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**THE RELATIONSHIP BETWEEN
THE KUWAITI NATIONAL
COURT AND COMMERCIAL
ARBITRATION**

**A Thesis Submitted for the Degree of Doctor of
Philosophy to the Faculty of Law and Financial
Studies, University of Glasgow**

By

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August 2003

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Abstract

This thesis examines how best Kuwait might reform its arbitration legislation to meet modern needs. Yet, the particular focus of the study is the relationship between the Kuwaiti national courts and commercial (voluntary) arbitration, with particular emphasis on how national courts can serve arbitration, and when the court should intervene in arbitration. On the one hand, the court provides valuable assistance and support to the arbitration by staying court proceedings, appointing arbitrators when required, and generally providing assistance in the conduct of the reference. Such support and assistance is very important to guarantee both the effectiveness and efficiency of the arbitral agreement, the arbitral process and the ultimate award. On the other hand, the court must have jurisdiction to intervene in the arbitral process and to scrutinise the award in order to ensure the fairness, integrity, legality and neutrality of the arbitral process. It is argued that court supervision of arbitration is the price that has to be paid for the support and assistance of the court to arbitration.

This study is divided into two parts, the support given by the court to arbitration, and the control exercised by the court over arbitration. The arbitration agreement should also be closely examined in order to understand the relationship between the court and arbitration, as the arbitration agreement is the foundation stone of arbitration. These parts are divided into five chapters. Chapter one is an introductory chapter. It highlights generally the role of arbitration, the value of arbitration for foreign investors, the link between arbitration and trade and the importance of the relationship between the court and arbitration. It also introduces the arbitral system in Kuwait, the UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act 1996. Chapter two is devoted to examining the most important aspects of the arbitration agreement. It is divided into four sections, namely, the definition and nature of arbitration and the arbitration agreement, the autonomous nature of the arbitration agreement, arbitrability and formality. Chapter three addresses the modes of assistance and support given by the court to arbitration. It is split into six sections as follow; the general principles of an Arbitration Act, enforcing an arbitration agreement, extending contractual time-bars, the constitution of the arbitral tribunal, the conduct of the arbitral proceedings and the enforcement of the arbitral award. Chapter four considers the judicial supervision of arbitration. It deals with judicial supervision over the arbitration agreement, the conduct of the arbitral tribunal and the arbitral award, while chapter five contains the conclusion of this thesis.

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Abbreviations

A.D.R.L.J	Alternative Dispute Resolution Law Journal
ABLJ	American Business Law Journal
ABLJ	American Business Law Journal
AC	Appeal Cases
All E.R.	All England Reports
Am.Rev.Int'l.Arb.	American Review of International Arbitration
Arb.Int.	Arbitration International
Arb.J.	Arbitration Journal
Art.	Article
CCP	Civil and Commercial Procedure
CCPL	Civil and Commercial Procedure Law
CLOUT	Case Law on UNCITRAL Text
Comm.Arb. Supp.	Commercial arbitration Supplement
Const.L.J.	Construction Law Journal
CPIA	Contemporary Problems in International Arbitration
D.R.J.	Dispute Resolution Journal
DAC	Department Advisory Council
EER	European Economic Review
EJCL	Electronic Journal of Comparative Law
IBA	International Bar Association
IBL	International Business Lawyer
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICCLR	International Company and Commercial Law Review
ICLQ	International and Comparative Law Quarterly
IER	International Economic Review
Int'l Arb.L.Rev.	International Arbitration Law Review
Int'l Enzycl.Comp.L.	International Encyclopaedia of Comparative Law
Intl. Handbook on	International Handbook on
J.Bus.L.	Journal of Business Law
L.R.	Law Reports
LCIA	London Court International Arbitration

Lloyd's L.Rep.	Lloyd's Law Report
UNCITRAL	United Nation Commission on International Trade Law
W.L.R	Weekly Law Reports
YCA	Yearbook Commercial Arbitration

United Nations Documents:

UN Doc.	United Nation Document
A/CN.9/127 A/32.17	Secretariat Note Reporting AALCC Decision 1997 Commission Report
A/CN.9/168	Secretariat Study of the New York Convention
A/CN.9/169	Secretariat Note on Further work
A/34/17	1979 Commission Report
A/CN.9/207	First Secretariat Note Possible Feature of a Model Law
A/36/17	1981 Commission Report
A/CN.9/WG.II/WP.35	Second Secretariat Note Possible Feature of a Model Law. Questions for Discussion.
A/CN.9/WG.II/WP.37	First Draft
A/CN.9/WG.II/WP.38	First Draft
A/CN.9/232	Second Working Group Report
A/CN.9/WG.II/WP.40	Second Draft
A/CN.9/WG.II/WP.41	Third Secretariat Note Possible Further Features of a Model Law
A/CN.9/233	Third Working Group Report
A/38/17	1983 Commission Report
A/CN.9/WG.II/WP.45	Third Draft
A/CN.9/WG.II/WP.44	Third Draft
A/CN.9/245	Fourth Working Group Report
A/CN.9/WG.II/WP.48	Fourth Draft
A/CN.9/WG.II/WP.50	Fourth Secretariat Note Comments and Suggestions on the Forth Draft
A/CN.9/WG.II/WP.50	Fifth Secretariat Note Territorial Scope of Application and Related Issues
A/CN.9/246	Fifth Working Group Report
A/CN.9/SR.285	Summary Record

A/39/17	1984 Commission Report
A/CN.9/263	Sixth Secretariat Note Analytical Compilation of Government Comments
A/CN.9/263/Addendum 1	Sixth Secretariat Note Analytical Compilation of Government Comments
A/CN.9/263/Addendum 2	Sixth Secretariat Note Analytical Compilation of U.K. Comments
A/CN.9/264	Seventh Secretariat Note Analytical Commentary on the Draft Text
A/CN.9/SR.305-333	Summary Record
A/40/17	1985 Commission Report

Preface

Commercial arbitration has proved a very popular means of resolving disputes in international trade¹. Recent studies by economists have emphasised its role in trade and market integration². As the great majority of commercial contracts contain arbitration agreements, legal scholars argue that commercial arbitration fosters the needs of business³. It serves trade and is dependent on it⁴. There is a clear relationship between the arbitral environment and the efficacy of trade relations. As Kuwait aims to attract investment and capital inflow⁵, it should consider an effective arbitration regime as one of the important elements for promoting investment. Such a regime is an effective instrument of commercial policy⁶.

Kuwait has noticed⁷ that the development of international and domestic business activity during the last century is closely related to the increasing availability of arbitration as a means of dispute resolution. Furthermore, most countries and businesses around the world have realised the benefit of arbitration as a successful method of settling a range of disputes. There is, moreover, a trend, which dates back to the second part of the last century, to promote arbitration on a world wide basis, and to drive towards greater uniformity in the national rules that govern arbitration⁸. Therefore this thesis suggests that Kuwait may have to seek to reform its arbitral provisions⁹ not only to meet the modern

¹ A. Casella, 'Arbitration in International Trade', Working Paper no. 4136 (NBER, Aug 1992). It is available at <<http://papers.nber.org/papers/W4136>> [Last visited 5 July 2003], 1-43, at p 1. See also, A. Casella, 'On Market Integration and the Development of Institutions: The Case of International Commercial Arbitration' (1996) 40 EER 155-186, at 156

² Dr A. Maniruzzaman, 'International Commercial Arbitration in the Asia Pacific' (2002) 30 (11) IBL 508-513 at p 508.

³ A. Casella, 'Arbitration in International Trade', op. cit., p1.

⁴ J. Werner, 'The Trade Explosion and Some Likely Effects on International Arbitration' (1997) 4 (7) J. Int Arb 5-16, at p5.

⁵ See Kuwait's New Direct Foreign Capital Investment law (Law No. 8/2001).

⁶ This is because of the fact that commercial arbitration plays a significant role in commercial and trade climate. See H. Yu, 'Total Separation of International Commercial Arbitration and National Court Regime' (1998) 15 (2) J. Int. Arb. 145-166.

⁷ Ministry of Justice, The State of Kuwait arbitration System, p 1.

⁸ See for instance New York Convention 1958 and UNCITRAL Arbitration Rules as a clear examples for a movement toward a unified legal frame work for the fair and efficient settlement of disputes arising in commercial trade and transaction.

⁹ Such step may be seen as a further step in creating an attractive investment climate. Since, effective and sufficient mechanism of resolving disputes is a vital guarantee for the investor that will ensure the compliance of provided protection in trade and investment. Arbitration helps to improve international economic relations by providing a mechanism, which plays an important role to reduce the risk of transnational commerce. See, H. Holtzmann and J. Neuhaus, *A guide to the UNCITRAL Model Law on International Commercial Arbitration: legislative history and commentary*, Deventer: Kluwer Law and Taxation Publishers; The Hague: T.M.C. Asser Instituut, c1989 Deventer, Boston, The Hague, Kluwer Law and Taxation Publishers, T.M.C. Asser Instituut, 1989, p2. See also General Assembly Resolution stressing on the "value of arbitration" in 40/72 A/40/53.

trends in this sector, but also to provide a healthy arbitration system, so as to make Kuwait an attractive venue for arbitration. Having a successful arbitral system helps to attract investment, as investors can have confidence that their contracts are underpinned by an effective, neutral form of dispute resolution. Equally, being recognised as an important centre of commercial arbitration also contributes to the economic health of the nation, as is illustrated by the example of London.

The success of the arbitration system will partly depend on the roles of the parties, the arbitral tribunal and the court, but above all on the role of arbitration legislation, which must ensure that each element functions effectively. This thesis focuses on the role of the court. It suggests that the nature of the relationship between arbitration and the courts is potentially very important for the users of arbitration, because they may be directly affected by it. The users of arbitration tend to desire to achieve as much freedom as possible from legal restrictions. They also have a particular interest in resolving their disputes within the minimum period possible that is consistent with the stability of their legal positions. Thus the users of arbitration before investing their money in particular states may well take the relationship between the courts and arbitration into consideration. So Kuwait should think about how it could provide an arbitral environment conducive to the goals mentioned above. The legal environment might look to develop arbitration rules which meet those objectives, as well as the objectives of arbitration and justice therein. In addition, it should meet the interests of the legal system, of which arbitration is merely a part. Finally, it should keep up with current developments in the arbitral field across the world.

The recent tendency towards modernisation and harmonisation of the arbitration regimes of the world provides much material against which the regime in Kuwait can be judged. This study will particularly examine the UNCITRAL Model Law, since the Model Law was developed in order to assist states in reforming and modernising their law on arbitration. The success of the Model Law has played a vital role in the process of standardising the rules that govern arbitration procedures in various countries, and would be a useful legislative guide for any country interested in modernising its arbitration law.

This thesis will investigate whether Kuwait should adopt the UNCITRAL Model Law, in whole or in part, in order to take the necessary steps towards modernising the legal system of Kuwait. Reference will be made to those Arabic states which have

already adopted the UNCITRAL Model Law - e.g. Egypt, Bahrain and Tunisia. A second source of comparison is English law. Arbitration in England is as old as its legal history¹⁰. England has been for centuries one of the important centres of arbitration, if not the most important. It has boasted statutes in the field of arbitration since 1697, and has witnessed several major statutory reforms between 1889 and 1996, culminating in the Arbitration Act 1996, the new foundation of English arbitration law. It has been said,

“ The 1996 Act is the most extensive statutory reform of English arbitration law, its scope exceeding any previous English statute on arbitration. It restates, with important modifications, the law and the practice of English arbitration, both common law and statute, running chronologically through each stage of an arbitration, from the arbitration agreement, the appointment of the arbitration tribunal, the conduct of the arbitration, the award, to the Court's recognition and enforcement of the award”¹¹.

The structure of the Arbitration Act in 1996 is very clear and comprehensible, set out in a logical order, and expressed in clear language that can be fully understood by any layman. It therefore provides the best benchmark for a modern arbitration statute.

This research then addresses the following themes:

- How can the court support arbitration?
- How should the court supervise arbitration?
- Can any recommendations be made to improve the legal system of Kuwait in this area, drawing from other models in existence?

Therefore, this thesis will consider the adequacy of the current Kuwaiti arbitration system, by reference, in particular to the Model Law and the English Arbitration Act 1996. The aim of this thesis is to explore the relationship between the courts and arbitration, so that the relationship might operate with maximum efficiency. This study will attempt to identify the defects of the arbitration system in Kuwait and to look for means of improvement.

¹⁰ G. William, 'United Kingdom National Report' Yearbook, vol. II, 1977, p 90

¹¹ V. Veeder, 'National Report on England' Intl. Handbook on Comm. Arb., Supp. 23, March 1997, p 1.

It is hoped that this study will be helpful to Kuwait in helping the development of the legal system. One aim would be to help create a user-friendly arbitration regime, which does not deter investment and capital inflow. Another would be to seek to establish the state as a centre of commercial arbitration. A third would be to contribute to the modernisation of the Kuwaiti arbitration system.

Chapter One:

General Introduction

1. The Role of Arbitration

Delivering justice is a cardinal duty of any state. It should spare no effort in attaining this goal. For this reason, each state has its own legal system and courts. In addition to this, most states allow litigants to submit their existing or future disputes to individuals whom they trust in order to settle their case outside the competent court. Arbitration, like litigation, is a means of dispute resolution. It could be argued that judges and arbitrators are partners, jointly responsible to administer justice - judges in the public system and arbitrators in the private system. Arbitrators, like judges, must judicially determine the matter in dispute¹. Those who might wish to invest in Kuwait might wish to know how any dispute, arising from the contracts they enter, could be settled there. Disputes could, of course, be settled by litigation. On the other hand, arbitration is available as an alternative to litigation. There are several reasons why parties may prefer arbitration.

1.1 Freedom to Choose the Arbitrators

Parties to an arbitration agreement are free to choose their arbitrator(s). Arbitrators, unlike judges, are not appointed by the State, but by the parties to the arbitration agreement, or by an institution chosen by the parties. Thus arbitrators can be chosen for their particular expertise, and may, indeed, not be lawyers. Or an arbitrator may be an expert in a particular area of law, or in the particular system of law which governs substance of the dispute, it being entirely possible that this might not be the law of Kuwait. Moreover, in international commercial arbitration it is commonplace to have a three-arbitrator tribunal, admitting the possibility that a variety of disciplines and/or legal cultures might be represented on the tribunal.

¹ It should be mentioned that arbitration, unlike national court systems, is a commercially oriented product that flourishes on the basis of market forces. See e.g., H. Yu, 'Total Separation of International Commercial Arbitration and National Court Regime', p 145.

1.2 Procedural Flexibility

The parties to an arbitration agreement are regarded as masters of the arbitral proceedings, and so can choose the most suitable procedure, determining the degree of formality or informality of the arbitral process. So an adversarial or inquisitorial procedure may be adopted, or a procedure combining elements of the two. They may decide on the type of evidence to be considered, e.g. whether oral evidence should be heard, and streamlined modes of proof may be adopted. So, arbitration as a private system of adjudication, offers much greater procedural flexibility than litigation.

1.3 Enforceability of Arbitral Award

Another factor in favour of arbitration is the enforceability of the arbitral award in other states. As a result of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, well over 100 states round the world, including all major trading nations, have agreed to recognise and enforce foreign arbitral awards. No judgement convention has anything like this scope, and it is often easier to enforce a foreign arbitral award than a foreign court judgement.

1.4 Privacy and Confidentiality

In arbitration the dispute is resolved in private, whereas by contrast, court justice is administered in public. Arbitration proceedings are not open to the public, who do not have the right to attend the hearings. Moreover, privacy offers the arbitrating parties the advantage of not revealing the fact of their conflict, or disclosing sensitive information to the outside world.

1.5 Disadvantages

There are, of course, disadvantages in choosing arbitration. For example, while certain types of arbitration are specifically designed to be low-cost, and this can be partly true even of international commercial arbitration if special expedited procedures can be adopted, more typically international commercial arbitration is more expensive than litigation. This is because the parties must meet the fees of the arbitrator(s) and the expenses of the tribunal. There may also be extra delays in resolving the dispute by arbitration. Jurisdictional issues may arise, which could never arise in litigation. For example, one party may challenge the question of the validity of the arbitration

agreement, or the method of appointing the arbitral tribunal. Moreover, an arbitral tribunal can only sit when arbitrators are available.

Yet many believe that the advantages of arbitration outweigh its disadvantages. Expense and delay are also features of court action. In practice, a good arbitral tribunal can control the proceedings to avoid undue delays and cost. It may be indeed be bound by legislation to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delays or expense, as in the case of the English Arbitration Act 1996 ss.1 and 33(1)(b)².

2. The Value of Arbitration for Foreign Investors

Since Kuwait aims to develop its investment infrastructure, attracting domestic and foreign investment, a conducive legal environment for investment has to be provided. Many investors prefer arbitration as a dispute resolution mechanism³. This preference is not only because of the advantages of arbitration noted above, but also because foreign investors are wary of litigating in the other party's "home" court⁴. When investors enter into foreign trade and investment transactions, they hope that there will be no future disputes. At the same time, the possibility of future dispute is seen as one of the dangers of such transactions. The danger is greater when the investors cannot be confident that reliable procedures are available to resolve any such future disputes promptly and fairly. It has been said:

"When the risk is increased because effective dispute resolution procedures are not available, businesses react in one of two ways: either to refuse to enter into the transaction because the risks are too

² In any event, it may argue that arbitration, as a legitimate method of dispute resolution, offers the chance to avoid going to the court. This by itself may justify resorting to arbitration rather than litigation. See W. Park, 'The Interaction of Courts and Arbitrators in England: The 1996 Act as a Model for United States' (1998) 1(2) Int. A.L.R. 54 -- 67 at p 45. This issue will come again under discussion the value of arbitration.

³ The Honorable A. Amisshah, 'Judicial Aspect of the Arbitral Process', Paper presented in Biennial IFCAI Conference- Oct 24,1997, Geneva, Switzerland. It is available at <<http://arbitrator.wipo.int/events/conferences/1997/october/hoellering2.html>>, [Last visited 5 Jul 2003]. This can be seen not only in the number of arbitration cases, but also by the growing utilisation of arbitration agreement in contracts and the expansive variety of transactions that are covered by these agreement. See M. Levin, 'The Role of Substantive Law in Business Arbitration and the Importance of Volition' (1997) 35 (1) ABLJ 105.

⁴ Prof. Y. Taniguchi, 'The Changing Attitude to International Commercial Dispute Settlement in Asia and Far East' (1997) 2 (Jun) A.D.R.L.R. 67-77 at pp. 72-73. See also R. Tindall, 'International Commercial Arbitration' (1969) 7 (1) ABLJ 65 at p 67.

great, or to raise the price to compensate for the additional hazard. In either event the free flow of trade is hampered"⁵.

An effective arbitration system helps to build and boost the confidence of parties in dealing with each other and that enhances trade⁶. Thus, when investors can be sure that laws and procedures exist to enable future disputes to be resolved properly and efficiently, the conduct of trade and investment is facilitated and may increase dramatically. Investors often look to arbitration as a system, which helps to improve trade and investment relations by providing a mechanism that decreases the risks mentioned above⁷.

So arbitration is probably the most popular mechanism for the settlement of dispute in international commerce. Arbitration has been recognised by most legal systems and many international convention (e.g. the New York Convention 1958) as an acceptable dispute resolution method. Sir Michael Kerr points to this favourable attitude toward arbitration by the international community, and says:

"What matters is that international arbitration has in general given rise to an internationally accepted harmonised procedural jurisprudence...It is establishing a generally accepted procedure for the resolution of disputes which cuts right across past and present barriers between different procedural philosophies and legal systems"⁸.

Moreover, a trend emerged towards the end of last century to spread the use of arbitration world-wide and to achieve uniformity in the rules governing arbitration. So one of the

⁵ See Holtzmann & Neuhaus, *op. cit.*, p 3.

⁶ A. Okekeifere, 'Commercial Arbitration As the Most Effective Dispute Resolution Method: Still a Fact or Now a Myth?' (1998) 15 (4) *J. Int. Arb.* 81-105. The view is that arbitration offers a chance for its users to design their method of adjudication as they think fit and proper. In addition, arbitration would relatively limit the state court intervention in the disputes. It has been said that "Stimulated by an enormous increase in international commerce during the last 50 to 60 years and reluctance of parties to litigate in foreign courts, an effective worldwide system of international commercial arbitration has come into being-one that provides procedural rules for the conduct of international arbitration proceedings, experienced and trusted arbitral institutions providing impartial services, and an effective treaty network for the enforcement of arbitral agreements and awards". See M. Hoellering, 'International Commercial Arbitration: A Peaceful Method of Dispute Settlement' (1985) 40 (4) *Arb. J.* 19 at p 20.

⁷ A. Okekeifere, *op. cit.*, 81-105.

⁸ M. Kerr, *Concord and Conflict in International Arbitration (The Keating Lecture)* (1996, Kings College, London), at p 7 cited in H. Yu, 'Total Separation of International Commercial Arbitration and National Court Regime', *op. cit.*, under [(I) The Changing Face of Arbitration].

aims of the UNCITRAL Model Law is to assist states in reforming and modernising their laws on arbitration⁹. It was claimed that,

“The Model Law constitutes a sound and promising basis for the desired harmonisation and improvement of national law. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a world-wide consensus of the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world”¹⁰.

Accordingly, if the authorities in Kuwait wish to achieve the policy of attracting investment, the arbitral system should recognise international movements in the arbitration field. This approach is based not only on the value of arbitration but also the notable relationship between arbitration and trade, which is discussed in the coming paragraphs.

3. The Link between Arbitration and Trade

The last conclusion opens the question: what is the relationship between arbitration and investment and trade? This relationship has been recognised for a very long time¹¹. So the preamble of the English Act of 1698 states:

“Whereas it hath been found by experience, that references made by rule of the court have contributed much to the ease of the subject, in the determination of controversies, because the parties become there by obliged to submit to the award of the arbitrators...now, for promoting trade, and rendering the award of arbitrators more effectual in all cases for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account of trade, or other matters, be it enacted...”.

⁹ See Explanatory Note of by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, [hereinafter cited as Explanatory Note on the Model Law] para 3.

¹⁰ *Ibid.*, para 2.

¹¹ Martin Odams de Zylva admits “Arbitration is an ancient institution which has been deployed as the principal means of resolving disputes since trade began”. See M. Zylva, ‘Effective Means of Resolving Distance settlement disputes’ (2001) 67 (3) *Arbitration* 230-239 at p 239.

Jacques Werner is one of those who observed the kinship between arbitration and trade. He said,

“International commercial arbitration serves international trade and is dependent on it. As all service industries, it lives or dies with the fortunes of its base industry. Consequently, the evolution of international trade cannot leave the international arbitration community indifferent”¹².

The same concept was behind Michael’s statement that “Common efforts to streamline and harmonize the practice of international arbitration have served to improve the fabric of international business relations”¹³.

Arguably, this perceived relationship between arbitration and trade has played a vital role in international and domestic movements for developing user-friendly arbitration regimes. The importance of arbitration to trade meant that the second half of the last century witnessed three major events in the development of arbitration to encourage trade – (1) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations Conference on International Commercial Arbitration in New York in June 1958; (2) the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) adopted by the UN General Assembly on 15 December 1976; and (3) the Model Law on International Commercial Arbitration adopted by UNCITRAL in Vienna on 21 June 1985 and by the UN General Assembly on 11 December 1985. That one of the objects of these measures has been to facilitate the conduct of international trade may be deduced from the UN General Assembly Resolution, which adopted the UNCITRAL Arbitration Rules. It stated

“The General Assembly...Being convinced that the establishment of rules for... arbitration, that are acceptable in countries with different legal, social and economic systems, would significantly contribute to the development of harmonious international economic relations...”¹⁴.

¹² *Op.cit.* at p 5. See also J. Saxby, ‘A User’s Perspective of the UNCITRAL Model Law’ (1986) 2 (2) *Arb. Int.* 164-166. Hong-lin Yu says “arbitration has had a fast growth and development fuelled by the expectations and the needs of the international business community”. See her article under title ‘Total Separation of international Commercial Arbitration and National Court Regime’, *op. cit.*, under [(I) The Changing Face of Arbitration].

¹³ See M. Hoellerning, *op. cit.*, at p 20.

¹⁴ Resolution 31/98 adopted by the General Assemble on 15 Dec 1976.

The UN General Assembly declared the same idea on adopting the Model Law on international arbitration. It states

“The General Assembly,
Recognized the value of arbitration as a method of settling disputes arising in international commercial relations,
Being convinced that the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonisations international economic relations,
Being convinced that the Model Law, together with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Arbitration Rules of United Nation Commission on International Trade Law, recommended by the General assembly in its resolution 31/98 of 15 December 1976, significantly contributes to the establishment of a united legal framework for the fair and efficient settlement of disputes arising in international commercial relations”¹⁵.

The link between arbitration and trade has to be noticed also by looking at the role of UNCITRAL, which was behind the advent of these vital events, as the core legal body within the United Nations system in the field of international trade law. The object of the Commission is the promotion of the progressive harmonisation and unification of international trade law. This function would include reducing or removing legal obstacles to the flow of international trade¹⁶.

The role of competent dispute settlement mechanism is vital for effective global economic development and liberalisation of trade and investment in any region¹⁷. Investors' confidence in a host country can be ensured through such mechanisms, as where there is confidence, there shall be co-operation. It was suggested that if an investor

“loses confidence in the host country's dispute settlement mechanisms, it is futile for the host country to expect co-operation in its economic development from such an investor. International commercial

¹⁵ Resolution 40/72 - A/40/53.

¹⁶ Resolution 40/71 - A/40/53.

¹⁷ See Dr A. Maniruzzamaman, op. cit., p 508.

arbitration has proved to be very popular with the international business community. Its current role in the expansion of international trade cannot be denied"¹⁸.

Thus, arbitration may make a very positive contribution to the enhancement of closer economic co-operation in any region.

Arbitration has proved to be very popular with the business community¹⁹. Most disputes concern business transactions between trading and investment entities from different countries (or the same country), such as private individuals, multinational corporations and governments²⁰. Many studies suggest that commercial arbitration has witnessed dramatic growth in the recent times. So bodies like UNCITRAL identified a need for effective modern arbitration regimes. It noted for example that:

"The view was expressed that in developing a model law, the Commission would be helping to bring about fairness and equality in business relationships, and that this was therefore relevant to the Commission's consideration of the legal aspects of a new international economic order"²¹.

The Commission also stated:

"There was general support for the suggestion to proceed towards the drafting of a model law on international commercial arbitration. This was deemed desirable in view of the manifold problems encountered in present arbitration practice and of the need for a legal framework for equitable and rational settlement procedures for disputes arising out of international trade transactions"²².

¹⁸ *Ibid.*

¹⁹ Robert Coulson says, "Scholars of business law are familiar with the recent growth of commercial arbitration. But remembering that arbitration was born from the desire of businessmen to escape the long delays and grievous costs of litigation, as well as to obtain the experienced judgement of associates from their own industry, educators may retain a residual skepticism as to the quality of justice dispensed in this "businessman's forum". See his article 'Management Arbitration in Action' (1965) 3 (1) ABLJ 31 and G. McKnight, 'Teaching International Aspects of Business Law' (1977) 15 (1) ABLJ 31-36 at p31.

²⁰ See M. Wang, 'Are Alternative Dispute Resolution Methods Superior to Litigation in Resolving Disputes in International Commerce?' (2000) 16 *Arb. Int'l* 189-211 at p 189.

²¹ A/34/17, para 78.

²² *Ibid.*, para 64.

Furthermore, the comment of the UK on the draft text of a model law suggested that “the only proper objective for any law of arbitration is to ensure that commercial men have their disputes decided fairly...”²³.

The importance of arbitration to trade is emphasised by Casella,²⁴ who suggests that efficient international trade is supported not only by international instruments but also international coalitions of private interests. Commercial arbitration is an important example of these private coalitions. He states:

“International arbitration is understood to provide a ‘supra-national’ jurisdiction created by international businessmen, shaped by the evolution of international markets, and itself responsible for some of this evolution. It has been theorised as the road towards a transnational law, a ‘self-made economic law’ created spontaneously by private traders and evolving independently of national parliaments and national courts”²⁵.

He also believes that commercial arbitration is a jurisdiction created by the actors in international trade, hence the fact that arbitration is the most frequently chosen mechanism for resolving disputes in international trade.

The Kuwaiti authorities must recognise the relationship between arbitration and trade. An effective arbitration regime is vital a factor in establishing a good investment environment in Kuwait²⁶. Kuwait aims to attract investments²⁷, but does not offer an attractive arbitral environment. Lord Mustill observes,

“To these rapid changes there should have been a clear and agile response by the word of international arbitration. I say, “should have been” because it is a fact too often overlooked that international

²³ A/CN.9/263/ADD.2, para 3.

²⁴ See A. Casella, ‘On Marketing Integration and the Development of Institutions; the Case of International Commercial Arbitration’, *op. cit.*, at pp. 155-186.

²⁵ *Ibid.*, p 156.

²⁶ Fabien Gelinat states “The overall result is a net gain in the recognition of arbitration and arbitral awards in the world and therefore an improvement in the ease with which one can conduct business globally. There can be no doubt that there is a strong link between the quality of a country’s legal framework for arbitration and business decisions about investment in that country”. See F. Gelinat, ‘Arbitration and Challenge of Globalization’ (2000) 17 (4) *J. Int. Arb.* 117-122 at p 20.

²⁷ For example, it authorizes 100 percent foreign ownership (in certain industries), it exempts foreign – majority owned companies from requiring a local agent, it authorizes 10 years tax holidays for new foreign investors, it facilitates the entry of expatriate labor and so on.

arbitration is at the same time the child and the servant of international commerce”²⁸.

4. The Importance of the Relationship between the Court and Arbitration

The success of an arbitral regime demands efficiency in every aspect of the operation of the system, including the scope of the role of the court in arbitration. This thesis will focus on the need for achieving the optimum role of the court in arbitration. The relationship between the court and arbitration is key to the success of any arbitral system. Arbitration cannot function without court support. The most serious weakness of arbitration as a method of resolving disputes is its inability to enforce its orders and awards without the assistance of the court. The power to give binding effect to the legal consequences of arbitration is invariably entrusted to the court by the legislature²⁹. The court may support arbitration in a number of ways, such as enforcing the arbitration agreement, constituting the arbitral tribunal, facilitating the conduct of the arbitral proceedings and enforcing the arbitral award. Quite simply, courts are indispensable to the effectiveness of arbitral process³⁰. However, there may be a price for such assistance and support. The price is judicial supervision over arbitration. It is argued,

“Attractive as it may be in theory to dissociate the arbitral process from judicial control, the fact remains that in practice this is an impossible aim”³¹.

So it is important that the lawmakers consider the proper function of the court in the arbitral process when they draft a new Arbitration Act. The relationship between national court and arbitration is a strategy of structure, as Lord Mustill says,

“Much more important however from the point of view of structure is the formal relationship between arbitration and national courts. Undoubtedly, the most important positive trend in arbitration since the Sixth Congress has been the widespread recognition that the existence

²⁸ ‘Keynote Speeches’, in A. Berg (ed.), *International Arbitration in a Changing World*, ICCA Congress Series, No. 6, Bahrain, Deventer: Kluwer Law and Taxation Publishers, 1993, ICCA Congress No. 6, Bahrain 1993, 13 at p 15.

²⁹ Sir M. Kerr, ‘Arbitration and the Courts: the UNCITRAL Model Law’ (1985) 34 I.C.I.Q., p 1.

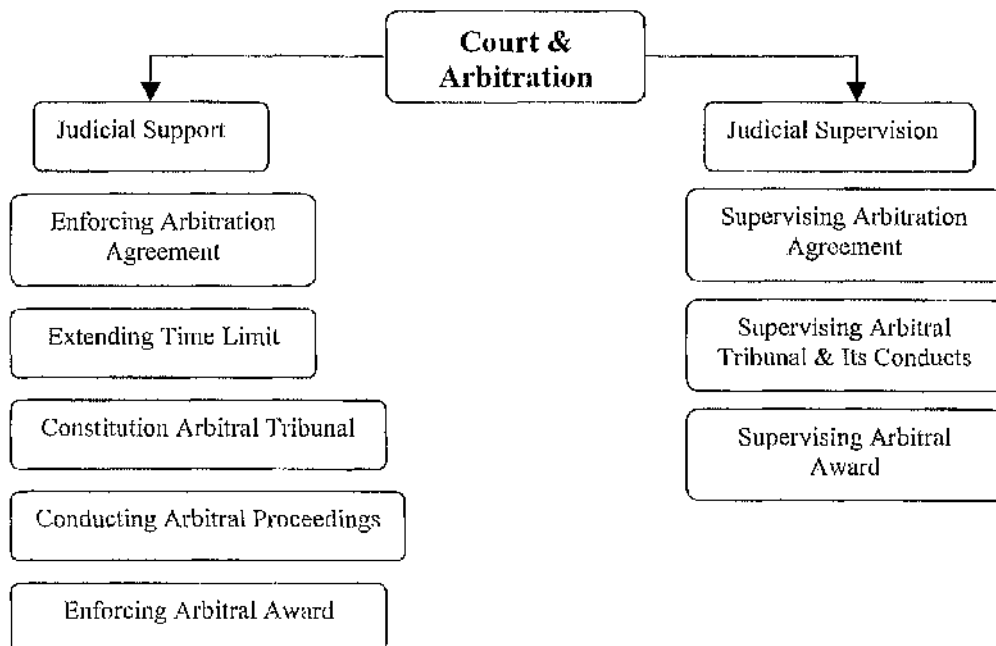
³⁰ *Ibid.*

³¹ A/CN.9/263/ADD.2, para 4.

of a properly balanced and properly understood relationship of this kind is indispensable to the success of arbitration³².

This relationship is a continuous relationship, starting with the arbitration agreement through the arbitral proceedings, until the enforcement of the award. Not only the law of arbitration is concerned with this relationship³³, but also the users of arbitration may take the relationship in account. However, the key question is that what is the proper relationship between the court and arbitration? This is the key question of this thesis. It will not cover all aspect of this relationship, but only the most significant.

It may be argued that the role of the court should not exclusively be to assist the arbitral process. The court must supervise that process to safeguard the interests of the legal system. This relationship between arbitration and the court, accordingly, may be divided into two branches, the first being the supportive role of the court, the second branch being its supervisory role, as illustrated in the diagram below.



³² See 'Keynote Speech', *op. cit.*, at p 20.

³³ See M. Kerr, 'Arbitration and the Courts', *op. cit.*, p 1. See also Sir M. Mustill & S. Boyd, *The Law Practice of Commercial Arbitration*, 2nd ed., London, Butterworths, 1989, p 5.

In principle, the focal point of this relationship should be based on supporting party autonomy to the fullest extent possible. The court may then support the effectiveness of the arbitral process, while supervising it in the interests of integrity of the legal system in general. Achieving the proper balance in this relationship should enhance the effectiveness of the Kuwaiti arbitral system, enhancing the attractiveness of Kuwait as a venue for arbitration.

5. Arbitration and the Legal System of Kuwait

After the independence of Kuwait from the British protectorate, which operated between 1899 and 1961, Kuwait developed a comprehensive legislative framework. Since independence Kuwait has adopted a legal system with a civil or Roman law basis. The majority of Kuwaiti rules are derived from the Egyptian and French codes. So, the legal system in Kuwait is sometimes called a French-Egyptian system. Moreover, Article 2 of its constitution provides that Islamic Law is a major source of law, but not the exclusive source. This opens the door for the legal system to be based on Islamic Law, as well as allowing the possibility of benefiting from other legal systems' experiences. Thus, it can be said that the legal system in Kuwait is a mixture of the Roman and Islamic traditions. It was submitted by Keesse, in his introduction to the legal system of Kuwait,

“Despite its many years of exposure to British political and legal influences, Kuwait after the treaty termination proceeded to enact codes and statute law which resembled far more the legislation of civil law jurisdictions such as France than the laws of common law jurisdictions such as Britain, and which strongly emphasised the accommodation of Western legal principles to precepts of Islamic Law”³⁴.

Kuwait permits arbitration as part of its legal system. The Kuwaiti legislature has recognised arbitration as a mean for the settlement of civil and commercial disputes within its judicial system. As El- Ahdab says, since becoming an independent state in 1961, the State of Kuwait has witnessed a codification movement in all branches of the law, including Civil and Commercial Procedure Law 1960 (CCPL 1960)³⁵. The basic

³⁴ Commercial Laws of the Middle East, vol. 1, issued 1989, by Oceana publications INC., p 3

³⁵ See A. El-Ahdab, *Arbitration in Arabic Countries*, vol. 1, Paris, 1990, p 551.

statutory regulations on arbitration were laid down in Articles 254-266 of CCPL 1960. This act was modified pursuant to Law no. 78/1980 (CCPL 1980).

The arbitration system does not distinguish between international arbitration and national (domestic) arbitration. However, arbitration is regarded as foreign only where the award is signed outside Kuwait³⁶. In such case it will be subject to the provisions of Articles 199 and 200 of CCPL 1980 and New York Convention 1958³⁷.

This thesis will study only Voluntary Arbitration³⁸, which is governed by CCPL 1980 (Article 173 -188). While arbitration offers the advantages outlined above, these may be undermined if the arbitration law of a particular state is not conducive to the flexible operation of arbitration. In the current context, it would have to be asked whether the ordinary arbitration regime of Kuwait is amenable to the modern arbitration process. The story of the last 20 years has been one of the liberalisation of arbitration regimes across the world to allow for greater and greater party and tribunal autonomy. The current Kuwaiti rules predate such developments. This work will examine whether those rules measure up to the demands of a modern arbitration system, using the English Arbitration Act 1996 and the UNICTRAL Model Law on International Commercial Arbitration as paradigms. The question will be asked whether Kuwait requires a new arbitration statute on the model of the English Act.

6. Background to The Model Law

It has been suggested above that one of the main templates for any modern arbitration statute is the UNCITRAL Model Law on International Commercial Arbitration. It may assist understanding to sketch the background to this measure.

6.1 UNCITRAL

UNCITRAL is the United Nation Commission on International Trade Law. The General Assembly of the United Nations established it on 17 Dec 1966. Its aim is to further the progressive harmonisation and unification of the law of trade and in that respect to bear

³⁶ This is according to Art. 182 (4) of CCPL 1980, which states that the arbitral award must be rendered in Kuwait, otherwise the rules prescribed for the awards rendered by the arbitral tribunal in a foreign country shall be applied. And Art. 183 (3) clarified the matter of rendering as that the arbitral award is deemed as having rendered as of the date on which the arbitrators have signed it after it has been put in writing.

³⁷ This convention is relating to Recognition and Enforcement of Foreign Arbitral Award. Kuwait acceded to it in 1978 pursuant Law no. 10/1978.

³⁸ This thesis is about voluntary (ordinary) arbitration apart from whether it is international or national.

in mind the interests of all people, in particular those of developing countries, in the extensive development of international trade³⁹. It has been described as

“the core legal body within the United Nations system in the field of international trade law, [with a mandate] to co-ordinate legal activities in this field in order to avoid duplication of effort and promote efficiency, consistency and coherency in the unification and harmonisation of international trade law”⁴⁰.

Within UNCITRAL's remit would be the harmonisation and improvement of national law related to arbitration⁴¹, given that a fair and effective process for settling disputes is vital to the development of international trade. UNCITRAL recognises the value of arbitration and its impact in the context of international trade law. Therefore, it has played a vital role in promoting significant projects in the field of commercial dispute settlement⁴². For example, it produced in 1976 the UNCITRAL Arbitration Rules, in 1980 the UNCITRAL Conciliation Rules, in 1985 the UNCITRAL Model Law and the UNCITRAL Notes on Organising Arbitral Proceedings in 1996. It has also made an effort to promote the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and to increase the effectiveness of the Convention, by paying attention to the importance of the Convention in most of its resolutions and educational programmes⁴³. For instance, it was stated in General Assembly resolution 40/72 that the Model Law, together with the New York Convention and the UNCITRAL Arbitration Rules, considerably contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes emerging in international commercial relations⁴⁴.

To sum up, commercial arbitration is a field in which UNCITRAL has been particularly active.

³⁹ See General Assembly Resolution 2205 (XXI) of 17 Dec 1966. That was subsequent to a proposal by Hungary that urged the United Nations to play a more active role in removing or reducing legal obstacles to the flow of international trade. See C. Fleischhaure, 'International Arbitration Report' (1986) 41(1) Arb. J. 17.

⁴⁰ General Assembly Resolution 40/71, 40 GAOR, Supp. No. 53, A/40/53, p. 307 (adopted in 11 Dec. 1985).

⁴¹ See Explanatory Note on the Model law, para 2.

⁴² C. Fleischhaure, *op. cit.*, at p 17.

⁴³ See Holtzmann & Neuhaus, *op. cit.*, p 5

⁴⁴ See A/40/53

6.2 The Model Law

The Model Law is a valuable example of the contribution of the United Nations to the promotion of arbitration as a method of resolving disputes. The Model law was regarded as a third major contribution and accomplishment of the United Nations in the field of arbitration. Having already produced the New York Convention 1958 regarding the Recognition and Enforcement of Foreign Arbitral Awards, and the UNCITRAL Arbitration Rules 1976, which are used world-wide in ad hoc and administered arbitrations, in 1985 the General Assembly of the United Nations adopted the UNCITRAL Model Law on International Commercial Arbitration. The starting point of the story of the genesis the Model Law occurred when the Asian - African Legal Consultative Committee (AALCC) of UNCITRAL invited UNCITRAL to consider the possibility of drafting a protocol to the New York Convention 1958 with view to clarifying a number of questions regarded as being of special importance in Asia and Africa⁴⁵.

UNCITRAL consequently requested its secretariat and the AALCC to prepare a study on these matters, in consultation with, where necessary, governments, interested international organisations and arbitration centres, including the international Council for Commercial Arbitration⁴⁶. This committee met on 6-9 June 1977. The committee realised the importance of these issues not only to the Asia/Africa region, but more generally in the context of international commercial arbitration. However, it reached the view that the preparation of a protocol to the New York Convention 1958 was not the most adequate way of dealing with them⁴⁷. This is because the New York Convention 1958 had been widely accepted and was deemed to be a successful instrument for facilitating the recognition and enforcement of foreign arbitral award⁴⁸. Thus, there was no need to alter or amend it. It suggested, instead of a protocol, that a new international convention or a uniform law should be prepared. The unanimous view was that

⁴⁵ See the decision by the AALCC on international commercial arbitration taken at its seventeenth session, Kuala Lumpur, 5 July 1976, para 3 (a), (b), (c). Those issues were that where arbitrating parties have adopted rules pertaining to the conduct of an arbitration between the parties, whether for the ad hoc arbitration or for institutional arbitration, should the arbitration proceedings be conducted pursuant to those rules, notwithstanding provisions to the contrary in municipal laws, and should the award thus rendered be recognised and enforced by all Contracting States? Another is that the exclusion in international arbitration of reliance on sovereign immunity. When a government agency is a party to a contract which contains an arbitration clause, it must not be able to invoke sovereign immunity in respect of an arbitration pursuant to that agreement.

⁴⁶ A/32/17, para 39 (4).

⁴⁷ *Ibid*, annex II "Report of Committee of the Whole II", para 30.

⁴⁸ A/CN. 9/169, para 5.

“ it would be in the interests of international commercial arbitration if UNCITRAL would initiate steps leading to establishment of uniform standards of arbitral procedures. It was considered that the preparation of a Model Law on arbitration would be the most appropriate way to achieve the desired uniformity. Such undertaking, if successful, would also meet the concerns expressed in AALCC recommendations”⁴⁹.

In August 1979, UNCITRAL accepted and adopted this suggestion.

Then, the commission considered the question of the scope of the application of such a model law. There was general agreement that that the scope of the Model law should be restricted to international commercial arbitration in view of specific features inherent in the settlement of international disputes. This would however, not prevent States which wished to do so from adopting the model law provisions also for domestic arbitration⁵⁰.

Thus, UNCITRAL asked its secretariat to prepare, in consultation with interested international organisations, in particular the AALCC and International Council for Commercial Arbitration, a preliminary draft of the model law on arbitration procedures, taking into account the provisions of New York Convention 1958 and UNCITRAL Arbitration Rules⁵¹. The commission at its 1981 session considered the Possible Features of the Model Law Report, which was prepared by the Secretariat and decided to proceed with the preparation of the Model Law via a Working Group. The working group composed representatives from 15 member States. The purpose of this size was to ensure efficient and expeditious work⁵². In addition to this, States not members of the Working Group had the right to attend the sessions and participate in the deliberations⁵³. Thereafter, observers from 30 member states and 6 international organisations attended⁵⁴. In August 1983 UNCITRAL decided to enlarge the working Group to include all 36 of its member States⁵⁵. The task of preparing the model law went through five drafts with the working group finally adopting the fifth draft in March 1984⁵⁶.

⁴⁹ *Ibid.*, para 6.

⁵⁰ A/34/17, para 79.

⁵¹ *Ibid.*, para 81.

⁵² *Ibid.*, para. 67.

⁵³ This is according to para 10 (C) of the General Assembly Resolution 31/99 of Dec 76 [31 G.A.O.R.] *Supp.* No. 39, A/ 31/39, p182-184 .

⁵⁴ A/CN. 9/216, para 5 and 6.

⁵⁵ A/38/17, para 143.

⁵⁶ The Working Group adopted the fifth draft at February 1984 session. See A/CN. 9/246.

In August 1984, UNCITRAL requested the Secretary-General of the UN to submit the draft text to all governments of the UN and all interested international organisations for their comments and asked the Secretariat to prepare an analytical compilation of all such comments⁵⁷. UNCITRAL met in Vienna in June 1985 to review the draft text. Representatives of 62 States and 18 international organisation were present as members or observers⁵⁸. In June 21, 1985, a final revised draft was approved and a report made thereon on August 21, 1985⁵⁹. In 11 Dec 1985 the General Assembly of the UN requested the Secretary General to submit the final text of the Model Law to governments, arbitral institutions and other interested bodies, recommending that all states give due consideration to the Model Law⁶⁰.

6.3 Is the Model law a Convention?

What is the legal nature of the UNCITRAL Model Law? It is important to understand that it is not a convention or treaty. There is no treaty obligation to adopt the Model Law, nor enact legislation in accordance with its provisions. It is designed to provide a unified legal framework for the fair and efficient settlement of disputes. Member States may consider the Model law and may decide to adopt it as a whole. Or they may decide to adopt it with some amendments or omissions, depending on what they consider appropriate for their legal systems in general and arbitration systems in particular, or they may decide not to adopt it all. The Mustill Report notes,

“Member States are under no treaty obligation to enact legislation in accordance with its terms. Questions of ratification do not arise. Nor does participation as a member of the Working Group or the Commission entail any obligation to enact such legislation. The purpose of the discussions was to develop a text which could be offered to states at large as a workmanlike and readily comprehensible basis for an arbitration regime broadly conforming with generally accepted concepts of international commercial arbitration. It was not to be expected that all states, whatever the characteristics of their arbitral

⁵⁷A/CN. 9/263 It may be mentioned that in May 1984 ICCA convened a conference in Switzerland to discuss the text draft of the model law. There were almost 550 practitioners and scholars in the field of international commercial arbitration from 39 nations. See Holtzmann & Neuhaus, *op. cit.*, p13.

⁵⁸ A/40/17

⁵⁹ *Ibid.*, para 332.

⁶⁰ General Assembly Resolution 40/72.

procedures, and of their contractual, constitutional and other laws directly or indirectly bearing on arbitration, would necessarily find it advantageous or even practicable to adopt the Model Law in its entirety”⁶¹.

The question whether the unification of arbitration law should be accomplished by a Model Law or a convention was considered, and the decision taken was to prepare a model law, rather than a convention. It was stated,

“as desirable as uniformity is in general, a model law is not necessarily less conducive to reaching uniform standards than a convention. Apart from any considerations concerning the time-consuming and costly procedures of adopting and ratifying a convention, it is ultimately the quality of the contents of the proposed law that determines its acceptability”⁶².

It may be added that the Model law will become the law of a State only if and when the State enacts the Model Law. It is worth mentioning that even if the Model Law is considered as a vital factor in standardising international commercial arbitration procedures, and would be a useful legislative guide for all states, it is not complete a code of arbitration, as it does not deal with certain areas such as capacity and arbitrability.

7. The Arbitration Act 1996

The new English Arbitration Act 1996 came into effect in early 1997. The 1996 Act is considered as the most extensive statutory reform of English arbitration law in the history of UK Parliament⁶³. The Department of Trade and Industry [DTI] initially followed on the Departmental Advisory Committee’s [DAC] advice to reject the adoption of the UNCITRAL Model Law as a legislative text and to maintain the existing English system⁶⁴. However, it came to be recognised that users needed a new English arbitration statute, with many features taken from the UNCITRAL Model Law. The DAC Report of

⁶¹ The DAC 1989 Report, ‘A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law’, [hereinafter cited as the DAC 1989 Report], para 9.

⁶² A/CN. 9/207

⁶³ See, V. Veeder, QC, ‘England’, *op. cit.*, p369.

⁶⁴ *Ibid.*, p 370.

1989 recommended that there should be a new and improved Arbitration Act along the following lines⁶⁵:

- a) It should comprise a statement in statutory form of the more important principles of the English law of arbitration, statutory and common law.
- b) It should be set out in a logical order, and expressed in language, which is sufficiently clear and free from technicalities to be readily comprehensible to the layman.
- c) It should not be limited to the subject matter of the Model Law.
- d) Consideration should be given to ensuring that such new statute should, so far as possible, have the same structure and language as the Model Law, so as to enhance its accessibility to those who are familiar with the Model Law.

So the Arbitration Act is an interesting new piece of legislation, which may improve the arbitral process in England, and may mark an improvement upon the Model Law⁶⁶. For this reason, it will be employed as a possible model for a new Kuwaiti statute.

The Kuwaiti authorities should take note of the growing internationalisation in sectors such as economics, commerce, law and arbitration sectors, and embrace that trend. The aim of this thesis is not to compare civilian and common law systems, but to lay out a better framework for the conduct of arbitration in Kuwait than exists at present. Quite clearly, there is no perfect arbitral system, but it may be that there is a better one.

8. Arbitration and Party Autonomy:

One of greatest the advantages of arbitration is party autonomy⁶⁷. The philosophy of this principle emanates from the theory that arbitration is a consensual means of dispute resolution, reflecting the will of the parties. Indeed, the recognition of party autonomy (e.g. in the appointment of arbitrators and the determination of procedure) is one of the major distinctions between arbitration and litigation. Embracing this principle shows the respect accorded by the legal system to the agreement of the parties to resolve their dispute by arbitration under a particular arbitral framework. It offers a degree of

⁶⁵ DAC 1989 Report, para 108.

⁶⁶ V. Raghaven, 'Heightened Judicial Review of Arbitral Award' (1998) 15 (3) J. Int'l. Arb. 103.

⁶⁷ This principle has been recognized widely not only in national legislations, but also by arbitral institutions (e.g. ICC Rules Art. 25 and AAA Rules Art. 16). See also Redfern & Hunter, para 6-03 at p 278.

“psychological satisfaction” to the parties giving them confidence that they are free to choose the most appropriate rules, arbitrators and governing law. The principle provides an assurance that their arbitration will be conducted according to their aspirations, and will meet their expectations as a means of dispute resolution.

At the most basic level, the application of the principle of party autonomy is seen in the obligation of courts, when a party breaches an arbitration agreement by resorting to litigation to decline jurisdiction or stay the legal proceedings⁶⁸. Therefore, the recognition and enforcement of the arbitration agreement is one of the effects of party autonomy. Another is the duty of the arbitral tribunal to comply with the wishes of the parties, as the agreement of the parties provides the source and sets the limits of the arbitrator’s powers. An arbitrator may be removed if he fails to conduct the arbitral proceedings as the parties have agreed, and any award may be set aside. So party autonomy not only guarantees the freedom of the parties, but also obliges the court and the arbitral tribunal to respect the will of the parties.

While not so long ago most systems featured fairly strict judicial control of arbitration⁶⁹, there has been a trend towards promoting party autonomy to the fullest extent possible, and the concept now lies at the heart of all modern systems of arbitration. Thus highly developed arbitration legislation, such as the Arbitration Act 1996 and the Model Law, is drafted so as to give the parties to the arbitration agreement maximum freedom in designing the arbitration process. These measures are full of instances where provisions feature the phrases, “the parties are free to agree” or “unless the parties agree otherwise”. Indeed, s.1 of the English Arbitration Act 1996, uniquely articulates the fundamental principles on which arbitration is based, and s.1(b) states,

“The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest”.

This provision therefore heralds to all those involved in the arbitration process, potential users, arbitrators, and even the courts, that party autonomy is now a central pillar of the English system. Similarly, article 19 of the Model Law provides,

⁶⁸ See the role of the court to enforce the arbitration agreement at p 66 *infra*.

⁶⁹ See The Honourable Austin N.E Amisshah, ‘Judicial Aspect of the Arbitral Process’ paper presented in Biennial IFCAI Conference 24 Oct 1997 Geneva, it is available at <http://arbitr.wipo.int/events/conferences/1997/october/hoellering2.html> [Last visited 5 July 2003].

“the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings”.

The Analytical Commentary on Article 19 describes the article as the most vital provision of the Model Law, which goes a long way towards establishing procedural autonomy by emphasising party autonomy in procedural matters⁷⁰. It may be added that the legislative history of the model Law shows this principle was adopted without opposition, it being declared

“...probably the most important principle on which the Model Law should be based on is the freedom of the parties in order to facilitate the proper functioning of international commercial arbitration according to their expectations”⁷¹.

Of course, giving the parties maximum scope for designing the process, instead of prescribing how that process is to operate, raises the question of how the arbitration is to be rescued if the parties fail to reach agreement on vital matters. Most modern systems deal with this matter by making liberal use of default provisions, laying down supplementary rules which apply in the absence of agreement, thus ensuring that the arbitration goes ahead and avoiding gaps in the process. So, in an important sense default provisions reinforce party autonomy⁷², by according primacy to the agreement of the parties, yet ensuring that failure to agree does not undermine the process. Moreover, the increasing presence of default rules in modern arbitration legislation testifies to the degree to which that legislation has embraced the principle of party autonomy.

Yet no system can allow party autonomy to be completely free from restrictions⁷³. As the drafters of the Act 1996 point out,

“In some cases, of course, the public interest will make inroad on complete party autonomy, in much the same way as there are limitations on the freedom of contract”⁷⁴.

⁷⁰ See A/CN.9/264, para 1.

⁷¹ See A/CN.9/207, para 17.

⁷² It was submitted that there is a very wide range of matters over which the parties can exercise the right of party autonomy to make an agreement: if the parties, for some reasons, do not do so, the statute provides satisfactory “fallback” rules. This gives official recognition to the principle party autonomy in arbitration procedure, with proper safeguards for both the system and tribunal. See Russell, para 2-111, at p 80.

⁷³ See C. Chatterjee, ‘The Reality of the Party Autonomy Rule in International Arbitration’ (2003) 20 (6) J. Int. Arb. 539-560 and T. Webster, ‘Party Control in International Arbitration’ (2003) 19 (2) Arb. Int. 119-

Thus mandatory rules must safeguard public policy, firstly by imposing limitations on the matters referable to arbitration (e.g. criminal matters, status, anti-trust and intellectual property)⁷⁵, and ensuring that party autonomy does not infringe the fundamental principles of a legal system or the basic moral, economic and social values of a society⁷⁶. In terms of specific mandatory rules which every legal system might be expected to insist upon, it is suggested that every system must insist that each party must be given an opportunity to present his case, and that each party must be treated equally⁷⁷. Such a requirement restricts party autonomy. So an agreement that the tribunal should hear only one party would be invalid. It may be suggested that these are the only principles that every legal system must lay down as mandatory. It might be thought that all systems must, as a matter of practice, feature rules dealing with the grounds on which an arbitrator might be challenged and removed⁷⁸, or grounds on which an award might be challenged and set aside⁷⁹. Yet the content of those rules would vary from system to system. Equally, both the Model Law and the 1996 Act feature mandatory rules dealing with such matters as the form of the arbitration agreement⁸⁰, raising jurisdictional objections⁸¹, the securing of evidence⁸² and the obligation of the court to stay court proceedings in the face of a valid arbitration agreement⁸³. Yet none of these issues is really fundamental, and the decision whether or not to make them the subject of mandatory rules must ultimately be a matter of policy. At the same time there are matters which are covered by mandatory provisions of the Model Law, which are not so dealt with by the 1996 Act⁸⁴. So even principles regarded as fundamental by the Model Law, such as the principle of competence-competence, or the separability of the arbitration

142. See party autonomy is under the supervision of the national court in this thesis at p130 *infra*.

⁷⁴ DAC 1996 Report, para. 19.

⁷⁵ See D. Jones, 'Arbitration and Party Autonomy- How Free is the Choice to Arbitrate?', in G. Hartwell (ed.), *The commercial way to justice, the 1996 International Conference of the Chartered Institute of Arbitrators*, The Hague: Kluwer Law International, 1997, p 121. See the question of arbitrability in this thesis at p 41 *infra*.

⁷⁶ The role of the public policy in arbitration is discussed in this thesis at p182 *infra*.

⁷⁷ For instance Art.18 of the Model Law and sec. 33 (1) (a) of the English Arbitration Act 1996.

⁷⁸ See s.24, Articles 12-14;

⁷⁹ See ss.67-71, Article 34;

⁸⁰ See s.5, Article 7;

⁸¹ See s.32, Article 16;

⁸² See s.43, Article 27;

⁸³ See ss. 9-11, Article 8;

⁸⁴ E.g. Article 3 (receipt of written communications), Article 23 (need for a statement of claim), Article 24 (need for oral hearing) Article 31 (form of award) Article 33 (jurisdiction to correct errors)

agreement, are explicitly non-mandatory in the Act⁸⁵. In the same way, numerous mandatory provisions in the Act find no counterpart in the Model Law⁸⁶.

