The Board of Grievances*

'The pyramid structure of the current Saudi Board of Grievances as an administrative court parallels that of the Sharia courts.'[449] In order to satisfy the growing needs of the government and its administration, the government of Saudi Arabia has espoused the concept of grievances *(mazalim)* for the sole purpose of dispute resolution to which the government or any of its agencies is a party. Before the acquisition of the status of today, the Board of Grievances had undergone a series of development. Prior to the institution of the Board, the King attempted applying grievances personally, whether or not they were involved governmental officials. This was inspired following the custom of classical Islamic rulers. This custom is manifested in the varying speeches and declarations, said and written by the King, Abdulaziz. A clear example to this effect would include a declaration published in 1926 in the *Umm al-Qurra* newspaper. In that declaration, the King urged anyone bearing a grievance or complaint, be it against an individual or government official, to come forward with such complaint in writing, and thereafter, place it in a complaint box Which was to be strategically located in a specified government building, the keys of which were to be solely possessed by the King.[450]

Usually, the King would reassure the complainants of their security, and their protection from any harm by reason of their complaint. The complaint was required to take the form of writing and duly signed by the complainants. The king, in his infinite wisdom, tried and punished the offenders when it was deemed necessary. It is noteworthy that a primary characteristic of this era was the nonexistence of judicial remedies for governmental and administrative actions. Although, court systems were present, they were not authorized to adjudicate upon governmental related disputes. This vested the

[449] Ayoub M. Al-Jarbou. 'The Saudi Board of Grievances: Development and New Reforms' (2011) 25 Arab Law Quarterly 177.
[450] Ibid 198.

original jurisdiction of all grievances against the government and its officials, on the King. "…it can be said that the administration was its own judge."[451]

In 1954, the Board of Grievances was in existence, however, it was not recognised as an independent Administrative Court. The complexities of the state developed both domestically and internationally due to the increase of the size of the state. Gradually, the King became indisposed to the accumulating judicial governmental matters, and so, the Board of Grievances was formally established as a department within the structure of the Council of Ministers pursuant to Article 17-24 of the Council of Ministers Statute.[452] A year later, another Royal Decree was enacted. This was to the effect of introducing new changes to the status of the Board of Grievance. The implication of which granted the Board its independence. Article 8(g) of the 1955 Royal Decree[453] provided that the proceedings before the Board under this decree were guided by the rules of Pleadings and Procedure. Furthermore, the Board also has the authority to seat before all matters referred to it by the Council of Ministers. With respect to proceedings before the Board, a claimant may be required to file its claim with the Board directly. This is achieved by submitting a bill of complaint containing the names of the litigants and subject matter of the claim. Where a claimant chooses to be represented by someone, say, an attorney, the bill of complaint "must" be accompanied by a power of attorney. In situations where the power of attorney is issued 'outside Saudi Arabia', it must consequently, be notarised and certified by the Saudi consulate in the country of issue.[454]

For matters pertaining to commercial disputes, such complaints should be filed with the Board's office in whose jurisdiction, the head office or branch office of the defendant is located. Where one of the parties to the suit is a corporate entity, it is sufficient if the notice of intended suit is delivered to one of the partners, the chairman of the board of directors, the managing director or his deputy. The language of all proceedings, like the Sharia Court,

[451] Ibid.
[452] Royal Decree of 12/7/1373 AH (1954) (Establishing the Board of Grievances as a Department in the Council of Ministers).
[453] Royal Decree No. 2/13/8759 dated 17/9/1379 (1955) (Separating the Board of Grievances from the Council of Ministers).
[454] Yahya (n 428).

is in Arabic. Therefore, all documents and testimonies of witnesses must be in Arabic, or be translated thereto.

Article 2 of the 1955 Royal Decree[455], provided that the Board of Grievances was vested with the authority to investigate every complaint brought against ministers, heads of departments and Sharia Court judges. However, if the complaints were against ministers or heads of departments, they had to be reported to the King make further orders, before any investigatory steps by the board may proceed or continue. It can therefore be deduced that, the independence granted upon the Board was not absolute. They were not independent from the King.

In 1982, a novel statute, Board of Grievances Statute, successfully issued by Royal Decree No. M/51, 17/7/1402 AH, on the 11th of May, 1982, brought enormous changes to the status of the Board of Grievances. Article I of this statute, made the Board of Grievances an independent administrative judiciary which was to be directly affiliated with the King. Article II of the new statute, entitled the Board to rights of adjudication on the following administrative disputes:

i. Annulment of administrative decisions, on the grounds of lack of jurisdiction, procedural defect, violation of applicable laws and byelaws, misapplication or interpretation thereof, and misuse of power including failure to act where required to do so by law;
ii. Claims by government employees under the civil service laws, and retirement and pension laws;
iii. Claims for compensation against the Government or a public agency arising out of acts or omissions by officials in executing their duties;
iv. "Disputes of a contractual nature in which the government or a public agency is a party".[456]

[455] Royal Decree No. 2/13/8759 dated 17/9/1379 (1955) (Separating the Board of Grievances from the Council of Ministers).
[456] Ayoub (n 449) 185.

In 2007, a new Board of Grievance Statute was enacted issued by Royal Decree No. M/78, dated 1 October 2007[457]. This Statute contained several essential differences from the preceding Statute. By virtue of Article 9 of the 2007 Statute, the board functions only as an administrative court and has no jurisdiction to adjudicate upon criminal cases and commercial disputes. An exception to this provision however, is where the statute vests adjudicatory powers on the Board regarding "requests for the execution of foreign judgments and arbitral awards", notwithstanding their nature.

Finally, the Board's judges usually, apply the Sharia as well as the relevant codes and terms of contracts to which the litigants are parties. It is worthy of note that the rules of conflict of laws are not applied under Saudi Law. Consequently, the Board applies Sharia rules and relevant statutes notwithstanding that the subject matter of the dispute within the contract provides for foreign law as the applicable law. Proceedings before the Board take approximately between one and two years, and sometimes more.[458]

5.2.4 Court Procedure:

Sharia Court procedures are highlighted in the Law of Procedure before the Sharia Courts.[459] The former lays down guides regulating the process in Saudi Arabian courts, while the latter, contains guides on certain issues including, jurisdiction, the filing of cases, hearing of cases and passing of judgments, and other matters of a general nature.

As for the question of time frames of court procedures, litigation in Saudi Arabia is characteristically tardy. Usually, the procedure officially begins when the plaintiff files a statement of claim, and duly serves it on the defendant, together with the notice of the first hearing date. Usually, a default judgment is normally rendered in favour of the defendant.[460] Default judgments have been embraced by Saudi Courts as a way of curbing delay

[457] Law of Judiciary (issued by Royal Decree No. (M/78) on 19 Ramadan 1428H – 1 October 2007).
[458] Yahya (n 428) 75.
[459] Law of Judiciary (issued by Royal Decree No. (M/78) on 19 Ramadan 1428H – 1 October 2007).
[460] Ibid art 53.

tactics litigants employ as a means of stalling legal proceedings against them. This usually occurs when litigation is subjected to a series of hearings –where pleadings of parties are submitted and responded ceaselessly – until the both responses of the pleadings are satisfactory to both the parties and the court. When this occurs, the court closes the case for judgment. Article 178 of the Law of Procedure before the Sharia Courts, provides that the parties have within 30 days from the issuance day of the judgment in order to file an appeal. "Interim relief in Saudi Arabia is available only in extremely limited circumstances. Parties may request interim relief if the matter is urgent and there is a risk that a delay in receiving relied will be damaging. For example, a creditor may obtain a protective attachment of a debtor's assets where there is a risk that the assets may be hidden or smuggled out of the country".[461] Note, however, that theoretically, while injunctive reliefs are available under law on an interim or permanent basis, it is highly uncommon in Saudi Arabia.[462]

By virtue of Articles 1, 3 and 18 of the Code of Law Practice,[463] a litigant may be represented either by himself, or by a lawyer, who is included in the list of practicing lawyers in Saudi Arabia. While self-representation is provided for in the Code, in practice, it is extremely rare for litigants to represent themselves except for minor criminal proceedings or labour disputes. Also, as stated earlier, all proceedings in Saudi courts are carried on in Arabic as the official language. This therefore, renders foreign parties to always seek representation by Saudi lawyers well versed in the procedure of legal proceedings – the submission of all documentary evidence, as well as oral evidence in Arabic – and also, the permissibility to use a private or court-appointed translator if it is deemed necessary.[464] Article 18 (c) Code of Law Practice, further provides for where a litigant is a legal entity. Such party can be represented either by an in-house counsel or a non-lawyer legal

[461] Richard (n 432) 666.
[462] A combined reading of Law of Procedure before Shari'ah Courts (issued by Royal Decree No. (M/21) 20 Jumada I 1421 – 19 August 2000), arts 233 to 238 as regard injunctions.
[463] Code of Practice (issued by Royal Decree No. (M/38) 28 Rajab 1422 - 15 October 2001).
[464] Richard (n 432) 667.

representative.[465] Whichever the case may be, such representative must be a Saudi national.

For cases heard by Saudi Sharia Courts involving the need for legal processes to be served outside of Saudi Arabia, Article 20 of the Law of Procedure before the Sharia Courts, sets out the procedure. It states:

> *If the place of residence of the person to be served is in a foreign country, a copy of the process shall be sent to the Ministry of Foreign Affairs, for the communication by diplomatic means. A reply stating that copy has reached the person to be served shall be sufficient.*

According to Richard Clarke[466], the concept of privilege in Saudi Arabia, is non-existent. Alternatively, the lawyer is obliged to protect the confidential information afforded by the client. This is on the authority of the Code of Law Practice. Article 23 of the code provides that any confidential information, either communicated to, or acquired by a lawyer in the course of practice, is barred from disclosure, even after the expiration of the power of attorney. Therefore, this obligation subsists even after the contract of employment of the lawyer lapses.

Finally, in Saudi Arabia, litigation proceedings are characteristically document-driven. In effect, arguments and oral testimonies are uncommon, and treated with little probative value. This, however, does not change the fact that a litigant's chances of discovering documents form the opposing party is exceedingly low. As regards discovery of documents, there are no laws in Saudi Arabia governing that. Be that as it may, parties are allowed to submit a request to the court seeking an order of compulsion on the other parties, of the production of particularly identified documents, which can be proved, or have been proven to exist.[467] For instance, a party may pray the

[465] Law of Procedure before Shari'ah Courts (issued by Royal Decree No. (M/21) 20 Jumada I 1421 – 19 August 2000), arts 47 and 48.
[466] Richard (n 432) 672.
[467] Law of Procedure before the Shari'ah Courts (issued by Royal Decree No. (M/21) 20 Jumada I 1421 – 19 August 2000), art 148.

court to compel the other party to produce a document that it either relevant to, or constitutes a part and parcel of the fact in issue. Similarly, the court can compel the production of documents from either parties "in suo motu" (i.e. on its own motion).

5.3 ALTERNATIVE DISPUTES RESOLUTION (ADR) IN SAUDI ARABIA

As alluded to earlier, litigation proceedings in Saudi Arabia, are peculiarly overstretched and tardy because in most situations, it takes a court several years to render a final judgment. The mundane protocols guiding the submission and response to pleadings and other ancillary legal procedures, have rendered court litigation processes tedious, lengthy and unable to proffer urgent solutions to accumulating disputes. Arbitration on the other hand, constitutes an easy method of dispute resolution where the parties consent to the interference of a third party into the matters resulting in the dispute. The vast number of international business transactions that are concluded every minute spawning from globalisation, has resulted in the arousal of even more disputes, ranging from commercial disputes, intellectual property disputes, international boundary disputes, and even to criminal disputes. This has made individuals take matters in their hands, rather than sit back and wait on procedural court summons to fall on their laps. Besides, most foreign businessmen prefer alternatives to litigation because of their unfamiliarity with, and lack of sufficient knowledge of the legal systems in foreign jurisdictions. What is more, the probability of publicity, that oftentimes accompany court hearings and litigation proceedings, repel businessmen from submitting their confidential matters to court litigation, neither does the little faith they have in the impartiality of national courts of foreign jurisdictions help matters. Also, the requirement of the Saudi *Sharia* judge to compulsorily be a Saudi national has been removed. Arbitrators can be of any nationality, so far as they possess the expertise or have the capability of possessing the expertise guiding the dispute in question, they will be regarded as competent. This is contrary to court systems which are usually constituted by persons who are mostly lacking in the technical knowledge of certain classes of disputes. The doctrine of *stare decisis*, unlike the court system, are applicable

in arbitration, especially when there is a similarity with the facts of a dispute within an international jurisdiction with those of the dispute in question.

Further, there is a plethora of conflicting and sometimes divergent factors that exist within the Saudi Legal system. Therefore, reliance cannot be placed on one form of dispute resolution system. Nevertheless, *Sharia*, has constituted an immutable and indivisible component of Saudi legal practice, notwithstanding the changing methods of legal practice.[468] Thus, on one hand, both the *Sharia* courts and traditional *Sharia* academics ("ulama") espouse the strict application of Sharia, especially in relation to insurance transactions, banking, *riba* (taking interest) and *gharar*; and on the other hand, includes the "modernists" duly represented by a great number of erudite academics and businessmen, who, although do not directly confront scriptural *Sharia* tenets, have conversely, favoured divesting the *Sharia* courts of some of their competence especially in commercial matters, consequently, relying majorly on contracts.

Other sensitive commercial issues such as banking, insurance and sales in stock markets are usually adjudicated by ad hoc tribunals, together with other secular legislation which does not affect the heart of the matter, i.e. *Sharia*. Arbitration on the other hand, dispenses with these complications, as there are stipulated international procedural rules governing arbitration proceedings, and what is more, the intricacies of the employment of arbitration and the institution of arbitral proceedings are principally, at the instance of the parties. Thus, the parties are not mandated to submit their matters to any court. In addition, arbitration allows the arbitral tribunal and the parties to consider and rely on decided cases on similar issues in arriving at a decision.

A major criticism against court decisions as a source of law, as submitted by Islamic scholars is that, given the superiority of Sharia, since it is expressly deducible from scriptural sources, i.e. the Qur'an, it would be assumptive to bestow on human-made decisions the rank of legal sources. It is posited that

[468] Initially based on the US contractual techniques, then subsequently, the Egyptian legal thought.

such authorities remain doubtful. The authority of the Board of Grievances to also make decisions, has also met criticisms. It has been submitted by a learned writer, [469] that, despite the 'prestige of its human infrastructure and spectacular jurisdiction' from the early 1980s to 2007 over a relatively broad spectrum of administrative and commercial matters, they still, are not precluded from the outright scepticism of the prophet, found in a well-known *hadith*, as it relates to man-made justice.

The *hadith* of Prophet Mohammad reads as follows:

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

This scepticism typified in the hadith of the Prophet Mohammad, is directed at the concept of human justice, restating that, justice in its purest form can only be apportioned to all by God himself, in his infinite wisdom, and definitely, not in the temporal realm. This scepticism is also the reason why the concept of stare decisis, applicable in the Western jurisdictions, are neither recognised, nor applicable in Saudi Arabia. In essence, a court is not bound by the decision of another, but may however, employ it as a utile guideline. The accumulation of inconsistencies between one judicial decision and another, which are consequences attributable to different factual backgrounds of Sharia judges, as well as, 'a human infrastructure prone to errors',[470] constitutes a practical basis why individuals, would rather seek alternative dispute resolution mechanisms, other than court litigation, in times of dispute. This necessarily goes to show the true essence of arbitration in every society since even the Prophet Mohammad, relied on this system as a valid mechanism for dispute resolution.

[469] Saleh (n 30) 351.
[470] ibid 358.

In order to comprehend the nature of dispute settlement in Saudi Arabia, one dispute settlement mechanism, arbitration, will be discussed. Since the latter is more commonly practiced in Saudi Arabia, a greater emphasis will be made on the subject.

5.5 ARBITRATION AS AN 'ADR' IN SAUDI ARABIA

Arbitration has been, from time immemorial, the most commonly utilised mechanism for dispute resolution in the Islamic commercial industry. Therefore, since the Saudi Kingdom applies Sharia as a matter of traditional practice, it is of necessity to comprehend the nature and status of Arbitration as it applies under Islamic law. Sharia has remained a principal actor in matters relating to Arbitration in Saudi Arabia, which depends mainly on the extent to which arbitration laws has been developing and on the degree of secularisation of the courts.[471]

For the purpose of this study, a critical analysis of "arbitration" as a dispute mechanism from the past times, to more contemporary times will be deduced. The study will also, evaluate the status of the "arbitrator", his appointment, proceedings, termination, remuneration, and other matters appertaining to the arbitrator.

5.5.1 Arbitration in Primitive Saudi Arabia:

'Arbitration is deeply rooted in Islamic law and in the history of Arabia. Since the pre-Islamic period, arbitration or prolonged wars were the only methods of settling disputes. Arbitration remained a preference in the Arab tradition till now…'[472] Arbitration has been often fondly cited from the Qur'an. Two examples are as follows:

> And if you fear a breach between the two, then appoint a judge from his people and a judge from her people; if they

[471] Saleh (n 30) 4.
[472] Abdulrahman (n 421) 1.

> both desire agreement, Allah will effect harmony between them; surely, Allah is knowing. Aware.[473]
>
> [Y]ou should always refer disputes to God and to His Prophet. And obey Allah and His Messenger; and fall into no disputes, lest you lose heart and your power to depart; and be patient and persevering: for Allah is with those who patiently persevere.[474]

Pre-Islamic communities had a tendency to rely more on self-help as a method of resolving disputes.[475] If the employment of negotiation as a method of resolving disputes relating to property, torts or succession proved futile, the parties would usually appoint an arbitrator to resolve the difference. The arbitrator is usually referred to as *hakam* or *qadi* in some texts, but it has been submitted that a *qadi* is more akin to a public official (judge). It should however, be noted that the *hakam's* decision was final but unenforceable.[476] The major reason why the practice of arbitration was most embracive to Muslims was the primary fact that they had the Prophet's imprimatur.[477]

Further, the period of the early 1950s to 1985, was significantly, characterised by a level of activity in the Chambers of Commerce, in relation to commercial and industrial disputes. Economic considerations, such as, the flow of foreign investments into the commercial and industrial sectors, taking the forms of joint ventures, commercial agencies and sponsorships, and the gradual development of the market economy in the 1970s, which was first, generally unregulated, then subsequently, governed by general statutes regulating insurance companies, banks and the stock market, were amongst the primary causes of the arbitral activities.[478] The statutes governing these disputes were largely reliant on party autonomy. Soon thereafter, ad hoc boards were put in place, to adjudicate upon disputes arising from private contracts. The major

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[473] Qur'anic Verse (4:35). See David Karl, 'Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know' (1992) 25 Geo. Wash. J. Int'l L. & Econ 131 and Sarvenaz Bahar, 'Khomeinism, the Islamic Republic of Iran, and International Law: The Relevance of Islamic Political Ideology' (1992) 33 Harv. Int'l L. J. 145.
[474] Qur'anic Verse (8:46). See Mohammed Abu-Nimer, 'A Framework for Nonviolence and Peace building in Islam' (2000-2001) 15 J. I. & Religion 245.
[475] Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press 1964) 7.
[476] Joseph (n 475).
[477] ibid.
[478] Saleh (n 30) 363.

boards included: the Insurance Disputes Board, the Board for Securities Disputes, the Banking Disputes Board, the Tariff (Customs) Board, the Labour Dispute Settlement Board, the Commercial Paper Board, and the Public Domain Board.[479] Several issues worked a hardship on the Chamber of Commerce in the field of arbitration. Firstly, the avoidance of substantive issues which were made subject to the prescriptions of Sharia, as well as the jurisdiction of the Sharia Courts intensified the activities of the Chamber of Commerce. Secondly, the artificial 'atomisation' of the Saudi judiciary into specialised boards added to this issue. Thirdly, the absence of an adequate piece of legislation on this subject added to the issues of the Chamber of Commerce. [480]

The law governing the development of the Chambers of Commerce at the time, was the Commercial Court Law,[481] which was subsequently, repealed by a decision of the Prime Minister.[482] It is pertinent to note that the perfunctory provisions of the Commercial Court Law which regulated arbitral processes, were silent on matters concerning the validity of arbitration clauses, neither, did they expressly prescribe the Muslim faith among the qualifications required from appointed arbitrators, nor gave any regards to the application of Sharia in general and the strict application of the scriptural sources to testimonial evidence. The absolute neglect to include the Sharia into the system and processes of arbitration, resulted in a considerable number of disputes to be left to the discretion of the parties, which subsequently, led to the outcry of the '*ulama*'.[483] Arbitration was not embraced as a system of dispute resolution by some judicial authorities in Saudi Arabia. Most often than not, it was perceived as a threat, or a principal competitor to the jurisdiction of the Sharia Courts. This became manifested by the hesitance to recognise and enforce arbitral awards both domestically and internationally. [484] This is quite unsolved, since this contention outrightly goes contrary to the fact that arbitration has existed ever since man has existed, and also, it was a

[479] Ayoub (n 449) 223.
[480] Saleh (n 30) 364.
[481] Commercial Court Law (issued by Royal Decree No. 32 of 1351) (1931).
[482] Prime Ministerial decision number No. 142 of 17/10/1374 (1954).
[483] Ayoub (n 449). '*Ulama'* refers to a body of Muslim scholars who are seen as possessing specialist knowledge of Islamic law and principles.
[484] Abdulrahman (n 421) 1.

recognised supplementary dispute resolution mechanism throughout Islamic history and was even provided for in the Qur'an.

Finally, notwithstanding the fact that prior to 1983, Saudi Arabia lacked an all-encompassing legislation governing the various aspects of arbitration conducted within the country, arbitration was still, deemed a valid mechanism for the settlement of certain disputes between private parties. For example, arbitration was expressly provided for in the Commercial Court Code of 1931.[485] It was also provided in the Labour Code of 1969[486] for the resolution of disputes between employers and employees. The article stated that the Committee for the Settlement of Labour Disputes may submit disputes arising between employers and employees to arbitration, instead of settling them.[487] All these, however, did not guarantee the continued success of arbitration in Saudi Arabia.

Regardless of the ingenuity of the promoters of arbitration at this time, and also, having explicated both the scriptural validation of the Qur'an and the practical endorsement by the Prophet, Muhammad, of arbitration as a form of dispute resolution, it would absolutely be expected, that a smooth and orderly passage into the modern day era, would have taken place. Unfortunately, this has not been the case. It is easily traceable to the strong opposition given by the ulama and the Shari'a judges as a consequence of the wilful exclusion of Sharia, and the absence of Scriptural backing, during the promotion and development of commercial arbitration. Yet, a contradistinction lies in the fact that the very essence of arbitration is evident in the Qur'an and from the Prophet's imprimatur. Arbitration lies in the very foundation of Islam, and Islam constitutes a way of life.

5.5.2 The Medjella:[488]

It is most reasonable to discuss about the arbitral historiography before jumping into arbitration in the contemporary era. The *Medjella* period is highly noteworthy because it houses a number of significant events. Firstly,

[485] Commercial Court Law (issued by Royal Decree No. 32 of 1351) (1931), arts 493-497.
[486] ibid art 183.
[487] Yahya (n 428) 80.
[488] Exclusively sourced from El-Ahdab (n 6) 19.

the first classification of Sharia under the Ottoman Empire was the Legal Provisions of the *Medjella*. "A number of Islamic countries relied on the *Medjella* and even after the fall of the Ottoman Empire, until they developed their own civil law."[489] Secondly, the *Medjella* contains an entire section devoted to arbitration; although, arbitration in this period took a semblance with conciliation or compromise. It is a noteworthy to mention that is only a court judgment was final and could give a valid authority to an arbitral award. No person could claim a *res judicata* solely, upon an arbitral award. Notwithstanding, arbitration was still characteristically, contractual in nature. Two parties had to agree to be bound by the decision of a third party, or a group of third parties whenever a dispute arose during the performance of obligations in a contract. The autonomy of the parties extended to the right of dismissal of any arbitrator(s) that was deemed either unnecessary or unwanted. This right was only exercisable before the dispensation of an award by the arbitrator(s). Arbitral awards that were dispensed by Arbitral tribunals were required to be rendered unanimously, and the parties were required to abide by the stipulations of the award, since the entire essence of the agreement to seek arbitration was to be bound by its decision. Also, the scope of an arbitrator or an arbitral tribunal, unlike the court, was strictly, limited to the matters extracted from the dispute before him, and of no other. It is pertinent to note that although, awards could not amount to a *res judicata*, courts never expressly interfered with dispensed awards. However, where those awards are either contrary to stipulated case laws, or directly or indirectly contradict public policy, the courts could render such arbitral awards null and void.

Finally, the *Medjella* was somewhat unpopular, and applied during the pendency of the Ottoman Empire as a legal system, until when it was eventually transformed into civil law. Schacht[490] wrote that the *Medjella* was 'an experiment [that] was undertaken under the influence of European ideas, and it is, strictly speaking, a secular code… not intended for the tribunals of

[489] Arthur J. Gemmell, 'Commercial Arbitration in the Islamic Middle East' (2006) 5 Santa Clara J. Int'l L. 176.
[490] Joseph (n 475) 92 - 93.

the *qadis* and was in fact, not used by them… It contains certain modifications of the strict doctrine of Islamic law.'

This was further stated by El-Ahdab, when he posited that the *Medjella* 'remained in force (subject to subsequent legislation) in the territories and later states which were detached from the Ottoman Empire after 1918, where it was applied as civil law…"[491]

5.5.3 Arbitration in Contemporary Saudi Arabia:

Whilst court litigation is still a more commonly adopted dispute resolution mechanism, the enactment of the 2012 Arbitration law is a manifestation of Saudi's shift to other alternatives as regards dispute resolution. The preceding Arbitration law of 1983 has, in the recent past, undergone severe criticisms 'which has led to both the *Shoura* Council and the Council of Ministers to expedite the process of legal update.'[492]

Although rooted in Sharia, arbitration was not generally welcomed in Saudi Arabia. This has been revealed by a number of high profile cases which had occurred in the recent past. These cases, including, the Abu Dhabi case and the ARAMCO case, just to mention a few, has contributed to the structuring and consequential development of Islamic Commercial Arbitration in Saudi Arabia. Each of these cases will be comparatively analysed since they relate to disputes over oil concessions granted by particular national governments to western oil companies.

The arbitrator in the Abu Dhabi arbitration case[493] has been described by several writers as somewhat overzealous. The dispute in this case is similar in nature to those of the Libyan cases since it involves oil concession contracts as well. In deciding the dispute, Lord Asquith acknowledging that Abu Dhabi law should be the applicable law, stated that:

> [I]f there exists a national law to be applied, it is that of Abu Dhabi. But no such law can reasonably be said to exist. The

[491] El-Ahdab (n 6) 21.
[492] David Holloway, *International Arbitration Law Review* (Sweet & Maxwell 2012) Vol. 5, Issue 4, 132.
[493] Petroleum Dev. (Trucial Coast) Ltd. v Sheik of Abu Dhabi (Award of 28 August 1951), Reprinted in (1952) 1 International and Comparative Law Quarterly 247, [1951] 18 I.L.R. 144.

> Sheik administers a purely discretionary justice with the assistance of the Koran, and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments. [494]

Though, Lord Asquith admitted that "English municipal law [was] applicable as such," he determined that "some of its rules are… so firmly grounded in reason, as to form part of this broad body of jurisprudence…"[495] In essence, the arbitrator contended that the principles of the Sharia could not be interpreted to include concession agreements, rather, he relied on English law as the more reasonably applicable law.

The locus Classics case of **Arabian Am. Oil Co v Saudi Arabia**,[496] popularly known as the ARAMCO case, has contributed to the status of Arbitration today. The arbitrators in this case, lacked the requisite knowledge on Sharia and its fundamental principles, and how it applies to commercial transactions. The arbitral tribunal dispensed an award against the Saudi Government, deciding that ARAMCO's rights would be incapable of being "secured in an unquestionable manner by the law of force in Saudi Arabia… [and that Saudi laws] must be interpreted or supplemented by the general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence."[497] "The initial distrust and scepticism towards arbitrations and consequently, its slow growth in Saudi Arabia may, at least in part, be attributed to this decision."[498]

A comparative study of the outlined cases reveals that the arbitrators, who were potentially non-Arab nationals, in making their awards, did not consider Sharia as comprehensive enough to be the governing law in these disputes, as it was conceived that Sharia provisions were not materially detailed to adequately cover energy disputes and petroleum concessions. Therefore, the common principles and practice in the oil and gas sector were employed, and

[494] Ibid.
[495] Charles Brower & Jeremy Sharpe, 'International Arbitration and the Islamic World: The Third Phase' (2003) 97 AMJIL 643, 644.
[496] (1963) 27 ILR 117.
[497] Charles and Jeremy (n 495).
[498] David (n 492) 134 - 135.

consequently, they ruled against the government of Saudi Arabia. 'The profound and lasting impact if these arbitrations on the region's arbitral psyche should not be underestimated. It is no wonder that "Western" forms of commercial arbitration have, to this day, not been integral to the Islamic legal system.'[499]

Notwithstanding the concomitant suspicion by countries of arbitration in the Islamic Arab nations, the oil boom of the 1970s and several conventions on International Arbitration have contributed to the general acceptance of it. This milestone spurred the enactment of the Arbitration Law of 1983[500] and its Executive Regulations.[501] The *Shoura Council* in 2012, approved a draft arbitration law, which was subsequently approved by the Council of Ministers in April 2012. The 2012 Arbitration Law has its basis on the UNCITRAL Model Law, 'which demonstrates a strong and clear commitment to arbitration and recognizes the role of modern international arbitration rules.'[502]

5.6 THE ARBITRATION AGREEMENTS AND ARBITRATION CLAUSES

5.6.1 Under Sharia Law:

Generally, the main elements of a "Sharia-based arbitration" include: an existing dispute; an agreement or consensus by the parties to submit the dispute to an Arbitrator, who is a *qadi*, and if not a *qadi*, must possess qadi-like qualities; acceptance of the Arbitrator by the parties, and; the determination of the dispute according to Islamic law.[503] The nature and processes of arbitration vary depending on the school of thought adopted. For instance, the *Hanafis* lay a greater emphasis on the contractual nature of the arbitration agreement. In addition, they allow disputes to utilise arbitration as a method, except cases that involve fixed punishments and retaliation. The *Hanbalis* on the other hand, has a wider contention on the matters that can be

[499] Arthur (n 489) 180.
[500] Arbitration Law (issued by Royal Decree No. M/46 of 12/07/1403H (14 September 1983).
[501] These were promulgated by the Prime Minister Resolution No. 7/2021 dated 8/9/1405 (29 April 1985).
[502] ibid [n 492] 135.
[503] Saleh (n 30) 21.

arbitrated. They contend that all matters excluding those relating to certain *Hadd* offences can be arbitrated. They are more concerned on the qualifications of the arbitrator. While the *Malikis* assert that the arbitrators' neutrality is key. Notwithstanding, all the schools consider the arbitration contract to be valid, although to the *Hanafis*, they are of no binding effect.[504]

Most legal systems in the Islamic Middle East classify Arbitration clauses into two distinctive categories. The first consists of valid arbitration clauses which are those materials to the contract, appropriately employed, and commonly utilised in commercial transactions. The second however, consists of invalid arbitration clauses which are generally invalid as it is inconsistent with the provisions of the *Sharia*. A contract which includes such provisions, including: the payment of *riba*;[505] *shurut;*[506] or *gharar*,[507] is deemed to be invalid, and of no effect whatsoever. Also, the *Sharia* expressly prohibits agreements to arbitrate disputes not in existence (future disputes). This renders the contract void *ab initio*.[508] Notwithstanding these restrictions, arbitration is still prevalent in the Islamic Middle East. How is this achieved: through pragmatism or sophistry? "[i]n practice…Muslim individuals and their governments routinely charge and pay interest on loans and concluded and enforce contracts of insurance because it is impossible to have a viable economic system today without these practices."[509]

5.6.2 Under Saudi Arbitration Law of 2012:[510]

The 2012 Arbitration law of Saudi Arabia succeeded the 1983 Arbitration law and its implementing rules with 58 articles. The Arbitration Law of 2012 is *in pari materia* with the Egyptian Arbitration Law[511] with slight constructive differences. This is attributable to the fact that the Egyptian law is over eighteen years old, and so, it is only logical that there exist differences in the choice of words during draftsmanship. This new law complies with the

[504] ibid 22.
[505] Interest or unearned advantage.
[506] Extraneous conditions.
[507] Uncertain or executory contracts.
[508] Arthur (n 489) 180-81.
[509] William Ballantyne, 'The Challenge of Islamic Commercial Law in the Middle East' in William Ballantyne and Howard L Stovall (eds), *Arab Commercial Law* (Amer Bar Assn 2002).
[510] Law of Arbitration (issued by Royal Decree No. 3/34 dated 24/5/1433H – 16 April 2012).
[511] No. 27 of 1994.

