

**YEMEN'S RATIFICATION OF THE NEW YORK CONVENTION:
AN ANALYSIS OF COMPATIBILITY AND THE UNIFORM
INTERPRETATION OF ARTICLES V(1)(A) AND V(2)(B)**

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by

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**Yemen's Ratification of the New York Convention: An Analysis of
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V(2)(b)**

Abstract

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, is the backbone of the universal mechanism for the enforcement system of foreign arbitral awards. Despite its universal success, Yemen has yet to ratify the Convention. Although Yemen is introducing new legislation on international arbitration, this legislation fails to provide clear guidance on the grounds for refusal of enforcement of foreign arbitral awards, unlike those listed in Article V of the New York Convention, which constitutes the core of the Convention.

This thesis aims to examine the grounds of invalidity of arbitration agreements, and the public policy violation embodied in Articles V(1)(a) and V(2)(b) of the Convention. It adopts doctrinal and functional comparative approaches that comprise theoretical discussion and interpretation, as well as application by the courts of contracting States—paying particular attention to English legal practice. This thesis then also critically analyses the corresponding provisions under the new Yemeni legislation. Through a careful comparative analysis, the thesis also seeks to evaluate the degree of compatibility between the grounds' applications and the relevant principles in operation in Yemen, which are derivative from Islamic Shari'ah law.

The thesis finds that the new Yemen's legislation on international arbitration has several shortcomings regarding the specific areas of the study, and it makes a set of recommendations for legislative improvement. Moreover, the thesis demonstrates how the Convention is compatible with Shari'ah principles, thereby showing that there are no considerable barriers to its ratification by Yemen. Ultimately, in order to rectify the shortcomings in Yemen's impending legislation on international arbitration, it is recommended that the Yemeni government considers ratifying the New York Convention. This progressive step will help Yemen adopt a pro-enforcement policy towards foreign arbitral awards and establish Yemen as an arbitration-friendly jurisdiction.

**In the name of Allah, the most Gracious
the most Merciful**

Verily! Allâh commands that you should render back the trusts to those to whom they are due; and that when you judge between men, you judge with justice. Verily, how excellent is the teaching which He (Allâh) gives you! Truly, Allâh is Ever All-Hearer, All-Seer.¹

¹ Surah An-Nisâ'; verse, 58.

*Dedicated with love to my parents
and
to my beloved ones*

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My foremost gratitude to Allah *Subhanahu Wata'ala*, the most gracious and most merciful, who always provides me with the strength and knowledge needed throughout my life. Peace be upon the Prophet Muhammad *Salle Alaa Hu Alaihi Wa Sallim*, his Family and his Companions.

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NOTES:

The verses of the Holy Qur'an cited in this thesis are based on the Arabic text, and their English translations of the meanings are from King Fahd Complex for the Printing of the Holy Qur'an website, unless indicated otherwise in the footnotes.

The English translations of the provisions of the Yemeni New Draft Arbitration Act cited in this thesis are drawn from Jalal El Ahdab, 'Yemen New Draft Arbitration Law' (2010) 2 International Journal of Arab Arbitration 371, 388, unless indicated otherwise.

The law set out in this thesis is correct to the author's best knowledge as of January 2013.

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Table of Abbreviations

AD	Other Calendar
AH	Islamic Calendar
	E.X: 1425 AH corresponding to 2004 AD.
ADRLJ	Arbitration and Dispute Resolution Law Journal
AIAJ	Asian International Arbitration Journal
Alta L Rev	Alberta Law Review
AJIL	African Journal of International Law
AJICL/Afr J Intl Comp L	African Journal of International and Comparative Law
Am Bus LJ	American Business Law Journal
Am J Int'l L	American Journal of International Law
AJSMS	American Journal of Social and Management Sciences
Am Rev Int'l Arb	American Review of International Arbitration
Am U Int'l L Rev	American University International Law Review
Arab L Q	Arab Law Quarterly
Arb Int'l	Arbitration International
Arb	Arbitration
Arb J	Arbitration Journal
Asian Int'l Arb J	Asian International Arbitration Journal
Art/Arts	Article/Articles
Cal W Int'l L J	California Western International Law Journal
Can Bus L J	Canadian Business Law Journal
CCP	Code of Civil Procedures
CEPMLP	The Centre for Energy, Petroleum and Mineral Law and Policy at University of Dundee
Chinese J Int'l L	Chinese Journal of International Law
CLOUT	Case Law on UNCITRAL Texts
Colum L Rev	Columbia Law Review
Cornell Int'l LJ	Cornell International Law Journal
Colum JTL	Columbia Journal of Transnational Law
CUP	Cambridge University Press
du Droit Intl	Journal du Droit International
ECJ	European Court of Justice
English AA	English Arbitration Act 1996
EU	European Union
FAA	United States of America Federal Arbitration Act 1925
FED B News & J	Federal Bar News & Journal
Fordham Int'l LJ	Fordham International Law Journal
Ga J Int'l & Comp L	Georgia Journal of International & Comparative Law
GW J Int'l L & Econ	The George Washington Journal of International Law and Economics
Harv LR	Harvard Law Review
ICAC	International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation
ICC	International Chamber of Commerce
I C L Rev	International Construction Law Review

ICSID Rev – FILJ	ICSID Review Foreign Investment Law Journal
IFA	The Islamic Fiqh Academy
ILA	International Law Association
ILA Final Report	Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards
ILA Interim Report	Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Award
Int'l Arb	International Arbitration
Int'l ALR	International Arbitration Law Review
Int ALR	International Arbitration Law Review
ICLQ	International and comparative Law Quarterly
Int'l J Arab Arb	International Journal of Arab Arbitration
Int'l Law	International Law
Int'l L FORUM dr int	International Law FORUM Droit International
Int'l L R	International Law Review
Intl Tax & Bus Law	International Tax & Business Lawyer
J Bus L	Journal of Business Law
JCL	Journal of Comparative Law
J Int'l Arb	Journal of International Arbitration
J I B L R	Journal of International Banking Law and Regulation.
JINEL	Journal of Islamic and Near Eastern Law
J Islamic L & Culture	Journal of Islamic Law and Culture
JWIT	The Journal of World Investment & Trade
Kluwer	Kluwer International Law
Law & Pol'y Int'l Bus	Law and Policy in International Business
LMAA	London Maritime Arbitrators Association
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
La Bar J	Louisiana Bar Journal
Loy L A Int'l & Comp L R	Loyola of Los Angeles International and Comparative Law Review
LQ R	Law Quarterly Review
Mich J Int'l L	Michigan Journal of International Law
ML 2006	The UNCITRAL Model Law on International Commercial Arbitration 1985(as amended on 2006)
MUJLT	Masaryk University Journal of Law and Technology
N C Banking Inst	
Nordic J Int'l Law	Nordic Journal of International Law
NYC	The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the New York Convention, of 1958
N Y Int'l L Rev	New York International Law Review
N Y U J Int'l L & Pol	NYU Journal of International Law and Politics
OECD	The Council of the Organisation for Economic Co-operation and Development
Ohio St J on Disp Res	Ohio State Journal on Dispute Resolution
OIC	Organization of the Islamic Conference
OIC	Organization of the Islamic Conference
OJLS	Oxford Journal of Legal Studies
OUP	Oxford University Press
Pace Int'l L Rev	Pace International Law Review