Yet one can deduce a legal system's attitude to the principle of party autonomy from its classification of statutory rules into mandatory and non-mandatory. When the majority of the provisions are non-mandatory, this indicates support of this principle. Accordingly, there should be a balance between mandatory rules and party autonomy. Arbitration legislation should not limit party autonomy unless there is strong justification. It seems that there is no need to limit the party autonomy by stipulating that there should be an odd number of the arbitrators merely to avoid the case of deadlock⁸⁷. One might commend the articulation of support for the principle of autonomy, which appears in the 1996 Act, as this signals to possible users of the system that the law will not interfere unduly with their freedom of choice⁸⁸.

⁸⁵ Compare Article 16 with ss.7 and 30;

⁸⁶ E.g. s.12 (power of court to extend time limits), s.26 (effect of death of arbitrator), s.28 (liability of parties for fees of arbitrator), ss.29 and 74 (immunity of arbitrators and arbitral institutions), s.40 (general duties of parties), s.56 (power to withhold award for non-payment of fees);

⁸⁷ See further discussion in this matter in this thesis at p 95 *infra*.

⁸⁸ See the recommended general principle for the new arbitration act in Kuwait at p 62 *infra*.

Chapter Two:

The Arbitration Agreement

1. Introduction

The arbitration agreement has to be closely examined in order to understand the relationship between the court and arbitration. Not only is that agreement the foundation stone of arbitration, but, as Herrmann has said, it is also the most fundamental requirement of arbitration¹, as the existence of a valid arbitration agreement is vital to the success of the arbitral operation. There can be no arbitration without an arbitration agreement. In contrast to litigation, arbitration takes place only where there is an agreement by the parties to arbitrate. Accordingly, having an arbitration agreement is the first step towards creating a relationship between the court and arbitration, given that the court supports the arbitration by enforcing the arbitration agreement and its provisions. When the court assists arbitration, it does so not only because of the desire of the parties to choose arbitration, not litigation, to resolve their existing or future disputes, but also because the law permits parties to refer their disputes to arbitration.

The aim of this section is to address the most crucial aspects of the arbitration agreement. This would cover the nature and definition of the arbitration agreement, the autonomous nature of the arbitration agreement, the domain of arbitration and formality of the arbitration agreement.

This chapter is devoted to deal with these questions. It is divided into four sections, each dealing with a significant aspect of the arbitration agreement.

- Section I: The Definition and the Nature of an Arbitration Agreement.
- Section II: The Autonomous Nature of the Arbitration Agreement.
- Section III: Arbitrability.
- Section IV: Formality.

¹ See, G. Herrmann, 'The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts', in A. Berg (ed.), *International Arbitration in a Changing World*, ICCA Congress Series, No. 6, Bahrain, Deventer: Kluwer Law and Taxation Publishers, 1993, p 41.

2. The Nature and Definition of Arbitration Agreement

2.1. The Nature of Arbitration Agreement

We have noted that arbitration, as a private method of adjudication, arranged and agreed by parties who are involved in a dispute, is one of a number of available methods of resolving civil and commercial disputes. Most legal systems allow people, who have the legal capacity, to resort to arbitration in order to place their dispute in the hands of an independent and impartial third party and to invest in him the powers to judge the matter. The decision of the arbitral tribunal will bind the parties to the arbitration agreement.

Arbitration is a consensual dispute resolution process based on an arbitration agreement, albeit that an arbitration clause can be a part of another contract. The arbitration agreement is the foundation stone of arbitration, and is an agreement like any other agreement. The subject matter of this contract is that the parties shall refer their present or future dispute to arbitration and not to the competent court. It may describe the arbitral tribunal and its jurisdiction, or lay out the procedure for appointment of the arbitral tribunal.

In general, the arbitration agreement expresses and reflects the desire of the contracting parties to settle their existing or future disputes by means of arbitration. This arbitration agreement gives the parties the right to submit their disputes to be resolved by arbitration. Indeed, it obliges them to go to arbitration and participate in the arbitral process unless they both decide otherwise². It also suspends the jurisdiction of the courts³. An arbitration agreement creates a contractual obligation. It binds each party to co-operate with the other in taking appropriate steps to refer the dispute or the difference to arbitration, to keep the arbitral process moving until the final decision is granted by the arbitral tribunal, and to respect and obey the arbitral award. This agreement creates a mutual obligation, obliging the parties to place their dispute before the arbitral tribunal to judge. It also binds them to go to arbitration and not resort to legal proceedings. However, the parties can ignore the arbitration agreement and resort to litigation if they both decide to do so; e.g. where they consider that litigation is more appropriate than arbitration. Furthermore, the court may treat the parties as having waived the arbitration agreement where one of the parties to the arbitration agreement litigates, and the other

² *Sanderson v. Armour & Co.*, 1922 S.C. (H. L.) 117 per Lord Dunedin at 120.

³ See Art. 173 (5) of CCPL 1980, Art. 8 of the Model Law and sec. 9 of the Arbitration Act 1996.

party participates in this litigation without pleading the existence of the arbitration agreement⁴. The court may also regard a party as having waived his right to arbitrate, even if an application to stay the proceedings has been made, if the court thinks that there has been unnecessary delay in raising that plea, in particular if the plea is raised at an advanced stage of the litigation.

A valid arbitration agreement, suspends the jurisdiction of the courts, the parties being deemed to have waived their basic right to litigate. It has been said, "if the parties have contracted to arbitration, to arbitration they must go"⁵. So, when one of the parties, contrary to the arbitration agreement, commences legal proceedings, the other party is entitled to apply for a stay. He may indirectly enforce the arbitration agreement by means of the rules that govern stays of legal proceedings⁶. Article 8 of the Model Law, s.9 of the English Arbitration Act 1996, and Article 174 of CCPL 1980 each deals with the effect of an arbitration agreement where a party brings an action before the court in a matter which is the subject of that agreement, providing that if the other party makes a timeous application to the court to stay the legal proceedings, it shall grant such a stay and refer the parties to arbitration.

A valid arbitration agreement gives the arbitral tribunal the foundation and the authority to deal with the dispute, empowering it to make an award which will bind the arbitrating parties. In other words, the arbitral tribunal derives its jurisdiction and power from the arbitration agreement. Moreover, the arbitration agreement invokes the rules that govern the arbitration under the applicable law, in particular, the supportive and supervisory powers of the court, since without a valid arbitration agreement, these rules will not be active.

In summary, Arbitration is a consensual dispute resolution process based on an arbitration agreement. This agreement reflects the decision of the parties to settle their disputes by arbitration. Such agreement in principle suspends the jurisdiction of the state court to deal with the disputes. This agreement is one of the sources of provisions that govern arbitral proceedings.

⁴ See Prof F. Davidson, *Arbitration*, op. cit., para 7.19 at p 119.

⁵ *Sanderson v. Armour & Co.*, 1922 S.C. (H. L.) 117 per Lord Dunedin at 120.

⁶ This matter is discussed in Ch. 3, see pp. 66-81 *infra*.

2.2 The Statutory Definition of Arbitration Agreement

It was submitted during drafting the Model Law, that “In contrast to court litigation, arbitration proceedings usually take place only if the parties have so agreed. Therefore, the model law should contain provisions on this basic agreement”⁷.

This section is divided into two parts. The first part focuses on the definition of arbitration, the second on the definition of an arbitration agreement, in order to get as clear a picture as possible of the problems of providing a statutory definition of these concepts. It will then be possible to decide whether any new Act should first define those terms.

(a) The Statutory Definition of Arbitration

It seems to be a difficult task to attempt to propound a universal or exhaustive definition of the term ‘arbitration’. It is true that this term is widely used in most legal systems, appearing in national legislation and international conventions. However, there has never been a comprehensive definition of the term⁸. The Kuwaiti system, like other legal systems, does not provide a comprehensive answer to the question, “what is an arbitration”?

UNCITRAL considered the question whether the model law should expressly state a statutory definition of arbitration⁹. After deliberation between the drafters the conclusion was that a definition of ‘arbitration’ was unnecessary¹⁰. The UNCITRAL Model Law is thus a good example of an unsuccessful attempt to define the term inclusively. The reasons for not attempting a comprehensive definition were declared in the Second Secretariat Note¹¹. The first was that it would involve the difficult task of drawing a distinction between arbitration proper and types of non-legal arbitration such as the Italian *arbitrato irritale*, the Dutch *bindend advies* and the German *schiedsgutachten*. The draftsmen of the Model law were agreed that the Model law should cover arbitration proper, and not apply to such devices, which are labelled arbitration, but which determine questions of fact rather than law and, and where the decision is binding like a mere contract provision, rather than as an award¹². The difficulty in distinguishing

⁷ A/CN.9/207, para 39.

⁸ A/CN.9/WG.II/WP. 35, para 10.

⁹ A/CN. 9/216, para 1 (Q1-2).

¹⁰ *Ibid.*, para 17

¹¹ A/CN. 9/WG.II/ WP. 35 para. 10

¹² *Ibid.*, para 30.

between arbitration as conceived by the Model Law and these other mechanisms, which are sometimes labelled arbitration, militated against providing a comprehensive definition of arbitration. The second reason was that while the term 'arbitration' is widely utilised in national legislation and international conventions, no attempt to define the term has yet been made¹³. Thus the Model Law does not offer a definition of arbitration. Nor did the framers of the English Arbitration Act 1996 seek to define the term arbitration¹⁴, as it was their conviction that any attempted definition would not serve any purpose¹⁵.

So, the conclusion must be that it is not an easy task for any legislature to offer a comprehensive definition of arbitration, even if that definition is required in order to distinguish arbitration from other types of process, so that it can be decided whether relevant legal rules apply. Thus, in practice, probably only the court can fill this gap, by determining whether there a process amounts to arbitration or not, whether there is an arbitration agreement, whether there is an arbitral process, and whether there is an arbitral award. It is able to judge these questions on a case-by-case basis, from both a theoretical and a practical angle.

(b) The Statutory Definition of an Arbitration Agreement

The concept of an arbitration agreement is very clearly defined in the Model Law, the English Arbitration Act 1996 and the Kuwaiti CCPL 1980. Article 7(1) of the Model defines an arbitration agreement 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 of defined legal relationship, whether contractual or not". The English Arbitration Act 1996 s.6 (1) states that, "an arbitration agreement means an agreement to submit to arbitration present or future disputes (whether they are contractual or not)". The Kuwaiti CCPL 1980 gives its definition in Article 173 (1) as an agreement to refer to arbitration a present or future disputes whether they are contractual or not¹⁶.

¹³ A/CN. 9/WG.II/WP. 35 para 10.

¹⁴ DAC Report on the Arbitration Bill, Feb 1996, [hereafter cited as DAC 1996 Report] para 18.

¹⁵ *Ibid.*

¹⁶ In France the Code of Civil Procedure 1981 (CCP) provided a definition for each of the arbitration clause and the arbitration submission. Art. 1442 contains that "An arbitration clause is an agreement by which the parties to contract undertake to submit to arbitration the disputes which may arise with respect to that contract", and Art. 1447 states, "A submission is an agreement by which the parties to an existing dispute refer the matter to arbitration by one or more persons".

So defining the arbitration agreement in such a way emphasises the contractual basis of arbitration, making it clear that such an agreement is necessary for arbitration. It indicates that the foundation of arbitration is an agreement to arbitrate and not a promise to arbitrate. The drafters of the Model Law agreed that an “arbitration agreement” should be defined as an “agreement” rather than as an “undertaking”, so as not to raise doubts as to the difference between an agreement and an undertaking¹⁷. Therefore, the definition of arbitration agreement should characterise the legal instrument which forms the basis and jurisdiction of an arbitration¹⁸ as a contract¹⁹. This would show that arbitration is not only a judicial regime but also a contractual regime²⁰. Although, an arbitral award illustrates the judicial nature of arbitration, arbitration is a method for resolving disputes which is based on the desire of the contracting parties²¹. The statutory definition should help stress why the court should support and assist the arbitral process and party autonomy, and why the arbitral tribunal should comply with the will of the parties. Moreover, the definition should recognise an arbitration agreement relating to existing or future disputes. This would send a clear message that there is no distinction (as to legal effect) between an arbitration clause and an arbitration submission, such as exists in some Latin American countries, so as to deprive an arbitration clause of any legal force²². It was hoped by the drafters of the Model Law that recognition of the two types of arbitration agreement, and

¹⁷ See A/CN.9/232, para 38.

¹⁸ A/CN.9/264, para 1.

¹⁹ This would serve eliminating the idea that arbitral clause is not an agreement, it is a promise to conclude an arbitration agreement when a dispute exists. See M. Aboul-Enein, ‘The Contract: What Causes Courts to Disregard Agreement to Arbitrate, and How Can Such Agreement Be Improved to Avoid That Fate According to New Arab Laws of arbitration?’ in A. Berg (ed.), *International Arbitration and National Courts: the Never Ending Story*, ICCA Congress, Series No. 10, New Delhi, Kluwer Law International, 2000, p 19.

²⁰ For the theories about the nature of the arbitration see for example H. Yo, ‘Total Separation of International Commercial Arbitration and National Court Regime’ op. cit., 145-166. See also R. David, *Arbitration in international trade*, Antwerp; Boston: Kluwer Law and Taxation Publications, c1985, p76. It seems that the issue of what is the legal nature of arbitration had been the subject of debate. However, no one can easily ignore the contractual nature of arbitration.

²¹ It was submitted “Arbitration is similar to litigation in that it involves an adjudicative process including the presentation of proofs and arguments and the making of a decision by a third party. It is different in other respects. Notably, the disputants, through their agreement to arbitrate, have the opportunity to design specific features of the process. They can set the procedural rules, which include, for example, establishment of a method for selecting the third party decision-maker. Additionally, the disputants can designate the decision-making principles that are to be applied by the arbitrators in reaching their decision”, see M. Levin, op. cit., p106. See also G. Moss, ‘National Rules on Arbitrability and the Validity of an international Award: the Example of Disputes Regarding Petroleum Investment in Russia’, It is available at <www.chamber.se/arbitration/shared_files/articles/arkiv/giuditta.pdf> [Last visited 5 July 2003] 7-24 at p 15.

²² Dr. H. Tadeusz (Rapporteur) & Prof. B. Cretnades (Chairman), ‘Arbitration Agreement and Competence of the Arbitral tribunal’, in P. Sanders (ed.), *Uncitral's project for a model law on international commercial arbitration*, ICCA Congress Series, No. 2, Lausanne, Deventer: Kluwer Law and Taxation Publishers, 1984, p 55.

particularly arbitration clauses given their frequent use in arbitration, would help promote global unification on the issue²³.

Thus the law should acknowledge that an arbitration agreement may arise in either of two ways. The first is where parties conclude a contract including a term that disputes which may arise from that contract shall be decided by reference to arbitration. An arbitration clause is just a single term among many in an agreement, and a secondary term at that. Parties at the time of concluding their contract tend rarely to contemplate disputes, with the result that they include as a mere formality a short model clause indicating their desire to refer any future dispute to arbitration²⁴. This is an agreement inside an agreement, the object of which is to bind the parties to submit any future dispute or difference to arbitration. It is usually brief, and does not include much detail. There are two reasons for this. Firstly, there is usually no specific legal requirement as to the form of the arbitration clause²⁵, which thus tends simply to reflect the desire of the parties to submit any future dispute or difference to arbitration. Secondly, no dispute or difference having arisen yet, the parties have no idea about the specific dispute or difference that may arise. The second form is that after a dispute or difference has already arisen between the parties, they may agree to refer that dispute or difference to arbitration. The position of the parties here is completely different, as they know precisely the nature of their dispute when they conclude an arbitration agreement, called an "arbitration submission". Thus, an arbitration agreement can be found in either an arbitration clause or an arbitration submission.

To sum up, the arbitration agreement is the principal basis of arbitration. The Model Law, the English Arbitration Act 1996 and the Kuwaiti CCPL.1980 all essay a definition of an arbitration agreement, by saying that an arbitration agreement is an agreement concluded by the parties to submit to arbitration present or future disputes whether they are contractual or not. Each definition covers both arbitration clauses and submissions, as well as making it clear that an arbitration agreement can be related to disputes that are not contractual. Any Arbitration Act should take this line.

²³ A/CN.9/264, para 2

²⁴ See M. Aboul-Enein, *op. cit.*, p19.

²⁵ This is not the case in franc. Since, it requires that the arbitration clause should either appoint the arbitrator or arbitrators or set forth the manner in which there are to be appointed. Failure to meet such statutory requirement, an arbitration clause shall be null. See, Art. 1443 of CCP 1981. Such requirement is not provided in Kuwait or England or the Model Law.

3. Autonomous Nature of the Arbitration Agreement

3.1 Introduction

The main purpose of this section is to focus on one of the most valuable aspects of the arbitration agreement. The crux of the following discussion is whether an arbitration agreement is separable from the underlying commercial agreement in which it appears. Obviously, such an issue does not arise in the context of an arbitration submission, as this is clearly an independent agreement. But an arbitration clause is a term of the main contract. So, should its fate follow that of the main contract, or is the clause an independent agreement inside the main agreement? The latter approach expresses the doctrine of separability.

3.2 The Doctrine of Separability

It should be added that most legal systems now regard the arbitration clause as constituting a self-contained agreement ancillary to the principal contract. This is known as the doctrine of separability or the autonomy of the arbitration clause. This means that the principal contract, containing a clause referring future disputes or differences to arbitration, sets up two independent contracts. The principal contract deals with the rights and obligations of the parties. The secondary or collateral contract concerns the agreement to refer any dispute or difference to arbitration. Thus it can be argued that both contracts are independent of each other. It follows from this that the termination of the principal contract does not affect the arbitration clause. This is the principle of separability.

The principle of separability seems to be logical²⁶, practical and desirable. The agreement to arbitrate is established in the arbitration clause, and without this agreement there can be no arbitration. Moreover, that clause is created with the pathology of the contract in mind, and may only be brought into action when one party is claimed to be in breach, and the other claims to be entitled to rescind and thus 'terminate' the contract. Accordingly, it is logical that it should survive the termination of the contract. It is fair to say, however, that not every legal system has always taken that view.

²⁶ See the view that the doctrine is not easy to justify as a matter of pure logic in W. Craig *et al.*, *International Chamber of Commerce Arbitration*, 3rd ed., N.Y. Oceana Publications, 2000, p 49.

To sum up, the concept of the doctrine of separability provides that an arbitration agreement, even though included in and related closely to an underlying commercial contract, is a separate and autonomous agreement.

3.3 The Aims of the Doctrine of Separability

It is suggested that the most important aims of this principle are as follows. Firstly, it prevents a party who desires to delay justice being done in due time achieving that object by questioning in court the existence or the validity of the arbitration agreement (by questioning the validity of the main contract), as the invalidity of the main contract does not necessarily invalidate the arbitration agreement. This is one of the consequences of the principle of separability. Secondly, it invests the arbitral tribunal with jurisdiction to deal with the disputes between the parties. It is recognised that the main practical advantage of this principle is to confer jurisdiction upon an arbitral tribunal²⁷. The principle, by ensuring the survival of the arbitration clause, gives the arbitral tribunal power to deal with disputes over the questions of the initial validity or invalidity of the principal contract. In other words, the principle implies the arbitral tribunal's power to consider its own jurisdiction. So, when the arbitral tribunal decides that the main contract is null and void, this does not by itself result in the validity of the arbitration agreement²⁸. Therefore, according to this principle, the arbitral tribunal has a proper foundation for its authority to decide on the nullity of the contract. For such reason, the separability principle is sometimes referred to as the principle of competence-competence. This is because of the direct connection between these two principles²⁹. It may be emphasised that these principles are indeed related, but quite distinct. Separability does not necessarily imply competence-competence³⁰.

Thirdly, it tends to facilitate international and domestic trade by upholding the desire of the users (investors and businessmen) of the arbitration clause to resolve their disputes by arbitration not by litigation. Its autonomous nature would correspond with the intent and the will of the parties when they conclude a main contract with an arbitral clause³¹.

²⁷ A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, 3rd ed. London: Sweet & Maxwell, 1999, para 3-32 at p155.

²⁸ See Commentary on the Articles of the Model Law: Part II of the Committee's Consultative Document on the Model Law, Dated October 1987, published in *Arb. Int.* 1990.

²⁹ Redfern & Hunter, *op. cit.*, para 3-34 at p156.

³⁰ The difference between the two principles is discussed in depth in pp. 33-37 *infra*.

³¹ See, P. Sanders, *Encyclopaedia of International and Comparative Law*, Vol. XIV, Chap. 12 (Arbitration), under the auspices of the International Association of Legal Science, Tübingen and Martinus Nijhoff Publishers, 1986, [Hereinafter cited as *Int'l Enzycl.Comp.L.*], para 112 at p 62.

It may also play a considerable role in the relationship between the court and arbitration, since as result of the autonomous nature of the arbitration agreement, the court would not deal with the dispute. It may have to uphold the arbitration agreement even if there is a challenge to the main contract.

To conclude, the autonomy of the arbitration agreement would help to ensure the smooth operation of arbitration³². This principle may enable the court to support arbitration, by obliging it to enforce the arbitration agreement, even if there is a challenge directed at the main contract³³. So, a party could not avoid arbitration or delay the arbitral proceedings by simply alleging that the principal contract is invalid. Generally, whatever degree of legal fiction is involved in this principle, it is regarded as vital to allow commercial arbitration to operate effectively³⁴.

3.4 The Attitude of Kuwaiti Law in Relation to the Principle of Separability

There is no doubt about the practical importance of the principle of separability, which has been accepted and recognised, in most legal systems in the world. It is probable that the users of arbitration (or their legal advisers) may look to a legal system to observe the principle, in order to deliver the benefits referred to above. In spite of these factors, Kuwaiti law has a negative position regarding this doctrine. Kuwaiti law does regard an arbitration clause as a type of the arbitration agreement, akin to an arbitration submission. However, arbitration law does not contain any provision in relation to the autonomy of the arbitration clause from the main contract. Current Kuwaiti arbitration rules do not address the question of the separability of the arbitration clause. In this matter they are silent³⁵. Moreover, the courts have not provided any decision on the issue. It is therefore possible that the doctrine of the autonomy of the arbitration clause from the main contract in which it is contained might actually be recognised, but remains unarticulated thus far. It is submitted that this is one of the defects of Kuwaiti arbitration

³² See, H. Yu, 'Five Years on: a Review of the English Arbitration Act 1996' (2002) 19 (3) J. Int. Arb. 209-225 at p 213.

³³ It was suggested that the motivating force behind the establishment of this doctrine is the plain desire to uphold the validity of the arbitration agreement. See W. Craig *et al.*, *op. cit.*, p 49.

³⁴ UK Department of Trade and Industry Consultation Document on Proposed Clauses and Schedules for arbitration Bill, in *Arb. Int.* 1994, para 4 (ii) at pp. 189-227.

³⁵ In France, the CCP1981 does not indicate directly to the principle of separability of the arbitration clause. However, it is believed that art. 1466 of the CCP 1981 recognises it implicitly. Since, this article adopts the principle of competence-competence. Yves comments on this, and said "It implies that he has the power to decide on the validity of the main contract, since the only reason why such power in the past was denied to arbitrators in domestic cases, in the absence of the recognition of the separability of the arbitral clause, was their inability to be judge of their own jurisdiction". See, Y. Derains, *op. cit.*, p 8.

law. It has not kept up with the development of arbitration law in the world³⁶. It must now adopt the principle of separability in order to gain the benefits of this principle. The question, is then what is the most appropriate method for adopting this principle? The following paragraphs will shed some light on the approaches of English law and the Model Law to this point in order to recommend how Kuwaiti arbitration law might best be brought in line with modern thinking on this issue.

(a) English Law

Even though the current position of English Law is established by the Act, the English courts played a significant role in establishing the principle of separability in the English legal imagination, and in the minds of the drafters of the Act³⁷. The principle of autonomy of the arbitral clause was developed in England in a line of cases, starting with the House of Lords decision in *Heyman v Darwins*³⁸, and culminating in the judgment in *Harbour Assurance v Kansa*.³⁹ In that case, Steyn J. held that an arbitration clause is a self-contained agreement providing for the resolution of the dispute by the means of arbitration and not otherwise.⁴⁰ This judgment establishes the nature of an arbitration clause as an agreement inside an agreement. Therefore, the arbitration clause was treated as independent from the main contract. Thus, the arbitration clause remains executory, even if the main contract is deemed invalid. This is due to the fact that the arbitration clause imposes a contractual obligation on the contracting parties. An arbitration agreement creates a mutual obligation. Each party to the agreement has to co-operate with the other in taking the first steps to resolve the dispute by the method they adopted. An arbitration clause is, "An agreement between the parties as to what will do if and whenever there occurs an event of particular kind"⁴¹.

Thus, a true understanding of the nature of the arbitration clause will lead logically to the principle of separability, as the existence of such a clause indicates the desire of the parties to settle their future dispute by arbitration not by other means. Therefore, how

³⁶ Since, there has been a clear tendency, in a great number of countries, to adopt the idea of independence of the arbitration agreement from the main contract. See R. David, *op. cit.*, para 211 at p 193.

³⁷ As indicated by Steyn J. in *Paul Smith Ltd. v. H & S International Holding Inc.* that the principle of separability has slowly won judicial approbation in England. See [1991] 2 Lloyd's Rep. 127. See also C. Svernlöv, 'Arbitration: Doctrines of "Separability" of the Arbitration Agreement and "Competence De La Competence" in English Law' (1992) 3(5) ICCLR C94-95.

³⁸ [1942] 1 All ER. 337.

³⁹ [1993] QB 701.

⁴⁰ *Smith Ltd v. H & S International* [1991] 2QB, 127.

⁴¹ *Bremer Vulkan v South India Shipping* [1981] 1ALL. ER, (HL) 289, per Lord Diplock at p 298.

could the arbitration clause be deemed other than independent from the principal contract? It is clear from the above that the English courts realised the importance of the principle of separability, and the danger which might result from not adopting it, i.e. that the nullity of the main contract will annul the arbitral clause. So even if it is argued that a contract is void due to illegality, the arbitration clause survives to confer jurisdiction on the arbitrator to rule on this issue⁴².

The position of the English courts is described above, but what is the position of the Arbitration Act 1996 in relation to the principle of separability? Section 7 states,

“Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as distinct agreement”.

By virtue of this section, an arbitration clause will remain valid and effective despite an allegation of illegality affecting the main contract “(which challenge if proved would render the substantive agreement void)”⁴³. Veeder opines,

“the doctrine of separability or autonomy, assumes a legally distinct agreement; and it ensures that a legal defect in the substantive contract does not infect with invalidity an otherwise effective arbitration clause physically embedded or incorporated by reference in that substantive contract”.⁴⁴

So s.7 brings English arbitration law in line with the modern principle of separability, which has been accepted and recognised in many countries. This section establishes the autonomous nature of the arbitration agreement more comprehensively and more definitively than case law, although the case law had already reached a similar position⁴⁵. It has to be noted that s.7 is non-mandatory, and may be overridden by the parties. So this would allow that parties to agree that the arbitration agreement is not autonomous

⁴² *Harbour Assurance Co. Ltd. v Kansa General International Insurance Co. Ltd* [1993] QB. 701.

⁴³ B. Harris *et al.*, *The Arbitration Act 1996 A Commentary*, 2nd ed., 2000, p 79.

⁴⁴ Intl. HandBook on Comm. Arb, suppl 23, March 97, p.23.

⁴⁵ D. Sutton *et al.*, *Russell on arbitration*, 21st ed., London: Sweet & Maxwell, 1997, [hereinafter cited as Russell] para 2-009, at p 33.

from the main contract if they wish, although it would be doubtful whether simply excluding s.7 would have this effect, given the attitude of the common law to this issue. Such freedom might not be found in other legal systems.

(b) The Model Law

At an early stage of the drafting process it was suggested that "The model law take a clear stand in favour of separability or the autonomy of the arbitration clause, as adopted in modern arbitration laws"⁴⁶, continuing that,

"An arbitration clause, which forms part of the contract, shall be treated as an agreement independent of the other terms of the contract. This independence may become relevant to, and facilitate, a ruling of the arbitral tribunal on objections that it has no jurisdiction where those objections relate to the existence or validity of the arbitration clause. Another useful import of separability is that decision by the arbitral tribunal that the contract is null and void and not entail *ipso jure* the invalidity of the arbitration clause"⁴⁷.

So very early on it was agreed that the Model Law would codify the doctrine of the autonomy of arbitration clause.⁴⁸ It was noted, "there was general agreement that the model should adopt the principle of the separability or autonomy of the arbitral clause"⁴⁹. So Article 16 of the Model Law articulates the broad and vital principle of separability, stating,

"for that purpose, an arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause"⁵⁰.

⁴⁶ A/CN.9/207 para 58.

⁴⁷ *Ibid*.

⁴⁸ See Dr. A. Broches, 'UNICITRAL Commentary on Model Law', Intl. HandBook on Comm. Arb, vol. IV suppl.11, January 1990, p 73.

⁴⁹ A/CN.9/216, para34

⁵⁰ Art. 16 of the Model Law.

(c) What Is the Difference Between these Approaches?

The following paragraphs will attempt to analyse the attitude of the Model Law and English Arbitration Act 1996 regarding the principle of separability and its relationship with the principle of competence-competence – the power of the tribunal to rule on its own jurisdiction. It is quite clear that both the Model Law and English Arbitration Act realised the importance of the principle of separability in arbitration. However, the Model Law and English Arbitration Act 1996 embodied the principle of separability through different structures and on different bases. In order to demonstrate this point, we must first consider the question of the relationship between the principle of separability and the principle of competence - competence.

The following paragraphs will concentrate on the relationship between these principles under the Model Law and Arbitration Act 1996. The first question to present itself is whether there is any relationship between the principle of separability and the principle of competence- competence? It is suggested that this relationship depends on the effect of the principle of separability. It is plain that Article 16 of the Model Law largely conjoined the principles of separability and competence - competence. The view of the makers of the Model Law seems to be that these concepts are important in practice, and without them a party could stall the arbitration at any time merely by raising an objection to the arbitral tribunal's jurisdiction that "could then only be resolved in possibly lengthy court proceedings"⁵¹. It may be deduced from the structure of Article 16 that the Model Law adopts the theory that the principle of separability does affect the jurisdiction of the arbitral tribunal. It seems that the makers of the Model Law support the theory that the principle of competence - competence is deemed a consequence of the principle of separability.

This theory was established clearly in the first draft of the relevant Article, which ran,

"For the purpose of determining whether the arbitral tribunal has jurisdiction, an arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract"⁵².

⁵¹ Holtzmann & Neuhaus, *op. cit.*, p 479.

⁵² A/CN.9/WGII/WP.37.

It would appear that the aim of the principle of separability, here, is to invest the arbitral tribunal with the jurisdiction to deal with the disputes between the parties. The principle of the autonomy of the arbitration clause plays a vital role in allowing the survival of the arbitration clause in order to give the arbitral tribunal a power to deal with the disputes over the question of the initial validity or invalidity of the principal contract. Therefore, according to this principle, the arbitral tribunal will not lack foundation for its authority to decide on the nullity of the contract. It can be said that, in the view of the Model Law, the doctrine of competence - competence complements the principle of separability⁵³. It was stated in the seventh Secretariat Note Analytical Commentary on the draft text

“The (doctrine of separability) complements the power of the arbitral tribunal to determine its own jurisdiction in that it calls for treating such a clause as an agreement independent of the other terms of the contract”⁵⁴.

Thus Article 16 operates on the basis that the principle of competence - competence is a logical outcome of the principle of separability of the arbitration clause⁵⁵.

On the other hand, although the English Arbitration Act 1996 adopted the two principles, it did so in separate sections so as to differentiate between them. Section 7 establishes the principle of separability, while s. 30 lays down the principle of competence - competence. By articulating these concepts in different sections, the English aim to distinguish between these principles. The English Arbitration Act is based on the view that there is no necessary relationship between the principles of separability and competence - competence. It was said,

“it seems to us that the doctrine of separability is quite distinct from the question of the degree to which the tribunal is entitled to rule on its own jurisdiction, so that unlike the model law, we have dealt with the principle of competence elsewhere in the Bill”⁵⁶.

⁵³ It was also said that the principle of competence-competence is based on the principle of separability. See M. Jalili, ‘Kompetence- Kompetenz: Recent U.S. and U.K. Development’ (1996) 13 (4) J. Int. Arb. 169-178 at p 169.

⁵⁴ A/CN.9/264, para 2.

⁵⁵ It was submitted “One of the fundamental principles of arbitration law is that arbitrators have the power to rule on their own jurisdiction. That principle is often presented as the corollary of the principle of the autonomy of the arbitration agreement”. See J. Savage & E. Gaillard, *International Commercial Arbitration*, Kluwer Law International, 1999, para 416.

⁵⁶ DAC 1996 Report, para 43.

The concept of the principle of the autonomy of the arbitration clause in this context suggests that the validity of the arbitration clause will not depend on the validity of the principal contract or the other terms of the contract. The concept of the principle of separability means that an arbitration clause included in an agreement shall be treated as an agreement separate from the main contract. Therefore, in principle, it will not necessarily follow the fate of the principal contract. To put it more simply, the contracting parties are bound, by virtue of this principle, to arbitrate. However, if the issue of separability is treated as logically distinct from competence- competence, the possibility remains open that it might primarily be for the court to decide the issue of the jurisdiction of the arbitral tribunal. Thus, the English Act is careful to distinguish the principle of separability from the principle of competence- competence, which latter principle is of course designed to give the arbitral tribunal the foundation to rule on its own jurisdiction

It is suggested that the approach adopted by English Arbitration Act 1996 might be difficult to understand. This is due to the fact that both the principle of separability and that of competence - competence work side by side for the purpose of making the arbitral process operative and effective. The key question is then what is the practical value of the principle of separability without the principle of competence-competence? It is suggested that making each principle non-mandatory, as the English Act does, will make the task of ensuring that arbitral process operates effectively more difficult. The aim of such an English approach might be to offer multiple choices for the contracting parties. So the parties are free under the English Arbitration Act 1996, (i) to contract out of both principles, or (ii) to contract out of only one of the principles, or (iii) to contract out of neither. In each case, it is the responsibility of the contracting parties firstly to realise the importance of each principle, and then to make a decision in this matter. If they do not address this matter, both principles would apply by default. This approach is of course based on the principle of party autonomy.

It would appear that the principle of separability of the arbitration agreement which is closely related to but different from, the concept of Competence- Competence. The principle of competence- competence should not be confused with the principle of the autonomy of the arbitration agreement, by which the validity of an arbitration agreement

is determined independently from the validity of the main contract in which it is encapsulated⁵⁷.

The philosophy of the principle of separability permits the arbitral tribunal to invalidate the basic contract (e.g., for illegality) without the risk that its decision will call into question the validity of the arbitration clause from which it derives its authority and power⁵⁸. Indeed, it gives the tribunal the tool with which to perform its function, by examining fully the parties' agreement⁵⁹. The scope of the principle of autonomy of the arbitration agreement only arises for consideration where the challenge is directed at the main contract, which contains the arbitration clause, and says nothing about the validity of that clause itself⁶⁰. It thus deals cases where a challenge to an arbitration clause is made on the basis that the main contract is invalid. Such allegations used to create,

“a major conceptual problem for an arbitral tribunal ruling on the validity of an arbitration clause. If the contract (and hence the arbitration clause) is invalid or is non-existent, then the basis for the tribunal to convene to decide whether or not the clause is valid is not immediately apparent”⁶¹.

The autonomous nature of the arbitration agreement provides the solution. Since it recognises an obligation to go to arbitration, which is distinct from the main contract, so that disputes as to the scope, or even the existence, of the main contract can be arbitrated⁶².

⁵⁷ See W. Craig *et al.*, *op. cit.*, para 5.04 at p 48. See also William W. Park when he says that the English Arbitration Act 1996 wisely avoids affirming separability in the same section with principle competence -- competence, thus resisting the tendency to confuse these two concepts. See his article 'The Interaction of Courts and Arbitrators', *op. cit.*, 54

⁵⁸ See P. Sanders, *Int'l Enzycl.Comp.L.*, *op. cit.*, para 112 at p 62. See also W. Park, 'Determining Arbitral Jurisdiction: Allocation of Tasks between Courts and Arbitrators' (2000) 1 (Mar) A.D.R.L.J. 19-30, at pp. 25- 27.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* See also, R. Merkin, *Arbitration Law*, London: Lloyds of London Press, 1991, para 4.33.1, Service Issue No 33: 1 Jan 2003.

⁶¹ Redfern & Hunter, *op. cit.*, para 5-30 at p 263.

⁶² R. Merkin, *op. cit.*, para 4.33.1, Service Issue No 33: 1 Jan 2003.

Meanwhile the concept of competence – competence means no more than that the arbitral tribunal can look into its own jurisdiction without waiting for the court to do so⁶³. Accordingly, when one of the parties alleges the arbitration clause is invalid, there is no need to stay the arbitral proceedings and refer such allegation to the court. The arbitral tribunal, by virtue of the principle of competence-competence, may examine the clause to rule on its jurisdiction. Thus, the separation of the arbitration agreement from the main contract would bring the allegation against the main contract within the scope of the arbitration agreement. In other words, it permits the arbitral tribunal to deal with dispute and to find the principal contract invalid without thereby destroying its power to make an award pursuant to the arbitral clause.

(d) Conclusion

To sum up, both Model law and English Law adopted the two principles due to their practical importance. However, the Model law does not distinguish between the two principles, and regards them as mandatory, whereas the English Law does distinguish between them and regards them as non-mandatory. It seems that principles of competence- competence and separability do considerable service to arbitration from practical angle, but each of them is independent from the other⁶⁴. It is in the interests of the parties to benefit from both of them, but it is perhaps appropriate that this should be a matter of choice.

3.5 The Limitation of the Principle of Separability

Is there any limit on the principle of separability? How far does it extend? Must an arbitration clause contained in an invalid contract always be given effect, on the ground that the validity of the arbitration clause does not depend on the validity of the main contract in which it is contained? The next paragraphs will address these questions in the contexts of English law and the Model Law.

⁶³ *Christopher Brown LD. v Genossenschaft Oesterreichischer*, [1954] 1 Q.B. 8. It submitted that this principle means that the arbitral tribunal has jurisdiction to decide challenges to its own jurisdiction- *i.e.*, tribunal is not competent to determine challenges to the arbitration agreements on which its own authority to resolve the parties' disputes is based on. See R. Smith, 'Separability and Competence-Competence in International Arbitration: *Ex Nihilo Nihil Fit?* Or Can Something Indeed Come From Nothing?' (2003) at [B]. It is available at <<http://www.simpsonthacher.com/CM/Articles/articles1595.asp>> [last visited 31/7/03].

⁶⁴ There are number of legal writers who in favor of such a distinction, for example, R. David, *op. cit.*, para 209 - 210 at p192. See also J. Savage & E. Gaillard, *op. cit.*, para 416.

*Harbour v Kansa*⁶⁵ recognised the principle of separability at English common law, by holding that the nullity of the main contract should not impeach directly the arbitration clause. But this means that the arbitration clause must itself be valid. So if the initial illegality of the main contract does not directly affect or taint the arbitration clause, the issue of the effect of that illegality is capable of being within the jurisdiction of the arbitral tribunal. On the other hand, when the illegality of the main contract is so extreme as to affect the arbitration clause, the arbitration clause cannot be enforced and will be deemed invalid. Thus the autonomy of the arbitration clause is limited by public policy. Hoffmann L.J. says,

“saying that arbitration clauses, because of separability, are never affected by the illegality of the principal contract is as much as false logic as saying that they must be”⁶⁶.

He continued saying,

“the most common examples of cases in which the ground of invalidity of the substantive obligations of the contract also necessarily entails the invalidity of the arbitration clause are cases of initial invalidity, such as the absence of consensus *ad idem, non est factum*, mistake as to the person and so forth”⁶⁷.

It can be argued that this limitation can also be found in Model law. It has been said,

“The primary of the importance of the principle of separability is that an arbitral tribunal may retain jurisdiction and issue a binding decision on the merits - even though the contract is null and void - *as long as the grounds for nullity do not affect the arbitration clause*”⁶⁸.

[Emphasis added]

To illustrate this limitation as applied in both legal systems, consider this example. Suppose, for instance, that a party to an arbitration agreement, against whom legal proceedings are brought, applies to the court to stay the proceedings and refer the matter to arbitration. The court should grant a stay, even if the other party alleges that the

⁶⁵ [1993] Q.B. 701.

⁶⁶ *Ibid.*, at 724.

⁶⁷ *Ibid.*, at 725.

⁶⁸ Holtzmann & Neuhaus, *op. cit.*, p 480.

contract is illegal. However, if the court is satisfied that the arbitration agreement is itself null and void, it will not grant a stay and consequently will deal with the dispute itself⁶⁹. The two arbitral systems instruct the court to enforce the arbitration agreement even if there is challenge directed at the main contract or the jurisdiction of the arbitral tribunal, as the arbitral tribunal has jurisdiction in the first instance to deal with such challenges⁷⁰. However, this is not so if the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. The Court of Appeal held in *Harbour v Kansa* that an arbitration clause contained in a written contract was a collateral agreement which fell to be construed according to its terms and the wishes of the parties; that the matter of initial illegality of the contract, not directly impeaching the arbitration clause, was capable of being within the jurisdiction of the arbitrator; that whether a particular form of illegality rendered void both the arbitration clause and the contract depended upon the nature of the illegality⁷¹.

So in *Soleimany v. Soleimany*, Waller L.J. points out, "It may be that in the case of palpable illegality...an English court would...refuse to grant stay in favour of arbitration, on the ground that an arbitrator could not lawfully enforce the contract..."⁷². Therefore, the court will not enforce an agreement, if enforcement would be contrary to public policy. Public policy cannot be overridden by private agreement, and the arbitrating parties cannot do so by procuring arbitration⁷³. When the court finds that the illegality of the main contract is not such as to taint the arbitration agreement, the principle of separability will ensure the survival of the arbitration agreement. But in the event of inarbitrability or fundamental illegality, this principle cannot separate the life of the arbitration agreement from that of the main contract.

To sum up, by virtue of the principle of separability, the invalidity of the main contract does not invalidate the arbitration clause. Therefore, the arbitral tribunal retains jurisdiction to consider question of the validity of the main contract. However, the principle of separability is limited by public policy. The fact that an arbitration clause may not itself be tainted by the illegality of the main contract does not mean that this is always so. When the main contract is fundamentally illegal, or the subject matter of the

⁶⁹ This is according to sec. 8 (4) of the English arbitration Act 1996, and Art. 8 (1) of the Model law.

⁷⁰ *Rio Algom Limited v. Sammi Steel Co.* [CLOUT case no. 18].

⁷¹ [1993] Q.B. 701.

⁷² [1998] 3 WLR 811.

⁷³ *Soleimany v Soleimany*, [1998] 3 W.L.R. 811 at p 824 -B-. See also A. Samuel, 'Separability of Arbitration Clause- Some Awkward Questions about the Law on Contract, Conflict of Laws and Administration of Justice' (2000) 1 A.D.R.L.J. 36-45 at p 45.

dispute is not referable to arbitration, this will impugn the arbitration clause directly, rendering it unenforceable. So the court will not stay any legal proceedings, and will set aside or refuse to enforce any purported arbitral award.

3.6 What Should Kuwait Do?

Broadly speaking, Kuwait should recognise the development of a growing uniformity in arbitration laws around the world. Thus, it should adopt the principle of separability, which has been recognised widely by legislation and courts around the world. What is the suitable method to adopt this principle? It is recommended that Kuwait creates a specific provision adopting the principle of separability. This provision has to be non-mandatory, giving the parties a choice as to how to design the arbitral process. This provision should also adopt the view that even if there is a close relationship between the principles of separability and competence-competence, it is possible to distinguish between them. Therefore, statute must provide not only that the arbitration clause be deemed a separate agreement, independent from the contract in which it is contained, but that it is for the tribunal to decide on challenges to its jurisdiction (unless in either case the parties provide otherwise). However, the principles should be articulated in separate sections.

4. Arbitrability

4.1 Introduction

It must be noted at the outset that the question of what matters can be referred to arbitration (arbitrability) differs entirely from the question of what disputes fall within the scope of an individual arbitration agreement. The issue of the scope of an arbitration agreement is a matter of interpretation and construction of each individual arbitration agreement. This point will be discussed in depth in Chapter 4⁷⁴. This section will focus on the question the importance of this sensitive area, the domain of arbitration and the role of the court in this context.

The question of arbitrability is vital. It is very important to the parties to an arbitration agreement to know whether the subject matter of their dispute can be decided by arbitration under Kuwaiti law, as if the subject matter of the dispute is not referable to arbitration, this leads to invalidity of the arbitration agreement and consequently of the arbitral award. When the subject matter of the dispute is outside the domain of arbitration, the Kuwaiti courts have jurisdiction to set aside the arbitral award, on the ground that the subject matter of the dispute is not capable of being settled by arbitration⁷⁵. Thus, the awareness from the outset of the question of arbitrability on the part of the parties to the arbitration agreement should avoid future difficulties, such as the delay in justice being done and the incurring of extra cost because of the setting aside of the arbitral award by the court. Such awareness will help the system of arbitration as a private means of adjudication to be effective and successful by delivering justice in due time. Thus, the users of arbitration in Kuwait have to pay attention to the question of whether the dispute can be settled by means of arbitration according to Kuwaiti law as the seat of arbitration or as the place of enforcement of the arbitral award.

The question of what matters are referable to arbitration may arise in different ways and stages as follows:

- i. If one of the arbitrating parties initiates a legal action to resolve a dispute, and the other party applies to stay the court proceedings, pleading that the arbitrator lacks

⁷⁴ See pp. 193-196 *infra*.

⁷⁵ Art. 185-200 of CCPL 1980, sec. 66 (3) Arbitration Act 1996 and Art 34 (2) (b) (i) of the Model Law.

the authority to determine the dispute due to the fact that the subject matter of the dispute is not capable of being settled by arbitration.

- ii. If one of the parties objects to the progress of the arbitral process on the basis that the subject matter of the dispute is not arbitrable.
- iii. At the stage of the challenge of the arbitral award
- iv. Enforcement of the arbitral award.

4.2 The Domain of Arbitration

The question of arbitrability limits the ability of the parties to submit to arbitration disputes between them. It shows the extent to which parties may submit disputes to arbitration. Arbitrability is one of the questions which the court will deal with. Most legal systems exclude from the domain of arbitration one or more subject matters, e.g. intellectual property, company law or unfair competition, often by establishing exclusive jurisdiction of certain courts⁷⁶.

In general, most arbitration laws take the stance that disputes which may be compromised are arbitrable, or else employ public policy as the test of arbitrability⁷⁷. Kuwait does not set out a list of disputes which may not be settled by arbitration, but does use public policy to decide whether the subject matter of a dispute is arbitrable. Article 173/3 of the Civil and Commercial Procedure Law states that arbitration may not be held in matters where a compromising conciliation may not be reached. So it must be possible to compromise the subject matter of a dispute, if that dispute is to be referred to arbitration. Furthermore, Article 554 of the Civil Law clarifies the question of what matters are compromisable, by providing that composition may not be concluded in regard to matters related to public policy⁷⁸. Yet such formulas leave room for uncertainty. Such an approach provides little clue as to what matters are actually capable of being settled by arbitration, especially for foreign businessmen who wish to know exactly the extent of the domain of arbitration. Employment of such general formulas may force the users of arbitration to embark on a detailed study of legislation and cases to determine whether a dispute arising out of the transaction at hand is arbitrable. In some circumstances, this may cause inconvenient delay.

⁷⁶ A/CN.9/207, para 55. As R. David said, "Some varieties of disputes, in the different laws, are necessarily brought in the State courts and cannot be deferred to arbitration. An agreement purporting to submit them to arbitration would be devoid of legal value". R. David, *op. cit.*, para 204 at p 186.

⁷⁷ P. Sanders, *Int'l Enzycl. Comp.L.*, *op. cit.*, para 114, at p 64.

⁷⁸ This is the same as the Egyptian treatment. See Art. 11 of Arbitration Act 1994 and 551 of Civil law.

Such considerations were discussed during the drafting the Model law, but the Model Law does not address the issue. Despite the fact that the Model Law is designed to establish a legal regime for arbitration, the Working Group agreed that it should not deal with the question of arbitrability. The framers of the Model Law did consider whether it should set forth a list of non- arbitrable subject matters, either as an exhaustive list or as an open list to be supplemented by the representative state, or whether it would be sufficient to express the restriction merely by reference to “ international public policy”⁷⁹? The answer was negative⁸⁰. The first Working Group Report took the view that any attempt to set forth a list of non-arbitrable subjects, whether as an exhaustive or open list, would be impractical, and would not further the cause of harmonisation. It was also thought insufficient to merely refer to “ international public policy”, as that concept was not sufficiently clear. Accordingly, the suggestion of Secretariat to attempt to limit the number of non-arbitrable subjects, or to at least list them as a means of easy reference for those interested in this matter such as lawyers and businessmen, was refused.

However, that does not mean that the Model Law gives full effect to an arbitration agreement irrespective of whether the subject matter of the dispute is referable to arbitration. In fact when the subject matter of the dispute is not arbitrable, the arbitration agreement is deemed void. This may be deduced from Article 36(1)(b)(i) which indicates that recognition and enforcement of an arbitral award may be refused if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of the state in question. So the model law does not make any dispute arbitrable which would not otherwise be so under the law of the state adopting the Model law. Moreover, Article 34(2)(b)(i) provides that the court may set aside an arbitral award if it is satisfied that the subject matter of the dispute is not capable of settlement by arbitration under the law of that state.

Thus, the Model Law does not deal with the matter of the domain of arbitration directly, leaving this point to the general law of the adopting state⁸¹. However, it allows an arbitral award to be set aside or refused enforcement if the subject matter of the dispute is not referable to arbitration under the law of the adopting state.

⁷⁹ The concept of public policy is discussed in pp. 185-187 *infra*.

⁸⁰ A/CN.9/216, para 30.

⁸¹ See Art. 1 (5) of the Model Law.

Nonetheless, the matter of arbitrability is an object of possible future work by UNCITRAL⁸², which, during its Thirty –second session (Vienna 1999), noted that the Model Law’s treatment causes uncertainty about which disputes are arbitrable, leading to considerable difficulties in practice⁸³. It was suggested⁸⁴, as one way of dealing with this problem, that there may be an attempt to reach a world-wide consensus on a list of non-arbitrable matters. If that did not prove feasible, an alternative would be to agree on a uniform provision, laying out three or four matters that are generally considered non-arbitrable, and then calling upon States to list immediately thereafter any other issues deemed non-arbitrable by that state. It would thus be easy to access information about such restrictions. The difficulties of such an undertaking are clear, but if it worked, it would provide a degree of certainty and transparency. Even if were not wholly successful, it would provide much useful information.

Equally, the English Arbitration Act 1996 does not attempt to deal with arbitrability. However, s 81 (1) states

“Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to- (a) matters which are not capable of settlement by arbitration”.

This section shows that this Act is not an exhaustive code, as other rules of law that are still consistent with the Act will continue to be effective⁸⁵. These rules may be found in case law or legislation⁸⁶. Arbitrability is one of the unaffected areas and is left open⁸⁷. The court may therefore evolve and change such matters as the need arises.

Yet perhaps further thought should be given to the treatment of the question of arbitrability. It would be beneficial to the practice of arbitration if the Arbitration Act could go further than the traditional formulas, by providing certainty and easy access to information about the domain of arbitration, in order to avoid the possibility of

⁸² See A/CN.9/460.

⁸³ A/CN.9/460, para 32.

⁸⁴ A/CN.9/460, para 33.

⁸⁵ It was stated in 1997 Supplementary Report on the Arbitration Act 1996 in para 32 “it will be noted that in what is now section 81 it is made clear that any rule of law relating in particular to matters which are not capable of settlement by arbitration or the refusal of recognition or enforcement of an arbitral award on the grounds of public policy continues to operate”.

⁸⁶ See DAC 1996 Report, para 386.

⁸⁷ B. Harris *et al.*, para [81C] at p 349.

disappointing the users of arbitration⁸⁸. Just because the Model law is neutral on this controversial matter, this should not mean that all arbitration legislation must follow suit. The Arbitration Act should attempt to list all commercial subjects which are outside the domain of arbitration. While this is not feasible in a measure such as the Model Law, which required to be adapted to a variety of different national environments, it is possible in the arbitration legislation of a particular state. Such an attempt would not only assist the users of arbitration, but also serve the arbitral tribunal when it deals with the question of arbitrability, as well as the court in examining the arbitrability of the subject matter of the dispute when called to enforce the arbitration agreement, or to enforce or set aside the award.

Any such list should be based on a liberal approach towards arbitration, balancing the interests of trade and commerce and the public interest. A friendly attitude toward arbitration would meet the object of encouraging business and investment⁸⁹. The philosophy of this approach is that arbitrators, as private judges, should have no less freedom than judges in dealing with the question of arbitrability⁹⁰. The Act should support arbitration and have faith in the ability of arbitrators to protect public policy. In order to ensure that the interests of public order are protected, arbitral decisions on arbitrability would be subject to judicial control, with the court having the last word on

⁸⁸ Since the areas of arbitrability vary from state to state. As stated "Arbitrability, in essence, is a matter of national public policy. As public policy can differ from one country to another, the arbitrability of particular dispute may vary considerably from jurisdiction to jurisdiction". P. Baron & S. Liniger, 'A Second Look at Arbitrability: Approaches to Arbitration in the United States, Switzerland and Germany' (2003) 19(1), *Arb. Int.* 27-54 at p 27.

⁸⁹ H. Yu, 'From Arbitrability to A-National Principles- the U.S Experience' (1999) 2(1) *Int. A.J.R.* 1-8. The worldwide is witnessing a movement towards expanding the domain of arbitration to include most commercial matters, e.g. issues of antitrust, company law, insolvency and intellectual property. See J. Savage & E. Gaillard, *op. cit.*, para 1617 and Redfern & Hunter, *op. cit.*, para 3-21 at p 148. The Act should not exclude from the list some subjects merely because it is concerning the public policy. The era of hostile attitude arbitration and mistrust has gone away.

⁹⁰ It was stated "Arbitrators should be allowed no less freedom than court of law". See US District Court E.D. Pennsylvania in matter of *Re Compudyne Co.*, 225 F.Supp.1004. Hong-Lin Yu says, "Generally speaking, though famous for the issue of arbitrability, the Mitsubishi case was in addition regarded as a demonstration of the arbitrator's function in applying public law. In other words, arbitrators are allowed to render private international justice on certain subjects, even though it is against American domestic public policy. The contribution made by these cases is a kind of recognition of the justice provided by a transnational private judicial system". See H. Yu, 'From Arbitrability to A-National Principles- the U.S Experience', *op. cit.*, at p 7. The relationship between court and arbitration is not as a competing system of dispute resolution. It has to be as a partnership in delivering justice. The American court was in the view in Mitsubishi case that the time of judicial's suspicion of arbitration is well past. It seems that the court could work in a comfortable symbiosis with arbitration.

most matters⁹¹. It may be emphasised that this liberal attitude cannot be applied in all cases which must be decided by the court *e.g.* criminal cases. In this sort of case quite often the public has an interest, and so it may not be determined privately⁹².

4.3 Conclusion

It is understandable that there should be some limitation on the freedom to resort to arbitration as a private method of adjudication. Most legal systems exclude from the domain of arbitration a number of matters, often by conferring exclusive jurisdiction upon the courts. Most legal systems, as in Kuwait, recognise the concept of arbitrability (and public policy as a norm to determine the question of arbitrability) as a restriction of freedom of contract and party autonomy in the public interest, but without actual defining the concept. Legislation generally ignores the content of arbitrability, and leaves its determination to the court in its exercise of its supervisory role over the arbitral process (at the stage of the enforcement of the arbitral award or at the stage of appeal against the arbitral award). Yet the Arbitration Act could take a new approach to the question of arbitrability by setting out a list of all subject matters which are non-arbitrable. This serves the needs of clarity, certainty and transparency. Accordingly, the will of the parties would not be easily frustrated by eccentric judicial determinations of what is arbitrable. The Act should adopt a liberal approach to this matter, which would stress the positive relationship between the court and arbitration⁹³.

⁹¹ The court, a liberal approach to arbitrability, retains its power to supervise the outcome of the arbitration at enforcement stage or challenging stage. The supreme court of US stated in *Mitsubishi v Soler*, "Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stages to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed", 473 US614, 105 S.Ct. 3346.

⁹² *Keir v Leeman* [1844] 6Q.B. 308-322, *R v Blakemore* [1850] 14 Q.B. 544-552. Arbitration is not permitted if the subject of the dispute is related to the criminal charges, but actions in respect of the damages caused by the crime are referable to arbitration. This accords with Article 554/2 of the Civil Law which indicates that composition may not be concluded in regard to matters related to public policy, but may be concluded in respect of financial matters resulting therefrom.

⁹³ This possible would meet the era of expanding world trade and commerce. See Supreme Court of the United States *M/S BREMEN and Unterweser Reederei, GmbH, Petitioners, v. Zapata Off-Shore C.* 407 U.S. 1, 92 S. Ct. 1907. See P. Baron. & S. Liniger, *op. cit.*, p 27 and Redfern & Hunter, *op. cit.*, para 3-21 at p 148.

5. Formality

5.1 The Requirement of Writing

Most modern arbitration legislation requires that the arbitration agreement be in writing and defines what constitutes writing for this purpose. Clear examples are the Model Law Article 7 and the Arbitration Act 1996 ss.5 and 6⁹⁴. Having an arbitration agreement in writing serves to evidence the agreement of the parties to submit to arbitration, which agreement is clearly indispensable to all consensual arbitration. Moreover, the requirement of writing may be related to the arbitration agreement suspending the jurisdiction of the courts. If parties are to be regarded as having relinquished their basic right to litigate, their agreement probably has to be in writing⁹⁵.