UNCITRAL Model Law on International Arbitration. The major difference between the Arbitration Law of 2012 and the preceding Arbitration Law of 1983 is the former's recognition and adoption of International Commercial Arbitration, and the consequential independence, accorded to processes of arbitration. 'The arbitration agreement no longer needs to be "validated" by a court judge in order for the arbitration to take place, giving the process the much needed independence it lacked under the old law.'[512]

Arbitration agreements under this Law does not cover disputes related to personal status, which have their own stipulated rules of arbitration, or to matters in which conciliation is not allowed.[513] It however, covers both domestic and international disputes, so far as the parties have agreed to subject such dispute to arbitration.[514]

Furthermore, under the second part of the Arbitration Law of 2012, parties to an arbitration agreement have the right to determine or agree on some procedural formalities that 'do not touch the essence of *Sharia*.'[515] For example, Article 6 of the Law vests upon the parties to the agreement, the discretion to determine the mechanism of notifying the parties of the arbitration agreement. Only where the parties do not utilise this discretion or where the arbitration agreement is silent on the procedure, does the law give standard rules of procedure to be followed by the tribunal and the parties. Arbitration agreements can relate to either earlier or later disputes, but either of the agreements must compulsorily, identify the issues included by the arbitration, otherwise, the agreement will be considered to be as null and void.[516]

Lastly, Article 9(2) stated that arbitration agreements must be in writing or otherwise , will be null and void.

[512] David (n 492) 135.
[513] Law of Arbitration (issued by Royal Decree No. 3/34 dated 24/5/1433H – 16 April 2012), art 2, pt 1.
[514] ibid.
[515] Abdulrahman (n 421) 4.
[516] Law of Arbitration (issued by Royal Decree No. 3/34 dated 24/5/1433H – 16 April 2012), art 9(1).

5.6.2.1 *Arbitral Proceedings*

1. **Choice of Law**: - Parties under the Arbitration Law of 2012 are free to designate the substantive law or procedural rules of arbitration. This is in contradistinction with the Arbitration Law of 1983 which required both the substantive and procedural laws to be Sharia law or Saudi law. procedural rules, which consists of institutional rules such as ICC, IDRC, DIAC, or LCIA may be elected by the parties as governing the subject of the dispute of arbitration as far as they do not contravene the provisions of the Sharia.[517]

2. **Seat of Arbitration**: - Likewise, parties to the arbitration have the right to elect a foreign seat of arbitration. Article 28 provides inter alia:

> *The parties of the arbitration may agree on the place of the arbitration in the Kingdom or abroad. And if there is no agreement, the arbitral tribunal shall determine a place for the arbitration taking into account the circumstances of the claim, and the convenience of the place for both parties, without prejudice to the authority of the arbitral tribunal to meet at any place it deems appropriate for deliberation among its members, and to hear witnesses, or experts, or the parties of the dispute…*[518]

3. **Language of arbitration**: Generally, the arbitral proceedings are performed in Arabic. This is in line with the Arbitration Law of 1983. However, the ingenuity of the 2012 Arbitration Law, lies in the provision for the independence of parties to elect a language of arbitration. Where it is not expressly agreed upon, the tribunal shall choose the applicable language of arbitration, which shall equally apply to "*written submissions and oral pleadings, as well as on every decision taken by the arbitral tribunal, or a message oriented by it, or*

[517] ibid art 25(1).
[518] The official translation of the 2012 Saudi Arabian Arbitration Law derived from <https://mci.gov.sa/en/LawsRegulations/SystemsAndRegulations/Documents/a9.pdf?AspxAutoDetectCookieSupport=1> accessed on 3 November 2015.

an award rendered by it, unless the agreement of the parties or the decision of the arbitral tribunal provides otherwise."[519] The tribunal may further decide that some or all of the written documents provided in the claim should be attached with a translation into the language of arbitration.[520]

4. **Duration of proceedings**: - Article 40(1) provides that "the arbitral tribunal shall deliver the award terminating the whole dispute within the period agreed by the parties to the arbitration, and if there is no agreement, the award shall be delivered within twelve months from the date of commencement of the arbitration proceedings"[521]. Article 40(2) provides that the tribunal can decide to an extension of six months unless otherwise agreed by the parties.

5.6.2.2 *The Arbitral Tribunal*

(Number, qualifications, appointment, remuneration and termination of arbitrators)

The arbitrators are characteristically, the most essential part of arbitration. The provision of the *qadi* under the Sharia Law renders the integrity of the status of the arbitrator "*somewhat diminished and overshadowed*".[522] They have limited jurisdiction under Sharia law and consequently, cannot arbitrate on matters of *Hadd*[523] and *La'an*,[524] or matters contrary to public policy. The 2012 Arbitration Law widens the scope of arbitral powers and jurisdiction. An arbitrator can now arbitrate on extensive array of disputes. His powers and jurisdiction are usually agreed and stipulated in the arbitration agreement, or is prescribed by a competent court where no agreement exists, but should be a non-violation of the principles of the Sharia.

Article 13 of the 3rd part of the Arbitration Law of 2012 provides that the arbitral tribunal 'shall be constituted of one arbitrator or more, provided that

[519] Law of Arbitration (issued by Royal Decree No. 3/34 dated 24/5/1433H – 16 April 2012), art 29(1).
[520] ibid art 29(2).
[521] ibid art 40(1).
[522] David (n 492) 134.
[523] Crimes against divine law sanctioned by a fixed punishment.
[524] A procedure whereby a married couple terminates their marital relationship upon one party accusing the other of adultery.

the number of the arbitrators shall be an odd number or the arbitration is null and void'. This provision is to enhance neutrality of decisions reached. The Law further goes on to provide for the requirements of an arbitrator. Article 14 states that the arbitrator "shall be legally competent, be of good conduct and behaviour, and also, hold at least, a college degree in either Islamic legislation knowledge or regular knowledge".[525] The Arbitration Law of 2012 gives parties more precision and certainty when selecting arbitrators. The recognition of the arbitral tribunal is also, a relatively new concept under the law. This is a shift from the recognition of a sole arbitrator, *qadi*, to a committee of more than one arbitrator.

When appointing arbitrators, the parties are charged with the responsibility of choosing a person or persons,[526] that would fit into the description of a consensus already reached by them, and who will possess the requisite knowledge of the subject of the dispute. Where this is not provided for in the arbitration agreement, the Law stipulates other methods of appointment[527]. For instance, a court appointed arbitrator when the tribunal is to consist of a sole arbitrator.

The Arbitration Law of 2012 also makes adequate provisions for the remuneration of the arbitral tribunal. This is in a bid to maintain the impartiality and independence of the tribunal and prevent situations where they become interested parties on basis of financial enticement. Article 24(1) provides that when appointing an arbitrator, an independent agreement shall be executed with the arbitrator prescribing the arbitrator's fees. The agreement shall be deposited at the entity designated in the Implementing Rules of this Law. Where no arbitration agreement to this effect exists, a competent court shall decide on the fees with an unchallengeable decision. It is pertinent to note that where the appointment of an arbitrator is made by the

[525] This is in furtherance of the Arbitration Law of 1983 which required the arbitrator to possess a "*working knowledge of Shari'a tenets, business regulations and of the customs and traditions of the Kingdom*" See Arbitration Law (issued by Royal Decree No. M/46 of 12/07/1403H (14 September 1983), art 14.
[526] Law of Arbitration (issued by Royal Decree No. 3/34 dated 24/5/1433H – 16 April 2012), art 15.
[527] ibid

court, the court is vested with the duty to determine the fees of such arbitrator.[528]

The position of the arbitrator can be terminated by death; through a rebuttal of the appointment by either the parties or a competent court; or through a dismissal. Moreover, where the arbitrator is deemed an "interested party" to the subject matter of the dispute of the arbitration, he is precluded from considering or hearing a claim, whether or not the preclusion is requested by either of the parties, in the same way a judge is exempted in similar circumstances.[529] A rebuttal of the appointment of the arbitrator comes to play when either or both of the parties refutes the appointment or status of the arbitrator. Generally, the parties to the dispute have the freedom to decide the procedures of rebuttal of the arbitrator. Article 18 of the Law provides that "if an arbitrator becomes unable to perform his duty", or did not commence his duties at all, or interrupts the "performance in a manner which leads to an unjustifiable delay in the arbitral proceedings", or refuses to withdraw upon rebuttal, a competent court is vested with full authority to terminate his appointment pursuant to a request from one of the parties. Such termination is unchallengeable.[530]

Finally, if an arbitrator's mission is completed by reason of death, revocation, termination, resignation, disability, or for "any other reason, a substitute must be appointed in accordance with the procedures for appointing the arbitrator whose appointment has been terminated".[531]

5.6.2.3 *Arbitral Awards*

By virtue of the principles of the Sharia law, article 42(1) of the 2012 Saudi Arbitration Law dispenses with the requirement of two witnesses to the award. It provides that the arbitral award shall be issued in writing, reasoned and signed by the arbitrators. It goes on to state that where the tribunal is constituted by more than one arbitrator, the signature of the majority of arbitrators is sufficient, provided that the reason for not signing the award by

[528] Law of Arbitration (issued by Royal Decree No. 3/34 dated 24/5/1433H – 16 April 2012), art 24(2)
[529] ibid art 16(2).
[530] ibid art 18(1).
[531] ibid art 19.

the rest of the arbitrators is recorded. Further, the four parts into which the award should be divided under Sharia law transforms under the Arbitration Law of 2012, to a list of requirements to be included in the award, such as: the issuance date; the place of issuance; names and addresses of the parties; the names, addresses, nationalities and capacities of the arbitrators; a summary of the arbitration agreement; a summary of the parties' claims; the fees of the arbitrators; arbitration costs; inter alia.

The process of reaching an award by the arbitrators –if composed of more than one– shall be issued by a majority after secret deliberations.[532] Where the opinions of the members of the arbitral tribunal differ, and it becomes impracticable to achieve a majority on an opinion, the tribunal shall appoint an umpire arbitrator within fifteen days from deciding on the impracticability of achieving that majority, or a competent court shall appoint such an umpire arbitrator.[533] It also stated "The arbitral tribunal shall issue the final award within the timeframe agreed by the parties. In the absence of such agreement, the tribunal must render the award within twelve months from the date of the commencement of the arbitration proceedings".[534] This does not preclude the arbitral tribunal from extending the duration of the arbitration if need be, provided that the extension does not exceed six months, or if the parties agree on a longer period.[535] Also, "the arbitral tribunal shall provide original copies of the arbitration award to the parties within fifteen days from the date of its issuance"[536]. The award may not be published in whole or in part without written approval from the parties to the arbitration.[537]

The implication of the award dispensed renders the dispute determined in its entirety. This is contrary to arbitration under Sharia Law which cannot be effective as a res judicata, and so, is only binding but inconclusive. Article 41 of the Law provides that the arbitral proceedings shall terminate upon the issuance of the award ending the dispute in its entirety. Article 49 further reiterates that arbitral awards issued in accordance with the provisions of this

[532] Law of Arbitration (issued by Royal Decree No. 3/34 dated 24/5/1433H – 16 April 2012), art 39(1).
[533] ibid 39(2).
[534] ibid art 40(1).
[535] ibid art 40(2).
[536] Ibid art 40.
[537] ibid art 43(1)(2).

Law are unchallengeable. Any action to procure the nullification of an arbitral award shall generally be unaccepted unless the arbitration agreement is void, voidable or expired; if at the time of entry into the agreement, one of the parties was incapacitated in accordance with the law governing his capacity; if the award fails to apply the applicable rules of law on the subject matter of the dispute as agreed by the parties; if the tribunal is constituted in a manner contrary to the provisions of this Law; inter alia.

5.6.3 Implementing Regulations of the 2012 Arbitration Law:

On 22 May 2017, Saudi Arabia approved Implementing Regulations in relation to the Arbitration law 2012, which became effected on June 2017[538]. These Implementing Regulations has a high impact within the growth and strength of arbitration in Saudi Arabia, as it elucidates the Arbitration Law 2012 precisely by identifying certain terms and filling the gaps within the previous law and to prevent any ambiguity by illustrating the articles in the Arbitration Law of 2012.

Article 2 of the Implementing Regulations has identified the Competent Court which was described in the Arbitration Law 2012 by signifying that arbitration will be controlled by the Appeal Court. Article 3 of the Regulations states that serving summons to arbitration can be made electronically, where generally, serving summons in Saudi Arabia used to be in person. Under Article 10 specify the appointment of Sole Arbitrator and if the parties do not agree on the appointment of the arbitrator, then the Competent Court will have the authority to make such appointment[539]. It further goes that timescale that an appointment of arbitrator will be made within fifteen days, in the case of, Competent Court has been requested by the parties to do so. The fifteen days counts from the day the parties has made a submission for appointing an arbitrator to the Competent Court "Appeal Court". Article 13 stated a significant regulation as it concerns the

[538]The Saudi Cabinet Decision No.541/1438 passed the Implementing Regulations of the 2012 Arbitration Law, which became effective on 9 June 2017. The Implementing Regulations were published by the Saudi Gazette. See Nabeel Ikram, Andrew Mackenzie and Lina Bugaighis, 'The Kingdom of Saudi Arabia's Implementing Regulations of the 2012 Arbitration Law enter into force' < https://www.lexology.com/library/detail.aspx?g=e86da74a-b59a-4f0e-8ff6-e25112520947&utm_source=lexology+daily+newsfeed&utm_medium=html+email+-+body+-+general+section&utm_campaign=the+law+society+subscriber+daily+feed&utm_content=lexology+daily+newsfeed+2017-07-25&utm_term= > accessed 2 October 2017.

[539] The Implementing Regulations, art 15.

Intervention and Joinder of a third party, where the arbitral tribunal "could" let a third party to intervene of the arbitration procedures. Additionally, in the case of Joinder of a third party would be depend on the consent of the parties to agree whether a third party could be part of the arbitration proceedings. It should be noted that even though that the Saudi Arbitration Law 2012 does not allow the intervention of joinder of a third party, however, the Implementing Regulations has provided the above possibilities in which facilitated the arbitration procedures in order to settle disputes between the parties. Challenges to Arbitral awards, can be requesting the Appeal Court to hear the challenges[540] as it is clarified that it is the Competent Court within the Regulations. The decision of the Competent Court (Appeal Court) is final and binding if it recognise the arbitral award and request to enforce it pursuant to Article 51[541]. However, if the Competent Court decided not to recognise and enforce the award, then its decision applicable to be appealed within thirty days of the date of the decision and the appeal process shall be submitted to the Supreme Court[542].

In summary, the Implementing Regulations has tackled the ambiguity that was around the Saudi Arbitration Law 2012. It shows that the development of Arbitration in Saudi Arabia is successfully improving after these Regulations has illustrated and elucidated the Arbitration Law of 2012.

5.7 ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN SAUDI ARABIA

The enforcement of foreign arbitral awards represents a core aspect of international commercial arbitration. The practice of arbitration as a dispute resolution mechanism is one thing, the recognition of arbitral awards resolving disputes and the enforcement of such awards, both nationally and internationally, is another. The ability to enforce decisions of a dispute resolution body is the hallmark of any dispute resolution mechanism.

Notwithstanding the inherent significance of having an effective and efficient enforcement process, the enforcement of arbitral awards in Saudi Arabia was

[540] ibid art 17.
[541] ibid art 51.
[542] Ibid.

not without difficulty, particularly in relation to the enforcement of 'foreign' arbitral awards, which process was complex and challenging. The enforcement of a foreign arbitral award may be hindered by the claim of sovereign immunity where the defendant is a state or one of its constituent subdivisions or agencies.[543] In a bid to avoid this problem, a series of bilateral and multilateral treaties have been outlined for the purpose of regulating the enforcement of foreign arbitral awards. It is worthy to note that despite Saudi Arabia is a signatory to the major arbitration treaties, foreign awards have still proven difficult to enforce[544].

Another problem apparent from the enforcement of foreign arbitral awards in Saudi Arabia is the duality in its legal system and the confusion that arises from the different interpretations of the legal systems of various countries, resulting in misconceived negative perceptions of these countries on the basis of the conflict between their legal system and *Sharia* principles. Saudi Arabia has therefore been described previously as a hostile country towards recognising and enforcing foreign arbitral awards.[545]

To improve the framework for the enforcement of foreign arbitral awards, Saudi Arabia acceded to the New York Convention in 1994.[546] The Convention requires contracting states to "recognition and enforcement of such" arbitral "awards made in the territory of a state other than the state where the recognition and enforcement are sought, and arising out of differences between persons, whether physical or legal"[547]. The Convention further provides that the arbitral awards sought to be enforced must "not be considered as domestic awards in the state where their recognition and enforcement are sought".[548] The Convention, therefore, applies to arbitral awards that are rendered abroad in arbitration between parties, notwithstanding their nationality.

[543] Yahya (n 380) 81.
[544] ibid.
[545] Abdulrahman Saleem, 'A Critical Study on How the Saudi Arbitration Code could be Improved and on overcoming the Issues of Enforcing Foreign Awards in the Country as a Signatory State to the New York Convention' (2013) 16 CEPMLP Annual Review 9.
[546] Arthur (n 441) 186.
[547] The New York Convention, art 1(1).
[548] Ibid.

The reservation adopted by Saudi Arabia is to enforce only awards issued from another New York Convention contracting state and no other. In effect, the courts consider whether the state in which the foreign arbitral award was rendered is a signatory to the New York Convention and whether such a state would enforce Saudi arbitral awards. Where these answer in the positive, the award is usually recognised and enforced; where, however, they are negative, such a foreign award is dispensed with.

However, a fundamental obstacle to the enforcement of foreign arbitral awards in Saudi Arabia is usually the adoption of the public policy exception under the New York Convention.[549] The term 'Public Policy' as provided in the New York Convention is exclusively intended to provide an explanation or justification for the refusal of recognition and enforcement of foreign awards. More so, public policy is a broad legal term that is susceptible to varying interpretations. This has warranted a lot of abuse by contracting states. The most common justification for exclusion based on public policy proffered in the Kingdom is the failure to comply with *Sharia* principles, in which case, such foreign award is rejected. Many foreign awards were rejected by the Board of Grievances on grounds of being disrespectful to Islamic laws[550].

Under the 2012 Arbitration law, an arbitral award issued in accordance with the provisions of the arbitration law cannot be appealed against[551]. Any action to set aside the arbitral award shall be declined by the court unless the arbitration agreement is void, voidable or expired. It is provided that the award may be set aside[552] only on grounds of incapacity of one of the parties, non-application of agreed rules of law and improper constitution of the tribunal.

However, Saudi Arabian courts are increasingly recognising foreign arbitral awards. Furthermore, Enforcement law has highlighted the process of how foreign arbitral awards could be enforced and recognised. Article 11 of the

[549] ibid art 5(2)(b).
[550] Abdulrahman (n544) 9.
[551] Arbitration Law of 2012, art 49.
[552] Arbitration Law of 2012, art 50.

Enforcement Law[553] stated that will only enforce and recognise foreign arbitral awards based on reciprocity, which Saudi Arabia has fulfilled this requirement since it became a signatory state to the New York Convention. However, foreign arbitral awards must meet few requirements as the following:

- The foreign arbitration tribunal is the most suitable process to issue the arbitral awards with the consistency of the conflict of laws other than the Saudi courts.
- The arbitral award has issued in accordance with the process requirements of arbitration such as litigants has duly summoned, fulfilled the legal requirements for representing their dispute and themselves.
- The foreign arbitration tribunal has reached a binding arbitral award which considered to be a final arbitral award in that state.
- No contradictions with any previous ruling by Saudi courts, compliance of these previous decisions is essential to recognise and enforce the foreign arbitral award.
- Foreign arbitral awards must be in accordance with the public policy of Saudi Arabia, such as *Shari'a* law.

From a practical perspective, "establishing whether or not the judgment/award complies with *Shari'a* law may result in the enforcement judge examining the case on its merits."[554] An enforcement order will be issued by the enforcement judge under article 6 of the Enforcement Law if the foreign arbitral awards meet the requirements that are specified above. The enforcement judge decision (order) is final "save granting the right of appeal for judgments on execution disputes and claims of insolvency, which may be appealed to the Court of Appeal whose ruling is final"[555]

[553] The Saudi New Enforcement Law (issued by Royal Decree No. M/53 of 13 Sha'ban 1433 Hejra - 3 July 2012). See < http://www.jonesday.com/files/Publication/8a125998-ccdc-426a-9cfb-a9c622ff1616/Presentation/PublicationAttachment/95ac0be5-ef48-48d8-b9b7a9c901966ff6/New%20Enforcement%20Law%20of%20Saudi%20Arabia.pdf > accessed 28 August 2017.

[554] See 'Enforcement of Foreign Judgments and Arbitral Awards in the Kingdom of Saudi Arabia' https://www.shearman.com/~/media/Files/NewsInsights/Publications/2016/09/Saudi-Arabia-Publications/Enforcement-of-Foreign-Judgments-and-Arbitral-Awards-in-the-Kingdom-of-Saudi-Arabia.pdf accessed 30 September 2018.

[555] Ibid.

5.7.1 The 2012 Enforcement Law[556] and the Enforcement Courts:

In line with the reform policy of the Kingdom to attract foreign investments, the Enforcement Law was introduced in 2012 to aid the enforcement of arbitral awards. The Enforcement Law replaced the related Rules of the Civil Procedure 1989 before the Board of Grievances[557] to implement a new set of Rules which effects all types of enforcement, whether domestic or foreign judgements and arbitral awards. The Enforcement Law also introduced enforcement courts and judges.

Prior to the Enforcement Law, enforcement of foreign judgments and arbitral awards was through the Board of Grievances[558]. This presented problems for the parties as procedures before the Board of Grievances was lengthy and rigid and the Board would undertake a full review on the merits of each award to make ensure compliance with *Sharia* principles[559]. The application of *Sharia* principles to test the enforceability of arbitral awards resulted in the rejection of most awards and in some cases retrial of the dispute between the parties.[560] The difficulty parties faced under the old system of the Board of Grievances is clearly illustrated by the case of **Jadawel International (Saudi Arabia) v. Emaar Property PJSC (UAE)**. In this case, Jadawel International (Saudi Arabia) commenced arbitral proceedings against Emaar Property PJSC (UAE) in Saudi Arabia. Jadawel International (Saudi Arabia) claimed damages in the amount of US$1.2 billion on the ground that Emaar Property PJSC (UAE) breached the terms of a joint venture agreement in respect of a construction project. The arbitration lasted for two years. The tribunal dismissed the claims of Jadawel International (Saudi Arabia) and subsequently ordered the company to pay legal expenses incurred by the other party. Upon presentation of the award to the Board of Grievances for

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[556] Ibid
[557] Board of Grievances Procedural Rules (issued by Council of Ministers Resolution No. 190, 16 *Dhu al-Qa'dah* 1409H – 19 June 1989).
[558] Jones Day Commentary, 'The New Enforcement Law of Saudi Arabia: An additional step toward a harmonized arbitration regime' < http://www.jonesday.com/files/Publication/8a125998-ccdc-426a-9cfb-a9c622ff1616/Presentation/PublicationAttachment/95ac0be5-ef48-48d8-b9b7-a9c901966ff6/New%20Enforcement%20Law%20of%20Saudi%20Arabia.pdf> accessed on 1 September 2017.
[559] ibid.
[560] ibid.

enforcement, the Board of Grievances considered the merits of the case to ensure compliance with *Sharia* principles. Consequently, the Board of Grievances upturned the award, annulled the damages awarded to Emaar Property PJSC (UAE) and thereafter ordered it to pay more than US$250 million damages to Jadawel International (Saudi Arabia)[561].

The Enforcement Law 2012, the enforcement courts and judges were introduced to cure such inequitable scenarios. At this stage, it is necessary to highlight some relevant provisions of the Enforcement Law as follows:

1. The meaning of Enforcement Judge has been stated under Article 1 as "the Chairman and Judges of the Enforcement Circuit, the Enforcement Circuit Judge, or the Judge of the Single Court"[562]. By establishing enforcement courts, the Enforcement Law allows for specialisation by judges, which would lead to the efficient and effective disposal of enforcement cases.

2. The Enforcement Judge is the authorising person to ensure the enforcement and recognition of all judgments, including foreign and domestic arbitral awards in the Kingdom (except the enforcement of judgements regarding administrative and criminal cases).

3. The new Enforcement Law under article 11 provides that the basis of principles of reciprocity (similar to the reciprocity reservation in the New York Convention) may only the way to enforce a foreign arbitral awards by the enforcement judge, and in order to seek such an enforcement of arbitral awards one must check that (i) whether the dispute of the parties involve a Saudi Arabia jurisdiction for the courts to intervene, (ii) whether the obligations of due process are in order with the procedures of the rendered award (iii) the law of the seat of the arbitration is in accordance with the final arbitral award, and (v) the award does not contain anything that contradicts the public policy of Saudi Arabia (in particular *Sharia* law – *e.g.*, the award should not include any award of interest).

[561] ibid.
[562] ibid.

4. Article 7 allows the Enforcement Judge to take "*all precautionary steps*" and "*seek assistance from the concerned authorities*" if a party should resist or violate enforcement. This provision is a welcomed development as it gives the Enforcement Judge broad powers to ensure that arbitral awards are in fact enforcement and the judgment creditor gets the fruit of the arbitral award.

5. In addition, the new Enforcement Law lays out the procedures available to an Enforcement Judge in pursuit of enforcement; they include provisional attachment, enforceable attachment, attached funds sale, debtor funds under third-party custody, direct enforcement and those in case of insolvency of the party against whom the award is being enforced.

6. Unlike the previous process before the Board of Grievances that involved full review of the case, the Enforcement Judge can enforce all local and foreign judgments or awards that are issued in the form of an execution deed. By the provisions of Article 9 of the Enforcement Law, "forms of execution deed include final judgments, decisions and orders issued by the courts, final arbitral awards, settlement agreements issued by authorised entities or authenticated by the relevant courts, commercial papers, authenticated contracts and instruments, judgments or judicial orders and authenticated instruments issued in a foreign country"[563]. Therefore, a party "seeking to enforce a foreign judgment or award must ensure that the final judgment or award" is within the ambit of "one of the listed forms of execution deed to ensure enforcement" in Saudi Arabia[564].

The first practical example of the effectiveness of the Enforcement Law is the enforcement of a US$18.5 million ICC awarded rendered in the UK against a Saudi Arabian domiciled entity. The Enforcement Law was actually passed during the enforcement proceedings. As a result of the legislative change, the

[563] Amer Abdulaziz Al-Amr, 'Qualitative shift; Saudi Arabia's new Enforcement Law' [2013] International Arbitration Newsletter < https://www.dlapiper.com/en/africa/insights/publications/2013/06/qualitative-shift-saudi-arabias-new-enforcement-/ > accessed on 1 March 2018

[564] ibid.

proceedings were transferred from the Board of Grievances to the Enforcement Court. Based on the Enforcement Law, the Enforcement Judge confirmed that the award is recognised and will be enforced in Saudi Arabia[565].

Recently, it was reported that the Enforcement Court ordered a Saudi company to pay arbitral awards in the amount of US$75 million to two Japanese claimants who sought to enforce arbitral awards in Saudi Arabia.[566] The Enforcement Law is therefore a profound move towards ensuring that the Saudi Arabian legal framework complies with international standards and global best practices and shows a strong commitment to improve arbitration in Saudi Arabia.

5.8 CONCLUSION

Arbitration has permeated significantly into almost every part of the world. The impact of arbitration in commercial matters is laudable; however, in Saudi Arabia, the arbitral system is undeniably a work in progress. This has raised the issue as to whether the adoption of a proper functioning arbitral system in Saudi Arabia, especially within the marine insurance industry should be made compulsory, rather than discretionary. This issue will constitute the substance of the next chapter. However, it suffices to point out that while the adoption of compulsory arbitration in the marine insurance sector is important, the enforcement of the awards and awards granted by international arbitral tribunals is another very important issue.

Although Saudi Arabia has a gravely limited record of enforcing foreign arbitral awards, the Arbitration Law 2012 and the Enforcement Law 2012 are playing a dual role of improving the arbitration and enforcement regimes. However, additional reforms may be implemented in the arbitration regime. For example, a full suite of interim measures may be introduced under the

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[565] Henry Quinlan et. al., 'Arbitration procedures and practice in Saudi Arabia: overview' < https://uk.practicallaw.thomsonreuters.com/5-632-8065?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed on 1 March 2018.