PIL	Swiss Code on Private International Law of 1987
Santa Clara J Int'l L	Santa Clara Journal Of International Law
Saws	<i>Salle Alaa Hu Alaihi Wa Sallim</i> and the English translation is (may peace and blessings be upon Him)
SG Report	UNGA 'Settlement of commercial disputes-Preparation of uniform provisions on written form for arbitration agreements- Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958): Note by the Secretariat' 44 th session (2006) UN Doc A/CN.9/WG.II/WP.139
Stan J Int'l L	Stanford Journal of International Law
(Swt)	Allah <i>Subhanahu Wata'ala</i> and the English translation is(Allah the Glorified and the Exalted)
TDM	Transnational Dispute Management
TILJ	Texas International Law Journal
Transnat'l Disp Mgmt	Transnational-Dispute-Management.
Transnat'l Law	The Transnational Lawyer
Tul L Rev	Tulane Law Review
VA L REV	Virginia Law Review
Vanderbilt JTL	Vanderbilt Journal of Transnational Law
VJ	Vindobona Journal of international Commercial Law
UAE	United Arab of Emirates
UCLA J Islamic & Near E L	UCLA Journal of Islamic and Near Eastern Law
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL ML	The UNCITRAL Model Law on International Commercial Arbitration 1985
UNCITRAL Recommendation	UNGA 'Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session, Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' 61 st session (2006) UN Doc. A/61/17
U Pa J Int'l Bus L	University of Pennsylvania Journal of International Business Law
U Pa J Int'l Econ L	University of Pennsylvania Journal of International Economic Law
U S	United States of America
Wis Int'l L J	Wisconsin International Law Journal
Yemen Arb J	Yemeni Arbitration Journal
YALE L J	Yale Law Journal
YBCA	Year Book Commercial Arbitration
YBUNCTL	Yearbook of the United Nations Commission on International Trade Law
YCAA	Yemeni Current Arbitration Act of 1992
YNDAA	Yemeni New Draft Arbitration Act 2010
ZPO	German Code of Civil Procedure 2005 and 1998 version

Introduction

Introduction

The picture is much brighter – and cause and effects are clearer – in the area of international commercial arbitration, and this is where the success story of the New York Convention begins.¹

1. Background to the Study

Commercial disputes increase with the growth of cross-border transactions just ‘as certainly as night follows day’.² Accordingly, the parties contemplating a contractual relationship are forced to find alternative methods for dispute settlement.³ International arbitration now dominates such alternative methods, having become the most prevalent and preferred method among them.⁴ This is not only because of the conventional view that international arbitration is cheaper and speedier, but also because it is confidential, neutral and flexible. Therefore, international business and global trade are intimately connected with international commercial arbitration.⁵

The arbitration process ends disputes through the issuing of a binding and enforceable award that is similar to a judicial judgment in terms of *res judicata* authority and effect, and is thereby considered final with respect to the subject matter of the disputes it resolved.⁶ The main feature in the success of international commercial arbitration is the

¹ Herbert Kronke, ‘Introduction: The New York Convention Fifty Years on: Overview and Assessment’ in Herbert Kronke and Patricia Nacimiento, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer 2010) 3.

² Rayneo Hamilton in Elizabeth Davidson, ‘No Dispute over ADR Success’(1999) *The Lawyer* 12 <<http://www.thelawyer.com/no-dispute-over-adr-success/87875.article>> accessed 20 March 2012.

³ Ileana Smeureanu (ed), *Confidentiality in International Commercial Arbitration* (vol: 22, Kluwer 2011) xv (stating that ‘the breakdown and asphyxia of national litigation, by courts of law, forces international business to resort another disputes methods such as Meditation, Negotiation, Conciliation and Arbitration’).

⁴ Gary Born, *International Commercial Arbitration* (Kluwer 2009) 15; Derek Roebuck, *Ancient Greek Arbitration* (Arbitration Press 2001) 348-349.

⁵ Ernest-Ulrich Petersmann, ‘Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade’ (2006) 27 *U Pa J Int'l Econ L* 273.

⁶ J. Merrilis, *International Dispute Settlement* (5th edn, CUP 2011) 8; Abdul Khoweildy, ‘Study on The International Islamic Centre for Conciliation and Arbitration in Dubai: A Modern Legal Prospective to Resolve Disputes in the Islamic Financial Industry’ (2011) 3 *Int'l J Arab Arb* 25.

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extensive enforceability of arbitral awards almost anywhere in the world in which the respondent has assets.

The importance of enforceability is, of course, paramount. There is no value to international commercial arbitration unless its awards are enforceable. Nonetheless, the risk of non-enforcement loomed like the ‘Sword of Damocles over the entire system, and the costs of non-enforcement, even when rare, are enormous for the parties, the arbitrators, the institutions, the States and the system as a whole’.⁷ Consequently, the international community established the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention (hereinafter, the NYC or the Convention), as a primary instrument for regulating the enforcement of foreign arbitral awards. The Convention came into force on 7 June 1959, marking a turning point in the entire history of commercial law sphere.⁸

1.1 The Philosophy and Objectives of the NYC

Fifty-four years ago, the drafters of the NYC created a framework that allowed litigants to construct agreements to arbitrate disputes relating to cross-border transactions, despite the great diversity of legal systems and cultural backgrounds. The NYC creates a structure by which an arbitral award rendered in one signatory State could be recognised and enforced in another signatory State noticeably more easily than the enforcement of judgements issued by national courts of law.⁹

⁷ Gunther Horvath, ‘The Duty of the Tribunal to Render an Enforceable Award’ (2001) 18 J Int’l Arb 135, 135.

⁸ United Nations, *Treaty Series*, vol. 330, No. 4739; Stephen Schwebel, ‘A celebration of the United Nations’ New York Convention’ (1996) 12 Arb Int’l 823.

⁹ Loukas Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer 2009) 86.

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Thus, the Convention establishes the backbone of a universal mechanism for the enforcement of foreign arbitral awards.¹⁰ As such, the Convention has been identified as ‘the single most important pillar on which the edifice of arbitration rests’¹¹ and the ‘constitutional document’ of private international commercial arbitration.¹² Also, It remains one of the most extensively acceded to international instrument in any field of law.¹³

The key objective of the NYC is to help encourage arbitration as an alternative settlement mechanism for international commercial disputes by means of enhancing confidence in the recognition and enforcement of arbitral awards and substantially facilitating enforcement procedures in foreign States.¹⁴ Thus, the NYC provides a further degree of commercial security and confidence for parties entering into cross-border transactions.¹⁵ It safeguards the enforcement of arbitral awards largely by restricting the grounds for refusal of enforcement as much as possible, and this pro-enforcement bias of the Convention is clearly evident in Art. V.¹⁶

¹⁰ Albert Jan van den Berg, ‘An Overview of the New York Convention of 1958’ in Emmanuel Gaillard and Domenico di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Ch 2, Cameron May 2008) 55-56.

¹¹ Gillis Wetter, ‘The Present Status of the International Court of Arbitration of the ICC: An Appraisal’ (1990) 1 *Am Rev Int Arb* 91, 93.