However, the approach to the legal significance of this requirement may be not the same. What is the result when the arbitration agreement does not comply with the requirement of writing? One system may suggest the nullification of the arbitration agreement if it fails to meet this requirement⁹⁶, while another requires the written form as a condition to apply the Arbitration Act. Thus the Arbitration Act 1996 s.5(1) states that the provisions of the Act apply only where the arbitration agreement is in writing. However, this does not mean that an oral agreement to arbitrate is wholly ineffective, but rather that it is not an arbitration agreement as defined by the Act, which consequently does not apply to it. An oral agreement to arbitrate is simply governed by common law⁹⁷. Equally, the Model Law does not seem to establish any legal consequences for non-compliance with the requirement of writing. No rule invalidates an arbitration agreement which does not fulfil

⁹⁴ See also Art. 12 of Egyptian Arbitration Act 1994.

⁹⁵ See Redfern & Hunter, *op. cit.*, para 3-09 at p141. The drafters of the Arbitration Act 1996 stated in the DAC Report 1996 para 33 "there should be a requirement of writing. An arbitration agreement has the important effect of contracting out the right to go to the court; i.e. it deprives the parties of the basic right. To our minds an agreement of such importance should be in some written form. Furthermore, the need for such form should help to reduce disputes as to whether or not an arbitration agreement was made as to its terms". It may be mentioned that writing is also important in international arbitration. It is necessary for the arbitrating parties to have a written agreement when they seek to enforce an arbitral award under the New York Convention 1958 art II (1). It is also required in many national laws that require an arbitration agreement to be in writing. See, A/CN.9/WG.II/WP.108/Add.1, para1.

⁹⁶ Art. 12 of Egyptian Arbitration Act 1994 is an example. It states, "The arbitration agreement must be in writing, on penalty of nullity". This is contrary to the old rules that writing is merely a matter of proof. See Dr. A. Al-Kosheri, 'Egypt', *Int'l. Handbook on Comm. Arb. Suppl.* 11, January 1990, at p 8.

⁹⁷ See sec. 81 of the Arbitration Act 1996.

that requirement, although it would not be subject to the provisions of the Model law⁹⁸. Other systems demand written agreements only for evidential purposes⁹⁹. So Kuwait addresses the matter of writing as the only mean to prove of the existence of the arbitration agreement. The arbitration rules do not cover the question what may constitute writing. This matter was left to the general provisions of the Civil Law or Evidence.

A number of things can be learnt from looking at Article 7 of the Model law and s.5 of the English Arbitration Act 1996. Kuwait must recognise how arbitration law has developed in the modern world, and move towards harmonisation. One area where improvement can be made is in relation to the question of the requirement of writing. As aforementioned, most recent national laws and the Model Law demand that the arbitration agreement should be in writing, even if each legal system formulates this rule in a different way. Having provided that a written agreement is required, the meaning of writing must be defined in the Arbitration Act, rather than leaving this vital question to be deduced from the provisions of other acts such as those relating to Civil Law or Evidence. This would be of great practical assistance to the users of arbitration in Kuwait. This opens the door to discuss what constitute writing in modern arbitral systems.

5.2 What Constitutes Writing?

The next paragraphs consider when the requirement of writing has been met - a question of practical importance, as the arbitrating parties should be sure that their agreement to arbitrate meets the requirement of writing as provided by the applicable law. Thus, the section aims to find out what constitutes writing under the Model Law, the Arbitration Act 1996, and asks what Kuwaiti law might learn from the other approaches to this question.

⁹⁸ In fact, the framers of the Model Law did consider whether oral agreements (which are common in certain countries and trades) should be covered. They intended to cover as many types of international arbitration as possible. So the provision was carefully drawn up, and it is clear that oral agreements were not intended to be governed by national rules outside the provisions of the Model Law, but rather to be enforceable only to the extent that the Model Law provides for the waiver of the requirement of writing. See, A/CN.9/232, para 46, A /CN.9/233, para 66, A/CN.9/232 para 46 and Hotzmann & Neuhaus, *op. cit.*, p. 260.

⁹⁹ A clear example is the French law in relation to submission arbitration (Art. 1449 of CCP) and in case of international arbitration. Whereas Art. 1443 of CCP requires writing for the validity of the arbitral clause.

(a) The Model Law

Article 7(2) of the Model Law provides a definition of the concept of "writing". It states,

"The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract".

While the Model Law follows the 1958 New York Convention in requiring written form¹⁰⁰, it was intended in art 7(2) to establish a more detailed definition than in the Convention. At an early stage it was suggested that,

"the Model Law gives a more detailed definition than the one in article II(2) of the 1958 New York Convention, so as to make clear that it encompasses, for example modern means of communication and frequently used contract practice"¹⁰¹.

Thus the Model Law aimed to cover modern and future means of communications¹⁰². The Analytical Commentary on Article 7 (2) notes,

"The definition of written form is modelled on article II (2) of the New York Convention, but with two useful additions. It widens and clarifies the range of means to which constitute a writing by the addition of "telex, or other means of telecommunication which provide a record of the agreements", in order to cover the modern and future means of communication"¹⁰³.

¹⁰⁰ A/CN. 9/264, para 6.

¹⁰¹ A/CN. 9/216, para 23.

¹⁰² Hotzmann & Neuhaus, *op. cit.*, p 263.

¹⁰³ A/CN 9/264, para 7.

1) Signed document

Article 7(2) declares that an agreement is deemed to be in writing if it is contained in document signed by parties. This is regarded as the classic contractual form and is explicitly established in New York Convention¹⁰⁴. According to this Article, an arbitration clause in a contract contained in a document signed by only one of the parties will be deemed not to be a written arbitration agreement. It was suggested that Article 7(2) be extended to cover a bill of lading (which often is not signed by the shipper) or any other document signed by only one of the parties, if that bill or document provided sufficient evidence of a contract¹⁰⁵. However, this suggestion was not adopted, as,

“the commission, after deliberation, did not adopt the additional wording because it appeared unlikely that many states would be prepared to accept the concept of an arbitration agreement which although contained in a document, was not signed or at least consented to in writing by both of the parties. It was also pointed out that there might be difficulties with regard to the recognition and enforcement under the 1958 New York Convention of awards based on such agreements”¹⁰⁶.

2) Exchange of letters, telexes, telegrams

This alternative definition of writing employed the words “an exchange of letters, or telegrams” used by the New York Convention, adding “other means of telecommunication which provide a record of the agreement” to cover modern and future means of communications. The requirement of “a record” may aim to ensure that there is writing involved. Accordingly, for example, an ordinary telephone conversation would not provide a “record”¹⁰⁷.

This provision seems to have the necessary flexibility to accommodate the wide variety of ways in which business in different trades is conducted, and all modern means of communication actual and potential.¹⁰⁸ Therefore, it will probably cover data appearing

¹⁰⁴ See New York Convention 1958, Art. II (2).

¹⁰⁵ A/40/17, para. 80.

¹⁰⁶ *Ibid.*

¹⁰⁷ See Hotzmann & Neuhaus, *op. cit.*, p.263.

¹⁰⁸ See the view of US on the art. 7(2) in A/CN.9/263, para 4.

on a computer screen, or in its memory disks, and all electronic transmission and communication¹⁰⁹, easily accommodating e-commerce. It has been observed,

“The question as whether electronic commerce is an acceptable means of concluding valid arbitration agreement should not pose no more problems than have been created by the increased use of telex and telecopy or facsimile. . . . [A]rticle 7(2) of the UNCITRAL Model Law expressly validates the use of any means of telecommunication ‘which provides a record of the agreement’, a wording which would cover most common uses of electronic mail or electronic data interchange (EDI) messaging”¹¹⁰.

It has also been noted,

“One might suggest then that despite the reference to “writing” the terms of paragraph 2 are met if any record of the agreement is maintained e.g. in the form of an electronic image on VDU, whether or not a paper copy is obtainable. Indeed, it might even embrace an audio or audio visual record of an oral contract”¹¹¹.

While recently the Commission has stated,

“ ‘Writing’ includes any form that provide a [tangible] record of the agreement or is [otherwise accessible as a data message so as to usable for subsequent reference. [‘Data message’ means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy]”¹¹².

¹⁰⁹ See A/CN.9/245, para 181. See also Hotzmann & Neuhaus, *op. cit.*, p 263.

¹¹⁰ See A/CN.9/460, para 22.

¹¹¹ See Prof. F Davidson, *Arbitration*, Edinburgh: W. Green 2000, para 3.12.

¹¹² A/CN.9/508, para 18.

3) Exchange of Statements of Claim and Defence in which the Existence of an Agreement Is Alleged by one Party and not Denied by the other Party

According to Article 7(2) the requirement of writing is also regarded as met when the parties have exchanged statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. This is logical, as if there is no arbitration agreement between the parties, either can challenge the jurisdiction of the arbitration tribunal in terms of Article 16 (2), and failure to take such action implies that the agreement exists, and consequently that the tribunal has jurisdiction. It was, indeed, asserted by Herrmann, the Secretary of UNITRAL, during the discussions of the Working Group, that "a statement of claim and the reply to that claim would constitute an exchange of letters for the purpose of this article... [A]n extract from the record of an arbitration tribunal would be an agreement in writing if it was signed by the parties"¹¹³. However, the Chairman (Mr. Loewe) said, "he did not think such an extract would constitute an agreement in writing unless it was signed by the parties"¹¹⁴. At any rate, this issue was settled in Article 7(2). Since, for the purpose of the Model Law, the requirement of writing is satisfied by this manner explicitly and eliminates any doubt about it.

Is there any discrepancy between writing as defined by Article 7(2) and the requirement of Article 35(2) that a party seeking recognition or enforcement of an arbitral award shall supply the original agreement or a duly certified copy thereof? The framers of the Model Law were aware of this question and sought to avoid confusion. Therefore, they stated "as regards this second condition, it is submitted that an exception be made for those cases where an original defect in form was cured by waiver or submission, for example, where arbitral proceedings were on the basis of an oral agreement initiated and not objected to by any party. *In such case the supply of an award, which records the waiver or submission, should suffice*"¹¹⁵. [Emphasis added].

Another question is that whether Article 7(2) is incompatible with Article II(2) of 1958 New York Convention? The Commission Report answered,

"It was pointed out in support of the suggested extension that, although awards made pursuant to arbitration agreement evidenced in that

¹¹³ A/CN.9/SR.307-308, 320, 332, para 11.

¹¹⁴ *Ibid.*, para 10.

¹¹⁵ A/CN.9/264, para 91.

manner would be possibly be denied enforcement under the 1958 New York Convention, adoption of that extension in the Model law might eventually lead to an interpretation of Article II (2) of that convention whereby arbitration agreements evidenced in the minutes of arbitral tribunals would be acceptable¹¹⁶.

4) Reference in a Written Contract to a Document Containing an Arbitration Clause, If the Reference Makes the Clause Part of the Contract

Article 7(2) recognises this as a sort of written agreement as a compromise between two bodies of opinion that arose in Second Working Group Report¹¹⁷. One view was that the text of the arbitration agreement should be before both parties in order to bind them. The second view was that a reference in the contract between the parties to general conditions or other documents containing an arbitration clause was sufficient. Thus the structure of this part of the provision article is a middle ground between these approaches. The solution reached was that the requirement of written form is satisfied where an arbitration clause is merely referred to, provided that the contract is in writing and the reference makes the arbitration clause part of the contract. It was stated that as a middle ground between these directions, it was suggested that the document containing the arbitration agreement should be referred to in the contract in which such a way that it becomes a part of the contract¹¹⁸.

But when does an arbitration clause in another document become part of a contract? The Model law does not answer this question, leaving national law to determine it. However, it is clear that the Model Law does not require an explicit reference to the arbitration clause in the contract¹¹⁹, but leaves this matter to the consideration of the court. It has been noted that the contract, which contains the reference to arbitration, must itself be in writing¹²⁰. This may be contrasted with s.5(3) of the English Arbitration Act 1996, which provides that incorporation by reference extends to an oral agreement or agreement by conduct, as we shall see later on. The framers of the Model Law stated that the reference establishes an arbitration agreement if it is as to make the clause part of the contract and, of course, if the contract itself meets the requirement of written form as defined in the

¹¹⁶ A/40/17, para 87.

¹¹⁷ A/CN.9/232, para 44.

¹¹⁸ *Ibid.*

¹¹⁹ A/CN.9/246, para 19.

¹²⁰ A/CN.9/264, para 8.

first sentence of para (2)¹²¹. It may be added that the meaning of the condition of the requirement that the reference be such as to make the arbitration clause a part of the contract should not be understood as asking an explicit reference to the arbitration contained in a document referred to¹²². So, the reference need only be to the document and no explicit reference to the arbitration clause contained therein is required¹²³.

5) Conclusion

The definition of writing as provided by the Model Law has been criticised in some quarters¹²⁴, and indeed is one of the topics for reconsideration by the Commission¹²⁵, as the requirement that arbitration agreement should be in written form, has been often been considered as difficult and frustrating¹²⁶. The meaning of 'writing' as provided by the Model Law does not meet trade practice. One of the problems is the expression "exchange". It was noted that such an expression lends itself to an overly literal interpretation in the sense of mutual exchange of writings. A tacit acceptance would be, in principle, not sufficient. Neither would be purely oral agreement¹²⁷. It may be said that if the test of "exchange" is interpreted literally, there will not be an arbitration agreement, where a contract containing an arbitration clause is formed by one party sending written terms to the other party, which performs its bargain under the contract without returning or making any other "exchange" in writing in relation to the terms of the contract. In this case, there may be a tacit acceptance, but there is no exchange. Accordingly, this is not an arbitration agreement under the Model Law¹²⁸.

Another problem is that an oral contract referring to a written form of agreement, which contains an arbitration clause, may not meet the concept of writing under the provisions of Model law. So where e.g. a maritime salvage contract is concluded by radio with a reference to a pre-existing standard contract form containing an arbitration agreement (such as Lloyd's Open Form), this may not be regarded as an arbitration agreement under the Model Law. It has been also noted that an arbitration clause in a sales or

¹²¹ *Ibid.*, para 8.

¹²² *Ibid.*, para 19.

¹²³ *Ibid.*, para 8.

¹²⁴ N. Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice' (1996) 12 *Arb. Int.* 27-45.

¹²⁵ A/CN.9/460.

¹²⁶ *Ibid.*, para 21.

¹²⁷ *Ibid.*, para 24

¹²⁸ The same case under Arbitration Act 1996 is recognised as an arbitration agreement in writing under scc. 5. See DAC Report 1996, para 36.

purchase confirmation will meet the written form requirement of Article 7 of the Model Law only if:

- i. The confirmation is signed by both parties; or
- ii. A duplicate is returned, whether is signed or not; or
- iii. The confirmation is subsequently accepted by means of another communication in writing from the party who received the confirmation to the party who dispatched it. This does not accord with international trade practice¹²⁹. The Commission is currently considering such matters in order to devise a definition of the words "in writing" that meets modern trade practice.

(b) The English Arbitration Act 1996

A written agreement is generously defined in s.5. While the Act 1996 does not follow precisely the wording of Article 7(2) of the Model Law, it has almost the same definition of the concept of "writing". The requirement of writing, under the Act, can be satisfied where –

1) The Agreement Is Made in Writing (whether or not It Is Signed by the Parties)¹³⁰

The Act 1996 thus does not follow the New York Convention and Model Law in requiring the signature of the parties. This was because it was recognised that the requirement of signatures on the document containing the contract would leave most bills of lading, many brokers' contract notes and various other important categories of contracts outside the scope of the Act¹³¹. The requirement of the signature of both parties on the document was deemed impractical, and the Act takes a more flexible approach than the Model Law and the New York Convention.

¹²⁹ See A/CN.9/460, para 26.

¹³⁰ Arbitration Act 1996, sec 5(2) (a).

¹³¹ DAC, A Consultative Document, Oct 1987, p 22.

2) If the Agreement Is Made by Exchange of Communication¹³² in Writing, or if the Agreement Is Evidenced in Writing¹³³, or Recorded by any Means¹³⁴

This covers all present or future means of communications. Under these provisions, the arbitration agreement will be deemed in writing, if it is made by exchange of letters, faxes or e-mails; or, if it is evidenced by recording such as by audio or video tape. This is a wide definition that would probably cover all forms of electronic transmission and communication, "and will almost certainly embrace a sound recording"¹³⁵.

3) Where Parties Agree otherwise than in Writing by Reference to Terms which Are in Writing, they Make an Agreement in Writing¹³⁶

This is designed to cover situations such as ship salvage operations, where the parties make an oral agreement which incorporates by reference the terms of a written form of agreement containing an arbitration clause. It would also cover agreement by conduct. For instance, where a party intends to make a contract on written terms which contains an arbitration clause, but the other party was not aware of those terms, he would be regarded as accepting them by performing the contract in accordance with them. It was stated in the DAC Report 1996,

"this provision [s.5(3)] would also cover agreement by conduct. For example, a party A may agree to buy from party B a quantity of goods on certain terms and conditions (which include an arbitration clause) which are set out in writing and sent to party B, with a request that he signs and return the order form, or sends any document in response to the order form. If, which is by no means uncommon, party B fails to sign the order, but manufactures and delivers the goods in accordance with the contract to party A, who pays for them in accordance with the contract, this could constitute an agreement otherwise than in writing by reference to terms which are in writing..., and could therefore include an effective arbitration agreement"¹³⁷.

¹³² Sec. 5(2)(b) of the Arbitration Act 1996.

¹³³ *Ibid.*, sec 5(2)(c).

¹³⁴ *Ibid.*, sec 5(b).

¹³⁵ B. Harris *et al.*, *op. cit.* (5H) at p 74.

¹³⁶ Sec. 5(3) of the Arbitration Act 1996.

¹³⁷ See para 36.

It has to be mentioned that even if the Act is clear that an arbitration clause may be incorporated by reference, the law does not state what is required for effective incorporation of an arbitration clause by reference. The Act states in s.6 (2) that the reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause, establishes an arbitration agreement if the reference is such as to make that clause part of the agreement. Thus, a reference in unwritten agreement to a written form of arbitration clause or to the document containing an arbitration clause, shall constitute an agreement in writing if the reference is as to make that clause part of the agreement. However, s.6 does not indicate how it is to be decided whether the reference is such as to make that arbitration clause part of the contract, but surely this is a matter of the Court to decide¹³⁸.

4) An Exchange of Written Submission in Arbitral or Legal Proceedings in which the Existence of the Arbitration Agreement otherwise than in Writing Is Alleged by one and not Denied by other Party in his Responses¹³⁹

It seems that s.5 (5) corresponds with Article 7(2) of the Model Law. It was stressed by the DAC that an allegation by a party that there is an arbitration agreement is not enough to constitute an arbitration agreement under this provision. There must be a response from the other party in which he does not deny that allegation¹⁴⁰.

5.3 Conclusion

It is recommended that Kuwait adopts a broad definition of the concept of writing, meeting the needs of commercial practice and embracing e-commerce. It has firstly to encompass the use of any telecommunication which provides a record of the agreement, including e-mail, or electronic data interchange (E.D.I.) messaging. Secondly, it must cover cases encountered in practice, such as where a party does not give written consent to arbitration. Oral or tacit acceptance should be deemed sufficient, if there is a document, which recognises the existence of an arbitration agreement. So, the definition of writing should extend to,

¹³⁸ DAC 1996 Report, para 42.

¹³⁹ Sec. 5(5) of the Arbitration Act 1996.

¹⁴⁰ DAC Report 1996 para 36.

(a) An arbitration agreement made in writing (whether signed or not). Signature will play no role in the question of the existence or the validity of the arbitration agreement, as long as the arbitration agreement itself is in written form.

(b) An agreement made by any means of exchange communications, which provide a record of the agreement. A record can be in any form, i.e. in documentary or electronic. This is important in order to reflect technological advances and electronic commerce. Furthermore, if the agreement is evidenced in writing this shall satisfy the requirement of writing.

Thirdly, when parties agree otherwise than in writing (e.g. orally or by conduct) by reference to terms which are in writing. Reference in a contract to written form of the arbitration clause or to the document containing an arbitration clause should constitute a valid arbitration agreement, provided that the contract is in writing, and the reference is such as to make that clause part of the agreement. This would reflect trade practice.

Fourthly, an exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party and not denied by the other in his response, should constitute an agreement in writing to the effect alleged. Finally, incorporation by reference shall be recognised.

By taking such steps the Kuwaiti Arbitration Act will meet practical requirements and be in tune with international developments and harmonisation. This would help assist the users of arbitration and their legal advisers, and enhance the attractiveness of Kuwait as an arbitral forum.

Chapter Three:

Judicial Support for Arbitration

1. Introduction

The law of arbitration is principally concerned with the relationship between the courts and arbitration. This relationship has to operate in a satisfactory way, with the court offering assistance and support to arbitration, respecting the fact that the parties have chosen arbitration instead of litigation. Courts may give effect to this preference not only by abstaining from inappropriate intervention, but also by providing their power and authority to reinforce the arbitral process, guaranteeing both its effectiveness and efficiency.

The policy of legislatures and courts in recent years has been very much in favour of arbitration. The new Kuwaiti Arbitration Act should recognise this policy and improve the amicable partnership between the courts and arbitration, as evidence of such an amicable relationship may help persuade the users of arbitration (foreign and domestic investors) to invest in Kuwait, confident that any arbitration will receive judicial support and assistance. Supportive rules, ensuring the arbitration process is effective and impartial, and the arbitration system is healthy and developed, may help convince such users that Kuwait is an attractive place not only for investment but also arbitration. If clear rules ensure that the Kuwaiti courts do not obstruct arbitration, this would avoid any sort of doubt or fear about judicial attitudes in Kuwait. Thus, it is recommended that the new Kuwaiti Arbitration Act should be brought in line with modern trends in arbitration, as embodied in modern, healthy legal systems such as the Model Law and the English Arbitration Act 1996.

The lesson to be taken from modern arbitration systems in other parts of the world is that an Arbitration Act may support the arbitration system in two main ways, firstly by establishing fundamental principles, and secondly method by enabling the courts to assist the arbitral process, e.g. by enforcing an arbitration agreement or by extending time limits for commencing arbitral proceedings.

This chapter will be devoted to showing how the law might best render support and assistance to arbitration, focussing on the question of how the relationship between the

court and arbitration can put on a similar basis to modern arbitration systems such as the Arbitration Act 1996 and the Model Law? It will be divided into six sections as follows:

Section 1: The General Principles of the Arbitration Act.

Section 2: The Enforcement of the Arbitration Agreement.

Section 3: Extending the Contractual Time-Bars.

Section 4: The Constitution of the Arbitral Tribunal.

Section 5: The Conduct of the Proceedings.

Section 6: The Enforcement of the Arbitral Award.

2. The General Principles of the Arbitration Act

2.1 Introduction

It has been observed in relation to the English Arbitration Act 1996, "Whatever new powers arbitrators have, those powers – and indeed the whole Act – are subject to a number of principles which, unusually, the Act sets out"¹.

While one of the aims of the English Arbitration Act 1996 is to give the arbitral tribunal an enhanced range of powers which will have a significant beneficial effect on the English arbitration system, it is a novel feature of the Act that it begins by reciting three basic principles, upon which the Act is founded. The framers of the Act wanted it to proceed in a logical order. Therefore, it starts by articulating the principles of the Act and ends with the provisions governing recognition and enforcement of arbitral awards. The three principles laid down out in s.1 seek to summarise the basis of the English arbitration system. These principles provide the foundation of the Act and consequently its provisions have to be construed accordingly.

No other arbitration statute seeks to identify such basic principles². So this pioneering step seems to offer an attractive basis on which to introduce a new, properly developed system. It is highly recommended that Kuwait follows this structure, and establishes these three principles in the Act as the basis of the future practice of arbitration in Kuwait. These principles deal with the object of arbitration, the question of party autonomy, and the extent of court intervention in arbitration, s.1 reciting,

"The provisions of this Part are founded on the following principles, and shall be construed accordingly -

(a) The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

¹ See, B. Harris *et. al*, *op. cit.*, p 5.

² South African Law Commission has suggested on the draft Bill to follow sec. 1 of the English Arbitration Act 1996. Since, s.1 of the draft Bill sets out the principles on which the Draft Bill is based on. See Discussion Paper 83 project 94: Domestic Arbitration 1999. However, this draft has not yet introduced to the Parliament. Scotland may be another example. See s.1 of the Arbitration (Scotland) Bill.

(c) In matters governed by this Part the court should not intervene except as provided by this Part”.

2.2 Recommended General Principles of the New Act

(a) The Object of Arbitration, and How Arbitrations Should Proceed?

This principle should reflect what the framers of the Kuwaiti Arbitration Act should believe to be the object of arbitration as a method of settlement based on the consent of the contracting parties. The 1996 Act states in s.1 (a) that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or cost. Three aims may be deduced from this provision, firstly to obtain a fair resolution of dispute, secondly to have an impartial arbitral tribunal, thirdly to settle disputes without unnecessary delay or expense. The provision codifies a range of important concepts, on which the operation of arbitration has to be based. Of course, any Arbitration Act would have to contain more specific provisions to help achieve these aims. For example, s.33 of the 1996 Act elaborates the general duties of the arbitral tribunal, charging the arbitral tribunal to act fairly and impartially as between the parties, giving each party a reasonable opportunity of presenting his case and dealing with that of his opponent, and to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. Section 33(2) continues that the arbitral tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it. At the same time s. 40(1) charges the arbitrating parties to “do all things necessary for the proper and expeditious conduct of the arbitral proceedings”, while s. 40(2) notes that this includes -

“(a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and

(b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law (see sections 32 and 45)”.

It is not enough to lay down the object of arbitration. Other provisions, e.g. elaborating the duties of all actors (arbitrators and parties) in the arbitral process, are necessary to ensure that the object will be successfully gained. If the new Kuwaiti Act states that the object of arbitration is to achieve a fair resolution of the dispute, (highlighting aspects such as fairness, impartiality, and equality of opportunity), while at the same time avoiding undesirable delay or cost, a favourable initial impression about the goal of the law of arbitration in Kuwait will be communicated. However, this must be reinforced by substantive provisions. Therefore, it is recommended that Kuwait embody the spirit and words of ss.1(a), 33 and 40 of the 1996 Act, as those provisions clearly establish the duties of the arbitral tribunal and the arbitrating parties, as well as the spirit in which the arbitral process should be conducted.

(b) Party Autonomy

The doctrine of party autonomy should be a cardinal element of any developed modern arbitration system. This doctrine is premised on the understanding that arbitration is a private method of dispute resolution based on the consent of the arbitrating parties. It gives the arbitrating parties significant freedom in designing the arbitral process, extending to where, when and how they would like their arbitration to be run, as well as to the choice of arbitrators, the scope of the arbitrators' authority, and to applicable substantive and procedural rules. Embracing this principle shows the respect accorded by the legal system to the agreement of the parties to resolve their dispute by arbitration under a particular arbitral framework. However, that does not mean that there should be no limitations or restrictions on the freedom of the parties. Their autonomy of the parties should be subject to relevant considerations of public policy and legislative provisions designed to ensure fair proceedings. Every arbitration statute must have certain mandatory provisions to this effect. Thus, the drafters of the Act 1996 stated, "In some cases, of course, the public interest will make inroad on complete party autonomy, in much the same way as there are limitations on the freedom of contract"³.

The law therefore must feature mandatory rules to ensure fairness in the arbitral process and to safeguard the public interest. When provisions are non- mandatory, the parties may choose to be guided by them, and those rules will allow the arbitration process to operate effectively in the absence of agreed procedures. At the same time however, the

³ DAC 1996 Report, para. 19.

parties are free to design their own provisions if these seem more appropriate than those laid down in the statute. On the other hand, when rules are mandatory, they will prevail regardless of the desire of the parties.

One can deduce a legal system's attitude to the principle of party autonomy from its classification of statutory rules into mandatory and non-mandatory. When the majority of the provisions are non-mandatory, this indicates support of this principle. One might commend the articulation of support for the principle of autonomy, which appears in the 1996 Act, as this signals to possible users of the system that the law will not interfere unduly with their freedom of choice.

(c) Court Support with Minimum of Intervention

This principle deals with the role of the court in arbitration. Modern Arbitration Acts restrict the scope of judicial intervention therein, clarifying its scope so that the parties and tribunal should know exactly the limits of the jurisdiction of the court to intervene in the arbitration⁴. Of course, judicial intervention is necessary both to support arbitration and to secure its fairness and legitimacy. The modern philosophy is that the court should have a mainly supportive rather than interventionist role. Thus, Article 5 of the Model law states, "In matters governed by this law, no court shall intervene except where so provided in this Law". Equally, s1(c) of the English Act of 1996 provides, "In matters governed by this Part the court should not intervene except so provided by this Part". The DAC states, "Nowadays the Courts are much less inclined to intervene in the arbitral process than used to be the case"⁵.

The modern approach seems to be that any Arbitration Act must draw a clear distinction between the supportive and interventionist powers of the court. The former are emphasised, while the view is taken that courts should not have any power to interfere with the arbitral process, unless requirements of basic justice so demand. Hence it is recommended that Kuwait should articulate this principle in the new Arbitration Act. This too would provide a clear signal to potential users of the system.

⁴ See, O. Chukwmerije, 'Judicial Supervision of the Commercial Arbitration: the English Arbitration Act 1996' (1999) 15 (2) Arb. Int 171-191.

⁵ DAC 1996 Report, para 21.

2.3 Conclusion

The lesson to be learnt from modern arbitration laws and particularly from the English Arbitration Act 1996 is that Kuwait should consider emphasising the Act's three fundamental principles as basic features of the new, modern and developed arbitration law. These three principles are necessary for realising and understanding the purposes of those involved in the arbitral process while at the same time securing the integrity of the process and safeguarding the public interest. The statement of such aspirations is valuable in reflecting the object of arbitration, codifying the principle of party autonomy, which is one of the bases of modern arbitration systems, and delineating the nature of the relationship between arbitration and the courts, while helping both the Act and the arbitration agreement to be understood and construed in the light of these general aspirations.

3. Enforcement of the Arbitration Agreement

3.1 Introduction

As aforementioned, the new Kuwaiti Arbitration Act should articulate important principles, which reflect the policies of the new arbitration system and meet the needs of modern arbitration regimes. This section deals with the effect of an arbitration agreement when one of the parties commences a legal action before a court in a matter within the scope of the arbitration agreement. How should the act deal with a breach of the arbitration agreement? Should the Act support arbitration by enforcing the arbitration agreement? The section looks at the current Kuwaiti rules governing the enforcement of the arbitration agreement, where a legal action is commenced in breach thereof, with a view to determining the extent to which the Kuwaiti legal system supports the arbitration process in this context, and whether any recommendation needs to be made to bring Kuwait in line in this area with modern arbitration regimes.

Suppose that party A commences a legal action against party B. Party B believes that an arbitration agreement between them governs the dispute, which is the subject of the proceedings. Is there any legal and procedural instrument that enables Party B, who wishes to enforce the arbitration agreement, to stop the court proceedings and ensure the reference of the matter of the dispute to arbitration? It is clear that in such a scenario Party B has number of options. The first is that he may decide to participate in the legal proceedings and renounce or abandon the arbitration agreement expressly or impliedly. Implied waiver arise simply by B participating in the court proceedings without objection. His participation indicates his desire to waive his right to arbitrate, and the court has discretion, in these circumstances, to consider certain procedural behaviour to be a waiver of the contractual right to arbitrate⁶.

The second option is that B may apply for a stay of the legal proceedings. There is no principle that requires arbitral proceedings or the arbitration agreement to terminate if a party to the agreement commences a legal action before the competent court. While resort to legal proceedings may constitute a repudiation of the arbitration agreement, that repudiation is not effective unless accepted by the other party. Thus B may seek a court order staying court proceedings and invoking the arbitration agreement. Such an order

⁶ See pp. 21-23 *supra*.

would leave A with no option but to comply with the provisions of the arbitration agreement.

The focus of this section is whether Kuwait properly supports the arbitration process in this context, or whether any recommendation needs to be made to bring Kuwait into line with arbitration regimes. We shall see therefore, how English law and the Model law deal with this question.

3.2 What Is an Application to Enforce the Arbitration Agreement?

Staying legal proceedings and invoking the arbitration agreement is one of the main aspects of court support of the arbitral process, indicating that the court recognises and gives effect to the arbitration agreement. The fact that an arbitration agreement gives exclusive competence to the arbitral tribunal over the subject matter of those disputes that the parties have agreed to refer to arbitration may be considered as an important “negative” effect of an arbitration agreement⁷. The agreement to refer certain questions to arbitration means no court may decide such questions⁸. The court, by virtue of the principle of party autonomy, has to respect their desire to choose this method of settlement. Moreover, the parties should also follow their chosen method of settlement. Accordingly, if either commences legal proceedings before the court in breach of the arbitration agreement, the other should be entitled to apply for the enforcement of that agreement. Most legal systems do confer such a right upon a party to an arbitration agreement, usually in the form of an application to stay the legal proceedings, while certain legal systems also allow that party to ask the court to refer the dispute to arbitration. It may be suggested that the width and efficacy of such rules may be regarded as a useful indicator of the extent to which a legal system properly supports arbitration.

The device of a stay is available in modern arbitration systems. Both the English Act and the Model Law oblige the court to stay the legal proceedings, if there is an arbitration agreement. So, the Model law states in Article 8

⁷ A/CN.9/264, para 1 and see pp. 21-23 *supra*.

⁸ It may be noted that the existence of the arbitration agreement does not prevent either party to from initiating judicial proceedings. This seems to be based on the ground that the parties have no right to agree to oust the jurisdiction of the state court. See, *Halifax v. Intuitive system* [1999] 1 ALL ER (Comm.) 303 and *Scott v. Avery* (1856) 5 HL case 811.

“A court before which an action is brought in matter which the subject of an arbitration agreement shall, if a party so requested not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed”.

While s.9 of the English Arbitration Act 1996 provides,

“ (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter”.

These provisions allow a party to the arbitration agreement who is being sued to enforce that arbitration agreement by applying to the court for a stay. Furthermore, it might be noted that both systems have the same approach, as the drafters of the 1996 Act had Article 8 of the Model Law in mind when they formulated s.9. This can be seen clearly from the statement in *Patel v Patel*⁹ that the court should take into account the terms of Article 8 in interpreting s.9¹⁰. However, this does not mean that 1996 Act follows the Model Law, slavishly, as unlike the Model Law, it is clear on the question of who may seek a stay.

In Kuwait, the right to ask for arbitration can be found in Article (173/5) which provides exclusive jurisdiction to an arbitral tribunal to hear and decide any dispute within the scope of an arbitration agreement. It states, “The court shall not have jurisdiction to hear disputes which have been agreed to be referred to arbitration”.

This article shows that the court is bound to enforce the arbitration agreement, although it does not refer to a stay. Therefore, when a party to an arbitration agreement, contrary to that agreement, initiates a legal action, the other party must apply for the dismissal of the legal proceedings, on the ground that the court has no jurisdiction to hear the dispute because of the existence of the arbitration agreement. However, this article does not

⁹ [1999] (C.A) WLR 322.

¹⁰ *Ibid*, see p 325. Per lord woolf.

cover comprehensively the conditions needed to activate the arbitration agreement, e.g. who may apply, the question of time, and whether a stay is mandatory or not.

Modern arbitration systems deal relatively clearly with the effect of an arbitration agreement when a party brings a legal action before a court in a matter is the subject of that agreement. Legislation should not only instruct the court to recognise and give effect to arbitration agreement, but also to draw its attention how the agreement may be enforced, indicating who may apply and within which period of time.

3.3 Who May Apply?

Who has the right to seek a stay? Can any party to legal proceedings avail himself of that right? It is suggested that an applicant should have to be a party to the arbitration agreement¹¹, who is being sued in relation to a matter which it has been agreed to submit to arbitration. Therefore, not every party to legal proceedings may seek a stay. But an applicant for a stay must be a party to legal proceedings to avail himself of that right¹². A party to an arbitration agreement, who has not been sued, should not be able apply to become a party to the proceedings purely for the purpose of acquiring an order to stay an action which has been brought against another party, who has no desire for a stay. The applicant for a stay should have to satisfy the court that the matters in respect of which a stay is sought fall within the scope of an arbitration agreement concluded between him and the party who has commenced legal proceedings, and that he is himself a party to those proceedings.

The rules governing applications for stays should be clear as to the conditions under which an application may be made, including the character of any applicant. Sadly, such clarity is not found in current Kuwaiti legislation. In order to discover who may apply for a stay, one must research the general principles of the Civil and Commercial Procedure Law 1980. This is not helpful, especially since recent arbitration legislation elsewhere indicates clearly who may apply for a stay. For instance, the English Arbitration Act 1996 s.9 makes it obvious that the only party entitled to invoke that section is a party to an arbitration agreement, against whom legal proceedings are taken (whether as a respondent to a claim or counterclaim)¹³. It is not clear from the wording used in the

¹¹ See Art.8 (1) of Model Law, sec. 9 (1) of Arbitration Act 1996.

¹² See Art.8 (1) of Model Law, sec. 9 (1) of the Arbitration Act 1996.

¹³ See B. Harris *et al.*, para [9C] at p 84 and R. Merkin, *op. cit.*, para 6.13, Service Issue No: 26: 6 March 2000.

Model Law 'if a party so requests' whether it covers both the plaintiff and defendant. This formula may suggest that an application to stay may be taken by either party¹⁴. The Court of First Instance of Hong Kong (Stone J.) confirmed such understanding and indicated that both plaintiff and defendant can request a stay under Model Law Article 8(1)¹⁵. The question was whether the court had power to dismiss the action as opposed to staying the action under the provisions of art 8 of the Model Law. Hanjin Shipping Co. Ltd (the plaintiff) argued that the case was firmly within Model Law art 8, which did not differentiate between the plaintiff or defendant as a seeking party. The court concluded that the phrase "a party" is sufficiently wide to include both plaintiff and defendant. The court in this case ordered a stay upon the plaintiff's application. This may be compared to the approach of the with Federal Court of Canada, Trial Division (Tremblay-Lamer J.) in *Granville Shipping Co Inc. v. Pegasus Lines Ltd*¹⁶, where the court took the view that, by commencing a legal action in court, the plaintiff waived its right to seek to stay the legal proceedings. These different results expose a lack of clarity in the Model Law.

It is therefore suggested that the new Kuwaiti Arbitration Act should follow the model of the English Act in this area.

3.4 The Role of the Court

The following paragraphs will consider the role of the court in this context. The key question is whether the court should have the power to refer the parties to arbitration on its own initiative. In Kuwait is quite clear that the court does not have any such authority. This relates to the fact that the Kuwaiti legal system is based on adversarial procedure¹⁷. Under an adversarial system, a court may not enforce the arbitration agreement and stay court proceedings merely because of the existence of the arbitration agreement. When one of the parties to an arbitration agreement initiates legal action against the other, he exercises his basic right to litigate, and the court has no power to decline jurisdiction in the action simply because of the existence of the arbitration agreement. Moreover, it has no power, by its own initiative, to compel a party to proceed with arbitration. It is for the respondent in the legal action to object to court proceedings by invoking the arbitration

¹⁴ See Prof. F. Davidson, *Arbitration*, op. cit., para 7.33 at p134.

¹⁵ *Hanjin Shipping Co. Ltd v. Grand King Shipping Ltd*. 20 Nov 1998, Unreported Commercial List No. 192 & 193, cited in H. Alvarez et al., op. cit., p122.

¹⁶ [1996] 2 F.C.R. 853; 111 F.T.R. 189, cited in H. Alvarez et al., op. cit., p 89.

¹⁷ In this type of system, the function of the state courts is to hear both sides and make a judgement. It is not to control the collecting of evidence or to dictate the issues, nor to inform the litigating parties what should do or not to do. The role of the state court is in fact a passive role. In this system, the parties play the primary role in the process.

agreement and seeking a stay. So the court will enforce the arbitration agreement only upon a request from such a party. Only upon such an application can the court – whether in Kuwait, England or under the Model Law - stop the progress of the legal action, and leave any dispute to be decided by means of arbitration. Only by such an application can a party show the court that he wants to settle the dispute by arbitration, as agreed. Thus the court is not permitted to invoke the provisions of the arbitration agreement without any request from the appropriate party¹⁸.

The importance of such a request from the appropriate party is very clear. Yet Kuwait does not indicate clearly that a party must apply for a stay to enable the court to enforce the arbitration agreement. This requirement has to be deduced from the general principles of the legal system of Kuwait. By contrast, most recent arbitration legislation articulates this requirement very clearly, as in s.9(1) of the Arbitration Act 1996, and Article 8(1) of the Model Law. Of the latter provision Dcnault, J. observes, “Where a valid arbitration agreement exists and a party requests a transfer of the dispute to requests at the first opportunity, Article 8 obliges the court to refer the matter to arbitration”¹⁹.

So there is a trend in developed arbitration systems to deprive the court of power to refer the parties to arbitration on its own motion²⁰, reinforcing the point that the court must not invoke the arbitration agreement without a request from an interested party. Thus a party’s failure to invoke the arbitration agreement should preclude him from relying on that agreement, as by his silence, he may be deemed to have waived his right to arbitrate. Therefore, a party has to be decisive in this matter and act positively in order to invoke the arbitration agreement. He should be aware that the court has no power to stay judicial proceedings of its own initiative, merely because of the existence of the arbitration agreement.

3.5 The Court’s Power to Enforce the Arbitration Agreement

In the event of an application for a stay of legal proceedings the court should not automatically suspend those proceedings. It has to be fully satisfied that the application

¹⁸ There was a general agreement in the Model Law that Art. 8 (1) did not empower the court without a request of a party, i. e. *ex officio*, to refer the parties to arbitration. See A/CN.9/246, para 22.

¹⁹ See *Coopers and Lybrand Limited (Trustee) for BC Navigation S.A (Bankrupt) v Canpotex Shipping Services Limited*, 1987, Federal Court of Canada, Trial Division [CLOUT case no. 9].

²⁰ See A/CN.9/246, para 22.

has fulfilled all the conditions required by the relevant law. Certain conditions are common as between Kuwait and developed legal systems such as England and the Model Law - that the application must be made at correct time, and that the arbitration agreement is not null and void, inoperative, or incapable of being performed. These conditions will be considered in the following paragraphs.

(a) Time for an Application to Stay

An applicant for a stay should not have delivered any pleadings nor taken any other step in the proceedings. Although the central purpose of an arbitration agreement is to settle disputes by arbitration rather than through the courts, so that if one of the parties seeks to litigate, the other should be able to invoke the arbitration agreement by seeking a stay, nevertheless, he has to do so at the correct time. One can understand why such a party should have to seek a stay without delay. Should he actually participate in the proceedings, he must be regarded as having waived his right to arbitrate. Therefore, imposing some restriction on the right to seek a stay balances the right to arbitrate and the basic right to litigate.

Most legal systems, like Kuwait, England and the Model Law, have stipulated time-periods for invoking an arbitration agreement once legal proceedings have been initiated, in that the application to stay proceedings should usually be made before taking any step in those proceedings. Kuwait makes this point in Article 173(5)(i) of CCPL 1980, which says that the court does not have jurisdiction to hear disputes which have been agreed to be submitted to arbitration, adding in Article 173(5)(ii) of CCPL 1980 that an abandonment of rebuttal of non-jurisdiction may be expressed or implied. The explanatory memorandum clarifies this article, stating that the legislator wished to elucidate the nature of resorting to the court to settle a dispute that the parties have agreed to refer it to arbitration. It adds that a defendant has right to seek an order from the court staying court proceedings and referring the matter to arbitration, but emphasises that the defendant must make a plea of non-jurisdiction before delivering his first statement on the substance of the dispute²¹.

In England, the Arbitration Act 1996 takes a similar line in s.9(3), which states " an application may not be made by person.... after he has taken any step in those proceedings to answer the substantive claim" while Article 8(1) of the Model law

²¹ See Attacks no. 33-36-39/95 Comm. on 19/11/95.

provides, "...if a party so requests not later than when submitting his first statement on the substance of the dispute,...". The British Columbia Supreme Court has noted of this provision, "a stay of proceedings should not be granted if it is applied for out of time. It would prejudice the plaintiffs to refer the matter to arbitration when the litigation process was well under way"²².

It can be appreciated then that in most jurisdictions, the court may not grant an application to stay unless it is made at the appropriate stage.

(b) The Validity of the Arbitration Agreement

Whatever the stage at which a stay is sought, it will not be granted if the arbitration agreement is null, void, inoperative or incapable of being performed²³. No court will enforce an arbitration agreement, which is a complete nullity²⁴. In Kuwait, the rules that govern the arbitration in CCPL 1980 do not specifically address this issue but the Supreme Court is of the view that an arbitration agreement shall be enforced only if it is valid and capable of being executed²⁵. Moreover, most modern arbitration statutes deal with the issue in a clear manner. For instance, s.9 (4) of the English Arbitration Act 1996 states, "on an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed".

Similarly, the Model Law Article 8(1) provides, "a court... shall, ... refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed"²⁶.

²² See *Queensland Sugar Corp. v "Hanjin Jedda"* 1995 [CLOUT case no. 181].

²³ See English Arbitration Act 1996 sec. 9 (4), the Model law Art. 8 (1) and in Kuwait see Attack no. 157/93 Comm. on 19/12/93.

²⁴ The question that who may decide the issue of the validity of the arbitration agreement is discussed at pp. 74-79 *infra*. See also for the court supervision over the ruling of the arbitral tribunal on its own jurisdiction in pp.190-191 *infra*.

²⁵ See Attack no. 157/93 Comm. on 19/12/93.

²⁶ It may be mentioned that the phrase "null and void, inoperative or incapable of being performed" which appears in Art 8 (1) in the Model Law and in sec.9 (4) of the English Arbitration Act 1996 is taken directly from Art. II of the New York Convention.

(c) The Relationship Between the Principle of Competence – Competence, and the Jurisdiction of the Court to Examine the Validity of the Arbitration Agreement²⁷

What is the relationship between the principle of competence – competence²⁸, and the jurisdiction of the court to rule upon the validity of the arbitration agreement? Who should decide the point if a party challenges the validity of that agreement - the arbitral tribunal or the court? This question does not currently arise under the Kuwaiti legal system, as Kuwait has not yet adopted the principle of competence-competence. Nevertheless, the question arises as to whether the principle should be adopted in Kuwait. Hence, we should consider how this issue is treated by modern arbitration legislation such as the English Act or the Model Law.

It has been seen that s.9 (4) demands that an English court cannot grant for a stay, unless sure of the validity of the arbitration agreement. On the other hand, the arbitral tribunal is empowered by s.30 to rule on its own jurisdiction, and may decide on challenges thereto, including questions concerning the existence or validity of the arbitration agreement. Should the English court rule upon the question of the validity of the arbitration agreement or it should leave the matter to the arbitral tribunal? It was noted earlier²⁹ that a key element of the philosophy of the Act is the recognition of party autonomy, so that the court should respect the parties' desire. It was, moreover, one of the fundamental principles of the Act that the court should not intervene in the arbitration, unless the law clearly sanctions this. Thus the indications are that the court should initially leave questions relating to the arbitral tribunal's jurisdiction to be determined by the tribunal itself, with the court only dealing with such questions pursuant to ss. 32 (Determination of preliminary point of jurisdiction) or 67 (Challenging the award: substantive jurisdiction).

Yet the principle of competence-competence does not invariably prevent the court from dealing with the matters relating to the validity and existence of the arbitration agreement, as ss. 9 and 30 do not oblige the court *always* to refer disputes as to the

²⁷ The coming paragraphs focus on this relation in case of enforcing the arbitration agreement and when the state court has the first chance to deal with challenges directed at the arbitration agreement. Therefore, it does not deal with this relation when the court is a body of review on the decision of the arbitral tribunal on its own jurisdiction. This matter is discussed in pp. 190- 191 *infra*.

²⁸ See pp. 33-37 *supra*.

²⁹ See pp.63-64 *supra*.

arbitral tribunal's jurisdiction to the tribunal itself. In practice, in certain situations it is better to decide for the court to rule on the matter. Thus the DAC notes,

“ For example, cases arise where a party starts an arbitration but the other party, without taking part, raises an objection to the tribunal. In such circumstances, it might very well be cheaper and quicker for the party wishing to arbitrate to go directly to the Court to seek a favourable ruling on the jurisdiction rather than seeking an award from the tribunal”³⁰.

And it has been held that an English court is competent to decide whether there is a valid arbitration agreement in terms of s.5 of the Act³¹. The court has jurisdiction to determine whether a stay should be granted if there is a question whether there is a valid arbitration agreement³². The Rules of the Supreme Court (Amendment 1996) in order 73 r.6 (2) states,

“Where a question arises as to whether an arbitration agreement has been concluded or as to whether the dispute which is the subject-matter of the proceedings falls within the terms of such an agreement, the Court may determine that question or give directions for its determination, in which case it may be order the proceedings to be stayed pending the determination of that question”.

*Birse Construction Ltd v St David Ltd*³³, clarifies the relationship between ss.9(4) and 30 and answers the question whether the court must always refer a dispute as to the existence of an arbitration agreement to the tribunal whose competence is disputed. Pill L.J. rejected that submission, stating that in some cases it would be better for the court to determine the issue itself, and continuing,

“[I]f it is clear on the evidence that a contract did or did not exist then the court should decide for it cannot be right to direct an issue pursuant

³⁰ See DAC 1996, para 141 (iii).

³¹ See *Birse Construction Ltd v St David Ltd* [1999] BLR 194, this decision was confirmed in *Thomas Dobbie Thomson Walkinshaw & Ors v Pedro Paulo Diniz*, Commercial Court (Thomas J) 19 May 1999.

³² See CPR 1998, Practice Direction 49G, para 6(2). See also, R. Merkin, *op. cit.*, Service Issue no 31:31 March 2002, para 6.22.1.

³³ [1999] BLR 194.

to order 73, rule 6(2) or to leave the 'dispute' to be determined by the arbitral tribunal".

This case, furthermore, explores the procedural options of a court facing an application to stay, listing them as follow:

- 1) It may determine on affidavit evidence that there was an arbitration agreement between the disputants, in which case the proceedings shall be stayed pursuant to s.9;
- 2) It may stay the proceedings under s.9 on the ground that the arbitral tribunal has jurisdiction to rule on its own jurisdiction in terms of s.30;
- 3) It may decide not to determine the question immediately but may order the question to be considered under CPR 1998, Practice Directions 49G, para 6(2).
- 4) It may decide that there was no agreement to arbitrate, refuse to grant a stay, and therefore proceed to deal with the case.

Ward L.J. indicated that judges in such situations have discretion to take whatever course they think appropriate, having weighed all the circumstances. One factor which should be taken into account is the interest of the parties in avoiding unnecessary delay or cost. The court should thus consider the likelihood of a challenge to the arbitral award (under ss.67 and 69³⁴) on the basis of lack of jurisdiction, or the non-existence of the arbitration agreement. It could not be in the interests of the parties to have to return to the court for a definitive answer to a question, which could and should have been decided by the court before the arbitral tribunal embarked upon the meat of the reference.

The Court of Appeal in *Ahmed Al-Naimi v Islamic Press Agency Inc*³⁵ further developed the analysis of the relationship between ss.9 and 30. One of the questions before the court of first instance was the scope of the arbitration clause the court being invited by the parties to determine this matter on affidavit evidence. Judge Bowsher QC refused to do so, on the ground that the arbitral tribunal should first consider this matter, staying the action pursuant to s.9. However, the Court of Appeal indicated that he had to accede to this request, Waller L.J. opining,

"on an application under s. 9, a Court is bound to consider the affidavit evidence, and to spend time in so doing. There is bound to be argument about the strength or otherwise of the case whether the

³⁴ The state court may bear in mind the possibility of the challenge to the jurisdiction of the arbitral tribunal (s 32), or the challenge to an arbitral award (ss67-69).

³⁵ [2000] 1 Lloyd's Rep. 522.

arbitration clause covered the subject matter of the action in considering what course to take. It thus also seems to me that in the interest of good litigation management and the saving of costs, the Court should see whether it can resolve that point on the affidavit evidence³⁶.

He Continued that the proper construction of s.9 was that the Court must be satisfied (a) that there was an arbitration clause and (b) that the subject matter of the action was within that clause before the Court could grant stay under that section³⁷.

There is an inherent tension between the jurisdiction of the arbitral tribunal to rule on its own jurisdiction and the power of the court to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed. It has been seen that the court may consider the interests of the expediency before dealing with an application for a stay, as shown by the cases considered above.

The Model Law seems to adopt the same stance as the English Courts to the issue of the relationship between the principle of competence-competence and the jurisdiction of the court to examine the arbitration agreement in the case of an application to stay. This is seen clearly in third Working Group Report which declares that where the parties differed on the existence of a valid arbitration agreement, that issue should be settled by the court, without first referring the issue to an arbitral tribunal which allegedly lacked jurisdiction³⁸.

In the case of *Cangene Corp v Octapharma AG*³⁹, which dealt with the question of whether the arbitration agreement was operative, and whether its scope covered the dispute. Morse, J, of the Manitoba Court of Queen's Bench held that the arbitration clause shall be extended to a dispute over the termination of the agreement. Thus the clause was not inoperative and the action was stayed. This shows that Article 16 does not oblig the court to leave jurisdictional challenges to the arbitral tribunal. Article 8(1) allows the court consider such challenges in deciding whether to enforce the arbitration agreement. *Jean Charbonneau v. Les Industries A.C. Davie Inc. et. Al* is another helpful

³⁶ *Ibid.*, per Lord J. Waller, at p 526, col. 1.

³⁷ *Ibid.*

³⁸ A/CN.9/233, para 77, see also Prof. F. Davidson, *International Commercial Arbitration*, op. cit., para 3.16 at p 53.

³⁹ [2000] 9 WWR. 606, cited in H. Alvarez *et al.*, op. cit., p 64.

example. The plaintiff, in this case, sued for damages caused by the delay in the delivery of a fishing boat, which one of the defendants was to construct and the other partly finance. The defendants sought a stay of proceedings pursuant to Article 8 of the Model Law on the ground that the contract contained an arbitration clause. The court found that under the arbitration agreement the Minister of Agriculture was to arbitrate any dispute arising between the parties. It was held that the arbitration clause was inoperative on the ground that the Minister of Agriculture could not act as an impartial arbitrator being a party to the contract. The court thus dismissed the defendant's application for a stay of the proceedings.

All these cases draw the attention to the general philosophy behinds the provisions that govern staying legal proceeding and the power of the arbitral tribunal to rule on its own jurisdiction. It is true on one hand that the purpose of the arbitration agreement is to settle any dispute by arbitration, to the exclusion of competent court⁴⁰. Moreover, the law and the courts should aim, wherever possible, to uphold the arbitration agreement and leave disputes and challenges to be resolved by the agreed authority. Yet on the other hand, the court may refuse to invoke the arbitration agreement, even if a party makes a proper and timeous application, when it is satisfied that there is no point going to arbitration⁴¹ since the arbitration agreement is clearly null or void, inoperative or incapable of being performed. The court may thus avoid unnecessary delay and cost which would result from following the desire of the parties as expressed in the arbitration agreement⁴².

Accordingly, the court should balance these policies. Its attitude towards determining whether an arbitration agreement is "null or void, inoperative or incapable of being performed" is a key matter, as this mirrors its attitude towards the arbitration agreement and the power of the arbitral tribunal to rule on its own jurisdiction. In principle, the court should respect the primacy of party autonomy, and operate the principle

⁴⁰ A/CN.9/207, para 59.

⁴¹ The parties could avoid such interaction by ensuring that there should be no cause which will require a court to disregard the arbitration agreement. See B.N. Kirpal, 'The Risk of Ambiguous Arbitration agreements', in A. Berg (ed.), *International Arbitration and National Courts*, ICCA Congress, Series No. 10, New Delhi, at p 15.

⁴² The source of this inherent power to examine the arbitration agreement may be not only Art 8 (1) or sec 9, but also by it is basic function as to delivery justice. The wards of Lord Saville may be relevant. He says "Justice delayed or unnecessarily expensive justice is indeed justice denied. However 'correct' the final decision can be said to be, it will have produced injustice if it took too long or was too expensive". See M. Saville, 'An Introduction to the 1996 arbitration Act' (1996) 62 *Arbitration* 165 at p 166.

competence- competence, unless the invalidity of the agreement is obvious⁴³ or can be clearly proved⁴⁴.

3.6 Judicial Relief for Breaches of the Arbitration Agreement

What is the nature of the relief that the court is bound and empowered to grant, when a legal action is brought that falls within the scope of an arbitration agreement, which it is then requested to enforce? Here the Model Law, the 1996 Act, and Kuwaiti law each has a totally different approach. Each approach shall be examined with view to recommending how this matter might best be dealt with in the new Kuwaiti Arbitration Act.

Article 8(1) of the Model Law indicates that the court "shall refer the parties to arbitration". In using these words, the object of the draftsmen of the Model Law was to keep it in line with the corresponding provision of the New York Convention 1958 – Article 2(3). For the sake of consistency, the lawmakers rejected the proposal to substitute the words "shall decline jurisdiction". This clearly emerges from the Fourth Working Group Report⁴⁵. Thus, a court which grants a stay must refer the parties to the arbitration. That this is an obligation incumbent on the court was confirmed by the High Court of Hong Kong (Leonard J.) in *Nassetti Ettore S.p.a. v Lawton Development Limited*⁴⁶. The Model law has therefore adopted the idea of a compulsory reference to arbitration. It is hardly common for a court to instruct the parties to resort to another institution to settle their disputes⁴⁷.

On the other hand, the 1996 Act has a completely different philosophy in relation to this question. Under s.9 the court may only grant a stay, which order cannot be interpreted as a judicial reference of the dispute to arbitration. The relief of the grant of a stay cuts off the plaintiff's preferred method of enforcing his claims, leaving him to go to arbitration if he wants to settle his disputes. Therefore England has not adopted the idea of a compulsory reference to arbitration. The 1996 Act in this respect simply continues the traditional philosophy of English arbitration law. So Lord Mustill notes, "The idea of a

⁴³ *Fung Sang Trading Limited v. Kai Sun Sea Products and Food Company Limited*, 29 October 1991, Hong Kong: High Court of Hong Kong (Kaplan J.), [CLOUT case no. 20], *Nanisivik Mines Ltd. and Zinc Corporation of America v. Canarctic Shipping Co. Ltd.*, 10 February 1994, Canada: Federal Court of Appeal (Mahoney, MacGuigan and Linden, J.J.A.), [CLOUT case no. 70].