[566] Mahmoud Abdel-Baky, 'Saudi Arabia Update – February 2018' < https://www.lexology.com/library/detail.aspx?g=4d785872-6f93-4044-b1e5-1cfab07b610a&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2018-03-06&utm_term > accessed on 6 March 2018.

Saudi national law. The Arbitration Law 2012 is brief about interim measures – it provides generally on the right of the parties to take provisional or precautionary measures or approach the Saudi courts for interim measures prior to the arbitration or for the tribunal to seek such assistance from the courts at any time[567]. The expanded section on interim measures in the 2006 UNCITRAL Model Law should be adopted in Saudi Arabia.

Also, the potential abuse of the concept of public policy stipulated in the New York Convention makes it imperative for further reforms to be implemented in the area of enforcement. The Enforcement Law should be reformed to restrict the application of the concept of 'public policy' or define stringent circumstances to warrant its application. This would reduce arbitrary interpretations by the judges.

Reforms are also desperately needed in Saudi Arabia as it relates to foreign investors. Saudi Arabia has been criticised as hostile in the religious application of its laws to foreigners, which creates unhealthy commercial environments. As at 2012, it was submitted that the percentage of foreign contribution in the insurance companies in Saudi Arabia was 91%.[568] With the overwhelming market share of foreign investors in the insurance sector (which is a critical sector in the diversification plans of the Kingdom because of the importance of maritime activities), the writer is of the opinion that it is critical for the Kingdom to ensure conducive commercial environments for foreign investors. In this regard, a comprehensive survey should be carried out in order to identify the problems or potential problems that foreign investors may have in relation to the Saudi commercial environment. This will ascertain the problems that should be highlighted by the Saudi government in order to guarantee the stable inflow of foreign investors.

[567] Saud Al-Ammari and A. Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30 Journal of the London Court of International Arbitration 2, 387.
[568] World Trade Organization (n 3).

CHAPTER SIX

THE INSURANCE REGIME IN SAUDI ARABIA AND THE IMPACT OF DUALITY IN ITS IMPLEMENTATION

6.0 INTRODUCTION

The prevalence of disputes within the insurance field is almost certain. The most common reason is that the compensation offered by the insurer does not match the insured's expectation. In other cases, the insurance company might be claiming that their policy does not cover the particular occurrence. If matters cannot be resolved amicably, it may lead to litigation.

Disputed claims have a major impact and arises within the insurance sector. For the insurance companies to resolve these disputed claims, tend to utilise arbitration clauses within their agreements, in order to avoid the delay and cost of the litigation process[569]. The arbitration procedure is described to be an alternative dispute resolution (ADR) method that is more effective and efficient than litigation process.[570]

Arbitration clauses have been on a persistent increase for several decades.[571] The procedure depends on the insurance agreement. For example, arbitration clauses might specify that the insurer has the right to appoint arbitrators rather than both sides; also the insured may have a right to veto any arbitrator. Insurance companies are usually beneficially placed in these proceedings as the arbitrators appointed are usually insurance professionals. The insurance sector effectively benefited from arbitration as process for a speedy resolution to solve its disputes by including arbitration clauses in the insurance policies.[572]

Arbitration usually is described as faster, cheaper, private or confidential than litigation process. It was stated that "*insurers and other businesses like arbitration agreements because they keep conflicts out of courts, where*

[569] See Public Citizen, 'Arbitration Clauses in Insurance Contracts: The Urgent Need for Reform' < https://www.citizen.org/arbitration-clauses-insurance-contractsthe-urgent-need-reform > accessed on 15 November 2017
[570] ibid 220.
[571] ibid.
[572] ibid.

disputes can turn costly, messy and public''.[573] It is a noteworthy to mention that if the court system is publicly funded and whether the case in arbitration is not, then it may be deduced that the cost of arbitration is not necessarily cheaper. However, in determining the cheaper option between arbitration and litigation, the period it takes to litigate a dispute compared to arbitrating a dispute must be closely considered.

Another advantage of arbitration is the availability of expertise. Disputes can therefore be effectively handled by arbitrators skilled within the field, and who have first-hand knowledge of the subject matter of the dispute. This makes up the core of the justification of utilising arbitration, especially when the goal between the policyholder and the insurance company is to resolve the issue promptly in order to avoid any controversy and publicity.

Compulsory arbitration is an arbitration, where the laws statutorily mandates parties involved in a dispute to undergo an alternative dispute method rather than litigation. In such arbitration, the disputed parties are obliged to be referred their dispute to arbitration by a compulsory law. Compulsory arbitration provisions may be particularly useful in marine insurance policies "where property is a total loss and the cost of repair or replacement is not the appropriate measure of damages".[574]

In Australia, which is a federation of six states, the federal government is vested with certain specific powers while leaving the other states their sovereign powers over all other matters. The seven powers haven chosen to exercise their legislative power on industrial relations, therefore provided for seven different legislations all providing for compulsory arbitration of industrial disputes.[575] Thereafter, the federal government set up a conciliation and arbitration tribunal system. In 1926, the supremacy of the federal tribunal over the sate tribunals was established in a high court ruling. So, despite the

[573] Edmund M. Kneisel and Richard English Dolder, 'Arbitration Clauses in Insurance Policies – A Primer for the Construction Professional' < http://kilpatricktownsend.com/~/media/Files/articles/2012/CH-5_CLUP_2004.ashx > accessed on 10 November 2017.

[574] USLegal, 'Compulsory Arbitration Law and Legal Definition' See <http://definitions.uslegal.com/c/compulsory-arbitration/> last accessed 06 April 2016.

[575] Kenneth F Walker, *Compulsory Arbitration: An International Comparison* (D.C Heath and Company 1972) 7.

continuous activity of state tribunals, federal awards will always supersede state awards and once the federal tribunal covers the field of any particular area, it covers it to the exclusion of the state tribunals.

Although, the idea of compulsory arbitration was introduced in Australia with the hope that it would prevent industrial disputes, it has speedily become an institution where the original idea of settlement plays a minor role. The Australian practice of compulsory arbitration has inherent in it legislative features. One might say that the work of an arbitrator in Australia is the making of an award, laying down minimum wages and conditions rather than the settlement of disputes[576].

6.1 THE MEANING AND DEVELOPMENT OF INSURANCE[577]

Bernstein stated that "the modern conception of risk is rooted in the Hindu-Arabic numbering system that reached the West Seven to eight hundred years ago. But the serious study risk began during the Renaissance, when people broke loose from the constraints of the past and subjected long held beliefs to open challenge. This was a time when much of the world was to be discovered and its resources exploited"[578] . He further connected the risk with time, and described time as "*Time is the dominant factor in gambling. Risk and time are opposite sides of the same coin, for if there were no tomorrow there would be no risk. Time transforms risk, and the nature of risk is shaped the time horizon: the future is the playing field.*"[579]

Insurance is the transfer of the risk of a loss from one party to another in exchange for the payment of premium. In essence, insurance is a form of risk management primarily used to hedge against the risk of uncertain loss.[580] It is therefore, a "risk management platform" where a party undertakes to cover the losses of another party for a premium. This is different from gambling

[576] ibid 1.
[577] Sourced from Aly Rahim Khorshid, 'Islamic Insurance: A Modern Approach with Particular Reference to Western and Islamic Banking' (PhD Thesis, The University of Leeds 2001) 22.
[578] Berntein Peter, *Against the Gods the Remarkable Story of Risk* (John Wiley & Sons, Inc 1998) Intro, 3.
[579] Ibid, ch1, 15.
[580] Winslow Donald Arthur, 'Tax Avoidance and the Definition of Insurance: The Continuing Examination of Captive Insurance Companies', (1989) 40 Case Western Reserve Law Review' 1, 85.

transactions, which also hedge against risk, but it offers the possibility of either a loss or a gain. Gambling creates losers and winners, whereas insurance offers support sufficient to replace or mitigate loss, not to create pure gain.

The insurance policy is a fairly modern development. However, the concept is by no means novel. The notion of transferring the risk of loss from the individual to a group began a very long time ago. Traces of fundamental insurance practices are still seen among the few primitive communities that are still in existence[581].

About 2500 BC, Chinese merchants were using primitive forms of marine insurance. When boat workers reached torrents in rivers they waited for other boats to arrive[582]. They then reallocated the cargo so that each boat carried some of the substances of the others. If one boat was lost in navigating the torrents, all the workers shared a small loss[583].

Generous societies were developed in Egypt as early as 2500 BC. There is evidence that the ancient Egyptians had writings on the walls of some of the temples and that they formed committees for entombing the dead. They believed that life after death was unavoidable and therefore the body should be well-preserved for the spirit when they were reunited at the time of reincarnation. Therefore the committee uses the money needed to preserve the body after death, for as long as that person or his relations paid a yearly fee. This annual fee could either be in the form of farm produce, or manufactured goods and clothes, sufficient to ensure that the body would be preserved in a properly sealed tomb. However, members funded burial expenses and gave relief for those seriously ill or injured by accident.[584]

By 1500 BC, these societies provided fire insurance. The biblical story of the Prophet Yusuf (Joseph) is another early illustration of insurance principles. Around 1700-1500 BC, according to the authorities,[585] Yusuf construed a

[581] Raynes Harold E, *A History of British Insurance* (Pitman & Sons 1948) 71.
[582] ibid 32.
[583] Abdul Rahman, *Ahmed Gad, Insurance* (1978) 32.
[584] ibid 32.
[585] ibid 33.

dream of the Pharaoh to mean that there would be seven years of abundance and seven years of lack. At Yusuf's idea, the Egyptians set aside grain during the years of abundance to get ready for the years of lack. Today, people set apart a little now to protect themselves against unforeseeable emergency or loss. Although this was cooperative, it is a sign that human societies have been involved in insurance (or risk mitigation /management strategy) as far back as the ancient Egyptians.[586] The Phoenicians, Greeks and Indians took another foremost step in laying[587] the foundation of today's insurance industry. One of these seagoing peoples developed insurance against a ship sinking. When a group of ship-owners funded a commercial expedition, they borrowed money from a lender, using the ship as collateral. If the expedition was successful, the ship-owner paid back the loan at a high rate of interest. If the ship was lost, the ship-owner was free of the debt.[588]

Ancient Romans had both life and health insurance. The Roman benevolent societies provided burial insurance and pecuniary help for the sick and aged. Roman associations issued life insurance contracts for members and by 200 AD; the Romans had a rough death table. The Roman military also had health and disability plans.[589]

When associations arose in Flanders and Holland, among the services they provided were health benefits and burial fees. Some associations made efforts to compensate members for fire losses. Their methods of operation were simple by today's standards but they popularised insurance[590].

During this period, insurance was underwritten mainly by individuals and unions. Benefits were relatively small; one person or a small group could have enough capital to conduct insurance business. The person selling insurance was called an underwriter, signing his name and the amounts of liability at the foot of the page.[591]

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[586] ibid 35.
[587] AI-Hanis Mokhtär Mohammad, *Mäbädun al-Ta"min"* (1979) 66.
[588] ibid.
[589] ibid.
[590] Abdul (n 583) 35.
[591] ibid.

Ibn-Khaldun, in his Muqaddimma[592] has written about Arab business ventures which were then known as winter and summer Voyages. The voyage members insured any member of the group against loss of their stock or their profit. All members of the voyage paid a ratio either of their profit or capital as compensation for the loss suffered or damage sustained by any member of the voyage.

6.2 THE CLARITY OF LEGAL PLURALISM

Certain developing countries appeared to be adapting their domestic laws and its legislations with market-oriented reforms, in order to meet the international standards within the modernisation market economy worldwide. "Legal Pluralism" could be defined as a linkage between domestic laws such as '*Sharia law'* along with the international market policies or regulations. This may have an impact on the "rule of Law", however, a suitable market-oriented legal infrastructure might be created within that developing country.

The theory of 'Legal pluralism' is described with any other jurisprudential theories as a replacement to the concept of "legal centralism". The theoretical aspect of legal centralism is

that "*law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a set of single of state institutions*"[593].

It has been debated by who are unwilling to support the theory of legal centralism that is considered to be a 'myth'.[594] These arguments have tackled the political, social and legal aspects. Two issues could be considered and dealing with the concept of 'legal pluralism'. The first issue what theory of legal pluralism is and its definition? The second issue is that in what circumstances is legal pluralism established under? These questions should be taken into consideration, the theory of legal pluralism and its definition is still under developing and neither clear or has a limit of its definition.

[592] Ibn-Khaldun, *The Muqaddima* (Franz Rosenthal tr, Princeton University Press 1981) 432.
[593] John Griffiths, 'What is Legal Pluralism?' (1986) 24 Journal of Legal Pluralism 1, 3.
[594] ibid 4 where it is stated that: "*Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion*".

This part of this section would highlight an overview within the theoretical aspects of legal pluralism, with the outcome of such theory to be considered for the purpose of this research. This part of the research does not endeavour to establish the meaning of legal pluralism.

6.2.1 The Meaning of Legal Pluralism:

It should be stated that the meaning of legal pluralism, has not been decided and clarified by legal pluralists in one single definition. Legal pluralism could be illustrated as "*the condition in which a population observes more than one body of law*"[595]. A separate study has conducted by Vanderlinden and Hooker to establish the meaning of the concept of legal pluralism[596]. Their study has a substantial involvement within meaning of legal pluralism. Legal pluralism highlighted by Vanderlinden as "*the existence within a particular society of different legal mechanisms applying to identical situations*".[597]

Therefore, the efficiency of legal pluralism has been explained by Vanderlinden as 'different legal mechanisms' should be in the position of concern to 'identical situations', it means that has been shift to the view of different laws other than the concept of legal pluralism. Vanderlinden has clarified the concept of legal pluralism by giving certain examples are as the following:

- Selling goods that are made between ordinary citizen and merchant, whereas in the case of merchant, is in strictly compliance to distinctive contractual obligations other than the ordinary citizen even though are in the same method.[598]
- Distinctive procedures which concerns adults and minors.[599]

[595] Gordon Woodman, 'The Idea of Legal Pluralism' in Baudoin Dupret, Maurits Berger and Laila al-Zwaini (eds), *Legal Pluralism in the Arab World* (Kluwer Law International 1999).
[596] See John Gilissen, *Le pluralisme juridique* (Université de Bruxelles 1971). *See also* Gordon Woodman, 'Ideological Combat and Social Observation: Recent Debate about Legal Pluralism', (1998) 42 J. of Legal Pluralism & Unofficial L. 21, 23-24 – where Gordon Woodman argued that Gilissen implied a definition of legal pluralism in his introduction and referred to *Jacus Vanderlinden,* who contributed to the volume edited by Gilissen. *See also* Barry Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon Press 1975).
[597] Gordon (n 595) 4.
[598] ibid.
[599] ibid.

- The laws of groups who are against an authority or a government which are not in compliance with the laws of the state within that territory.[600]

On the other hand, the concept of legal pluralism was illustrated by Hooker in a study with a comparative approach as "the situation in which two or more laws *interact*"[601]. The study by Hooker highlighted that "the systems of legal pluralism in the contemporary world which have resulted from the transfer of whole legal systems across cultural boundaries"[602].

Moreover, it was debated by Hooker that a state's legal structure may have unsuccessful outcome for certain purposes[603]. This can be seen in the case where there are "multiple systems of legal obligation existing within the confines of the state"[604]. It was also stated by Hooker that 'multiplicity of obligation' can be raised in four instances. The first example is where 'multiplicity of obligation' could occur within the colonial laws[605]. The colonial territories could have legal system on the basis of imperial power. Colonial laws would be remained in the legal structure within the 'indigenous law' even though colonies territories have been remained independent.[606] The second example is where indigenous individuals can be involved as not as a standard class and as a result 'multiplicity of obligation' would occur in states.[607] The third instance is where developing countries are implementing western laws in order for improving their legal mechanisms, additionally; it would have an impact of 'multiplicity of obligation'.[608] The last example is where a state has implemented a penal statute which overturned the previous system and such a consequence has presented 'revolutionary ideology'.[609]

On the other hand, there were criticisms in regards to the view of Vanderlinden and Hooker on the concept of legal pluralism and its definition.

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[600] ibid.
[601] Barry (n 596) 6.
[602] ibid 1.
[603] ibid 2.
[604] ibid.
[605] ibid.
[606] ibid.
[607] ibid.
[608] ibid 3.
[609] ibid. However, the third instance will be concentrated on because of its relevance to the theme of this thesis.

Furthermore, these criticisms have added illustrations to the definition and categorised its meaning into two classifications.[610] The first classification is where a state established as "two bodies of norms within the law of the state" which categorised to be within the meaning of 'state legal pluralism'.[611] 'Deep legal pluralism' is the second classification[612]. The reasoning behind the meaning of 'deep legal pluralism' is 'normative orders' that are considered within the law of the state, which are previously implemented, and these orders are not precisely co-operative with the state.[613] The word *deep* clarified the aspects of distinguishing between the state laws and laws that does not existed within the legal system, even though legal pluralism has been emphasised variation in the core of state laws.[614]

Notwithstanding of these criticisms in relation to the definition of legal pluralism, and how it has been divided into *state legal pluralism* and *deep legal pluralism,* as a result, it is a noteworthy to mention that the concept of state legal pluralism could be noticed and has established basis within certain states.[615]

It should be mention that some developing countries such as Saudi Arabia have the foundation of state legal pluralism. This may have an impact on the structure of the marine insurance industry, whether such state legal pluralism structure should be struck out, amended or modified, and whether disputes within marine insurance industry as a result of maintaining state legal pluralism which can be defined as duality, would be solved through arbitration. These issues should be clarified in this chapter.

6.2.2 State Legal Pluralism and Introducing Legal Transplantation:

Legal system can be transplanted from other countries and fit into another states system; this is so-called legal transplantation which defined as "the

[610] Gordon (n 595)
[611] ibid.
[612] ibid.
[613] ibid.
[614]Gordon Woodman, 'Legal Pluralism and the Search for Justice', (1996) 40 Journal of African Law 2, 152-159.
[615] Barry (n 596).

moving of a rule or system of law from one country to another".[616]This transplantation process occurs as a result of a legal reform or throughout legislative procedure.[617] The reason is for the law to function as a tool, in order to comply with the policies that it might be needed for economic growth, [618] the objective behind developing countries are passing transplant laws, legal models which are recognised internationally, is because to have the advantage of benefiting their own legal structure, by utilising laws that are made by developed countries. The reasons are because of modernising and improve their legal infrastructure, and to introduce economic policies for their countries which are compatible with the developed countries.

There are two purposes for the concept of legal transplantation is adopted in legal reforms. The first purpose is that there are some legal models where it establishes efficiency in the legal sector, and the economic field by the state that has provided it.[619] The second purpose is that the legal reforms by developing countries are necessary to facilitate the improvement of their legal models.[620]

Watson has commented on the philosophy of legal transplantation that as "*mirror theories of law*".[621]The law was expressed in the theory that, it is not imaged to be as an implemented legislation, but rather it is modelled to mirror the society.[622] It was convinced by Watson that a linkage between law and its society may not be essential.[623]Thus, there was a debate by Watson that the legal transplantation has provided a law, usually, which may not be have been

[616] Alan Watson, Legal Transplants: An Approach to Comparative Law (Scottish Academic Press 1974) 21.
[617] Loukas Mistelis, 'Regulatory Aspects: Globalisation, Harmonisation, Legal Transplants, and Law Reform – Some Fundamental Observations (2000) 34 International Lawyer 1055 referring to Eric Stein, 'Uses, Misuses and Non-uses of Comparative Law', (1977) 72 NW.U.L.Rev 198, 202.
[618] Joseph Norton, 'Financial Sector Law Reform in Emerging Economies' [2000] BIICL 129.
[619] ibid 130.
[620]ibid.
[621] William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 Am. J. Comp.
L 489, 492.
[622] ibid. See also Lawrence Friedman, *A History of American Law* (Simon & Schuster, 1985) 12. It was stated that the law is "*not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as mirror of society. It takes nothing as historical accident, nothing as autonomous, and everything as relative and moulded by economy and society*".
[623] Alan Watson, 'Comparative Law and Legal Change' (1978) 37 Cambridge L. J. 313, 314ff.
"*There is no exact, fixed, close, complete, or necessary correlation between social, economic or political circumstances and a system of rules of private law*".

a connection within the society's system[624]. Watson has pointed out that "most changes in most systems are the result of borrowing"[625], and he also commented that "Actually, receptions and transplants come in all shaped and sizes. One might think also of an imposed reception, solicited imposition, penetration, infiltration, crypto-reception, inoculation and so on, and it would be perfectly possible to distinguish these and classify them systemically…. No point in elaborating a detailed classification of borrowing until individual instances has been examined to see what they reveal"[626].

However, there was a criticism by Kahn-Freund[627] to Watson's statement as oppose to the existence of linking between the law that is structured by a state and the society. He debated that any effort "to use a pattern of law outside the environment of its origin continues to entail the risk of rejection".[628] He also discussed that the "degrees of transferability" are established.[629] His view is that a comparison study should be taken into consideration, the legal transplantation between the developing country and for any law or rule that taken by a developed country, by examining the social and political theortical aspects of the roots of transplantation.[630]Notwithstanding the criticisms of the legal transplantation as a concept and its effectiveness on the developing countries, these occurrences could be viable to improve legal structure for developing countries. Thus, by adopting legal models where are transplanted from an achieved and successful legal structure developed countries.[631]This

[624] Alan (n 623) 315.
[625] ibid.
[626] ibid.
[627] Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 1, 11.
[628] ibid 27.
[629] ibid. He states: "*In most cases we must ask what chances there are that the new law will be adjusted to the home environment and what are the risks that it will be rejected. The chance and inversely, the risk, may be smaller or larger, and the magnitude of this chance and of this risk determine the point on the scale at which we have to place the foreign law*".
[630] ibid 11-13. See also Loukas (n 617) 1066.
[631] See Joseph (n 618) 130 where it is stated that: "*In terms of the legal content of the economic reform dimension of the transition to a market economy, the role of law should be seen, on the one hand, as a means or instrument for implementing effective and efficient policies*". See also Patti Ofosu-Amaah, 'Reforming Business-Related Laws to Promote Private Sector Development: The World Bank Experience in Africa' [2000] The International Bank For Reconstruction and Development 18-19 and Ann Seidmanet Al., State and Law in The Development Process: Problem-Solving And Institutional change in the Third World (St. Martins Press 1994) 44, where it was stated that: "*Turkey copied French law; Ethiopia copied Swiss law, the French-speaking African colonies, French law, Indonesia, Dutch law. Universally, these laws failed to induce behaviour in their new habitats anything like [that] in their birth places. Inevitably, people chose how to behave, not only in response to law, but also to social, economic, political, physical, and subjective factors arising in their own countries from custom, geography, history, technology, and other, non-legal circumstances*".

would implicate a viable legal transplantation by the developed country, instructions, modification within a strength procedure.[632]

It could be argued that legal plurality in the legal structure may occur as the result of lacking education, by applying and merge the transplantation law from a developed country to the legal structure of the developing state. Moreover, Hooker has pointed out and supports that one of the reasons behind the theory of state legal pluralism is failure to reconcile the laws that has been transplanted from the developed countries to the developing country.[633]

The procedure was illustrated by Hooker as follows:
"multiple obligation arises in those states which have voluntarily adopted western laws with the motive of modernising themselves…. A *legal plurality* arises here quite simply because the original is by no means displaced in whole or in part by the introduced law. There are number of reasons for this and they commonly include the non-communication or maladministration of the new law… The result is a conflict of principle which is settled in a number of different ways or, more often than not, left unsolved".[634]

Hooker has indicated a viable statement that is incompliance between the already established laws with transplanted laws, could occur by the maladministration or non-communication of the new law. This is the case where the incompliance laws would remain uncertain if state legal pluralism would not be solved. Laws are leading to inconsistency in one single state structure would have an effect as an outcome of lack on the system. To resolve such lacking within the legal structure, the developing state which have transferred some of the law from the developed state, must maintain the 'communication' and 'administration' in order to accomplish methods which prevent any inconsistency laws within the system, by ensuring the new law be implemented smoothly.

[632] See Joseph (n 618). He further pointed out that the comparative methodology should be considered carefully by the developing countries. He also stated that both external and internal of the methodology are essential to be highlighted for the purpose of study. This can be submitted with internal economic, political and legal aspects within the "*internal influences*".
[633] Barry (n 596).
[634] ibid 3.

Another solution that could add a contribution to the legal structure of the developing country is utilising legal models of the developed states, to provide an absolute new framework of law, and also to avoid any conflict of laws between the previous, existing law and the new legal framework. For instance, DIFC[635] has been recognised as an independent body with its own legal structures and laws, it is described as a "free zone", and as a result its laws implemented in a sense to benefit the international financial accomplishments[636]. However, it should be clarified that the laws of DIFC is separated from United Arab of Emirates laws and its legal body.

Moreover, by providing new law, Hooker has highlighted that it would 'by no means displaced in whole or in part' the existing law in which legal plurality established. Also legal plurality could be recognised where the delivered new law with a legal structure, however, it is functioned independently as "free zone" within the system. Logically, the remained legal system would not be concerning "displace in whole or in part".

6.3 THE DUALITY IN SAUDI ARABIA

The "duality" or "dualism" of a legal system reflects a conceptual division of modes of governance significantly, "into two opposed or contrasted aspects".[637] This may consequently, indicate to the presence of having a dual judiciary or two-court systems.

Vogel described the duality in the Saudi Arabian legal system as follows:

"*In most Islamic states other than Saudi Arabia, the legal system is bifurcated: one part is based on man-made, positive (wadi) law; the other part on Islamic law. The first part usually exists in the form of comprehensive codes similar to those of the European civil law systems, and the second in the form of Islamic law, usually codified as well. The positive legal system provides the basic or residual law, while the Islamic law is exceptional, supplementary and relatively narrow in scope. There is a similar bifurcation in the institutions that apply the law, for example, between positive law*

[635] Dubai International Financial Centre.
[636] See generally Michael Blair et. al., 'Legal Issues Arising in the New Dubai International Financial Centre' (2005) 20 J.I.B.L.R 207.
[637] Judy Pearsall, *The Concise Oxford Dictionary* (OUP 1999) 440.

tribunals and religious law courts. Saudi Arabia also has a dual legal system, but the relative roles of the two sides are reversed. The Islamic component of the legal system is fundamental and dominant. The positive law, on the other hand, is subordinate, constitutionally and in scope".

The occurrence of duality or 'legal pluralism' within a legal system has been clarified by Hooker[638]. He has pointed out that states borrow certain law from another and apply it, could result the theory of duality.[639]Therefore, the occurrence of duality clearly for the reason that "the original [law] is by no means displaced in whole or in part by the introduced law"[640]

To conclude this point, market-economy is a target that developing countries are aiming for to meet its needs and keen to improve their legal system as in the case of Saudi Arabia, where specific laws tend to be implemented by developed countries, which are obtained by Saudi Arabia. Such consequence would provide the theory of duality within the legal system, if it has not been combined with the existing law and no conflicting laws has been created. This further would lead the *Sharia* law and other laws that are passed through developed countries, which produces duality within the structure of the country.

The position of the Middle East has been clarified by Nabil expressing his views as the following "The Egyptian and Arab cases have had many…legal dualities and shortcomings historically, and still have. We dare not say pluralism lest it may imply a legal coexistence and peace among legal systems which are philosophically, referentially and functionally contradictory in so far as effectiveness and applicability to legal relations are concerned, not to mention their applicability to the contradictory legal centres in society. There is a duality within the official legal system itself between secular, western references and purely religious references".[641]

[638] The term 'duality' is utilised in this chapter to highlight the existence of two laws/legal regime within the same legal system.
[639] ibid.
[640] Barry (n 596).
[641] Nabil Abd Al-Fattah, 'The Anarchy of Egyptian Legal System: Wearing Away the Legal and Political Modernity' in Baudoin Dupret, Maurits Berger and Laila al-Zwaini (eds), Legal Pluralism in the Arab World (Kluwer Law International, 1999).

Moreover, the duality has been notified as it has been stated above within "official legal system". Duality could be described as an alternative concept to state legal pluralism[642].

Duality, for the purpose of this study, is created when certain laws which are borrowed from another state are voluntarily adopted, without the original law getting displaced in whole or in part by the introduced law. The dualistic nature of the legal system is reflected by the existence of Sharia law as well as other modern (foreign) laws.

From the foregoing, the presence of a duality within a legal system can amount to complexities, since two distinct laws can be applicable to a particular legal issue. This will undeniably, cause legal radicalism within the judiciary when litigants will plead the law which is more convenient to their claims. It becomes pertinent that a detailed historical description of the advent of this dualism to be discussed.

6.3.1 Historical Background:

The Kingdom of Saudi Arabia in its current form, began with its foundation in 1932 by Abdulaziz Al-Saud.[643] Declaring himself King, he unified the five main regions under one kingdom namely: Najd, Al-Hasa, the Hijaz (the western region), Asir, and the Northern region. Prior to the annexation of the Western region in 1932, the Western region used to be under the control of the Ottoman Empire. Thus, the Western region had the influence of the Ottoman law.[644]

The Ottoman Empire applied the Islamic law originally for a long time, and later introduced *the Tanzimat.*[645] *The Tanzimat* which means 'ordering' or 'to put things in order'[646] was introduced to act as a supplement to the Ottoman Empire and not as a replacement. The Ottomans introduced laws that were copied from Europe, and in particular France. The reforms in the Ottoman

[642] ibid. Nabil utilises in the above statement the concept of duality rather than pluralism illustrating that, such pluralism might indicate consistency within legal systems. However, the author's deliberations of "legal pluralism" did not stated the term 'pluralism' but rather indicates consistency and smooth mechanism within the system.
[643] Morderchai Abir, *Saudi Arabia: Government, Society and the Gulf Crisis* (Routledge 2001).
[644] See Justin McCarthy, *The Ottoman Peoples and the End of Empire* (Arnolds Publishers 2001) 83.
[645] ibid 16.
[646] ibid.

Empire caused state legal pluralism. New courts were also established to apply the newly adopted laws, leading to a duality in the judicial organisation. The result was that the Ottomans had a two court system namely: the "*Tanzimat* Courts" to apply the new *Tanzimat* and the "Islamic *Sharia* Courts" to apply Islamic law.

The adoption of Western laws along with the application of Islamic law in the Ottoman Empire had, arguably, laid the foundation of the duality of the legal and judicial systems in all the territories falling under its control i.e., the Western region or the Hijaz of Saudi Arabia. Upon the unification of the region with the other regions in the kingdom, the King stated that the Ottoman laws would still apply in the Western region.[647] This duality which did not exist in the Saudi Arabian legal system prior to the inclusion of the Western region, had been passed to the Saudi Arabian legal system and the rest of the kingdom.[648]

It is a plausible argument that there are historical reasons for the existing duality in the Saudi Arabian legal system. However, upon the discovery of oil, the need arose to enact new laws to accommodate the economic changes. Many laws were passed, especially in relation to the commercial sector. So, duality in the Saudi Arabian legal system cannot be seen only as an annexation of the legal system of the western region. There are also other very important reasons, which will be discussed further in the chapter.