¹² Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer 1981) 1.

¹³ Tetiana Vucurovic, ‘50th anniversary of the New York Convention: any progress in recognition and enforcement of foreign arbitral awards in Ukraine?’ (2008) *Int ALR* 1; Linda Silberman ‘Symposium: International Commercial Arbitration: Fifty Years after the New York Convention’ (2009) 38 *Ga J Int'l & Comp L* 25.

¹⁴ William Park and Alexander Yanos, ‘Treaty Obligations and National Law: Emerging Conflicts in International Arbitration’ (2008) 58 *Hastings Law Journal* 251.

¹⁵ Kronke (n 1) 12.

¹⁶ UNGA ‘Settlement of commercial disputes-Preparation of uniform provisions on written form for arbitration agreements- Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958): Note by the Secretariat’ 44th session (2006) UN Doc A/CN.9/WG.II/WP.139 para 24(expressing that ‘the New York Convention has been described as having a “pro-enforcement” bias in that it seeks to encourage enforcement of awards in the greatest number of cases as possible).

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1.2 The Significance of Art. V of the Convention

Art. V constitutes the heart of the NYC.¹⁷ The article's structure provides a favourable obligation to recognise and enforce foreign arbitral awards, subject to limited exceptions and without providing any affirmative obligation to deny recognition and enforcement.¹⁸ Accordingly, Art. V enshrines a strong pro-enforcement bias policy as a main objective of the Convention and helps thwart the expansive interpretations of these limited grounds to refuse enforcement.¹⁹ Hence, all such grounds are exhaustive and must be interpreted in accordance with the spirit of the Convention, which facilitates rather than limits the circumstances in which the foreign arbitral award should be enforced.²⁰

In addition, Art. V provides international standards and transparent uniformity of enforcement exceptions, thereby helping to release parochial resistance and archaic limitations that no longer exist in arbitration practice. Part of the rationale for this could be that many arbitration laws still contain grounds for refusal that are designed to deal merely with judgments by foreign courts rather than foreign arbitral awards.²¹ Alternatively, the Convention may simply be ensuring that such arbitration laws are more dutiful in honouring foreign arbitral awards by implementing the internationally accepted grounds for refusal.

Two essential but distinct features that demonstrate the pro-enforcement policy of the Convention are the provisions relating to the invalidity of arbitration agreement and

¹⁷ Pieter Sanders, 'The History of the New York Convention' in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series, No. 9, Kluwer 1999) 13.

¹⁸ Gary Born, *International Arbitration: Law and Practice* (Kluwer 2012) 377.

¹⁹ Wetter (n 11) 91.

²⁰ Born (n 4) 2723.

²¹ The Yemeni Civil Procedural Act of 2002 Art. 494; Bahraini Law No. 12 of 1971 on Civil and Commercial Procedures Arts 252 and 253.

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violation of public policy, which are embodied in Art. V(1)(a) and Art. V(2)(b). These are both common and compelling grounds for refusal at the enforcement stage.²²

1.3 The Significance of Art. V(1)(a) and Art. V(2)(b) of the NYC

Accepting the validity of arbitration agreements represents the relinquishing of an important right to have disputes resolved judicially and establishes the right to set up a process for settling disputes by arbitral tribunal.²³ Thus, the refusal of enforcement is expected to arise more often when a lack of arbitral jurisdiction is found to exist rather than where an award is challenged on more general grounds.²⁴ In addition, even though a valid arbitration agreement may exist, the limits of its form and substantive requirements may be circumscribed in ways that require serious consideration.²⁵ Hence, examining the invalidity of arbitration agreements is of real importance, as this can lead to long drawn-out process that is not only expensive for the parties but can result in an unenforceable award.

The ground of violation of public policy has given rise to a series of practical problems in terms of its interpretation and application. It is still considered a “safety valve” and “major loophole”.²⁶ The interfering of States’ public policy rules considered as ‘one of the most difficult questions with which an arbitrator may be confronted in more than fifty

²² Lanfang Fei, ‘Public Policy as a Bar to Enforcement of International Arbitral Awards: A Review of the Chinese Approach’ (2010) 26 Arb Int’l 301; Zhu Weidong, ‘Determining the Validity of Arbitration Agreements in China: Towards a New Approach’ (2010) 6 AIAJ J 44; S.I. Strong, ‘What Constitutes an “Agreement in Writing” in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act’ (2011) 48 Stan J Int’l L 1.

²³ Margaret Moses, *The Principles and Practice of International Commercial arbitration* (CUP 2008) 17

²⁴ W. Michael Reisman and others, *International Commercial Arbitration Cases, Materials and Notes on Resolution of International Business Disputes* (The Foundation Press Inc 1997) 1262.

²⁵ William Park, *Arbitration of International Business Disputes : Studies in Law and Practice* (OUP 2006) 88; Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (2nd edn, Kluwer 2001) 41.

²⁶ Winnie (Jo-Mei) Ma, ‘Public Policy In The Judicial Enforcement of Arbitral Awards: Lessons For and From Australia’ (PhD Thesis, Bond University 2005)

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percent of the cases'.²⁷ Consideration of public policy exceptions is critical since it has been identified as the 'greatest single threat' to the use of arbitration in international commercial disputes. There has been genuine concern that expansive interpretation of this loophole may negate the effectiveness of the NYC.²⁸ Art. V(2)(b) therefore provides a narrative interpretation approach used as a vehicle whereby a signatory State can opt out of enforcing a foreign arbitral award if it finds, in extreme cases, that the award contrary to its public policy.²⁹

These two provisions, together with the wide acceptance and recognition of the international commercial market of the Convention,³⁰ have led many States, including Middle Eastern countries, to ratify the NYC and adopt its significant enforcement policy.³¹

2. The Relevance of the Thesis

Initially, with 148 contracting States, the NYC has widespread global recognition, including by the world's leading trading nations and by most of Middle Eastern States.³² Despite the great success of the Convention, Yemen is still not a party to it.³³ As a result,

²⁷ Marc Blessing, 'Impact Of The Extraterritorial Application Of Mandatory Rules On International Contracts' (1999) 9 Swiss Commercial Law Series 5.

²⁸ Audley Sheppard, 'Public Policy and the Enforcement of Arbitral Awards: Should there be a Global Standard' (2004) 1 Transnat'l Disp Mgmt 1.

²⁹ Kristin Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' (1995) 18 Fordham Int'l LJ 924.

³⁰ Carolyn Lamm, 'Recent Developments in International Arbitration' (1989) 36 FED B News & J 276.