⁴⁴ *Inco Europe Ltd and others v First Choice Distribution (a firm) et al*, [1999] 1 ALL ER (C.A.), p 820

⁴⁵ A/CN.9/233, para 76.

⁴⁶ See CLOUT case no. 129.

⁴⁷ This is in many legal systems such as in Kuwait and England.

compulsory reference was mooted before the great reforms of the 1850s, but was rejected in favour of discretionary stay....⁴⁸

At the moment Kuwaiti law, like French law, obliges the court (if timeously requested to do so) to dismiss an action brought in breach of an arbitration agreement, on the ground that it has no jurisdiction to deal with this dispute⁴⁹. But what is the ideal approach for the law to take in this context? It might be argued that it is inappropriate for a court to relinquish its jurisdiction to another institution. Thus the idea of a compulsory reference must be rejected. The court should not be required positively to refer the parties to arbitration. The practical and appropriate relief could be merely staying the judicial proceedings, and this approach is recommended to the Kuwaiti legislator. This relief should be compulsory and not permissive. This is another lesson may be learnt from the modern arbitral systems.

It has been seen then, that the court's power to grant to stay legal proceedings, and thus enforce the arbitration agreement, can be invoked only when the application to stay has fulfilled all relevant requirements. Most modern and healthy legal systems adopt the approach that in such a case the court has no discretion. It must stop the proceedings and refer the matter to arbitration, unless the arbitration agreement is invalid.

That is the view taken of Article 8 of the Model Law by the Canadian Federal Court of Appeal, which has opined that "*shall* in article 8 clearly means *must*, not *may*"⁵⁰. In another example the Ontario Supreme Court (Campbell J.) opines

"The Court held that with respect to matters falling within the scope of the arbitration clause, Model Law Article 8 was mandatory and required a stay of proceedings unless the plaintiffs discharged the onus of showing that the agreement was null and void, inoperative, or incapable of being performed. The court recognized a strong public policy in favour of upholding and enforcing agreement to arbitrate"⁵¹.

⁴⁸ See *Chanel Tunnel Group v Balfour Beatty Ltd.* [1993] 1 ALL ER (HL) p. 679 para g-h-j.

⁴⁹ See Art. 173/3 of CCPL 1980. See the French treatment in Art. 1458 of CCP 1981.

⁵⁰ *Nanisivik Mines Ltd. And Zinc Corporation of America V Canarcctic Shipping Co. Ltd.* [C.I.O.U.T case no. 70].

⁵¹ *Boart Sweden A.B., et al. v Nya stromnes A.B., et al.* (1988), 41 B.L.R. 295. See also Canada: Federal Court of Canada, Trial Division (Denault, J.) in *BC Navigation S.A. (Bankrupt) v. Carpotex Shipping Services Limited*, 2 November 1987, [CLOUT case no. 9]. It provides "Where a valid arbitration agreement exists and a party requests a transfer of the dispute to the arbitration tribunal at the first opportunity, Art. 8 MAL obliges the court to refer the matter to arbitration".

The 1996 Act seems to adopt the same stance as the Model Law to the issue of the imperative duty on the court to stay its proceedings. Since the provisions of s 9 of the 1996 Act are mandatory⁵². Kuwait has to take the same line trend.

3.7 Conclusion

Any developed and healthy arbitration system must start from the fact that the interest of justice generally dictates that contractual agreements should be upheld. The Arbitration Act must feature a requirement that court proceedings be stayed in respect of disputes subject to an arbitration agreement. Kuwait should deal with question of the enforcement of an arbitration agreement in one provision, like the English Arbitration Act 1996 s.9 or the Model Law Article 8, which enables the statute to treat this issue comprehensively, in turn helping the users of arbitration to be certain where the law stands on the issue. The relevant provision must state all conditions that are required to be satisfied if court is to grant a stay, and a stay should be the exclusive judicial relief for breaching the arbitration agreement by bringing legal proceedings. This remedy should be mandatory.

⁵² See sec. 4 of 1996 Act and Shed. 1 to the Act for the mandatory provisions.

4. Extending Contractual Time-Bars

4.1 Introduction

Arbitration agreements may well feature clauses stipulating time limits for commencing arbitral proceedings or for making the arbitral award⁵³. The agreement may provide that the right to go to arbitration is extinguished if it has not commenced within the time limit agreed by the parties. So a clause may, for example, stipulate a time limit of three months after the dispute has arisen for beginning the arbitration, otherwise there can be no arbitration. The agreement may also provide that an arbitral award should be made, e.g. within ten months of the first session- if it is to be valid. Such clauses may thus affect the claimant's right to arbitrate or the validity of the arbitral award. Thus, contractual limitation clauses may have significant consequences. Contracting parties may resort to such clauses for different purposes. The DAC Report 1996 records one of the justifications as enabling commercial concerns to draw a line beneath transactions at much earlier stage than ordinary limitation provisions would allow⁵⁴. Another object might be to provide some limit to the uncertainties of whether a party will go to arbitration or not - a party would know that the other could not insist on arbitration after the lapse of the time limit. Thus, there are a number of logical and practical justifications for including such contractual time-bars⁵⁵.

Time-bar clauses are recognised and enforced by many legal systems across the world, for example, in both Kuwait and England. However, legislative treatment of this matter is not always the same. The role which the court is accorded regarding time bar clauses is often a crucial difference. In most legal systems, the court plays no other role in relation to a contractual time bar, other than to recognise and enforce it. On the other hand, the court could have a significant role, if it were permitted to extend the stipulated time limits. This diversity between legal systems raises a number of questions. Does failure by the claimant to comply with a contractual time bar always entail that the claim is barred or the claimant's right extinguished, or that a late arbitral award is invalid? Or can the claimant be relieved from the consequences of his delay or failure to comply with the contractual time limit? What role should the court play in such cases?

⁵³ The contractual time limit is considered as a positively beneficial feature of commercial contract. See Mustill & Boyd, *op. cit.*, p 200.

⁵⁴ Para 68.

⁵⁵ See R. Merkin, *op. cit.*, para 11.17, Service Issue No 23: 7 April 1999.

This section endeavours to focus on the role of the Kuwaiti court pertaining to the contractual time bar, dealing with how Kuwaiti legislation treats the question of the effects of failure to comply with the stipulated time, and whether the court should have any authority to extend the contractual time-bar. The aim of this section is to examine the role the state could play to support arbitration in relation to the outcome of contractual limitation. It considers whether the court should be able to extend an agreed time limit, to give the parties another opportunity to resolve their disputes by means of arbitration. What is the attitude of the Kuwaiti courts to this issue? What lessons could be learnt from the 1996 Act or the Model Law?

The best way to examine these issues is to consider the matter under three headings,

- Extending time for commencing arbitral proceedings.
- Extending time for making an arbitral award.
- Extending other time limits.

4.2 Extending Time for Commencing Arbitral Proceedings

The starting point here must be the treatment accorded by the 1996 Act to this question. The 1996 Act takes a pioneering step as regards contractual time limits for the commencement of arbitral proceedings. The court, under s.12 of the 1996 Act, has the authority to extend such contractual limitation periods. Neither the Model law nor the Kuwaiti arbitration system confers such authority. This makes the issue of this power particularly interesting. The following paragraphs are thus designed to focus on s.12, with a view to advising whether the new Kuwaiti Arbitration Act should adopt a similar approach.

(a) Contractual Time Bars to Arbitration

It is quite common to find in a range of types of commercial contracts a clause that stipulates that, if specified steps or procedures are not taken within a given period after the dispute has arisen, the right to arbitrate is extinguished. Prof. F. Davidson says "commercial contracts quite often stipulate that if certain steps are not taken- generally the making of a claim within specified period of time- then a party's rights are extinguished or his right to have a claim determined by arbitration is extinguished"⁵⁶.

⁵⁶ See Prof. F Davidson, *Arbitration*, op. cit., para 8.02.

This type of contractual time-bar is often considered as barring the right to arbitrate⁵⁷. This style of agreement has been recognized as totally valid and effective. The House of Lords in *Atlantic Shipping and Trading Company v Louis Dreyfus and Company*⁵⁸ notes, "It is perfectly legal to make such stipulation- it is done, e.g., every day in insurance policies"⁵⁹.

(b) The Power of the Court Under s. 12 of the 1996 Act

Does the failure by the claimant to comply with the contractual time limit inevitably prevent a party from resolving his claim via arbitration, or can he be relieved from the consequences of his delay or failure? Section 12 of the 1996 Act provides that the court has jurisdiction to extend time limits for commencing arbitral proceedings or taking other steps as a pre-condition to arbitration, stating,

" (1) Where an arbitration agreement to refer future disputes to arbitration provides that a claim shall be barred, or the claimant's right extinguished, unless the claimant takes within a time fixed by the agreement some step -

(a) To begin arbitral proceedings, or

(b) To begin other dispute resolution procedures, which must be exhausted before arbitral proceedings can be begun, the court may by order extend the time for taking that step.

(2) Any party to the arbitration agreement may apply for such an order (upon notice to the other parties), but only after a claim has arisen and after exhausting any available arbitral process for obtaining an extension of time".

Thus, a failure to appoint an arbitrator on time, or to give notice to determine an arbitrator, or to take some specified other step to commence arbitral proceedings within the stipulated time limit does not always lead to the loss of the right to arbitrate.

⁵⁷ However, that may not prevent that barred party resorting to litigation to settle the dispute. Since that does not affect the basic right to litigate and the nature of the time bar does not extent to bar the claim. See *Hardwick Game Farm v S.A.P.P.A., Ltd.* [1964] 2 Lloyds Rep. 227 at 274, col.1. Nevertheless, this surely depends on the nature of the contractual time limit and its effects.

⁵⁸ [1922] 2 A.C. 250.

⁵⁹ *Ibid.*, Per Lord Dunedin, p. 256.

(c) The Criteria for Exercising the Jurisdiction Under s.12

However, s.12 allows the court to act only if either of two conditions is met. Mance J. notes that the effect of s.12 is, pursuant to the doctrine of party autonomy, to introduce a very material restriction of situations in which the court can grant an extension of time for commencement of arbitration⁶⁰. Thus, s.12(3) states,

“The court shall make an order only if satisfied -

(a) That the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or

(b) That the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question”.

Waller L. J. thus clarifies the construction of s.12,

“the construction of section has, in my judgment to start from the assumption that when the parties agreed a time bar, they must be taken to have contemplated that if there were any omission to comply with its provisions in not unusual circumstances arising in ordinary course of business, the claim would be time barred unless the conduct of the other party made it unjust that it should”⁶¹.

The following paragraphs will consider the statutory criteria for exercising this judicial power.

1) Circumstances outside the Reasonable Contemplation of the Contracting parties

If, despite a limitation clause, a party wants to arbitrate, he has to satisfy the court in terms of s.12(3)(a) that the need for an extension arises out of circumstances that were “outside the reasonable contemplation of the parties”. He has also to satisfy the court that it would be “just” to grant an extension of the time bar⁶². The Court of Appeal confirmed this in *Harbour and General Works LTD. V Environment Agency*,

⁶⁰ See, *Grimaldi S. P. A. v Sekihyo lines Ltd.* (Q.B.D.) [1999] 1 W.L.R. 708 at p 722.

⁶¹ See *Harbour and General Works LTD. V Environment Agency*, (C.A.) [1999] 1 W.L.R. 950 at p 959.

⁶² Per Judge Jack QC in *Vosnoc Ltd v Transglobal Projects Ltd* [1998] 2 ALL ER. (QBD), p 990 at 1001.

“Section 12(3)(a) does not to allow the court to interfere with a contractual bargain unless the circumstances are such that, if they had been drawn to the parties’ attention when they agreed the provisions, they would at very least have contemplated that the time bar might not apply; that if they had so contemplated it is then for the court to rule whether justice required giving an extension”⁶³.

It was held that a party’s failure properly to read the agreed contractual provisions relating to the time limit could not be deemed as circumstances outside the parties’ contemplation so that the court could not act under s.12 in such a case⁶⁴. So what circumstances do trigger the court’s power to extend time bars?

Neither s.12(3)(a) nor any other provision of the Act suggest any definition of or limitation to the expression “circumstances”. It was noted in the *Vosnoc* case that the subsection placed no limit on ‘the circumstances’⁶⁵. So, the law does not draw a list of circumstances that merit an extension. The interpretation of ‘circumstances’ must depend upon the circumstances of each individual case. Judge Jack QC in the *Vosnoc* case states, “[T]he court should look at the whole of the circumstances in which the application for an extension arises”⁶⁶.

Furthermore, the court seems to have a discretionary jurisdiction to consider all circumstances presented before it and decide whether these were or not outside the reasonable contemplations of the parties, considering all the circumstances as whole and focusing on those circumstances placed before the court. Geoffrey Brice QC states in *Cathship v Allanasons*

“Thus the court is concerned not only with what the parties actually contemplated at that time (the relevant time is restricted to the time when the parties agreed the arbitration clause) but what they reasonably would have contemplated. This must involve a consideration of the relevant transaction, or ordinary practices within

⁶³ (C.A.) [1999] 1 W.L.R. at p 951-F-.

⁶⁴ *Ibid.*, p 951-G-.

⁶⁵ [1998] 2 ALL ER at p 991-a-.

⁶⁶ *Ibid.*, p 1001-g-.

that type of transaction and with the reasonable expectations of parties involved in such a transaction”⁶⁷.

It is worth remembering that even if the reasonable contemplation hurdle is negotiated, the applicant must still prove that an extension would be just. He must establish both elements in order to obtain an extension.

2) The Conduct of the other Party

Yet s.12(3)(b) establishes an alternative ground for an extension - that the conduct of one of the parties to the arbitration agreement makes it unjust to hold the other to the strict terms of the provision in question. It seems that when the court feels that the defendant’s conduct had not caused the applicant trouble, it will not grant an extension under s. 12 (3)(b). So in the *Harbour* case it was held that, as there was no obligation on the respondents to advise the applicants that time was about to expire, the applicants’ own failure to read properly the relevant provisions of the contract did not make it unjust to hold them to the strict terms of the time bar⁶⁸.

If either of two conditions is met, a party to the arbitration agreement may invoke the provisions of s12. Section 12(2) provides,

“Any party to the arbitration agreement may apply for such an order (upon notice to the other parties), but only after a claim has arisen and after exhausting any available arbitral process for obtaining an extension of time”.

The qualification to that right means that an applicant has first to take any agreed steps and follow any agreed procedures before resorting to the court under s.12. The applicant should apply without any delay, as delay is a factor which the court may take into account in exercising its discretion whether to or not to grant an extension. The House of Lords in *Comdel v Siporex*⁶⁹ emphasises this point. There are several other cases where

⁶⁷ [1998]3 ALL ER. 714 at p 726 -e-f.

⁶⁸ [2000] 1 W.L.R at p 961 -h-.

⁶⁹ [1990] 2 Lloyd’s Reports (HL) 207. Even this decision is made before Arbitration Act 1996 and based on sec. 27 of the Arbitration Act 1950, which of course repealed; this point seems to be still relevant. This since, sec.12 is based on the old sec.27.

the court had regard to the length of the delay⁷⁰, and applications have been rejected where not made within a reasonable time and without delay⁷¹.

(d) Section 12 and Party Autonomy

It may be observed that s.12 is very closely related to the idea of party autonomy⁷². It has been said its power under s.12 will give the court "the opportunity to reconsider how to proceed in the light of the philosophy underlying the Bill as whole namely that of party autonomy"⁷³.

Generally the court should respect the agreement of the parties. Accordingly it should recognise a contractual time bar. However, this is not only the meaning of the concept of party autonomy. Another meaning is that any jurisdiction given to the court to ignore the bargain that the parties have made must be completely justified⁷⁴. The drafters of the 1996 Act clearly believe that justice requires the possibility of extending a bar in the two situations contemplated by s.12(3). The DAC Report of February 1996 stated clearly that the power given to the court by s.12 Act could be justified in view of the fact that it is fair to extend the time limit in these two cases⁷⁵. So no contractual time-bar is absolute, and the power conferred by s.12 enables "the court to qualify the effect of the party's actual agreement"⁷⁶.

The drafters' approach is stressed in *Harbour v. Environment*, where Waller L.J states,

"the changes to wording of section 12 as intended to reflect the underlying philosophy of the Act as being that of 'party autonomy' . By that phrase was meant 'among other things', that any power given to the court to override the bargain that the parties have made must be fully justified"⁷⁷.

It may be learnt from s.12 that it gives rein to the court to extend the contractual time limit where justice calls for such reaction. This is one of the ways to support party autonomy. As Waller L.J. says,

⁷⁰ See R. Merkin, op. cit., para 11.45 (2), Service Issue No 32:30 August 2002.

⁷¹ *Richmond Shipping Ltd v Agro Co.* [1973] 2 Lloyd's Rep 145.

⁷² *Harbour v Environment Agency, (C.A.)* [2000] 1 W.L.R. 950 at 959 -f-.

⁷³ DAC 1996 Report, para 72.

⁷⁴ *Ibid.*, para 69.

⁷⁵ *Ibid.*, para.70.

⁷⁶ See *Grimaldi v Sekihyo* [1999] 1 W.L.R. 708 at 717-E-.

⁷⁷ [2000] 1 W.L.R. at 959 -E-.

“The subsection is concerned with party autonomy. its aim seems to me that to allow the court to consider an extension in relation to circumstances where the parties would not reasonably have contemplated them as being ones where the time bar would apply”⁷⁸.

(e) The Relationship Between s.9 (Staying Court Proceedings) and s.12 (Extending Time Limits)

In some cases, the application of a time bar may be an issue of contractual interpretation. So in the *Grimaldi* case one of the questions was whether the Hague Rules⁷⁹ (which contain a contractual limitation clause) were incorporated into the contract, so as to make the time bar effective. In such a case, or when the court is asked to grant two orders - one under s.9 staying the proceedings, and the other under s.12 extending the time limit - how should it react?

It seems that R.S.C order 73, r.21⁸⁰ supports the principle of party autonomy by allowing the parties to agree to the court, rather than the arbitral tribunal, determining by declaration issues which would otherwise fall within the jurisdiction of the tribunal. The parties may wish to resolve all questions between them. Therefore, the court decides whether the time bar applies, and if so, whether the time limit should be extended. However, in the absence of such agreement, the court is obliged to stay the proceedings and leave the contractual issue to be determined by the arbitral tribunal. Where a dispute as to whether an arbitration agreement was time-barred involved factual questions or substantial contractual issues, and one of the parties had objected under s.9 to its being considered other than by arbitrators, it was held that the matter should be referred to the arbitrators under the agreement, rather than being dealt with by the court under s.12⁸¹. Hence, Mance J. in the case in question had to order a stay, and dismiss the application for an extension, without prejudice to applicant’s right to argue and contest the time bar point before the arbitrators⁸². The arbitral tribunal may then decide the time bar issue, but

⁷⁸ *Harbour v Environment Agency*, (C.A.) [2000] 1 W.L.R. at p 960 -f.

⁷⁹ It is an International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (*Brussels, 25 August 1924*).

⁸⁰ This is as it held in *Grimaldi v Sekihyo*, where the court says “Although Order 73, r21 allowed parties to an arbitration agreement to agree to the court, rather than arbitrators, determining by declaration issues which would otherwise fall within the jurisdiction of the arbitrators...”. [1998] 3 ALL ER, p 943. Order 73, r21 provides “An application for an order under section 12 of the Arbitration Act may include as an alternative an application for a declaration that such an order is not needed”.

⁸¹ *Grimaldi v Sekihyo* (Q.B.D.) [1999] 1 W.L.R., p. 709 -A-.

⁸² *Ibid.*, p709 -B-.

only the court may grant an extension under s.12, although the parties may of course contractually empower the arbitral tribunal to grant an extension⁸³. In such a case, the court cannot deal with the application under s.12 without exhausting firstly any available arbitral process for obtaining an extension of time⁸⁴.

It may be noted that the parties may agree to postpone the decision of the court or the application under s.12 until after the arbitral tribunal has determined the contractual issues, without prejudice to the claimant's legal position if an application under s.12 should prove necessary. Mance J observed

"I see no reason why the court should not encourage and give effect to an agreement of this nature to delay a section 12 application until its need is established"⁸⁵.

On the other hand, in the absence of such agreement, the applicant may have to invoke the provisions of s.12, to protect his legal position, and the court may, if it thinks fit, stay its consideration of the s.12 issue, pending the arbitrators' determination whether or not there is any applicable consensual time bar⁸⁶. It is worth mentioning nonetheless, that the court may decide to rule on a s.12 application on the assumption that there is an applicable consensual time bar⁸⁷. It seems apparent then that there is a sensible, practical relationship between ss.9 and 12⁸⁸.

(f) Conclusion

It is suggested that a power to extend a contractual time – bar is a good idea. Accordingly, the new Kuwaiti Arbitration Act should have a similar provision. An examination of the case law under s.12 of the 1996 Act shows that this is a workable model which relates well to the overall framework of that statute. However, in order to support the tendency of party autonomy this provision should be non-mandatory. So there may be a consensual mechanism for extension.

⁸³ See *Comdel Commodities Ltd v Siporex Trade SA* (No.2) (HL) [1991] 1 A.C. 148, and R. Merkin, op. cit., para 11.31, Service Issue no 31; 31 March 2002.

⁸⁴ Sec. 12 (2) of the Arbitration Act 1996.

⁸⁵ *Grimaldi v Sekihyo* (Q.B.D.) [1999] 1 W.L.R., p718 -F-.

⁸⁶ *Ibid.*, p 718 - F-.

⁸⁷ *Ibid.*, p 718 - G-H, and see *International Tank v Kuwait Aviation Fuelling Co. KSC* [1975] 1 ALL ER 242.

⁸⁸ It may be important for the successful arbitral environment to see the respondent is co-operative party or at least should not act to prevent the s 12 claim proceedings. This is for the sake to save time and cost. See ALL E R Annual Review 1998, at p 21.

4.3 Extending Time for Making Arbitral Awards

Kuwait and England have different approaches to empowering the court to extend the time limit for making an arbitral award. In Kuwait Article 181 of CCPL 1980 permits the arbitrating parties to agree on a time limit for making an arbitral award. Furthermore, it provides a supplementary provision in the absence of an agreed time limit. This states that if the arbitration agreement does not contain a time limit, the arbitral tribunal has to make its decision within 6 months from the date when the parties were notified of the first arbitration session. It also allows the parties to agree to extend the agreed or statutory date, or to authorise the tribunal to extend the date.

By contrast s.50 of the 1996 Act provides,

“(1) where the time for making an award is limited by or in pursuance of the arbitration agreement, then, unless otherwise agreed by the parties, the court may in accordance with the following provisions by order extend that time.

(2) An application for an order under this section may be made -

(a) by the tribunal (upon notice to the parties), or

(b) by any party to the proceedings (upon notice to the tribunal and the other parties), but only after exhausting any available arbitral process for obtaining an extension of time.

(3) The court shall only make an order if satisfied that a substantial injustice would otherwise be done.

(4) The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed (by or under the agreement or by a previous order) has expired”.

It can be noted that while Kuwait stipulates a time limit for making an arbitral award in the absence of contrary agreement, in England the tribunal may make its decision at any time, unless the parties agree that an award has to be made within a specific time⁸⁹. Each approach has its advantages. Stipulating a time limit for making the award will clearly oblige the tribunal and parties to do their best to end the arbitral process within a reasonable time, such as 6 months. This would make the arbitral process quicker than litigation. Yet this is at the expense of party autonomy, as the parties are subject to this

⁸⁹ Russell, *op. cit.*, para 7-039, p 343.

pressure, which is imposed by law not by their agreement. They should have the flexibility and the right to design their arbitral procedures and determine whether there should be a time limit for making an award or not. Yet Kuwait arguably provides that flexibility, given that the parties may agree to override the statutory time limit and/or extend that limit where it applies. So it might be said that Kuwait combines respect for the principle of party autonomy with encouragement for the tribunal to make its award within a reasonable time.

The second point is that the 1996 Act gives the court the power to extend agreed time limits - a power not accorded to courts in countries like Kuwait and France⁹⁰, where only the parties themselves may extend such limits. The Kuwaiti approach might be said to be flawed, as obtaining the consent of both parties is often impractical, in particular if the arbitral proceedings have already commenced. Kuwait might like to cure this defect by giving the court power to extend statutory or agreed time limits, indicating the circumstances in which the court may exercise this authority. Such a step would show that the court has the power to assist the arbitral process.

The third point is that s.50(2)-(3) of the 1996 Act restricts the power of the court to extend the time limit for making an arbitral award. The first qualification is that arbitral procedures for obtaining an extension should be exhausted before resorting to the courts for this purpose. The second qualification is that the court should be satisfied that substantial injustice would be done if the time limit were not extended. Although the Act itself does not clarify what is intended here, the DAC 1996 Report notes,

“ it seems to us that these qualifications are needed so as to ensure that the Court’s power is supportive rather than disruptive of the arbitral process. For the same reason, it seems to us that it would be a rare case indeed where the Court extended the time notwithstanding that this had not been done through an available arbitral process”⁹¹.

Such qualifications limit the power of the court to intervene in arbitration. When court has authority to extend the time limit for making an award, this should not operate

⁹⁰ Since Art. 1456 of CCP 1981 states “The legal or contractual deadline may be extended either by agreement of the parties or, by a request of either of them or of the arbitral tribunal, by the President of the Tribunal De Grande Instance or, in the case contemplated by Article 1444, paragraph 2, by the President of the Tribunal de commerce”.

⁹¹ See para 239.

without any limitation. It should not be able to override contractual time limits, unless it is satisfied that substantial injustice would otherwise be done. This test is a proper criterion for justifying an extension, striking a reasonable balance between supporting party autonomy and achieving arbitral justice. The court should, in principle, uphold any contractual time limit, as this is what the parties wanted. However, arbitral justice would require the court's intervention, when, for example, a party has procured a delay, or where the award has not been made for reasons beyond the control of the tribunal, e.g. delay in obtaining evidence.

4.4 Extending Other Time Limits

Unless the parties agree otherwise, s.79(1) of the English Arbitration Act 1996 gives the court the power to extend other time limits agreed by the parties in respect of the arbitral proceedings or non mandatory limits specified by the Act 1996. By virtue of s.79, the court is able to extend, for instance, the time limit for appointment of an arbitrator under s.16, or the 28 day time limit for appealing or challenging an arbitral award under s.70(3)⁹². Yet, there are limitations on the discretion under s.79. These are identical to those provided in respect of the power of the court to extend the time limit for making an arbitral award under s.50. It should also be remembered that the provisions of s.79 are non-mandatory, so that the parties may exclude the court's power to grant such extensions. Sadly, Kuwait lacks any similar provisions. The court has no power to extend any time limit of any kind.

4.5 Conclusion

It is submitted that the Arbitration Act 1996 allows the courts to provide valuable support for the arbitral process through their wide ranging powers to extend time limits. This seems to be one of the major English innovations in arbitration. Such valuable provisions are to be found in neither the UNCITRAL Model Law nor the Kuwaiti arbitration system. It is suggested that Kuwait crystallizes these provisions in a new Arbitration Act.

⁹² See DAC 1996 Report, para 389 and 294.

5. The Constitution of an Arbitral Tribunal

5.1 Introduction

Sometimes the parties to the arbitration agreement will determine some important questions about the arbitral tribunal, e.g. the number of arbitrators, the method of appointing the member(s) of the tribunal, the rules which apply in case of the failure of appointment, provisions covering the removal of arbitrators and the filling of vacancies. Where the parties agree clear rules regarding these vital questions, there should be no problems about the constitution of arbitral tribunal. The parties are bound to comply with the agreed provisions and the courts are bound to enforce them in line with the concept of the party autonomy.

However, in other cases, the parties may not have reached any agreement on the above issues. Or there may be agreement, but one party might not implement his duties (e.g. appointing an arbitrator when obliged to do so). How does the law deal with such situations? What role should the court play in supporting arbitration by helping the parties constitute the arbitral tribunal? This section deals with how the law can help constitute the arbitral tribunal both in the absence of the agreement between the parties, and when agreed procedures have not been complied with, with a view to determining how such matters might optimally be covered in a new Arbitration Act. This part is divided into two sections, the first section dealing with how the Arbitration Act might support the arbitral tribunal, the second section looking at how the court might support the tribunal.

5.2 The Law's Support

Most legal systems allow the parties to determine the constitution of the arbitral tribunal and any procedure for challenging arbitrators. More advanced systems feature provisions which apply where the arbitration agreement does not deal with such matters and the parties are subsequently unable to reach an agreement thereon. Such provisions are certainly found in the Model Law, which in turn provide the inspiration for the corresponding provisions of the Arbitration Act 1996.

(a) The Number of Arbitrators

Article 10(1) of the Model Law and s. 15(1) of the 1996 Act both emphasise the freedom of the parties to agree on the number of the arbitrators. Similar freedom is implied in the

Kuwaiti arbitration system. As the CCPL 1980 does not prescribe a specific number of arbitrators, the parties may be considered free to agree on the number. On the other hand, Kuwait requires an odd number of arbitrators⁹³, while an even number is permissible in both the Model Law and the 1996 Act⁹⁴. The justification for this restriction in Kuwait is the need avoid any possible deadlock in the arbitral tribunal, leading to delay, extra cost, and potentially rendering the process nugatory. Sadly, although modern arbitration systems like the Model Law and the 1996 Act impose no restriction on the freedom of the parties in this regard, neither do they contain any provisions to deal with deadlock⁹⁵. So, parties have to be aware of this practical issue before nominating the number of the arbitrator(s). That being said, it is possible for the parties to nominate one of the arbitrators as having decision making power in such cases, while legislation may confer decision-making power on the presiding arbitrator⁹⁶, or contemplate reference to an umpire. The role of umpire in the event of deadlock is well established in commercial practice⁹⁷. Accordingly, where an arbitral tribunal consisting of one arbitrator appointed by each party fails to agree, the umpire may be called to decide⁹⁸. Such possible options would suggest that there is no need to limit party autonomy by stipulating that there should be an odd number of the arbitrators merely to avoid the case of deadlock. The number of the arbitrators is one of the areas where the party may have a freedom to agree on without any restrictions. So, the new Arbitration Act may support party autonomy in this matter and refrain from overprotective requirements, as long as the parties are able to

⁹³ See Art. 175 of CCPL 1980. This is the same as the French approach that provided in Art. 1453 of CCP 1981. In Egypt, this requirement is still operative, even if the 1994 Act does not indicate to this issue. See A. El-Kosheri, *op. cit.*, p 22. In relation to the Model Law, such stipulation was considered but rejected. It was stated, "the number of arbitrators may be thought to be one of the issues that should be fully left to the parties' discretion and agreement. However, one might consider requiring an uneven number ... Yet, while such requirement could enhance the efficiency of arbitration, it may be deemed as an overprotective legislation measure. As to the special feature, known in some systems, of a third arbitrator acting as an "umpire" or as a "referee," it is suggested that the model law recognize such function if envisaged in an arbitration agreement but not include it in any "supplementary" rules". See A/CN.9/207, para 67.

⁹⁴ In France, this is possible only in case of international arbitration. See, Art 1495 of CCP 1981.

⁹⁵ 1999 Swedish Arbitration Act predicted the case of deadlock and suggested a way to overcome this event by adopting the idea that the opinion of the chairman shall prevail. See sec.30 of 1999 Swedish Arbitration.

⁹⁶ This option was rejected by the Commission to codify such rule. The justification of this attitude is that in some circumstances it might lead to depriving the other members of the arbitral tribunal from having an appropriate influence on decision-making. See A/40/17 para 244. However, the parties may agree on such issue. Since, Art. 29 is not mandatory and authorise the parties to adopt any approach as they consider fit and proper to avoid the possibility of enforcing the arbitral tribunal- if there is no majority, to continue to deliberate until a majority is formed, or else issue no award. See A/CN.9/264 para 3 and Hotlzman & Neuhaus, *op. cit.*, p808. See also sec.22 of the Arbitration Act 1996 (Decision-making where no Chairman or Umpire).

⁹⁷ See Prof. F. Davidson, *International Commercial Arbitration*, *op. cit.*, para 7.17 at p 155.

⁹⁸ See sec. 21(4) of the Arbitration Act 1996.

sort out such difficulty. The new Arbitration Act may also provide supplementary rules in such case to ensure that the arbitration goes ahead.

But what does the law say if the parties have not reached agreement on the number of arbitrators? Modern arbitration systems provide an answer. Thus, s.15(3) of the 1996 Act states that in this situation the tribunal shall consist of a sole arbitrator, while Article 10 (2) of the Model Law provides that there shall be three arbitrators. Sadly, Kuwait does not deal with this issue. It is therefore recommended that the new Kuwaiti Arbitration Act provides that, in the absence of agreement as to the number of arbitrators, the arbitral tribunal will consist a sole arbitrator. The English approach is preferred, because it will save the parties from the extra costs associated with a three-arbitrator tribunal. (It is not argued that the cost of a three-arbitrator tribunal is likely to be three times the cost of a sole arbitrator). The Model Law suggests three, not only to meet the growing preference for commercial disputes to be referred to a three-arbitrator tribunal⁹⁹, but also to help ensure equal treatment of the parties in the context of international commercial arbitration, where the parties were likely to hail from different legal cultures¹⁰⁰. This is not a consideration which need underpin the Kuwaiti Act.

The Kuwaiti Arbitration Act should thus recognise the parties' freedom to determine the number of the arbitrators. The choice of any number should be given effect. The suppletive rules may be in favour of saving time and cost, and thus may suggest a sole arbitrator in case of the absence of an agreement of the parties.

(b) The Manner in Which the Arbitral Tribunal Will Be Appointed

Once the number of the arbitrators is determined by the agreement or by virtue of a statutory presumption, the next question is how will the arbitrator(s) be appointed, assuming this is not stipulated in the arbitration agreement, or dealt with by the parties subsequent agreement? Once more in modern arbitration systems statute fills such a gap. For instance, Article 11(3) of the Model Law states,

“Failing such agreement, (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint

⁹⁹ A/CN. 9/264, para 3.

¹⁰⁰ A/CN. 9/232, para 81.

the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6 ”.

While s. 16 of the 1996 Act runs,

“(3) If the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of a request in writing by either party to do so.

(4) If the tribunal is to consist of two arbitrators, each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so.

(5) If the tribunal is to consist of three arbitrators -

(a) each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and

(b) the two so appointed shall forthwith appoint a third arbitrator as the chairman of the tribunal.

(6) If the tribunal is to consist of two arbitrators and an umpire -

(a) each party shall appoint one arbitrator not later than 14 days after service of a request in writing by either party to do so, and

(b) the two so appointed may appoint an umpire at any time after they themselves are appointed and shall do so before any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration”.

Unfortunately, once more Kuwaiti law is silent on this matter, lacking such provisions as set out above. The new Kuwaiti Arbitration Act should therefore bring law in line with modern developed systems. Any such provision should fulfil certain criteria. Firstly, it should provide for an appointment procedure in relation to the most common forms of arbitral tribunal (*e.g.* a sole arbitrator, two or three arbitrators). The Model Law, for example, prescribes the manner in which three arbitrators or a sole arbitrator will be appointed. Yet s.16 of the Arbitration Act 1996 caters for more possible cases than the Model Law, dealing also with the cases of a tribunal of two arbitrators or of two arbitrators and an umpire. This is preferable in the sense of providing supportive

supplementary provisions to assist in giving guidance to constitute the arbitral tribunal in most common forms. Secondly, the new Act should impose a time limit for appointing arbitrators, in order to encourage each party to make his appointment promptly, and thus to expedite the arbitral process. Such a time limit has to be reasonable and fair. The Model Law, for example, requires that each party should appoint his arbitrator within 30 days of receipt of a request to do so from the other¹⁰¹, while s.16 of the 1996 Act requires the parties jointly to appoint a sole arbitrator not later than 28 days after service of a written request to do so from either one of them.

5.3 The Court's Support and Assistance

For an arbitration to be efficient, the national court may assist with the constitution of the arbitral tribunal. Arbitration may require support and assistance from the court at two stages, firstly at the stage of the constitution of the arbitral tribunal, and secondly when an arbitrator requires to be removed.

(a) The Court's Role in the Constitution of an Arbitral Tribunal

Arbitration law may empower the court to play an essential role in constituting the arbitral tribunal where the appointment procedure has failed, whether because of the failure of the parties act on their agreement, or their failure to reach agreement¹⁰². In such cases one of the parties may request the court to make the necessary appointment(s). This can be regarded as a classic case of court support for the arbitral process, given that the constitution of the arbitral tribunal is the first step in the arbitral proceedings¹⁰³. The exercise of this power, can resolve any practical difficulty, and ensure that the progress of the arbitral tribunal is not frustrated by, say, a party refusing to appoint an arbitrator, or refusing to agree on an appointment procedure, or making an inept appointment. Most legal systems confer such a role on the court - Article 11(4) of the Model Law, for example, while Toulmin J. describes s.18(3) of the 1996 Act as, "the enabling section which gave the court power to intervene to assist the arbitration process by appointing an

¹⁰¹ See Art. 11 (3) (a).

¹⁰² It may be taken in account that the parties may agree what is to happen in case of failure of the procedure for the appointment of the arbitral tribunal. In the absence of such agreement, the court is given power to make an appointment. It is assumed here that there is no agreement in the event of failure of the procedure of the appointment of the arbitral tribunal.

¹⁰³ DAC 1996 Report, para 87.

arbitrator when one of the parties refused to assist in the process"¹⁰⁴. Similar powers are conferred in Kuwait by Article 175 of the CCPL 1980.

1) The Court's Power

When there is failure to constitute the arbitral tribunal¹⁰⁵, a party may resort to the court to secure the appointment. The Kuwaiti court- under Article 175 of the CCPL 1980- has a limited power in that it may only appoint an arbitrator. The article simply states that in such case the competent court will appoint the necessary number of arbitrator(s) mentioning no other powers. The Model Law position is essentially the same as the Kuwaiti position. The provisions of the Model Law provide that under such circumstances, any party may request that the court take "the necessary measure"¹⁰⁶. The Working Group states that this phrase means that the court must itself make the appointment, rather than, for example, ordering an appointing authority to do so¹⁰⁷. The fact that this function is entrusted to the court seems designed to avoid extra costs and further delay in the arbitral proceedings. A couple of cases illustrate how the court may take the necessary measure to constitute the arbitral tribunal. In *China Ocean Shipping Company v Mitsui Maritime Panama S.A.*, the defendant had failed to appoint his arbitrator, and the plaintiff applied to the High Court of Hong Kong to appoint an arbitrator on behalf of the defendant. The court found that the defendant had failed to honour his obligation to appoint an arbitrator and duly made the appointment¹⁰⁸. In *Shipping v East Asia Sawmill* the court indicated that the failure of a party to respect that obligation was contrary to the spirit of arbitration, which aims to resolve a dispute speedily and economically. It regarded such conduct as a flagrant breach of the defendant's contractual obligation to arbitrate, and so not only appointed an arbitrator, but also ordered the defendant to pay the costs of the plaintiff¹⁰⁹.

¹⁰⁴ See *R. Durnell and Sons Ltd. v. The Secretary of State for Trade and Industry* Queen's Bench Division (Technology and Construction Court), [2001] 1 Lloyd's Rep. 275

¹⁰⁵ This may be because of one of the parties fails to act as required to appoint his arbitrator, or when the two arbitrators are unable to agree on the third arbitrator.

¹⁰⁶ Art. 11 (4).

¹⁰⁷ A/CN.9/246, Para 32.

¹⁰⁸ See CLOUT case no. 59.

¹⁰⁹ See CLOUT case no. 60.

This may be contrasted with the English Act, which offers the court a number of options to assist the process of appointment where the appointment procedure has failed¹¹⁰. Thus under s.18(3) those powers are –

- “(a) to give directions as to the making of any necessary appointments;
- (b) to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;
- (c) to revoke any appointments already made;
- (d) to make any necessary appointments itself”.

Thus the court may direct a party to appoint his arbitrator. Its power to make the appointment itself might be regarded as a last resort, invoked to avoid delay, where the relevant party or appointing authority has already proved recalcitrant. These powers are so much wider than those are under CCPL 1980 or Model Law.

Neither s.18(3) nor art 11(4) lays down any time frame within which the court must exercise its constitutive function. This means any relevant application will be part of the normal caseload of the court. This might be unhelpful to the notion of arbitration as a speedy and economic method of settlement, if court delays slow the arbitral process. Accordingly, it is recommended that a special fast-track procedure be created for such applications.

2) Is the Court's Power Discretionary?

When the court is asked to constitute the arbitral tribunal, does it always have to do so, or may it decline to appoint? In England it appears that the power is discretionary, so that the court may decline to act, if it judges that it is not appropriate to do so. This is clear from cases such as *Villa v Longen*. It may be noted that s.18(3) does not offer any guidelines as to when it might be appropriate for the court to decline whether to exercise its powers. The court's discretion is thus unfettered¹¹¹. However, if the court does exercise its discretion Toulmin J notes,

- “(1) The Court has a discretion under s. 18 of the 1996 Act whether or not to appoint an arbitrator. (2) This discretion must be exercised

¹¹⁰ See B. Harris *et al.*, *op. cit.*, para [18D] at p 115.

¹¹¹ *Ibid.*, at p 197.

judicially and consistent with the principles set out in s. 1 of the 1996 Act and the residual discretion of the Court. (3) Consistent with s. 1(a) of the 1996 Act, the application should be refused if the Court considers that: (a) It is impossible to obtain a fair resolution of the dispute; (b) by an impartial tribunal; and (c) without unnecessary delay or expense¹¹².

The court's powers are probably discretionary under the Model Law as well. On the other hand, the words of Article 175 of C.C.P.L. 1980 do not suggest a discretionary power, as they indicate that the competent court *will* appoint an arbitrator. It seems that it is hard to believe that this is appropriate, as courts in modern arbitral systems, always have discretion in dealing with any type of application. Nonetheless, it is suggested that the Arbitration Act should clarify this matter and adopt the modern approach. Accordingly a court's power may be discretionary. The court should show its pro-arbitration policy and decide on such application taking in the account the supportive inspiration toward arbitration.

3) Is the Decision of the Court Appealable?

Is the court's determination of such issues final? According to the provisions of the 1996 Act, an appeal is open albeit only with the leave of the court¹¹³. By contrast Article 11(5) of the Model Law stipulates that there is no appeal from the decision of the court in this kind of application. Its drafters thought the court's decision should be final, as such finality was, "appropriate in the view of the administrative nature of the function and essential in view of the need to constitute the arbitral tribunal as soon as possible"¹¹⁴.

The justification of the draftsmen of the 1996 Act for not following the provision of Article 11(5) was that there could be questions of important general principle, which would benefit from authoritative appellate guidance¹¹⁵. It is suggested that the Model Law's approach is preferable, since it reduces the risk of dilatory tactics. It is also the

¹¹² *R. Durnnell and Sons Ltd. v. The Secretary of State for Trade and Industry Queen's Bench Division (Technology and Construction Court)*, [2001] 1 Lloyd's Rep. 275

¹¹³ Leave of the court is required for any appeal from a decision of the court under ss. 17, 18, 21 of the Act.

¹¹⁴ See A/CN.9/264, para 7.

¹¹⁵ See DAC 1996 Report, para 89. R. Merkin states this may be helpful where an important point of law relating to the meaning of statutory provisions arises. See R. Merkin, *op. cit.*, para 9.31, Service Issue No 32:30 August 2002.

case that the court's decision on such matters is final in Kuwait¹¹⁶. There is thus no need to recommend any change.

4) Is there any Statutory Guidance for the Court?

The CCPL 1980 provides no guidance as to the factors that the court might consider before making an appointment. But such guidance is to be found in certain modern arbitration statutes. In England the main guidance is the agreement of the parties. Section 19 of the 1996 Act requires the court to have regard to any agreement between the parties as to the qualifications required of the arbitrators. So, when the arbitration agreement contains a particular qualification of the arbitrators, the court shall respect the parties' agreement. However the question whether the court is bound to follow that agreement may be not clear from the language of s.19. It is suggested that the object of this section be, as far as possible, to require the court to have due regard to any agreement of the parties as to the qualifications required of the arbitrator, but the court need not be bound by such guidance¹¹⁷. Article 11(5) of the Model law is to the same effect, but requires the court also to have regard to

“such considerations as are likely to secure the appointment of an independent and impartial arbitrator, and in the case of a third or sole arbitrator shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties”.

The drafters of the 1996 Act considered the reference to impartiality and independence to be superfluous and the reference to nationality unlawful under the Race Relations Act 1976¹¹⁸. Thus it omitted these unnecessary criteria. It is suggested that the English approach is sensible. There is no need to direct the court's attention to such obvious criteria as independence and impartiality, especially as failure to meet these criteria will open an arbitrator to challenge¹¹⁹.

¹¹⁶ See Art. 175 of CCPL 1980.

¹¹⁷ B. Harris *et al.*, *op. cit.*, para [19C] at p 119.

¹¹⁸ See R. Merkin, *op. cit.*, para 9.12, Service Issue No 32:30 August 2002.

¹¹⁹ See, “Appointment of Arbitrators; Exercise of Default Powers”, *Arbitration Law Monthly*, March (2002) 2 (3), p 6.

(b) The Court's Role in Removing Arbitrators

Normally an arbitral tribunal operates from the time of its appointment until it completes its function by making the arbitral award. However, there may be circumstances in which a party may seek to challenge an arbitrator. Generally, modern arbitration statutes contain provisions which specify the circumstances in which the court may remove an arbitrator. Such intervention may be regarded as supporting arbitration as a method of dispute settlement, as parties are usually only entitled to challenge an arbitrator on the ground that he is not suitable to hold office and judge the disputes. Thus the power of removal would inspire confidence in the arbitral process.

1) The Power of the Court to Remove an Arbitrator

The arbitration provisions of Kuwait and England both indicate that an application to remove an arbitrator has to be made to the competent court, although s.24(2) of the 1996 Act adds that if the parties have agreed on the machinery for challenge, it must first be exhausted before the court can exercise its power of removal. So, under the 1996 Act the parties may empower another authority to remove an arbitrator, while Article 178 of the CCPL 1980 indicates that only the court may remove an arbitrator¹²⁰. The rules, in Kuwait, are not clear about the reaction of the Kuwaiti court should the parties arbitrate under institutional rules which empower a third party to remove an arbitrator. On the other hand, the Model Law lays down special challenge procedures in Article 13. Respecting the autonomy of the parties, *prima facie* they may agree on a challenge procedure, although in the absence of agreement, the arbitral tribunal will decide on the challenge, subject to review by the court if the challenge is unsuccessful.

So each of the systems mentioned deals clearly with this important issue, and inevitably concedes a role to the court. However, which approach is the best? Leaving for the moment the question whether the court or the arbitral tribunal should decide on the challenge and what the grounds of challenge should be¹²¹, the freedom of the parties to agree on a procedure for challenge should be recognised. This is surely one of the areas where party autonomy could play its role.

¹²⁰ The French approach is that the parties are at liberty to organise the procedure of challenging an arbitrator, as they consider fit and proper. See Y. Derains, *op. cit.*, at p 10.

¹²¹ The ground of removal generally are lack of impartiality and independence, the arbitrator's physical or mental incapability to perform his functions, the absence of qualifications required by the parties, and the failure or refusal of the arbitrator to act or conduct the arbitral proceedings properly. These matters are discussed in Ch. 4 pp. 143-151 *infra*.

2) General Comments

Certain general observations may be made regarding how arbitration legislation deals with the power of the court to remove an arbitrator. Firstly, it is important to empower the court to remove an arbitrator if arbitration is to be properly supported. Legislation may recognise the parties' freedom to agree on a challenge procedure, so that they resort to a third party, an institution, or even the arbitral tribunal itself, but the court should have the final word.

Secondly, the legislation must specify clearly the potential grounds for removal. These grounds should be designed to maintain the integrity of the arbitral process. So an arbitrator should be removed if he fails to act properly, impartially or independently¹²², or if he lacks qualifications required by the parties, as he is no longer fit and proper to perform his functions.

Thirdly, the consequences of removal on the arbitral proceedings must be dealt with. In Kuwait those proceedings must be suspended when there is a challenge to the arbitral tribunal¹²³. On the other hand, in England s.24(3) of the 1996 Act permits the arbitral tribunal to continue the proceedings, and even make an arbitral award. Article 13(3) of the Model law is to the same effect, stressing that the challenged arbitrator may continue to participate in the decisions of the tribunal. This latter approach seems preferable as helping avoid any possible tactical applications made to delay the progress of the arbitral proceedings¹²⁴. Moreover, there should be no fear of allowing the tribunal to make an award, as it may always be set aside if, e.g. the composition of the tribunal was flawed, or the tribunal failed to act fairly and impartially¹²⁵. There should also be a time limit for the court to make its decision in order to protect the interests of both parties to avoid impeding the arbitral process unduly.

Fourthly, removal of an arbitrator should not terminate the operation of the arbitration, but rather create a vacancy to be filled by the court upon an application by one of the

¹²² The meaning of these concepts and the reaction of the Arbitration Act toward the concepts of impartially or independently are discussed in pp. 145-148 *infra*.

¹²³ Art. 109 of CCPL 1980.

¹²⁴ A/CN.9/245, para 211.

¹²⁵ See the grounds for challenge in Art. 34 of the model law and sec. 68 of the 1996 Act.

parties' challenge¹²⁶. However, the parties should have the freedom to decide on how the vacancy should be filled¹²⁷. In the absence of such agreement, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. The role of the court may come again to reconstitute the arbitral tribunal.

5.4 Conclusion

A number of lessons may be learnt from the approach of modern arbitration systems to the role of the court in constituting the arbitral tribunal. The first lesson is the parties' freedom. The Arbitration Act has to be based on the principle of party autonomy. It must therefore recognise their freedom to decide upon appointment and challenge procedures. Secondly arbitration legislation must establish supplementary provisions to deal with cases where there is no agreement between the parties regarding the constitution of the arbitral tribunal. Supplementary rules should contain detailed prescriptions for common cases, with more general rules to cover all other cases. They should not attempt to prescribe detailed rules for too many different situations. The approach of Articles 10(2) and 11(2) of the Model Law and ss.15 (3) and 16 (3)- (5) of the 1996 Act is commended. The third lesson is that arbitration legislation must ensure that the court provides effective support for arbitration by avoiding unnecessary delay or extra cost when constituting and reconstituting the arbitral tribunal. Thus, there might be time limits for the court to deal with such matters as appointing or removing arbitrators. Moreover a specialised court could be created to deal with cases pertaining to arbitration, in order to emphasise the desire of the state to support and serve arbitration. So, applications regarding arbitration would not be part of the caseload of the ordinary courts, ensuring that speedy assistance from the court reinforced arbitration as an expeditious method of resolving disputes.

These lessons reflect essential themes of modern and developed arbitration systems and should be embodied in the new Kuwaiti arbitration act.

¹²⁶ A/CN.9/245, paras 211.

¹²⁷ See sec. 27(1) of the arbitration Act 1996 and Art. 15. In relation to the model Law it has to be noted that words of Art. 15 as "a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced" does not preclude the parties from providing their own mechanism for appointing substitute arbitrator. It may mean, "the same set of rules under Article 11 will apply". See Holtzmann & Neuhaus, op. cit., p 465 and see Prof. F. Davidson, *International Commercial Arbitration*, para 4.39 at p 82.

6. The Conduct of the Arbitral Proceedings

6.1 Introduction

Unlike litigation, the rules under which arbitral proceedings are conducted mostly depend on the will of the parties to the arbitration. The modern trend is to recognise their freedom to design the conduct of the arbitral proceedings. Thus, the parties should make sure that they have adopted the fit and proper procedures to be followed by the arbitral tribunal in conducting the arbitral proceedings, as the manner in which the proceedings are conducted will play a significant role in the success of arbitration and enhance the idea that arbitration is faster and less expensive than litigation. Once the parties have determined how the proceedings are to be conducted, it is expected that they will follow the agreed procedures voluntarily. However, sometimes court assistance is needed. In this section the powers of the court to support the arbitral process will be considered, in order to see whether the law of Kuwait measures up to best practice, especially as reflected in the 1996 Act and the Model Law.

6.2 Court Assistance in Securing Attendance of a Witness

An arbitral tribunal derives its jurisdiction and powers from the arbitration agreement. Therefore, a third party who is not a party to that agreement is not subject to its authority, and cannot be compelled to appear at an arbitration hearing as a witness. Thus, the arbitral tribunal cannot oblige a witness to give oral evidence or to present documents or other material evidence related to the subject matter of the dispute. In practice, most witnesses cited by parties testify voluntarily. But where this is not the case, the fact that the tribunal cannot compel the attendance of a witness may cause difficulties. A party may struggle to prove his case or rebut the other party's allegations, especially if the witness is his sole source of evidence. Furthermore, the arbitral tribunal may need a particular witness to clarify ambiguous issues, or a particular witness may be the only person who can answer certain key questions. So a party or the tribunal may need help in securing the attendance of witnesses.

Can the court compel a witness to attend the arbitral hearing or yield documentary or other material evidence? Kuwaiti has realised the tribunal's need for court assistance in this context. Thus Article 180(1)(a) of CCPL 1980 gives the tribunal the right to resort to the court to secure the attendance of a witness. Similar assistance is available under Article 27 of the Model Law and s.43 of the 1996 Act. All of these systems look broadly

to provide the same forensic support to in arbitration as is available to the parties in litigation.

6.3 Court Assistance in Taking Evidence

The court may also assist the conduct of the arbitral proceedings by taking the evidence of a witness for use at an arbitration hearing, where it is not possible to secure the actual attendance of that witness¹²⁸. Thus, the court may order that the witness attend for examination before a commissioner appointed by the court for the purpose of taking evidence from a witness who is unable to attend the hearing. Or it may also request a foreign authority to take evidence from a witness resident in its state. Such assistance is available under Article 180(c) of the CCPL 1980, Article 27 of the Model Law and s.44(2)(a) of the 1996 Act. It can be seen why such assistance is important for the efficient functioning of the arbitration. This would provide a useful means to keep the arbitration going ahead.

6.4 Other Support

The following paragraphs will examine other supportive powers given to the courts by arbitration legislation in other states, which are not to be found in Kuwait.

(a) Enforcement of Peremptory Orders¹²⁹ of the Arbitral Tribunal

An arbitral tribunal may sometimes require a party to do something or refrain from doing something. However, is there any means to force that party to comply with tribunal's order? The parties may have confer on the tribunal power to deal with a party who fails to act in accordance with its peremptory orders¹³⁰. This would be accepted and

¹²⁸ For instance, a witness is outside the state of Kuwait or UK, or due to the witness's illness.

¹²⁹ When one of the parties fails to comply with any order or direction of the arbitral tribunal, the later may make a peremptory order to the same effect, prescribing time for compliance with it as the tribunal considers fit. It is a scheme for enforcing the tribunal's order by making them peremptory. Since, failure to comply with the order, certain consequences will follow. There are sanctions which can be applied if the peremptory order are not complied with.

¹³⁰ Sec. 41 of the Arbitration Act deals with power of the arbitral tribunal in case of party's default. In sec. 41(7) provides a supplementary provisions for the power of the arbitral tribunal that may do in case if a party fails to comply with any peremptory order. It states "(7) if a party fails to comply with any other kind of peremptory order, then, without prejudice to section 42 (enforcement by court of tribunal's peremptory orders), the tribunal may do any of the following - (a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order; (b) draw such adverse inferences from the act of non-compliance as the circumstances justify; (c) proceed to an award on the basis of such materials as have been properly provided to it; (d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance".

recognised by virtue of the principle of party autonomy. However, in the absence of such agreement¹³¹ the tribunal cannot force a party to obey its orders, as it derives its power from the arbitration agreement. There is no doubt about the fact that a negative action from one of the parties may affect the progress of the conduct of the arbitral proceedings. In such case, the court may intervene to support arbitration via assisting the arbitral tribunal to enforce the tribunal's peremptory orders, as under s.42 of the 1996 Act. That provision allows the arbitral tribunal, or a party with the leave of the tribunal, to seek the assistance of the court to require a party to execute peremptory orders of the tribunal. The DAC Report 1996 states,

“In our view there may well be circumstances where in the interest of justice, the fact that the court has sanctions which in the nature of things cannot be given to arbitrators (e.g. committal to prison for contempt) will assist the proper functioning of the arbitral process”¹³².

So, where a party refuses to comply with a peremptory order for discovery, and is prepared to suffer such sanctions as the tribunal could impose, the power of the court may be utilised to support arbitration by forcing the party in default to obey the arbitral tribunal's order. The threat of imprisonment might force that party to comply with the tribunal's order¹³³. Accordingly, the court, under a pro-arbitration policy, may be prepared to use its powers to counter problems of delay and non-co-operation¹³⁴, ensuring that the defaulter complies with procedures¹³⁵.

(b) Consolidation of the Arbitral Proceedings

In certain systems the court has the power to order the consolidation of two or more arbitrations without the need for the consent of all of the parties. It often arises that the same dispute involves several parties and perhaps several arbitrations. In the interests of justice and to ensure a successful arbitration, there should be a single arbitration rather

¹³¹ Or in case of such agreement the court assistance may also be needed. For instance, the enforcement of the tribunal's order to preserve property. See Russell, *op. cit.*, para 7-112.

¹³² Para 212.

¹³³ See B. Harris *et al.*, *op. cit.*, para [42B] at p 209.

¹³⁴ The state court may have a discretion jurisdiction to make an appropriate order to ensure the enforcement of the peremptory orders made by the arbitral tribunal. It perhaps deals with default party in the same manner as any party in breach of court order, or may just enforce the sanction threatened by the arbitral tribunal in their peremptory order assuming that the arbitral tribunal itself is not able to enforce it. See R. Merkin, *op. cit.*, para 14.32, Service Issue No 31:30 March 2002.

¹³⁵ The provisions of the Model Law do not provide such judicial function.

than a series of separate proceedings. This is to avoid the possible risk of inconsistent fact-findings or conclusions¹³⁶ and difficulties of time and costs¹³⁷. Consolidation may be one of the means of mitigating these possible dangers of separate proceedings¹³⁸.