6.3.2 Analysis of the Saudi Dual Legal System:

Today, when taking a general view over the Saudi legal system, one can clearly and very much easily, observe its legal duality.[649] As a developing country, the government is undertaking various legal reforms in order to facilitate the adoption of new economic policies and move towards a market economic policy. In order to achieve its economic goals, the important role

[647] Ronald Wilson, 'Modern Ottoman Law' (1907) 8 Journal of Comparative Legislation and International Law 1, 41.
[648] Muhammed Abdul Jawad, *The Legislative Development in the Kingdom of Saudi Arabia* (Munshat Almaref 1977) 66.
[649] Amr Daoud Marar, 'The Duality of the Saudi Legal System and its Implications on Securitisations' (2006) 20 Arab Law Quarterly 389.

of the law cannot be overlooked. Economic policies would prove fruitless if they operate in a legal vacuum, or within a legal system that either does not accommodate economic changes or is inconsistent with their application. To meet development needs and to accommodate newly adopted economic policies, legal reforms are important. This legal framework thereby results in duality.

This in turn, has led to the duality of the Saudi judicial system where Islamic *Sharia* courts have paramount[650] general jurisdiction on the one hand, and other specialised, western-based commercial dispute resolution systems on the other hand, to function under the umbrella of the Islamic law.[651] For instance, alternate dispute resolution mechanisms such as arbitration is widely employed in insurance disputes today as opposed to litigation because it is usually quicker, cheaper and more predictable than litigation. On the basis of the above statement that has been described by Vogel on duality within the Saudi legal system[652] , shows the existence of duality.

There is no doubt that the paramount legal system in Saudi Arabia is the Islamic *Sharia* law. It is even considered by most Saudis as their indigenous law.[653] Furthermore, there are many contradictions between the ideologies of the Islamic *Sharia* law and the Western-based financial system. One of the most important differences is that the Islamic law does not recognise the trade of money as a subject matter of trade.[654] Islam supports an "asset-backed" form of financing.[655] The second issue is the Islamic prohibition of interest (as a form of *riba*). Thus the implications of the prohibition of interest (*riba)* are unambiguous on the Saudi financial system. Considering Article 2 of the Saudi Arabian Monetary Agency (SAMA) Charter, this states that: "the Saudi Arabian Monetary Agency shall not pay or receive interest but shall only charge certain fees on services rendered to the public or the Government in

[650] Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia (*Namara Publications 2000) 2.
[651] *Shari'a,* sometimes referred to as *Shari'ah,* is an Arabic word which means the path to be followed and literally means the way to a watering place. See Abdur Rahman Doi, *Shari'ah: The Islamic Law* (Ta Ha Publishers 1987).
[652] Frank (n 650).
[653] Ibid.
[654] Muhammed Usmani, *An Introduction to Islamic Finance (*Kluwer Law International 2002) xiv.
[655] ibid.

order to cover the Agency's expenses."[656] Article 6(a) of the Charter states that SAMA shall not act: "in any manner that conflicts with the teachings of the Islamic law. The Agency shall not charge any interest of its receipts and payments."[657]

The existence of the inconsistencies between the principles of Saudi Islamic law and the Western-based financial system has led the government to take certain measures as an attempt, at increasing the efficiency of the Saudi legal system in order to improve the economic development. Notwithstanding this, it appears that Saudi legal system still requires a more effective way of handling the existing dual system. As would be explained subsequently, compulsory arbitration seems like the most likely solution to the existing duality.

6.4 THE DUALITY IN RELATION TO THE INSURANCE SECTOR

The insurance sector in Saudi does not offer financing. Instead, they offer traditional insurance services. The insurance sector in Saudi Arabia can be divided into two namely: (1) The General Organisation for Social Insurance[658] and the pension fund, which are collectively owned by the state and are responsible for providing pension to the Saudi workforce. (2) The rest of the insurance market, which is made up of privately owned companies.

In the past, insurance transactions were viewed to be against the Saudi Islamic law. Hence, no insurance company could obtain commercial regulation to carry on an insurance business in the Kingdom. To circumvent these legal obstacles, insurance companies register within a neighboring G.C.C state and run a branch in Saudi Arabia. This duality was clear, as conventional insurance companies were trying to function in an Islamic system that did not recognise them. This even resulted to varying insurance disputes. Seeing as insurance was viewed to be against *Sharia* law, the Islamic *Sharia* courts were not prepared to sit on any matter relating to the insurance business.

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[656] Charter of the Saudi Arabian Monetary Agency (issued by Royal Decree No 23 dated 23-5-1377), art 2.
[657] ibid art 6(a).
[658] See generally <http://www/gosi.co.sa/> accessed on 2 April 2016.

The insurance sector in Saudi Arabia was unregulated until the enactment of the 'Law on Supervision of Cooperative Insurance Companies' (LSCIC) in 2003.[659] The (LSCIC) is the legal recognition of the insurance sector by the government. The (LSCIC) called for the islamicisation of the insurance sector, with the intent to make sure all insurance practices are in compliance with the Islamic *Sharia*. The LSCIC states that:

> Insurance in the Kingdom shall be undertaken through registered insurance companies operating in a cooperative manner as is provided within the article establishment of the National Company for Cooperative Insurance promulgated by the Royal Decree M/5…and in agreement with the principles of Islamic *Sharia.*[660]

The implications of the LSCIC on the current practices of the Saudi insurance sector are unclouded. All the existing conventional (i.e. non-Islamic) insurance companies are expected to shift their working techniques to comply with the values of the Islamic *Sharia.* The main objectives of the law is to protect the rights of insured parties and investors, to encourage a fair and healthy environment for competition, to provide better insurance service with competitive prices and coverage, and to develop the insurance market and strengthen the stability of the insurance sector in Saudi Arabia.[661] The LSCIC has also provided that a committee or more should be established in order to hear disputes between insurance companies and their clients. The committee will also hear cases resulting from violations of the regulatory and supervisory instructions allotted to the insurance and reinsurance companies.[662]

The duality exists as a result of the running of conventional insurance companies within an Islamic law body. Nevertheless, since the LSCIC has stated that the insurance practices should conform to the principles of Islamic *Sharia*, it would mean that the LSCIC is in line with entire Islamic *Sharia* legal system of Saudi Arabia. Does this however mean that the duality has been abolished? It may be rash to imply so, as insurance companies along

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[659] Cooperative Insurance Companies Control Law (issued by Royal Decree No. M/32 2 Jumada II1424 – 31 July 2003) available at <http://www.sama.gov.sa> accessed on 2 April, 2016.
[660] ibid art 1.
[661] Implementing Rules (for the Cooperative Insurance Companies Control Law), art 2.
[662] Ibid.

with their financial investors are responsible for most of the trading in the financial markets. Insurance companies are the most important type of institutional investors.[663] In establishing a developed financial system, insurance companies should be able to invest in the financial market.[664] By having an Islamic insurance system conforming to the Islamic *Sharia* principles along with the conventional capital market, the Islamic insurance sector might have difficulty investing in the capital market. Hence, this is another form, of duality created within the financial system: "a system *parallel to* a system."[665] Also, the LSCIC provides that the conventional insurance companies conform to the Islamic *Sharia* principles but then provides for a committee to resolve their disputes with their clients, and not referring them to the traditional *Sharia* courts.

The existence of the duality in the financial system in Saudi Arabia is strong. It can be argued that if the government recognised the existence of the duality, the financial system would function in a more effective manner. It would become more predictable, and will essentially, promote certainty and security within the system. There are two possible solutions to this duality. They are: Firstly, the government may consider the advisability of developing an Islamic financial system which should operate as a compromise between the two contradictory systems. It should clearly stipulate answers to unanswered questions posed by the existing systems. It should also represent the statute which clarifies any contradictions or ambiguities or unnecessary implications of law derived from the existing systems. Secondly, this new system should also, stipulate a definite means of resolving disputes rather than litigation, in order to materially prevent and avoid multiplicity of suits within the courts. The most effective form of dispute resolution will be arbitration, which is made compulsory on all parties to an insurance contract.

6.5 INSURANCE IN ISLAMIC THEORY

Insurance plays a critical role in emerging economies in particular and in the world's economy generally. Stemming from the importance of insurance to

[663] Such as pension and investments funds.
[664] Marc Levinson, *Guide to Financial Markets* (Profile Books Ltd 1999) 8.
[665] Amr Daoud Marar, 'Saudi Arabia: The Duality of the Legal System and the Challenge of Adapting Law to Market Economics' (2004) 19 Arab Law Quarterly 100, 122.

economic development, the validity of conventional insurance vis-à-vis the tenets of *Sharia* became a major topic in Islamic Jurisprudence. Ibn Abdin[666] expressed his views on insurance within the Islamic concept particularly in regard to marine insurance (as it was the only known insurance in the Middle East). He concluded that there are contradictions between *Sharia* law and marine insurance and *Sharia* law would assume a marine insurance contract to be an invalid contract due its inherent uncertainty[667].

In western economies, the primary aim for the floatation of an insurance business is to make profit. This is the basic principle of capitalism. *Sharia* law, however, frowns at profit making at the expense of another. *Sharia* prohibits commercial insurance on the ground that commercial insurance contains the following prohibited elements: *riba, gharar* and *maisir.*

6.5.1 ***Riba*** **(Usury),** ***Gharar*** **(Risk) and** ***Maisir*** **(Gambling):**

These elements have been stated to be embedded within commercial insurance contracts, hence the prohibition of commercial insurance by *Sharia* law. It should, however, be noted that the prohibition of commercial insurance does not apply to the goals and objectives of insurance but the way insurance contracts are formulated.[668]

Riba literally translates to "accretion".[669] Qur'an made clear the prohibition of interest payment in connection with debts. That is, the lending of money for profit. Prophet Mohammed also outlined the prohibition of the 'usury' in relation to sale as well as debts. Sale usury was further categorised into two types by Muslim jurists[670]. The first category is the increase usury, which occurs where a 'trade-by-batter' (i.e. exchange) transaction is concluded with

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[666] He was a famous jurist in his time during the period (1800). See Allamah Sayyid Muhammad Amin ibn Abidin ash-Shami, *Rad Al-Muhtarala Al-dar Al-mukhtar* (repr.1960).
[667] Aly Khorshid, *Islamic Insurance: A Modern Approach to Islamic Banking* (Routledge-Curzon 2004) and Mahfuz Ahmed, 'A Research to Develop English Insurance Law to Accommodate Islamic Principles' (DPhil thesis, University of Manchester 2012) <https://www.escholar.manchester.ac.uk/api/datastream?publication> accessed on 15 December 2014.
[668]Renat Bekkin, 'Islamic Insurance: national features and legal regulation' (2007) 21 Arab Law Quarterly 1, 3.
[669] < http://www.financialencyclopedia.net/islamic-finance/tutorials/meaning-of-riba.html > accessed on 15 December 2014.
[670] Al-Khadri, *Tarkih al-tahiaa al-islami* (Dar al-Kitab 1958).

one item being superior to the other. The second category is delay payment usury. This occurs where two items are expected to be received contemporaneously but one arrives at a later date. The result would be delay payment usury. Scholars thus regard usury as an "*unjustifiable increase in capital for which no compensation is given*".[671]

Gharar is any uncertainty or ambiguity created by the lack of information or control in a contract.[672] This element concludes that a contract based on a risk is ambiguous. It also states that a contract that does not specifically delineate the duties of the parties is unjustifiable. *Sharia* law makes it obligatory for parties to precisely and clearly state the terms of their contract. *Gharar* is said to be present in insurance contracts because one of the parties may get all the profit, while the other party runs the risk of losing everything.[673]

Maisir known as gambling has been described as a "*man's natural play instinct with his desire to know about his fate and his future*" and also includes betting and wagering.[674] Professor R Qaiser defined it as "*any form of business in which monetary gains come from mere chance, speculation and conjuncture and not from work or real business*".[675] Profits from insurance business are seen as dependent on chance.[676]

6.5.2 The Views of Jurists towards Insurance:

There are arguments and counter-arguments amongst Islamic scholars on the applicability and validity of commercial insurance contracts in Muslim countries. The majority of scholars maintain that *Sharia* prohibits any form of commercial insurance. Some scholars, however, concluded that cooperative insurance is permitted as an alternative to commercial insurance. These diverse views are evident in the resolution of the Islamic *Fiqh* Academy in Resolution No.9 (9/2) on insurance and reinsurance. The Islamic *Fiqh* Academy resolved that: "*commercial insurance contract with a fixed periodical premium…is a contract which contains major elements of deceit,*

[671]Aly Khorshid (n 667).
[672]Zamir Iqbal and Abbas Mirakhor, *An Introduction to Islamic Finance: Theory and Practice* (John Wiley & Sons (Asia) Pte Ltd. 2007).
[673] Renat (n 668) 21.
[674]Franz Rosenthal, *Gambling in Islam* (Brill 1975) in Mahfuz (n 667).
[675] Mahfuz (n 667) 53.
[676] Renat (n 668) 26.

which void the contract and, therefore is prohibited (haram) according to Sharia" and "*the alternative contract, which conforms, to the principles of Islamic dealings is the contract of cooperative insurance, which is founded on the basis of charity and cooperation*."[677]

More recently, scholars have advocated an insurance system that complies with the tenets of *Sharia* as an alternative to the western insurance system. This system is known as the *takaful.*[678]Commenting on this, Yusuf al-Qaradawi stated as follows: "*Our observation that the modern form of insurance companies and their current practices are objectionable islamically does not mean that Islam is against the concept of insurance itself; not in the least – it only opposes the means and methods. If other insurance practices are employed which do not conflict with Islamic forms of business transactions, Islam will welcome them*."[679]

6.5.3 Islamic Insurance:

The prohibition of commercial insurance by *Sharia* necessitated the development of an insurance system that is *Sharia* compliant. This *Sharia* compliant insurance is called the "*Takaful"* whilst reinsurance is called *"Retakaful".* The word *Takaful* originated from the Arabic word *Kafalah*, translated to as "guaranteeing each other" or "joint guarantee".[680] *Takaful* is said to have developed within ancient Arab tribes through *diyah* (blood money) and *zakah* (obligatory charity tax). *Diyah* is the payment of compensation by offenders or their relations to victims or their heirs.[681] *Zakah* is a tax system created for the benefit of needy members of the *Ummah* (Muslim community). The *Takaful* was approved in 1985 by the Grand Counsel of Islamic scholars in Makkah, Saudi Arabia, Majma al-Fiqh.[682]

Takaful is seen as cooperative insurance requiring members to contribute into a fund to be used to support one another for the common good by upholding

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[677]Resolutions and Recommendations of the Council of the Islamic Fiqh Academy 1998 – 2000, <www.irtipms.org> accessed on 16 December 2014.
[678] Renat (n 668) 19.
[679]Sheikh Yusuf al-Qaradawi, *The Lawful and the Prohibited in Islam* (Al-Falah Foundation 1960) <http://thequranblog.files.wordpress.com/2010/06/the-lawful-and-the-prohibited-in-islam.pdf> accessed on 16 December 2014.
[680]<http://www.islamic-banking.com/takaful_insurance.aspx > accessed on 18 December 2014
[681] Renat (n 668) 11.
[682] Mohammad Ajmal Bhatty, 'Takaful Industry: Global Profile and Trends' [2001] <http://www.islamic-banking.com/tarticle_1.aspx> accessed on 18 December 2014.

the principle of *"bear ye one another's burden"*.[683] Muslim scholars have approved the *Takaful* system as being *Sharia* complaint. A Muslim scholar stated as follows: "*Cooperation and solidarity to restore the results of risks and compensate people for damages they incurred is an act compatible with the aims of Sharia… The practical formula which Islam legitimised for cooperation, solidarity, and sacrifice is donation contracts, whereby both the one who cooperates and the one who sacrifices do not seek profit from their cooperation and solidarity nor do they ask for financial compensation for what they have offered.'*[684]

6.5.4 INSURANCE IN SAUDI ARABIA

The awareness of commercial insurance in Saudi Arabia was prohibited in the eyes of Islamic scholars. Judges in courts refused and avoided handling insurance cases due to their beliefs that it is against the principles of *Sharia* law, especially subrogation claims[685]. In light of the necessity of the insurance sector and as an alternative to conventional insurance, the Saudi Council of Senior Ulema and the Islamic Jurisprudence Centre approved the concept of "The Cooperative Insurance Concept". In 1986, the National Company for Cooperative Insurance was also established by Royal Decree[686] as a Saudi Joint Stock Company with its purpose being "*to transact co-operative insurance operations and related activities…provided that such activities were in conformity with Islamic Sharia…".*[687] The first Saudi Arabian law regulating insurance was issued in 2003 as the Cooperative Insurance Companies Control Law, Royal Decree No. M/32. The decree came into force

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[683] Deena M Barakah, DDS and Shakir Ahmed Alsaleh, PhD, 'The Cooperative Insurance in Saudi Arabia: A Nucleus to health Reform Policy' (2011) 21 International Conference on Information and Finance 6.

[684] Dr. Hussine Hamed Hassan, 'Islamic Shari'a Judgment on Insurance Contracts' in Dr. Ahmed Salem Mulhim and Ahmed Mohammed Sabbagh, *The Islamic Insurance: Theory and Practice* <http://www.albaraka.com/media/pdf/Research-Studies/Book-Islamic-Insurance.pdf> accessed on 18 December 2014.

[685] Subrogation implies the right of the insurer to take the position of the insured in order to take benefit of the rights and remedies that the insured may have against the party that caused the damage to the insured. In the case of Castellain v Preston [1883] 11 Q. BD. 380 CA, the court described the underlying principles of subrogation as follows: "*As between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or remedy for whether capable of being insisted on or already insisted on or in any other right, whether by way of condition or otherwise, legal or equitable and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured can be or has been diminished.*

[686] Royal Decree No. (M/5) of 17.4.1405H (establishing the Company for Cooperative Insurance (Tawuniya)).

[687] Ahmed A. Al-Ghadyan, 'Insurance: The Islamic Perspective and Its Development in Saudi Arabia' (1999) 14 Arab Law Quarterly 336

on 20 November 2003 and became effective with the publication of its Implementing Rules on 23April 2004.[688]

As with its legal system, Saudi Arabia's insurance industry is also based on duality. The insurance industry is operated in line with the tenets of *Sharia* on the one hand and issued decrees and resolutions similar to insurance practices in western countries provided that such practices are not prohibited by Islam. The impact this duality has on the Saudi insurance industry will be examined in this thesis. Specifically, it is argued that due to the predominance of *Sharia* law in Saudi Arabia, courts and dispute resolution committees are unlikely to enforce marine insurance claims which are perceived to be contrary to the principles of *Sharia*. Hence, the author's argument that compulsory arbitration is the effective tool for settling disputed marine insurance claims *Sharia* in light of the Saudi Arbitration Law of 2012 and the establishment of the Saudi Centre for Commercial Arbitration.

6.5.5 The Elements of Islamic Insurance:

There are some essential elements of Islamic insurance which must be in place for a product to be considered to be *takaful*. These will be discussed below.[689]

6.5.5.1 *Sharia Compliance*

This constitutes the most important requirement. For such product to be regarded as *takaful*, it must comply with the tenets of *Sharia*. All investment conditions must be approved by a *Sharia* council, both conceptually, as well as the various practical aspects of implementation. A transaction of lending and borrowing money is not valid because it is tantamount to *riba*. Similarly, a transaction between parties agreeing to sell or purchase an asset of which specification or existence is uncertain, is prohibited. Identification of the subject matter is necessary to avoid uncertainty or *gharar*.

[688] <http://www.saudilegal.com/saudilaw/14_law.html> accessed on 22 December 2014.
[689] Dr Moud Daud Bakar, *Takaful Islamic Insurance* 34-42.

6.5.5.2 ***Mutual Guarantee***

The objective here is to pay a defined loss from a defined fund; the loss is covered by a fund created by the policyholders. Liability is spread amongst the policyholders and all losses divided between them. In effect, the policyholders are both the insurers and the insured.

6.5.5.3 ***The Risk Sharing Basis vis-à-vis Risk Transfer Basis***

As Islam would not allow any form of risk transfer in return for a premium, Islamic insurance has resorted to a form of mutual guarantee. Here, risk must be assumed by the insurer, who will partially or fully, bear the financial loss of the policyholder in return for a premium. This is the core objective of insurance. As Islam does not allow, i.e. the transfer of risk for a fee, risk sharing has been advocated instead. The idea of risk distribution amongst a group of people who have agreed to "absorb" parts of the risk of the group, finds no objection. The practice also endorses classifications of risk, whereby risk is differently accessed in order to know the level of risk involved, as the contribution must suit the profile of the risk been distributed.[690]

6.5.5.4 ***The Ownership of the Takaful Fund***

The *takaful* fund is a separate fund and it does not belong any of its operators or its shareholders. The participants, who have made donations or contributions to the fund, have ownership of the risk fund and apply it to settle claims of participants. They do not have any individual rights to the fund. In the event of absence of any claim, the participants, as owners of the fund, may consent to retaining the totality of the fund as a form of investment for future claims.[691]

6.5.6 <u>Commercial Insurance and Islamic Insurance Compared:</u>

The *takaful* concept is fundamentally different from the conventional form of insurance notwithstanding the existence of certain similarities. Commercial insurance is a contractual relationship between two parties whereby one party

[690] ibid 48-49, 88.
[691] ibid 43.

(the policyholder) pays a fixed sum (*i.e.* the premium) to the other party (the insurer) in return for the insurer taking full or partial responsibility for possible financial losses incurred by the policyholder. The policyholder (insured) will benefit from the protection of the insurer and the insurer in return will benefits from the premium paid. The insurance contract is a pure commercial contract. *Takaful* on the other hand does not have the element of commerciality.[692] It is a contract based on a mutual guarantee. In fact, the operator is not seen as an 'insurer' (as understood in conventional insurance), but as one who manages the operations of the *takaful* fund.

Takaful is different from commercial insurance conceptually and in operation. There are various viewpoints from which they can be compared. These include:[693]

6.5.6.1 *Governance*

From the governance viewpoint, *takaful* has its roots in *Sharia* principles. These principles are necessary for an action to be approved religiously. While in commercial insurance, rules and regulations are made according to the human mind and thinking. While it can be said that it is driven by the western philosophy, there still exist conflict as regarding the source.

6.5.6.2 *Risk Sharing or Transfer*

In the commercial insurance system, premium is paid in order to transfer some of the uncertainty of the risks to the insurer. The insurer in the event of loss from the insured's peril, compensates the victim out of the pool of other premiums so gathered from large members of the insured. In *takaful*, the mutual risk is shared among participants rather than transferred. *Takakful* operations are based on the principle of mutuality, whereby each participant makes a donation to a fund and in the event of its loss, the participant will receive the amount of his claims.[694]

[692] ibid 31.
[693] Aly Khorshid (n 667) 155.
[694] ibid 37.

6.5.6.3 *Shared Responsibility*

Takaful, the Islamic alternative to commercial insurance, is based on the idea of cooperation and joint indemnification of the losses of members. It is an agreement of a group of people to jointly share responsibility of a loss or damage that may inflict upon any of them, out of the fund they donate collectively but within the commercial set up, loss is indemnified by the insurance company according to the terms and condition of the policy.

6.5.6.4 *Coverage against Loss or Chance of Loss*

Commercial insurance covers against chance of loss i.e., risk, and not against the actual loss itself. The rationale is quite technical. It is an arrangement against risk, rather than the existence of an actual damage. *Takaful* is based upon the loss theory where its essence lies in the distribution of actual losses as the essential element of insurance. It provides for the compensation of the actual loss of its participants.

6.5.6.5 *Ownership*

Takaful fund is managed by an operator, but the ownership is vested in the participants.[695] They have a complete right of contribution and benefits. The operator is like the trustee of the fund. While in commercial insurance, the policyholder purchases the policy and creates form of buyer-seller relationship.

6.5.6.6 *Monitoring Committee*

In *takaful* companies, their products are subject to the supervision of *Sharia* board. It is to be formed by the operators and their role is to review the operations, supervise its development of *Sharia* investment products, compliance of these products and investments. In Commercial insurance, the *Sharia* principle in its entirety does not apply.

[695] ibid 38.

6.5.6.7 *Unlawful Elements*

Different elements which are against the *Sharia* principle for *takaful* are involved in commercial insurance. Elements like *riba*[696] (interest) and *gharar* (uncertainty) are prohibited by *Sharia,* (and consequently, takaful), but are however, at the centre of commercial insurance. For example, in non-life insurance policies, if a policyholder does not make a claim, his insurance company keeps the whole amount. If the policyholder cancels the policy, he also loses the entire premium which has been deposited. Likewise if the insurance company stops running, the policyholders will be refunded proportionally.

6.5.6.8 *Operation*

Takaful system operates in such a way that participants make their contributions[697] to the company, who then, divides the contributions into two parts i.e. *tabarru (*which is the donation for meeting mortality liability and losses of the fellow participants) and another part, which is used for investments. The returns of the investment according to the *mudaraba* principle are distributed between the participants and the *takaful* operators.[698] Conversely, commercial insurance operates in such a way that the premium is paid by the policy holders to the insurance company and the amount is invested by the insurance company. The amount of interest and profit, as well as the surplus, is received and retained by the insurance company.

6.5.6.9 *Forfeiture*

In a commercial insurance contract, there is a clause that provides that the insurer can forfeit the amount that is paid by the policyholders under certain circumstances. Islam does not allow the forfeiture of premium wholly or partly. The amount of premium paid as contribution is considered a loan from

[696] ibid 31.
[697] Moud (n 689) 35.
[698] ibid.

one participant to another. If there is a surplus, it is to be shared evenly amongst the participants.

Finally, *takaful* insurance is taken very seriously in Saudi, as it is not just considered as a financial instrument, but also carry religious considerations. The commercial insurance on the other hand, has no religious significance.

6.6 DEVELOPMENT OF MARINE INSURANCE IN SAUDI ARABIA

Marine insurance is an 'early second century form' of Islamic insurance. In 1980, a ship was going from Europe to Jeddah, when the owners realised there were two bills of lading in motion for the cargo on board, they became concerned on what could happen in Saudi Arabia if the different parties got a hold of the other bills of lading for the same consignments. Their London solicitor advised them that the position under Islamic law for the delivery of goods to the wrongful owner could amount to conversion[699]. Consequently, since under Islamic law, *Sharia* judges have a wide range of discretion in deciding disputes and in dealing with wrongdoers, a proper understanding of the law will enable them to decipher the extent of their liabilities. However in practice, when it comes to marine dispute, *Sharia* courts, mostly would not decide on them. They would be referred to specialised committees.

The point of this story is to highlight the essence of understanding Saudi shipping law, one has to do more than just referencing Islamic texts. It has to be combined along with statutes and regulations, direct knowledge of the practices of the courts. Although, combining and understanding them is not always easy and may in some cases be impossible. It is the best means of proffering definitive answers.

6.6.1 Analysis of the Saudi Arabian Marine Insurance Legal Regime (The Commercial Court Law, 1931):

One of the laws that have contributed to the existence of the duality in the Saudi legal system was the enactment of the Commercial Court Regulations

[699] Andreas and Galloway (n 24) 1.

(CCR) in 1932.[700] The CCR contained six hundred and thirty-three articles dealing with various areas including companies, bills of lading, marine insurance, and money exchangers. The CCR set up the commercial court with jurisdiction to hear commercial disputes. Thus, despite the existence of the Islamic *Sharia* courts and an Islamic law body, there were other regulations governing commercial transactions. However, in 1954 the commercial court was abolished.[701] No clear reasons were given for such decision, but one has argued that there was a pressure that commercial transactions should be heard by the original and normal courts (*i.e.*, Islamic *Sharia* courts)[702].

Thereafter, Islamic *Sharia* courts regained their jurisdiction over commercial transactions. However, at that time, *Sharia* courts were not prepared to hear such cases. Faced with such dilemma, the Ministry of Commerce established the Commercial Disputes Settlement Board (the "Commercial Board")[703]. According to the Resolution, the Commercial Board is competent to hear all commercial disputes just the like its predecessor (*i.e.*, the commercial court)[704]. Despite these measures that aimed to improve the judiciary and ensure its efficiency, in order to keep pace with the rapid improvements and development that Saudi Arabia was undergoing, there was insufficiency of substantive laws that dealt with specific areas of laws such as company law regulations. In light of this, the government passed the Company Regulations in 1965.[705] This law provided for the establishment of a new committee to deal with any disputes governed by the Company Regulations. However, in order to avoid the conflicts between the jurisdiction of the Commercial Board and the new committee established by the Company Regulations, it was agreed that one committee should be established with the competence to hear all commercial related disputes including those related to Company Regulations.

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[700] Commercial Court Regulations (issued by Royal Decree No (32) June 1931) available (in Arabic) at <http://www.commerce.gov.sa> accessed on 25 April 2016

[701] Muhammad Al-Sheikh, 'Pluralism of the Commercial Judicial Committees: Reasons, Consequences and Solutions' (1997) 21 Journal of Law, 233ff.

[702] ibid 242.

[703] ibid 243

[704] ibid.

[705] Company Regulations (issued by Royal Decree No M/6, July 1965) available (in Arabic) at <http://www.commerce.gov.sa> accessed on 25 March, 2016.

Oddly, the new committee, namely; the Commercial Disputes Settlement Committee (CDSC) had branches in three main cities in Saudi Arabia only. This meant that the settlement of commercial disputes in accordance with the CDSC laws and regulations is only possible in these three cities. Similar commercial disputes in other cities were governed by the Islamic *Sharia* and adjudicated by the Islamic *Sharia* courts. Such position was unsatisfactory and the Ministerial Council had to transfer the competence over commercial disputes to the Board of Grievances, which would be competent to hear commercial disputes in all areas of the Kingdom on temporary basis until the establishment of a new commercial court. Such court, however, has not been established yet, and the *status quo* remains that the Board of Grievances is the entity which has the jurisdiction over commercial disputes.

The Saudi Arabia Marine Insurance Legal Regime (the Commercial Court Law), enacted by Royal Decree in 1931, encodes Islamic law principles and seems to cover personal areas of insolvency rather than the corporate aspect.