³¹ Elana Levi-Tawil, 'East Meets West: Introducing Sharia into the Rules Governing International Arbitrations at the BCDR-AAA' (2011) 12 Cardozo J Of Conflict Resolution 609; Loukas Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer 2009) 86

³² Muhammed Aboul-Enein, *Peaceful Settlement of Commercial Disputes: Commercial Arbitration and other ADR Techniques* (1st ed, S.I.N 2005) 51

³³ < http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html > accessed 10 October 2012

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the Yemeni arbitration system has become isolated from the wider international arbitration community.³⁴

The NYC as an international instrument and its concordance with traditional Islamic Law (hereinafter, Shari'ah) is not always fully understood in many Middle Eastern States including Yemen, despite the clear dominance of the NYC in international arbitration.³⁵ In this context, it has been noted, by some scholars, that many Middle East States, which apply mainly Shari'ah in their legislation, remain hesitant to abandon their traditional cultures and religious principles by adopting international arbitration conventions on the ground that the terms of such conventions are contrary to the States' domestic legal systems.³⁶ The arbitration agreement validity requirements and public policy exception are a case in point.³⁷ Unfortunately, this allegation has been one of the major breakdowns in the ratification of the Convention by Yemen and has also led to Yemen being described as "traditionally hostile" to the enforcement of foreign arbitral awards.³⁸

It is therefore become essential to demonstrate the compatibility between the NYC and Shari'ah, so as to determine whether the stated grounds for non-ratification are genuine or merely superficial excuses.

Second, Yemen has issued a New Draft of Arbitration Act (hereinafter, the YNDAA), which is still currently being examined prior to being enacted by the Yemeni

³⁴ Fahim Muhsin, 'Enforcement of Foreign Arbitral Awards in Yemeni law' (in Arabic, 2009) Note 1

³⁵ Nigel Blackaby and Constantine Partasides, et al, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 226; Roy (29) 921-924 ; Waleed Al-Tuwaigri, Ground for Refusal of Enforcement of Foreign Arbitral Awards under the New York Convention 1958 with special reference to the Kingdom of Saudi Arabia, (PhD thesis, University of Glasgow, UK 2006) 7.

³⁶ Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries* (Kluwer 1990) 551-574; Samir Saleh, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East' (1985) 19 Arab LQ 1; Tarek Badawy, 'The General Principles of Islamic Law as the Law Governing Investment Disputes in the Middle East' (2012) 29 J Int Arb 255.

³⁷ Mary Ayad, 'International Commercial Arbitration Awards Enforcement at the Crossroads of Sharia Law and Ordre Public in the MENA: Paving the Golden path towards Harmonisation' (2009)10 JWIT 723; Mark Wakim, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21 N Y Int'l L 1; Abdulrahman Baamir, *Shari'a Law in Commercial and Banking Arbitration* (Ashgate Publishing Limited 2010) 74.

³⁸ El-Ahdab (n 36) 363.

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Parliament.³⁹ If enacted, the YNDAA will replace the Current Arbitration Act No 22/1992 amended by the Arbitration Act No 32/1997 (hereinafter, YCAA).⁴⁰ The YNDAA contains sixty-eight articles generally inspired by the Egyptian Arbitration Act, which originally largely embraced the UNCITRAL Model Law (hereinafter, ML).⁴¹ Although the YNDAA, specifically Art. 59, exhaustively lists the grounds, identical to Art. 34 of the ML, on which an award may be set aside, there is an absence of grounds mirroring those contained in Art. 36 of ML on which an award may be refused enforcement. The grounds in Art. 36 of ML were originally drawn from Art. V of the NYC.⁴² This statutory vacuum raises deficiencies of two types.

- a) Where the YNDAA is applicable, the grounds for refusal will be governed by Art. 66 of the YNDAA.⁴³ With some variation, the grounds for refusal in Art. 66 correspond largely with that contained in Art. 494 of the Yemen's Civil Procedural Act of 2002, which treats foreign arbitral awards as writs of execution. Thus, in reaching a decision, the Yemeni Courts must take into account the following considerations: the award is not contrary to a final ruling previously rendered by the courts of Yemen in the subject matter of the dispute; the award does not violate the public policy of the Republic of Yemen; the award was not rendered in a matter that cannot be subject to arbitration; and the award was duly notified to the party against whom it was rendered.⁴⁴ By virtue of Art. 66 of the YNDAA, a foreign arbitral award will be treated akin to a writ of execution. This approach can be considered antiquated and limited by practical shortcomings in the light of ongoing developments and uniformity in the arena of international arbitration, such as advances in the interpretation and application of the grounds for refusal. Moreover,

³⁹ The Yemeni New Draft Act 2010 on Arbitration in Civil and Commercial Matters.

⁴⁰ The Yemeni Current Arbitration Act of 1992 cited and translated in (1995) 10 Arab LQ 150.

⁴¹ The UNICTERAL Model Law on International Commercial Arbitration 1985 (amended in 2006).

⁴² The same gap still remains in place under the YCAA.

⁴³ Art. 3 reads that 'Without prejudice to the provisions of the international conventions ratified by the Republic of Yemen, the provisions of this Law shall apply to any arbitration conducted in the State and when parties to an arbitration conducted abroad agree to submit it to the provisions of this Law'.

⁴⁴ YNDAA, Art. 66.

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such ambiguous grounds provide almost limitless discretion to the Yemeni courts when examining questions of enforcement, and thereby not only undermine the principle of legal certainty but create a perpetual risk of non-enforcement.

- b) There are no explicit provisions with regards to the enforcement of foreign arbitral awards that were not issued in accordance with the provisions of the YNDAA. This means, by virtue of the YCAA and the YNDAA, that foreign arbitral awards can be enforced in Yemen only where reciprocal agreements to enforce Yemeni arbitral awards exist in the State in which the award was issued.⁴⁵ Otherwise, the Civil Procedural Act will apply and arbitral awards would be treated yet again as writs of execution⁴⁶ unless an arbitral award is embodied in a foreign judgment then enforcement is sought before the Yemeni court.⁴⁷

When the grounds for refusal are left to the discretion of the Yemeni courts in this way, it inevitably leads to inconsistency and allows these grounds to be either waived or expanded on a case-by-case basis. Moreover, the absence of clear grounds for refusal is likely to generate conflicts with many laws and conventions that Yemen has ratified.⁴⁸

Ratifying the NYC would solve these deficiencies. Where the YNDAA is applicable, the NYC would prevail since it would be embodied in the Yemeni Arbitration Law. Where the YNDAA is not the applicable law by the arbitral parties or where they have failed to choose the law governing arbitration, the NYC would also prevail

⁴⁵ Rita Bou Aoun, 'A New Draft Arbitration Law in the Republic of Yemen' (2010) 2 Int'l J of Arab Arb 73.

⁴⁶ Mohammed Abu Al-Ainain, 'The application of the New York Convention in Arab countries' (in Arabic, 2008) 106 Yemeni Arbitration Journal 11.

⁴⁷ Judgments No. 10 of 29 September 1978.9 (High Court of Aden) in Isam Ghanem, 'The Enforcement of Arbitral Awards and Foreign Judgments in the Yemen Arab Republic' (1988) 3 Arab LQ 81.

⁴⁸ Esaam Al-Tamimi, *Practical Guide to Litigation and Arbitration in the United Arab Emirates* (Kluwer 2003) 158 (stating that 'since UAE, has not acceded the NYC at that time, applying Art. 235 of the UAE Civil Procedure Law, which is mirror to Art. 494 of the Yemeni Civil Procedural law, are "problematical").

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based on Art. 497 of the Yemen's Civil Procedural Act.⁴⁹ Thus, the NYC, if ratified by Yemen, would substantially influence the YNDAA framework in matters of enforcement and would create broad uniformity in enforcement with the majority of countries today.