A number of systems have adopted this philosophy¹³⁹. For instance, s.26 of the Australia Uniform Arbitration Act 1990 gives the court power to order joinder¹⁴⁰, while the Netherlands Arbitration Act 1986 s.1046 confers jurisdiction on the court to consolidate the arbitral proceedings (in full or partially) with other arbitral proceedings. Section 6B of the Hong Kong Arbitration Act 1982 is to the same effect. No such power is conferred by the Model Law nor the 1996 Act, although under s.35 of the latter the parties are free to empower the arbitral tribunal (but not the court¹⁴¹) to consolidate arbitral proceedings. During the drafting of the Model Law there was a general agreement that it should not deal with problem of consolidation in multi-party arbitrations, on the basis that there is no real need for such a provision¹⁴². However, this matter is now one of the possible matters for consideration by the Commission¹⁴³, as the view has gained ground that it

¹³⁶ Lord Denning M.R. in *Abu Dhabi Case Linquefaction Co. Ltd v Eastern Bechtel Corporation*, indicted "There is a danger in having two separate arbitrations in case like by two separate arbitrators on virtually the self-same question, such as causation", [1982] 2 Lloyd's Rep., 425 at 427. Consolidation could avoid the possible risk of inconsistent decisions, e.g. where one of the arbitral tribunal asks a party to do some thing, while the other tribunal prevents him from doing exactly the same thing, or the liability of A to B and B's claim against C for indemnity depends on the same or similar issues, and B risks failing against both. See Sir M. Mustill, 'Multipartite Arbitrations: An Agenda for Law-Makers' (1991) 7 (4) Arb. Int. 393-402.

¹³⁷ See Mistill & boyd, op. cit., at p 142. It is suggested that consolidation may be desirable in a variety of cases. Such as in case of where more than one arbitrations arises out of the same set of facts or involves the same parties. See A/CN.9.460, para 52. Sir Mustill adds further benefit of consolidation, as it would serve the trade. See his article 'Multipartite Arbitrations: An Agenda for Law-Makers', op. cit., 393-402 [para (c)].

¹³⁸ Appointment of same arbitrator to arbitrations might be a solution. See Prof. F. Davidson, *Arbitration*, op. cit., para 12.06 at p 206.

¹³⁹ In the absence of the statutory initiative, the court may show its attitude in relation to the judicial power to consolidate. For instance, the US federal circuits apply a straightforward rule that a court may not order consolidation of arbitral proceedings unless the parties agree explicitly on such authorisation. See, J. Hosking, 'Non-party Participation - The Extent to Which Non-Contracting Parties be Encouraged or Compelled to Join Proceedings?', paper presented at LCIA & AMINZ arbitration Seminar, held on 20 Feb 2003 in Auckland, New Zealand, at p 7. However, this is not always the case in US. Since, some courts have ordered consolidated hearings while others have denied consolidation. See, National Conference of Commissioners on Uniform States Law at its Annual Conference, July 28- August 4, 2000 1-74, at p 27.

¹⁴⁰ This is not the case before 1990 amendment to sec. 26 in Uniform Acts. Since, the court at that time was not permitted to consolidate the separate arbitral proceedings without an application of all the parties. The view was that this treatment was not inconsistent with fundamental concepts of commercial arbitration, those of privity of contract and party autonomy. See, A.A. De Fine, 'Consolidation of Arbitration Proceedings in Australia' (2001) 4(5) Int. A.L.R. 164-171.

¹⁴¹ Indeed, nothing said in the 1996 Act of the judicial role in this spectrum. According to s. 1 (c), the state court has no power to consolidate the arbitral proceedings. See, T. Melyk, 'Non-party Participation - The Extent to Which Non-Contracting Parties be Encouraged or Compelled to Join Proceedings? The English (Arbitration Act 1996) Perspective, paper presented at LCIA & AMINZ arbitration Seminar, held on 20 Feb 2003 in Auckland, New Zealand, at p 5.

¹⁴² A/CN.9/216, para 37.

¹⁴³ A/CN.9/460 -E-

may be desirable to have the power to consolidate into one set of arbitral proceedings two or more cases deriving from different arbitration agreements¹⁴⁴, in order to avoid the risk of inconsistent decisions and avoid duplication of proceedings (hearing and reviewing the same witnesses and other evidence several times), with a consequent saving of expense and time for all of those involved¹⁴⁵. Still, the vital question of who should have authority to order consolidation as yet remains unanswered¹⁴⁶. The Commission's decision should in any case not violate the principle of party autonomy.

Providing this kind of support meets the criticism that arbitration may not effect joinder of separate arbitrations where there is significant commonality of the facts or law or both¹⁴⁷. It is highly desirable to have such a power of consolidation, in order to avoid potential difficulties which may arise in case of multi-arbitration.

On the other hand, giving the court power to consolidate separate arbitral proceedings might be considered as a negation the principle of party autonomy¹⁴⁸, as the court may order consolidation without need for the consent of all parties. This would frustrate the agreement of the parties to choose their own tribunal to settle their disputes, as well as affecting the confidentiality of the arbitral proceedings through disclosure of documents relating to several disputes in one set of proceedings¹⁴⁹. Conferring such jurisdiction also creates a serious risk that judicially imposed consolidation may impair the enforceability of arbitral awards in international arbitration¹⁵⁰, as compulsory consolidation could constitute a ground for resisting the enforcement of the award under the New York Convention, on the basis that,

- A party was unable to present his case, or

¹⁴⁴ *Ibid.*, para 51.

¹⁴⁵ *Ibid.*, 9/460 -B-, para 53.

¹⁴⁶ A/CN.9/460 -B-, para 61.

¹⁴⁷ A.A. De Fine, *op. cit.*, p164.

¹⁴⁸ See the English view against the compulsory consolidation in DAC 1996 Report, para 180 and 181. This seems to be not complying with contractual nature of arbitration. The court may not consolidate disputes except to enforce the parties' agreement. This corresponds with arbitration, as we all have been taught, is a creature of contract, and therefore it is up to the users of arbitration to provide specifically for multi-party arbitration if they want to have it. See M. Goldstein, 'Constitution the Arbitral Tribunal for the Multi-Party Case: Possible Solutions for Institutional Rules', in G. Hartwell (ed.), *The commercial way to justice, the 1996 International Conference of the Chartered Institute of Arbitrators*, The Hague: Kluwer Law International, 1997, 101-120 at p 104.

¹⁴⁹ This also ignores the doctrine of private of the contract. See F. Davidson, *Arbitration*, *op. cit.*, para 12.5.

¹⁵⁰ *Ibid.*, para 12.16.

- The award deals with a difference not contemplated or not falling within the terms of the submission to arbitration, or
- It contains decisions on matters beyond the scope of the submission, or that the procedure was not that agreed by the parties.

Thus the decision whether to extend this kind of support needs careful consideration. Kuwait must balance the advantages and disadvantages of consolidation powers before deciding whether to create them. It is submitted that the disadvantages of this kind of assistance outweigh its advantages, and it is thus recommended that no statutory power of consolidation should be given to the court. The new Arbitration Act should be built on the philosophy of party autonomy, allowing the parties full freedom to agree to consolidate the arbitral proceedings, or to empower for example the court to order consolidation, as suits their interests¹⁵¹.

(c) Determination of Preliminary Points of Law

In principle, the arbitral tribunal should decide all questions of fact and law that arise in the arbitral proceedings. However, where the case turns on a point of law, a party may wish to appeal against the arbitral award. Indeed in such circumstances a party may wish to ask the court to determine a preliminary issue of law at an early stage, so that the award reflects that decision. Not every system contemplates this kind of assistance, but s.45 of the English Arbitration Act 1996¹⁵² allows the court to intervene during the arbitral proceedings to determine a preliminary question of law, upon an application by a party before the arbitral award has been made. This kind of support might be regarded as a procedural device for expediting the arbitral proceedings, as having a definite answer from the court regarding an important question of law may prevent any possible future conflict, which might delay the progress of arbitral proceedings. The English view was that in such special circumstances it would be cheaper and better for all to obtain a definitive answer from the court at an early stage¹⁵³, while also providing a mechanism for the development of the law in respect of matters that are commonly arbitrated¹⁵⁴.

¹⁵¹ The tactic of consolidation cannot be a court initiative. This surely would comfort with the consensual nature of arbitration that should not be usurped. See DAC Report May 1990, pp. 28 and 29. It seems that the desirability of statutory provisions for the consolidation of the arbitral proceedings, in the absent of parties' agreement, "is highly controversial subject". See Prof. D. Bulter, *Arbitration: International Arbitration Act for South Africa*, July 1998, South African Law Commission, project 94, para 2.68 at p58.

¹⁵² There is no comparable provision in the Model Law.

¹⁵³ DAC 1996 Report, para 218.

¹⁵⁴ See R. Merkin, *op. cit.*, para. 12.42, Service Issue No.18: 7, August 1997.

However, this kind of assistance might be criticised on the ground that a party may run to the court every time a question of law arose, giving him an opportunity to delay the progress of the arbitral proceedings and increase the costs of arbitration. This seems the better view. However, that does not mean that the power of the court to give preliminary rulings on questions of law has to be removed. Rather, this method of support needs some safeguards to make sure that it is not misused. The 1996 Act provides such safeguards. Firstly, an application requires the agreement of all of the other parties, or the permission of the arbitral tribunal¹⁵⁵. Secondly, such an application need not have any impact on the arbitral proceedings, as the arbitral tribunal may continue the proceedings and make an award while an application is pending¹⁵⁶. Thirdly, the court will not exercise its power to rule on the preliminary issue of law unless it is satisfied that the determination of the issue is likely to produce substantial saving in expenses and the application was made without delay. Fourthly, the application should identify the question of law and state the grounds on which it is said the court should determine the issue of law¹⁵⁷. Fifthly, the jurisdiction in this matter is non-mandatory, so that the parties may agree to exclude it. Thus the possible disadvantages of this sort of court assistance may be overcome by providing such safeguards. Thus, it is highly recommended that the new Kuwaiti Arbitration Act adopts the approach of the 1996 Act to this question. It may be suggested that this would allow too much court intervention in the arbitral proceedings. On the other hand, this approach would provide a useful mechanism for offering a definitive ruling on a question of law and thus in many cases would shorten the arbitral proceedings¹⁵⁸. At any rate, the parties can judge this matter and decide whether they are in favour of such intervention or not.

(d) Interim Measures

It is submitted that interim measure of protection in arbitration is an interface between private dispute settlement and the state courts. It is one of these aspects of arbitral procedure that could not escape court involvement. Since, the effectiveness of interim

¹⁵⁵ See sec. 45 (2) of the Arbitration Act 1996.

¹⁵⁶ *Ibid.*, sec. 45 (4).

¹⁵⁷ *Ibid.*, sec. 45 (3).

¹⁵⁸ DAC 1996 Report, para 218 and 221. See also R. Merkin, *op. cit.*, para 12.42, Service Issue No 31:31 March 2002.

measure of protection depends, in the end, on its enforceability, court assistance may be needed.¹⁵⁹ Lord Mustill points out,

“there is the plain fact, palatable or not, that it is only a court possessing coercive powers which can rescue the arbitration if it is in danger of foundering, and that the only court which possesses these powers is the municipal court of an individual state”¹⁶⁰.

Such measures do not obstruct the arbitral process nor impede expeditious arbitral proceedings, but help ensure that the arbitral award is meaningful, by preserving the subject matter of the dispute or the assets of a party. Fry writes,

“If arbitration is to remain an effective means to resolve commercial disputes, it must accommodate the practical requirements of those who resort to it. Interim measures of protection... are a feature of domestic litigation in most countries. Interim measures permit domestic courts to guard against the eventuality that the subject matter of the dispute will vanish, or be passed into the hands of a third party or that object of the proceedings will be defeated. As commercial arbitration is prone to similar potential pitfalls, it is reasonable to expect that a similar regime should be available to litigants who seek a more efficient resolution of their disputes through arbitration”¹⁶¹.

Arbitration legislation in certain states codifies the power of the court to provide assistance by granting interim measures and may declare that the application by a party to the court for interim measures of protection is compatible with the arbitral process¹⁶². Such codification eliminates any possible doubt about whether the court has jurisdiction to grant such measures (e.g. attachments, seizure of assets, measures affecting – or relating to - third parties) in matters governed by the arbitration agreement¹⁶³. It also ensures that seeking the court assistance does not mean that the applicant party waives his right to arbitrate. The rules in Kuwait are not that clear. It is true that it allows the

¹⁵⁹ See J. Schaefer, ‘New Solutions for Interim measures of protection in International Commercial Arbitration: English, German and Hong Kong Law Compared’ (1998) 2 (2) EJCL 1-40, para 3.1.1, at p 5. It is available at <<http://www.ejcl.org/22/abs22-2.html>> [Last visited 5 July 03].

¹⁶⁰ See *Coppee Lavalin v Ken-Ren Chemicals and Fertilisers Ltd*, [1995] 1 AC 38.

¹⁶¹ J. Fry, ‘Recent Developments and the Way Ahead’, paper presented at LCIA & AMINZ Arbitration Seminar, held on 20 Feb 2003 in Auckland, New Zealand.

¹⁶² A/CN.9/216, para. 39.

¹⁶³ A/CN.9/168, para 29.

parties to empower the arbitral tribunal to make interim measures¹⁶⁴. However, does such agreement exclude the court from any role in this regard? Does the applicant party waive his right to arbitrate when he seeks the court assistance?¹⁶⁵ The rules do not suggest a clear answer.

Article 9 of the Model Law states, "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". It is worth mentioning that this article may not empower the court to grant interim measures¹⁶⁶. This depends on the legal system of each adopting state. This article articulates two principles¹⁶⁷. First, the court is not prevented from granting interim measure, and the existence of an arbitration agreement will not prevent the court from granting such measures, if asked by one of the parties. Secondly when a party asks the court grant an interim measure, this will not be considered as a waiver of his right to arbitrate. Article 9 is not restricted to any particular type of interim measures, and so may cover a wide of range of such measures, including measures to conserve the subject matter of the dispute; measures to protect trade secrets and proprietary information; measures to preserve evidence; pre-award attachments to secure an eventual award and similar seizures of assets; measures requested from third parties; and enforcement of any interim measures ordered¹⁶⁸.

The High Court of Hong Hong has even concluded that it had jurisdiction to grant a *Mareva* injunction in support of the arbitration¹⁶⁹. It is essentially for the national court in each system to determine what interim measures fall within the scope of Article 9. For instance, the Federal Court of Canada dismissed an application for an injunction on the grounds that the applicant had not made out a strong *prima facie* case for an injunction, nor shown that damages would not be adequate to compensate any loss he suffered. More importantly, it held that the remedy sought was not an interim measure within Article 9¹⁷⁰.

¹⁶⁴ See Art. 173 (6) of CCPL 1980.

¹⁶⁵ See Dr A. Abd- Alftah, *op. cit.*, pp. 168-171. In France, the arbitral tribunal can take the same interim measures as the state court and the arbitration agreement is not an obstacle of the power of the court to take interim measures. See Y. Derains, *op. cit.*, 14.

¹⁶⁶ See J. fry, *op. cit.*, p 11. See also P. Sandars, *Int'l Encycl. Comp.L.*, para 171 at p 112.

¹⁶⁷ A/CN.9/264, para 1 and 2.

¹⁶⁸ See Holtzman & Neuhaus, *op. cit.*, p 333.

¹⁶⁹ See *Katran Shipping Co. Ltd. v. Kenven Transportation Ltd.* [CLOUT case no. 39].

¹⁷⁰ See *Relais Nordik v. Secunda Marine Services Limited.* [CLOUT case no. 11].

Section 44 of the English Arbitration Act 1996 provides a wide range of orders that the court may use to support the arbitral proceedings¹⁷¹. This provision, which is subject to exclusion by the parties¹⁷², derives in part from Article 9 of the Model Law, but gives the court the same powers as it might exercise in legal proceedings, at the same time specifying a list of orders that the court might grant *e.g.*:

1) Orders Relating to Property

The court is able under s.44(2)(c)(i) to make a wide variety of orders in respect of property which is the subject of arbitral proceedings, or as to which any question arises in the proceedings. Thus the subject matter of the dispute may be protected, so as to ensure that a party in possession thereof does not perform any act in respect of it which could affect its probative value or render the final award worthless. So under s.44(2)(c)(i) the court may order the inspection, photographing, preservation, custody, and detention of the property, or the taking of samples in order to prevent the property being altered, destroyed or disposed of, before evidence of its existing state can be secured for the purpose of arbitration. Furthermore, it may authorise the arbitral tribunal or one of the parties or a third party (*e.g.* an expert) to enter any premises in the possession or control of party to the arbitration in order to take samples or make observations for the purpose of obtaining full information or evidence.

2) Interim Injunction/ Receiver

The court may also under s.44(2)(e) grant interim injunctions, providing a party to the arbitration with a speedy and effective means of preserving the status quo pending the outcome of arbitration¹⁷³. Such an injunction may protect the subject matter of the dispute, for example by preventing resale of particular item by either party¹⁷⁴. The provision also allows the state to order the appointment of a receiver for the purpose of

¹⁷¹ It may be noted that sec.44 does not contain specifically a provision expressing that a party does not waive his right to arbitrate by addressing himself to the state court for interim measures of protection. However, the existence of the section may be regarded as such an intention. See J. Schaefer, *op. cit.*, para 4.1.2.1 at p 11. See also, J. Balanch, 'Interim Measures in International arbitration and the UK Courts: the Current Position', paper presented at LCIA & AMINZ Arbitration Seminar, held on 20 Feb 2003 in Auckland, New Zealand, at p 4.

¹⁷² In relation to the Model Law, Art. 9 does not prevent the operation of any agreement which purports to exclude the right of the parties to seek interim measures of protection. The Commission Report provides "That understanding also provided the answer to the question whether Art. 9 would prevent parties from excluding in the agreement resort to courts for all or certain interim measures. While the article should not read as positively giving effect to any such exclusion agreement". A/40/17, para 97.

¹⁷³ See Russell, *op. cit.*, para 7-128.

¹⁷⁴ See R. Merkin, *op. cit.*, para 12.63, Service Issue No 25:8 December 1999.

or in relation to arbitral proceedings, again to ensure the protection and preservation of property. Yet the various powers listed in s.44 are not exhaustive, as the DAC Report 1996 noted,

“it is under this Clause that the court has power to order *Mareva* or *Anton Piller* relief (i.e. urgent protective measures to preserve assets or evidence) so as to help the arbitral process to operate effectively. Equally, there may be instances where a party seeks an order that will have an effect on a third party, which only the Court could grant. For the same reason the Court is given the other powers listed”¹⁷⁵.

It is also worth mentioning that s.44 prescribes the manner for invoking its provisions. So s.44(4) requires an application by one of the parties, either with the leave of the arbitral tribunal or the agreement in writing of the other parties. However, in urgent cases s.44(3) allows the court to make such order as it considers necessary for the purpose of preserving evidence or assets, in the absence of permission of the arbitral tribunal or written agreement from the other parties.

Comparing s.44 with Article 9 of the Model Law, it may be noted that the Model Law does not require permission from the arbitral tribunal or the agreement of all the parties, nor does it describe how to invoke the assistance of the court in this regard. This is because it is a statement of principle not a practical provision. Furthermore, under s.44 the court will exercise its power only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person entrusted by the parties with power in that regard, has no power or is unable for the time being to act effectively¹⁷⁶. Under s. 44 such a requirement is not found in Article 9. The court acts only as the last resort. However, where the arbitral tribunal cannot act (e.g. where the parties clearly deprive it of this power tribunal) or act effectively (e.g. it has not yet set up), the court may be a significant player in this spectrum.

These requirements limit the role of the court involvement in arbitration. In principle, the court can only act if either the arbitral tribunal or all parties agree, unless the applicant

¹⁷⁵ See DAC 1996 Report, para 214.

¹⁷⁶ Sec. 44 (5) of the Arbitration Act 1996. It was submitted in DAC 1996 Report, “the powers we have given the Court are intended to be used when the tribunal cannot act or act effectively, as subsection (5) makes clear”. See para 214.

party can prove urgency. Furthermore, it can only act when the arbitral tribunal has no power or is unable for the time being to act effectively.

To sum up, it would be useful to confer on the court the power to grant interim measures of protection, in order to protect a party from the risk of being unable to enforce an arbitral award¹⁷⁷, and to enhance the efficiency and efficacy of the arbitral process¹⁷⁸. As Lord Mustill argues,

“an order is interim in the sense of being made whilst the substantive dispute is awaiting final adjudication and conservatory in the sense of being designed to ensure that the arbitral process is not frustrated in its last stages by the refusal of the losing party to honour the award”¹⁷⁹.

Thus, it is recommended that the new Kuwaiti Arbitration Act should contain provisions dealing with the power of the court to grant interim measures of protection. A party to an arbitration agreement should be able to apply to the court for a wide range of interim measures, and the court would have, as regards interim measures, the same powers for making orders as it has in relation to legal proceedings. This procedure should not be used to usurp arbitration. The court's power should be only used where the arbitral tribunal cannot act or act effectively. However, if the case is not one of urgency the court should not intervene without the agreement of the parties or leave from the arbitral tribunal. These stipulations would ensure that the role of the court would be consistent with the principle of party autonomy and limiting the court intervention. It should declare, moreover, that resorting to court assistance does not mean that the applicant party has waived his right to arbitrate.

6.5 General Comments on the Kuwaiti Approach to the Court's Supportive Powers

Kuwait's approach to this issue is critical. This view is based on the following grounds: First, Kuwait does not deal with the matter of the court's assistance to the arbitral process independently, but in the context of the suspension of the arbitral proceedings. Kuwait should deal with such assistance clearly in a specific provision.

¹⁷⁷ See *Trade Fortune Inc. V. Amagalamated Mill Supplies Ltd.* [CLOUT case 71]

¹⁷⁸ A/CN.9/264, para 1.

¹⁷⁹ *Coppee Lavalin v Ken-Ren Chemicals and Fertilisers Ltd.*, [1995] 1 AC 38

Secondly, Kuwait clearly provides that the arbitral tribunal may seek the court's assistance and support, but does not indicate whether the parties may seek such assistance. Yet parties may need the court's assistance in securing evidence even before the constitution of the arbitral tribunal, while during the arbitral process a party may need assistance in calling a witness or taking evidence. Kuwait does not make clear whether parties may seek the court's assistance, or are reliant on the arbitral tribunal taking such steps. Modern arbitration systems deal clearly with this matter. For instance, Article 27 of the Model Law and s.43 of the English Arbitration Act 1996 both allow a party to seek court assistance with the permission of the arbitral tribunal or the agreement of the other parties. These requirements ensure that a party does not abuse the court process by seeking to introduce extraneous or irrelevant evidence¹⁸⁰, and prevent the side-stepping of an agreement between the parties, or a direction the arbitrators that the case shall proceed on a documents only basis.

The question of who may seek the court's assistance is important, as showing the system's attitude to the concept of party autonomy, while allowing the parties to work together with the court to ensure an effective and successful arbitration. The modern approach as represented by the Model Law and the 1996 Act reflects a compromise between the two conflicting ideas that court assistance should be granted only upon application by the parties or exclusively upon request by the arbitral tribunal¹⁸¹. It is recommended that the new Kuwaiti Arbitration Act imports this philosophy and does not give the arbitral tribunal exclusive power to seek court assistance. Court assistance could be invoked in three ways

- i. Upon request by a party with the approval of the arbitral tribunal.
- ii. Upon an agreement by all parties to arbitration.
- iii. Upon request by the tribunal, when the parties invest it with such power.

Thirdly, according to the provisions of Article 180 of CCPL 1980, when the arbitral tribunal needs to invoke court assistance, it should stay the arbitral proceedings. Thus such resort to the court will have a significant impact on the arbitral proceedings. The connection between court assistance and staying the arbitral proceedings is difficult to

¹⁸⁰ Since, the other side party or arbitral tribunal can oppose the application of a party to seek such assistance, when they think that requested evidence does not justify the court assistance or it can be obtained by another means without the court's involvement. See A/CN.9/WG.II/WP.41, para 32 and 33.

¹⁸¹ A/CN.9/246, para 98.

understand, and potentially damaging to the process. If the law makes available the court's supportive powers to aid the progress of the arbitral proceedings, it is difficult to see how that end is served by the inevitable suspension of the arbitral proceedings each time court assistance is invoked. It is notable that modern and healthy arbitration systems such as the 1996 Act and the Model Law do not insist on such suspension. It is therefore recommended that the Kuwaiti Act should make clear that the invocation of court assistance need not prompt the stay of the arbitral proceedings.

Fourthly, the provisions of the CCPL1980 do not indicate whether (i) it is possible to resort to the court during arbitration, (ii) such court assistance is compatible with arbitration, and (iii) the request for such assistance can constitute a waiver of the right to arbitrate. On the other hand, the modern trend is to empower the court to take steps where the arbitral tribunal itself cannot act effectively or at all, for instance in relation to third parties, in cases of urgency, or where the arbitral tribunal has not yet been constituted. The court is usually allowed to grant interim measures of protection, such as interim injunctions preventing the removal of assets in order to avoid the enforcement of the arbitral award, or orders preserving evidence. Since such court assistance clearly aids the arbitral process, the new Kuwaiti Arbitration Act should provide that court assistance is available to the parties to an arbitration, allowing a party to request interim measures from the court (even if the arbitral tribunal also has the power to make such orders) confident that such action will not be regarded as a waiver of the right to arbitrate. Furthermore, the Act should specify exactly the kind of measures available.

6.6 Conclusion

It is in the interests of justice for the court to be able appropriately to assist the proper functioning of the arbitral process, and the new Kuwaiti Act should seek to achieve this by importing the approach found in modern and developed arbitration systems.

7. The Enforcement of Arbitral Award

7.1 Introduction

The arbitral award is the fruit of the operation of the arbitral process. In fact, a binding award is one of the objectives of entering an arbitration agreement, as when the parties conclude such an agreement, they not only oblige themselves to resort to arbitration, but also voluntarily to enforce the arbitral award. However, the unsuccessful party may not comply with the arbitral award voluntarily, potentially defeating the feasibility of arbitration as a method of dispute settlement. Thus, the successful party should be able to enforce the arbitral award, and so, needs an effective mechanism to force the unsuccessful party to carry out its provisions. An award without an effective enforcement mechanism may be worthless. This section will focus on the role of the court in supporting the enforcement of the arbitral award, dealing with practical aspects of the enforcement of arbitral awards in Kuwait. The section will concentrate on enforcement under the provisions of CCPL 1980 of domestic arbitral awards, i.e. awards made in Kuwait irrespective of the nationality of the parties. Enforcement of foreign arbitral awards, made outside Kuwait, will not be considered, as this thesis aims at the reform of the Kuwaiti arbitration system, and is not concerned with the system adopted by adherence to the New York Convention.

7.2 Arbitral Award

Arbitration legislation normally does not set out a statutory definition of an arbitral award¹⁸², but it may be regarded as a final determination of a specific issue or dispute by arbitration¹⁸³. Should the Arbitration Act require a specific form of award, or leave this matter to the discretion of the arbitrating parties? Certain modern arbitration systems do not require a definite form of arbitral award, but give the arbitrating parties the freedom to agree on the form of the award, in line with the principle of party autonomy. For instance, s.52(1) of the English Arbitration Act 1996 states, "The parties are free to agree on the form of an award", while providing supplementary provisions in case of the absence of agreement. So if, for any reason, there is no agreement on the question of the form and the content of the arbitral award,

¹⁸² However, few national arbitration acts do define the award. See A/40/17, para.49.

¹⁸³ See Russell, *op. cit.*, para 6-001, and Prof. F. Davidson, *Arbitration*, *op. cit.*, para 17-14.

- i. The arbitral award will be in writing.
- ii. It will be signed.
- iii. It will contain the reasons for the award.
- iv. It will state the seat of arbitration and the date of making an award.

On the other hand, the Kuwaiti arbitration system requires a specific form of award, providing a list of issues that the arbitral award should meet, or otherwise be null¹⁸⁴. Thus Article 183 CCPL 1980 requires that the award should be in writing, should include a copy of the arbitration agreement, a summary of the litigant parties statements and documents, the grounds of the award, its ruling, the date it was rendered, the venue, and signatures of arbitrators.

The drafters of the Model Law discussed these issues¹⁸⁵, concluding that the Model Law should establish minimal formal requirements for all arbitral awards made under its provisions¹⁸⁶. Thus, Article 31 states,

“(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1)”.

Apart from the question whether this formal requirement is mandatory, Article 31(2) allows the parties to agree whether the arbitral tribunal should give the reasons on which the award is based. Thus, it can be said that the parties have the freedom to agree on the form of the arbitral award.

At first sight it might be suggested that the Arbitration Act, in line with party autonomy, should allow the parties to agree on the form of the award. But, when one considers the legal and practical value of the award, one may be driven to remove any kind of liberty as to the form of the award, especially as the form of the award is a matter of public

¹⁸⁴ See Attack no. 37/39 Comm. 6/11/1977; see also Attack no. 32/33 Comm. 16/11/1983. This is the same as the French treatment. See Art. 1471–1473 of CCP 1981.

¹⁸⁵ See A/CN.9/216.

¹⁸⁶ See Holzmann & Neuhaus, *op.cit.*, p 836.

policy in legal systems such as Kuwait and France. It is best to defer this until it can be considered in the context of the supervision of the award by the court.

7.3 The Need of Court's Assistance

An arbitral award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and any persons claiming through or under them. In other words, an award is conclusive as to the matters with which it deals, unless and until it is successfully challenged or appealed¹⁸⁷. The award takes effect from when it is made. According to the provisions of Article 183 of CCPL 1980 an arbitral award will be made and will take the effect from when it is signed by the sole arbitrator or by the final arbitrator in the arbitral tribunal, while s.54 of the Arbitration Act 1996 states,

- “(1) Unless otherwise agreed by the parties, the tribunal may decide what is to be taken to be the date on which the award was made.
- (2) In the absence of any such decision, the date of the award shall be taken to be the date on which it is signed by the arbitrator or, where more than one arbitrator signs the award, by the last of them”.

Once the arbitral award takes effect, there is an implied obligation upon the losing party to carry it out¹⁸⁸. However, if he refuses to do so, the successful party must look to the court for enforcement of the award, as this lies beyond the power of the arbitral tribunal.¹⁸⁹

7.4 The Methods of Enforcement

What are the available enforcement methods? It seems that there are two principal routes that can be followed to seek the court's assistance in enforcing the arbitral award - raising an action, and application for leave to enforce.

(a) Enforcement by Action

This method of enforcement may not be codified in the provisions of the arbitration act¹⁹⁰, but subject to the general rules that govern litigation. Under this method, the

¹⁸⁷ The effect of the arbitral award as final and binding award does not affect the right of challenge or appeal. See, Russell, *op. cit.*, para 6-190.

¹⁸⁸ See Redfern & Hunter, *op. cit.*, para 10-01 at p 443.

¹⁸⁹ C. Soo, "International Enforcement of Arbitral Award" (2000) ICCLR 1.

¹⁹⁰ Sec. 66 (4) of the Arbitration act 1996 mentions this method of enforcement.

successful party commences a legal action based on the arbitral award as a binding contract¹⁹¹. As the arbitration agreement contains an implied promise to perform the arbitral award, a losing party who fails to honour the award breaches this obligation. The successful party need only present the arbitration agreement, the arbitral award, and show that the losing party has failed to comply with it. The successful party might resort to an action on the award in England, where he cannot get leave to enforce, e.g. if the arbitral award is not in writing, or does not comply with agreed or statutory form.

(b) Summary Enforcement

Most arbitration systems feature a summary procedure that the successful party may follow to enforce the arbitral award. In this case, he seeks court assistance to enforce the arbitral award by granting leave to enforce (or order to execute). According to Article 185 of CCPL 1980, a party may ask the court enforce the arbitral award by granting leave to enforce (writ of execution)¹⁹². The successful party must deposit the arbitral award in the Registry of the court, which was originally competent to hear the dispute¹⁹³, and may then apply for leave to enforce from the President of the Court. The order for enforcement will be endorsed on the arbitral award. Similarly, s.66 of the Arbitration Act 1996 provides that an arbitral award may be enforced, by leave of the court, in the same method as a judgement or order of the court to the same effect.

The aim of this kind of procedure is to facilitate the enforcement of the arbitral award without a complicated regime. It is a simple, clear and speedy method of enforcement.

7.5 The Role of the Court

The state court can be a very important player in enforcing the arbitral award. Much depends on the manner in which the arbitration law deals with enforcement. The mechanism for enforcement should be compatible with pro-arbitration policy. This requires that the mechanism meet the "reasonable expectation"¹⁹⁴ of the successful party to enforce the award without delay. This entails, furthermore, prescribing a time limit within which the court has to grant leave to enforce¹⁹⁵. Having said that the court can show its pro-arbitration policy by adopting presumptive principle of enforcement.

¹⁹¹ See, Russill, *op. cit.*, para 8-006.

¹⁹² This is the same French approach as provided in Art. 1475-1477 of CCP 1981.

¹⁹³ See Art. 184 of CCPL 1980.

¹⁹⁴ See Redfern & Hunter, *op. cit.*, para 10-01 at p 443.

¹⁹⁵ In Kuwait for example the decision of the state court should be declared in the next day of the application to enforce the arbitral award. See Art. 163 of CCPL 1980.

However, the court does not always have to grant leave to enforce. Such judicial discretion might be considered as a test of the level of the support and assistance that the arbitral award will get from the courts. The court before dealing with such an application should consider the relationship between court and arbitration and the need to maintain this relationship on an amicable level, and should usually support arbitration by assisting the enforcement of arbitral awards. Enforcement through the court represents a classic case of using the court to support the arbitral process¹⁹⁶. Thus, in principle, the court should grant leave to enforce the arbitral award, unless there are good grounds for not do so¹⁹⁷. There are a number of cases where the court may refuse to grant leave to enforce, e.g. when the award is not in proper form, or its enforcement would be contrary to public policy. Where leave to enforce is granted by the court, the arbitral award may then be enforced in the same manner as a judgement of the court, as under s. 66 of the 1996 Act.

7.6 Conclusion

The arbitration system has to guarantee the enforcement of the arbitral award, and the court may play a vital role in assuring its execution of the arbitral award. Such guarantee is established by means of the interaction between arbitral tribunal - a private body chosen by the parties to decide their dispute - and the court - a state body with the authority and means to execute awards. The law must make it clear that the court should favour enforcement of the arbitral award unless it finds a good legal reason for not doing so.

¹⁹⁶ See DAC 1996 Report, para 273.

¹⁹⁷ The supervisory role of the national court over the arbitral award is discussed in Ch: 4, see p 168 *infra*. The issue here is the supportive role of the state court to the question of enforcement of the arbitral award.

Chapter Four:

JUDICIAL SUPERVISION OVER ARBITRATION

1. Introduction

Most modern legal systems recognise arbitration as a dispute resolution mechanism, while also respecting the principle of party autonomy. The latter principle is one of the most important features of any arbitration system, and one of the most vital principles governing the drafting of new arbitration legislation. The Model law, for example, felt compelled to positively confirm the freedom of the parties¹, while s.1(b) of the English Arbitration Act 1996 states,

“the provisions of this Part are founded on the following principles, and shall be construed accordingly- (b) the parties should be free to agree how their disputes are resolved”.

However, it is hard to accept this principle without certain limitations and judicial supervision in order to safeguard the public interest, since, “arbitration to a large extent is replacing the jurisdiction of the national court”².

Acceptance of the principle of party autonomy does not mean that the parties will be free from the demands of public policy. The DAC notes, “In some cases, of course, the public interest will make some inroads on complete party autonomy, in much the same way as there are limitations on the freedom of contract”³. Adding, “[A]s appears from mandatory provisions of the Bill, there are some rules that cannot be overridden by the parties who have agreed to use arbitration”⁴.

There are number of logical justifications for the need for judicial supervision. Firstly, there should be judicial supervision over the arbitration agreement. This is because arbitration is based on a contract, and that contract should be subject to judicial scrutiny

¹ See A/CN.9/207, para 16-27. See also Prof. I. Szasz (Rapporteur) & T. Oyekunle (Chairman), ‘Introduction to the Model Law of UNCITRAL on International Commercial Arbitration’, in P. Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration*, op. cit., p 36.

² Dr. W. Melis (Rapporteur) & Dr. S. Hanak (Chairman), ‘Arbitration and the Court’ in P. Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration*, op. cit., p 84.

³ DAC 1996 Report, para 19.

⁴ *Ibid.*, para 19.

to make sure that it is not invalid, null or inoperative. Secondly, there should be judicial supervision over the arbitral process, as the state has an interest in ensuring the fairness, integrity and impartiality of the arbitral proceedings, and so the court should ensure that the arbitration accomplishes its object of obtaining the fair resolution of disputes by an impartial tribunal. Thirdly, there should be judicial supervision over the arbitral award, as it may terminate the dispute between the parties, and alter their legal relations.

Yet, while judicial supervision is justified, what is the appropriate degree of that supervision? The answer to this vital question must reflect a particular philosophy as to the proper balance between respect for the principle of party autonomy, and the interest of the state in superintending the arbitral process⁵. Most modern arbitration systems impose significant limits on judicial supervision. UNCITRAL itself notes, "As evidenced by recent amendments to arbitration laws, there exists a trend in favour of limiting court involvement"⁶. This has also been recognised by certain courts, e.g. the Canadian Court of Appeal in *Quintette Coal Limited v. Nippon Steel Corp.* "noted the world-wide trend toward restricting the scope of judicial intervention in commercial arbitration"⁷.

As aforementioned, modern arbitration legislation which adopts the principle of court support of arbitration with minimum intervention, tends to delimit precisely the scope of judicial intervention in arbitration so that the parties and tribunal might know exactly the limits of the court's jurisdiction to intervene in the arbitration⁸. This is very important in order to increase certainty for the parties and arbitrators⁹, while it is also very important for the court to know that it does not have a general or residual jurisdiction. The draftsmen of the Model Law comment,

"it merely requires that any instance of court involvement be listed in the Model Law. Its effect would, thus, be to exclude any general or residual powers given to the courts in domestic system, which are not listed in the Model Law. The resulting certainty of the parties and the arbitrators about the instances in which court supervision or assistance

⁵ It was considered that the issue how to strike a balance between respect for the wishes of the parties to use a private system of dispute resolution and the in the public policy is one of the delegate questions. See O. Chukwumerije 'Judicial Supervision of the Commercial Arbitration: the English Arbitration Act 1996', op. cit., p176.

⁶ See, Explanatory Note by the UNCITRAL on Model Law, para 14.

⁷ Canada: British Columbia Court of Appeal, 24 October 1990, [CLOUT case no. 16].

⁸ See O. Chukwumerije, op. cit., p 176.

⁹ See Holtzmann & Neuhaus, op. cit., p 216.

is to be expected seems beneficial to international commercial arbitration”¹⁰.

It is thus important to consider the question of judicial supervision. The first side of the relationship between the courts and arbitration is their supportive role, which was dealt with in chapter Three. The other side of this relation is their supervisory role over arbitration, in the shape of the arbitration agreement, the arbitral process and the arbitral award. This will be the focus of this chapter. The chapter is divided into three sections as follows:

- Section 1: The Judicial Supervision over the Arbitration Agreement.
- Section 2: The Judicial Supervision over the Arbitral Tribunal and its Conducts.
- Section 3: The Judicial Supervision over the Arbitral Award.

¹⁰ A/CN.9/263, para 2.

2. Judicial Supervision over the Arbitration Agreement

2.1 Introduction

As aforementioned,¹¹ the arbitration agreement is the foundation stone of arbitration, the source of the obligation that the parties must settle their disputes by arbitration and not otherwise, and the source of the arbitral tribunal's powers, rights, obligations and jurisdiction. Furthermore, it prevents the court from dealing with the dispute unless the parties agree otherwise¹². Yet the courts must exercise a supervisory role over it, as its effects cannot be triggered, if it is invalid, null or inoperative.

2.2 The National Court and Arbitration Agreement

When should the court exercise supervision over the arbitration agreement? If the law of a state imposes no limit on judicial intervention, it is possible that the court may supervise that agreement at every conceivable opportunity. However, this is not the approach taken in most modern and developed arbitration systems, which aim to preclude intrusive judicial intervention in arbitration and they limit it to those cases where such intervention is provided for expressly by the law¹³. Such an approach enables judicial supervision to secure the fairness and legitimacy of the arbitration, while preventing the parties abusing their right to resort to the court in order to delay the progress of the arbitration. Taking the view that Kuwait should embrace this approach, the following paragraphs consider where the court should be allowed to intervene. It is suggested that the court may exercise its supervisory role over the arbitration agreement when it is asked to exercise its supportive role. Thus, it may exercise its supervisory role in the following cases:

(a) Support to the Arbitration Agreement

The supportive role of the court in this context was discussed in chapter Three. The court should enforce the arbitration agreement, unless it finds that the agreement is null, void,

¹¹ See pp. 21-23 *supra*.

¹² These legal effects are considered because of the recognition of the principle of party autonomy.

¹³ See O. Chukwumerije, *op. cit.*, p176.

inoperative or incapable of being performed¹⁴. So if the arbitration agreement itself is challenged, and the jurisdiction of the arbitral tribunal thus questioned, the court would have to decide that the arbitration agreement is valid before enforcing it¹⁵, as the duty of the court to enforce the agreement only applies if it is not invalid, null, inoperative or incapable of being performed. If the court is satisfied that the arbitration agreement does not meet these requirements, then it may refuse to support the arbitration. The British Columbia Supreme Court has confirmed that in terms of Article 8 of the Model Law the court is required to grant a stay of legal proceedings, unless it finds that the arbitration agreement was null and void, inoperative or incapable of being performed¹⁶.

Clearly then, the court may exercise its judicial supervision over the arbitration agreement by examining the agreement's validity when that is challenged, before deciding whether to enforce it¹⁷. In particular, the court will not enforce the agreement to arbitrate if it is satisfied that the arbitration agreement is:

- i. null and void, i.e. never concluded or concluded but found to be void *ab initio*.
- ii. inoperative or incapable of being performed, i.e. containing such inherent contradictions that it cannot be given effect and or performed by the parties even if they were willing to do so.

The court deals with issues of the existence or validity of the arbitration agreement whenever they arise, and need not always defer to the principle of competence-competence. Alternatively, it may exercise its supervisory power after the arbitral tribunal has ruled on its own jurisdiction¹⁸, as such a ruling must always be subject to court scrutiny. Thus Article 16(3) of the Model Law states,

¹⁴ It may be mentioned that the phrase "null and void, inoperative or incapable of being performed" which appears in art 8 (1) in the Model Law and in sec.9 (4) of the Arbitration Act 1996 is taken directly from Art. II of the New York Convention.

¹⁵ The relationship between the principle of competence – competence, and the jurisdiction of the court to examine the validity of the arbitration agreement was discussed in pp. 74-79 *supra*.

¹⁶ *Cecrop Co. v Kinetic Sciences Inc.* (2001), 16 B.L.R. (3d) 15, in H. Alvarez *et al.*, op. cit., p 63.

¹⁷ Despite the tendency favouring the enforcement of arbitration agreement, a stay of legal proceedings should be refused where the court is satisfied that it is null and void, inoperative or incapable of being performed. See *Clavel v Production Musicales Donald Inc.* (1994), 114 D.L.R. (4th) 441, in H. Alvarez *et al.*, op. cit., p 102 and *International Resource Management (Canada) Ltd. v Kappa Energy (Yemen) Inc.*, [2001] A.J. No. 798, 2001 ABCA 146, in H. Alvarez *et al.*, op. cit., p 61.

¹⁸ See A/CN. 9/233, para 77.

“if the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the court specified in article 6 to decide on this matter”¹⁹

While s.32 of the Arbitration Act 1996 is to the same effect²⁰. Furthermore, in terms of s.32(2) the court may consider the arbitration agreement in the course of determining a preliminary point of jurisdiction, either upon an application by one of the parties with permission of the arbitral tribunal or with an agreement of all the other parties.

(b) Support for the Arbitral Award

The court's supervisory role may even be exercised over the arbitration agreement after making the arbitral award, since the invalidity of the arbitration agreement will always constitute a ground for challenging the award. For instance, Article 34(2)(a)(i) of the Model Law enables the court to set aside the arbitral award, if it is satisfied that the agreement to arbitrate is not valid under the law to which the parties have subjected it. This is also a ground for refusing the recognition and enforcement of the award in terms of Article 36(1)(a)(i). The 1996 Act adopts an identical ground of challenge under s.67(1)(a).

2.3 Party Autonomy Is under the Supervision of the National Court

This heading alludes to the fact that the freedom of the parties to refer their disputes to arbitration is restricted, as they must both conclude a valid agreement and comply with any mandatory provisions and public policy requirement of the law²¹, otherwise they cannot seek assistance or support from the court.

(a) The Validity of the Arbitration Agreement

Although the court is obliged to respect the agreement to arbitrate, the principle of party autonomy does not mean that the court will always enforce that agreement. If the court finds the agreement invalid, it will not support it. So the court may not enforce the

¹⁹ It may be mentioned that the judicial supervision under the model law is available here only in case if the ruling of the tribunal is positive as it has jurisdiction, while according to the provisions of 1996 act there is no such limitation.

²⁰ For a definition of “substantive jurisdiction” see sec. 82(1) of the Arbitration Act 1996.

²¹ Redfern & Hunter, *op. cit.*, para 6-06 at p280.

arbitration agreement, e.g. where a party lacks the legal capacity to conclude the agreement, or the subject matter of the dispute is not arbitrable, or the arbitration agreement is inoperative. The court should initially assume the validity of the arbitration agreement, but this presumption may be rebutted by the party who contends that the agreement is not valid proving that contention to the satisfaction of the court. The court may also raise the issue of the validity of the agreement on its own motion in court proceedings, where the invalidity is of a fundamental nature involving questions of public policy, as where the subject matter of the dispute is not arbitrable²². Yet even though the validity of the arbitration agreement is crucial, arbitration legislation in most legal systems neither specifies the reasons for the invalidity of that agreement nor determines the intended meaning of the terms "null and void, inoperative or being performed"²³. It has been said that preparing an exclusive list of defined reasons for the invalidity of the arbitration agreement is "extremely difficult"²⁴. This then provides an opportunity for the court to show a pro-arbitration attitude. The power not to enforce an invalid arbitration agreement should not be understood as requiring the court to examine in detail the validity of the arbitration agreement²⁵. The court should exercise its role consistently with a strong presumption in favour of the validity of the arbitration agreement, and with the principle of competence – competence. Thus the court should lean in favour of the arbitration being allowed to progress, and the arbitral tribunal being allowed to make the initial ruling on its own competence, subject to ultimate court control. The court should thus construe narrowly the terms "null, void, inoperative or incapable of being performed", and the arbitration agreement should be only held invalid where this is manifestly the case²⁶.

(b) Mandatory Provisions

Modern arbitration legislation takes the view that the health of the process is best ensured by enabling parties to design their arbitral procedures, as they consider suitable and proper²⁷. Recognising the principle of party autonomy, such legislation allows the

²² See Model Law Art 34 (2) (b) (i).

²³ Holtzman & Neuhaus, *op. cit.*, p 303.

²⁴ See A/CN.9/207, para 44. The adopted approach was to include only those reasons which relate directly to arbitration and to leave out the other reasons relevant to any agreement or contract (e.g. mistake, misrepresentation or duress).

²⁵ A/CN.9/233, para 77.

²⁶ Albert Berg as cited in Holtzman & Neuhaus, *op. cit.*, fn.5 at p 303. It might be added that the same approach could apply on the supporting the arbitral award. The court should respect the presumption of the validity of the award which is based on valid arbitration.

²⁷ See A/CN.9/263, para 26.

parties to reach agreement about most aspects of arbitral procedure. For instance, they may usually agree on the seat of arbitration, the application of institutional rules, the number of arbitrators, appointment procedures including what happens when the agreed procedure fails, the scope of the authority of the arbitral tribunal, whether legal or other representation is permitted, and the form of the arbitral award. On the other hand, the principle of party autonomy is generally subject to mandatory provisions²⁸ of the law, which reflect the safeguards imposed by public policy, and the court must ensure that the parties' agreement is not contrary to these mandatory rules. It has been said,

“it is for the parties to decide how their arbitration should be conducted, unless public interest dictates otherwise and subject also to the mandatory provisions of the Act. Thus, the State intervenes and diminishes the parties' will. The legislator, through these provisions, keeps the sovereign power of the state in the hands of the courts. The arbitral tribunal is not regarded as a means of safeguarding the principles of public order and policy”²⁹.

Thus we can assume that arbitration legislation will contain mandatory provisions to guard against major procedural defects, prevent denials of justice and ensure due process of law³⁰. The question what provisions should be mandatory is beyond this study. However, it is concerned with the proper means of designating clearly whether provisions are mandatory or not. There are different approaches to this question.

1) English arbitration Act 1996

Lord Fraser of Carmyllie Q.C said in introducing the Bill,

“The principle of party autonomy is central to the Bill. Parties who are in dispute are able to decide how the arbitration should be conducted. The flexibility and control, which this freedom gives to the parties, is of critical importance. Having said that, the freedom is not absolute.

²⁸ This indicates to the fact that the parties' freedom is not absolute. See *Durtnell v DTI* [2001 1 Lloyd's law Rep.275, at p 279.

²⁹ See G. Zekos, 'The Role of Courts in Commercial and Maritime Arbitration under English law' (1998) 15(1) J. Int. Arb. 51-73.

³⁰ See G. Herrmann, 'The UNCITRAL Model Law -its background, salient features and purposes' (1985) 1 (1) Arb. Int. 6-29.

There are a small number of provisions which for reasons of public policy cannot be overridden"³¹.

The drafters of the Arbitration Act 1996 decided to provide a list of the mandatory provisions. Thus s.4 is headed 'Mandatory and non-mandatory provisions', and runs,

"(1) The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.

(2) The other provisions of this Part (the "non-mandatory provisions") allow the parties to make their own arrangements by agreement but provide rules, which apply in the absence of such agreement".

The mandatory rules listed in Schedule 1 contain for example ss.9-11 (stay of proceedings); s.12 (power of Court to extend an agreed time limit); s.24 (power of the Court to remove an arbitrator); s. 29 (immunity of an arbitrator); s.31 (objection to the substantive jurisdiction of an arbitration tribunal). The Act thus aims³², firstly, to make it very clear that it features provisions which cannot be overridden by the parties' agreement, and other provisions which the parties can change or substitute as they see fit. The second aim is to allow easy reference to these mandatory provisions.

2) The Model Law and Kuwaiti Arbitration Law

The question of mandatory provisions is not covered by the Model Law. A proposal was made during the Working Group's second session that, "it would be useful to make clear in the model law (possibly in a separate article) from which provisions of the model law the parties cannot derogate"³³.

The Working Group adopted this suggestion and decided to consider which provisions of the model law should be listed as mandatory³⁴, hoping to clarify which provisions cannot be overridden by agreement³⁵. However, the idea was soon dropped, it being said that,

³¹ In the House of Lords debate on Second Reading on Jan. 18, 1996 (vol. 568/No. 28 House of Lords Official Report relating to Parliamentary Debates p. 761). See also, *R. Durnell and Sons Ltd. v. The Secretary of State for Trade and Industry*, [2001] 1 Lloyd's Rep. 275 QBD (T&CC), at p 279.

³² DAC 1996 Report, para 28.

³³ A/CN.9/232, para. 77.

³⁴ A/CN.9/245, para. 175.

³⁵ A/CN.9/WG.II/WP.50, para. 8.

“there are certain difficulties and other considerations which cast doubt on the appropriateness and need for such approval. Firstly, a considerable number of provisions are obviously by their content of a mandatory nature. Secondly, there are number of provisions granting freedom to the parties, accompanied by suppletive rules failing agreement by the parties; here the question of a mandatory nature appears to be a philosophical one and equally redundant. Thirdly, with respect to some draft Articles only part of the provisions, (e.g. a time limit) is non-mandatory”³⁶.

Thus the Working Group agreed that the Model Law should not contain an article wherein all mandatory provisions would be listed³⁷. Instead,

“the Working Group was agreed that the non- mandatory character of articles 2(e), 23 (2) and 26 (2) and (3) should be expressed in those provisions by words such as “unless otherwise agreed by the parties”³⁸.

This decision does not mean that all those provisions of the model law, which do not clearly express their non-mandatory character, are necessarily mandatory³⁹. So the Model Law does not list mandatory and non-mandatory provisions, partly because it was thought, either unnecessary or unwise to include such a list, and partly due to drafting difficulties. However, it indicates the non-mandatory character of an article either by providing an explicit freedom to the arbitrating parties, (e.g. Article 10 (1) states, “The parties are free to determine the number of arbitrators”) or by laying down a provision, but giving the parties the right to agree otherwise. Thus Article 21 states,

“Unless otherwise agreed by the parties, the arbitral proceedings in respect of particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent”.

³⁶ *Ibid.*, para.9.

³⁷ A/CN.9/246. para. 176

³⁸ *Ibid.*, para 175.

³⁹ *Ibid.*, para 177.

So while the Model Law does not contain an article listing which provisions are mandatory, as in England, the concept of mandatory provisions is nonetheless recognised. So Article 4 (dealing with waiver of the right to object) states,

“A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object”.

While Article 34(2)(a)(iv) runs,

“An arbitral award may be set aside by the court specified in article 6 only if the party making the application furnishes proof that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate”.

Similarly in Kuwait Article 182(1) of CCPL 1980 gives the parties great freedom to agree on the procedures they wish to adopt for settling their disputes. However, Article 182/2 of CCPL 1980 imposes a limitation on this freedom, by stating that public order should be respected and applied. Yet while this provision clearly contemplates that certain provisions will be mandatory, it tells us nothing about what provisions will relate to public order. It might be guessed that any agreement contrary to basic and fundamental principles of procedural fairness will have no effect, as where a party is denied the opportunity to defend or present his case. Such matters are undoubtedly related to public order⁴⁰. But what about agreements to exclude the supportive role of the court, or to make an unreasoned award? The question is not always simple.

Adopting the concept of party autonomy without specifying which rules are mandatory as in the cases of the Model Law and the CCPL 1980, makes it difficult to assign

⁴⁰ See A. Abd-Altah, *op. cit.*, pp. 241- 257.

provisions to one classification or the other⁴¹. It thus falls to the court and the arbitrators to attempt to declare into which category specific provisions fall⁴². They have a number of forms of guidance. They may ask whether the structure and the language of the article indicate anything about its nature. Equally articles setting out supplementary rules, which apply only in the absence of the agreement of the parties are clearly non-mandatory. Yet leaving such significant matters to be thus decided may lead to different interpretations, and such conflict can only undermine the harmony of the system. The Model Law is usually considered as a sound and promising basis for the harmonisation and improvement of national laws, but here features a practical shortcoming. Lack of clarity in the legislative treatment of this question may not only frustrate party autonomy, but may also be a source of disappointment to the users of arbitration⁴³.

An Arbitration Act should then state clearly whether each individual provision is mandatory or non-mandatory. It should adopt an appropriate method for articulating the mandatory nature of a provision. The adopted method may be based on the following practical and theoretical considerations.

Firstly, the legislation must be made more accessible to arbitration users. The Arbitration Act should use clear and simple language, indicating in relation to each individual provision whether the parties may derogate from it. This could be done either by listing all mandatory provisions in one article (as in England) or, by stating in each article whether and to what extent it is mandatory.

Secondly, it would be very helpful for ideal implementation of the principle of party autonomy to deal with mandatory provisions in a clear manner. As the parties' freedom is restricted by mandatory rules, it is better for arbitration users to know in advance the level of the freedom they are accorded by the Arbitration Act. For instance, when the English Arbitration Act 1996 is the applicable law, arbitration users are able to agree on most matters with confidence that their agreement will be fully respected, as that Act deals with mandatory provisions in a very clear and straightforward manner. It is

⁴¹ Although the language of the Model makes this an easy task in most cases.

⁴² The Sweden' view is "the question whether a provision at the model law is a mandatory or non-mandatory should be left to the decision of the arbitral tribunal or court". See A/CN.9/263, p 60.

⁴³ As Gerold Herrmann states "The disappointment of the parties may result from provisions which unduly restrict their freedom, for example, to submit future disputes to arbitration or to appoint arbitrators of their choice". See G. Herrmann, 'The UNCITRAL Model Law - Its Background, Salient Features and Purposes', *op. cit.*, at [(1) (a) Frustration due mandatory provisions of national law].

inimical to this vital principle to let the parties agree upon the arbitral procedure, and then find their agreement is not wholly effective, especially if this relates to a matter which was very important to one of the parties, and without which he would never have agreed to arbitrate (or at least never have agreed to arbitrate in that country). Suppose, for example, that the parties have agreed that the court has no power to remove an arbitrator, or have provided a time limit for commencing the arbitral proceedings otherwise the right to arbitrate will be waived. If the arbitration act does not make clear whether provisions in this area are mandatory, the parties' expectations may be undermined.

Thus it is recommended that the Kuwaiti Act should inform arbitration users in very simple terms which provisions are mandatory.

2.4 Conclusion

It has been seen that the arbitration agreement should be brought under the supervision of the court at different stages of the arbitral operation. The court should not provide any kind of support and assistance to the arbitration agreement if it finds that the arbitration agreement is invalid. Such judicial intervention may play a significant role for the success of arbitration as a mean of resolving disputes, as thwarting arbitration which is not based on a valid arbitration agreement is surely in the interests of the parties. If a party knows at an early stage that the arbitration agreement which has been concluded is not valid, and there is no point in to continuing the proceeding, as the court will not recognise or enforce the arbitral award, the parties may decide whether they wish to litigate or conclude a new and valid agreement to arbitrate, saving them time and money. Of course, these advantages do not accrue if the invalidity of an agreement should arise at a very late stage in the proceedings. Yet, following the basic principle that there is no arbitration if there is no valid agreement, it is still in the interests of the parties for the court to strike down an award based on an invalid agreement.