6.6.2 Marine Insurance in Saudi Arabia:

Marine insurance is a centuries-old aid to the conduct of sea trade. It relieves the shipowner, buyer and seller of goods from the burdensome financial consequences of their property being lost or damaged as a result of the various risks of the high seas. Marine insurance therefore gives financial security so that the risk of an accident occurring leading to losses is not an inhibiting factor in the conduct of international trade.[706] Generally, marine insurance can be divided into commercial insurance and mutual insurance. Commercial insurance is for profit whilst mutual insurance is for the collective benefit of the members.[707] As noted previously, commercial insurance is prohibited by Islam. Mutual insurance is akin to the *takaful* and *retakaful.* It involves a group of persons or companies agreeing in advance to contribute to offset each other's losses. That is, members of the group act as insurers for themselves.[708]

[706] United Nations Conference on Trade and Development (n 21).
[707] ibid
[708] ibid

Saudi Arabia practices the mutual form of marine insurance. By the Saudi Arabian law on marine insurance as contained in the Commercial Court Law of 1931, a marine insurance contract in Saudi Arabia is required to be in writing, in the form of a policy but need not be in a particular form. The policy must contain details directly relevant to the parties and known to them. This requirement is to prevent the contract being regarded as containing an element of *gharar* (uncertainty).[709] There are different forms of marine insurance contracts and covers available. First, there is insurance against the loss of or damage to a ship called hull and machinery cover and usually contained in a time policy because it is done annually. Second, the third-party liability insurance known as collision cover. Third, insurance taken out against loss of or damage to the goods called marine cargo insurance contained in a voyage policy because it is taken out to protect the goods in transit.[710] However, it has been argued that intangibles can also be insured because Article 327(7) of the CCL provides that "*anything of value which may encounter marine hazards*" is an insurable item.[711]Notwithstanding, the CCL prohibits the insurance of freight, profit on cargoes, crew's wages and money borrowed against the ship or cargo.

On the conclusion of the contract, the insurer is obliged to indemnify the insured in respect of losses which the insured may suffer as a result of the risks covered under the policy. These losses may be; (i) general average expenditure; (ii) expenses reasonably incurred by the insured after a peril in order to avoid or minimise his loss; (iii) partial losses; (iv) actual total losses; or (v) constructive losses. In making a claim for loss suffered, the insured is required to furnish all documents proving shipment and the loss suffered. The onus is on the insured to prove his claim. The insurer may, however, refute the claim by providing counter-evidence to show that the claim is baseless.[712]

Under Saudi Arabian law, for the insured to have a claim under the insurance contract, the risks that occurred must be mentioned and covered in the policy. Articles 344 and 383 of the CCL specified the risks covered by the CCL as follows: (i) storms; (ii) sinking, stranding, wreckage, leakage or breaking up

[709] Andreas and Galloway (n 24).
[710] ibid.
[711] ibid.
[712] ibid.

of the ship; (iii) jettison; (iv) fire; (v) the consequences of a necessary deviation, change of voyage or the substitution of the carrying ship; (vi) capture or seizure as a result of war, retaliation or hostilities; (vii) arrest or seizure on governmental orders (excluding judicial arrest); (viii) blockage; (ix) capture by pirates; or (x) any other peril. It has been argued that the omnibus provision can be extended to cover modern risks that were not contemplated under the CCL.[713] There are, however, risks excluded by the CCL except the parties expressly agree to cover the risks in the policy. These risks include: (i) losses and damages arising from defaults of the insured or master and crew; (ii) losses and damages resulting from unjustifiable deviations, changes of voyages or transhipment; or (iii) inherent defects.[714]

6.6.3 Cooperative Insurance Companies Control Law 2003:

The first Saudi Arabian legislation regulating insurance was enacted by a Royal Decree as the Cooperative Insurance Companies Control Law in 2003 with its Implementing Rules in 2004. The Cooperative Insurance Companies Control Law has highlighted the principles of the legal framework and monitor the insurance industry in Saudi Arabia[715]. The most significant rule by the the Cooperative Insurance Companies Control Law is that all registered and operated Insurance Companies in Saudi Arabia, must be in compliance with sharia law and in "cooperative" way of activity within the sector[716]. It is noteworthy to mention that, generally, there are no a complete code ruling insurance contracts. The Saudi Arabian Monetary Agency (SAMA) was elected to control and monitor the insurance industry.

6.6.4 Duality in Marine Insurance Law:

One of the laws that have contributed to the existence of the duality in the Saudi legal system was the enactment of the Commercial Court Regulations (CCR) in 1931.[717] Article 324 of the Commercial Court Regulation (CCR)

[713] ibid.
[714] ibid.
[715] See <http://www,saudi-re.com/en/reinsurance-market-en/saudi-market.html> accessed on 25 April 2016.
[716] See <http://ww.saudilegal.com/saudilaw/14_law.html> accessed on 25 April 2016.
[717] Commercial Court Regulations (issued by Royal Decree No (32) June 1931) available (in Arabic) at <http://www.commerce.gov.sa > accessed 25 April 2016.

defines marine insurance law as containing an undertaking by the insured to pay the agreed insurance premium to the insurer in return for insurance indemnity against perils and loss that may be incident to a marine disaster on items that could meet a risk on a sea voyage.

The general and paramount legal system in Saudi Arabia is the Islamic *Sharia* law. As explained earlier, the main cause of duality is the introduction of other laws which are not exactly *Sharia* compliant. Some committees which were established in Saudi Arabia, to deal with commercial and financial related disputes contributed to the subsistence of the de facto duality. It is argued, however, that there is confusion among the litigants regarding the efficiency of these committees and that the decisions issued by these committees have no obligatory nature. This is why the litigants have chosen to take their cases to the Islamic *Sharia* courts. Hence, some commentators have reached the conclusion that these committees are quasi-judicial and not real judicial bodies.

However, there is a logical reason behind the existence of these committees, if only because the Islamic *Sharia* courts are not prepared to apply the positive laws such as the Capital Market Law *etc*. Nevertheless, the status quo regarding the judicial system, which is resulting from the existing duality, is unacceptable and should be resolved. A one court system is a probable solution to the duality. Moreover, within this court system there should be specialised judges who will be specialised in different areas of law such as banking and insurance. The reason for reaching such solution is that it is more in line with the Saudi society's mentality.

Flowing from this, since the status of Saudi has significantly developed from the past where no marine insurance claims (or any other concepts foreign to Sharia law) were wholly unrecognised and unenforced, to a system where such foreign concepts were in fact, recognised and were directed for settlement, to the relevant industry settlement committees, e.g. Insurance settlement Committee. The core of the dilemma is not the speciality nature of the courts but it is really the existence of two conflicting body of laws. On the one hand, we have the Islamic *Sharia* and on the other we have other laws.

To unite the judicial system and to have one Islamic *Sharia* court system means to unify the legislation which is the main reason for the duality in the Saudi judicial system. To this effect, Saudi Arabia is advised to modify its existing de facto duality into a new modified scheme whereby a conventional financial system is functioning alongside an Islamic financial system, and at the same time, a clear-cut independence should exist between these laws applying to distinct legal contemplations.

6.6.5 **Effectiveness:**

As alluded to earlier, the Sharia courts do not intervene in matters relating to marine insurance disputes. Such matters are wholly within the purview of the Insurance Settlement Committee. The prevalence of disputes within the marine insurance industry, as mentioned earlier, has contributed to a floodgate of actions instituted periodically within the Committee. These multiplicities of actions has warranted the writer's view, to advocate for the imperativeness of compulsory arbitration as a viable statutory alternative method of resolving these disputes, and in conformity with the Arbitration law 2012 of Saudi Arabia. When the parties to such a dispute are left with no say or compromise as to whether or not to institute such arbitration process, it defeats any ploys or schemes that an insurer may try to manipulate in order to evade settlement. A number of scholars[718] second this view because undeniably, compulsory arbitration will institute a functional dispute resolution system within the industry, which houses potential disputes due to the nature of its transactions. Interestingly, compulsory arbitration is utilised within the field of Foreign Investment Law in Saudi Arabia as last solution, if the parties are not satisfied with the Investment Disputes Settlement Committee discretion[719].

It appears that the new regulations, which although, constitutes an improvement from the traditional Saudi Courts and Board of Grievances

[718] Kenneth (n 575) 173.
[719]Under the Implementing Regulations for Foreign Investment (issued (in Arabic) on 01/January 2013), art 26 <http://mci.gov.sa/LawsRegulations/SystemsAndRegulations/ForeignInvestmentSystem/Pages/4-3.aspx> accessed on 10 May 2016.

system, still cannot satisfactorily repair the complexities consequent from the dualistic system within the marine insurance sector. As stated earlier, a primary feature of the new regulations afford the parties to an insurance policy contract, the autonomy to elect the form of dispute resolution they desire. This in fact, will only compound the issues prevalent within the marine insurance sector. An Islamic finance system which acts as a "bridge" between the two systems should be put in place in order to unitise the dualism. Furthermore, it is pertinent that the autonomy given to the parties in respect to alternative dispute resolution mechanisms to be utilised, be duly restricted. Where the law is clear and final on the type of resolution system to utilise, it will create a definite legal system which can be envisaged during preliminary stages of the insurance contract. It will concomitantly, promote the Saudi Insurance system as an international commodity which is secure and protected.

Ultimately, the dual system prevalent in the marine insurance industry will therefore, strive to become "congruent" due to the imposition of compulsory arbitration as "the" resolution method. This will wholly prevent the conflicts which are likely to arise from the existence of contradictory rules. In such an instance, the Sharia courts, as well as Insurance settlement committees, will have no obligation to hear such disputes as it will be resolved out of their jurisdiction.

6.6.6 The Saudi Arabian Monetary Agency:

The Saudi Arabian Monetary Agency (SAMA) is the "Central Bank" of Saudi Arabia and also acts as the main regulator of the insurance sector. The operations of SAMA are managed by a board of directors.

SAMA has been given extensive powers[720], including the licensing of insurance companies and insurance professionals, and policing and control of the Saudi insurance market. Insurers have to be licensed by SAMA to write specific classes of business, which are generally grouped as general insurance

[720] Clyde & Co, 'Insurance and reinsurance in Saudi Arabia' <http://www.clydeco.com/uploads/Files/CC007080_PLG_KSA_Brochure_ME_V4_11-03-15.pdf> accessed on 9 May 2015.

(including accident, liability, motor, property, marine, aviation, energy and engineering), health insurance, and saving and life insurance, or for two or more of these. It is additionally required of Saudi insurers to operate on a cooperative basis. All insurance and reinsurance must be issued by the SAMA and be submitted for approval as stated under article 18 of the Implementing Regulations[721].

Jones has commented that "Risks can be placed with insurance companies outside of Saudi Arabia in exceptional circumstances. For example, where coverage cannot be provided for a risk within Saudi Arabia. An insurance intermediary must obtain written approval from the Saudi Arabian Monetary Agency (SAMA) in those circumstances".[722]

Finally, the fact that marine insurance industry was neither recognised nor regulated in the past, thus causing a duality within the legal system, is the reason why the SAMA implements rules regulating the industry, to conform to the standards of the World Trade Organization (WTO) (which Saudi is signatory to since 2005), since the (WTO) monitors and regulates insurance industry of its member states globally.

6.6.7 The Committee for the Resolution of Insurance Disputes and Violations:

Insurance Disputes Committee (IDC) and Appeal Committee are specifically set out to facilitate resolving disputes in the insurance sector. For instance, disputes between Saudi insurance companies and beneficiaries, third parties administrators and intermediaries.

The Committees are described to be a quasi-judicial bodies that function and managed by SAMA. The Committees are separated bodies from the *Sharia* courts of Saudi Arabia. The process of the Committees hearings are set out

[721] See <http://ww.saudilegal.com/saudilaw/14_law.html> last accessed on 26 March 2016.
[722] Wayne Jones, Saudi Arabia: Insurance And Reinsurance In Saudi Arabia' < http://www.mondaq.com/saudiarabia/x/382590/Reinsurance/Insurance+and+reinsurance> accessed on 21 March 2016.
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by three members, represented by a legal adviser, with two members within the insurance, with the expertise of finance and accounting qualifications.

There is no indication by the legislative bodies that the use of arbitration are not permitted within arbitration disputes claims in Saudi Arabia. However, Section 21 of SAMA's regulations require disputes arising between parties within the insurance industry to be referred to the Insurance Settlement Committee. This, in the writer's opinion, shows ambiguity which breeds uncertainty. It is therefore submitted that these regulations should be amended to accommodate the need for compulsory arbitration of such disputes. The introduction of compulsory arbitration will eliminate the ambiguity and the uncertainty and thus develop an effective dispute resolution system within the insurance industry.

6.6.7.1 *The New Rules and Regulations for the Committee*

The New Regulations came into force on 13 April, 2014 for The Committee for the Resolution of Insurance Disputes and ViolationsThe New Regulations undeniably, marks an important step in the development of the insurance market in the Kingdom of Saudi Arabia (KSA). However, it falls short in circumstances already mentioned above. It does not sufficiently repair the ills of the dualistic nature of the preceding legal system in Saudi Arabia, particularly within the marine insurance sector. Apparently, the development of the insurance industry by the New Regulations, can only be appreciated when directly juxtaposed with the preceding legal system, but does not render justice to the problems created from the preceding system.

The New Regulations failed to expressly accommodate the use of arbitration for insurance disputes.

6.6.7.2 *Major features of the New Rules and Regulations*

Flowing from the above, certain major aspects of the New Regulations will be examined*:*[723]

- **Use of hearings**

  The New Regulations shed light on the necessary advantage of "hearings" at which the parties are demanded to establish their case and analyse their arguments prior to the first Committee and the Appeal Committee. To some insurers from a similar background, it may not sound necessarily new, it should be remembered that in the past, Saudi Arabia had a traditional legal system in which oral advocacy before judges, and detailed argument and oral submissions were almost non-existent. Therefore, the occasion for parties to engage in oral advocacy to make their case is a winning development.

- **Proof and evidence**

  The Committees can rely on the general *Sharia* Court procedural rules for help on matters of procedure and evidence, but have the discretion as to proceed on that. The New Regulations make it precisely clear that the Committees can accept "all methods of proof/evidence" in hearing a case. So, again, in contradistinction to other jurisdictions in this region, it will be feasible for parties to bank much more on witness evidence, written and oral, to support their cases. The New Regulations also clearly state that the Committees can allow modern methods of adducing evidence ranging from emails, texts, voicemails to evidence retrieved from computers, thereby giving the Committees an ample range of discretion to look at whatever evidence they think relevant. However, the evidence tendered must be in Arabic.

- **Recoverability of legal costs**

[723] See Clyde & Co, 'The new SAMA insurance dispute committee rules in the Kingdom of Saudi Arabia' <http://www.clydeco.com/insight/updates/view/the-new-sama-insurance-dispute-commitee-rules-in-the-kingdom-of-saudi-arab> accessed on 27 April 2016.

The New Regulations also give the Committees the power to order "all legal expenses" to a party that pursues or defends the claim. This is an enormous development and sets the Committees apart from most court systems in the region where legal expenses incurred in the course of pursuing insurance claims are more often than not irrecoverable.

- **Limitation of claims**

A statutory limitation of five years has been set by the New Regulation for insurance claims, the period starts from occurrence of loss or when the claim has first requested from the date the loss is crystallised or a demand was first made. That is an important shift because in the past there was no limitation generally of insurance claims in the Kingdom of Saudi Arabia and insurers remained prone to future claims indefinitely. In this light, the need for utilising compulsory arbitration cannot be overemphasised since it will gravely reduce the length of time required for the resolution of disputes.

- **Comparative jurisprudence**

Conceivably the most fascinating development of all is Article 9 of the New Regulations which provides that the Committee can consider in connection with the determination of insurance claims "*comparative jurisprudence*". This means that the law allows the committee to take cognisance of what is attainable in other jurisdictions where, say, the guidance from the Saudi Arabian law is not sufficient. This is the first time that a Saudi Arabian promulgated law has allowed judges to take into consideration international customary law and practice. However, the law failed to interpret the meaning of "other jurisdictions" whether to mean other Sharia law jurisdictions or other jurisdictions generally. If compulsory arbitration is utilised on the other hand, it would apply expansively using precedents of marine insurance claims by experts within the field. Arbitration, as stated earlier, seems like a more viable idea, especially in the light of the dualistic system.

> This is an attractive development that paves the way for parties to argue points of comparable insurance law from, say the United Kingdom and American legal systems, where there is an expansive law and precedent on wide range of insurance law issues. Nevertheless, the laws relied upon should be compliant with *Sharia* principles and the conditions for cooperative insurance in Saudi Arabia. Nonetheless, this opens the door for the parties to look to other jurisdictions for direction and best practice ideologies where Saudi Arabia law is not exhaustive and to reason that the Committees should adopt alike international principles and best practice in determining any dispute before it.[724]

Lastly, the New Regulations in the writer's opinion, still goes in line with the litigation process requiring the parties to disputes to be represented by only Saudi nationals and such proceedings to be in Arabic language, and primarily, not clear as to the jurisdictions that can be recognised. This consequently, has continued the trend of ambiguities that was prevalent in the preceding system of regulation of the marine insurance industry in Saudi Arabia. Alternatively, a more predictable resolution system will be the compulsoriness of arbitration within the industry, since this system has been proven to be a more viable option for international parties.

6.7 CONCLUSION

Marine Insurance disputes occur primarily when the insurer and insured cannot agree on value of settlement after a claim. These disputes can become terribly unpleasant when litigation is instituted. The suits can go years unattended to, and the disputed claim remains without remedy. It is therefore, advisable to habitually check whether an insurance policy includes an arbitration clause, to avoid long drudging litigation proceedings. Further, statutorily utilising arbitral dispute system for insurance disputes is absolutely desirable. This is because arbitration offers some measure of confidentiality, provides for consideration of the issues by industry experts (rather than

[724] See Nicholas Diacos, 'Saudi Arabia: Governing Law and Dispute Resolution Provisions for Commercial Agreements' <http://www.mondaq.com/x/96076/Arbitration+Dispute+Resolution+Provision+for+Commercial+Agreements> accessed 1 April 2016.

unknowledgeable judges within the field) and primarily avoids the time commitment inherent in the judicial trial system.

Notwithstanding these attractions, in reality, arbitration of insurance is not a definite solution. The inadequacy of the arbitration clause and/or the parties' failure to clarify issues such as choice of law, venue, scope of discovery, enforcement of the final award, and right to appeal, often leaves the arbitration proceeding tainted with ambiguity. Similarly, without stare decisis, arbitration offers less predictability when compared to court proceedings. Alternatively, the cost of arbitration, which is usually very exorbitant, will cause a hardship upon indigent parties who after suffering a loss or damage, is compelled by statute, to undergo an expensive form of dispute resolution. Indeed, all that party will care about at that instance, will be securing a remedy and not liabilities. Also, sects of persons believe that arbitration panels render compromised judgements, because of its potential for bias by the inducement of those insurance professionals. While some others believe that the panels are usually reluctant to issue a ruling that chastises one of the parties.

The point remains that the advantages of the arbitration clause within an insurance policy in Saudi Arabia, will significantly do more good than harm. When the resort to arbitration becomes crystalised in a statute as compulsory, it ultimately, secures a formalised functioning economy within Saudi Arabia.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.0 SUMMARY

In the previous chapters, the writer examined several research questions from the context of Islamic jurisprudence, economic implication for Saudi Arabia, international outlook as well as legal positions and the merits of possible reforms. These questions were examined in relation to the inadequacies of the present litigation-style mechanism for the resolution of disputed claims in the marine insurance sector in Saudi Arabia and the effectiveness of imposing compulsory arbitration for the settlement of such claims, as well as the implications of such measures in relation to foreign investments in Saudi Arabia. The writer's analysis and views are significantly shaped by the ongoing efforts by the Kingdom to develop, modernise and diversify its economy**.**

In proposing the imposition of compulsory arbitration for disputed marine insurance claims, the writer is influenced by consideration of the peculiar position of arbitration in the Saudi Arabian legal system. While the concept of mandatory arbitration is easily implemented in western jurisdictions where courts would readily decline jurisdiction and refer the matter to arbitration on the basis of an arbitration agreement, the strict test for compliance with Sharia requirements and the unpredictable and even skeptical attitude of Saudi Arabian judiciary to arbitration means that the existence of arbitration agreement by parties cannot make arbitration mandatory in Saudi Arabia in certain stages. Consequently, the usual presence of arbitration clause in insurance contracts does not achieve the objective of mandatory arbitration for resolution of disputed marine insurance claims. Therefore, compulsory arbitration for marine insurance is the only effective way to disqualify parties from utilising the litigation process and ensure recourse to arbitration to resolve disputed claims faster, predictably and cheaper.

The strategic significance of imposing compulsory arbitration for disputed claims within the marine insurance sector in Saudi Arabia is clearly deducible from the fact that effective dispute resolution mechanism is vital for attracting

and retaining foreign investment as well as ensuring development and growth of the maritime industry, marine insurance and the export-oriented sectors of the Saudi Arabian economy. With the significant presence of foreign investors and businesses in the Kingdom, especially in the cooperative insurance sector, the need for the imposition of compulsory arbitration for the resolution of disputed marine insurance claims becomes more apparent given the general unfamiliarity of foreign investors with *Sharia* law, which is applied by the Insurance Dispute Committee in resolving claims made on insurance contracts.

Another argument for the imposition of compulsory arbitration in the marine insurance sector is the current uncertainty, unpredictability and confusion arising from the fact that the decision(s) of the Insurance Dispute Committee declining jurisdiction and referring parties to arbitration (where there is an arbitration agreement) is not final but subject to appeal to the Appeal Committee. Compulsory arbitration will introduce predictability in the marine insurance dispute resolution framework.

This thesis commenced discussion and analysis of the research topic in Chapter three with a presentation of the nature, development and the effectiveness of arbitration. The idea of compulsory arbitration in contrast to mandatory arbitration was examined in Chapter four with references to examples of implementation of compulsory arbitration for specified economic sectors by several countries including the United States of America, United Kingdom, Norway, Chile, Egypt, Bahrain and even Saudi Arabia. In Chapter five, the thesis presented a discussion and analysis of Saudi Arabian legal system and the development of arbitration in the Kingdom where Sharia law is the fundamental law. The nature and development of insurance in the western context and in Saudi Arabia with particular reference to the influence of Sharia and the resulting duality were discussed and analysed in Chapter six.

Under the following sub-headings, the writer reflects on the discussions in the preceding chapters and presents findings from authoritative information, critical analysis of contrasting authorities underlying the findings and the writers' observations. Reforms and recommendations are also presented at

the end of the conclusion that presents a summary of the outcomes in relations to the research objectives.

7.1 REFLECTION ON ARBITRATION

Through the preceding chapters, the writer has presented discussions on the nature and development of arbitration. The discussion showed that arbitration developed from its adoption for dispute resolution practices in historical civilizations including the Roman Empire, Greek Empire, ancient Islamic societies. It also showed that international commercial arbitration institutions like LCIA, AAA and ICC have played significant role in the promotion of the practice of international commercial arbitration. The writer also showed that the concept of arbitration has been known in Saudi Arabia since inception of the Kingdom. The following are the findings, analysis and observations from the discussion of the nature and development of arbitration.

7.1.1 International and General Perspective on the Nature and Development of Arbitration:

1. It is the writer's finding that the various attempts made to define arbitration present the term as an alternative dispute resolution mechanism which has all the advantages of litigation without its disadvantages. Despite the failure of the conventions or the Model Law[725] to define the term "arbitration", an author has defined arbitration as the reference of dispute between parties to "an arbitrator or arbitrators who derive their powers from a private agreement not from the authority" of a state and "the arbitrators are to proceed and decide the case on the basis of such an agreement"[726]. Another definition emphasises the binding outcome of arbitration (award)[727].

   The underlying factor in the preceding definitions is that arbitration as a mode of dispute resolution is based on party autonomy whereby parties can freely exercise the choice to determine all aspects of the arbitration process. However, it is instructive that the definition of

[725] Aron (n 65) 21-24.
[726] Rene (n 70)
[727] Lord Hailsham (n 62) 332.

arbitration in the context of Saudi Arabia requires the arbitration agreement and arbitral award to be *Sharia*-compliant because *Sharia* constitutes the basic law and the public policy of the Kingdom.

2. It is also found that the fundamental features of arbitration include its non-adversarial nature which preserves relations between parties, being cheaper, faster, flexible, and adaptable to the choice and convenience of the parties[728]. While most favorable features of arbitration are generally agreed, the suggestion that arbitration is cheaper than litigation has been contested with an argument[729], to the effect that litigation is usually subsidised by the state through provision of judges and the court facilities, while arbitration cost is entirely borne by the parties who pay both arbitrators and counsel, and also procure the venue. However, it is argued by the writer that the longer time spent in litigating disputes constitutes costly delay with far-reaching commercial and financial implications, which ultimately makes litigation costlier than arbitration, which concluded within a stipulated and limited time.

3. The legal outcome[730] and relative ease of enforcement of an arbitral award also makes arbitration the preferred dispute resolution mechanism. Arbitration has become the preferred mode of resolution of international and domestic commercial disputes because of the enforceability of arbitral awards[731].

4. Arbitration has many attractions for disputing parties in commercial or investment transactions because of party autonomy[732]. This is the freedom of the parties to appoint the arbitrators, decide the applicable law, language and the venue of the arbitration. It enables the parties to determine the arbitral process and procedure for the resolution of their dispute.

[728] Edward (n 164) 86
[729] Moses (n 90) ch 1, 4.
[730] Fiadjoe (n 91) 21-32.
[731] Ibid.
[732] Moses (n 90).

7.1.2 Arbitration in Saudi Arabia under the Commercial Court Law 1931:

1. It has been posited that arbitration existed in ancient Islamic practice as a dispute resolution method before the founding of the Kingdom of Saudi Arabia[733]. Therefore, arbitration in Saudi Arabia has its root in *Sharia* law which is mainly influenced by the Qur'an, the Sunna of the Prophet and the views of the *Ulama's*[734]. From the inception of Saudi Arabia, the practice of arbitration was provided for under the Commercial Court Law 1931[735].

2. Although the practice of arbitration is approved by the Qur'an and the Sunna of the Prophet (PBH), it went through a hostile reception from the *Ulama* - who control the Judiciary in Saudi Arabia. Resulting from the fear by the *Ulama's* that arbitration is a competitor to the jurisdiction of the *Sharia* courts, the manner of its introduction in the Kingdom (without due consideration for *Sharia* requirements) and the aftermath of the Aramco decision, the development of arbitration in the Kingdom was noticeable stalled until the recent reform of the legal regime for conduct of arbitration and enforcement of awards inspired by the drive for foreign investments and economic growth and diversification.

3. *Sharia* is the fundamental law of Saudi Arabia and determines the validity of other legislations issued in the Kingdom[736]. This explains the supervening implication of *Sharia* requirements to which every adjudicatory process and decision must conform in order to be valid. Litigation before *Sharia* courts or a commercial/administrative court (including Insurance Dispute Committee) must conform to *Sharia* requirements which further include *Sharia* rules of evidence and

[733] Abdulrahman (n 421) 1.
[734] Basic Law of Governance (Royal Order No. (A/91) 27 Sha'ban 1412H – 1 March 1992).
[735] Commercial Court Law (issued by Royal Decree No. 32 dated 15/1/1350) (1931).
[736] ibid

procedure. This is because *Sharia* law is the fundamental law in Saudi Arabia.

4. Arbitration as practiced in Saudi Arabia is differentiated from the western version because of the requirement of compliance with *Sharia* requirements[737]. While the western business practice accommodates speculation, uncertainty, interest etc. These elements are prohibited[738] under *Sharia* law which is the fundamental law in Saudi Arabia. The consequence was that most arbitration agreements were nullified for being speculative and uncertain because they provided for dispute resolution before the occurrence of the dispute.

5. It has been stated that the government's distrust of arbitration was founded on the belief that the international framework for arbitration as developed does not take into consideration the core religious foundation, cultural values, language and legal traditions of Islam and the Arab world.[739]

6. Parties to dispute are permitted to have recourse to arbitration through an arbitration clause or agreement[740]. The Commercial Court Law authorises the competent court to consider the merit of arbitration agreement on the request of a party and determine its compliance with *Sharia* requirements as the basis to make an order referring the dispute for arbitration subject to supervisory power of the court[741].

7. The competent court for the subject of arbitration under the Commercial Court Law was the Board for Settlement of Commercial Disputes[742]. Being a commercial court within the *Sharia* court structure, it suffers the *Sharia* court limitations of lack of judicial precedents and adjudication by personal interpretation of *Sharia* law.

[737] Richard (n 432) 2012) 677.
[738] Arthur (n 489) 180-81.
[739] Stephen (n 332).
[740] Stephen (n 332) 89, 90–91.
[741] ibid.
[742] The Board is a *Shari'a* court established in 1965 with jurisdiction over arbitration

8. Institutional arbitration under the Commercial Court Law 1931 was also very restrictive as it could only be conducted under the supervision of the Saudi Chamber of Commerce and in accordance with its rules only[743]. Parties to institutional arbitration were not allowed to adopt an alternative institution or rules even though the Chamber did not provide comprehensive rules for institutional arbitration[744]. Institutional arbitration was substantially discouraged under this circumstance until the issuance of Arbitration Law 1983 and later Arbitration Law 2012, which incrementally improved the legal regime for arbitration in the Kingdom.

9. *Sharia* law requires an arbitration agreement to be written and clearly state the agreed terms between the parties and to cover a subject that is not prohibited by *Sharia* principles[745]. These requirements have basically been retained from the practice of arbitration under the Commercial Court Law 1931 through Arbitration Law 1983 and the current Arbitration Law 2012. The agreement of the parties should cover the appointment of arbitrators, choice of applicable laws, venue, cost and submission of dispute. However, default provisions are made in the arbitration law for legal or judicial intervention to cover failure or default of parties to exercise certain autonomous power.

7.1.3 Milestone Improvements from Arbitration Law 1983 to Arbitration Law 2012:

4. International commerce and investment are the key drivers for the development of international arbitration in response to the desire for a neutral dispute resolution mechanism that allays the fear of biases by nationals of various countries involved in commercial transactions. It is the writer's observation that the principal inspiration for the legal reforms introduced by Saudi Arabia including the issuance of the

[743] Saleh (n 30).
[744] ibid
[745] Richard (n 432).

Arbitration Law 2012[746] and Enforcement Law 2012[747] is the desire to provide an enabling legal framework for international commercial arbitration which appeals to foreign investors in view of the Kingdom's membership of the WTO.

5. Saudi Arabia has signed and ratified the New York Convention and also domesticated the UNICITRAL Model law through the Arbitration Law 2012.