Third, although the YNDAA aims to produce a legal framework and incorporates several arbitration principles which are consistent with the best modern practice in international commercial arbitration,⁵⁰ the provisions relating to the invalidity of arbitration agreements and to public policy issues as grounds for refusal are problematic.

The YNDAA addresses the invalidity of arbitration agreements in two separate articles that are not connected to the grounds for refusal.⁵¹ This is noteworthy; questions about the validity of an arbitration agreement serve not only to ensure the will of the parties and to enforce their agreement, but also to ensure the efficacy of the enforceability of the award.⁵²

This important principle is clearly recognised under the NYC, which closely connects validity with enforceability. In addition, the NYC, by virtue of Art. II(1) and Art. II(3), establishes basic rules for determining the formal and substantive validity of international arbitration agreements. These joint requirements play a principal role in the contemporary trend of enforcement processes and should therefore be taken into account by the YNDAA. By ignoring them, the Yemeni national courts may well reach problematic and anomalous decisions on questions of enforcement, which would in turn undermine arbitration procedures in Yemen.

With respect to the public policy exception, although the YNDAA explicitly lists this under Art. 66(b) as a ground for refusal, there remain unresolved issues about its

⁴⁹ Abu Al-Ainain (n 46) 11.

⁵⁰ The Law recognises several arbitral principles, such as the party autonomy , the doctrine of separability, the doctrine of competence-competence and follows international trends of the times as well as the scope of its application is limited to international commercial arbitration.

⁵¹ Art. 15 for the formal validity and Art. 59 as a ground for setting aside the Arbitral Award.

⁵² Born (n 4) 2777.

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definition, characterisation and application. It is notable that Art. 66(b) permits the non-enforcement of arbitral awards when they violate the Republic of Yemen's public policy, which merely indicates its national public policy. However, the courts of States that have ratified the NYC and also many commentators, as elaborated in this study, have tended to view the application of international public policy as more desirable in the context of enforcement.⁵³

Moreover, the public policy exception has always been marked by significant tensions in the enforcement context in terms of its contents and application. The clash is most marked between the NYC and the Shari'ah principles known as *Maslaha*, which are embedded in the Yemen's legislation on arbitration. Accordingly, it is important to seek to resolve such tensions and to demonstrate, if possible, that international public policy derived from internationally accepted sources and used for the purpose of Art. V(2)(b) of the NYC does not contradict with Shari'ah principles, so that it may be accepted into the Yemeni arbitration system.

Finally, Yemen is currently witnessing rapid development in the investment sector, particularly in the gas and oil industries, and therefore legal regulations governing the security and performance of business organizations and international corporations have continuous room for improvement.⁵⁴ Given the recent sweeping political changes in the region together with other legal security issues, investors and international corporations that have activities in the region are increasingly looking to arbitration institutions in their country of domicile.⁵⁵ In response, Yemen established the Yemeni Centre for Conciliation and Arbitration and remains committed to creating a more arbitration-friendly atmosphere through a uniform arbitration commercial law. Additionally, Yemen has promulgated the following laws: Law No. 24 of 1993 on Free Zones; Law No. 15 of

⁵³ Emmanuel Gaillard and John Savage (eds), *Fouchard Gailard and Goldman on International Commercial Arbitration* (Kluwer 1999) para 1647; Born (n 4) 2835

⁵⁴ Ghazi Al-Aghbari, 'Recent trends and Enforcement of Foreign Arbitral Awards in Yemeni law' (in arabic, 2002) 33 Yemeni Arbitration Journal 8.

⁵⁵ Habib Al Mulla and others, *Comparison of MENA International Arbitration Rules* (JurisNet LLC 2011) iii.

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2010 on Investment; Law No. 20 of 2010 on Industry; Law No. 22 of 2010 on Mines and Quarries; Law No. 23 of 2010 on Trademarks and Geographical Indications. Further, there are a number of new draft laws and principal reforms of existing laws that are at different phases of enactment, including the YNDAA. This indicates some of the efforts being undertaken to reduce barriers to investment and international trade and to making Yemen more attractive as a territory for international investment. The ratification by Yemen of the NYC would be the next progressive step in engendering confidence in foreign investors and ensuring Yemen's engagement with the international community in the commercial arbitration sphere.

3. Aims of the Thesis

This thesis has specific aims and a general aim. The specific aims are to closely examine the grounds of (a) the invalidity of arbitration agreements and (b) the public policy exception embodied in Arts V(1)(a) and V(2)(b) of the NYC in the light of their corresponding provisions in the YNDAA. The analysis of the grounds of invalidity and the public policy exception in this thesis will focus on both theoretical discussions and practical applications by the domestic courts of contacting States, with particular attention to English practice. The general aim of this thesis is to examine through careful analysis whether or not the provisions of the NYC relating to the grounds of invalidity and the public policy exception are compatible with the principles of Shari'ah. This will establish whether or not there any serious contradictions between these two legal systems, thereby potentially eliminating the principal barrier to the ratification of the Convention by the Yemeni government.

4. Scope and Methodology of the Thesis

4.1 Scope of the Thesis

This study is limited in scope to the invalidity of arbitration agreements and to the public policy exception, as two crucial grounds for refusal of enforcement by the courts of NYC contracting States. As mentioned previously, the study will give particular attention to English practice, this being one of the most effective representations of the NYC's achievement,⁵⁶ and to the YNDAA. Therefore, the use of case law, arbitration practices, and national legislation that implements the NYC is for clarity and illustration purposes only. It should be noted, however, that the YNDAA is in large measure identical to the YCAA with respect to the specific areas considered in this study, and thus the few previous cases and legal opinions that there are, as well as the interpretation of provisions remain highly relevant to any consideration of the YNDAA.

This study is constrained by a number of factors. First, Yemen is a country that continues to abide by the Shari'ah jurisprudence, which is based on four main sources, the Holy *Qur'an*⁵⁷, the *Sunnah*⁵⁸, *Ijma of Ulama*⁵⁹ and *Qiyas*.⁶⁰ It is impossible within the limited scope of this study to provide or even attempt to discuss all views of these sources or offer a comprehensive analysis of all the Islamic schools related to the area of the study.⁶¹ It may suffice, however, to concentrate on the important verses from the Holy *Qur'an* and the *Sunnah* and present the best-established views that concord with the

⁵⁶ Born (n 4) 2715.

⁵⁷ The *Qur'an* is a compilation of revelations received by the Prophet Muhammed from God (Allah); Mark Cammack, 'Islam, Nationalism, and the State in Suharto's Indonesia' (1999) 17 *Wis Int'l LJ* 27

⁵⁸ They are the practice, conduct, and tradition of the Prophet Muhammed(saws).

⁵⁹ Refers to the consensus of qualified Islamic scholars of a given generation on particular points of Islamic law.

⁶⁰ The process of analogical reasoning form a known injunction to a new injunction based on the primary sources of Shari'ah the Holy Quran and Sunnah in Baamir (n 37)5.