3. Judicial Supervision over the Arbitral Tribunal / Arbitrator's Conduct

3.1 Introduction

As was seen in chapter Three, when the policy of the state is to support arbitration, the court may play a significant role in supporting and assisting the arbitral tribunal, with a view to ensuring the effectiveness of the process. The supportive role of the court also reflects the principle of party autonomy. As the parties have agreed on arbitration to settle their disputes, the court should respect their desire, and it is a logical consequence of the principle of party autonomy that the arbitral tribunal shall receive support from the court, to enable it to perform its functions properly.

The arbitral tribunal obviously has a significant role in the arbitral process, as it is in charge of the conduct of the arbitral proceedings and its mandate is to resolve the dispute by issuing an arbitral award. Its task is to resolve the disputes referred to it, on the basis of evidence and submissions, according to the law chosen by the arbitrating parties⁴⁴. The Arbitration Act should provide a supportive framework to enable the arbitral tribunal to carry out its duties. At the same time, the court should exercise supervision over the conduct of the arbitral tribunal, in order to ensure that the tribunal has fulfilled its duties. The arbitral tribunal cannot be immune from judicial supervision, whether during the arbitral proceedings or after the making of the arbitral award. The rationale behind allowing such judicial supervision is to guarantee the integrity and fairness of the arbitral process, to ensure that the arbitral tribunal possesses the agreed qualifications, and that its conduct accords with the will of the parties, mandatory statutory provisions and public policy.

The concept of party autonomy does not exclude the supervisory role of the court as described above, but it could be an ambition of the principle of party autonomy to define the proper limits of judicial intervention in the arbitral process. In some systems the aim of limiting court intervention has contributed to the articulating the duties of the arbitral tribunal, so that judicial intervention is kept to the absolute minimum necessary to ensure that the arbitral tribunal fulfils its duties.

⁴⁴ Russell, *op. cit.*, para, 4-002.

Thus, this section will focus on the role of the court in ensuring the proper and efficient conduct of the arbitral proceedings. The aim is to explore the nature of the relationship between the supervisory role of the national court and the arbitral tribunal's conduct of the arbitral proceedings, with a view to seeing how the court should deal with the tribunal's failure to comply with its duties. It is important to deal with this question, since the arbitral tribunal's breach of its duties is one of the limited grounds upon which an arbitral award or tribunal by itself could be challenged, perhaps leading to the removal of an arbitrator or the setting aside of the award.

3.2 A Fair Trial

(a) Introduction

As the arbitral tribunal is acting judicially, in the sense of being responsible to deliver justice, it is one of its duties to act fairly and equally, giving each party an opportunity not only to present his own case, but also to be aware of his opponent's case and able to rebut it. Furthermore, the arbitrating parties should be treated alike⁴⁵. Thus, the arbitral tribunal should approach its task to achieve the object of arbitration as a fair resolution of disputes and deal with its task to do full justice to the parties⁴⁶.

(b) Codifying this Duty

Modern legislation tends to confirm positively the fundamental principles mentioned above. For instance, Article 18 of the Model Law states, "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case". While s.33(1)(a) of the English Arbitration provides "The tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent".

In contrast, the CCPL 1980 does not explicitly impose such duties. However, the source of these duties may be found in the general rules which requires that the arbitral tribunal to comply with public order. Fair trials and equal treatment have always been regarded as a part of the public order of the legal system in Kuwait. Thus, arbitral tribunals must

⁴⁵ See Mustill & Boyd, *op. cit.*, p 299.

⁴⁶ DAC 1996 Report, para 150.

respect fundamental principles of litigation such as equal treatment between the parties and the right to defend oneself and present one's case⁴⁷.

The difference in these approaches may offer Kuwait a lesson. Codifying these duties establishes clear parameters within which the arbitral tribunal should act in order to be seen to be doing justice as between the arbitrating parties⁴⁸. Moreover, it might be useful to impose these duties not only on the arbitral tribunal, but also on the parties, so that these two fundamental principles apply equally to procedures agreed by the parties. They must design the arbitral proceedings to ensure a fair trial. However, it is the duty of the arbitral tribunal to create a fair trial even if that means conducting the arbitral proceedings contrary to the agreement of the parties, since the duty to ensure a fair trial must be mandatory. In the context of the Model Law, Prof. F. Davidson states,

“ The arbitral tribunal should decline to follow any such rules which offend against the principle. Its award would not be challengeable under Article 34(2)(a)(iv) on the basis that the procedure was not in accordance with the agreement of the parties, as any agreement which conflicts with mandatory provision of the Model Law is effectively void”⁴⁹.

Furthermore, the duty to act fairly and treat each party with equality obviously restricts the power of the arbitral tribunal to conduct the arbitral proceedings as it considers fit. These principles provide general guidance for the arbitral tribunal in its conduct of the arbitral proceedings. For instance, when it wants to fix time limits for submission of statements, or presentation of evidence, or choosing the operative language, it should not ask more from a party than might be reasonably expected under the circumstances⁵⁰.

Although the codification of the principles of fairness and equality is only one sentence long, it would be at the heart of the law's regulation of arbitral proceedings- even though other provisions provide the detailed mechanisms by which the goals of equality and fair

⁴⁷ This is the same as the French approach, which provided in Art. 1460 (2). This article indicates to the fact that the guiding principles of litigation shall always be applicable to arbitral proceedings. The view was that there is no difference in principle between the arbitral justice and litigious justice. See, Prof. A. Abd-Altah, *op. cit.*, p 259.

⁴⁸ See, B. Harris *et al.*, *op. cit.*, p 169.

⁴⁹ See, *Arbitration*, *op. cit.*, para 13.36.

⁵⁰ A/CN.9/264, para 9.

procedure are to be accomplished⁵¹. Prof. F. Davidson describes Article 18 of the Model Law as the shortest article in the Model Law, but one of the most significant⁵². It may be noted that the Arbitration Act 1996 does not adopt the precise words of Article 18. Rather it imposes a general obligation on the arbitral tribunal to act fairly and impartially as between the arbitrating parties, requiring the tribunal to offer each party a 'reasonable opportunity' (as opposed to 'full opportunity' in Model law) to put forward his case and to deal with that of his opponent. This wording was adopted in order to rebut any suggestion that a party to the arbitration is entitled to take as long as he likes to put forward his case or defence. The DAC stated,

"we prefer the word 'reasonable' because it removes any suggestion that a party is entitled to take as long as he likes, however objectively unreasonable this may be. We are sure that this was not intended by those who framed the Model Law, for it would be entail that a party is entitled to an unreasonable time, which justice can hardly require. Indeed the contrary is the case, for an reasonable time would *ex hypothesi* mean unnecessary delay and expense, things which produce injustice and which accordingly would offend the first principle of Clause 1, as well clause 33 and 40"⁵³.

Reference to a 'reasonable opportunity' sets a practical standard, while reference to a 'full opportunity' invites difficulties, by giving a party too much freedom to present his case, creating the potential for improper delay in the progress of the arbitration and an unjustified increase in expense. One of the parties might rely on the term 'full' to prolong the proceedings or to make unnecessary submissions, simply as delaying tactics. For such reasons, suggestions emerged during the drafting of the Model Law to replace the term 'full'. For instance, Norway proposed to replace the word 'full' by another word, for example, 'adequate'⁵⁴. Obviously, this view did not prevail⁵⁵.

⁵¹ Holtzmann & Neuhaus, *op. cit.*, p 550.

⁵² Prof F. Davidson, *International Commercial Arbitration*, *op. cit.*, para 6.1, at p 94.

⁵³ DAC 1996 Report, para 165.

⁵⁴ A/CN.9/263, para 7. It may be noted that by contrast there were some fears toward that it might be interpreted to allow a party too little scope to present his case. Such fear was expressed by International Bar Association which suggested inserting the words 'and proper' after 'full', as "in the English language, the word "full" is rarely used on its own in this sense and the words "full and proper" constitute an idiomatic expression which would be well understood in the context and would be capable of reasonably precise definition. By contrast, the word "ful" is relatively imprecise on its own, and might be capable of being interpreted *in an unduly restrictive sense*". [Emphasis added] See A/CN.9/263, para 8.

⁵⁵ This of course does not obligate the national legislator, which considers adopting the Model Law to rethink about this term to find out the most appropriate phrase, as it considers fit and proper.

On the other hand, the term a 'reasonable opportunity' requires merely an acceptable standard that could be achieved without any improper delay and costs that might undermine the benefit of arbitrating. It is easy to agree on what constitutes a 'reasonable opportunity'; while it is doubtful whether general agreement could be reached on what constitutes a 'full opportunity'. Moreover, the former phrase might encourage the parties to present their cases expeditiously, not prolonging the arbitral proceedings unnecessarily, as the term 'reasonable opportunity' does not require the tribunal to respond positively each time a party applies for extra time lodge his evidence, or secure the attendance of witnesses, or submit statements. Use of the term 'reasonable opportunity' strikes a proper balance between fairness and expedition/economy⁵⁶.

The conclusion then is that the fundamental principles discussed above are to be found to any developed arbitration legislation. While these principles are implicit in the Kuwaiti arbitration system, they are not clearly expressed as in the Model Law and 1996 Act. It is therefore recommended that the new Arbitration Act explicitly obliges the arbitral tribunal to treat the parties with equality and give them at any stage of the arbitral proceedings a reasonable opportunity of presenting their case.

(c) Failure to Comply with this Duty

The duty to act fairly and equally as between the parties requires the arbitral tribunal to give each party a fair opportunity to lay his arguments to the tribunal, furnish evidence in support of his case, and address all submissions and evidence presented by the other party. Most arbitration legislation would see failure to comply with this duty as a valid ground for challenging the arbitral award. This is certainly so under s.68(2)(a) of the Arbitration Act 1996, while Article 34(2)(a)(iv) of the Model Law provides that the arbitral tribunal's failure to comply with the principles of fairness and equality constitutes a valid ground for setting aside the arbitral award. A party could also rely on Article 34(2)(a)(ii), which provides the ground of challenge that

“the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case”⁵⁷.

⁵⁶ See B. Harris *et al.*, *op. cit.*, para [33D] at p 170.

⁵⁷ A/40/17, para. 302. See also, Prof F. Davidon, *Arbitration*, *op. cit.*, para 18.26, at 368.

(d) Conclusion

It can be seen that the arbitral tribunal is required to comply with the duty of ensuring a fair trial in conducting the arbitral proceedings and in the exercise of any powers conferred on it⁵⁸. Where the tribunal fails in that duty, justice calls out to the court to intervene to correct such procedural failing. The court should protect the injured party, and not allow an arbitral award to be enforced when there has been an unfair trial. This shows the value of judicial supervision in ensuring that arbitration obtains a fair resolution of disputes, as the supervisory role of the court provides a very important safeguard for the parties.

3.3 Grounds of Challenging Arbitrators

(a) Introduction

One of the main ways in which the court may become involved in arbitration is to deal with challenges to the arbitrators. Normally an arbitral tribunal has authority from the time of its appointment until it is *functus officio*. It is possible, however, that an arbitrator may be removed by the court, as most arbitration legislation allows a party to the arbitral proceedings to resort to the court to seek the removal of an arbitrator in certain circumstances. The next paragraphs ask what the statutory tests for challenging an arbitrator should be, and what limitation should be on court intervention in this context.

(b) The Statutory Tests for Challenging an Arbitrator

1) Qualifications

One of these grounds might be the absence of required qualification. In certain cases, the parties may agree that the arbitrator should possess certain qualifications, perhaps that he should be a lawyer, or commercial man, or engineer, etc. Such an agreement may obviously limit the freedom of the party to choose an arbitrator. Modern arbitration legislation provides that an arbitrator who lacks agreed qualifications may be challenged and removed. This is certainly the case under Article 12(2) of the Model Law and s.24(1)(b) of the Arbitration Act 1996. Sadly, such clarity cannot be found in the CCPL 1980. It is important for the new Kuwaiti Arbitration Act to deal with this matter clearly, as if it adopts the principle that no court shall intervene except where so provided by the

⁵⁸ See Russell, *op. cit.*, para 8-036, at p 417.

Act, the extent of permissible court intervention must be explicitly laid out. So modern arbitration legislation explicitly provides the grounds and the procedures for challenging an arbitrator, to prevent court intervention on a more general basis. The court must be confined to deciding whether the challenged arbitrator possesses the agreed qualification or not. It should be open to the parties to agree on the procedure for triggering court involvement, with the Arbitration Act laying down supplementary provisions which apply in the absence of agreement⁵⁹. The supervisory role in this context shows that the court safeguards not only public policy but also party autonomy, as judicial intervention here ensures that the constitution of the arbitral tribunal is as the parties agreed.

2) Impartiality / and Independence

Rosell stated at the Tenth Zagreb Arbitration Conference⁶⁰

“one of main reasons that parties engaged in international commerce choose to resolve their potential or existing disputes by recourse to international arbitration, rather than the national courts of one of the parties, is the perceived independence, impartiality and neutrality of arbitral tribunals. It is often said that an arbitration is only as good as the arbitrators conducting it, and it is fundamental that an arbitrator must be independent and impartial”.

Impartiality or/and independence⁶¹ are also criteria that an arbitrator should meet, or otherwise be subject to challenge and removal, as an arbitrator should not be biased in favour of or against a particular party or its case. There are some arbitration systems, which adopt these two tests⁶². Thus Article 12 of Model Law states, “An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence”.

⁵⁹ Sec. 24 (2), and Art. 12 of the Arbitration Act 1996.

⁶⁰ J. Rosel, ‘The Challenge of Arbitrator’, paper presented in Tenth Zagreb Arbitration Conference, in 5 Dec 2002, 1-8, at p 1.

⁶¹ It may be noted that there is no internationally accepted, clear-cut definition of the “impartiality” and “independence”. Since, the arbitral systems do not provide a statutory definition to the concept of impartiality or independence, which justify disqualify an arbitrator. It was however submitted that the an impartial arbitrator is one who is not biased in favour of, or prejudice against, a particular party or its case, and the independent arbitrator is one who has a close relationship ... financial, professional or personal- with a party or its counsel. See D. Bishop & J. Reed, *op. cit.*, at p 398, Redfern & Hunter, *op. cit.*, at pp. 220-221 and J. Rosel, *op. cit.*, 2.

⁶² Art. 7.1 of The AAA International Arbitration Rules states these two tests. It provides “Arbitrators acting under these rules shall be impartial and independent”. Another example is WIPO Arbitration Rules, which provides in Art. 22 (a) “Each arbitrator shall be impartial and independent”.

On the other hand, other systems do not lay down this dual test. Thus s.24 of the Arbitration Act 1996 demands only impartiality. The English approach is based on that the view that the inclusion of the test of independence would give rise to endless argument where almost any connection- even if remote- put forward to challenge the independence of an arbitrator⁶³. The DAC,

“considered however that a separate requirement of independence could give rise to endless arguments on the scope of dependence and consequently of disclosure as to independence (as it has in other jurisdictions); and that it could frustrate also the legitimate expectations of arbitration users in small, specialist fields where the arbitrators are commercial men in regular business contact with users of those arbitrations (e.g., certain shipping, commodity trades and specialist classes of reinsurance)”.

The drafters of the 1996 Act thus emphasised that lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance. So, the concept of independence is subsumed as a subset of the test of impartiality⁶⁴. It is submitted that the English approach is consistent with practical reality, wherein parties may waive a strict interpretation of independence, but may not waive the fundamental requirement of impartiality⁶⁵. So an arbitrator who is impartial but not wholly independent, may be not challenged and removed, whereas an arbitrator who is independent but is not impartial may be challenged and removed.

Other arbitration systems do not provide a general formula, but specify in detail the grounds for challenge, by reference to the grounds on which judges may be challenged. Thus in both Kuwait and France⁶⁶, an arbitrator may be challenged on the same grounds as a judge⁶⁷. There is a long list of such grounds, which might be summarised as family or financial relations with one of the parties, a special interest in the outcome of the dispute, the existence of current or past litigation with one of the parties, and friendship

⁶³ See DAC 1996 Report, para 102.

⁶⁴ See D. Bishop and L. Reed, *op. cit.*, pp. 399-400.

⁶⁵ See Redfern & Hunter, *op. cit.*, p 221.

⁶⁶ See Law No. 72.626 of July 5, 1972.

⁶⁷ Art. 178 (4) of CCPL 1980.

with one of the parties. All these grounds could also be raised with regard to the arbitrator's spouse.⁶⁸

Yet the list is not exclusive, as may be deduced from Article 104(5), which allows a judge or arbitrator to be challenged, if there is between him and a party such an enmity or friendship, as would make it impossible for him to judge the case impartially.

The question of challenging an arbitrator is obviously subject to judicial supervision, as it must be for the court to decide whether the challenged arbitrator is impartial or independent. In this it will have a wide discretion, as arbitration legislation does not usually provide a statutory definition of those concepts.

However, the real question is how should the legislation deal with the concepts of impartiality and independence? It is suggested that lack of impartiality and lack of independence should each be a ground for removal. While one may be impartial even if not independent, lack of independence itself may raise a question mark over an arbitrator, making one of the parties justifiably reluctant to participate in the arbitral process. Such reluctance could significantly affect his confidence in the arbitral process, while a party who has lost his trust and confidence in either the impartiality or independence of the arbitrator would probably not participate in a positive manner in the arbitral proceedings, with the risk that they might be rendered ineffective. Moreover, there seems no point in allowing a non-independent arbitrator to hear the dispute, and waiting until the question of independence gave rise to justifiable doubts about his impartiality. Prevention is surely better than cure. Both lack of impartiality and lack of independence may give rise to justifiable doubts about the fair resolution of the dispute. So, retaining both as separate grounds for removal eliminates any possible doubts about fair resolution, helping the parties to participate effectively in the arbitral proceedings and to accept the arbitral award. The judicial function of the arbitrator argues for this approach⁶⁹. An arbitrator is involved in the administration of justice, being selected to act in a quasi-judicial capacity in place of the court. Thus, the arbitrator should ordinarily be impartial and non-partisan, so as to render exact justice to the parties⁷⁰. He should not be

⁶⁸ It is identical to the French law. See Y. Derains, *op. cit.*, at p.10.

⁶⁹ See G. Eastwood, 'A Real Danger of Confusion? The English Law Relating to Bias in Arbitrators' (2001) 17(3) *Arb. Int.* 287-312.

⁷⁰ It seems that public policy requires that the arbitrator not only be completely impartial but also that he has no connection with the parties or the dispute involved, which might give the appearance of their being otherwise. See, J. Gillis Wetter, *the International Arbitral Process*, published by Ocean Publication, 1979, Vol. III., at p 410.

biased in favour of or prejudiced against, particular party or its case. Accordingly, the new Arbitration Act should recognise these concepts, as the fundamental requirements required of in an arbitrator⁷¹, in line with mainstream international commercial arbitration⁷².

3) Effective Arbitrator

An effective arbitrator is the key to the door of good arbitration⁷³, and it is the duty of an arbitrator to conduct the arbitral proceedings effectively. This duty implies various obligations that an arbitrator must comply with or else open himself to challenge and removal. In such cases the court will take into account all aspects of the arbitrator's conduct, and all events surrounding the alleged breach of his duty to be active in the conducting the arbitral proceedings. The court aims to ensure that the arbitration is properly and expeditiously conducted by a suitable arbitrator, with appropriate physical and mental abilities.

i. Arbitrator's Ability

An arbitrator should be physically and mentally capable of fulfilling his role as an arbitrator, and lack of such capacity must be a potential ground of challenge, as it is hard to see a how an arbitration can be conducted properly (or at all) by a person, who is physically or mentally incapable⁷⁴.

ii. Arbitrator's Performance

An arbitrator should be challengeable where he fails to act positively⁷⁵. This covers not only the case where he refuses to act, (e.g. refusing to conduct the arbitral proceedings or

⁷¹ Adopting these concepts would be more practical than providing an open list. So the court would ensure that the arbitrator is impartial and independence.

⁷² See Redfern & Hunter, *op. cit.*, para 4.47 at p 210 and G. Eastwood, *op. cit.*, at p 293.

⁷³ D. Hacking, 'The Effective Arbitrator', *op. cit.*, 237.

⁷⁴ The question of the incapacity of an arbitrator could be in some cases clear such as a physical handicap. However this is not always the case. Since there could only be there some doubt about his incapacity or the deficiency does affect his capacity to conduct the arbitral proceeding. In such clear case, the challenging party should satisfy the state court of the matter of the incapacity of an arbitrator to act. See Russell, *op. cit.*, para 7-70.

⁷⁵ See Art.14(1) of the Model Law and Sec.24 (d) of Arbitration Act 1996. These sections entail that the arbitrator has to conduct the arbitral proceedings with reasonable speed and with due diligence to act without undue delay. Redfern & Hunter, *op. cit.*, para 5-19 at pp. 256-275. The arbitrator's conduct should meet not only the parties' expectations, but also the objects of arbitration. The arbitrator's performance is a

to make the award⁷⁶), but also where he takes part in the proceedings but fails to conduct them properly. A good example of the latter category can be found in *Wicketts and Sterndale v Brine Builders*⁷⁷. There the arbitrator issued directions, which indicated that he had an inadequate comprehension of his role, since one of his directions inhibited a settlement of the case, while another would cause a party substantial expense and might threaten its continuing participation in the arbitration. Seymour J decided that these directions were enough to justify an order removing this arbitrator who would otherwise “continue to demonstrate that wholly inadequate grasp of the nature of his functions and powers”⁷⁸.

So, when an arbitrator’s conduct of the arbitral proceedings would frustrate the object of arbitration, the court should be able to remove that arbitrator. One of the justifications of such judicial involvement is to ensure that the arbitrator must have and retain the confidence of the parties and get the best out of the arbitral process⁷⁹. Furthermore, making the arbitral process effective is not only a duty of an arbitrator but also duty of the court⁸⁰, as long as the court is not permitted to substitute its own view as to how the arbitral proceedings should be conducted. As the DAC notes,

“The choice by an arbitrator of a particular procedure, unless it breaches the duty laid on arbitrators by Clause 33, should on no view justify the removal of an arbitrator, even if the court would not itself have adopted that procedure. In short, this ground only exists to cover...where an arbitrator so conducts the proceedings that it can fairly be said that instead of carrying through the object of arbitration as stated in the Bill, he is in effect frustrating that object. Only if the court confines itself in this way can this power of removal be justified as a measure supporting rather than subverting the arbitral process”⁸¹.

significant element for the success of arbitration. It is often submitted that the quality of arbitration stands and falls with the quality of arbitrators. See P. Sanders, *Int’l Enzycl.Comp.L.*, op. cit., para 141 at p 87.

⁷⁶ See Russell, para 7-072.

⁷⁷ *Wicketts v Brine Builders* (Unreported, June 8, 2001) (QBD (T&CC)). See, *Arbitration Law Monthly*, (March 2002) 2 (3) 1-6.

⁷⁸ *Ibid.*, p 4.

⁷⁹ D. Hacking, op. cit., p40.

⁸⁰ This is due to the fact that the modern function of the court is to ensure the effectiveness and sufficiency of arbitration. Such an approach enhances the success of the arbitral system. It was submitted that the better the arbitration process works, the better would be businessmen who have to resort to it. D. Hacking, op. cit., p 40.

⁸¹ DAC 1996 Report, para 106.

Another aspect of the failure to act positively is where the arbitral proceedings are not conducted with reasonable despatch or an award is not made within a reasonable time. In such event, an arbitrator fails to fulfil his duty to perform his function without undue delay⁸².

Judicial supervision thus aims to prevent unsuitable or dilatory arbitrators from continuing in charge of the arbitral process. So, when the court is satisfied that the challenged arbitrator is unable to act, or that his conduct is improper, has caused substantial injustice to the parties, or has led to serious and inexcusable delay, it may remove such arbitrator. In other words, the purpose of the supervisory role of the court is to ensure that the arbitrator does not frustrate the object of arbitration as a method of settling disputes. It would be wrong to allow such an unsuitable or dilatory arbitrator to remain in charge of the arbitral proceedings, as this is inimical to the general objects of arbitration and the interests of the arbitrating parties. The drafters of the Model Law noted,

“arbitral proceedings should be carried out with speed and efficiency. That was precisely why the parties had resorted to arbitral procedure. Undue delay through prevarication on the part of one of the arbitrators could well be grounds for recourse by the other party and an application for challenge of the arbitrator”⁸³.

Therefore, it should be possible to have recourse to the court to ensure that an able arbitrator conducts the arbitral proceedings with due speed and efficiency. The fact that an arbitrator cannot or does not act as might reasonably be expected, should give the parties the right to ask the court to remove the arbitrator. Such an application should allow the court to review the entire proceedings. When it exercises its supervisory role it has to consider a variety of factors pertaining to the operation of the arbitration, e.g. the nature of the dispute, the nature of procedural instructions and, the character of the

⁸² An arbitrator who fails to proceed with reasonable speed in conducting the arbitral proceedings may be challenged. Since, an arbitrator has a duty to act with due diligence. This is not only an obvious moral obligation, but also a legal obligation. Since many arbitral systems have this approach. See sec. 24(1)(d); sec.33 (1)(b) of the Arbitration Act 1996, Art.14 of Model Law, A/CN.9/SR.414 at para 57 and Redfern & Hunter, *op. cit.*, para 5-19 at p 256

⁸³ A/CN.9/SR 314, para 52.

challenged arbitrator. The drafters of the Model Law saw the following considerations as potentially relevant, in the Seventh Secretariat Note⁸⁴:

i. What action was expected or required of an arbitrator in light of the arbitration agreement and the specific procedural situation? Has the challenged arbitrator done anything in this regard?

ii. Has the delay been so inordinate as to be unacceptable in the light of the circumstances, including the technical difficulties and complexity of the case?

iii. If the challenged arbitrator has done something and acted in a certain way, did his conduct fall clearly below the standard of what may reasonably be expected from an arbitrator?

iv. Amongst the factors influencing the level of expectations are the ability to function efficiently and expeditiously and any special competence or other qualifications required of the arbitrator by an agreement of the parties.

The court may ask the arbitrator to clarify his performance before deciding on the challenge. It has been said that,

“from a practical point of view however the court will consider the arbitrator’s view on the matter, because if he was of the view that he had refused to act, and maintained his refusal, then the court would take into account that he could not be forced to continue with arbitration against his will”⁸⁵.

It is also a matter of justice to give the challenged arbitrator an opportunity to defend himself and his conduct. Thus the framers of the English Arbitration Act 1996 emphasises that the arbitrator’s right to appear and be heard in any application for his removal, is a matter of simple justice⁸⁶. So s.24(5) confers that right. No such provision appears in the Model Law nor CCPL 1980. However, one may say that arbitrator has an implied right to appear, as there are no provisions prevent an arbitrator participating, upon his application, in an application for his removal.

⁸⁴ A/CN.9/264, para 4.

⁸⁵ Russell, *op. cit.*, para 7-072.

⁸⁶ DAC 1996 Report, para 109.

Another factor the court has to consider is the role of the arbitrating parties in the arbitral proceedings. So, when the court finds that the reason for delay is, e.g. the behaviour of the parties, it should reject the challenge. Thus, the failure of the challenging party to do all things necessary for the proper and expeditious conduct of the arbitral proceedings, such as complying without delay with the arbitrator's orders or directions, means that the arbitrator cannot be blamed for any delay.

(c) Limitation on the Court Intervention

1) Court's Considerations

As aforementioned, an arbitrator or his conduct may be challenged before the court by a party. The court shall consider a wide range issues before judging whether the arbitrator has failed to act or cannot act. It must be made clear to the court that it should not substitute its own view about how the proceedings should be conducted, but should reserve the power of removal for those cases where, rather than fulfilling the general object of arbitration, the arbitrator performs in such a way as to frustrate the arbitration⁸⁷. The supervisory role of the court is thus subject to this limitation. The court should ask whether the arbitrator has breached the duty to conduct the arbitral proceedings properly, and whether such breach, if any, justifies his removal? Is it inexcusable or unreasonable to extent that justice demands his removal? Have the parties suffered substantial injustice as a result of his conduct, or will they suffer substantial injustice if he is not removed?

2) Question of Timing

Another important limitation is the question of the timing of the application for challenge. Under s.73(1) of the English Arbitration Act 1996, a party who desires to challenge an arbitrator should apply to the court as soon as he becomes aware of the ground for challenge. It is in his interest to apply timeously, as he loses his right to challenge if he delays. So, when the complainer, despite his awareness of the ground of challenge, participates in the arbitral proceedings without making an objection, he loses his right to object. Failure to make timeous objection is considered as a waiver of this

⁸⁷ *Ibid.*, para 105 – 106.

right, precluding a challenge at a later date⁸⁸. This limitation is clearly designed to prevent parties from delaying the arbitral proceedings by raising late objections.

The Arbitration Act 1996 does not specify a period of time, but merely requires that any challenge to the arbitrator must be made promptly. This gives the court discretion to intervene in the arbitration, as long as it considers that a challenge is made in due time without such delay as to justify loss of the right to object. By contrast, in Kuwait, the provisions of Article 178 (4) of CCPL. 1980 suggest that an application to challenge an arbitrator shall be made within 5 days from the date on which the other party had been informed of the appointment of the arbitrator, or the date when he became aware of the cause for challenge, while Article 13 of the Model Law provides a 15 day time limit for making a challenge. However, the question left unresolved by Article 13, is what is the legal effect of failure to comply with this time limit? Does such failure bar a party from raising the matter again, for instance, in setting aside proceedings? The logic of Article 13 suggests that the answer is yes⁸⁹. It may be deduced from the philosophy of Article 13 that a party, who does not object within its specified time limits has to be precluded from raising this objection once those limits have expired. That Article would be better expressed if the following words suggested by Norway had been added,

“if a party does not raise an objection in the period of time provided for in paragraph (2), he should be precluded from raising it not only during the arbitral proceedings but also under Articles 34 (2)(a)(iv) and Article 36 (1)(a)(iv)”⁹⁰.

The Arbitration Act 1996 s.73(1) clearly indicates that failure to raise the objection timeously prevents a party raising the objection later, either before the tribunal or the court⁹¹. Yet that provision permits a party to retain his right to object, if he can show that he did not know of the grounds for objection, and could not have discovered them with reasonable diligence. Many institutional rules are to the same effect⁹¹. It may be added in Article 178 (5) of CCPL. 1980 requires that in all cases, an application to challenge an

⁸⁸ *Rustal v. Gill & Duffus* [2000] 1 Lloyd's Rep. 14

⁸⁹ See Prof. F. Davidson, *Arbitration*, op. cit., p 98.

⁹⁰ A/CN. 9/263. Para 4. Nevertheless, such effect, in some views, may not necessarily mean that a party would be also barred to raise the objection under Art. 34 (2)(a) or Art. 36(1) (a)(iv) alleging and proving “procedural injustice”. Even supposing that the injustice could arguably have been avoided by a timely challenge of one or more members of the arbitral tribunal. See, A. Broches, *Commentary*, op. cit., para 11 at p 65.

⁹¹ A. Abd-Altah, op. cit., p 223.

arbitrator will not be admitted after rendering the award or conclusion the hearing. This time limit provides that a party cannot rely on the ground for challenge if he fails to raise the objection during the arbitral proceedings.

3) Exhausting other Recourse

Another factor, which may limit court intervention, is that the parties have given the power to remove an arbitrator to an arbitral institution (e.g. ICC or LCIA) or a third party. In such cases, the court in certain systems would not consider removing a challenged arbitrator unless the applicant has first exhausted any available recourse. Such limitation found in Article 13(1) of the Model Law's recognition of the parties' freedom to agree on procedures for challenging an arbitrator. Thus, it gives full effect to any agreement on how challenge may be brought and decided upon⁹². It noted early in the drafting process that the Model law shall,

“guarantee the parties' freedom to agree on the procedure to be followed in case of challenge. In particular, it should recognise any agreement as to the person or body called upon to decide about the challenge (e.g. the arbitral tribunal, the court of arbitration, the Secretary or a special committee of an arbitration association, or an appointing authority)”⁹³.

Similarly s.24(2) of the English Arbitration Act 1996 provides,

“If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person”.

The drafters of the Act made it clear that the exhaustion of any arbitral process for challenging an arbitrator is a pre-condition to the right to apply to the court⁹⁴. Therefore, both arbitration systems adopt a similar stance on this issue.

⁹² A/CN.9/264, para 2. This freedom is of course limited and cannot exclude the role of the court in this matter due to it has the final word in the application for challenge. This matter shall be discussed in depth in the coming paragraphs.

⁹³ A/CN. 9/207, para 66.

⁹⁴ See DAC 1996 Report, para 107.

By contrast, the CCPL 1980 says nothing about any such limitation, stating only that an application for challenge shall be made to the court which had original jurisdiction to hear the dispute⁹⁵. This raises the question of what could Kuwait learn from modern arbitration systems in this context? Before dealing with this question, some factors should first be considered.

4) Relevant Considerations

i. Groups of Challenge Grounds

It is notable that the model law distinguishes between two groups of grounds of challenge. The first, listed in Article 12, contains lack of impartiality and independence and failure to possess agreed qualifications. The second group, set forth in Article 14, covers failure or impossibility to act. The Model Law treats each group differently. Firstly it confirms the freedom of the parties to agree on the challenge procedure when the ground of challenge is one listed in Article 12, but says nothing similar in Article 14. This poses the question whether the parties can agree on a challenge procedure in the case of an arbitrator's inability or failure to act. The Commission Report states,

“article 14, unlike articles 11 and 13 did not expressly give the parties the freedom to agree on procedure in case of an arbitrator's inability or failure to act. It was understood, however, that the provision was not intended to preclude parties from doing so, or from entrusting a third person or institution with deciding on such termination”⁹⁶.

Secondly, in the absence of agreed procedures for challenge, the Model Law gives the arbitral tribunal jurisdiction to rule on challenges made under Article 12, but not Article 14. This is because there is a supplementary provision that applies where there is no agreement on challenge procedures⁹⁷. So Article 13(2) states,

“Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of

⁹⁵ This is similar to the French approach. See Y. Derains, *op. cit.*, p 10. However, Y. Derains suggests that the parties are free to agree on the challenge procedures. He adds that the decision of the agreed authority may be final if the parties agree on the matter and therefore the court does not have power to deal with challenge as a judicial review.

⁹⁶ A/40/17, para 136, see also A. Broches, *Commentary*, p 69.

⁹⁷ A/CN. 9/264, para 3.

the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge”.

Article 13(2) thus permits the arbitral tribunal to be the first resort for a party, who wants to initiate a challenge. This approach pushes back court involvement in the arbitral proceedings, by postponing the role of the court to the stage after the tribunal has decided upon the challenge. Therefore, the challenging party cannot immediately ask the court to with his application for challenge. When the challenge is not successful, he may then in terms of Article 13(3) pursue that challenge before the court. Thus the final decision on the challenge is that of the court.

The aim of the Model Law's approach in Article 13 is to, “strike a proper balance between the need for preventing obstruction or dilatory tactics and the desire of avoiding unnecessary waste of time and money”⁹⁸. One drafting suggestion was that an application for challenge should have to be brought to the court immediately after its denial by the arbitral tribunal or any other agreed body. The supporters of this view believed that permitting the court's involvement in the arbitral proceedings would help to avoid delay and controversy during the arbitral proceedings and reduce the risk of later setting aside the arbitral award and, thus, of waste of time and resources⁹⁹. They thought it would not be acceptable to continue the arbitral proceedings without first resolving the question of challenge by way of a final decision on the matter¹⁰⁰. Another suggestion was that the court should not be allowed to deal with a challenge application at all during the arbitral proceedings, but should only be involved by way of an application to set aside the arbitral award. It was suggested that this would avoid opportunities for dilatory tactics by the parties¹⁰¹. Ultimately, a compromise solution was adopted¹⁰², permitting court intervention during the arbitral proceedings, but adding three features designed to reduce the possible risk and adverse effects of dilatory tactics¹⁰³ - firstly, a short time period for resorting to the court, secondly, no appeal against the court's decision, and

⁹⁸ A/40/17, para 124.

⁹⁹ A/CN.9/WG.II/WP.37, Art. 9 n.21.

¹⁰⁰ A/CN.9/245, para 210.

¹⁰¹ A/CN.9/233, para 110 and A/CN.9/245, para 209.

¹⁰² A/CN.9/245, para 212.

¹⁰³ A/CN.9/264, para 6.

thirdly, giving jurisdiction to the arbitral tribunal to continue the arbitral proceedings during the court proceedings.

On the other hand, when the challenge is based on the provisions of Article 14, the Model Law does not suggest how a party goes about making the challenge¹⁰⁴. There are no supplementary provisions along the lines of Article 13(2). It has been observed,

“Article 14 does not set forth any particular procedure to be followed by a party who believes that the arbitrator’s mandate should be terminated. The second sentence of paragraph 1, however, requires that there be “controversy remain [ing]” in order for a party to request the court or designated authority to decide on the termination of the mandate. Therefore, a party presumably should at least send a statement of reasons for seeking termination to the affected arbitrator (so that he can withdraw), to the remaining members of the arbitral tribunal, and to the other party or parties (so that they can agree or refuse to agree to the termination)”¹⁰⁵.

In fact, first draft of Article 14 contained just such a procedure stating,

“(a) Any party who wishes that, for any of these reasons, the mandate of an arbitrator be terminated shall send a written statement of the reasons to the other party and to all arbitrators; (b) If, within [20] days after the notification, the other party does not agree to the termination of the mandate and the arbitrator does not withdraw from his office, the party may request the Authority specified in article 17 [Art.6 in the final text] to make a final decision thereon”¹⁰⁶.

This draft provision was considered as too detailed and likely to be relied merely to prolong the arbitral proceedings¹⁰⁷, so that it was abandoned¹⁰⁸.

It has been seen that the Model Law classifies the grounds of challenge into two groups, providing supplementary provisions in relation to one group, but not the other. Unfortunately, the drafters of the Model Law do not explain the philosophy behind such

¹⁰⁴ See, Prof F. Davidson, *International Commercial Arbitration*, op. cit., para 4.33, at p 78.

¹⁰⁵ Hotzmann & Neuhaus, op.cit., p. 433.

¹⁰⁶ A/CN. 9/WG.II/WP.37, Art 11 [Art. 14 in the final text].

¹⁰⁷ A/CN. 9/232, para 67.

treatment. It might be because asking an inactive arbitrator to rule on a challenge might not be appropriate where it has become impossible for him to act, e.g. where he is very ill. However, it would better if the drafters had explained their thinking. Thus the English approach to this issue is preferable, as it is comprehensive¹⁰⁹. It is therefore recommended.

ii. Who May Decide on the Challenge?

The English Act lists all grounds of challenge in one section, and deals with them all in the same way. This makes the procedures easy and simple. The Act also confirms the freedom of the parties to agree on the procedure for challenge, including the body, which shall decide on the challenge, but it does not contain any supplementary provision about the challenge procedures. It was thought

“to introduce a formal procedure for challenging the arbitrator would be an open invitation to delaying tactics by the respondent, of a kind which English arbitration has so far succeeded in avoiding”¹¹⁰.

Similarly, Kuwait has no supplementary provisions regarding challenge procedures. Like England, in the absence of contrary agreement, the court will decide on the challenge.

On the other hand, one of the important questions for the drafters of the Model Law was whether it should feature supplementary provisions for those cases where parties did not regulate the issue of challenge procedures¹¹¹. Divergent views were expressed¹¹². One was that it was not in accordance with the purpose of the Model Law to include detailed provisions on such a procedural question, while another was that it would be helpful if the Model Law laid down a mechanism for challenge, in order to avoid protracted controversy and delay in the arbitral proceedings. At any rate, the conclusion was that it might be appropriate to set forth supplementary rules to govern this matter in the absence of the agreement by the parties.

¹⁰⁸ See Prof. F. Davidson, *International Commercial Arbitration*, op. cit., para 4.33, p 76.

¹⁰⁹ Redfern & Hunter, op. cit., para 4-61, p 219.

¹¹⁰ See DAC on Arbitration Law- a Report on the UNCITRAL Model Law on International Arbitration Law-, p 24.

¹¹¹ A/CN. 9/207, para 66, and see A/CN. 9/WG.II/WP.35, [Q 3-5].

¹¹² A/CN. 9/216, para 45.

Having supplementary provisions is recommended¹¹³. However, giving the arbitral tribunal statutory jurisdiction to rule on the application for challenge might be criticised. If the parties have expressly empowered the arbitral tribunal, such jurisdiction could be justified on the basis of party autonomy. On the other hand, giving the arbitral tribunal this power in the absence of the agreement by the parties might be inadvisable. One of the possible grounds of criticism is practical. From a practical angle, the body which will decide on the challenge application is itself the subject of the challenge, as the arbitral tribunal, including the challenged arbitrator, who may indeed be the sole arbitrator, will judge the challenge. This means that the object of the challenge is also its judge. Another practical issue is that the challenged arbitrator may be considered as the respondent in the challenge. So, how might he exercise his right to put his case? It is difficult to see him trying to put his case, and at the same time deciding on the challenge, performing two different roles simultaneously, as an arbitrator and a respondent. How could a sole arbitrator be both arbitrator and respondent? Does he have to leave the bench, and go to the defence bar to present his case? Who will hear his argument? Or, if there are three members in the tribunal, can two members hear the challenged arbitrator when he is putting his argument, or will he listen to his argument as a member of the tribunal?

It seems also that giving the arbitral tribunal this statutory power to decide on challenges could significantly impact on the question of the confidence of the challenging party in the challenged arbitrator. Such confidence is, of course, a vital element in the success of arbitration, and it could be affected when an arbitrator is allowed to be a judge in his own cause. Another possible ground for criticising the approach of the Model Law is that it may cause delay in the progress of the arbitration. This is because the arbitral tribunal has to consider and decide on the application for challenge, thus obliging it to spend some time on the challenge. Even though the application need not stay the arbitral proceedings, the time spent on considering the application will cause delay. The tribunal should spend such time making a final decision on the main subject matter of the dispute, and arbitration legislation should insist that it does so, rather than considering another issue, which could be resolved by the court, without disturbing the conduct of the arbitral proceedings.

¹¹³ See pp. 94-97 *supra*.

Moreover, there is no time limit within which the arbitral tribunal has to make its decision on the challenge. It is under no obligation to deal with the challenge in a speedy and efficient manner. Nonetheless, the challenging party could challenge a dilatory arbitrator in this context on the ground of failing to act without undue delay, in terms of Article 14. Such an approach could make the arbitration more complex and cause yet more delay and costs. Suppose for instance, a party challenges a sole arbitrator on the ground of lack of impartiality. In terms of Article 14(2), he must, within 15 days of becoming aware of those grounds, send a written statement of the reasons for challenge to the arbitral tribunal. The tribunal continues the arbitral proceedings, but delays making a decision on the challenge. The challenging party then becomes aware of this failure to act. He could then challenge the arbitrator under Article 14. In this second challenge, he is able to resort to the court for a decision. Such a scenario illustrates the implications of the Model Law's approach, and calls into question the wisdom of that approach¹¹⁴. What is the philosophy behind according jurisdiction to the arbitral tribunal to rule on challenges?

Some justifications for this approach may be found. One is that the provisions of Article 13(2) operate only in case of the absence of the agreement of the parties as regards challenge procedures. Their failure to agree on this matter impliedly empowers the arbitral tribunal to decide on the challenge. Another possible reason giving the tribunal this jurisdiction is that it reflects the principle of the limited court intervention. Article 5 of the Model Law articulates the policy of limiting court involvement in arbitration. One of the results of this policy is the power of the arbitral tribunal to rule on its jurisdiction (competence-competence), which has been respected and welcomed across the world. It might be said that giving the arbitral tribunal the power to rule on the challenge is another result of the aim to limit the court intervention. By suggesting that a challenging party may not have recourse to the court as a first resort, but instead directing him to the arbitral tribunal, judicial intervention may be avoided.

Moreover, it might be argued that there should be no fear in allowing the arbitral tribunal itself to decide on the challenge, as its decision is subject to judicial review. Thus, the

¹¹⁴ Its treatment to this vital matter has been examined by number of legislation authorities of the States, which consider adopting the model law. For instance, Tunisia, when adopted the Model Law, did not prefer to follow wholly the treatment of the Model Law. It does not give a statutory jurisdiction to the arbitral tribunal to decide on the challenge. See Art. 58. Of the Tunisia Arbitration Code 1993.

possible dangers of such an approach are rendered illusory in light of the safeguards provided by the supervisory role of the court. Moreover, the challenged arbitrator might not be seen as a party to the challenge, as the challenging party may discuss the matter with the other party, and if they agree, this will be the end of the challenge. If, they fail to reach agreement, this will mean there is a dispute between the parties on the matter whether the challenged arbitrator should be removed or not. In this case, the arbitral tribunal may consider the challenge and decide on it. It would be like a judge ruling on a challenge to his impartiality. He does not appear as a party, does not put his case, but simply assesses the arguments put by the challenging party.

In conclusion, it would appear that it is desirable, when the law allows the parties to agree on the challenge procedure, to set out provisions, which apply if there is no agreement. Such supplementary provisions help fill the gaps in the arbitration agreement, and should be designed to serve the general principles of the Arbitration Act (particularly, the principle of limited court intervention) and the interests of the parties.

iii. Appeal to Court Against the Challenge Decision

The right to resort to the court to review the decision of the tribunal (or any other body) on the challenge is guaranteed under the Model Law¹¹⁵. The last word on the challenge must be the court's, as judicial supervision over challenges ensures the fairness and integrity of the challenge process. The Arbitration Act 1996 takes the same line in the mandatory provisions of s.24. So, the decision of the tribunal regarding a challenge must always be subject to judicial review. But can there be an appeal against the court's decision? The provisions of Articles 13(3) and 14(1) clearly indicate that the decision of the court is not subject to appeal "whether to a higher court or some person or institution nominated in the agreement between the parties"¹¹⁶. Yet under s.24 the court's decision might be appealed. In fairness, this should not directly affect the progress of the arbitral proceedings, as they may continue in the meantime. However, the fact that the process is under threat from the decision of the appeal court may indirectly affect the will of the parties to participate effectively in the arbitral proceedings. Suppose for example, they have agreed that the arbitration is to be governed by ICC rules of arbitration. The

¹¹⁵ See Art. 13 (3) of the Model law. Contrary to this view, in France, the decision of the Arbitral institution (e.g. ICC) on the challenge may be final. Since, the parties may agree on the finality of the tribunal's decision and waived the right to resort to the court as an appeal stage. See Y. Derains, *op. cit.*, p 10.

¹¹⁶ Prof. F. Davidson, *International Commercial Arbitration*, *op. cit.*, para 4.25 at p 74.

challenge procedure to be adopted is then governed by Article 2(8) and (9) of those Rules. These provide *inter alia* for the court of the ICC to decide upon any challenge. Yet its decision is subject to appeal to the court under s.24(2), with a further appeal against the court's decision, lying under s.24(6.), albeit that this requires the leave of the court. It is surely adequate to allow a challenge application to be considered by two instances - the agreed authority, and the court. This provides sufficient safeguard. Thus it would be better to provide that the court's decision on any challenge shall be subject to no appeal.

Article 178 of CCPL 1980 allows an appeal against the decision of the court of first instance on a challenge. Moreover article 109 suggests that any challenge shall suspend the arbitral proceedings. In light of the above discussion, it is recommended that challenges should no longer have this effect, and that the decision of the court of first instance should be considered final.

iv. The Suggested Approach

Kuwait must consider the provisions of Articles 12-14 of the Model Law and s.24 of the Arbitration Act 1996 in order to decide upon the nature and extent of the supervisory role of the court in this context. It is surely preferable to have all possible grounds of challenge dealt with in similar fashion in one article. It is also desirable to confirm positively the freedom of the parties to agree on a challenge procedure. Any decision on a challenge should be open to judicial supervision, and the decision of the court should not be subject to another appeal. The general philosophy behind this approach is to determine the proper limits of court intervention in arbitration, hence the freedom of the parties to agree on challenge procedures. Moreover allowing the tribunal to decide on the challenge, unless the parties agree otherwise, protects the integrity of the arbitral process, ensuring that the parties do not have to resort to the court. Yet the challenging party should be able to seek judicial review of the tribunal's decision. This safeguard is necessary to ensure fair procedure, and strike a proper balance between party autonomy and legitimate court intervention. Accordingly, the new Arbitration Act must allow the parties to agree on challenge procedures, and permit the arbitral tribunal itself to rule on the challenge, as a supplementary measure. The supplementary provisions must be simple and effective, and might contain time limits for making the challenge as under the Model Law. Having clear time limits and clearly specifying the consequences of failure

to respect those limits would provide some stability to the process, by preventing parties from delaying the arbitral proceedings through raising late objections. The supplementary provision may also enhance the power of the arbitral tribunal to rule on the challenge, while rendering its decision subject to judicial examination, upon the request of an interested party. Some time limit for appeal is desirable (e.g. 30 days after having received notice of the decision on the challenge), and failure to meet this time limit would make that decision final. Equally the decision of the court should be subject to no appeal.

(d) Conclusion

Judicial intervention to remove an arbitrator, where retention of a “non-performing” arbitrator becomes intolerable is a good example of the necessity of judicial supervision even prior to the making of an arbitral award. The supervisory role of the court over the arbitrator and his conduct is a vital element for the success of arbitration. The court may remove a challenged arbitrator to give the parties another chance to constitute an arbitral tribunal which is able to act positively. The court must pay attention to the quality and conduct of arbitrators, as this sort of judicial intervention plays a significant role in reinforcing the confidence in the arbitral tribunal, which is vital to the success of arbitration as a method of resolving disputes. A party who has lost his confidence in the fairness, impartiality or ability of the arbitrator or his conduct of the arbitral proceedings must have some recourse.

3.4 Ensuring Party Autonomy in Procedural Matters

(a) Introduction

It is often said that one of the advantages of arbitration is the freedom of the parties to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitral proceedings, as such freedom is one of the keys to an effective system of arbitration¹¹⁷. For this reason, among others, modern arbitration legislation recognises this freedom and articulates it clearly¹¹⁸. For instance, Article 19(1) of the Model Law states “Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by

¹¹⁷ It is submitted that recognising the parties’ freedom to lay down the rules of procedure goes a long way towards establishing procedural autonomy. A/CN.9/264, para 1

¹¹⁸ See Art. 19 (1) of the Model Law and sec. 34 (1) Arbitration Act 1996.

the arbitral tribunal in conducting the proceedings”, while s.34(1) of the 1996 Act provides, “It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter”. Similarly, Article 182 of CCPL 1980 confirms the freedom of the parties to agree on the arbitral procedure.

(b) The Role of the Court

Merely guaranteeing party autonomy does not ensure that the will of the parties is respected by the arbitral tribunal. Thus the conduct of the arbitral proceedings by the tribunal must be subject to court supervision, so that the risk of the arbitral award being set aside ensures that the tribunal complies with agreed procedures. The supervisory function of the court in this context shows how it safeguards party autonomy. Court intervention is justified here on the ground that it is not for the tribunal to override the agreement of the parties on how the arbitration is to be conducted, given that arbitration is the parties’ own chosen method of dispute settlement, and they have an absolute right to decide on the form the arbitration should take¹¹⁹. Thus, when the parties have adopted rules for the conduct of their arbitration, it is the duty of the tribunal to comply with those rules, and failure to do so opens the award to challenge. So Article 34(2)(a)(iv) of the Model Law provides

“An arbitral award may be set aside by the court specified in article 6 only if the party making the application furnishes proof that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law”.

Similarly, breach of agreed procedures is one of the irregularities listed in the Arbitration Act 1996 as justifying the setting aside of the award, s.68(2) stating

“Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant- (c) failure by the tribunal to

¹¹⁹ DAC 1996 Report, para 173.

conduct the proceedings in accordance with the procedure agreed by the parties”.

The same result may be found in Article 186(3)(a) of CCPL 1980.

(c) Who Controls the Arbitration?

The above duty may suggest that the parties, not the arbitrators, control the arbitration. The question of who controls of the arbitral process was one of the matters discussed at the Sixteenth ICCA Congress¹²⁰. There was “lively debate”¹²¹ on the motion; “The parties, not the arbitrators, control the arbitration”. Fitzgerald suggested that it was the arbitrators, not the parties who controlled the arbitration. She argued that party autonomy is a relative principle and there is a duty on the arbitrators to conduct the arbitral proceedings with speed and efficiency, concluding that the arbitrators determine the arbitral procedure with the agreement of the parties, but must remain in control of the arbitral process otherwise the case could not be decided¹²². Lord Mustill shared that view, noting that while arbitrators direct the arbitral proceedings along the lines which the parties wish, they are in overall charge of the arbitration and ultimately responsible for conducting an efficient and just procedure. His conclusion was that the likelihood of any significant procedural agreement coming from the parties is marginal at best¹²³. On the other hand, Prof. Gabrielle Kaufmann-Kohler supported the motion that the parties, not the arbitrators, control arbitration, grounding that view on the consensual nature of arbitration and the principle of party autonomy, which is a universal legal rule safeguarded and enforced by the courts¹²⁴.

It is suggested that the latter is the better view. If, when the arbitrator accepted his appointment, there was an existing procedural agreement, he is impliedly bound by it. If he was not happy with that procedural agreement, he did not have to accept the mandate. Should the parties modify¹²⁵ their procedural agreement after the arbitral tribunal has

¹²⁰ It was held in London May 12-15, 2002.

¹²¹ See Christopher Koch, ‘The Sixteenth ICCA Congress’ (2002) 19 (6) *J. Int. Arb.* 609-620.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ The freedom of the parties to agree on the procedure is continuing one throughout the arbitral proceedings and not limited, for instance, to the time before the first arbitrator is appointed. A/CN.9/246, para 63.

been constituted, any arbitrator who is not comfortable with the new procedural agreement, may resign. Prof. Hans Smit suggested that if the parties conclude a procedural agreement, the arbitrators should go along with it, as it is up to the arbitrators to make sure that the parties do not agree to things that they do not want¹²⁶. Even the duty to conduct the arbitral proceedings effectively without any undue delay does not justify a breach of procedural agreement. The arbitrator may advise the parties to change their agreed procedures, but it is for the parties to consider that advice and theirs is the last word. If the arbitrator, for whatever reason, thinks that he cannot proceed under the agreed procedure, he may resign¹²⁷. To support this motion favours party autonomy, upholding the agreement of the parties on procedural matters above the views of the arbitrators¹²⁸. Furthermore, according to the contractual approach, when the arbitrator agrees to act, he concludes a contract with the parties, which obliges him to comply with agreed procedures. Moreover, if an arbitrator agrees to accept payment for this important task, he is under a moral duty act as the parties direct. Furthermore many systems see the failure of the arbitrator to conduct the arbitral process in accordance with procedure agreed by the parties as justifying a challenge of the award¹²⁹.

(d) Limitation on Court Intervention

We have seen that the parties are free to agree on procedural matters, and that it is the duty of the arbitral tribunal to respect that agreement, or else open the award to challenge. However, this does not mean that this freedom is not subject to any restriction. Party autonomy must respect restriction imposed by the law, and if it does not the arbitral tribunal need not comply with agreed procedures to the extent that they offend against the law. Similarly, in such circumstances the court will not set aside the award, merely because the arbitral procedure is not in accordance with the agreement of the parties. The duty of the arbitral tribunal to comply with agreed procedures applies only where the agreement does not offend against the law. But what restrictions does the law impose?

¹²⁶ *Ibid.*, p 610.

¹²⁷ It seems that the right to resign is provided to confer a degree of a protection upon the arbitrator. Since, it allows an arbitrator, who is asked by the parties to follow procedural agreement, which he is not comfortable to resign "without incurring liability to the parties". See, R. Merkin, *op. cit.*, para 12.4, Service Issue No. 22:4 Dec 1998.

¹²⁸ See <http://www.icca-2002.org/working_programme.htm>[Last visited 5 July 2003].

¹²⁹ See Art. 34 (2)(iv) of the Model Law, sec.68(2)(c) of the Arbitration act 1996 and Art. 186 (3)(a) of CCPL 1980.

The freedom of the parties to determine the arbitral procedures is restricted by mandatory provisions¹³⁰. So, it was said in the context of the Model Law, "The freedom of the parties is subject only to the provisions of the model law, that is, to its mandatory provisions"¹³¹. Therefore, if the parties' agreement conflicts with the mandatory provisions of the Model Law, the arbitral tribunal does not have to comply with the agreed procedures, as it is obliged to follow those mandatory provisions rather than agreed procedures¹³². So, Article 34(2)(a)(iv) provides that it is a ground for setting aside the arbitral award that it breaches agreed procedures "*unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law;*". [Emphasis added]

Equally, the English Arbitration Act 1996 s.4(1) is to the same effect. So such mandatory provisions restrict the scope of party autonomy, in that any agreement contrary to those mandatory provisions will automatically be ineffective, and the arbitral tribunal should not comply with agreed procedures to the extent that they offend against such provisions. This also represents a limitation on court intervention, as where the arbitral tribunal does not comply with agreed procedures, on the ground that they conflict with mandatory rules, the court should accept this justification and should not set aside the arbitral award. Its role in this context is to uphold the mandatory provisions.

3.5 Conclusion

This section has considered court supervision of the arbitral tribunal and its conduct. The supervisory function of the court should be exercised, upon application of the parties to the arbitration, to ensure that the arbitrator is qualified to conduct the arbitral proceedings, both in the sense of being competent and possessing agreed qualifications. The court must ensure that the arbitrator is both impartial and independent, that he is conducting the proceedings properly and respecting party autonomy. Failure to comply with such duties justifies removing an arbitrator or setting aside the arbitral award. Thus the supervisory role of the court, as a price for allowing arbitrators to be involved in the

¹³⁰ The concept of mandatory provisions as a limitation on the party autonomy has been dealt with in pp. 131-137 supra. See also P. Mayer, 'Mandatory Rules of Law in international arbitration' (1986) 2(4) *Arb. Int.* 274-293. The drafters of the Model Law argue that the quarantining the freedom of the parties in this context is subject to the fundamental principles of fairness. See Art. 19(3) of the Model Law and A/CN.9/264, para 1.