6. Saudi Arabia has recently established the Saudi Centre for Commercial Arbitration[748] to provide institutional arbitration for commercial and investment disputes in Saudi Arabia. This is a better facility for arbitration than the Saudi Chamber of Commerce which was the mandatory option earlier available for enabling the conduct of institutional arbitration in Saudi Arabia[749]. It was reported that the Chamber of Commerce was unsuccessful in introducing a comprehensive set of arbitration rules for the conduct of institutional arbitration[750]. It is the writer's view that the Saudi Centre for Commercial Arbitration will facilitate the conduct of compulsory arbitration by previewing the arbitration agreement and award to ensure compliance with *Sharia* requirements of Saudi Arabia to remove likely obstacles to enforcement.

7. From the 1983 Arbitration Law until the 2012 Arbitration Law, the *Sharia* requirements remain clearly codified for arbitration in Saudi Arabia except the requirement that the sole arbitrator must have knowledge of *Sharia* which is widened in the Arbitration Law of 2012 by allowing alternatives of degree in *Sharia* or any other subject.

[746] Law of Arbitration (issued by Royal Decree No. 3/34 dated 24/5/1433H – 16 April 2012).
[747] The Saudi New Enforcement Law (issued by Royal Decree No. M/53 of 13 Sha'ban 1433 Hejra - 3 July 2012).
[748] < http://www.kslaw.com/imageserver/kspublic/library/publication/ca051914.pdf> accessed on 26 August 2016.
[749] Saleh (n 30).
[750] ibid.

8. *Sharia* requirements for validity of arbitration agreement and arbitration awards in Saudi Arabia prohibit uncertainty, speculation, interest-payment and gambling among others. Therefore, Saudi Arabian courts usually nullify arbitration agreement or arbitral award which contravenes any of these *Sharia* requirements. The arbitration laws of both 1983 and 2012 have retained compliance with *Sharia* requirements as vital pre-conditions for the enforcement of arbitral awards.

9. *Sharia* law requires an arbitration agreement to be written[751] and clearly state the agreed terms between the parties and to cover a subject that is not prohibited by *Sharia* principles. These requirements have basically been retained from the practice of arbitration under the Commercial Court Law of 1931 through the Arbitration Law 1983 and the current Arbitration Law 2012.

10. The agreement of the parties should cover the appointment of arbitrators, choice of applicable laws, venue, cost and submission of dispute. However, default provisions are made in the arbitration law for legal or judicial intervention to cover failure or default of parties to exercise certain autonomous power.

11. The arbitral award is also required to comply with the written form specified under the arbitration law[752], and it must not relate to a subject that offends *Sharia* principles. This requirement reflects the fundamental aspects of *Sharia* principles of certainty of terms and specific prohibitions of anti-Islamic practices like interest-earning, unjustified profits, risk and speculations.

12. Foreign arbitral awards are enforceable in Saudi Arabia under the Arbitration Law 2012 and the provisions of the New York Convention which the Kingdom ratified in 1995. However, the Convention allows exceptions by which countries may refuse enforcement of foreign

[751] Richard (n 432).
[752] The Arbitration Law of 2012, art 42.

arbitral awards. Saudi Arabia has reserved the exceptions on principle of reciprocity and public policy[753].

13. The arbitration award is enforceable in Saudi Arabia through the Enforcement Court under the Enforcement Law 2012. Under the previous enforcement regime through the Board of Grievance, it was the usual practice to review the arbitral award on the merit before enforcement. However, under the current regime, there is no review of the award by the Enforcement Court.

14. The combined effect of Saudi Arabia's ratification of the New York Convention and the enactment of the Arbitration Law 2012 which adopted the UNCITRAL Model law is the opening up of the Kingdom to international commercial arbitration. It is the writer's observation that this is a significant improvement on the old Arbitration Law 1983 which was designed for domestic arbitration.

15. The Arbitration Law 2012 and the Enforcement Law 2012 provide enabling legal regime for compulsory arbitration in Saudi Arabia and represent the most important pillars of reforms geared towards making the Kingdom an attractive seat for international commercial arbitration.

16. In Saudi Arabia, litigation is conducted in Arabic with all documents submitted in Arabic language and only Saudi nationals are allowed to appear as counsel on behalf of parties to litigation. These procedures are also applied by the Insurance Dispute Committee for the resolution of insurance disputes. Compulsory arbitration provides an alternative to the strict litigation regime and gives parties the freedom to choose legal representative(s) with expertise in marine insurance law, which will lead to the development of marine insurance law in Saudi Arabia and also improve the Saudi Arabia adjudicatory process.

[753] The Enforcement Law of 2012, art 11.

17. Mandatory arbitration (voluntary) is arbitration conducted in pursuance of an arbitration agreement entered into by the parties which the competent court is required to consider and make a referral order for arbitration upon application of a party[754]. However, mandatory arbitration is hardly implemented in Saudi Arabia where judges in litigation courts rely on uncertain personal interpretation of the law to apply the test of compliance with *Sharia* requirements in adjudicating the validity of arbitration agreement without any judicial precedent. In view of the obstacles of *Sharia* requirements associated with relying on mandatory arbitration in Saudi Arabia, compulsory arbitration is apparently the only way to ensure adoption of arbitration for resolution of dispute.

18. Despite the apparent institutional hostility towards arbitration, the Saudi Arabian government continued to maintain an international posture of supporting international and domestic arbitration. This is expressed in the signing and domestication of the Convention of Arab Countries for the enforcement of judgments and arbitral awards in 1954 which was later replaced with the 1983[755] Riyadh Convention for Judicial Cooperation among Arab Countries, the ICSID Convention and the New York Convention. These Conventions laid the foundation for international commercial arbitration in the Kingdom.

19. It was reported[756] that the newly established Saudi Centre for Commercial Arbitration shall be operated by the Council of Chambers of Commerce and Industry and have the benefit of a broad spectrum of support from the private sector, the Ministry of Justice, the Ministry of Trade and Industry and the Saudi Arabian General Investment Authority. This places the Centre as a generally accepted platform to promote the conduct of *Sharia*-compliant arbitration for the resolution of commercial disputes including disputed claims in marine insurance

[754] Arbitration Law of 2012, art 8.
[755] The Riyadh Convention on Judicial Cooperation, 1983.
[756] <http://www.kslaw.com/imageserver/kspublic/library/publication/ca051914.pdf> accessed on 26 August 2016

in the Kingdom. It is the writer's view that the popularization of institutional arbitration in Saudi Arabia through the operation of the Saudi Centre for Commercial Arbitration will surely become a major driver for the widespread adoption of arbitration in the Kingdom. Indeed, the Centre is being touted to become an all-reference Centre for commercial arbitration in the Kingdom.

20. Though headquartered in Riyadh, the possibility is expressed for the future establishment of branches[757] of the Saudi Centre for Commercial Arbitration in other parts of the Kingdom and even outside Saudi Arabia. It is the writer's view that the potential of a Centre for international arbitration with branches spread around the Kingdom guarantees availability of institutional facilities for conduct of compulsory arbitration for resolution of marine insurance disputes.

21. In view of the revered role of *Sharia* law for determining the validity of arbitral award before recognition and enforcement, it has been stated that the Saudi Centre for Commercial Arbitration will have rules with built-in mechanism to require submission of arbitral awards for scrutiny before the award is issued in order to prevent contravention of *Sharia* law[758].

22. Under the 2012 Arbitration Law, the arbitrator could be qualified by the possession of degree in *Sharia* or law. This improves on the former law which required that the sole arbitrator or chairperson should possess qualification of *Sharia* law. This provision opens the opportunity for non-Saudi nationals to operate as arbitrators in the Kingdom, which will aid knowledge sharing and increase the resource-pool of arbitration professionals available.

23. The arbitral award rendered by a tribunal under the 2012 Arbitration Law is final[759]. However, the arbitral award under the 1983

[757] ibid.
[758] ibid.
[759] Arbitration Law of 2012, art 49.

Arbitration Law is not final and required Board approval. This marks a substantial reduction of the supervision and oversight vested on the competent courts by the former arbitration law. It has been shown in the preceding discussions that subjecting arbitral awards to court approval discouraged arbitration in the Kingdom as the arbitration efforts would easily be rendered wasteful by disapproval of the arbitral awards while it was being reviewed on the merit.

24. Under the 2012 Arbitration Law, the language of the arbitration tribunal may be Arabic or any language agreed[760] by the parties. All documents at the tribunal must be prepared and submitted in the adopted language of the arbitration tribunal. It is observed that this provision applies where the arbitration adopts this law as the applicable law. Where non-Saudi parties are faced with language difficulty utilising Arabic, they may adopt another language and more suitable law of any country or institution provided there is no violation of *Sharia* law.

25. In addition, the 2012 Arbitration Law states that applicable law should be subject to agreement without violation of Islamic *Sharia* law and Saudi public order. Parties are at liberty to choose a governing law different from the 2012 Arbitration Law provided there is no violation of the *Sharia* requirements. Even *Sharia* law may be chosen by the parties as the *lex arbitri* provided the parties and the arbitrators have the knowledge and background of utilising *Sharia* law and rules. The 1983 Arbitration Law did not allow the option to choose any other law than the Saudi law.

26. Under the 2012 Arbitration Law, parties are also given choice of venue of arbitration which may be in the Kingdom or abroad[761]. Parties to arbitration can choose any venue outside the Kingdom. This was not possible under the 1983 Arbitration Law which required venue to be within the Kingdom. This current provision reflects the

[760] Arbitration Law of 2012, art 29.
[761] Arbitration Law of 2012, art 28

recommended best practice of international arbitration under the UNCITRAL Model law.

27. Under the 2012 Arbitration Law, the tribunal shall issue an award within the agreed timeframe or twelve months in the absence of agreement and option for extension of time[762] . This is a lot more time than the default time allowed under the former law which was ninety days. This increased time allowance shows the intention of the Kingdom to encourage arbitration practice.

28. Under the current law, an arbitral award issued in accordance with the provisions of the arbitration law cannot be appealed against[763]. Any action to set aside the arbitral award shall be declined by the court unless the arbitration agreement is void, voidable or expired. It is provided that the award may be set aside[764] only on grounds of incapacity of one of the parties, non-application of agreed rules of law and improper constitution of the tribunal.

29. Once an arbitral award has been issued, the winning party should take steps to obtain court order to enforce the award. Enforcement of domestic arbitral awards usually poses no problem provided the law has been complied with especially *Sharia* requirements. It is observed by the writer that enforcement of foreign arbitral awards faces more difficulty than the enforcement of domestic arbitral awards. However, Saudi Arabian courts are increasingly recognising foreign arbitral awards.[765]

[762] Arbitration Law of 2012, art 40.
[763] Arbitration Law of 2012, art 49.
[764] Arbitration Law of 2012, art 50.
[765] John Balouziyeh, 'Judicial Reform in Saudi Arabia: Recent Developments in Arbitration and Commercial Litigation' < http://arbitrationblog.kluwerarbitration.com/2017/12/31/judicial-reform-saudi-arabia-recent-developments-arbitration-commercial-litigation/?print=print > accessed on 1 March 2018.

7.1.4 The Concept of Compulsory Arbitration:

1. As compared to (voluntary) mandatory arbitration[766] where parties who have included an arbitration clause in their contract would be mandated by the court to comply with the submission agreement in the event of dispute, compulsory arbitration arises through statutory provision[767] even in the absence of an arbitration clause. It is observed that parties to compulsory arbitration can exercise choice for applicable law, language, venue and other matters for arbitral process and procedure.

2. It is the writer's view that the idea of compulsory arbitration does not affect the right of the parties to decide every other aspect of the arbitration process. It has been held in a suit arising from arbitration under ICSID that a party who enters a transaction regulated by statute has consented to all terms applicable to the transaction under the statute including provision for compulsory arbitration[768].

3. Circumstances also have arisen in many countries whereby arbitration has been made compulsory by its legislative imposition, as the mode of resolving specific kind of disputes while leaving the parties to make choices regarding the arbitration process and procedure. Countries such as the United States (State of Kansas)[769], UK[770] and Nigeria[771] among others have found compelling benefits to legislatively impose compulsory arbitration for specific sectors and commercial relationship which would be adversely affected by subjection of disputes to litigation and optional arbitration. It is observed that such circumstances are usually concerned with unique socio-economic situations for which regulatory intervention is needed to achieve predictability and effectiveness.

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[766] Bovis Land Lease Pty Ltd v Jay-Tech Marine an Projects Pre Ltd Case No O/S77/2005, 166/2005 - Decision of The High Court (Singapore) on 6 May 2005.
[767] Wesley (n 53).
[768] SPP v Egypt (1983) 22 ILM 752 1983.
[769] Ch. 29 L. 1920 (Laws of Kansas).
[770] Hepple (p46) ch 3, 83.
[771] S. 26 (3) of the Nigerian Investment Promotion Commission Act, Cap N117 Laws of the Federation of Nigeria, 2004 and Section 11 of the Petroleum Act Cap P10 Laws of the Federation of Nigeria, 2004.

4. Disputed insurance claims in Saudi Arabia are required to be first referred to the Insurance Dispute Committee which, upon the request of a party, may consider the merit of arbitration agreement and make referral decisions if satisfied that the arbitration agreement does not contradict *Sharia* principles.

5. In the absence of judicial precedence[772], there is no certainty and predictability on the expected decision on any given case. Even the referral decision by the Insurance Dispute Committee may be appealed to the Appeal Committee and further appeal to the Board of Grievances by the opposing party.

6. The benefits of compulsory arbitration have been profoundly exemplified by the review of its adoption by U.S.A, United Kingdom, Chile, Norway, Egypt and Bahrain where it has been credited with ensuring timely and effective dispute resolution and predictable growth and development of the concerned industry.

7. It has been contended that the idea of compulsory arbitration defeats the value of arbitration by depriving parties of their voluntary power of choice in arbitration[773]. It is the writer's observation that the most important concern of parties in arbitration is party autonomy whereby parties can make their choice about the arbitration process and not necessarily the decision to arbitrate.

8. Statutory prescription of arbitration is needed to prevent the uncertainty and delay which occur as parties must first have recourse to litigation with the uncertain hope of referral to arbitration even with the presence of arbitration clause in the insurance contract.

9. Even the referral decision may suffer more delay and uncertainty through the appeal process[774]. Making the arbitration compulsory will

[773] Benjamin (n 54).
[774] Arbitration Law of 2012, art 8.

prevent parties from unwittingly or recklessly resorting to litigation in certain situations.

10. In the light of expositions in respect of adoption of compulsory arbitration in chapter three, it is shown that compulsory arbitration has resulted in efficiency, effectiveness, growth and development of the specified sectors or commercial/industrial relationship. It is with reference to the identified benefits that compulsory arbitration is being proposed for resolution of disputed claims in marine insurance.

11. Considering the notorious defects of litigation as a dispute resolution mechanism[775], the statutory imposition of arbitration ensures that parties only adopt an effective and predictable mode of dispute resolution that would satisfy the peculiar nature of the industry.

12. Interestingly, Saudi Arabia has imposed compulsory arbitration for dispute arising from foreign investment as a solution of last resort if the parties are not satisfied with the decision of the Investment Disputes Settlement Committee[776]. The writer contends that this choice has been inspired by the need for predictable, effective and non-partial dispute resolution option that is attractive to foreign investors.

13. The recent establishment of Saudi Centre for Commercial Arbitration[777] in Riyadh has introduced a platform which can provide essential services for institutional arbitration and ensure effective conduct of the proposed compulsory arbitration.

[775] Fiadjoe (n 91) 46.
[776] The Implementing Regulations for Foreign Investment (issued (in Arabic) on 01 January 2013), art 26. <http://mci.gov.sa/LawsRegulations/SystemsAndRegulations/ForeignInvestmentSystem/Pages/4-3.aspx> accessed on 10 May 2016.
[777] <http://www.kslaw.com/imageserver/kspublic/library/publication/ca051914.pdf> accessed on 26/9/2016

7.1.5 The Necessity for the Introduction of Compulsory Arbitration for the Settlement of Disputed Claims in Marine Insurance of Saudi Arabia:

1. Saudi Arabia is a significant source of world maritime activities as a result of shipping operations for oil export. The recent establishment of economic cities will also increase the maritime activities in Saudi Arabia[778]. The significant maritime activities inevitably generate a flood of disputes over claims which need a faster, cheaper and predictable mechanism for dispute resolution. As compared to the unpredictable reliance on mandatory arbitration which arises from voluntary arbitration agreement of the parties, compulsory arbitration is an ideal dispute resolution mechanism.

2. Marine insurance is essential because it hedges against the diverse risks and the subsequent impact of large losses inherent in the shipping industry[779]. This vital role of marine insurance for the development and growth of the maritime sector in Saudi Arabia renders it necessary to provide a dependable and predictable dispute resolution mechanism such as compulsory arbitration.

3. Presently, the percentage of foreign companies among Saudi insurance companies is 91%[780]. Insurance businesses for the Saudi Arabian maritime sector are dominated by foreign investment because of the transaction volume. The clear dominance of foreign investment in the insurance sector of the Kingdom makes is needful to provide a neutral, choice-driven, effective and predictable mechanism for resolution of disputed claims especially in marine insurance.

4. Saudi Arabia operates a dual legal system where western-like legislation exist as subordinate laws to Islamic *Sharia* which form the constitution of the Kingdom based on the Qur'an, Sunna of the

[778] Fadi Daher, 'Special Economic Zone in The Kingdom of Saudi Arabia' < http://www.tamimi.com/law-update-articles/special-economic-zones-in-the-kingdom-of-saudi-arabia/> accessed on 1 March 2018.
[779] United Nations Conference on Trade and Development (n 21).
[780] World Trade Organization (n 3).

Prophet and views of the *Ulamaa*. The effect of this dualism is that adjudication processes and adjudicatory subject are evaluated for compliance with *Sharia* requirements irrespective of the western origin of such process or subject. This has created substantial uncertainty in the litigation process. Compulsory arbitration will provide much needed balance in the legal framework.

5. The Insurance Dispute Committee does not provide an effective dispute resolution mechanism for marine insurance dispute because it conducts litigation process which involves a cumbersome and lengthy process in Saudi Arabia. The apparent defects of the Insurance Dispute Committee create a vacuum which can only be suitably filled by compulsory arbitration against the backdrop of uncertainty and problems associated with reliance on arbitration clause in the insurance contract. In addition, arbitration is generally accepted worldwide as the appropriate mode of resolution of commercial disputes (both local and international).

6. The lack of an effective dispute resolution mechanism for disputed claims in marine insurance leads to protracted litigations, unsettled claims and higher cost of insurance, which has negative cost, commercial, financial and developmental implications on businesses in Saudi Arabia and the Saudi Arabian economy. Compulsory arbitration will reduce and ultimately eliminate these negative effects.

7.2 REFLECTION ON INSURANCE

It has been shown through this research that insurance is an essential facilitator of commercial or trade activities especially in cases that involve significant monetary investment. Insurance removes the fear or consequence of financial loss in commercial or trade investments so that investors would make investment without bearing the risk alone.

However, the concept of insurance as known in western economies is forbidden in Islam because of its conflict with some western commercial practices which are forbidden in Islam. Among the western commercial

practices forbidden in Islam include interest-earning, risk-transfer, uncertainty, speculation, unjustified profit-making and gambling.

Through the discussions in the preceding chapters, the writer has identified key findings which are categorized and presented below with analysis and observations.

7.2.1 Insurance in Saudi Arabia before the enactment of Law for the Control and Supervision of Cooperative Insurance Companies:

1. Insurance is an important part of the modern business environment and it plays a vital role in todays' economy.[781] In some cases, people are required by law to take out insurance of one form or another. This show that the adoption of insurance products is inevitable for economic development.

2. Insurance as practiced in the western world is forbidden[782] under Islam because of unjustified enrichment that results from the inherent uncertainty, risk and speculation associated with the insurance transaction. As such, the Saudi Arabian dualistic legal system poses acceptability and validity problems for insurance which is a western-created product for risk management.

3. As a result of the requirement of *Sharia* compliance, the concept of cooperative insurance[783] is adopted in Saudi Arabia in a departure from the commercial insurance as practiced in western countries. Cooperative insurance as approved under *Sharia* is based on risk-sharing, mutual guarantee and profit-sharing (*madaraba*) and may be either *takaful* (*Sharia* insurance), *retakaful* (reinsurance).

4. Even before the inception of cooperative insurance in Saudi Arabia under Law on the Supervision of Cooperative Insurance Companies 2003[784], marine insurance has been available for coverage of risks in

[781] Aly Khorshid (n 667) 155.
[782] Mohammad (682) 86.
[783] Mohammad (682) 86.
[784] Cooperative Insurance Companies Control Law (issued by Royal Decree No. M/32 2 Jumada II1424 – 31 July 2003) <http://www.sama.gov.sa> accessed on 2 April, 2016.

maritime services under the Commercial Court Law introduced in 1931. The Commercial Court Law which provided for several commercial matters also provided for resolution of commercial disputes through litigation before the Board of Settlement of Commercial Disputes or arbitration on the basis of arbitration agreement subject to supervision and oversight of the competent court having jurisdiction over the subject matter.

7.2.2 Insurance after the Law on Supervision of Cooperative Insurance Companies:

1. The insurance sector in Saudi Arabia was unregulated until the enactment of the Law on Supervision of Cooperative Insurance Companies ("LSCIC") in 2003[785]. The LSCIC called for the islamisation of the insurance sector, with the intent to make sure all insurance practices are in compliance with *Sharia.*

2. The LSCIC has also provided that a committee or more should be established in order to hear disputes[786] between insurance companies and their clients. The committee will also hear cases resulting from violations of the regulatory and supervisory instructions allotted to the insurance and reinsurance companies.
3. An insurance contract often contains an arbitration clause[787] which requires recourse to arbitration for settlement of disputed claims. Under western legal systems, the presence of an arbitration agreement would have amounted to mandatory arbitration whereby the competent court will, on the request of a party, decline jurisdiction and make an order referring the dispute for arbitration. However, given the convoluted history of arbitration in Saudi Arabia and the legal dualism, the Insurance Dispute Committee which is bound to ensure compliance with *Sharia* requirements would commonly refuse to order recourse to arbitration on grounds that the arbitration agreement is not written in Arabic or is not pre-approved by Saudi

[785] ibid.
[786] The Implementing Rules for the Cooperative Insurance Companies Control Law, art 2.
[787] See Public Citizen (n 569).

Arabian Monetary Authority[788] or any perceived defect on *Sharia* requirements.

4. Normally, if proceedings are commenced despite the presence of an arbitration clause, the Insurance Dispute Committee must make a decision upon the jurisdictional objection of the responding party. However, the Insurance Dispute Committee ruling is subject to appeal to the Insurance Dispute Committee Appeal Committee and further appeal to the Board of Grievances. In addition to the chances of rejecting the request for arbitration, the delay and costs in pursuing the referral order through litigation only worsens the position of the parties and may negate the perceived advantages of arbitration if eventually ordered.

7.2.3 Marine Insurance and Disputed Claims in Saudi Arabia:

1. Marine insurance as practiced in Saudi Arabia is mutual insurance for the collective benefit of the members and has the features of risk-sharing and profit-sharing (*madaraba*) among the parties. It involves a group of persons or companies agreeing in advance to contribute to offset each other's losses. That is, members of the group act as insurers for themselves.

2. The policy must contain details directly relevant to the parties and known to them. This requirement is to prevent the contract being regarded as containing an element of uncertainty (*gharar*).[789]

3. Given the legal foundation for marine insurance, the Board of Grievances which has jurisdiction over commercial disputes[790] was previously relied upon for the adjudication of disputed claims before the enactment of the Law on the Supervision of Cooperative Insurance Companies in 2003 which established the Insurance Dispute

[788] Charter of the Saudi Arabian Monetary Agency (issued by Royal Decree No. 23 dated 23-5-1377).
[789] Andreas and Galloway (n 24).
[790] Company Regulations (issued by Royal Decree No M/6, July 1965) available at <http://www.commerce.gov.sa> accessed 25 March 2016.

Committee and required insurance disputes to be referred to the Committee for adjudication with option of appeal to the Insurance Dispute Committee Appeal Committee and further to the Board of Grievances.

4. Compared to the present regime of litigation under Insurance Dispute Committee, the writer argues that imposing compulsory arbitration for resolution of disputed claims of marine insurance will result in faster and more effective resolution of marine insurance disputes and also develop a body of marine insurance practices. Also, making arbitration compulsory for disputed claims in marine insurance will prevent time-wasting recourse to Insurance Dispute Committee with the attendant appeal options even for only obtaining an order to pursue arbitration upon an arbitration agreement.

7.3 IMPOSING COMPULSORY ARBITRATION FOR MARINE INSURANCE DISPUTES IN SAUDI ARABIA

Granted that arbitration ought to be based on the voluntary choice of parties, it has been shown by examples that economic expediency may justify its compulsory imposition on parties in a specified economic sector. For Saudi Arabia, it may be argued that the economic importance of the marine sector qualifies for the application of the expediency rule to impose compulsory arbitration for dispute resolution. However, the writer's analysis and discussion of this sub-topic through the thesis has yielded the following findings:

1. It has been stated that the Saudi Arabian legal system provides for a dual system of dispute resolution involving *Sharia* courts administering *Sharia* law and commercial courts administering western-style laws over commercial and administrative disputes[791]. Although the commercial courts are created to implement western-style laws, the judges implement *Sharia* law principles and procedures

[791] Frank (n 650).

for the adjudicatory process. Therefore, a matter would be easily dismissed if any aspect of it conflicts with requirements of *Sharia* law.

2. It has been clearly exposited that arbitration as a mechanism for dispute resolution has its root in the *Qur'an* and Sunna of the Prophet before the founding of the Kingdom of Saudi Arabia[792]. However, since the founding of the Kingdom, arbitration has been practiced subject to *Sharia* requirements and in accordance with applicable laws.

3. The idea of compulsory arbitration has been criticised as being in conflict with the recognised rights of parties to choose the mode for resolution of their disputes. However, it has been decided that where the substantive law provides for arbitration a party who enters the prescribed transaction is presumed to have consented to utilise arbitration for the resolution of any dispute arising from the transaction[793]. Compulsory arbitration does not take away the parties' power of choice. However, implementation of compulsory arbitration only prescribes the mode of dispute resolution while leaving parties to exercise their choice in respect of other matters.

4. The duality of Saudi Arabian legal system adversely affects the resolution of disputed claims in marine insurance. It is the writer's view that imposing compulsory arbitration will help harmonise and resolve the confusions caused by legal dualism in the Kingdom.

5. The present process of dispute resolution in Insurance Dispute Committee is cumbersome and lengthy. Language of all proceedings and documents are submitted Arabic. This situation is very unpleasant to foreign investors who constitute most of the proprietors of marine insurance and marine businesses.

[792] Abdulrahman (545).
[793] In the case of SPP v Egypt (1983) 22 ILM 752 1983.

6. The writer argued that faster and predictable resolution of disputes in respect of marine insurance claims will be more attractive to international investors. The current situation of dispute resolution works a lot of hardship on parties and discourages investment in the marine sector which is very crucial for export-dependent Saudi Arabian economy. This makes the imposition of compulsory arbitration very much suitable, particularly in the newly established economic cities.

7. It is clearly demonstrated that a party-controlled dispute resolution mechanism would be very much conducive to international investment and the growth of the marine sector of the Saudi Arabian economy. A party-controlled dispute resolution mechanism enables the parties to choose applicable law, procedure and language that are convenient for the resolution of their dispute. However, it is remarked that such party-controlled dispute resolution mechanism should not be conflicting with requirements of *Sharia* law.

8. The imposition of compulsory arbitration is strongly argued only for the purpose of prescribing an appropriate mode of dispute resolution which allows parties to exercise their choice to determine other elements in the process and procedure. The imposition of this compulsory arbitration will prevent parties from undertaking costly and time-wasting litigation.

9. It has been shown in this research that disputed marine insurance claims faces the prospect of prolonged litigation and frustrated claims in the present dispute resolution mechanism of Insurance Dispute Committee. Compulsory arbitration will resolve these lingering problems.

10. Compulsory arbitration can avoid the imposition of *Sharia* procedures and rules to the resolution of marine disputes involving non-Saudi nationals. This is because the parties can choose the applicable law

and even venue of the arbitration proceedings which may be situate outside the Kingdom.

11. Compulsory arbitration is urged by this research because it enables opportunity for expert consideration of the dispute instead of unknowledgeable judges involved in the resolution by the Board or non-specialist professionals involved in dispute resolution by the Committee. This ensures that the dispute is effectively resolved applying industry specific knowledge and appropriate rules and principles.

12. Utilising compulsory arbitration will take advantage of wide range of precedents on the resolution of disputed claims in marine insurance. This is because arbitration can be guided by decisions rendered elsewhere on facts similar to the present dispute.

13. Even arbitration proceedings on the basis of arbitration clause already inserted into the insurance contract are often plagued with contentious ambiguities because parties are usually without real consensus on the constituent aspects of the arbitration. This situation usually leaves the insured party less satisfied with the arbitration than the insurer who introduced the arbitration clause into the policy. This writer argues that imposition of compulsory arbitration will enable the parties to clearly negotiate and agree on various aspects of the arbitration process because they know from onset that arbitration will be the only mode for the resolution of their dispute.

14. It is argued that imposition of compulsory arbitration in accordance with the provisions of the 2012 Arbitration Law will guide the parties to clearly agree on the arbitration process and any default on aspects of the agreed arbitration will be covered by the default provisions of the applicable arbitration law.

15. It has been stated that imposing compulsory arbitration for the resolution of disputed claims of marine insurance will engender effectiveness and efficiency to the sectors of marine insurance and maritime services and stimulate sustainable economic development in the quest towards the diversification of the Saudi Arabian economy.

7.4 WHAT HAS SAUDI ARABIA DONE TO STRENGTHEN AND IMPROVE THE ARBITRATION SECTOR IN ORDER TO MAKE IT CONDUCIVE FOR COMPULSORY ARBITRATION

It has been stated that arbitration has been practiced since inception of the Kingdom of Saudi Arabia because it has positive recommendation from the Holy Qur'an, which is the basic law of the Kingdom. Except for the periodic set back caused by government reaction to the arbitral decision in the Aramco case, the Kingdom has always taken positive steps to strengthen the practice of both domestic and foreign arbitration.

1. In 1980, Saudi Arabia signed the ICSID Convention which focused on using arbitration to resolve international investment disputes especially involving private-party and state-party.

2. Efforts towards regional cooperation for enforcement of arbitral awards have been made by the Kingdom with the signing of the Convention of Arab Countries for the Enforcement of Judgments and Arbitral Awards in 1954. This was later replaced with the 1983 Riyadh Convention on Judicial Cooperation. These Convention covered the enforcement of arbitral awards rendered in other Arab countries which signed the Conventions.