⁶¹ Baamir (n 37) 7; (it is worth noting that in the case of Yemen the grounds for interpretation is not specified to a specific Islamic school of jurisprudence, therefore the Yemeni scholars and judges take into their considerations all the major schools of thought under Shari'ah, see The Constitution of the Republic of Yemen of 1994, Art. 3).

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current epoch in order to demonstrate that Shari'ah is compatible with the approach of the NYC.

Second, although the terms “recognition” and “enforcement” are distinct in terms of their application and effects, this study will focus solely on the enforcement stage in order to avoid being unduly broad or inclusive.⁶² As such, this work will not distinguish between the recognition and the enforcement of arbitral awards. Instead, it will for the sake of expediency refer to both using the term “enforcement”.

Third, it should be noted that Art. V(1)(a) of the NYC embodies two grounds: the incapacity of the parties and the invalidity of the arbitration agreement. This study excludes the incapacity of the arbitral parties argument, largely because it arises very rarely in practice and thus has not given rise to any issue in the enforcement stage, to the best knowledge of the author.⁶³ This study therefore refers to Art. V(1)(a) of the NYC solely with respect to the invalidity of arbitration agreements, as the central issue that arises repeatedly in practice.

Fourth, whereas there is an absence of clear grounds under the YNDAA and the YCAA for non-enforcement on account of the invalidity of an arbitration agreement, there is identical parallelism of the grounds for setting aside under both laws with those for non-enforcement under the NYC.⁶⁴ Although, the legal consequences of setting aside and non-enforcement are technically different, referrals to relevant literature and case law on the setting aside ground will be included in this study for the following reasons. Initially, the criteria and procedures are the same and correspond with the same authorities and application under Art. 34 and Art. 36 of the UNCITRAL ML.⁶⁵ In addition, the grounds

⁶² Blackaby (n 35) 627-628.

⁶³ Elliott Geisinger, ‘Implementing the New York Convention in Switzerland’ (2008) 25 J Int Arb 691; Sanaa Obeidat, ‘Exceptions to the Enforcement of Foreign Arbitral Awards under The New York Convention: Prospects for Jordan’ (Master Thesis, McGill University 1994) 28.

⁶⁴ YNDAA Art. 59 and YCAA Art. 53.

⁶⁵ Art. 34 of the ML 1985 lists grounds for setting aside that mirror the grounds for non-enforcement set out in Art. 36, see *Corporacion Transnacional de Inversiones SA de CV v STET Int'l SpA*, 45 OR 3d 183 (Canada, Ontario Court of Justice 1999) (stating that ‘The grounds for challenging an award under the Model Law are derived from Article V of the New York Convention....Accordingly; authorities relating to

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for setting aside under both Yemeni Arbitration Acts are consistent with Art. V of the NYC. Therefore, the same interpretation and analysis for both provisions as well as the same reasoning likely apply by analogy within both contexts. Moreover, the functions of both articles share the same issues and thus the substantive analysis that applies in both contexts is also applicable. Most importantly, as Sheppard observes, ‘it is difficult to ascertain whether the practice of courts is less rigorous when asked to recognize/enforce a foreign award than they are when asked to set aside an award made in their own jurisdiction.’⁶⁶ Therefore, the courts may well apply the same examination under the two circumstances. Fundamentally, both provisions and their interpretations are related to each other or they are *in pari materia* with each other.⁶⁷ Consequently, decisions by the Yemeni courts on setting aside awards that are relevant to the subject matter of this study will also be considered, for illustrative purpose.

Finally, the ML and the NYC jointly reflect a preference for many arbitration principles and promote the finality of the arbitral awards and legal confidence by reducing the existing grounds for review and codifying them into definite and consistent standards.⁶⁸ As is also well-known, the ML has had a significant impact on reforming many States’ arbitration laws and has become ‘a yardstick by which to judge the quality of ... existing arbitration legislation and to improve it’.⁶⁹ Therefore, occasional references and comparisons are made with certain relevant provisions and authorities related to the ML. At the same time, where necessity of illustration is required, references are also made to relevant legislative provisions in some of the NYC’s contracting States with a view to highlight the similarities and differences found in the provisions relating to non-enforcement issues with that of the Yemeni Act provisions.

Article V of the New York Convention are applicable to the corresponding provisions in Article 34 and 36 of the Model Law’.).

⁶⁶ Audley Sheppard, ‘Interim ILA Report on Public Policy as Bar to Enforcement of International Arbitral Awards’ (2003) 19 Arb Int’l 217.

⁶⁷ Ian Mcleod, *Legal Methods* (7th edn, Palgrave Macmillan 2009) 249.

⁶⁸ Amokura Kawharu, ‘The Public Policy Ground for Setting Aside and Refusing Enforcement of Arbitral Awards: Comments on the New Zealand Approach’ (2007) 24 J Int’l Arb 491.

⁶⁹ Johan Steyn, ‘England’s Response to the UNCITRAL Model Law of Arbitration’ (1994) 10 Arb Int’l 1, 1.

4.2 Methodology of the Thesis

This thesis will be completed through library-based research, relying primarily on a wide and comprehensive review of existing literature, legislation, case law, arbitral awards, journal articles and other official documents. It follows theoretical doctrinal and functional comparative approaches. Prior to addressing the specific research approaches, it is important to elucidate two methodological questions: (1) Why is Yemen chosen as a research object; and (2) why is the NYC treated through the experience of the English courts?

Why is Yemen Chosen as a Research Object?

The incentives for choosing Yemen as the principal research object are not only because the author originates from Yemen and has a strong motivation to contribute to Yemen's arbitration system, but also because Yemen is now introducing a new arbitration law that is still at a rudimentary phase with respect to the grounds for refusal of foreign arbitral awards. Moreover, Yemen now finds itself in the insular position of not being among the 148 member States to have acceded to the NYC. Therefore, particular attention is given to this matter in Yemen based on the necessity of having clear grounds for responding properly to the international trend demonstrated by the NYC.

Moreover, the analysis in this thesis is useful for international businesses and foreign investors to better understand the legal environment and legal security measures in Yemen and other Middle Eastern jurisdictions for safeguarding their rights, particularly when they choose arbitration as a method for dispute resolution. Furthermore, this thesis and the theoretical questions it examines are useful for other Middle Eastern countries

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that share the same culture and legal background and, like Yemen, remain reluctant to ratify the NYC.⁷⁰

Why is the NYC Treated Through the Experience of the English Courts?

English arbitration practice has enjoyed fairly extensive historical success in implementing the NYC's pro-enforcement policy since the establishment of the NYC.⁷¹ In addition, the English courts provide a wide range of judicial decisions and well-established precedents with regard to the application of the NYC, thereby providing a rich field of material in keeping with the spirit of the NYC.⁷² Thus, English practice provides clear insight into the Convention's nature and purposes.

Moreover, the English Arbitration Act 1996 (hereinafter, English AA) and the NYC both have a great influence on giving effect to the Convention's arbitral awards through a 'speedy and effective' enforcement mechanism.⁷³ Indeed, the English AA has had significant influence on the arbitration reforms of other nations.⁷⁴ The widespread acceptance and reference to the English arbitration legislation and court practice demonstrates that the English experience provides perhaps the clearest and most helpful reference point for Yemen in the field of international arbitration.