¹³¹ A/CN.9/264, para 3.

¹³² See A/CN.9/264, para 3 and Prof F. Davidson, *Arbitration*, op. cit., para 18.28 at p 371.

administration of justice, like judges, seeks to ensure that arbitrators act properly and as envisaged by the parties.

4. The Judicial Supervision over the Arbitral Award

4.1 Introduction

As aforementioned, the arbitral award is the fruit of the arbitration¹³³. Court support of the arbitral award was discussed earlier in this thesis. The theme of this section is to shed some light on court supervision of the arbitral award, as the court should not merely support awards, but from time to time must supervise them. The supportive role sees the court providing an effective enforcement mechanism, to ensure that arbitration is an effective method of dispute settlement, while the supervisory role gives an unsuccessful party a chance to challenge the arbitral award through judicial review, in order to guarantee the fairness, integrity and validity of arbitration as a method of adjudication. Judicial control over the arbitral award is not only designed to protect the interests of the parties to arbitration, and to ensure its effectiveness, but also to protect the interests of the legal system. Arbitration is a method of adjudication, and the award has significant impacts on the rights or obligations of the parties. It is in the interest of the legal system to ensure that arbitration, as a private method of adjudication, operates judicially and the award reflects a true judgment, since arbitration is a vital part of the legal system. This section then examines, firstly, the methods and secondly the grounds of challenging an award.

4.2 The Method of Challenge

(a) Introduction

How may an award be challenged? We are here looking at the role of the courts, rather than appeals to another arbitral tribunal or some other body. By virtue of party autonomy, such devices are open to the parties, but we are concentrating upon the relationship between the arbitration and the court¹³⁴. National laws, in general, provide a variety of actions or remedies available to a party¹³⁵, varying both as to procedural forms of challenge, and as to the grounds on which challenges may be made¹³⁶. However, a common ground between most arbitration systems is that they provide two essential

¹³³ See p 120 *supra*.

¹³⁴ This could be a part of the relationship between the court and arbitration in case of the enforcement of the agreed procedures. It is the duty of the state court to ensure the implementation what the parties were agreed on. This duty is part of the role of the court as safeguard to party autonomy.

¹³⁵ A/CN. 9/264, para 1.

¹³⁶ A/CN. 9/207, para 108.

challenge devices - challenging an arbitral award before the court, and resisting its recognition and enforcement.

(b) Recourse to the Court

A party may, for a variety of reasons, decide not take active steps against the arbitral award, but wait until the successful party seeks court assistance and support in enforcing the arbitral award¹³⁷. At this stage, he may raise his complaints as grounds for opposing an application for recognition or enforcement. The general idea of these provisions¹³⁸ is that the recognition or enforcement of an award may be resisted and refused. This is a means of indirect challenge in the form of opposition to the recognition and enforcement of the arbitral award¹³⁹. However, a party, who desires to challenge the arbitral award, may choose to take the initiative and raise the matter before the court. He is acting positively by initiating judicial review in order to put an end to the arbitral award without undue delay. Most arbitration legislation recognises and accommodates such a desire¹⁴⁰. Broadly speaking, there are two means of thus positively challenging the award, namely, setting it aside and appealing against it.

1) Setting Aside

It has been said that, as the policy is that the court must have the final word in arbitration¹⁴¹ all national arbitral systems recognise an action to set aside the arbitral award, but the name of this remedy varies¹⁴². For instance, Article 34 (1) of the Model Law states, "Recourse to a court against an arbitral award may be made only by an application for setting aside".

¹³⁷ It may be worth to note that the state court may ask why the arbitral award was not challenged by positive attack where that possible. The state court, by its judicial desecration, may be legitimate to ignore the challenge due to the unjustified failure of the challenging party to attack the award positively.

¹³⁸ It is meant by provisions here that the rules that govern the recognition and enforcement of the award. In Model Law Art.35 and 36; in Arbitration Act ss. 66 and 103 (New York Convention Award) and in CCPI. 1980 Art. 185 (award made in Kuwait) and Art.199-200 (Award made outside Kuwait).

¹³⁹ A. Broches (Rapporteur) & Prof. G. Bernini, 'Recourse against the Award; Recognition and Enforcement of the Award', in P. Sanders (ed.), *Uncitral's project for a model law on international commercial arbitration*, op. cit., para 17, p 209.

¹⁴⁰ Art. 34 of the Model Law, art. 186 of CCPI1980, sec.67- 68 of Arbitration Act 1996 and Art. 1484 French CCP 1981.

¹⁴¹ *Ibid.*

¹⁴² P. Sanders, *Int'l Enzycl.Comp.L.*, para 229 at 157.

Equally ss.67 and 68 of the Arbitration Act 1996 also gives a party the right to seek judicial review by applying to the court to challenge the arbitral award on ground of substantive jurisdiction or serious irregularity. Similarly, Article 186(3) of CCPL 1980 allows a party to apply to the court to nullify the arbitral award¹⁴³. This channel of judicial review is mandatory, and cannot be excluded by the parties. According to Article 187, the interested party may apply to the court which had original jurisdiction to hear the case, for nullification of the arbitral award. A case of nullity is only available in the case of a domestic arbitral award, made in Kuwait, and where the award is not subject to appeal¹⁴⁴. Any such application, when competent, is subject to the general procedure for commencing a case¹⁴⁵.

2) Appeal (Second Instance)

Very clearly, the provisions of the Model law do not contemplate an appeal to the court. Article 34(1) states that the only recourse against the arbitral award is an action to set it aside¹⁴⁶. The aim was to provide a single exclusive method of judicial recourse against the arbitral award, permitting no other means of attacking the award¹⁴⁷. There was a general agreement that the Model law should streamline the various types of recourse against the arbitral award and should provide for only one type of challenge¹⁴⁸. The Commission Report noted that, "it was understood that the application for setting aside was exclusive in the sense that it constituted the only means for actively attacking the award"¹⁴⁹.

The drafters of the Model Law also considered the question whether the model law should allow any appeal to a court on the merits of the award¹⁵⁰, but decided against it¹⁵¹, as this approach reflected the attitude of most States, and a trend was discernible to further reduce the remaining instances of court review. This treatment would meet the clear trend towards limiting the intervention of the courts in arbitration¹⁵².

¹⁴³ Art. 1484 French CCP 1981.

¹⁴⁴ For instance, the parties do not agree on the matter of appeal or the nature of the arbitral award is not appealable according to the general provisions, which govern the system of appeal in CCPL 1980.

¹⁴⁵ See Art. 187 (1) of CCPL 1980.

¹⁴⁶ This is of course besides the resisting recognition and enforcement the arbitral award.

¹⁴⁷ A/CN.9/264, para 1.

¹⁴⁸ A/CN.9/232, para 14.

¹⁴⁹ A/40/17, para 274.

¹⁵⁰ A/CN.9/207, para 103 - 104.

¹⁵¹ A/CN.9/216, para 107.

¹⁵² A/CN.9/207, para 103.

By contrast, both the English Arbitration Act 1996 and Kuwaiti CCPL 1980 accept the idea of appeal to the court, albeit on completely different philosophical bases.

i. Article 186 of C.C.P.L 1980 states that an arbitrator's award may not be appealed, save as is agreed by the parties prior to rendering the arbitral award¹⁵³. So an arbitration system may exclude the right to appeal to the court, but give the parties the right to agree on appeal if they wish so¹⁵⁴. Therefore, an appeal against the arbitral award is available only if the parties have so agreed. The justification of the Kuwaiti approach is the attempt to resolve the disputes between the parties by the agreed method, without the need for a judicial appeal, unless this is what the parties clearly wish. Another justification is the avoidance of the delay and costs of an appeal.

ii. On the other hand, s.69(1) of the 1996 Act states, "Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings".

The common ground between these two arbitral systems is the role of party autonomy. Both allow the parties to decide whether an appeal lies to the court. The complete exclusion of the right of appeal, as under the Model Law, prevents the parties making a choice as to whether an appeal should be available¹⁵⁵. This raises the question of whether the parties should be able to agree on the extent of judicial control¹⁵⁶.

There is no doubt that modern arbitration systems emphasise the principle of party autonomy, as arbitration is a consensual process, and enabling the users of arbitration to design its conduct ensures the health of the arbitral process. Yet what should be the extent of party autonomy? Should it apply in the field of judicial control? Why should it not? The philosophy of limiting court intervention may require minimising certain forms of judicial control, but need not necessitate setting a maximum nor indeed eliminating

¹⁵³ This is contrary the French approach, which gives the parties the right to appeal, and allow them to waive this right in agreement. See Art.1482 of CCP 1981. However, there is no appeal available in case of international arbitration.

¹⁵⁴ It may be mentioned that there are number of cases where there is no appeal even if the parties agree on the appeal. These are for example where the arbitrator is authorized to compromise and conciliate, or if he is an arbitrator of appeal or the value of the relevant action does not exceed KD 500. These are a limitation of the freedom of the parties to agree on the appeal.

¹⁵⁵ See, O. Chukwumerije, *op. cit.*, 179.

¹⁵⁶ This is one of the comments of United Kingdom, see A/CN.9/263/ADD.3 para 36,37 and 38.

even those means of judicial control, which the parties themselves desire to have. During the drafting process of the Model Law the United Kingdom asked whether,

“the principle of party autonomy demand[ed] that if the parties have agreed to avail themselves of measures available under the local law, the court should be able to give effect to their agreement?”¹⁵⁷.

The UK raised this question for two purposes - firstly to defend the English approach to appeals on questions of law, which was articulated in the Arbitration Act 1979 (and confirmed with some modifications in the 1996 Act). Secondly, consultations on the draft of the Model Law disclosed a substantial body of opinion among users of the arbitral process in England, which favoured retaining the possibility of recourse to the court on questions of law. The UK suggested that the logical consequence of the philosophy of party autonomy is that the parties should be allowed to have such recourse, if that is what they have agreed.

The question of whether the approach of the 1979 Act did fulfil a need was considered by the Commercial Court Committee, first by canvassing arbitrators, practitioners and users, and then by discussion within the Committee. The Committee concluded as follows:

“As regards the right of appeal to the High Court on questions of law, there appears to be fairly general satisfaction with the balance struck by the 1979 Act. We received no representations to the effect that the position should be restored to what it was before the 1979 legislation, and we would not ourselves favour this. Conversely, although there was some support for the elimination of the special categories of transactions in respect of which the parties cannot contract out of the right of appeal, this was a minority view. Our own opinion is that these special categories should be maintained....”¹⁵⁸.

The reference to the pre 1979 position testifies to the fact that the existence at that point of an unrestricted right of appeal, and the fact that many appeals were in fact being taken, were seen as undermining the attractiveness of England as an arbitral forum. The

¹⁵⁷ *Ibid.*, para 37.

¹⁵⁸ See DAC 1989 Report, para 80.

courts were heavily involved in supervising arbitration through the "special case" procedure, whereby the arbitral tribunal- which was presumed likely to misapply the law- could be required to state a case on a question of law for the opinion of the court¹⁵⁹. Thus, there was a move to restrict this right of appeal in the Arbitration Act 1979, e.g. by requiring leave of the court for an appeal unless it was brought with agreement of all parties, and permitting the parties to contract out of the right of appeal¹⁶⁰. Further restrictions were imposed in the Arbitration Act 1996, in particular the filtering provisions established by the House of Lords' decision in *The Nema*¹⁶¹ for the role of the court to grant leave to appeal¹⁶².

However, the other side of the coin is that English commercial law is seen as modern and dynamic, and thus often selected to govern international contracts. It is believed that the law is kept dynamic, partly because new issues are constantly coming before the courts in the form of appeals from arbitral tribunals. Therefore, the Act 1996 seeks to ensure that appeals on legal issues of general importance may still come before the courts, it being thought that the continuing availability of appeals on questions of law serves a valuable purpose in many commercial contexts as a means of resolving and clarifying important points of principle¹⁶³.

In Kuwait, when an appeal is available, it will be a 'full appeal' on the merits of the award¹⁶⁴, in line with the supervisory role of the court over questions of fact and law. The justification of maximising court supervision of the merits of the dispute is to provide legal certainty concerning the merits of disputes. Thus, the court must ensure that the arbitral tribunal did not err in fact or law. This approach requires another trial of the dispute. On the other hand, England allows only a 'limited appeal' on questions of law. Which approach is more appropriate? The prevailing tendency is to eliminate or restrict rights of appeal, in line with the trend towards limiting judicial control over arbitral awards. The general philosophy of modern arbitration legislation is to limit the

¹⁵⁹ R. Holmes & M. O'Reilly, 'Appeals from Arbitral Award: Should 69 Be repealed?' (2003) 69(1) *Arbitration*, 1-9 at p 2.

¹⁶⁰ Mustill & Boyd, *op cit.*, pp. 585-586.

¹⁶¹ [1982] AC 724.

¹⁶² See V. Veeder QC, "England", *op. cit.*, p 60.

¹⁶³ DAC Report 1989 and see *Glencore Grain Ltd. v. Flacker Shipping Ltd* [2002] (C.A) 2 Lloyd's Rep. 487; discussed in R. Holmes & M. O'Reilly, *op. cit.*, p8, as for a good example of how the continuing availability of this jurisdiction serves to shape and clarify English commercial law

¹⁶⁴ This is exactly the same as the French treatment in Art. 1483 of C.C.P. 1981. However, there is no appeal in case of international arbitration.

control function of the court to the utmost. In line with this philosophy some would entirely remove the option of appeal – as under the Model Law, even if this thwarts the will of the parties.

However, if the legislature wished to support the principle of party autonomy and this would offer a right of appeal, should it be a full appeal or a limited appeal? It is recommended that there should be a limited appeal. This recommendation is based on the view that there should be no appeal on the substantive matters in the arbitration. When parties conclude an arbitration agreement, they agree to resolve their disputes via a decision of the arbitral tribunal, not the court,

“so that whether or not a court would reach the same conclusion was simply irrelevant. To substitute the decision of the court on the substantive issues would wholly to subvert the agreement the parties had made”¹⁶⁵.

Therefore, one of the disadvantages of allowing a full appeal is that the decision of the court may be substituted for the decision of the arbitral tribunal. The second possible disadvantage is that a full appeal may damage the privacy of arbitration, which might be one of the fundamental factors for choosing arbitration in the first place, and a full appeal- on fact and law- may make the merits of the disputes public, removing the veil of privacy. The third possible disadvantage is the possibility of misusing the right of appeal, as a party may use the appeal process as delaying tactic. The fourth ground against the full appeal is that it would involve the parties in ordinary court proceedings, which they tried to avoid when they concluded the arbitration agreement.

How then does one strike a balance between eliminating the right of appeal and allow a full appeal? It has been said that,

“it is not easy to strike a balance between the need for privacy, speed and above all, finality in the arbitral process and the wider public interest in some measure of judicial control, if only to ensure consistency of decisions and predictability of the operation of the law. Internationally, however, the balance has come down strongly in

¹⁶⁵ The DAC 1996 Report, para 284.

favour of finality, and against judicial review, except in very limited circumstances”¹⁶⁶.

The English Arbitration Act 1996 seeks to strike a balance between denying a right of appeal and allowing a full appeal, as s.69(1) allows judicial review of arbitral awards with regard only to questions of law¹⁶⁷, and then only if the parties do not agree otherwise. This strikes the balance substantially in favour of the finality of the arbitral award and the autonomy of the arbitral process¹⁶⁸. It establishes the finality of the arbitral awards with regard to questions of fact, Bingham J., stating “The finding of fact of an arbitrator are binding on the Court and the Court cannot go behind these findings so far as they are questions of fact”¹⁶⁹.

On the other hand, the court and not the arbitral tribunal has the final word on questions of law. This treatment gives the state court the jurisdiction to supervise the question of law that arise from the arbitral award and has the last word on this matter. It was said in *Geogas S.A. v. Trammo Gas Ltd*,

“The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong”¹⁷⁰.

The drafters of the 1996 Act believed that a restricted appeal only on questions of law, is more consistent with the fact that the parties have chosen to arbitrate rather litigate¹⁷¹. The supervisory role of the court ensures that the arbitral tribunal will not misapply the relevant law. It is thought that when the parties agreed on the applicable law, they expected that the arbitral tribunal would properly apply that law. Failure to do so frustrates the result contemplated by the parties and the arbitration agreement¹⁷². Similarly, Lord Saville states,

¹⁶⁶ Refern & Hunter, op. cit., para 9-36, p 434.

¹⁶⁷ See the Historical background of the appeal in question of law in article written by R. Holmes & M. O'Reilly, op. cit., at p2.

¹⁶⁸ *Ibid.* para 1.1.5, at p3.

¹⁶⁹ See, *Bulk Oil V Sun international* [1984] 1 Lloyd's Rep. 531-533, *Bremer v. Raijffisen* [1982] 1 Lloyd's Rep. 599-633, per Kerr L.J, “An arbitral tribunal has the final word on all questions of fact”.

¹⁷⁰ (CA) [1993] 1 Lloyd's Rep. 215 at p 228.

¹⁷¹ DAC 1996 Report, para 285.

¹⁷² *Ibid.*

“it seems to me that it is well arguable that this limited right of appeal can properly be described as supportive of the arbitral process. Where the parties have agreed that their dispute will be resolved in accordance with English law, and the tribunal then purports to reach an answer which is not in accordance with English law, it can be said with some force that unless the court corrects this error, the tribunal itself will have failed to carry out the bargain of the parties”¹⁷³.

Accordingly, it is submitted that a right of appeal on a point of law arising out of an award supports party autonomy. It may be said that the Act's approach both reinforces and detracts from the finality of the arbitral award. On the one hand, it endorses the finality of the award in matters of fact, while, on the other hand, giving the court jurisdiction to review questions of law arising out of the award. Yet the English approach to this matter is out of step with most other countries, as users of arbitration are faced with the prospect of judicial intervention in an area that is forbidden to judges elsewhere¹⁷⁴, especially in states which have adopted the Model Law. Still, even if this is true, the Act allows the parties to contract out of the powers of the court under s.69 at any time, while they may indeed agree that their dispute is to be determined by general considerations of justice and fairness rather than in accordance with the strict law¹⁷⁵. The DAC states,

“There appears to be no good reason to prevent parties from agreeing to an equity clause. However, it is to be noted that in agreeing that a dispute shall be resolved in this way, the parties are in effect excluding any right to appeal to the Court (there being no ‘question of law’ to appeal)”¹⁷⁶.

Yet it could be said that, even if this balance is reasonable, a limited appeal may be still be misused, delaying the proceedings and increasing costs¹⁷⁷. However, such fears may be met by providing further restrictions on the right of appeal, designed to control the relationship between the court and the arbitral award, upholding arbitral autonomy, the

¹⁷³ (1997) 63 *Arbitration* 104 at p 108.

¹⁷⁴ See M. Needham, *op. cit.*, p 26

¹⁷⁵ See DAC 1996 Report, para 222 and 223.

¹⁷⁶ *Ibid.*, para 222.

¹⁷⁷ See suggestion to repeal or reform sec. 69 of the Arbitration Act 1996 in R. Holmes & M. O'Reilly, *op. cit.*, p 1. See the opposite view, which argues for the continued validity of s. 69 of the Arbitration Act 1996, by H. Dundas, 'Appeals on Questions of Law: section 69 revitalised' (2003) 69 (3) *Arbitration* 172-183.

finality of the award and limited court intervention as far as is possible. Thus the Arbitration Act 1996 restricts the right of appeal by stipulating in s.69(2) that an appeal will not be brought except with the agreement of all the other parties to the proceedings, or with the leave of the court, while s.69(3) limits the role of the court in granting leave to appeal by requiring,

- “(a) that the determination of the question will substantially affect the rights of one or more of the parties,
- (b) that the question is one, which the tribunal was asked to determine,
- (c) that, on the basis of the findings of fact in the award -
- (i) the decision of the tribunal on the question is obviously wrong, or
- (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
- (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question”.

It can be seen then that an appeal can always be brought if both parties agree - thus supporting party autonomy. But, if only one party wishes to appeal, extensive filters restrict the power of the court to intervene. So a party who alleges error of law must specify the question of law to be determined and state the grounds on which support his view¹⁷⁸. The appeal should be made within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process¹⁷⁹. An appeal on question of law cannot be used as a basis for judicial intervention in other arbitral matters e.g. procedural questions. Furthermore, this appeal can be used only on question of English law. The court held in *Sanghi Polyesters Limited (India) v the International Investor KCFC (Kuwait)*¹⁸⁰, that a question of Islamic Law (Shari'a Law) is not a question of English law giving rise to an appeal under the Act¹⁸¹.

¹⁷⁸ See sec. 69(4) of the Arbitration Act 1996.

¹⁷⁹ See sec. 70 (3) of the Arbitration Act 1996.

¹⁸⁰ [2000] 1 Lloyd's Rep. 480. See also *Bank Of Credit and Commerce International S. A. v Ali et al.*, [2000] 1 W.L.R. 735

¹⁸¹ See sec. 82 (1) of the Arbitration Act 1996.

The court, of course, plays a significant role in ensuring that the appeal meets the statutory requirements and tests. Section 69 sets out four tests¹⁸², all of which have to be satisfied before permission to appeal is given. The statutory criteria mentioned above - which are intended to discourage all but the most serious of challenges when the award is "manifestly dysfunctional"¹⁸³ - limit the power of the court to grant leave to appeal, as leave to appeal will only be granted if the court is fully satisfied that all criteria are fulfilled. The statutory tests are as follows¹⁸⁴:

(i) Would determination of the question substantially affect the rights of one or more of the parties? The court should be satisfied that the determination of the point of law must have substantial effect. So when it is of the view that there may or may not be such a substantial effect, the court cannot grant leave to appeal.¹⁸⁵

(ii) Was the question one the arbitrator was asked to decide? This demands that the question of law concerned is one that the arbitral tribunal was asked to determine. This does not cover error of law that was not raised or debated in the arbitration¹⁸⁶. It follows, therefore, that the court cannot deal with a fresh point of law which had not be argued before the arbitral tribunal.¹⁸⁷

Was the arbitral tribunal's decision obviously wrong or open to serious doubt? The drafters of s.69 proposed to make an appeal available, in the ordinary case, only where the arbitrator's decision is obviously wrong. If the matter is one of general public importance¹⁸⁸, the test is less onerous, but the decision should still be open to serious doubt¹⁸⁹.

(iii) Was it just and proper in all the circumstances for the court to determine the question? This is a new test introduced by the 1996 Act and the DAC gives its reason for this additional criterion as follows:

¹⁸² These tests are not of course applicable to the consensual appeal.

¹⁸³ W. Park, 'The Interaction of Courts and Arbitrators in England', *op. cit.*, at p 62.

¹⁸⁴ *HOK Sport Limited (Formerly Lobb Partnership Limited) v. Aintree Racecourse C. Ltd.*, QBD (T&CC) 2002. The question of law in this case was "On what basis should the quantum of damages recoverable by Aintree as a consequence of Lobb's breaches of its duty to warn Aintree be determined?". See para 59 in this case.

¹⁸⁵ *Lobb v Aintree*, *op. cit.*, para 42.

¹⁸⁶ This test prevents what could happen under the previous law [sec.1 (4) of the Arbitration Act 1979] where some applications for leave were made and given on the ground that an examination of the reasons for the award revealed an error of law that had not been raised or debated in arbitration. See DAC Report 1996, para 286 (ii) and Russell, *op. cit.*, para 8-063 at p 430.

¹⁸⁷ *Lobb v Aintree*, *op. cit.*, para 43.

¹⁸⁸ For example the meaning of a provision in a standard printed form of charterparty applied to a factual situation widespread in market, such as the Gulf War 1990-91. See Veeder QC, England, *op. cit.*, p 60.

¹⁸⁹ See DAC 1996 Report, para 288.

“...we think it is desirable that this factor should be specifically addressed by the court when it is considering an application. It seems to us to be the basis on which the House of Lords acted as it did in *The Nema*... The court should be satisfied that justice dictates that there should be an appeal; and in considering what justice requires, the fact that the parties have agreed to arbitrate rather than litigate is an important and powerful factor”¹⁹⁰.

The court in *Lobb v Aintree* noted that the final requirement provided in s.69 is a new test and the Act suggests no guidance as to the circumstances in which this requirement should preclude leave to appeal being given where, otherwise, leave would be granted¹⁹¹. The court believed that it should take account of, and give weight to, the policy that ordinarily party autonomy should dictate that the arbitral tribunal should decide all questions in dispute, including questions of law. However, in circumstances where the arbitral tribunal is obviously wrong and an erroneous decision could substantially affect one of the parties, the Arbitration Act 1996 envisages that the affected party will be allowed leave to appeal. It follows that, in such circumstances, the responding party must show that it would suffer substantial injustice if permission to appeal was granted¹⁹².

The argument in favour of allowing an appeal in order to guard errors of law is supportable¹⁹³, as long as it does not conflict with party autonomy. The right of the court to grant an appeal should be restricted along the lines laid down by s.69 to ensure that the right is not misused. It is noteworthy that when the court is going to examine an application for leave to appeal, it must consider additionally the general principles of the Arbitration Act party autonomy, limiting court involvement in arbitration, the finality of

¹⁹⁰ *Ibidi.*, para 290.

¹⁹¹ *Lobb v Aintree*, *op. cit.*, para 55.

¹⁹² *Ibid.*, para 56. See also *Icon Navigation Corporation v Sinochem International Petroleum (Bahamas) Co Ltd*, where a successful party to an arbitration wished to oppose an appeal by the other side on the basis that there had been an irregularity in the arbitration that would cause them injustice if the appeal succeeded, they should do so when leave to appeal was sought. By Moore-Bick J, [2002] it is available at <http://www.richardsbutler.com/news/list/cpr_newletter_dec_02.pdf> [Last visited 31 July 2003].

¹⁹³ It is fair enough to say that “it meets the interest of legal certainty that there should be some uniformity in the decisions of the arbitrators in order that other traders might be sufficiently certain where they stood as to be able to close their transactions without recourse to arbitration, and it might be proper exercise of the Judge's discretion to give leave to appeal in order to express a conclusion as to the frustrating effect of the event that afforded guidance binding on the arbitrators in other arbitrations arising out of the same event”. See *B.T.P. Tioxide Ltd. v. Pioneer Shipping Ltd. and Armada Marine S.A.*, (The “Nema”) HL, [1981] 2 Lloyd's Rep. 239 at p 241- para (6). See also Redfern & Hunter, *op. cit.*, para 9-35 at 434.

the arbitral award. It is thus suggested that the English treatment of the question of appeals on errors of law, even if contrary to the modern tendency to deny the possibility of appeals on this ground, provides a balanced approach on this issue.

Yet even if England strikes a balance on this issue, which is appropriate for its legal system, is such an approach necessarily suitable for any other state, and in particular Kuwait? There is no doubt that the English approach was largely driven by the need to maintain the dynamism of English commercial law. English law is one of the most popular systems on the world in terms of being chosen to govern commercial contracts. This is because it is highly detailed, providing answers to most questions which arise in modern commercial practice, while at the same time is continually being refined and developed. As many of the areas where English law dominates feature standard form contracts containing arbitration clauses, e.g. maritime law, those areas are largely dependent for their continuing development on new issues arising in practice coming before the courts in the form of appeals from arbitral awards.¹⁹⁴ The English feared that if that route were closed off, English law would lose its dynamism and hence its attraction. Thus the Act seeks to ensure that questions of law of general public importance may be brought before the court, even if one party objects to this.

Is Kuwait in the same position? It might be argued that if Kuwait aspires to its commercial law becoming as popular as that of England in international commercial contracts, there should be some encouragement to enhance its development, and so Kuwait might follow the English lead in this matter. Yet if it is thought that such an aspiration is wholly unrealistic, it is surely preferable to allow no appeal to the court on the grounds of error of law. This would not only reflect the attitude of most states, but also support the tendency towards reducing the instances of court review, as well as enhancing the finality of arbitration¹⁹⁵. This approach moreover, is more compatible with party autonomy, as when the parties conclude an arbitration agreement, they agree to abide by the arbitral award made by the chosen tribunal, not by the court's decision.

¹⁹⁴ The many parties from the world wide who include London arbitration clauses in their commercial transactions or who refer their disputes to the Commercial Court is the best possible evidence of this event. See B. Davenport QC, 'The UNCITRAL Model Law on International Commercial Arbitration: The Users' Choice' (1988) 4 (1) *Arb. Int.* 69-74.

¹⁹⁵ It was submitted "there is a worldwide tendency to limit the extent of judicial intervention in respect of arbitration, both during its course and after the making of an award, with a view to preserving the integrity of the arbitral process and the finality of the arbitral award". See J. Murray, 'Letting Arbitrators Get on With The Job' (1997) 8 *S.L.T.* 64-66 at p 65.

Therefore the new act should provide a single exclusive method of judicial recourse against the award. If the parties, fear the possibility of error of law, they may agree on an appeal to a second arbitral tribunal. Modern arbitration legislation should be not built on the presumption that the parties assume that the arbitral tribunal might err in law. It should support arbitration and arbitrators by trusting in the arbitrator's ability to apply the law correctly.

(c) Conclusion

It is recommended that a sole means of recourse against an award be created, so that the right to a full appeal should be abolished. Kuwait should consider carefully whether there should be some sort of appeal against arbitral awards on the basis of error of law. Certainly, Kuwait is not subject to the same sort of pressures that shaped the English Act. Yet should the new Arbitration Act allow a limited appeal? Is there any significant need to justify overriding the strong tendency towards immunising the arbitral award from challenge on basis of error of law¹⁹⁶? Does Kuwait need to provide for a greater degree of judicial supervision than other countries? The present answer should be negative. Kuwait should fall in with the world-wide tendency to limit the extent of judicial intervention in respect of arbitration with a view to safeguarding the integrity of the arbitral process and finality of the arbitral award¹⁹⁷.

4.3 The Content of Judicial Supervision

(a) Introduction

Here we are looking at grounds on which the supervisory role of the court may be triggered. The aim of judicial supervision of the arbitral award is to ensure that it deserves judicial support, and it might be said that an award deserves such court support when there is no ground for challenging it. Most arbitration legislation provides a list of the grounds upon which the arbitral award may be challenged. Such a list is often

¹⁹⁶ See Prof F. Davidson, 'The New Arbitration Act', *op. cit.*, at p122. M. Kerr states "Rightly or wrongly- and I think rightly- there is no question of going back to the system which made the courts the ultimate over arbitrations on virtually all issues of law". See his article 'Arbitration and the Courts', *op. cit.*, at p 5.

¹⁹⁷ It is noteworthy that adopting the limited appeal might not enhance the policy of state of Kuwait to be an attractive venue for arbitration. Since, there are some allegations that because of the right of appeal more and more arbitration clauses in international contracts were submitting the disputes for settlements to arbitration under the Rules of Arbitration of International Chamber of Commerce (ICC) in Paris. See Sir P. Neill QC, 'New Zealand and UNCITRAL Model Law' (1990) 6 (3) *Arb. Int.* 271-280

exclusive. This step of providing an exclusive list of limited grounds on which the arbitral award may be challenged may be considered as a further measure of development and improvement of the arbitral system¹⁹⁸. The purpose of such an approach is to limit the judicial review of the arbitral award, while educating the arbitrating parties and the arbitrators about the grounds of challenge, offering an opportunity to avoid these grounds if they want judicial support. The following paragraphs shall focus on the content of judicial supervision over the arbitral award, to determine the grounds on which the court might properly intervene. It is submitted that the court supervision should ensure firstly that the award is not in conflict with public policy, secondly, that it meets the required form, and thirdly, that it does not exceed the jurisdiction of the arbitral tribunal.

(b) Arbitral Award and Public Policy

Public policy is a matter, which usually has a significant impact on arbitration, as its violation destroys the arbitral operation and the consequences thereof. Public policy is seen as an acknowledgement of the right of the state and its judicial authority to exercise ultimate control over the arbitral process. The role of the court in this matter is to safeguard public policy. It cannot allow an arbitral award to be effective, if it breaches the public policy of that state. Although a legal system may recognise arbitration as a method of adjudication, respecting the principle of party autonomy, there must be limitations. Public policy is the most important of these limitations. Infringement of public policy will certainly be a ground for challenging an arbitral award and a bar to recognition and enforcement of that award. This is often made explicit in legislation¹⁹⁹. For instance, Article 34(2)(b)(ii) of the Model law states that the award may be set aside if the court finds that 'the award is in conflict with the public policy of this state', which conflict with public policy is also a ground for challenge under s.68(1)(g) of the Arbitration Act 1996, and a ground for resisting enforcement under s.81(1)(c).

However, the remaining question is what is meant by the term "public policy"? It is understandable that there is no statutory definition of the term, as public policy by its nature is relative and mutable²⁰⁰. The difficulties of proffering a comprehensive definition of public policy are thus obvious. However that does not mean that no

¹⁹⁸ See Explanatory Note on the Model Law, para 42.

¹⁹⁹ This cannot be seen not only in national legislation, but may be seen also in number of international conventions, such as New York Convention 1958.

meaning can be given to this vital concept. It is clear that public policy must reflect the fundamental economic, legal, moral, political, religious and social standards of a given State or extra-national community (e.g. international obligations by treaties or by United Nation Security Council Resolution)²⁰¹.

The concept of public policy in civilian systems is wider than in common law systems, as it covers not only substantive categories of public policy such as fundamental principles of law, morality, and matters of national interest, but also embraces procedural categories, such as fraud, corruption, natural justice and due process. The question whether the term "public policy" used in the Model Law embraced the civilian concept arose in the discussion of Article 34. The term 'public policy' was seen by a number of delegates as much too vague²⁰², and there was concern that it might be interpreted in common law jurisdictions as not covering principles of procedural justice, while in civilian, inspired by the French concept of "*ordre public*", such principles would be regarded as included²⁰³. This divergence of interpretation led to the concern that the list of the grounds in article 34(2) did not cover all serious instances of procedural injustice where annulment was justified, for example, the award being obtained by the corruption of the arbitrator or the witnesses of the losing party²⁰⁴. The Commission ultimately decided that the reference to "public policy" should be retained, but emphasised that it should be understood in its civilian sense. The Commission Report²⁰⁵ noted that it was understood that the term 'public policy' covered fundamental principles of law and justice in substantive as well as procedural respects, and would embrace instances such as corruption, bribery or fraud and similar serious cases²⁰⁶. It added that the wording "the award is in conflict with the public policy of this state" had to be interpreted as including instances or events relating to the manner in which the arbitral award was arrived at²⁰⁷.

A number of countries were still not happy with the concept of public policy as adopted by the Model Law. Therefore, when they adopted the Model Law, they added procedural

²⁰⁰ Chitty on Contracts, Vol. 1, twenty-eight Edition, para17-004 at p837.

²⁰¹ See the Interim Report on the Public Policy as a Bar to Enforcement of International Arbitral Awards presented in the 69th conference of International Law Association, held in London, 25-29 July 2000, p5.

²⁰² See, A/CN.9/SR.318, para 34-40.

²⁰³ See A/40/17, par 296.

²⁰⁴ See *ibidi*, para 277.

²⁰⁵ *Ibid*, para 297.

²⁰⁶ *Ibidi*, para 297

²⁰⁷ *ibidi*, para 297.

categories of public policy, in order to avoid any possible doubt about the scope of the public policy. For example, Australia, Scotland, New Zealand, India and Zimbabwe, have enacted modified versions of articles 34 and 36 of the Model Law, providing that “for avoidance of doubt” and “without limiting the generality” of articles 34 and 36, an award is contrary to public policy if: “the making of the award was induced or affected by fraud or corruption”. England did not adopt the Model Law, but made this distinction clearly in s.68(2)(g) of the Arbitration Act 1996, which provides that the award may be set aside if obtained by fraud, or procured in a way contrary to public policy.

Generally, public policy (substantive and procedural) may obviously cover a wide number of matters, which may potentially affect the arbitral award. Substantive examples include breach of good faith, abuse of rights; activities that are *contra bonos mores* (e.g. piracy or terrorism, smuggling or drug trafficking) Procedural examples include breach of natural justice or due process. Therefore, when there is a violation of the fundamental principles of procedure, such as not providing a fair trial or not treating the parties equally, this may open the door for the arbitral award to be challenged²⁰⁸. Another example would be when the award is induced or affected by fraud, bribery or corruption.. So when a court is satisfied acts of deceit have been perpetrated on the arbitral tribunal (e.g. falsified certificates of ownership of the property claimed or perjured evidence) or on the other party (e.g. if the tribunal was party to the fraud)²⁰⁹, it may set aside the award or refuse to recognise or enforce it. The court should have the same attitude when it is satisfied that any undue pecuniary or other advantage was offered, promised or given, whether directly or indirectly, to the arbitral tribunal or any witness. In other words, it may deny force to the arbitral award when there is evidence of fraud, bribery or corruption. If an award is procured by illegal means, there is a breach of public policy.

The concept of public policy, as it is described by an English judge as “... a very unruly horse, and when once you get astride it you never know where it will carry you”²¹⁰. [Emphasis added]. The approach of the judiciary to public policy as a ground for challenging the arbitral awards is a vital matter. The court should not equate the public policy with national policy (in the diplomatic or foreign policy). For instance, the U.S. court of Appeal, in *Parsons & Whittemore v Societe General de L’Industrie*²¹¹ held that

²⁰⁸ See for example Art 34 (2)(a)(iv) of the Model Law.

²⁰⁹ See Russell, *op.cit.*, para 8-045, at p 421.

²¹⁰ *Richardson v Mellish*, [1824] All ER Rep. 258.

²¹¹ 508 F.2d 969 (2nd Cir. 1974).

the court would not refuse to enforce the arbitral award in favour of an Egyptian party simply due to the tensions at that time between U.S. and Egypt. The same attitude was taken in *National Oil Corp. -v- Libyan Sun Oil Corp*²¹², where the court rejected a challenge to an award at the enforcement stage on the ground that it was in favour of Libya - "a state known to sponsor international terrorism". The U.S court noted that the United States still recognised the government of Libya, had not declared war on it and had specifically given it permission to bring an action to confirm the award. However, one may wonder whether such outcomes might be different today (the war against terror)²¹³. Nevertheless, it is impossible to determine the attitude of courts to public policy by statutory prescription, unless an attempt is finally made to define the concept more exactly. In light of the discussion above, that may prove an impossible task.

Recently, however, there has been a tendency to narrow the public policy as a ground for challenging an award²¹⁴. Systems sometimes classify the concept of public policy into international and domestic in order to narrow the scope of public policy as a ground for challenging awards which are international in the sense that although made in that state, the parties are not nationals of that state. International public policy tends to be construed as connoting only the infringement of the most fundamental notions of morality and justice. This approach asks the court to distinguish between domestic and international public policy²¹⁵, in that the policy considerations that apply in domestic relations or transactions do not necessary apply to international relations or transactions. It is believed that this approach promotes greater certainty and uniformity in that the impact of public policy ground of challenge, which largely depends on the domestic law of the place of enforcement, is thereby lessened.

²¹² 733 F. Supp. 800 at 819 (Del., 1990).

²¹³ See Treasa Dunworth, 'The Use of Arbitration to Enforce International Public Policy Setting Aside or Refusing Enforcement of Awards on the Public Policy Ground' paper presented in AMINZ Conference, Auckland, 21-22 Feb. 2003.

²¹⁴ The International Commercial Arbitration Committee of the International Law Association conducted a six years study into the application of public policy by enforcement courts. The Committee concluded its work last year. Notwithstanding the very different legal and cultural traditions of State courts, public policy is rarely successful in preventing enforcement of international awards. Nevertheless, the Committee concluded that greater harmonisation of approach would lead to greater consistency and predictability, which would dissuade unmeritorious challenges to awards. The ILA Committee made a number of recommendations, which were adopted at the ILA's 70th Conference in New Delhi, in April 2002. The Committee's Interim Report is available at www.ila-hq.org.

²¹⁵ "International public policy" (rather than, simply, "public policy") is increasingly referred to in legislation and court judgments. See International Law Association, Committee on International Commercial Arbitration, Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Award, London Conference, 2000, 1-36 at p 5. Examples for arbitration legislation are France, Portugal Algeria and Lebanon.

Although neither the Model Law nor the 1996 Act refers to international public policy, the modern trend is towards formal adoption of the concept of international public policy in national legislation.²¹⁶ So the French Code of Civil Procedure (1981) Article 1498, which deals with an award made in France in an international arbitration²¹⁷, states that an arbitral award shall be recognised and enforced in France, if such recognition or enforcement is not manifestly contrary to international public policy. Furthermore, the concept of international public policy is also as a ground for setting aside an award made in France in international arbitration²¹⁸. Accordingly, when the award is issued in France in an international arbitration, the standard of judicial review will be the standard of international public policy, while Article 1484 simply refers to (domestic) public policy in case of domestic arbitration. The purpose of this classification is to persuade the French judiciary to operate a more liberal concept of public policy in international arbitration.

The concept of public policy is obviously nebulous and fluid, differing in its content from country to country and over time.²¹⁹ It may be influenced by the changing moods of the society in question or political, economic and social calculations. Nevertheless, it is vital element in the arbitral system, as it is invariably a constraint upon the operation of the arbitral process. Even if no definitive content can be supplied for the concept, Kuwait should take note of the tendency towards narrowing the interpretation of public policy in international arbitration, so as to respect the finality of arbitral awards save where fundamental notions of morality and justice are violated. Thus the new act should explicitly recognise the existence of two levels of public policy, the national level concerned with purely domestic considerations, and the international level which is less restrictive in its approach²²⁰.

²¹⁶ See A. Berg, 'Distinction Domestic - International Public Policy' (1996) XXI Yearbook at p 502.

²¹⁷ Or with recognition and enforcement of an award rendered abroad.

²¹⁸ See Art. 1502, 1504 and 1505.

²¹⁹ This is known as principle of the evolving character of public policy. See J. Savage & E. Gaillard, *op. cit.*, para 1650.

²²⁰ The growing recognition of nation of international public policy is notable. This growing is not only in relation to enforcement of foreign award, but also in relation to challenge an international award made in international arbitration. Accordingly one may suggest being in the same line of the movement. See P. Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA Congress Series No.3, Kluwer, New York 1986. See also International Law Association, Committee on International Commercial Arbitration, Interim Report on Public Policy as a Bar to Enforcement of International arbitral Award, London Conference, 2000 and International Law Association, Committee on International

(c) Form of the Arbitral Award

1) Introduction

This is one of the elements that may be brought under the supervision of the court, since failure to comply with agreed or statutory requirements may open the door to challenge the arbitral award. Thus Article 183 of the Kuwaiti CCPL 1980 lays down statutory requirements for the form of the award, and failure to justify setting the award aside, as this defect in form renders it a void nullity²²¹. Equally, s.68(2)(h) of the English Arbitration Act 1996 states that failure to comply with the requirements as to the form of the award is regarded as a serious irregularity justifying a challenge. Also the Model Law allows a defective award to be challenged under Article 34(2)(a)(iv), on the ground that it has contravened a mandatory requirement²²². Accordingly, it is important that the award shall meet the relevant statutory requirements in order to avoid the possibility of challenge.

The next paragraphs shall consider the statutory requirements as to the form of the award as provided in CCPL 1980, the Model Law and the Arbitration Act 1996, to indicate the aspects which the court may examine in relation to the form of the arbitral award.

2) The Matter of Writing

This is one of the statutory requirements for the form of an arbitral award²²³. The requirement of written form facilitates both enforcement and challenge²²⁴, while promoting certainty²²⁵. Yet England recognises an "oral award", if the parties have so agreed. While this approach serves the principle of party autonomy, it may create fundamental problems such as how to prove the award or to determine exactly its

Commercial Arbitration, Final Report on Public Policy as a Bar to Enforcement of International arbitral Award, New Delhi Conference, 2002.

²²¹ See Art. 186 (d), this was confirmed in Attack no. 37,39/Comm. 1975 and Attack no 32,33/1983.

²²² Even if the Model Law does not contain particular legal consequences for the defective award, it is submitted that either the award does not qualify to be treated as an award at all, or else the arbitral procedure has contravened a mandatory provision of the provision of Model Law in terms of Art. 34(a)(iv). Art. 31 which establishes the formal requirements for all awards issued under the Model Law is considered mandatory one (except Art. 31(2) which allows the parties to derogate it). See Prof. F. Davidson, *Arbitration*, op. cit., para 17-16 at p 334; see also to the same author, *International Commercial arbitration*, para 10-43 at p 239.

²²³ See, Art. 31(1) of the Model Law, sec. 52 (3) of the Arbitration Act 1996 and Art. 183 of CCPL 1980.

²²⁴ See Russell, para 6-047 at 266. Since many legal systems require the award to be deposited with either the application to enforcement or to challenge the award. See for example Art. 185 of CCPL 1980.

²²⁵ A/CN. 9/264, para 1.

“operative part”. Thus, in the interests of certainty the award must be required to be in writing.

3) The Matter of Reasons

The question whether the arbitral award should contain the reasons upon which it is based, is controversial. The parties may not be in favour of a reasoned award, and the practice of stating the reasons upon which the award is based varies from one system to another²²⁶. The drafters of the Model Law thought that the solution which would command most international acceptance would be to require such statement of reasons unless the parties agreed otherwise²²⁷. This approach suggests that the question of a reasoned award is not a matter of public policy. However, other systems require reasons without allowing the parties to contract out of this requirement. Kuwait is such a system, requiring a specific form of award, and stating that failure to comply with this statutory form may nullify the award. One of the requirements of form is that the award contains the reasons upon which it is based. The philosophy behind this approach is that the required form is mandatory, as in the case of a court judgement. This is exactly the same as the French attitude, as embodied in Article 1471 9(2) of CCP 1981. Article 1480 makes it clear that this provision is mandatory, and that failure to comply with this statutory requirement may justify a challenge²²⁸. The rationale behind this requirement is that the parties must be able to understand how the arbitral tribunal arrived at its conclusions and thus the award. Moreover, it also enables the court to exercise adequately its supervisory role over the arbitral award, as a statement of the reasons upon which the award was based would significantly help judicial review²²⁹, e.g. in considering a challenge on the basis of error of law²³⁰.

So failure to comply with requirement to provide reasons should indeed constitute a ground of challenge. Yet the requirement to give reasons does not mean that the award should always resemble a court judgment. It is usually sufficient to explain why the

²²⁶ *Ibid.*, para 3.

²²⁷ A/CN.9/207, para 87.

²²⁸ However, in international arbitration, an award without reasons may be recognised and supported on ground of international public policy. See, Y. Derains, *op. cit.*, 20. A. El-Kosheri, *op. cit.*, pp. 34-35.

²²⁹ See Ontario Court of Justice, General Division, *Schreter v Gasmac Inc.*, [1992] B.L.R. (2d) 71 cited in H. Alvarez *et al.*, p244.

²³⁰ R. Merkin, *op. cit.*, para 16.42 at Service Issue No 20:26 March 1998. For example, the court under Sec. 70(4) could order further and better reasons be given when its view the given reason were inadequate to allow the state court to determine whether an error of law was contained in the award for the purpose of hearing an appeal on question of law.

arbitral tribunal reached its conclusion. Donaldson L.J. commented in *Bremer Handelegsellschaft mbH v Westzucker GmbH*,

“All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what their decision is. Where [an] .. award differs from a judgement is in the fact that the arbitrators will not be expected to analyse the law and the authorities. It will be quite sufficient that they should explain how they reached their conclusion”²³¹.

Equally, the Court of Cassation in Kuwait has held that an arbitral award is not measured according to the same criteria as a judgement. An award is not defective, if it contains reasons in general or comprehensive form²³².

By contrast, both the Model Law and the Arbitration Act 1996 authorise the parties to reach such agreement on this requirement, as they see fit. Both approaches realise the importance of the requirement for that those chosen to act judicially and charged with making a binding decision affecting the rights and the obligations of others to give the reasons upon which their decision is based. Yet as to whether this requirement should be mandatory or non-mandatory, one philosophy supports party autonomy, as well as recognising that not requiring reasons to be stated has certain advantages - the award could be rendered speedily, would be difficult to challenge, and could be appropriate for certain types of arbitration, for example quality arbitration²³³. The other approach treats the award as equivalent to a decision of the court, and sees it as a matter of public policy that it should be rendered in the same form.

It is suggested that allowing such freedom may cause problems, especially in cases of the arbitrator's death or inability to proceed. Suppose the parties agreed that the award be unreasoned. One of the parties wishes to enforce the award, and the other party seeks to resist that. The reasons for the award are needed by the latter party to support his challenge (e.g. error of law). Unfortunately, the arbitrator cannot provide reasons or is dead. What is the solution? It is surely preferable to have a reasoned award to avoid any such uncertainty. The advantages of making reasons mandatory outweigh the

²³¹ [1981] 2 Lloyd's Rep. 130 at 132.

²³² See Attack no. 19/1974 Comm. 2/6/1976 and Attack no. 46/1983 Comm. 22/2/1984.

²³³ A/CN.9/216, para 80.

disadvantages, as such a requirement would have a beneficial influence on the decision of the arbitral tribunal²³⁴(to improve the quality of the arbitral decisions)²³⁵, and promote the certainty of the award. It is therefore recommended that a reasoned award be required.

4) The Matter of Signature

It may be required that the arbitral award be signed. This may have additional significance, as in certain systems in the date of signature *prima facie* determines the date on which the award is made. This obviously helps determine such issues as whether the award was made within agreed time limits, or in calculating the time limit for a challenge. Thus it is recommended that an award be required to be signed and dated. However, one need not require the signature of all the arbitrators, as such a requirement is open to practical abuse, and may cause improper delay. A dissenting arbitrator who is unwilling to sign should not be allowed to create a procedural obstacle for rendering the award. Thus it is recommended that it be required that only majority of the arbitrators should have to sign²³⁶. Yet it should be required that if a minority of arbitrators is unwilling to sign, this should be mentioned in the award by the other arbitrators. This is the rule in Kuwait (under Article 183), and also in France²³⁷. The Model Law goes further by requiring that the reasons for any omitted signature be stated²³⁸. On the other hand, the Arbitration Act 1996 has no requirement at all in this regard, taking the view that dissenting arbitrators might not wish to be identified as such²³⁹, although s.52(3) requires that all arbitrators should be given the opportunity to sign the award, failing which it can presumably be challenged under s.68²⁴⁰.

²³⁴ *Ibid.*

²³⁵ Holtzmann & Neuhaus, *op. cit.*, at p 838

²³⁶ See Art. 31 (1) of the Model Law, sec. 52(3) of Arbitration Act 1996 and Art. 183 of CCPL 1980.

²³⁷ See Art. 1473 of CCP1982.

²³⁸ See Art. 31 (1) of the Model Law.

²³⁹ DAC Report 1996, para 251.

²⁴⁰ R. Merkin, *op. cit.*, para 16.18, Service Issue No 20:26 March 1998. Merkin refers the possible responsibility of the arbitrator for his refusal in case of the arbitration agreement requires all of the arbitrators to sign the award. He cited *Cargill International SA v Sociedad Iberica de Molturacion SA* (1997) the Times, 26 December.

5) The Matter of Place and Date

The place where the arbitral award is made is an element that a court may examine, as it is significant in determining the question whether the award is domestic or foreign²⁴¹. According to Kuwaiti law, the place of signature is the place of rendering the award²⁴², which may be different from the seat of arbitration. So an arbitral award signed in Kuwait is a Kuwaiti (domestic) award. By contrast, Article 31 (3) of the Model Law creates an irrebuttable presumption²⁴³ that the arbitral award is made at the place of arbitration as stated in the award. So, it does not matter where an arbitrator happens to be when the award is signed. Accordingly, if the place of arbitration as determined by the parties or by the tribunal is Scotland, but for some reason the tribunal sits in France where indeed the award is signed, the award still be considered as made in Scotland. Meanwhile, s.52(5) of The Arbitration Act 1996 states, "The award shall state the seat of arbitration and the date when the award is made". Further s. 53 automatically determines the place where award is treated as made²⁴⁴. The award will be deemed as made in England where it the seat of arbitration. This is regardless of where the award was signed²⁴⁵.

The requirement that the award should state the date when it was made is also found in the CCPL 1980 and the Model Law. It is a useful requirement as the date of the award will be of assistance in calculating interest due on the award, and in determining such issues such as compliance with agreed time limits for making the award, and statutory time limits for appeals, challenges and the seeking of corrections, interpretations and additional awards.

²⁴¹ The identity of the place at which the award was made would determine the law under which the award could be challenged and under which the award would be judged for certain purposes in enforcement proceedings. As cited in A/CN.9/216, para 79 "It was noted that the identity of the place of the award might be relevant in enforcement proceedings under the 1958 New York Convention (e.g. Art. V, 1(e)-award set aside by a competent authority of the country in which the award was made".

²⁴² Art. 182 of CCPL 1980.

²⁴³ A/CN.9/264, para 4.

²⁴⁴ This section derives from the Model Law, Art.31 (3). It provides "Unless otherwise agreed by the parties, where the seat of the arbitration is in England and Wales or Northern Ireland, any award in the proceedings shall be treated as made there, regardless of where it was signed, despatched or delivered to any of the parties".

²⁴⁵ However the potential difficult of this provision is when the award states that it is signed in place Kuwait, though the seat was England. In such case, each of Kuwaiti court and English court could possibly have a jurisdiction. This might open the consideration of the value of this treatment from practical angle. It is submitted in case where the award states both the seat and the place where the award is made- if they differ-, although it may be hoped that the foreign courts constructing s.53 will understand its effect as being that the award signed, for example, as 'made in Milau' should be taken as have been 'made in England' where there is also a statement in the award that the place of arbitration was London. See, B. Harris *et al.*, para [52C] at p250.

6) Certainty and Ambiguity

An award may usually be challenged when it is uncertain or ambiguous as to its effect. Thus the CCPL 1980 states that an award may be challenged where its text is contradictory, as such this contradiction makes it difficult to discern its effect. The Arbitration Act 1996 considers the uncertainty or ambiguity as to the effect of the award to be a serious irregularity that justifies challenging the award²⁴⁶. This ground of challenge may derive from the requirement that the award must be certain. It has been said

“An award must be certain in the sense that the tribunal’s decision on the matters dealt with must be clear from its face, as must the nature and extent of the duties it imposes on the parties. If the effect of the award is uncertain or ambiguous, it will be susceptible to challenge”²⁴⁷.

Therefore, it is required that the award must be clear exactly as to what is required to be done and by whom. For example when the award directs the payment of money, the award must be clear about the sum of the money that to be paid, by whom and to whom²⁴⁸.

(d) Arbitral Award and Substantive Jurisdiction of the Arbitral Tribunal

1) Introduction

This is another crucial element of judicial supervision of the arbitral award. The court must ensure, first, that the arbitral tribunal has jurisdiction, and secondly, that it does not exceed the scope of that jurisdiction. As the tribunal derives its jurisdiction exclusively from the arbitration agreement, the court must ensure it remains within the bounds of that agreement. This type of supervision thus indirectly supports party autonomy.

2) Lack of Jurisdiction

Jurisdictional issues are often linked to the validity of the arbitration agreement, as given that that agreement is the sole source of the tribunal’s jurisdiction, its invalidity makes it

²⁴⁶ See sec. 68 (2)(f).

²⁴⁷ See, Russell, *op. cit.*, para 6-093 at p 284.

possible for a party to say that tribunal has no jurisdiction²⁴⁹. The theory is that there can be no valid arbitration without a valid arbitration agreement. We have seen that an arbitral award may be challenged or refused enforcement on the ground that the arbitral tribunal lacks jurisdiction because of the invalidity of the arbitration agreement (e.g. illegality of the main contract). Yet we have also seen that such an allegation does not prevent the arbitral tribunal ruling on its own jurisdiction, by virtue of the principle of competence-competence. Of course the court has the last word in matters of jurisdiction, and if it is satisfied that the arbitral tribunal does not have jurisdiction, it will not support the award.

The ruling of the arbitral tribunal on its own jurisdiction is subject to the supervision of the court. Thus, s.31(4) of Arbitration Act 1996 provides that when one of the arbitrating parties challenges the jurisdiction of the arbitral tribunal, it may rule on its own jurisdiction either in a jurisdictional award or as part of the award on the merits of the dispute. In either case such determination must surely be subject to the supervision of the court. So s.67 states

- “(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court -
- (a) Challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
 - (b) For an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.
- (3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order -
- (a) Confirm the award, (b) vary the award, or (c) set aside the award in whole or in part”.

By contrast, the Model Law does not provide for court control over the decision of the arbitral tribunal on its own jurisdiction, except where it decides that it has jurisdiction. However, if it decides that it has no jurisdiction; the court has no right to review such a

²⁴⁸ *Ibid.*, para 6-094 at p 284.

²⁴⁹ As submitted that objections to the tribunal's jurisdiction go to the very foundation of arbitration. See A/CN.9/264, para 11.

decision²⁵⁰. Such a ruling would presumably lead the parties to litigate, and thus creates the possibility that the court will decide that the issue is covered by a valid arbitration clause, so that the tribunal does have jurisdiction. This possibility persuaded Scotland in adopting the Model Law to amend Article 16(3), so that a party may appeal to the court against the tribunal's ruling that it has no jurisdiction²⁵¹.

3) Exceeding Jurisdiction

If the arbitral tribunal has jurisdiction, but exceeds it, the court may again be involved in the arbitration. Its intervention may be triggered upon an allegation by the unsuccessful party that the arbitral tribunal exceeded its substantive jurisdiction, perhaps because the award covers matters beyond the scope of that jurisdiction, or confers a remedy that the parties did not authorise. The award is then susceptible to challenge. So Article 34(2)(a)(iii) of the Model Law provides that it is a ground for setting aside the award that

“the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration”.

Moreover, s.67 of the Arbitration Act 1996 declares that a party may challenge an award on the basis that the arbitral tribunal lacks jurisdiction, while s.68(2)(b) indicates that if the tribunal exceeds its powers, this is a serious irregularity justifying a challenge²⁵². Kuwait also stated that it is a ground for setting aside the award that the arbitral tribunal has acted outside the scope of its jurisdiction²⁵³. Such provisions indirectly place a duty on the arbitral tribunal to act within its substantive jurisdiction and not exceed its powers. It is the tribunal's responsibility to comply with its mandate²⁵⁴. In certain systems there is a powerful presumption that the arbitral tribunal acted within its powers, which a challenging party has to overcome, as is seen in the decision of Ontario Superior Court

²⁵⁰ The idea behind making the ruling by the tribunal that it has no jurisdiction is final was that it is inappropriate to compel arbitrators who had made such decision to continue the proceedings. See A/40/17, para 163.