3. In 1994, Saudi Arabia acceded to the New York Convention, with the obligation to take steps to institutionalize the practice of international arbitration as well as the enforcement of foreign arbitral awards.

4. In 2005, Saudi Arabia acceded to the membership of the World Trade Organization (WTO) with further commitment to ensure the domestic practice of international arbitration for international trade and commerce.

5. The Arbitration Law of 2012 substantially reflects the provision of UNCITRAL Model law as relevant for international and domestic arbitration.

6. In 2013, the Kingdom enacted the Enforcement Law and established specialized Enforcement Courts for the purpose of enforcing "executory instruments" such as cheques, promissory notes, court judgments and arbitral awards (including judgments and awards obtained in foreign jurisdictions)[794].

7. The establishment of Saudi Arabian Centre for Commercial Arbitration in 2014 [795] in Riyadh is a comprehensive step by the Kingdom to demonstrate a practical commitment to the practice of both international and domestic arbitration, with the concomitant enforcement of both foreign and domestic arbitral awards. The Centre was formally launched in 2016. In addition, the rules for the Centre became effective from May 2016. The rules are based on the UNCITRAL arbitration rules and are consistent with the Arbitration Law of 2012.[796]

8. In 2015, the Saudi Arabian Council of Ministers approved the new company law, which is intended to reflect global best practices.[797]

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[794] Aceris Law, 'The Legal Framework for the Enforcement of Arbitral Awards in Saudi Arabia' <https://www.acerislaw.com/legal-framework-enforcement-arbitral-awards-saudi-arabia/> accessed on 1 March 2018.
[795] <http://www.kslaw.com/imageserver/kspublic/library/publication/ca051914.pdf> accessed on 25 December 2014.
[796] Deborah and Julia (n 58).
[797] Joseph Chedrawe and Sami Tannous, 'The Middle Eastern and African Arbitration Review 2016' < https://globalarbitrationreview.com/benchmarking/the-middle-eastern-and-african-arbitration-review-2016/1036973/middle-east > accessed on 1 March 2018.

9. In relation to Saudi case law, Saudi judges have in recent years given deference to arbitral tribunals, upheld arbitration clauses and enforced foreign arbitral awards. The most prominent being the decision of a Riyadh court in 2016 to confirm that a US$18.5 ICC arbitral award rendered in the UK would be enforced in Saudi Arabia.[798]

10. The draft Government Tenders and Procurement Law recently released by the Saudi Arabian Ministry of Finance established that government entities/employers could have choice to utilise arbitration as a mechanism for to settle their disputes with contractors[799]. Although still in its draft form, the proposed introduction is a major step forward as a first time for the Kingdom in respect of the acceptability of arbitration.

7.5 HOW COMPULSORY ARBITRATION WOULD BE EFFECTIVE COMPARED TO THE INSURANCE DISPUTE COMMITTEE

7.5.1 <u>For the Parties:</u>

1. Although litigation is the most common process for the resolution of legal disputes, on the other hand, arbitration ranks top as the most preferred mode of alternative dispute resolution mostly adopted for commercial and investment disputes.

2. The procedure for resolution of dispute before the Insurance Dispute Committee is state-imposed as the parties do not have choice in the selection of the adjudicating officials, venue, sittings and language. However, compulsory arbitration allows parties to exercise choice over arbitrators, procedures, venue, sitting and language. The party autonomy guaranteed by arbitration constitutes a principal reason for

[798] John (n 765).
[799] Amer Abdulaziz Al-Amr et. al., 'Saudi Arabia calls for comment on new Government Tenders & Procurement Law' < https://www.lexology.com/library/detail.aspx?g=0961e014-1b28-4b7f-a75d-0699eb0ea039 > accessed on 2 March 2018.

the preference of arbitration in commercial contracts. Arbitration has also proved to be a very effective mechanism of alternative dispute resolution as evidenced by its international recognition, adoption and enforcement.

3. Resolution of marine insurance disputes before the Insurance Dispute Committee perpetuates the duality in the Saudi legal system, thereby leaving the judicial umpires with dilemma about which rules or law to apply to a given case. Compulsory arbitration presents a unified mechanism of dispute resolution whereby parties can make choice of applicable law in accordance with the Arbitration Law 2012.

4. While parties exercise their choice for appointment and qualification of arbitrators, venue, applicable law, determination of the proceedings and language, the statute intervenes to prevent the parties from going for the less effective litigation.

5. Proceedings under the Insurance Dispute Committee are required to be conducted in Arabic, whereas parties in compulsory arbitration can choose the preferred language of the proceedings.

6. The option of Insurance Dispute Committee is domestic and alienates non-Saudi nationals. However, compulsory arbitration has international appeals as parties can choose venue outside Saudi Arabia and arbitration will incorporate non-Saudi nationals.

7. Compulsory arbitration will also aid the enforcement of claims in other countries by virtue of the awards being recognised under the New York Convention. This is a better and predictable alternative than enforcing a judgment of the Saudi Arabian courts or committees in another country.

7.5.2 For the Marine Insurance Sector:

1. Despite the indisputable advantages of arbitration for marine insurance disputes, it remains the truth that arbitration clauses contained in insurance contracts between parties have always fallen short of expectations and may be discarded as parties engage in contentions over the terms of arbitration. The Insurance Dispute Committee would mostly annul contentious arbitration clauses and proceed with litigation on the disputed claims. Making arbitration compulsory for marine insurance provides the incentive for regulatory oversight to ensure parties are conversant with mandatory issues to be clearly agreed in view of the arbitration. Compared with the present option of Insurance Dispute Committee, compulsory arbitration is a more effective mechanism.

2. Resolution of dispute under the Insurance Dispute Committee are conducted by judge who may not possess specialist knowledge on maritime and insurance sectors. However, compulsory arbitration can be conducted by industry experts who are appointed by the parties.

3. Imposing compulsory arbitration in the marine insurance sector would engender effectiveness and encourage predictable growth of the sector through increased foreign investments in the marine industry and the insurance business.

4. Compulsory arbitration will provide a model for the development of an effective dispute resolution system within the insurance industry which may later be extended to other needful industries.

5. Compulsory arbitration will help to eliminate the negative impact of the dual legal system of Saudi Arabia on resolution of disputed claims under marine insurance policies.

6. In the absence of judicial precedents as is the case in Saudi judicial system, adoption of compulsory arbitration would provide opportunity for experts handling disputed claims of marine to take advantage of precedents in the field of marine insurance.

7. It will concomitantly promote the Saudi Arabian economy and aid the diversification programme of the Kingdom.

8. The successful implementation of compulsory arbitration in the Saudi Arabian marine insurance sector would act as an international model to be studied and implemented by other developing economies.

7.6 RECOMMENDATIONS FOR REFORM

Marine insurance disputes would greatly benefit from the imposition of compulsory arbitration and this will further the growth of the maritime sector, the cornerstone of the Saudi Arabian oil export trade. Arbitration will bring about increased efficiency and predictability to insurance services as this will be a major incentive for foreign investments into the Saudi Arabian economy.

In order to effectively provide for compulsory arbitration in the marine insurance sector, the following reforms are proposed by the writer:

1- A review of the existing Law on the Control and Supervision of Cooperative Insurance Companies 2003, to provide for compulsory arbitration in the resolution of disputes under marine insurance policies. In particular, under article 20 it is stated, where a dispute arises in the insurance sector it is to be referred to the Insurance Settlement Committee. A review should be made amending the law to the following: any controversy, claim or dispute between the Parties, directly or indirectly, arising from marine insurance contracts, shall be settled finally by arbitration, which shall be held in accordance to Saudi Arbitration Law.

This amends the law by shifting all disputed marine insurance to compulsory arbitration procedures, in order to achieve the best results by resolving disputes and avoiding the concept of duality.

The idea of having compulsory arbitration in order to achieve results that are effective along with many other characteristics of this mechanism was discussed in Chapter three and four.

The amendments would let foreign investors approve the law of Saudi Arabia by utilising Arbitration as a mechanism for marine insurance policies. This would provide international experts in the region, especially non-Saudi nationals, to use their expertise in resolving the disputes, by applying their experiences from other jurisdictions.

The weakness of this suggestion is the time it would take SAMA to integrate these amendments into the law. From the 2003 law, the process of the Insurance Committee was not disclosed and failed to provide any set of rules to the public, in relation to how the Committee conducts resolving marine insurance claims. In 2014 the Rules of the Insurance Committee were introduced. This may apply to the law above, in relation to the period of how long would take to implemented such law and be amended to the 2003 Law, also how would be organised in a manner that would meet international parties satisfaction.

2- To ensure that arbitration agreements are not nullified for contravening *Sharia* principles, model *Sharia*-compliant agreements should be introduced for compulsory adoption by parties. In addition, a *Sharia* law expert should be retained to provide *Sharia* law advisory services to arbitral tribunals to ensure that arbitral awards are *Sharia*-compliant in accordance with the recent Saudi arbitration law. The idea of this recommendation is to ensure that a *Shari'a* law expert will assist in the subject matter of marine insurance disputes. This ensures that the issued arbitral award is in accordance with the principles of *Shari'a* law and public policy, thus enduring their recognition and enforcement.

The weakness here, however, stems from the theory of the delocalisation and seat theory, which would be considered when parties wish to enforce their arbitral awards. Saudi Arabia would

apply the seat theory when it comes to enforcing the arbitral awards. If the disputed parties have chosen Saudi Arabia as the seat of arbitration and the governing law of the agreement, Saudi Arbitration Law 2012 would apply accordingly; this means that the Saudi judicial system would have a significant impact on the arbitration proceedings between the parties. However, if the parties choose Saudi Arabia as a seat of arbitration and the governing law of the agreement is non-Saudi, the non-Saudi law would apply, provided that it is not against shari'a law or public policy.

The delocalisation theory would also be utilised in Saudi Arbia when a winning party of a dispute applies for the recognition and enforcement of a foreign arbitral award. In such a situation, the competent court in Saudi Arabia, authorised to recognise and enforce such arbitral awards, would look at whether the arbitral award is in conformity with the public policy and *Shari'a* law in order to enforce the award. So even though parties have autonomy to choose any arbitration laws acceptable by the 2012 Law for arbitral proceedings as well as any governing law contract, when it comes to enforcing the arbitral award the law cannot contradict the *Shari'a* law and public policy in Saudi Arabia.

3- The newly established Saudi Centre for Commercial Arbitration should initiate institutional assistance services for the effective conduct of the compulsory arbitration. This institutional assistance service will provide a predictable and neutral dispute resolution forum and increase investors' confidence in Saudi Arabia.

In addition, arbitrators and experts from a specific background of the disputes and knowledge in the sector would develop the arbitration into a successful dispute resolution mechanism. For instance, any nationality and gender will have the opportunity to be an arbitrator in the process, represent the parties and resolve the marine insurance dispute with the relevant expertise. As opposed to the case of the Insurance Settlement Committee which requires and limits representation to only Saudi male nationals albeit for the parties themselves or to the Committee itself.

Language is also an important consideration in arbitration; as Saudi 2012 arbitration law states that the arbitration proceedings can be conducted in any language that disputed parties choose (this would also include that all documents that can be disclosed in any language during the process), which is a major advantage for arbitration to be compulsory and will benefit international parties; whereas the Insurance Settlement Committee relevant documents are presented only in the Arabic language for its proceedings.

However, this may take sufficient time for Saudi Arabia to promote at the Saudi Arbitration Centre, as it would need sufficient funding to develop the Centre in a way that would meet international standards in line with other international arbitration Centre which might be potentially a successful arbitration centre. It must be noted that this might not be successful due to the laws of the jurisdiction that may apply for arbitration procedures.

For example, Dubai has distinguished its legal jurisdiction by letting parties utilise Common Law as the governing law of their agreements as well as for resolving their disputes. They accomplished this by creating independent common law arbitration centres and its own zone distinguished from the UAE law. The case of Saudi Arabia would be inapplicable if the laws contradict Shari'a law and public policy. Therefore, it could be considered that the laws that would be applicable for resolving the disputes by arbitration is a major issue for Saudi Arabia and such results may affect the reputation and have a disadvantageous impact on the Saudi Arbitration Centre.

4- Capacity building seminars and the provision of courses, conferences and seminars in the main cities (Riyadh, Dammam, and Jeddah) by SAMA; whether at the Saudi Arbitration Centre (Riyadh) or by establishing an independent organization which has its own buildings around the region can ensure continued education for the

process of arbitration in compliance with the recent Saudi arbitration laws.

SAMA should also provide workshops, educating all parties who are part of the arbitration process in judicial precedents and tasks from other jurisdictions (such as common law jurisdiction) within marine insurance sector as well as the Saudi Arabia jurisdiction on how marine insurance disputes could be resolved. This would ensure understanding the subject matter of common disputes, and how to arbitrate them in accordance with the *Shari'a* principles and Saudi Marine Insurance Law.

These seminars, courses and conferences should be held periodically to sensitize stakeholders including insurance industry operators, maritime service companies, arbitrators, judicial officers and legal practitioners on how to effectively implement compulsory arbitration and to understand the arbitration process clearly.

The potential of this suggestion is to let international parties and foreign investors have a wide image of the arbitration mechanism in Saudi Arabia and to promote the process because arbitration has become an essential part of commercial agreements and widely accepted worldwide as a mechanism for resolving disputes in the commercial sector and in particular marine insurance disputes.

Recently, the first conference was held on international commercial arbitration in Saudi Arabia by the Saudi Arbitration Centre in association with 'AAA', highlighting arbitrations effectiveness as a mechanism for resolving disputes in the economic sector[800]. The reason for having the conference is to attract foreign investors to resolve their disputes in a fair and just way within the region and to promote investments.

It was suggested in the conference that promoting international commercial arbitration would speed and successfully resolve the disputes in the region. It was highlighted that Saudi Arabia tends to provide knowledge of arbitration procedures within the region to improve this sector. On the other hand, the weakness of this

[800] See < http://www.arabnews.com/node/1388221/saudi-arabia> accessed on 20/10/2018.

suggestion is whether Saudi Arabia has the capability to provide sufficient knowledge and experts for these conferences, seminars and courses in the arbitration sector, and this would need be taken into consideration.

The need for international experts to be involved in these improvements is very important in order to provide the necessary knowledge and expertise of the region and apply the ethical principles. As a result practitioners in the sector would have a significant knowledge of the sector from both domestic and international perspective in Arabic and English Language.

5- Compulsory arbitration should be introduced in the Economic Cities that are being established under the authority of the Saudi Arabian General Investment Authority[801]. For example, the King Abdullah Economic City (located mid-way between Makkah and Madinah), the commercial hub of Jeddah which seeks to establish itself as a regional transhipment centre and will comprise a seaport is expected to be one of the world's largest seaports[802]. Introducing compulsory arbitration in the Economic Cities will provide comfort to both international and local investors and aid the diversification plans of the Kingdom. Branches of the Saudi Centre for Commercial Arbitration should also be established in all the Economic Cities to ensure accessibility.

The benefit of this recommendation is that foreign and local investors would trust the process and not select other arbitration centres in neighbouring countries around Saudi Arabia. By introducing Arbitration Centers, international parties for any disputed claims would benefit as neutrality of arbitration would be considered. Also, anyone can participate in the arbitration procedure, despite their known-Saudi background, thus increasing the available expertise and knowledge available.

[801] Established under the Foreign Investment Law (issued by Royal Decree No. M/1 5 *Muharram* 1421 – 10 April 2000).

[802] Fadi Daher, 'Special Economic Zone in The Kingdom of Saudi Arabia' < http://www.tamimi.com/law-update-articles/special-economic-zones-in-the-kingdom-of-saudi-arabia/ > accessed on 1 March 2018.

On the other hand, the weakness of this suggestion is again, how long it would take Saudi Arabia to set up these arbitration centres and allow for participation in the region sufficiently. It would take a reasonable time to develop the centres and convince experts and outstanding arbitrators to be part of the development of this sector. Also promoting the centres for all types of investors would take a period of time, in order to the change the previous reputation of the arbitration process in Saudi Arabia and the enforcement and recognition of foreign arbitral awards.

6- The Enforcement Law should be reformed to prevent any potential abuse of the concept of public policy (as stipulated in the New York Convention), by restricting the application of the concept or define stringent circumstances to warrant its application. Moreover, it should clarify the concept of public policy and how it would meet the requirements and conditions in order to be in accordance with the public policy for enforcement and recognition of arbitral awards.

This potential recommendation would be very beneficial for foreign investors and international parties, to understand and have knowledge of the concept of public policy and to ensure that foreign arbitral awards would be recognised and enforced. By providing this reform, foreign investors and international parties would trust the process of arbitration in Saudi Arabia and would improve its efficiency. It also would provide for recognition and enforcement of foreign arbitral awards. This would reduce arbitrary interpretations by the judges. The weakness of this is that Saudi Arabia needs to conduct major research and critical studies into interpretations of judges in order to provide the meaning of public policy and set these requirements clearly.

This recommendation would need a considerable time for implementation. Also whether this would be acceptable reform in Saudi Arabia is another important issue to be factored in. This is due to interpretation Shari'a law which would impose different

interpretation and this would lead to a contradiction for providing a clear meaning of the public policy.

7- It is recommended that studies in respect of Islamic arbitration should be commissioned in various educational institutions. It should be mandated for non-Saudi nationals (international) practitioners' as courses within Saudi will cultivate awareness of alternative dispute resolution, and to have an understanding of the requirements that deems to be necessary for enforcing arbitral awards generally in the region.

This was discussed in the first conference held on international commercial arbitration in Saudi Arabia by the Saudi Arbitration Centre in association with 'AAA', in relation to the arbitration effectiveness as a mechanism towards the economic sector for resolving disputes[803], that courses would be provided.

However, it was unclear whether a study in relation to the Islamic arbitration is provided for non-Saudi. If it satisfied this recommendation, a huge shift would lead to improvements in the arbitration sector of Saudi Arabia and would open the door to change the international attitude and be viewed as a trustworthy mechanism for international parties.

On the other hand, the disadvantage is that non-Saudi practitioners in the field has become limited and restricted, as Saudi Arabia is implementing and establishing the structure of their system for only Saudi nationals and in this case, to resolve this is to be pressured by other developed countries in order to change and re-structured the system in a way that would open the door for non-Saudi to participate and benefit the region to develop the arbitration sector in order to be improved.

[803] See < http://www.arabnews.com/node/1388221/saudi-arabia> accessed on 20/10/2018.

BIBLIOGRAPHY

Articles and Papers

- Abdul Aziz Al-Faki, 'Companies seeking to increase their insurance share in the maritime sector' <http://www.aleqt.com/2013/04/30/article_751875.html> accessed 25 December 2014.

- Abdulrahman Saleem, 'A critical study on how the Saudi Arbitration Code could be improved and on overcoming the issues of enforcing foreign awards in the country as a signatory state to the New York Convention' (2013) 16 CEPMLP Annual Review 9.

- Abdulrahman Y. Baamir, 'The New Saudi Act: Evaluation of the Theory and Practice' [2012] Int'l ALR 4.

- Aceris Law, 'The Legal Framework for the Enforcement of Arbitral Awards in Saudi Arabia' <https://www.acerislaw.com/legal-framework-enforcement-arbitral-awards-saudi-arabia/> accessed on 1 March 2018.

- Ahmed A. Al-Ghadyan, 'Insurance: The Islamic Perspective and Its Development in Saudi Arabia' (1999) 14 Arab Law Quarterly 336.

- Alan Watson, 'Comparative Law and Legal Change' (1978) 37 CLJ 313.

- Alexander Nerz, 'The structure of an arbitration clause in a contract with a Saudi party' (1985) 1 Arab Law Quarterly 380.

- Al-Fadhel Faisal M., 'Legislative Drafting and Law-Making Practices and Procedures under Saudi Arabian Law: A Brief Overview' [2012] International Journal of Legislative Drafting and Law Reform 95.

- Al-Fumah Khalid M, 'Arab State Contract Disputes: Lessons from the Past' (2002) 17 Arab Law Quarterly 215.

- Alnowaiser Khalid, 'The New Arbitration Law and its impact on investment in Saudi Arabia' (2012) 29 Journal of International Arbitration 6, 723.

- Amer Abdulaziz Al-Amr et. al., 'Saudi Arabia calls for comment on new Government Tenders & Procurement Law' < https://www.lexology.com/library/detail.aspx?g=0961e014-1b28-4b7f-a75d-0699eb0ea039 > accessed on 2 March 2018.

- Amer Abdulaziz Al-Amr, 'Qualitative shift; Saudi Arabia's new Enforcement Law' [2013] International Arbitration Newsletter < https://www.dlapiper.com/en/africa/insights/publications/2013/06/qualitative-shift-saudi-arabias-new-enforcement-/ > accessed on 1 March 2018.

- Amir Khoury, 'Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks' (2003) 43 IDEA: The Journal of Law and Technology 151.

- Amr Daoud Marar, 'Saudi Arabia: The Duality of the Legal System and the Challenge of Adapting Law to Market Economics' (2004) 19 Arab Law Quarterly 100.
  - - - , 'The Duality of the Saudi Legal System and its Implications on Securitisations' (2006) 20 Arab Law Quarterly 389.

- Amr Shalakany, 'Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism' (2000) 41 Harv. Int'l L.J. 419.

- Arbouna Mohammad Burhan 'The operation of ReTakaful (Islamic Reinsurance) Protection' (2000) 15 Arab Law Quarterly 335.
- Arthur J. Gemmell, 'Commercial Arbitration in the Islamic Middle East' (2006) 5 Santa Clara J. Int'l L. 173.

- Aseel Al-Rahmani, 'Sulh: A Crucial Part of Islamic Arbitration' (2008) 12 London School of Economics Research Paper 1 < http://ssrn.com.abstract=1153659 > accessed on 14 December 2014.

- Ayoub M. Al-Jarbou, 'The Role of Traditionalists and Modernists on the Development of Saudi Legal System' (2007) 21 Arab Law Quarterly 192.
  - - -, 'The Saudi Board of Grievances: Development and New Reforms' (2011) 25 Arab Law Quarterly 177.

- Benjamin F. Trueblood, 'Compulsory Arbitration' (1892 – 1893) 55 American Advocate of Peace 3, 58.

- Baker S and Davis M, *The UNCITRAL Arbitration Rules in Practice: the Experience of the Iran-United States Claims Tribunals* (Kluwer 1992)

- Badawy Tarek, 'The General Principles of Islamic law as the Law Governing Investment Disputes in the Middle East' (2012) 29 Journal of International Arbitration 3, 255.

- Bahrain Chamber for Dispute Resolution, 'Why BCDR-AAA' < http://www.bcdr-aaa.org/why-bcdr-aaa/ > accessed on 10 January 2018.

- Baptista, Monteverde & Associados, 'Portugal – Patent Enforcement' < http://www.bma.com.pt/news/bmaNewsMar2015.pdf > accessed on 25 August 2015.

- Caron D, Caplan L and Pellonpaa M, *The UNCITRAL Arbitration Rules- A Commentary* (Oxford University Press 2006)

- Charles N. Brower and Jeremy K. Sharpe, 'International Arbitration and the Islamic World: The Third Phase' (2003) 97 AMJIL 643.

- Christopher Mills and Karim Fawaz, 'New Saudi shipping regulations: regulating shipping and marine insurance policy wording'< http://www.clydeco.com/insight/updates/new-saudi-shipping-regulations-regulating-shipping-and-marine-insurance-pol > accessed 26 January 2014.

- Christopher S. Gibson and Christopher R. Drahozal, 'Iran- United States Claims Tribunal Precedent in Investor-State Arbitration' (2006) 23 Journal of International Arbitration 6, 521.

- Chuah Jason, 'Impact of Islamic Law on Commercial Sale Contracts- A Private International Law Dimension in Europe' (2010) 4 European Journal of Commercial Contract Law 191.

- Chukwumerije Okojie, 'Reform and Consolidation of English Arbitration Law' (1996) 8 Am. Rev. Int'l Arb. 21

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

- C. Partasides, 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration' (2002) 18 Arb Int. 2, 147.

- Craig Shepherd, 'Middle East arbitration highlights from 2016 and trends for 2017' < http://hsfnotes.com/arbitration/2016/12/20/middle-

east-arbitration-highlights-from-2016-and-future-trends-for-2017/#page=1 > accessed on 2 April 2018

- David Karl, 'Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know' (1992) 25 Geo. Wash. J. Int'l L. & Econ 131.

- D. Richmond, 'Bad Insurance Bad Faith Law' (2003) 30 Tort Trial & Ins. Prac. L.J. 1.

- Deborah Ruff and Julia Belcher, 'International arbitration developments in the Middle East' < http://www.nortonrosefulbright.com/knowledge/publications/148976/international-arbitration-developments-in-the-middle-east > accessed on 10 January 2018.

- Daniel Busse, 'Privity to an Arbitration Agreement' (2005) 8 IALR 95.

- Deena M Barakah, DDS and Shakir Ahmed Alsaleh, PhD, 'The Cooperative Insurance in Saudi Arabia: A Nucleus to health Reform Policy' (2011) 21 International Conference on Information and Finance 6.

- Dubai Chamber News, 'DIAC Discusses the Launch of an Islamic Arbitration Window' < http://www.dubaichamber.com/whats-happening/c_news/diac-discusses-the-launch-of-an-islamic-arbitration-window > accessed 12 November 2017.

- Edmund M. Kneisel and Richard English Dolder, 'Arbitration Clauses in Insurance Policies – A Primer for the Construction Professional' < http://kilpatricktownsend.com/~/media/Files/articles/2012/CH-5_CLUP_2004.ashx > accessed on 10 November 2017.

- Edward Manson, 'The City of London Chamber of Arbitration' (1893) 9 Law Quarterly Review 86.

- Elshurafa Dina, 'The 2012 Saudi Arbitration Law and the Shari'a Factor: A friend or Foe in Construction? (2012) 15 International Arbitration Law Review 4, 137.

- Eric Stein, 'Uses, Misuses and Non-uses of Comparative Law', (1977) 72 NW.U.L.Rev 198.

- Fadi Daher, 'Special Economic Zone in The Kingdom of Saudi Arabia' < http://www.tamimi.com/law-update-articles/special-economic-zones-in-the-kingdom-of-saudi-arabia/ > accessed on 1 March 2018.

- Foster Nicholas HD, 'Islamic perspective on the law of business organisations: Part 1: an overview of the classical Sharia and a brief comparison of the Sharia regimes with Western-style law' (2010) 11 European Business Organisation Law Review 3.

- G.C.C. Commercial Arbitration Centre, 'Learn about the center – Commercial Arbitration Center of the GCC States' < http://www.gcccac.org/ar/about-centre > accessed on 10 January 2018.

- George Sadek and Mohamed Oweis Taha, 'Egypt: Legal Framework for Arbitration' < https://www.loc.gov/law/help/arbitration/egypt.php > accessed on 10 January 2018.

- Golloway Patricia D, 'Using Experts Effectively and Efficiently in Arbitration' (2012) 67 Dispute Resolution Journal 3, 26.

- Goode Roy, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 17 Arb. Int'l 19.

- Gordon Blanke, 'Dubai announces plans to establish Emirates Maritime Arbitration Centre: Do they hold water?' <http://kluwerarbitrationblog.com/blog/2014/10/02/dubai-announces-plans-to-establish-emirates-maritime-arbitration-centre-do-they-hold-water/> accessed on 25 January 2014

- Gordon Woodman, 'Legal Pluralism and the Search for Justice', (1996) 40 Journal of African Law 2, 152.

- Hampton Whitney, 'Foreigners Beware: Exploring the Tension between Saudi Arabian and Western International Commercial Arbitration Practices in Re Aramco Services Co' (2011) 2011 Journal of Dispute Resolution 2, 431.

- Harold Frey et. al., 'Arbitration procedures and practice in Switzerland: Overview' < https://uk.practicallaw.thomsonreuters.com/5-502-1047?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed on 10 January 2018.

- Hatim Al-Bashir, Tim Gray and Selina M. Stead, 'The concept of integrated national maritime policy and its application to Saudi Arabia' (2012) 39 Journal of Maritime Policy and Management 5, 525.

- Henry Quinlan et. al., 'Arbitration procedures and practice in Saudi Arabia: overview' < https://uk.practicallaw.thomsonreuters.com/5-632-8065?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed on 1 March 2018.

- Henry Quinlane and Amer Abdulaziz Al-Amr, 'Landmark enforcement decision in the Kingdom of Saudi Arabia' < https://www.dlapiper.com/en/saudiarabia/insights/publications/2016/05/landmark-enforcement-decision/ > accessed on 19 December 2014.

- Herbert Northrup and Richard L. Rowan, 'Arbitration and Collective Bargaining: An Analysis of State Experience' (1963) 14 Labor Law Journal 2, 178.

- HM Holtzmann, 'Some Lessons of the Iran-United States Claims Tribunal' in Private Investors Abroad: Problems and Solutions in International Business (1987) 16.

- Houtte Vera, Wilske Stephan and Michou Isabelle, 'What's New in European Arbitration?' (2012) 68 Dispute Resolution Journal 1, 117.

- Hunter M, 'Arbitration Procedure in England: Past, Present and Future' (1985) 1 Arb. Int'l 82.

- Ibrahim Shihata, 'Some Observations on the Question of Riba and the Challenges Facing 'Islamic Banking' [2000 – 2001] Yearbook of International Financial and Economic Law 25.

- International Chamber of Commerce, *Resolutions Adopted at the Second Congress* (ICC Congress, Rome, March 1923)

- John Balouziyeh, 'Judicial Reform in Saudi Arabia: Recent Developments in Arbitration and Commercial Litigation' < http://arbitrationblog.kluwerarbitration.com/2017/12/31/judicial-reform-saudi- arabia-recent-developments-arbitration-commercial-litigation/?print=print > accessed on 1 March 2018.