⁷⁰ For instance; Sudan, Libya, Iraq and Phalistan.

⁷¹ Born (n 4) 2715; Hew Dundas, 'The pro-enforcement assumption of the New York Convention: but... enforcement of a foreign award refused by English Court of Appeal: *Dallah v Pakistan*' (2009) 75 Arb 555.

⁷² *Dardana Ltd v Yukos Oil Co* (No.1) [2002] EWCA (Civ) 543, [2002] 1 All ER 819; *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2005] EWHC 726 (Comm), [2005] 2 Lloyd's Rep 326.

⁷³ *Gater Assets Ltd v Nak Naftogaz Ukrainiy* [2007] EWCA (Civ) 988, [2008] 2 Lloyd's Rep 295; *Kanoria and others v Guinness* [2006] EWCA (Civ) 222, [2006] 2 All ER (Comm.) 413, [421] (where English Court of Appeal, concluded that 'limited conditions in which an English court could be confident to refuse enforcement of an arbitral award to which the NYC applicable').

⁷⁴ Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law Practice* (OUP 2007) 489; William Park, 'The Interaction of Courts and Arbitrators in England: The English Act as a Model For The United States?' (1998) Int'l ALR 54.

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Having addressed these two important questions, this introduction will now set out the research methodology used throughout this thesis.

4.2.1 The Doctrinal Approach

The doctrinal approach, or black-letter law approach, is based on extensive use of legal authorities and statutes to explain and understand the law. Therefore, this approach is conducted in order to systematize and clarify the best solution to the problem being studied through the careful analysis of authoritative texts that consist of primary and secondary sources.⁷⁵ This gathering of data on the subject itself represents a major step towards the achievement of the aims of this thesis, providing the groundwork for a careful and thoughtful analysis.

4.2.2 Functional Comparative Approach

This thesis also utilizes the functional comparative approach since, as some scholars observe, ‘comparative law not only shows up the emptiness of legal dogmatism and systematic but, because it is forced to abandon national doctrines and come directly to grips with the demands of life for suitable rules, it develops a new and particular system, related to those demands in life and therefore functional and appropriate’.⁷⁶ Lepaulle argues that the comparative law method is the best technique for any researcher to analyse and understand his own legal system, and that there is in fact no other better

⁷⁵ Mike McConville and Wing Hong Chui(eds), *Research Methods for Law* (EUP 2007) 5.

⁷⁶ Konard Zweigert and Hein Kotz, *An Introduction to Comparative Law* (3rd edn, OUP 1998) 33-34.

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method for any hypothesis or theory to be endorsed than in the light of comparison.⁷⁷ That said, this thesis does not utilize the comparative approach in the traditional sense.⁷⁸ Rather, it utilizes the basic methodological principle of all comparative law, which is functionality.⁷⁹ Therefore, the functional method is one of the most fruitful approaches in comparative law.⁸⁰

Generally, any kind of comparative study should be conducted between two or more entities that are comparable in all relevant respects. However, it is clearly impossible within the scope of this study to compare the law of Yemen with that of all 148 contracting States to the NYC. Therefore, this study opts for the English experience as a representative of the NYC legal family for the reasons already outlined previously.

It should be emphasized, at this juncture, that although the English legal system, being a common law system, and Yemen's as a civil law system are conceptually and historically different, they still perform the same functions with regard to interpreting international instruments such as the NYC.⁸¹ Again, this thesis does not attempt to focus on the hermeneutics of comparative law between the two jurisdictions or even to trace origins back to their legal systems and judicial cultures.⁸² Rather, this thesis focuses on how the NYC rules are applied within the English jurisdiction and how they will be applied functionally in the context of Yemeni arbitration law, while providing a critical analysis of compatibility. Put differently, the functional approach in this thesis focuses on two important elements: it emphasises rules and legal arguments, and also their effects and applications through judicial decisions. Consequently, this thesis examines the

⁷⁷ Pierre Lepaulle, *The Function of Comparative Law* (1922) 35 Harv LR 838.

⁷⁸ Peter de Cruz, *Comparative Law in A Changing World* (2nd edn, Cavendish Publishing 1999) 1-30.

⁷⁹ Zweigert (n 76) 34.

⁸⁰ Hugh Collins, 'Methods and Aims of Comparative Contract Law' (1989) 11 OJLS 396.

⁸¹ Zweigert (n 76) 37.

⁸² Geoffrey Samuel, 'Taking Method Seriously' (Part I, 2007) 2 JCL 94; See also Geoffrey Samuel, 'Taking Method Seriously' (Part II, 2007) 2 JCL 210.

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consequences of judicial decisions as ‘responses to real situations’ and it compares legal systems ‘by considering their various judicial responses to similar situations’.⁸³

The functional method has the advantage of providing a better perspective on how best to tackle legal cases and produce sound judgments. In addition, using such a method within a contextual approach leads to numerous benefits, not least an awareness and appreciation of new perspectives in the formulation of legal texts and the interpretation and enforcement of law. It provides an outsider’s perspective on the researcher’s national law and further helps to enhance the quality of legislation and promote legal reform. It also leads, one hopes, to better potential for legal transplantation with successful legal experiences and, of course, to a successful harmonisation with respect to the areas being examined in this thesis.⁸⁴

5. Organization of the Thesis.

The thesis is divided into two parts, each in turn divided into three chapters, excluding this introduction and the final conclusion of the work.

Part I will consider the invalidity of arbitration agreements. Chapter One examines the doctrine of separability and the law applicable to the international arbitration agreement. Chapter Two treats the formal grounds of invalidity of arbitration agreements. Chapter Three addresses the substantive grounds of invalidity of the international arbitration agreement. The three chapters of Part II will be devoted to examining the public policy exception. Chapter Four focuses on the notion of public policy; Chapter Five elaborates on the complexities of the public policy exception; and chapter Six provides an in-depth analysis of the application and practical treatment of the public policy exception.

⁸³ Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook Of Comparative Law* (OUP 2006) 342.

⁸⁴ Esin Orucu and David Neklen (eds), *Comparative Law Hand Book* (Hart Publishing 2007) 279-280

PART I

Invalid Arbitration Agreements

Chapter 1

The Doctrine of Separability and the Law Applicable to the International Arbitration Agreement

Article V(1)(a)'s establishment of a uniform, minimum choice-of-law regime for the law governing an international arbitration agreement is one of the most significant achievements of the New York Convention...¹

1.1 Introduction

The invalidity of the arbitration agreement is the first grounds for refusing the enforcement of the foreign arbitral awards embodied in Art. V of the NYC. Art. V(1)(a) provides that:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) [T]he said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

An arbitration agreement is treated as separate and independent from the primary contractual agreement. Accordingly, an arbitration agreement must be 'treated independently from the existence or the validity of the main contract as it results from the intention of the parties'.² This then raises the preliminary question of the legal connection and consequences between the main contract in general and the arbitration agreement, particularly in cases where the main contract, which contains the arbitration clause, is alleged to be invalid.

¹ Gary Born, *International Commercial Arbitration* (Kluwer 2009) 430.