²⁵¹ The view of the Dervaird Committee that if the parties were informed by the tribunal that it lacked jurisdiction and thereafter resort to litigation, either party could petition the court under Art. 8 to refer the matter to arbitration, which it would be bound to do so if satisfied that the arbitral tribunal has jurisdiction. The Dervaird Committee opined that this is a very roundabout way. See Prof. F. Davidson, *Arbitration*, para 11.19 at p 200-201.

²⁵² Sec. 68(2)(b) of 1996 Act.

²⁵³ Art. 186 (a) of CCPL 1980.

²⁵⁴ The French CCP codified this view in Art. 1484 (2)(3), which provides that if the arbitrator decided in manner incompatible with the mission conferred upon him”.

of Justice in *Corporacion Transnacional de Inversiones v. STET International* (1999)²⁵⁵. This illustrates a positive attitude towards the award, and minimises the possibility of tactical challenges, unless there is strong evidence to rebut that “powerful presumption” and justify the court’s involvement.

4) Omission of Matters in the Award

The arbitral tribunal is expected to deal with all issues referred to it. However, suppose it fails to do so? Is this a ground of challenge? Under the Model Law, Article 33(3) states

“Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days”.

Thus the making of an additional award would resolve such an omission. It will be noted, nonetheless, that the Model Law imposes a time limit for seeking such an additional award, while the provision is not mandatory. What then happens if that time limit is allowed to elapse, or the parties contract out of this right? The Model Law does not provide a clear answer to these questions. It might be suggested that the omission of issues or claims raised in by the submission might not be regarded as a ground of challenge of the arbitral award, as it is not mentioned in the exclusive list of grounds laid down by Article 34(2). Accordingly, an interested party might seek to enforce the arbitration agreement so as to resolve by arbitration the issues not covered by the arbitral award. The alternative view is that failure of the arbitral tribunal to deal with all issues referred to it in the arbitral award is a ground of challenge on the basis that the arbitral proceedings were not conducted in accordance with the agreement of the parties²⁵⁶. This approach attempts to widen the concept of the arbitral proceedings to cover the arbitral award taking the view that if the arbitral tribunal does not comply with its mandate, the arbitral procedure is not conducted as agreed by the parties²⁵⁷. Each of these arguments

²⁵⁵ See H. Alvarez *et al.*, *op. cit.*, pp. 212-218.

²⁵⁶ See Art. 34 (2)(a)(iv) of the Model Law. See also P. Sanders, *Int'l Enzycl.Comp.L.*, para 196, p 132.

²⁵⁷ *Ibid.*, para 236, p 161.

has its merits, but it would be better had the Model Law provided a clear answer to this question.

Section 57(3)(b) of the 1996 Act allows an additional award, while s.68(2)(d) clearly treats failure by the arbitral tribunal to deal with all the issues put to it, as a serious irregularity, and thus a ground of challenge. However, s.70(2)(b) indicates that a challenge may not be made unless the applicant has exhausted any available recourse²⁵⁸. Thus the Act supports party autonomy and the power of the tribunal, seeing court intervention as a last resort. This is further emphasised by the fact that, if the opportunity to seek an additional award has not been taken within the time limit, an interested party may seek the support of the court to extend the time limit²⁵⁹.

In Kuwait, as the CCPL 1980 does not deal with this matter in the context of arbitration, one must look to the general principles which apply to litigation²⁶⁰. On that basis, it may be said that the arbitral tribunal may make an additional award, if the application is made within six months from the date of the original award²⁶¹. Otherwise, the court has jurisdiction to make an additional award²⁶². Failure to deal with all issues is not a ground of challenge, and the Kuwaiti system does not recognise the idea of remission. It might be recommended that the arbitral tribunal should be allowed to make an additional award, since while an award usually terminates the jurisdiction of the arbitral tribunal, if it omits issues from the award it still has jurisdiction with respect to the issues not determined. This may offer a chance to the parties to return arbitration to resolve such issues, and prevent the court dealing with those issues, as well as offering the arbitral tribunal a chance to fulfil its entire mandate. If the defect can be put right by the tribunal itself, without resorting to the court, this seems a sensible solution, and is recommended for adoption. Yet if the defect cannot be put right by the arbitral tribunal itself, as where the application is made out of time, it may be helpful to be permitted to resort to court to extend such time limit, as under the 1996 Act. All the legislation examined lays down a time limit for an arbitral tribunal to make an additional award, in order to discourage

²⁵⁸ The Model Law does not provide such statutory requirement.

²⁵⁹ Sec. 12 of the Arbitration Act 1996.

²⁶⁰ This is unlike the French treatment that empowers the arbitral tribunal to correct, interpret and to complete the award when it has omitted to rule on an element of the claims. See Art. 1475 of CCP 1981.

²⁶¹ See Art. 126 of CCPL 1980.

²⁶² This likes the French treatment where it states that if the arbitral tribunal cannot be reconvened, this power shall be vested in the court. See Art. 1475 of CCP 1981.

delay. Yet if a party had the option to ask the court to extend such a period, that might prove useful.

Kuwait might also consider designating failure to exhaust the submission as a ground for challenging the arbitral award. There need be no fear about the possibility of setting aside in such circumstances if the court was under an obligation not to set the award aside, in whole or in part, unless it were satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for completion. This requirement would eliminate any concern that such omission does not justify setting aside the award, and signal the policy of the Arbitration Act to limit the exercise of the court's power, where the tribunal might still play a role. The English model is instructive here, as before the advent of the possibility of remission, the English courts had to set aside many awards for failure to exhaust the submission, the view being that the entire award was vitiated by such failure²⁶³.

4.4 Remedies Available to the Court

(a) Introduction

What remedies does the court have when an award is challenged? Modern arbitral systems appear to offer the court a number of options, but this is not the case in Kuwait. Therefore, the following paragraphs ask what lessons may be learnt from the modern systems. There are indeed a number of types of remedies, which are common to the CCPL 1980, the Model Law and the Arbitration Act 1996, e.g. the power of the court to confirm, vary, or set aside an award. However, in the context of setting aside, the remedy of remission is very important. Therefore, the following paragraphs deal firstly with setting aside, particularly the effect of such an order before looking at remission as a device to avoid the ultimate remedy of setting aside.

(b) Setting Aside

This remedy is available under the CCPL1980, the Model Law and the Arbitration Act 1996. But what are the consequences of setting aside upon the arbitration agreement?²⁶⁴

²⁶³ See R. Merkin, *op. cit.*, para 16:31, Service Issue no 31:31 March 2002.

²⁶⁴ According to the Art. V. (1) (e) of New York Convention 1958 -which adopted by the Model Law Art.36 (1) (v)- where an award is setting aside in the country in which was made, this is one of the grounds for refusal of recognition and enforcement. However, this now is not always true. See for example *Chromatloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907- 909 (D.D.C. 1996) and *Baker*

The Model Law says nothing about the legal effects of setting aside. At one point the Secretariat suggested dealing with the question of how a party may pursue his claim after the arbitral award has been set aside²⁶⁵. It proposed that if the ground of setting aside was lack of a valid arbitration agreement, the party would have to litigate²⁶⁶, while if the award was set aside on other grounds, there would be two possible solutions. One would be to conclude that the arbitration did not work, and refer the parties to court without, of course, taking away the option of making an arbitration agreement²⁶⁷. The other possibility would be to reactivate the original arbitration agreement, on the view that it was still operative²⁶⁸, as the mandate of the arbitral tribunal would have revived when the award was set aside. However, neither the Working Group nor the Commission considered this proposal, with the result that the Model Law does not deal with the question.

On the other hand, both the Arbitration Act 1996 and the CCPL 1998 provide an answer to this matter, although they are totally different. Their common ground is that when the order to set aside is based on ground that the arbitration agreement is invalid or non-existent there can be no new arbitration. However, if the order is based on other grounds, for instance, the constitution of the arbitral tribunal was not in accordance the rules (agreed or statutory), the laws differ as to whether a new arbitration can be resumed. English law takes the view that setting aside the award does not affect the validity of the agreement between the parties to resolve their disputes by arbitration. Accordingly, the dispute shall ultimately be resolved by arbitration unless the parties agree to terminate their arbitration agreement²⁶⁹. Setting aside does not revive the original jurisdiction of the court to hear the dispute, which was suspended by the arbitration agreement. The effects of that agreement continue, unless the parties agree otherwise. By contrast, in Kuwait an order to set aside the award automatically terminates the agreement to arbitrate, and invests the court with jurisdiction to determine the merits of the dispute.

Marine Ltd. V Chevron Ltd., 191 F.3d 194 (2d Cir. 1999). See also R. Mosk & R. Nelson, 'The Effects of Confirming and Vacating an International Arbitration Award on Enforcement in Foreign Jurisdictions' (2001) 18(4) J.Int. Arb. 463-474.

²⁶⁵ A/CN.9/WG.II/WP.50, para 24.

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*, para 25.

²⁶⁸ *Ibid.*, para 26.

²⁶⁹ See, R. Merkin, *op. cit.*, para 18.28, Service Issue No.32: 30 August 2002.

Although an Arbitration Act has to favour arbitration, in such cases there may be a strong desire to put an end to the dispute by a judgement. So, after long arbitral proceedings and challenge proceedings, in light of the matter of time and costs, it might not be a good idea to let the parties (or one of them) suffer the expenditure of extra money and time. Delayed justice is no justice. Thus, settling the disputes by the court in such cases may be a proper and practical outcome. However, this may run contrary to party autonomy, as the parties have chosen arbitration not litigation. It is therefore recommended that where a court decides to set aside the arbitral award, it shall decide the merits of the dispute, as part of the same proceedings. This suggestion would allow justice to be done in due time, ensuring that no extra time or costs were expended, contrary to the interest of the parties. However, the parties should be allowed to contract out of this jurisdiction, in line with the principle of party autonomy. This is the approach taken by France, which states in CCP 1980 Article 1485,

“Whenever a court seized of a motion to set aside does set the award aside, it decides on the merits of the case within the limits of the arbitrator’s mission, unless the parties are agreed to the contrary”.

So, when the court sets aside the arbitral award, it shall itself decide the disputes, unless the parties object²⁷⁰.

(c) Remission

As noted above, this type of relief is not recognised in Kuwait, although available in both the Model Law and the Arbitration Act 1996²⁷¹. Article 34(4) of the Model Law states,

“The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal’s opinion will eliminate the grounds for setting aside”.

²⁷⁰ See the same treatment in Italy. See CCP 1994 Art. 830 (2) and Tunisia Arbitration Code 1992, Art.44 (2) and Art. 78(5).

²⁷¹ In principle, once an award has been made, the arbitral tribunal becomes *functus officio*. However, remission of an award, by the court, will resurrect the arbitral jurisdiction to the arbitral tribunal only on matters remitted to it, see *Aiden Shipping Co. Ltd. v Interbulk Ltd. (The Vimeira)*[1986]2 Lloyd’s rep. 177

While s.68(3) of the Arbitration Act 1996 provides, "the court may (a) remit the award to the tribunal, in whole or in part, for reconsideration".

It may be mentioned that before the Model Law, remission as an alternative to setting aside was known only to common law systems²⁷². The drafters of the Model Law after some doubts about whether they should adopt it, agreed to provide this mechanism as it must prove useful in that it enables the arbitral tribunal to cure a certain defect and, thereby, save the award from being set aside by the court²⁷³.

Remission then allows procedural defects to be cured without having to vacate the award; by allowing the arbitral tribunal to resume the arbitral proceedings or to take such other step as in its view will eliminate the grounds for setting aside²⁷⁴. The device also reinforces the policy of supporting arbitration as a method of resolving disputes, as the court need not always vitiate the arbitral proceedings whenever there is a defect. Thus, this remedy may allow the dispute to be resolved within the arbitral environment, albeit that it lies at the option of the court.

It may be noted that the Model Law requires a request by a party to open up the possibility of remission, its drafters not having adopted a proposal to delete the requirement that a party must request the remission procedure²⁷⁵. During discussions there was a view that the provision should be amended to provide that the court had the power to order remission on its own motion and not only at the request of a party²⁷⁶. However, the prevailing view was that the power of the court to remit should be only at a request of a party, as if the court had the power to remit the award of its own initiative, the potential costs to the parties would be much higher²⁷⁷. By contrast, the court may order remission of its own initiative under the 1996 Act. Another difference between the Model Law and the 1996 Act is as regards the time limit of making a fresh award in respect of the matters remitted. The Model law does not suggest any time limit within which the arbitral tribunal must make such a new award, although it empowers the court to determine the period of time of suspension of the setting aside proceedings. On the other hand, s.71(3) of the 1996 Act gives the arbitral tribunal three months within which

²⁷² A/CN.9/264, para 13.

²⁷³ *Ibid.*

²⁷⁴ *Ibid.*, para 127.

²⁷⁵ See, A/40/17, para 307.

²⁷⁶ See Mr. Jarvin, observer ICC, in A/CN.9/SR.319, para 13.

to make a fresh award after remission of the original award, in whole or part, subject to the power of the court to amend this period, as it sees fit. This is preferable. Neither measure provides a sanction²⁷⁸ in case of failure to comply with the time limit for making a new award, although it has been suggested that this is a minor shortcoming that the legislature may address²⁷⁹. It is argued that the idea that there should be a time limit for the arbitral tribunal to make its fresh award may not add any thing valuable, especially if there is no specific sanction in event of breaching this delay. In the context of remission the arbitral tribunal is still subject to the duty to act properly and without any delay, and thus subject to the legal consequences of breaching this general duty. Nonetheless, the provision of a time limit may organise the procedures and put the arbitral tribunal under some kind of pressure to cure its defects in due time.

A remission system is thus recommended. It may be true that it may cause problems for arbitrators, particularly, if they are located in different countries, and increase the expenses of the arbitral proceedings²⁸⁰. Yet it may save the parties time and money in cases where otherwise the award would be set aside, leaving the parties to re-arbitrate or litigate. Thus remission system may inflict less harm on the parties than setting aside the award. Furthermore, the remedy would be very helpful in cases such as where the award is not complete, uncertain or ambiguous, or where it does not meet agreed or statutory formal requirements. In such cases, the court may, instead of destroying the arbitral operation, remit the case to the arbitral tribunal to cure defects which otherwise would necessarily lead to the setting aside of the award. Adopting the common law approach, which requires the court not to exercise its power to set aside, unless it is satisfied that it would be inappropriate to remit the matter in question to the arbitral tribunal for reconsideration would add additional importance and effectiveness to the remission system.

²⁷⁷ See, Mr. Matango (United Republic of Tanzania) in A/CN.9/SR.319, para 16.

²⁷⁸ The old provisions suggested remitting the award to a fresh panel. See sec.22 of Arbitration Act 1950. The court, under Arbitration Act 1996, has no such power. However, failure of the arbitrator is a ground of removal.

²⁷⁹ See, B. Harris *et al.*, *op. cit.*, para[71D] at 322.

²⁸⁰ See Mr. Szurski (Observer from Poland) in A/CN.9/SR.319, para 15. It may also possibly enforce a party to seek for vacancy to be filled, where an arbitrator who for some reasons cannot continue in office (e.g. died or ill). It is advised that a party, in such possible case, might apply for removal or vacancy at the same time as the application as the application o challenge an award. See R. Merkin, *op. cit.*, para 18.30, Service Issue No.32: 30 August 2002.

4.5 Limitations on Court Intervention:

(a) Restrictive List of Grounds for Challenge

When the Arbitration Act sets out a list of ground upon which an award may be challenged, its aim should be to limit court supervision, by making it clear that the court cannot intervene except on those grounds mentioned in the Act. The policy is adopted by the CCPL 1982, the Model Law and the Arbitration Act 1996. The provisions of CCPL 1982 make it clear that the policy of a restrictive list of grounds of challenge is adopted in Kuwait²⁸¹. In relation to the Model Law, it was made clear that the reasons for setting aside the award provided in Article 34(2) are exhaustive, as indicated by the fact that the court may intervene “only” on those grounds²⁸², which are also the grounds for refusing enforcement and recognition of the award under Article 36. Containing an exclusive list of limited grounds on which the arbitral award may be challenged is considered to be a significant achievement of the Model Law²⁸³. It may be noted that error of law is not a ground of challenge under the Model Law²⁸⁴.

The Arbitration Act 1996 takes a similar approach. Against the interventionist background of the previous English law, it stresses that the court does not have a general supervisory jurisdiction over arbitration, but is limited to the specific cases where challenge can be made²⁸⁵. So, the list of irregularities is closed list, which it will not be open to the court to extend²⁸⁶. However, the drafters of the Act did not adopt the policy of the Model Law in having a similarly restricted list of grounds for resisting enforcement. Although s.66(3) states,

“leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award”.

There are other grounds which are not specified, but upon which a party may rely on to oppose the grant of leave to enforce, such as serious irregularity, or pending appeal on a

²⁸¹ France has the same approach. It is submitted that the grounds listed for challenging an award in art. 1484 (domestic arbitration) and 1502 (international Arbitration) are exhaustive and any alleged basis for review not listed in those articles e.g. errors of law is inadmissible. See J. Savage & E. Gaillard, *op. cit.*, para 1603.

²⁸² A/CN.9/264, para 5.

²⁸³ See, Explanatory Note on the model Law, para 42.

²⁸⁴ See *Quintette Coal Ltd. V. Nippon Steel Corp.*, *British Columbia Supreme Court (Esson C.J.B.C.)* 1990, [1991] 1 W.W.R. 219 in H. Alvarez *et al.*, *op. cit.*, p 218.

²⁸⁵ See DAC 1996 Report, para 280.

point of English law or the matters of arbitrability or public policy²⁸⁷. The drafters of the Act made it clear that s. 66 (3) is not a closed list²⁸⁸, the DAC remarking,

“The reason for this is that the clause does not require the court to order enforcement, but only to give it a discretion to do so. That discretion is only fettered in negative way i.e. by setting out certain cases where enforcement shall not be ordered. To our minds there is nothing to prevent a court from refusing to enforce an award in other appropriate cases. Unlike, for example, clause 68, there is no closed list of cases where leave to enforce an award may be refused”²⁸⁹.

This then permits the court to intervene as it thinks fit and proper without any limitation. This might not be preferable, in light of the policy of limiting court intervention, or in the interests of the parties, who should be able to anticipate the grounds for resisting enforcement. Thus it would be preferable for the Arbitration Act to adopt the policy of a closed, limited list, as under the Model Law. This would clearly delineate the relationship between the court and arbitration, allowing everyone to know in advance and the extent of supervisory role of the state court over the arbitral award, and curtailing judicial discretion.

However, what is the role of party autonomy here? May the parties contract out of one or more of the closed list of grounds of challenge, and may they add additional grounds to that list? In relation to the first matter, provisions governing grounds of challenge and judicial review are usually mandatory, but not always. Arbitration legislation may confirm the scope of judicial scrutiny of arbitral awards and set out a list of grounds for challenge, but make these provisions non-mandatory. Both the CCPL 1982 and the Arbitration Act 1996 make it clear that their grounds are mandatory, so that parties cannot contract out of any of them. The Model Law, on the other hand, does not address the question of what is regarded as mandatory or not. It may be argued that the parties cannot contract out of the exclusive grounds for challenge to an award under the Model Law, as they are impliedly mandatory²⁹⁰. On this basis, if the parties agreed to exclude the

²⁸⁶ *Ibid.*, para 282.

²⁸⁷ See sec. 81 (1)(a) and (c) of the Arbitration Act 1996.

²⁸⁸ DAC 1996 Report, para 375.

²⁸⁹ *Ibid.*, para 374.

²⁹⁰ See Prof F Davidson, *Arbitration*, 2000, para 18.21 at p 363. The wording of e.g. Art. 34 in permitting challenges only on grounds enumerated may not leave much space for contractual modification of the judicial review. One may compare the used language in 34 and the used language in e.g. Art. 10 (Freedom

power of the court to scrutinise the award, or if an arbitration clause incorporated rules²⁹¹ to that effect, such agreement or rules will be ineffective. Yet others argue that the parties may indeed contract out of these provisions. This view is taken by the Ontario Court of Justice, in *Nobel China Inc. v. Lei*²⁹² which after reviewing the Model Law and the Analytical Commentary contained in the Report of the Secretary General of UNCITRAL, decided that Article 34 is non-mandatory. Such divergent views are attributable to the failure of the Model Law to address this issue properly.

Can the parties extend the scope of the judicial supervision over the arbitral award? What is the legal value of having in the arbitration agreement a clause such as the award shall be final and binding on both parties, except that errors of law shall be subject to appeal. As aforementioned, error of law is not a ground for challenge an award under the Model Law. But, if the parties enlarge the supervisory role by agreement, would this be recognised? In fact, there was at one point a proposal to enable the parties to agree on wider scope of court intervention. However, there were some doubts about whether the parties could be expected to draft an agreement on the point that would adequately deal with this problem, while concerns were also expressed that institutional arbitration rules might include a provision extending judicial review, and the parties who had agreed to the use of those rules might be subject to a greater degree of court intervention than they had expected²⁹³. After deliberation the Commission adopted Article 5 in its current form. The philosophy of this article is that the Model Law contains a categorical and exhaustive enumeration of the instances in which the court may intervene, and excludes the theory of general court supervision. The Article states that the court cannot intervene except as provided by the Model Law, thus freezing the level of court intervention to the extent found in its provisions. Articles 34 and 36 are covered by this principle, as matters such as setting aside and recognition and enforcement of an award are matters which are regulated by the provisions of the Model Law. By requiring that any instance of court involvement be listed in the provisions of the Model Law, the effect of Article 5

to determine the number of arbitrators); Art.13 (Freedom to agree on procedure for challenge of arbitrator and 33(1) (parties' freedom to vary the time frame within which the tribunal should announce corrections and interpretations to the award). Further, contractual modification to the judicial review could be difficult due to the discipline of Art 5. It argues that Art.5 of the Model Law shuts the door completely on the ability of the parties to modify the standards for judicial review of arbitral award. See V. Raghavan, 'Heightened Judicial review of Arbitral Awards: Perspectives from the UNCITRAL Model Law and English Arbitration Act 1996 on some US developments' (1998) 15 (3) J. Int'l. Arb. 103-134.

²⁹¹ For instance, ICC Rules of Arbitration, Art. 28.6, see also article 26.9 of I.C.I.A Rules.

²⁹² (1998) 42 B.L.R. (2nd) 262, see also H. Alvarez *et al.*, *op. cit.*, p 214.

²⁹³ A/40/17, para 64.

is to exclude any general or residual powers of the court, which are not listed in the Model Law²⁹⁴. This philosophy aimed to create certainty for the parties and arbitrators as to the instances in which court supervision (or assistance) is to be expected and anticipated²⁹⁵.

There is no doubt about that arbitration is a consensual process, the health of which is best ensured by enabling its users to conduct their arbitration in whatever way they have agreed to be suitable. This is subject only to certain exceptions designed to ensure that courts are not required to countenance procedures and awards in circumstances, which render them objectionable. It would appear that Articles 5, 34 and 36 of the Model Law indicated an intention to minimise judicial control²⁹⁶, setting not only the minimum level of judicial control, but its maximum, eliminating even those means of judicial control, which the parties themselves desire to retain²⁹⁷.

Again in the context of the Arbitration Act 1996 it seems that the scope of judicial supervision cannot be expanded by agreement. An agreement to extend the scope for challenge is clearly rendered ineffective, firstly because the provisions of ss.67 and 68 are mandatory²⁹⁸, so that the parties may not contract out of or alter any ground on the list provided in the Act. The provisions of s. 69 (appeal on questions of law) are not mandatory, and therefore may be excluded by the parties. Secondly, it is one of the principles of the Act that in matters governed by it (including judicial control) the court shall not intervene except as provided by the Act²⁹⁹. This indicates very clearly that any agreement to expand judicial review would violate the limiting language of the principle provided in section 1 (c).

Yet the possibility of heightened judicial review of the arbitral award is adopted in some systems. For example, the United States Federal Court recognises this possibility in a number of cases. Therefore, in *Gateway Technologies Inc. V. Mci Telecommunications Corp.*,³⁰⁰ the US Federal Court of Appeal for the fifth Circuit had again to deal with the question of expanded judicial review of arbitral determinations. The parties agreed that the arbitral award should be final and binding on both parties, except that errors of law

²⁹⁴ A/CN.9/264, para 2.

²⁹⁵ *Ibid.*, para 2.

²⁹⁶ see *Quintette Coal Ltd. V. Nippon Steel Corp* (1990), 47 B.C.I.R. (2^d) 201 (S.C).

²⁹⁷ C/AN.9/263/ADD.2, para 36 (UK Comments).

²⁹⁸ See sec. 4 of the Arbitration Act 1996.

²⁹⁹ See *ibid.*, sec. 1.

shall be subject to appeal. The Court of Appeal noted that, while normally only a narrow standard of review was available under s.10 of the FAA, here the parties had contractually agreed to permit expanded review of the award. It found that such a stipulation in the arbitration agreement was acceptable, since the Supreme Court's decision in *Mastrobuono v Shearson Lenham*³⁰¹ had emphasised that arbitration was a creature of contract, and the FAA's pro-arbitration policy did not operate without regard to the wishes of the contracting parties³⁰².

However, the question of the ability of the users of arbitration to expand the scope of the judicial review of an award may be still unclear in the US, as the United States Court of Appeal for the Tenth Circuit decided in *Bowen v. Amoco Pipeline Co.*,³⁰³ that the parties are not free to interfere with judicial process by imposing on the state courts a heightened standards of review of awards. This conclusion would diverge from the contrary result reached by the US Courts of Appeal for the Fifth and Ninth Circuits, respectively³⁰⁴. The view of the Tenth Circuit was that "expanded judicial review undermines the policies behind the FAA by threatening the independence of arbitration and weakening the distinction between arbitration and adjudication"³⁰⁵. According to the Tenth Circuit, Congress had through the FAA set out explicit guidance regarding judicial standards of review of arbitral awards, and if the parties have a desire broader appellate review, they could agree on an appeal to another arbitral tribunal or another body of second instance³⁰⁶.

This decision thus leaves the federal appellate courts divided on whether the users of arbitration may expand the scope of judicial review of arbitral awards. It has been said,

"This split highlights the tension between the federal policy in favour of restrictive review of arbitral awards and the federal policy in favour of enforcing private contracts to arbitrate as written. Until the United States Supreme Court rules explicitly on this issue, the validity of the

³⁰⁰ 64 F. 3d 993 [1995].

³⁰¹ 514 U.S 52 [1995].

³⁰² Another example see *Lapine Technology v Kyocera Cor.*, 130 F. 3d 884 [9th Cir. 1997]. In this case the U. S. Court of Appeal, in this case, concluded that expanding Judicial review through agreement of the parties was legally legitimate.

³⁰³ 254 F. 3d 925 [2001].

³⁰⁴ See, D. Donovan & R. Dickson, 'US: Parties' Ability to Expand the Scope of Judicial Review of the Arbitral Award' (2002) 5(5) Int'l Arb.L.Rev. 58.

³⁰⁵ *Ibid.*, 59.

³⁰⁶ *Ibid.*

agreements to expand judicial review will depend upon the court in which enforcement of an arbitral award is sought³⁰⁷.

It is recommended that the Arbitration Act makes it clear whether the parties may extend the scope of judicial review. Moreover, while one of the most vital features of modern arbitration legislation is to limit court involvement as much as possible, the court must still supervise the arbitral process. As Lord Saville states,

“Justice dictates that certain rules should apply to dispute resolution of this kind. Since the state is in overall charge of justice... the courts should not hesitate to intervene as and when necessary, so as to ensure that justice is done in private as well as public tribunals³⁰⁸.”

The chief purposes of setting forth statutory grounds upon which the court may intervene to supervise the arbitral award are not only to minimise and limit judicial control- by declaring that the court cannot be involved except upon those statutory grounds - but also to limit the grounds for challenging the award. If the Arbitration Act adopts the recent tendency toward limiting court involvement, this might also suggest that the parties should not have a free hand to tailor the role of the court. Thus, when the act decides to set forth grounds of challenge, this list should be appropriate, exclusive and mandatory. Nonetheless, when the law desires to give the arbitration users freedom to limit or extend the grounds of challenge, it should state this very clearly³⁰⁹. Thus the 1996 Arbitration Act indicates that the provisions conferring the right to appeal on questions of law are not mandatory, but the other grounds of challenges are³¹⁰. Without such legislative permission, the extent of judicial involvement cannot be altered by a private contract³¹¹.

³⁰⁷ *Ibid.* See also R. Greig & I. Reznik, ‘Current Developments in Enforcement of Arbitration Awards in the United States’ (2002) 68(2) *Arbitration* 120-173. The authors’ advice to the parties and practitioners is clear and simple; do not agree to expand the judicial review of an arbitral award. See p 126. See also H. Smith, ‘Contractual Modification of the Scope of the Judicial Review of Arbitral Award’ (1997) 8 *Am. Rev. Int’l Arb.* 147. This article criticised the allowance of contractual modification, while R. Solomon supports this allowance in his article ‘Why they Should Be Allowed’ (2003) May/July *D.R.J.* 58-56.

³⁰⁸ Dinning, Lecture, 1995, *Arbitration and Court*, p 157 cited in Redfern & Hunter, *op. cit.*, para 7-34 at p 359.

³⁰⁹ This surely promotes confidence and stability in the legal system.

³¹⁰ Such legislative treatment could avoid possible vital questions which could raise in the absence of such legislative treatment, e.g. the legitimacy of the contractual extending and the judicial acceptance to such agreement.

³¹¹ Any contractual modification to the scope of judicial review, without legal authorisation, could possibly affect the statutory organisation to the relationship between the national court and arbitration. Since, the parties could dictate how the state court should review the arbitral award. Further acceptance such agreement -without the legislative decision- could possibly undermine the legislative objects behind

On the other hand, this approach should not be considered as hostile to party autonomy, as when the parties want to enhance the standard of review they may go to another arbitral tribunal. This would be compatible with arbitration as simply matter of contract. But courts of law should not be subject to the whims of the parties.

(b) Time Limit for Challenge

It is quite common for legislation to prescribe time limits during which the arbitral award may be challenged³¹², at least in the sense of a positive challenge, where a party asks the court to set the award aside, or appeals to the court. There is no time limit for challenge at the enforcement stage, as there is usually no time limit for enforcement of an award. Accordingly, enforcement may be resisted, even if the time limit for positive challenge has expired. A time limit is very useful procedural device, introducing a degree of certainty by making the arbitral award immune from challenge after a fairly short period of time. This also helps the speed of the process and promotes the finality of arbitration. Time limits also obviously limit judicial supervision, as if a challenge is made after the time limit provided by the law, the court cannot entertain it. This is apparent from the terms of Article 34(3) of the Model Law and s.70 of the Arbitration Act 1996. In Kuwait, the time limit is 30 days. In cases of appeal, this time limit runs from the date of depositing the award in the Registry of the court which originally had jurisdiction to hear the dispute³¹³. In cases of application to set aside, this time limit runs from the date of notification of the award³¹⁴.

A limit has to strike a reasonable to balance between the interests of each party and the speed and efficiency of the arbitral system. The 3 months time limit provided by the Model Law is more generous than the 28 days allowed in England or the 30 days

adopting narrow grounds. This could also open the risk of the extent of judicial supervision upon the agreed ground of challenge. As Peter Bowman comments- on the extending the judicial review in US-, "courts [without legislative decision] should not enforce party-based expansions of the grounds for review. In the federal context, this means that cases such as *Gateway* and *Syncor* were wrongly decided. Party-based expansions impinge on certain institutional interests that might underpin a legislative decision not permit judicial review of arbitral awards for legal error. Where the applicable Arbitration Act also supplies the basis for the court's subject matter jurisdiction, party-based expansions also collide with prohibitions on parties manufacturing the court's subject matter jurisdiction. Party-generated expansions of the grounds for review also entail substantial risks exemplified by *Syncor* and *Gateway* that the courts will conduct a far more scrutinizing review than the parties ever intended". See his article, 'On the Importance of Institutions: Review of Arbitral Awards for Legal Errors' (2002) 19(2) J. Int. Arb. 81-116, [in his conclusion].

³¹² A/CN.9/264, para 1.

³¹³ See Art. 186 of CCPL 1980.

³¹⁴ Art. 187 of CCPL 1980.

allowed in Kuwait. The time limit provided in the Model Law applies to all grounds of challenge, including cases such as like fraud or false evidence materially affecting the award. In fact, it was suggested at one point that a considerably longer limit should apply where it was alleged that the award was procured by fraud, bribery or corruption. In the end, this suggestion was rejected because such extension was contrary to the need for speed and final settlement of disputes in international commercial relationships³¹⁵. However, the ordinary time limit risks denying recourse to a party who only discovers the fraud, etc, after a significant period of time. Such fears led Scotland, when adopting the Model Law to impose no time limit for challenging an award on such grounds³¹⁶. The CCPL 1980 allows considerable longer period of time in which to seek to set aside an arbitral award on grounds of fraud, false evidence, or the discovery of new evidence which the other party had concealed. In these cases, the time limit runs from "the day on which the discrepancy was revealed, or the forgery was admitted or the award establishing the forgery was rendered, or the day on which a witness was sentenced for perjury, or on which the evidence withheld was revealed"³¹⁷. This allows the unsuccessful party a fair chance to challenge the award in such cases. It seems to be unfair to close the door of challenge in such cases.

Nonetheless, the recognition of the exceptions considered above, does not deal with other cases where failure to challenge on time is excusable. The Arbitration Act 1996 is of interest here. While it states a general time limit for challenges, it admits of the possibility of extending this time limit under the general provisions empowering the court to extend time limits³¹⁸. This discretion to extend time limits is not restricted to certain cases, but covers any cases where there is an adequate reason for delay and a good arguable case for challenge. In *Aoot Kalmenft v Glencore International AG*,³¹⁹ the applicant sought to have an arbitral award on a jurisdictional issue set aside under s.68 of the Act, on the ground that that issue of should not have been dealt with in a preliminary award and, but in the award on the merits of the dispute. However, the application was made 14 weeks after the expiry of the time limited laid down by s.70(3), and the court refused to extend the time limit under the power conferred by s.80(5), as there was no reasonable justification for the delay, which had largely been caused by the applicant's

³¹⁵ A/40/17, para 200 and 300.

³¹⁶ See Prof F. Davidson, *Arbitration*, para 18.32 at 375.

³¹⁷ See Art. 149 of CCPL 1980.

³¹⁸ Sec. 80 (5) of the Arbitration Act 1996.

³¹⁹ [2001] 2 ALL ER (Comm) 577.

failure to seek legal advice as to the effect of the 1996 Act. Nonetheless, Colman J., took the opportunity to set out seven considerations or factors that are likely to be material when parties are applying for extensions of time under the 1996 Act. These are³²⁰ :

- 1- The length of the delay;
- 2- Whether, in permitting the time limit to expire and the delay to occur, the applicant was acting reasonably in all the circumstances;
- 3- Whether the respondent or the arbitrator caused or contributed to the delay;
- 4- Whether the respondent would suffer irremediable prejudice, in addition to mere loss of time by reason of the delay, if the application succeeded;
- 5- Whether the arbitration continued during the period of delay and, if so, what impact the determination of the application by the court might now have on the progress of the arbitration or the costs incurred;
- 6- The strength of the application;
- 7- Whether in the broadest sense, it would be unfair to the applicant to be denied the opportunity to have the application determined.

The English approach is recommended. A time limit for challenge confers the advantages of having a time limit. Yet it is in the interests of justice that an arbitral award should not invariably be immune from challenge, simply because that limit has elapsed, especially where it would be unfair to prevent a challenge. So, when the court is satisfied that there was a justification for delay and a good case for setting aside the award, it should be able to allow a challenge, despite the expiry of the statutory time limit.

(c) Substantial Effect

Under s.68(2) of the 1996 Act, the court may only act the ground of challenge has caused or will cause substantial injustice to the applicant. The purpose of such requirement is to emphasise that the court no longer has a general supervisory role over the arbitral award,

³²⁰ T. Fyfe and A. Dahlberg, 'Guidance on Extending Time Limits and Determining Jurisdiction under the English Arbitration Act' (2002) 5(1) *Int. A.L.R.* 9-10. See also, D. Altaras, 'Application to extend Time Limit under Arbitration Act 1996 ss.67-69' (2002) 68 (2) *Arbitration* 161.

but may only intervene if there is substantial injustice³²¹. Thus, it is not enough to prove the ground of challenge exists. One must also show that it has a real effect, such as a financial loss. In *Aoot Kalmneft v Glencore International AG*, the court rejected the challenge, as Kalmneft had failed to show substantial injustice flowing from the serious irregularity. The same result followed in *Egmatra v Marco Trading Corp* where Tuckey, J considered the decision of the arbitral tribunal to not allow *Egmatra* to submit expert evidence did not give rise to substantial injustice³²². It has indeed been said,

“The test of substantial injustice is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action. The test is not what would have happened had the matter been litigated”³²³.

Nothing similar is required as a condition for setting aside the arbitral award under the Model Law. However, the Commission discussed a proposal requiring that procedural errors should be serious or material to the result in order for the award to be set aside³²⁴, but concluded that the arbitral award might be set aside on any of the grounds listed in article 34(2) irrespective of whether such ground had materially affected the award³²⁵. Yet it should be remembered that the court always has discretion in deciding whether to set the award aside. It need not set aside the award, or refuse to enforce it merely because it is defective. It is permitted to decide whether substantial injustice is caused by the alleged defect. Nonetheless, it would be preferable for the Model to make this discretion explicit.

The position in Kuwait is not clear. One of the general principles of the CCPL 1980 is that nullity will not result, in spite of a provision to that effect, if the action did not result in injury to the party³²⁶. Nevertheless, the Kuwaiti courts have set aside number of arbitral awards merely on proof of the ground of challenge, without reference to substantial injustice. For instance, the court may set aside an award just because it does

³²¹ See *Egmatra AG v. Smith & Sheriff Ltd* 1998, (unreported) cited in Merkin, op. cit., para 18.8, Service Issue no: 32:30 August 2002.

³²² [1999] 1 Lloyd's Rep 862.

³²³ DAC 1996 Report, para 280.

³²⁴ A/CN.9/SR.318, para 63-68.

³²⁵ A/40/17, para 303.

³²⁶ Art. 19 of CCPL 1980.

not contain a copy of the arbitral agreement³²⁷. It is suggested that the English approach is preferable. Court intervention in arbitration should be available only in extreme cases, when the arbitral tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected. Thus, it is recommended that statute requires that a ground of challenge should have to cause substantial injustice to the party in order for the award to be set aside. This would help ensure that the court would be in favour of arbitration and the finality of the award, unless there are strong practical grounds for intervention.

(d) Exhausting Available Recourse

Such a requirement may limit court intervention by insisting that the challenging party must exhaust all available arbitral processes before seeking to trigger the supervisory role of the court. This requirement supports the arbitral process by demanding that a party utilises every means available to correct the alleged defect within that process. So, if the arbitral tribunal could correct the defect, the challenging party must resort to the tribunal in the first instance. Only if such resort is not possible, or the tribunal refuses to correct the defects can the challenge can be brought before the court. The requirement also supports party autonomy, as the parties must exhaust agreed processes of review before resorting to the court. The Arbitration Act 1996 expresses its position on this matter very clearly as s.70(2) runs,

“An application or appeal may not be brought if the applicant or appellant has not first exhausted (a) any available arbitral process of appeal or review, and (b) any available recourse under section 57 (correction of the award or additional award)”.

The position under the Model Law is not so clear. On one hand, a party does not appear to be prohibited from seeking recourse under Article 34 until he has exhausted such means of recourse³²⁸, as Article 34 does impose such a requirement, while the parties cannot limit the right conferred by Article 34 due to its mandatory nature. On the other hand, one might argue that, given the emphasis, the Model Law lays on the principle of party autonomy, it might be suggested that an arbitral award is not finally made in terms

³²⁷ See Attack no 113/94 Comm. 25/10/94.

³²⁸ See Prof. F. Davidson, *Arbitration*, op. cit., para 18.32 at 376.

of Article 34 until agreed processes of recourse are exhausted³²⁹. In terms of the latter approach, agreed processes of recourse would have to be exhausted before resorting to the court.

Whatever the correct interpretation of the Model Law, the philosophy of this approach is desirable. Still it would be a good idea for the Arbitration Act to deal with the matter in a very clear way, which leaves no doubt, perhaps along the lines of s.70(2) of the 1996 Act.

5. Conclusion

This chapter examines the other side of the relationship between the national court and arbitration. It shows not only the logic of the need for judicial supervision over each the arbitration agreement, the arbitral tribunal, its conduct and the award, but also that judicial involvement in arbitration is welcome in many cases. This chapter examines various instances where the court is seen as a guard not only of the interests of the legal system (e.g. public policy), but also of the objects of arbitration, as the court plays a vital role in obtaining the fair resolution of a dispute by an impartial and independent tribunal. Furthermore, judicial intervention is vital in many cases to ensure the success of arbitration, e.g. removing an arbitrator, where retention of a “non-performing” arbitrator becomes intolerable. The court must oversee the quality and conduct of arbitrators, as this sort of judicial intervention plays a significant role in reinforcing the confidence in the arbitral tribunal, which is vital to the success of arbitration as a method of resolving disputes. A party who has lost his confidence in the fairness, impartiality or ability of the arbitrator or his conduct of the arbitral proceedings must have some recourse. This chapter, in addition, argues that judicial supervision is a useful means of safeguarding party autonomy, for example, by ensuring that the arbitral tribunal does not override agreed procedures or exceeds the jurisdiction it derives from the arbitration agreement. That being said, it is important to see judicial supervision in context. So the Arbitration Act should restrict the judicial supervision in order to support the arbitral tribunal, determining very clearly the parameters of court supervision, e.g. articulating the grounds of challenging an arbitrator or the award, providing time limits for invoking

³²⁹ *Ibid.*, para 18.32 at 376.

court supervision, and ensuring that the court shall not intervene until any available recourse has been exhausted.

Chapter Five:

Conclusion

This thesis deals with the development of the Kuwaiti arbitration regime. It has been suggested that arbitration has become the most widely used dispute resolution mechanism in international trade transactions, and that it is important to the trade relations of any state that it be able to boast an effective arbitration regime. Kuwait has an old fashioned and ineffective arbitration regime, and given the wholesale modernisation of arbitration regimes, and the increasing congruence of such regimes, the thesis has considered how the Kuwaiti arbitration regime might best be improved to keep pace with these developments. The approach taken has been to examine that system against templates such as the UNCITRAL Model Law on international commercial arbitration, and the English Arbitration Act 1996. It may be said that there is no perfect system, but lessons may be gleaned from different arbitral systems in order to improve the arbitral system in Kuwait. The question is not whether to adopt entirely this or that arbitral system, but to create a regime which is fair, efficient, allows the arbitral process to flourish, and finds the most appropriate relationship between the court and that process. It is believed that the existence of a successful arbitration system would encourage individuals to invest and arbitrate in Kuwait.

The philosophy of a successful arbitration system, must embrace factors such as the role of the arbitral tribunal, the role of the parties and the role of the court. This study has focused on the role of the court, given that that the role of the court is an indispensable element in the success of any arbitration system. The key task is to assign it both an appropriate facilitating function, (whereby it may assist in the constitution of the arbitral tribunal, the conduct of the arbitral proceedings and the enforcement of the arbitral award) and an appropriate supervisory function, whereby it may remove an arbitrator or set aside an award. It may also be considered where it might review the award. The drafters of the new Kuwaiti Arbitration Act should consider carefully the relationship between the court and the arbitral process, so that the court may most effectively support that process, in order to guarantee both its effectiveness and efficiency, while at the same time supervising that process in order to ensure its the fairness, integrity, legality and neutrality.

This thesis has examined the relationship between the court and the arbitral process, concentrating on the arbitration agreement, judicial support for arbitration and judicial supervision over arbitration. Its conclusions are summarised below.

1. The Structure and Language of the New Act

The Act has to be designed to reform and simplify the law, in order to make Kuwait a more attractive place for arbitration. It should first of all use simple and clear language that a layman could understand. Freedom from technical terms and legal jargon, as far as this is possible, could render the conduct of arbitration in Kuwait more straightforward, as clarity of language should minimise any possibility of confusion or misinterpretation. Much benefit would also be derived from the Act adopting a logical structure. It should start by declaring its general principles, then the rules dealing with arbitration agreements, the rules governing the arbitral tribunal and its conduct, and finally the rules regarding the arbitral award, the methods of challenge and its recognition and enforcement.

2. Supremacy of Party Autonomy

As arbitration is a consensual process, the new Act should articulate at the outset, an intention to emphasise party autonomy. This would be in step with modern trends, and would reflect the basis of such healthy arbitral systems as the Model Law and the Arbitration Act 1996. This principle may, from a practical angle, attract the users of arbitration, as they must be assumed to desire significant freedom in designing the arbitral process. Such freedom should encompass the ability to decide where, when and how they would like their arbitration to run, and extend to the choice of the members of the arbitral tribunal. It would obviously embrace the extent of the tribunal's jurisdiction, and might even permit the determination of modes of challenging the arbitral award. However, given that arbitration is a form of private justice, which the state allows largely to supplant the system of public justice, there must be limitations imposed on the freedom of the parties in the public interest. Thus, if the users of arbitration require support from the court, they must conclude a valid arbitration agreement and comply with any mandatory provisions and public policy requirements to ensure the fairness and integrity of the arbitration.

3. The Object of Arbitration

The Act should articulate the principle that the object of arbitration is to obtain the fair resolution of the disputes by an impartial arbitral tribunal without unnecessary delay or expense. More specific provisions would have to follow to achieve that object. Therefore there may be a need, for instance, to state the duties of all actors in the arbitral process (the arbitral tribunal and the arbitrating parties).

4. Court Involvement

The support and assistance of the court is often needed in arbitration. The thesis has examined the range and nature of support offered by the court. The arbitral tribunal's lack of coercive power necessitates the seeking of the aid of the court to oblige a reluctant party to arbitrate, to facilitate the gathering of evidence, or to enforce the arbitral award. Such support is clearly vital to ensure the satisfactory outcome of the arbitration. However, the other side of the coin of court involvement is its supervisory role. This is the price of court support and assistance. Such supervision is justified, since each element of arbitration has significant legal consequences which require judicial supervision to safeguard the public interest. Thus the court should not give its assistance and support to an invalid, null or inoperative arbitration agreement, and should ensure the fairness, integrity and impartiality of the arbitral proceedings. It should make sure that arbitration, as part of the legal system, accomplishes its object of obtaining the fair resolution of disputes by an impartial tribunal without undue delay and expense. It should supervise the arbitral award, given that it fundamentally alters the rights of the parties.

It was recommended that the new Act should be based on the philosophy of striking an appropriate balance between respecting the principle of party autonomy, and the interests of the state in superintending the process. The new Arbitration act should delineate the scope of the judicial function in arbitration, so that the users of arbitration could know exactly the nature and extent of the functions of the court. This would be a simple but important step, as it would oblige the drafters of the act to make explicit exactly how the court could be involved in arbitration, in order to increase certainty for the parties and arbitrators. It would be equally important for the court to be made aware that it does not have general or residual jurisdiction, other than that prescribed by the Act. The Act would in effect list any instance of court involvement. The philosophy should not be to exclude

the court from the arbitral process, but to limit its involvement to those cases, where such involvement whether is a supportive or supervisory capacity, would be beneficial to the arbitral process.

5. The Form of the Arbitration Agreement

The arbitration agreement is the foundation stone of the arbitration. Thus the new Act must define what constitute an arbitration agreement, and insist that the agreement be in writing. What meets the requirement of writing is a fundamental matter. The definition of what constitutes "writing" must reflect trade practices and the needs of the Electronic Commerce age. Therefore, there should be no requirement for a signature, while many different forms of communication should be taken to satisfy the requirement of writing.

6. Supplementary Provisions

The new Act should allow the users of arbitration to design the arbitral provisions, as they see fit and proper. Thus, for example, they may agree on the number of arbitrators, the challenge procedure and the time limits for making the award. However, the new Act should set out provisions which would apply in cases of the absence of agreement or failure to reach an agreement, so that the law steps into what would otherwise be gaps in the process. Such supplementary provisions would also serve as a statutory framework in order to ensure the success of arbitration as a method of resolving disputes. At the same time, the public interest demands that the arbitral process operates as fairly as possible. For such reason, some statutory provisions would establish rules so fundamental as to override any agreed terms. It is very important that such rules, safeguarding public policy, should be unambiguously declared to be mandatory.

7. The Principle of Separability

It was seen that this principle deals with the question of the relationship between the arbitration agreement and the main contract. It stresses the autonomy of the agreement from that contract, constituting the arbitration clause as a self – contained agreement ancillary to the principal contract. The thesis noted that it was necessary for the arbitration agreement to be autonomous, as this would prevent a party from delaying justice being done in due time, by questioning in court the existence or the validity of the arbitration agreement through questioning the validity of the main contract. It was thus

recommended that the new Act should adopt this principle, so that the court would uphold the arbitration agreement, even if the main contract were not valid. The relationship between the principles of separability and competence – competence (see below) was also explored. The conclusion was that the principle of separability was closely related to, but different from, the doctrine of competence- competence. Thus although certain systems conflate the two, the Act should distinguish them. Accordingly, although the Act should recognise both principles, the parties should be free to contract out of both, or out of either one.

8. Competence – Competence

The new Act should enshrine the importance of the principle of Competence-Competence, whereby the arbitral tribunal has the jurisdiction to rule on its own jurisdiction, subject to ultimate judicial review. This again would help prevent dilatory tactics, in that a party may not stall the arbitration merely by raising an objection to the arbitral tribunal's jurisdiction. Under the principle of Competence- Competence, the court should initially leave such questions to the arbitral tribunal to decide, subject to the possibility of ultimate judicial review.

9. Enforcing the Arbitration Agreement

The new Act should empower the court to enforce the arbitration agreement, which provides for the settlement any existing or future dispute by arbitration rather than by any other means. The court should be empowered to compel a reluctant party to implement his obligation to arbitrate. So, should a party to the arbitration agreement resort to legal proceedings, contrary to his agreement, the other party may seek court support to enforce the arbitration agreement. Such recourse may be regarded as an indication of the extent to which the arbitral system and the court supports arbitration. However, the fact that a party pleads the existence of an arbitration agreement would not mean that the court must automatically stop the legal proceedings. The Act should require that the court has to be fully satisfied that an application to stay has fulfilled all the conditions, which are required by the Act, e.g. the application should be made at the correct time, and the arbitration agreement should not be null and void, inoperative, or incapable of being performed. The new Act should deal comprehensively with such matters.

9. Extending Time Limits

This may be another potentially very effective tool, which the new Act may confer on the court in order to support arbitration. The court should be empowered to extend any time fixed in the arbitration agreement for commencing arbitral proceedings, and any arbitral time limit, whether agreed by the arbitrating parties or fixed by the Act. Arbitration agreements often feature clauses stipulating time limits for commencing arbitral proceedings, appointing arbitrators, or making the award. Such contractual limitations can have significant legal consequences, as for example, an award made out of time will be considered invalid. Such time limits cannot occasion operate unjustly so as to thwart the arbitral process. Thus permitting the court (in certain defined circumstances) to extend those limits indicates strong state support for arbitration.

10. Constituting the Arbitral Tribunal

The arbitral tribunal is clearly vital to the arbitral process, and the constitution of the tribunal is usually the first step in the arbitral operation. The Act should give the court an essential role in constituting the arbitral tribunal, where this is necessary, by authorising it to deal with all cases where the appointment procedure has failed. Thus it may be empowered to act where the parties have not implemented their agreed procedure for constituting the arbitral tribunal, or indeed where they have not reached an agreement as to the constitution of the arbitral tribunal. The supportive role of the court in this context should ensure the efficient operation of arbitration, especially if the court in exercising this jurisdiction were itself subject to a time limit.

11. Supporting the Conduct of the Arbitral Proceedings

The manner in which the arbitral proceedings are conducted will clearly play a significant role in the success of arbitration, and might enhance the idea that arbitration is faster and less expensive than litigation. The parties should be given full freedom to design their own procedures. Normally, it might be expected that the parties will follow these procedures voluntarily. However, court assistance may be needed in some cases, as where it is necessary to secure the attendance of a witness, take evidence, enforce the peremptory orders of the arbitral tribunal, consolidate the arbitral proceedings, determine preliminary points of law and grant interim measures. The new Act should codify the instances where the court can render its assistance to the conduct of the arbitral

proceedings, indicating who may seek court assistance in this context. It should be made clear that when court assistance is sought, the arbitral proceedings need not be stayed.

12. Enforcement of the Arbitral Award

The arbitral award is the fruit of the arbitral operation. The availability of a binding award may often be one of the reasons behind concluding an arbitration agreement. However, an arbitral award may be worthless without an effective enforcement mechanism. The Act should assign the court the key role in enforcing the arbitral award. The Act should provide for a simple, clear and speedy method of enforcement. However, the court should not be obliged invariably to support the arbitral award, but should have discretion as to whether to do so. The method of exercising this discretion provides a test of the extent to which the system supports arbitration. Thus, the Act should direct the court to enforce the arbitral award, unless it is satisfied that there are good reasons for not doing so.

13. Judicial Supervision over the Arbitration Agreement

The court should exercise supervision over the arbitration agreement, in order to ensure that it does not receive effect unless it is clearly valid. The new Act should delineate the extent of this function and indicate when it may be invoked, i.e. when it is asked to enforce the arbitration agreement, to support the arbitral process, or enforce the arbitral award. It must be made clear that party autonomy is subject to court supervision. The recognition of this judicial role is vital to the success of arbitration as a method of private adjudication recognised by the legal system, as neither the interests of the parties nor the integrity of the legal system is served by allowing arbitration for illegal purposes.

14. Judicial Supervision over the Arbitral Tribunal and its Conduct

It has been recommended that the new Act should stress that it is the role of the court to support arbitration and the arbitral tribunal. Yet the Act must also stress that the arbitral tribunal is subject to the supervision of the court. The court must be empowered to ensure that the tribunal has fulfilled its duties, and to guarantee the integrity and fairness of the tribunal and its conduct. In addition, it should be empowered to ensure that arbitrators possess the qualifications agreed by the parties. The Act should enable the court to ensure that the general principles of the Act are respected by the arbitral tribunal, that the arbitral

proceedings are being conducted properly and efficiently, and that there are no mistakes or procedural mishaps in the conduct of the arbitral process. Again, the new Act should provide that the arbitral tribunal's breach of its duties is one of the limited grounds upon which the arbitral tribunal or its award could be challenged, a successful challenge leading to the setting aside of the award or the removal of an arbitrator, depending on the context. The Act must thus clearly articulate the duties of the arbitral tribunal, and specify the circumstances in which the court may exercise supervision over the arbitral tribunal and its conduct.

15. Judicial Supervision over the Arbitral Award

Given its legal significance, the award must be subject to court supervision. In the first place, this supervision might protect the interests of the users of arbitration. An unsuccessful party must be afforded an opportunity to challenge the award. Secondly, such supervision may protect the interests of the legal system itself. Arbitration is merely a method of private adjudication, albeit that it significantly impacts on the parties. It is thus in the interests of the legal system to ensure that the award is made judicially. The new Act must therefore clearly indicate the means by which an award may be challenged and grounds upon which this may happen. Generally, challenges may be made via an application to set the award aside. The right to a full appeal against the arbitral award to the court should be abolished. The retention of a limited right of appeal on questions of law, along the lines of the English Arbitration Act 1996 might be recommended, but only if Kuwait aspires to its commercial law becoming as popular as that of England in being chosen to govern international commercial contracts. Any such right of appeal should not be mandatory, allowing the parties may to derogate from it as they see fit, and should be hedged about by restrictions to ensure that it could not be abused as a dilatory tactic.

The new Act should also establish a limited set of grounds upon which an arbitral award may be challenged. That set must be exclusive and comprehensive, in order to determine the spectrum of court involvement in arbitration, as well as making it clear to the users of arbitration the sort of conduct to avoid if they do not wish to put the award at risk. The Act should confer on the court options other than setting aside, particularly the possibility of remission to the arbitral tribunal to cure defects (where possible) and, thereby, save the award from being set aside. This may help ensure that disputes are still resolved within

the arbitral environment. Requiring that court may not set the award aside unless it is satisfied that it would be inappropriate to remit the matter in question to the arbitral tribunal for reconsideration may reinforce the arbitral process.

16. Court of Arbitration

The creation of a specific court to deal with arbitration is recommended. Its members would be appointed due to their knowledge and experience not only in law but also in arbitration. This court of arbitration may assist the success of arbitration, as it will boast high quality judges, who are familiar with arbitration, and able to deal with legal requirements without damaging the spirit of arbitration. Moreover the users of arbitration will find court applications dealt with expeditiously, without the need to be subject to the general provisions and caseload of the regular courts. Accordingly, it is recommended that the new Act lays down a reasonable time frame for the court of arbitration perform its functions.

17. Conclusion

Up till now there has been no move to modernise the Kuwaiti arbitral system, despite the importance of arbitration in commercial life. Yet such legislative modernisation in the arbitral field is a vital step, in order to seize the benefits of the increase of international trade and commercial activities. It is hoped that this thesis suggests the foundation of a legislative framework from which to launch Kuwait as an excellent arbitral venue. It differs from what has gone before firstly by supporting party autonomy, secondly, by ensuring judicial intrusion in arbitration is the minimum compatible with the proper operation of the system, while at the same time, offering maximum judicial support for arbitration, and thirdly by adopting a liberal attitude towards arbitration and arbitrators. It is hoped that the thesis will provide a blueprint for the redefinition of the relationship between the court and arbitration, allowing Kuwait to become a favoured forum for arbitration in the present millennium.

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