- Julian DM Lew, 'The Law Applicable to the Form and Substance of the Arbitration Clause' [1998] 9 ICCA Congress Series 114.
- Jean-Pierre Harb and Alexander G. Leventhal, 'The New Saudi Arbitration Law: Modernization to the Tune of Shari'a' (2013) 30 Journal of International Arbitration 2, 113.
- Jean Trepp McKelvey, 'Legal Aspects of Compulsory Arbitration in Great Britain' (1952) 37 Cornell Law Review 3, 415.
- Jones Day Commentary, 'The New Enforcement Law of Saudi Arabia: an additional step toward a harmonized arbitration regime' < http://www.jonesday.com/the-new-enforcement-law-of-saudi-arabia-an-additional-step-toward-a-harmonized-arbitration-regime-09-04-2013/ > accessed 24 January 2014.
- Jones Wayne and Keith Hutchison, 'DIFC Court asserts its jurisdiction over reinsurance claims litigation' [2013] Middle East Insurance Review <*http://www.clydeco.com/insight/articles/difc-court-asserts-its-jurisdiction-over-reinsurance-claims-litigation*> accessed 26 January 2014.
- John Griffiths, 'What is Legal Pluralism?' (1986) 24 Journal of Legal Pluralism 1, 3.
- Joseph Norton, 'Financial Sector Law Reform in Emerging Economies' [2000] BIICL 129.
- J van Hoff, *Commentary on the UNCITRAL Arbitration Rules: The Application by the Iran-United States Claims Tribunal* (Kluwer 1991).
- Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 1, 1.
- Kaster Laura A 'Improving Lawyer Judgement by Reducing the Impact of "Client-Think"', (2012) 67 Dispute Journal Resolution 1, 56.
- Keenan Mark, 'Marine Insurance - Watch out for Hidden London Arbitration Provisions', [2006] Winter Quarter < https://www.andersonkill.com/webpdfext/PropellerClub-Winter2006.pdf > accessed on 24 January 2014.

- Kent Scott and Adam T. Mow, 'Creating an Economical and Efficient Arbitration Process is Everyone's Business' (2012) 67 Dispute Resolution Journal 3, 36.

- Kingston Christopher, 'Marine Insurance in Britain and America, 1720-1844: A Comparative Institutional Analysis' (2007) 67 The Journal of Economic History 2, 379.

- Leila Hanafi, 'Improving the Legal Infrastructure in the Middle East and North Africa Region Through Alternative Dispute Resolution' < http://webcache.googleusercontent.com/search?q=cache:http://slconf.uaeu.ac.ae/images/%25D9%2585%25D8%25A4%25D8%25AA%25D9%2585%25D8%25B1%252019%2520%2520%25D8%25A7%25D9%2584%25D8%25A7%25D8%25B3%25D8%25AA%25D8%25AB%25D9%2585%25D8%25A7%25D8%25B1/part%25204%2520E/19.pdf> accessed on 11 November 2017.

- Linda Demaine and Deborah Hensler, 'Volunteering to Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer's Experience' (2004) 67 Law & Contemp. Probs. 55.

- Linda Lim, 'Terrorism and Globalization: An International Perspective' (2002) 35 Vand. J. Transnat'l L. 703.

- Loukas Mistelis, 'Regulatory Aspects: Globalisation, Harmonisation, Legal Transplants, and Law Reform – Some Fundamental Observations (2000) 34 International Lawyer 1055.

- Mohammed Abu-Nimer, 'A Framework for Nonviolence and Peace building in Islam' (2000-2001) 15 J. I. & Religion 217.

- Mahmoud Abdel-Baky, 'Saudi Arabia Update – February 2018' < https://www.lexology.com/library/detail.aspx?g=4d785872-6f93-4044-b1e5-1cfab07b610a&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2018-03-06&utm_term> accessed on 6 March 2018.

- Malkawi, Bashar H, 'Arab Countries' (Under) Participation in the WTO Dispute Settlement Mechanism' (2012) 14 Flinders Law Journal 1, 35.

- Mann Francis, 'Lex Facit Arbitrum' (1986) 2 Arb. Int. 3, 241.
- M. Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Arbitration' (1997) 14 JIA 4, 23.
- Marcus Machin, 'Finance and Investment in Shipping' (Maritime Saudi Arabia Conference, Jeddah, 30 May – 1 June 2010).
- Mark Beer, 'Keynote Speech at the International Bar Association (IBA) Dispute Resolution in the Arab Region Conference' (Dubai, 12-13 May 2016).
- Mark Beswetherick and Saud Alsaab, 'The new SAMA Insurance Dispute Committee Rules in the Kingdom of Saudi Arabia' < https://www.clydeco.com/insight/article/the-new-sama-insurance-dispute-committee-rules-in-the-kingdom-of-saudi-arab > accessed on 22 December 2014.
- Marwan Elaraby, Sultan Almasoud, Sanjarbek Abdukhalilov, Alexander Bevan, Iain Elder, Brendan Hundt and Matthew Powell, 'Saudi Arabia: Introduction to the Legal System of the Kingdom of Saudi Arabia' <*http://www.al-maarifa.shearman.com/sitefiles/14111/introduction%20to%20the%20legal%20system%20of%20the%20kingdom%20of%20saudi%20arabia.pdf* > accessed on 14 December 2017.
- McCarthy W.E.J, 'Compulsory Arbitration in Britain: The Work of the Industrial Disputes Tribunal' in Royal Commission on Trade Unions and Employers' Associations, *Research Paper 8* (H.M.S.O. Publication 1968).
- Mervyn Lewis, 'Wealth Creation through Takaful (Islamic Insurance)' (Islamic Wealth Creation Conference, University of Durham, July 2003).
- Michael Blair et. al., 'Legal Issues Arising in the New Dubai International Financial Centre' (2005) 20 J.I.B.L.R 207.
- Michael J Moser and Teresa Cheng, 'Hong Kong Arbitration 100 Questions and Answers' < http://www.hkiac.org/arbitration/why-hong-kong/hong-kong-arbitration-faqs#017 > accessed on 10 January 2018.

- Michael Pryles 'Singapore: The Hub of Arbitration in Asia' < http://siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/198-singapore-the-hub-of-arbitration-in-asia > accessed on 10 January 2018

- Mildon David, 'Unique Issues in Oil and Gas Disputes' (2007) 2 OGEL 2 < https://www.ogel.org/article.asp?key=2467 > accessed 10 May 2016.

- Mohammad Ajmal Bhatty, 'Takaful Industry: Global Profile and Trends' [2001] < https://www.coursehero.com/file/6222823/Takaful-Industry-Global-Profile-amp-Trends-2001/ > accessed 10 May 2016.

- Morgan R, 'Abandoning Colonial Arbitration Laws in Southeast Asia – II: Background and Commentary' (2000) 15 Mealey's International Arbitration Report 7, 44.

- Muhammad Al-Sheikh, 'Pluralism of the Commercial Judicial Committees: Reasons, Consequences and Solutions' (1997) 21 Journal of Law 3, 233.

- Mustil, 'Arbitration: History and Background' (1989) 6 Journal of International Arbitration 2, 43.

-- - - , 'A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law' (1990) 6 Arb. Int'l 3, 51.

- Muteb Al-Eshiwy, *Arbitration Regulations in the Gulf Co-operation Council (GCC) States* (The University of Exeter 1997).

- Nabeel Ikram, Andrew Mackenzie and Lina Bugaighis, 'The Kingdom of Saudi Arabia's Implementing Regulations of the 2012 Arbitration Law enter into force' < https://www.lexology.com/library/detail.aspx?g=e86da74a-b59a-4f0e-8ff6-e25112520947&utm_source=lexology+daily+newsfeed&utm_medium=html+email+-+body+-+general+section&utm_campaign=the+law+society+subscriber+daily+feed&utm_content=lexology+daily+newsfeed+2017-07-25&utm_term= > accessed 2 October 2017.

- Nergaard Kristine, 'Extensive use of compulsory arbitration to settle conflicts'

<http://www.eurofound.europa.eu/observatories/eurwork/articles/industrial-relations-working-conditions/extensive-use-of-compulsory-arbitration-to-settle-conflicts> accessed on 16 September 2015.

- Newhall Christine L, 'The AAA's War on Time and Cost – The Campaign to Restore Arbitration's Benefits' (2012) 67 Dispute Journal Resolution 3, 20.

- Norton Rose Fulbright, 'Dispute resolution developments in Bahrain: Creation of a New Arbitral Institution and Introduction of a Form of Statutory Arbitration' < http://www.nortonrosefulbright.com/knowledge/publications/30151/dispute-resolution-developments-in-bahrain-creation-of-a-new-arbitral-institution-and-introduction-of-a-form > accessed on 10 August 2015.

- Nudrat Majeed, 'Investor-State Disputes and International Law: From the Far Side' (2004) 98 Am Soc'y Int'l L Proc 30, 32.

- Onyema Emilia, 'Drafting an Effective Arbitration Agreement in International Commercial Contracts' (2003) 7 Vindobona Journal of International Commercial Law 2, 277.

- - -, 'The Role of the International Arbitral Tribunal Secretary' (2005) 9 VJ 99.

- Patrick Norton, 'A Law of the Future or a Law of the Past? Modern Tribunals and the Int'l Law of Expropriation' (1991) 85 A.J.I.L. 474.

- Paulsson Jan, 'Universal Arbitration- what we gain, what we lose' in Julio Cesar Betancourt and Jason A. Crook, *ADR, Arbitration, and Mediation: A Collection of Essays* (Chartered Institute of Arbitrators 2014) 535.

- Reem Shamseddine, 'Saudi Arabia sets up commercial courts to expedite investment' < https://www.reuters.com/article/us-saudi-court/saudi-arabia-sets-up-commercial-courts-to-expedite-investment-idUSKBN1CL2DT > accessed on 19 December 2017.

- Renat Bekkin, 'Islamic Insurance: national features and legal regulation' (2007) 21 Arab Law Quarterly 1, 3.

- Richard Garnett and Michael Pryles, 'Recognition and Enforcement of Foreign Awards under the New York Convention in Australia and New Zealand' (2008) 25 Journal of International Arbitration 899.

- Richard Mitchell and Richard Naughton 'Australian Compulsory Arbitration: Will It Survive into the Twenty-First Century?' (1993) 31.2 Osgoode Hall Law Journal 265.

- Robert von Mehren and P. Nicholas Kourides, 'International Arbitration between States and Foreign Parties: The Libyan Nationalization Cases' (1981) 75 A.J.I.L. 476.

- Rogowska, Anna, 'English Law in Saudi Arabia' (2013) 27 Arab Law Quarterly 271.

- Ronald Wilson, 'Modern Ottoman Law' (1907) 8 Journal of Comparative Legislation and International Law 1, 41.

- Saad Rizwan, 'Foreseeable Issues and Hard Questions: The Implications of U.S Courts Recognizing and Enforcing Foreign Arbitral Awards Applying Islamic Law Under The New York Convention' (2013) 98 Cornall Law Review 2, 493.

- Sami Tannous and Amr Omran, 'International Arbitration 2017 – Middle East and North Africa Overview" < https://iclg.com/practice-areas/international-arbitration-/international-arbitration-2017/middle-east-and-north-africa-overview > accessed on 10 January 2018.

- Samuel Adam, 'Arbitration Statutes in England and the USA' (1999) 8 Arb. & Disp. Res. L.J. 2, 6.

- Sarvenaz Bahar, 'Khomeinism, the Islamic Republic of Iran, and International Law: The Relevance of Islamic Political Ideology' (1992) 33 Harv. Int'l L. J. 145.

- Saud Al-Ammari and A. Timothy Martin, 'Arbitration in the Kingdom of Saudi Arabia' (2014) 30 Journal of the London Court of International Arbitration 2, 387.

- Saville M, 'The Origin of the New English Arbitration Act 1996: Reconciling Speed With Justice in the Decision-Making Process' (1997) 13 Arb. Int'l 237.

- Schaefer JK, 'Abandoning Colonial Arbitration Laws in Southeast Asia- I: An Analytical History' (2000) 15 Mealey's International Arbitration Report 7, 30ff

- Scott Kent and Mow Adam 'Creating an Economical and Efficient Arbitration Process' [2012] Dispute Resolution Journal <http://www.babcockscott.com/wp-content/uploads/2014/09/Creating-an-Economical-and-Efficient-Arbitration-Process.pdf > accessed on 28 February 2018.

- Shanmoon Rona G, 'Top 10 Mistakes to Avoid when Drafting Dispute Resolution Provisions' [2012] Dispute Resolution Journal < https://ronashamoonadr.com/pdf/shamoon_publications_1.pdf > accessed on 28 February 2018.

- Stefan M Kroll, 'Arbitration and Insolvency Proceedings- Selected Problems' in L.A. Mistelis and J.D.M. Law (eds), *Pervasive Problems in International Arbitration* (Kluwer International Arbitration 2006).

- Stephen J. Ware, 'Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements' [2001] J. Disp. Resol. 6, 89.

- V Petocha, 'Geneva Convention on the Execution of Foreign Arbitral Awards', (1986–1987) 1 World Arbitration Reporter 11.

- Wesley A. Sturges, 'Compulsory Arbitration –What Is It?' (1961) 30 Fordham Law Review 1, 10.

- Winslow Donald Arthur, 'Tax Avoidance and the Definition of Insurance: The Continuing Examination of Captive Insurance Companies' (1989) 40 Case Western Reserve Law Review 1, 85.

- Williams, 'The Compulsory Settlement of Contract Negotiation Labor Disputes (1949) 27 Texas L. Rev. 587.

- William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 Am. J. Comp. L. 489.

- Yahya Al-Samaan, 'Dispute Resolution in Saudi Arabia' (2002) 7 Yearbook of Islamic and Middle Eastern Law 79.

- Yasuhei Taniguchi, 'Is There a Growing International Arbitration Culture? - An Observation from Asia' (1996) 8 ICCA Congress Series 31.

- Ziad Ahmad Ansari, 'Analysis of the Impact of Reforms on Insurance Industry of Saudi Arabia' (2011) 1 Interdisciplinary Journal of Research in Business 8, 28.

- Zisha Rizvi and Amrutha M, 'Who's Winning and Who's Whining Under Saudi Arabia's New Enforcement Law' [2017] < https://www.lexology.com/library/detail.aspx?g=cccabf54-9a95-4d17-9623-6c977a3109b5 > accessed on 28 February 2018.

Books

- Abdul Hamid El Ahdab and Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 2011).
- Abdul Rahman, *Ahmed Gad, Insurance* (1978).
- Abdur Rahman Doi, *Shari'ah: The Islamic Law* (Ta Ha Publishers 1987).
- Ahmad Aldiweesh, *Fatawa Alagnah Aldaimah Lilbohooth Alehmih Wa-alifa* (1st edn, Riyadh, AH 1412).
- AJ van den Berg, *The New York Convention of 1958: Towards a Uniform Interpretation* (Kluwer Law International 1981).
- Alan Bullock, *The Life and Times of Ernest Bevin* (vol. II Heinemann 1967)
- Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974).
- Albert Hourani, *A History of the Arab People* (Vol. 1, The Belknap Press of Harvard University Press 1992).
- Alec Spoor, *White Collar Union* (Heinemann 1967) 193.
- Allamah Sayyid Muhammad Amin ibn Abidin ash-Shami, *Rad Al-Muhtarala Al-dar Al-mukhtar* (repr.1960).
- All'amah Sayyid M.H. Tabataba'i, *The Qur'an In Islam: Its Impact and Influence On The Life Of Muslims* (Zahra Publications 1987)
- Al-Khadri, *Tarkih al-tahiaa al-islami* (Dar al-Kitab 1958).
- Al Tamimi Essam, *International Commercial Arbitration in the MENA: Institutional v Ad hoc: A wealth of choice* (Sweet & Maxwell 2017).

- Aly Khorshid, *Islamic Insurance: A Modern Approach to Islamic Banking* (Routledge-Curzon 2004).
- Amin Sayed H, *Middle East Legal Systems* (Royston Limited 1985).
- Amulree William W, *Industrial Arbitration in Great Britain* (Oxford University Press 1929)
- Andreas Haberbeck and Mark Galloway, *Saudi Shipping Law* (Fairplay Publications 1990).
- Aron Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law and Taxation Publishers 1990).
- A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet and Maxwell 2004).
- Baamir Abdulrahman Y, *Shari'a law in commercial and banking arbitration, law and practice in Saudi Arabia* (Ashgate Publishing Limited 2010).
- Banakar Reza and Max Travers, *An Introduction to Law and Social Theory* (Hart Publishing 2002).
- Barry Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon Press 1975).
- Being Willard, *King Fisal and The Modernisation of Saudi Arabia* (Croom Helm 1980).
- Bob Hepple, 'Compulsory Arbitration in Great Britain' in Loewenberg J. Joseph, *Compulsory Arbitration* (Lexington Books 1976).
- Bradley Anthony, Keith Ewing and Christopher Knight, *Constitutional and Administrative Law* (Addison Wesley Longman 1997).
- Brown Nathan, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge University Press 1997).
- Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (4th edn, Wiley-Blackwell 2007).

- Carter James and Fellas John, *International Commercial Arbitration in New York* (Oxford University Press, 2011).
- Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2001).
- Comair-Obied Nayla, *The Law of Business Contracts in the Arab Middle East: A Theoretical and Practical Comparative Analysis With Particular reference to Modern Legislation* (Kluwer Law International 1996).
- Dale Stepheson, Carol Welu and Paul Oxnard, *International arbitration of commercial disputes involving parties from Saudi Arabia and the GCC* (Financier Worldwide 2011).
- Dalhuisen Jan, *International Commercial, Financial and Trade Law* (Hart Publishing 2004).
- David St. John Sutton, John Kendall and Judith Gill, *Russell on Arbitration* (Sweet & Maxwell 1997).
- Domke Martin, *Commercial Arbitration* (Englewood Cliffs: Prentice-Hall 1965).
- E. Kamenka & A. Erh-Soon Tay (eds) *Law and Social Control* (St. Martins Press 1980).
- Effendi Ismail, CR Tyser DG Demetriades (tr), *The Mejelle* (Law Publishing Company 1967).
- El-Ahdab Abdul Hamid, *Arbitration with Arab Countries* (Kluwer Law International 1999).
- El-Sayed Hussein M, *Maritime Regulations in the Kingdom of Saudi Arabia* (Graham & Trotman Limited 1987).
- Emmanuel Gaillard and Domenico di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards* (Cameron May Ltd. 2008).
- Emmanuel Gaillard, 'Reflections on the Use of Anti-suit Injunction in International Arbitration' in L.A. Mistelis and J.D.M. Law (eds), *Pervasive Problems in International Arbitration* (Kluwer International Arbitration 2006).

- Fiadjoe Albert, *Alternative Dispute Resolution: A Developing World Perspective,* (Cavendish Publishing Limited 2004).

- Faundez Julio, *Good Government and Law: Legal and Institutional Reform in Developing Countries* (Macmillan Press Ltd. 1997).

- Fouchard Gaillard Goldman, *International Commercial Arbitration* (Emmanuel Gaillard and John Savage ed, Kluwer Law International 1999).

- Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia (*Namara Publications 2000).
  - - - 'Islamic Governance in the Gulf: A Framework for Analysis, Comparison, and Prediction' *in* Gary Sick and Lawrence G. Potter (eds), *The Persian Gulf at the Millennium: Essays In Politics, Economy, Security and Religion* (Macmillan Press Ltd. 1997).

- Franz Rosenthal, *Gambling in Islam* (Brill 1975).

- Gaja G., *International Commercial Arbitration: The New York Convention,* (Oceana Publications Inc 1978-1980)

- Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (3rd edn, Wolters Kluwer 2010).
  - - - *International Arbitration: Law and Practice* (Kluwer Law International 2012).
  - - - *International Commercial Arbitration: law and practice* (2nd edn, Kluwer Law International 2014).

- Gordon Woodman, 'The Idea of Legal Pluralism' in Baudoin Dupret, Maurits Berger and Laila al-Zwaini (eds), *Legal Pluralism in the Arab World* (Kluwer Law International 1999).

- Grant Hanessian and Lawrence Newman, *International Arbitration Checklists* (Juris Publishing 2009).

- Greenberg Simon, Kee Christopher and Weeramantry, *International Commercial Arbitration; An Asia-Pacific Perspective* (Cambridge University Press 2012).

- Gregory Gause, *Oil Monarchies: Domestic and Security Challenges in the Arab Gulf States* (Council on Foreign Relations Press 1994).

- Gurnett Richard et. al., *A Practical Guide International Commercial Arbitration* (Oceana Publications 2000).
- Haberbeck Andreas and Galloway Mark, *Saudi Shipping Law* (Fairplay Publications Ltd. 1990).
- Hamish Fraser, *A History of British Trade Unionism 1700 – 1998* (St. Martin's Press 1999)
- Hooker Barry, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon Press 1975).
- Huxley Andrew, *Religion, Law and Tradition: Comparative Studies in Religious Law* (Routledge-Curzon 2002).
- Ibn-Khaldun, *The Muqaddima* (Franz Rosenthal tr, Princeton University Press 1981).
- Ibrahim Warde, *Islamic Finance in the Global Economy* (Edinburgh University Press 2000).
- John Gilissen, *Le pluralisme juridique* (Université de Bruxelles 1971).
- Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press 1964).
- Judy Pearsall, *The Concise Oxford Dictionary* (OUP 1999).
- Justin McCarthy, *The Ottoman Peoples and the End of Empire* (Arnolds Publishers 2001).
- Ian G Sharp, *Industrial Conciliation and Arbitration in Great Britain* (The Blackfriars Press Ltd 1950).
- Kamali Mohammad, *Islamic Commercial Law: An Analysis of Futures and Options* (Islamic Texts Society 2000).
- Kay Ernest, *Legal Aspects of Business in Saudi Arabia* (Graham & Trotman Ltd. 1979).
- Kenneth Walker, *Compulsory Arbitration: An International Comparison* (D.C Heath and Company 1972).

- Kronke Herbert, *Recognition and enforcement of foreign arbitral awards – a global commentary on the New York Convention* (Kluwer Law International 2010).

- K.W. Wedderburn and P.L. Davies, *Employment Grievances and Disputes Procedures in Britain* (University of California Press 1969).

- L. Mistelis, *Applicable Law in International Commercial Arbitration* (Oceana Publications 1978).

- Loewenberg J. Joseph, *Compulsory Arbitration* (Lexington Books 1976).

- Lord Hailsham, *Halsbury's Laws of England* (4th edn, Butterworths 1991).

- Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (The Stationery Office 2010).

- Luddeke Christof, *Marine Claims: A guide for the handling and prevention of marine claims* (Lloyd's of London Press 1996).

- Marc Levinson, *Guide to Financial Markets* (Profile Books Ltd. 1999).

- Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 1994).

- Mohammad Kamali, *Islamic Commercial Law: An Analysis of Futures and Options* (Islamic Texts Society 2000).

- Morderchai Abir, *Saudi Arabia: Government, Society and the Gulf Crisis* (Routledge 2001).

- Moses Margaret, *The Principles and Practice of International Commercial Arbitration* (2nd edn, Cambridge University Press 2012).

- Muhammed Abdul Jawad, *The Legislative Development in the Kingdom of Saudi Arabia (*Munshat Almaref 1977).

- Muhammed Usmani, A*n Introduction to Islamic Finance (*Kluwer Law International 2002).

- M.T. Rankin, *Arbitration Principles and the Industrial Court; an Analysis of Decisions 1919-29* (P.S. King & Son 1931).

- Nabil Abd Al-Fattah, 'The Anarchy of Egyptian Legal System: Wearing Away the Legal and Political Modernity' *in* Baudoin Dupret, Maurits Berger and Laila al-Zwaini (eds), *Legal Pluralism in the Arab World* (Kluwer Law International, 1999).

- Nabil Saleh, *Unlawful Gain And Legitimate Profit In Islamic Law* (Graham & Trotman 1992).

- Onyema Emilia, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge, Taylor & Francis Group 2010).

- Poudret Jean Francois and Besson Sebastien, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell Ltd. 2007).

- Raynes Harold E, *A History of British Insurance* (Pitman & Sons 1948).

- RD Bishop, J Crawford and WM Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary,* (Kluwer Law 2005).

- Rene David, *Arbitration in International Trade* (Kluwer Law and Taxation 1985).

- Richard Clarke, *The Dispute Resolution Review* (4th edn, Law Business Research Ltd. 2012).

- Robert Merkin, *Arbitration Law* (Informa Law from Routledge 2004).

- Roberts Simon and Palmer Michael, *Dispute Processes: ADR and the Primary Forms of Decision –Making* (Cambridge University Press 2005).

- Rose Francis, *Marine Insurance Law and Practice* (Informa Law, Routledge 2012).

- S. Macintyre and R. Mitchell (eds), *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration, 1890-1914* (Oxford University Press 1989).

- Saleh Samir, *Commercial Arbitration in the Arab Middle East* (2nd edn, Lexgulf Publishers Ltd. 2012).

- Saunders John, *Words and Phrases Legally Defined* (3rd edn, Butterworths 1988).

- Sheikh Yusuf al-Qaradawi, *The Lawful and the Prohibited in Islam* (Al-Falah Foundation 1960)

- Simon Archer et. al., *Takaful Islamic Insurance: Concepts and Regulatory Issues* (Wiley Publishers 2009).

- Sohail Jaffer, *Islamic Insurance: Trends, Opportunities and the Future of Takaful (*Euromoney Books 2007).

- Thomas Rhidian, *Marine Insurance: The Law in Transition* (Informa Law, Routledge 2006).

- Vishwanath K S, *Insuring Cargoes: A Practical Guide to the Law and Practice* (Witherby & Co. 2010).

- William Ballantyne *Essays and Addresses on Arab Laws* (Curzon Press 2000).
  - - - *Commercial Law in The Arab Middle East: The Gulf States* (Graham & Trotman 1992).
  - - - 'The Challenge of Islamic Commercial Law in the Middle East' in William Ballantyne and Howard L Stovall (eds) *Arab Commercial Law* (Amer Bar Assn 2002).

- Zamir Iqbal and Abbas Mirakhor, *An Introduction to Islamic Finance: Theory and Practice* (John Wiley & Sons (Asia) Pte Ltd. 2007).

- Zekos Georgios, *International Commercial and Marine Arbitration* (Routledge-Cavendish 2008).

Reports

- American Arbitration Association, *2010 Annual Report* (2010).

- Center for Security Policy, *Shariah: The Threat to America Report: An exercise in competitive analysis – Report of Team B II* (Center for Security Policy Press 2010).

- Institute of Islamic Banking and Insurance, *Encyclopaedia of Islamic Banking and*
  Insurance (1995).

- Insurance Institute of London, *Report of Research Study Group: Alternative Dispute Resolution in Practice* (January 2011).

- International Chamber of Commerce, *Techniques for controlling time and costs in* Arbitration (2003 – 2004)

- International Islamic Rating Agency, *Methodology for Shari'a Quality Rating* (May 2006).

- Islamic Financial Services Board, *Issues in Regulation and Supervision of Takaful Islamic Insurance* (August 2006).

- Queen Mary University, *An empirical research on 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (2016).

- Royal Commission on Labour, *Fifth and Final Report - Cmnd. 7421* (H.M.S.O. Publication 1894).

- Royal Commission on Trade Unions and Employers' Associations, *1965 – 1968 Report (Cmnd. 3623)* (H.M.S.O. Publication 1968)

- Saudi Arabian Monetary Agency, *Forty-Second Annual Report* (2006).

- UK Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (1996).
  - - - *Supplement to the Departmental Advisory Committee on Arbitration Law Report of February 1996* (1997).

- United Nations Commission on International Trade Law, 'Report of the [UN] Secretary-General: Possible Features of a Model Law on International Commercial Arbitration' (UN Doc A/CN.9/207 - 14 May 1981) < https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL8/102/47/PDF/NL810247.pdf?OpenElement > accessed on 7 November 2017.

- United Nations Commission on International Trade Law, *UNICTRAL rules of procedure and methods of work – Note by the Secretariat* (UN Doc A/CN.9/676 dated 4 June 2010) < https://digitallibrary.un.org/record/685339/files/A_CN.9_697-EN.pdf > accessed on 7 November 2017.

- United Nations Conference on Trade and Development, *Legal and documentary aspects of the marine insurance contract* (United Nations Publication, TD/B/C.4/ISL/27/Rev.1, 1982).

- United Nations Economic and Social Council, *Consideration of the Draft Convention on the Recognition and Enforcement of Foreign*

Arbitral Awards (Item 4 of the Agenda) (UN Doc E/CONF.26/L43 – 3 June 1958) < http://newyorkconvention1958.org/index.php?lvl=notice_display&id=3371 > accessed on 7 November 2017.

- United Nations Economic and Social Council, *United Nations Conference on International Commercial Arbitration - Summary Record of the Twenty-Fourth Meeting* (UN Doc E/CONF.26/SR.24 – 12 September 1958) < www.newyorkconvention.org/11165/web/files/document/1/5/15860.pdf > accessed on 7 November 2017.

- World Trade Organization, *Trade Policy Review: Saudi Arabia* (January 2012) < https://www.wto.org/english/tratop_e/tpr_e/tp356_e.htm > accessed on 31 March 2014.

Thesis

- Al-Fadhel Faisal M, 'Party Autonomy and the Role of the Courts in Saudi Arbitration Law, with reference to the Arbitration Laws in the UK, Egypt and Bahrain and the UNCITRAL Model Law' (PhD Thesis, University of London 2010).
- Al-Jarba, Mohammad, 'Commercial Arbitration: A Study of its Role in Saudi Arabia within Islamic Jurisprudence' (PhD Thesis, The University of Wales, Aberystwyth 2001).

- Al- Shubaiki Torki, 'The Saudi Arabian Arbitration Law in the International Business Community: A Saudi Perspective' (PhD Thesis, London School of Economics 2003).

- Al-Subaihi, Abdulrahmam 'International Commercial Arbitration in Islamic Law, Saudi Law and the Model Law' (PhD Thesis, University of Birmingham 2004).

- Aly Abdul Rahim Khorshid, 'Islamic Insurance: A modern approach with particular reference to Western and Islamic Banking (PhD Thesis, The University of Leeds 2001).

- Amr Daoud Marar, 'Saudi Arabia: The Duality of The Legal System and Its Implications on Financial Related Transactions' (PhD Thesis, University of London 2007).

- Mahfuz Ahmed, 'A Research to Develop English Insurance Law to Accommodate Islamic Principles' (DPhil thesis, University of Manchester 2012).

Websites

- < http://www.bahri.sa/about-us > accessed on 17 December 2014.
- <http://www.diac.ae/idias/services/diac/> accessed on 23 December 2014.
- <http://www.difcarbitration.com/law/index.html> accessed on 23 December 2014.
- http://icsid.worldbank.org > accessed on 7 November 2017.
- <http://www.islamic-banking.com/how_does_takaful_work.aspx> accessed on 18 December 2014.
- <http://www.islamic-banking.com/takaful_insurance.aspx > accessed on 18 December 2014.
- < https://www.sadr.org/about-scca?lang=en > accessed on 19 December 2014.
- <http://www.sama.gov.sa/sites/samaen/AboutSAMA/Pages/SAMAHistory.aspx> accessed on 22 December 2014.
- < *http://www.saudiembassy.net/about/country-information/government/legal_and_judicial_structure.aspx* > accessed on 18 December 2014.
- <http://www.saudilegal.com/saudilaw/14_law.html> accessed on 22 December 2014.
- < http://www.wto.org/english/tratop_e/tpr_e/tp356_e.htm > accessed on 24 January 2014.
- < www.unicitral.org.