² Mauro Rubino-Sammartano, *International Arbitration Law & practice* (Kluwer 2001) 35; William Craig and others, *International Chamber of Commerce Arbitration* (3rd edn, Oceana Publications & ICC Publishing 2000) para 5-04; For the origins of separability, see Adam Samuel, 'Separability of Arbitration Clauses- Some Awkward Questions about the Law on Contracts'(2000) 9 ADRLJ 36.

Chapter 1

Questions relating to the law applicable to the validity of an arbitration agreement are also controversial and can vary from the domestic legislation of one country to that of another.³ This is because the nature of the arbitration agreement can involve several factors that can be, expressly or impliedly, governed by several laws. Moreover, there are crucial underlying tensions of the choice-of-laws that are applicable to the validity of the arbitration from the perspective of Shari'ah law.⁴ In addition to that, the text of the YNDAA is silent on the law applicable to the validity of arbitration agreements.

The aim of this chapter is to examine the doctrine of separability and the law applicable to the validity of arbitration agreements under both the NYC and the YNDAA. The purpose of doing so is to illustrate the effect of choice-of-law under the NYC so as to critically examine the YNDAA and highlight its shortcomings through such comparative analysis.

1.2 International Arbitration Agreement and the Doctrine of Separability

The separability doctrine is used now as the source for the 'principle of the validity of international arbitration agreements, under which such agreements are not subject to the traditional choice-of-law method.'⁵ The consequence of the separability doctrine applies where a different law from that of the main contract governs the arbitration agreement. Conversely, the reasoning may be different particularly when the enforcement court's law does not provide a clear guidance as to which law is applicable if the parties failed to indicate this in their agreement, and this is the case under the YNDAA.

³ Julian Lew and others, *Comparative International Commercial Arbitration* (Kluwer 2003) para 6-26

⁴ Mohamed Shariff, 'Specific Issues in Islamic Dispute Resolution' (2009) 75 Arb 213; Kristin Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?' (1995) 18 Fordham Int'l L J 920

⁵ Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer 1999) para 418.

1.2.1 The Doctrine of Separability under the NYC

Generally, an arbitration agreement is treated as having a status that is autonomous, at least to some extent, from the main contract.⁶ This autonomous feature has two direct consequences. First, the law applicable to the arbitration agreement is sometimes determined separately from the law applicable to the main contract. Second, the illegality or invalidity of the main contract does not affect the validity of the arbitration agreement itself, whether the arbitration agreement takes the form of a term within the main contract or of an independent agreement, and vice versa.⁷ This is a doctrine that is almost universally accepted in the arena of international arbitration.⁸

Due to this wide acceptance, the doctrine has obtained great legitimacy and is now regarded as a legitimate transnational rule of international commercial arbitration.⁹ Separability safeguards the integrity of the arbitration agreement and further ensures that the parties' intention to choose arbitration to resolve their disputes is not simply defeated. Hence, it protects the arbitration tribunal's jurisdiction, and is thus closely linked to the doctrine of competence-competence. Both are referred to as *regles materiells*.¹⁰ The competence-competence empowers the tribunal to decide on its own jurisdiction and the

⁶ *Islamic Republic of Pakistan v Rizzani De Eccher SpA, et al.*, (2008) XXXIII YBCA 600, 601 (Italy, The Supreme Court 2007) (holding, however, that the doctrine of separability does not apply if the underlying contract is non-existent rather than invalid).

⁷ Neil Kaplan, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*, (Kluwer 2011) 52.

⁸ For instance: the Tunisian Arbitration Code of 1993 Art. 61(1); the Egyptian Arbitration Law No.27 of 1994 Art. 23 and the Algerian Code of Civil Procedural of 1993 Art. 485; LCIA 1985 Rules Art. 14(1); AAA of 1991 Rules Art. 15 and the UNCITRAL Arbitration Rules Art. 21; Case No. 37/122 (Cairo Court of Appeal 2006); Lew, *Comparative International Commercial Arbitration* (n 3) para 6-7; Albert Jan van den Berg (ed), *The New York Convention-Consolidated Commentary- Cases Reported in Volumes XXII (1997) - XXVII (2002)* (XXVIII YBCA, Kluwer 2003) 626.

⁹ Gaillard and Savage (eds), (n 5) para 398.

¹⁰ Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law Practice* (OUP 2007) 217.

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doctrine of separability ensures that it can decide on the merits.¹¹ Ultimately, the NYC embraced the doctrine of separability in order to protect and ensure the parties' intentions to employ arbitration as their preferred method to resolve their disputes, as well as to adjudicate on challenges to the validity of arbitration agreements.

It can be argued that although the NYC does not expressly refer to the separability doctrine, it is understood from common interpretation that the understanding and the expectation of the parties to international arbitration is that such an agreement is to be considered separable from the main contract. Art. II and Art. V(1)(a) of the NYC impliedly render the arbitration agreement separable from the main contract. In essence, Art. II(1) refers to the arbitration agreement as 'an agreement in writing under which the parties undertake to submit to arbitration all or any differences' that may occur between them.¹² Art. II(2) further identifies a written agreement to arbitration as including 'an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchanged of the letters or telegrams.'¹³ Clearly, then, these articles indicate that an arbitration agreement will be treated presumptively as a separate agreement from the main contract between the parties.

Importantly, Art. V(1)(a) of NYC also impliedly indicates the separability of the arbitration agreement by providing the exception to the enforceability of an arbitral award where the arbitration agreement is not valid under the law governing the arbitration agreement. Thus, Art V(1)(a) rests on the assumption that the arbitration agreement is entirely separate from the main contract since it could be determined under the laws of a different jurisdiction to that applicable to the main contract.

¹¹ John Barceló III, 'Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective' (2003)36 Vanderbilt JTL 1115(stating that 'the competence-competence and the doctrine of separability are two of the best known concepts in international commercial arbitration. They are distinct, but normally linked, because they share a common aim: to prevent early judicial intervention from obstructing the arbitration process').

¹² NYC Art. II(1).

¹³ NYC Art. II(2).

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Some commentators, however, take the view that the Convention is “indifferent” to the doctrine of separability.¹⁴ Others conclude that the Convention adopts the doctrine of separability “by implication”.¹⁵ A careful reading of the Convention itself suggests that while the NYC does not explicitly refer to the separability doctrine, it recognises and adopts it implicitly through its drafting. Certainly, it can be argued that the Convention adopts a presumption in favour of the separability doctrine. This interpretation is supported by many commentators and judicial practice, with the courts of some contracting States indicating in general that there is a presumption in favour of validity of the arbitration agreement even if the main contract was invalid.¹⁶

In England, the doctrine of separability has long been accepted and was unequivocally incorporated in the English AA, which provides as follows:

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 a distinct agreement.¹⁷

The words ‘whether or not in writing’ in the Act not only indicate the general purpose of the doctrine, but also expressly affirm the significance of the doctrine for the purpose of the validity of the agreement.¹⁸

Under English common law, the doctrine of separability exists but with significant limitations; and hence the English courts have traditionally been reluctant to apply it. For

¹⁴ Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer 1981) 145; Emmanuel Gaillard and John Savage(eds), *Fouchard Gaillard and Goldman on International Commercial Arbitration* (Kluwer 1999) para 399.

¹⁵ Born (n 1) 318 fn.33.

¹⁶ *Italian Company v German (F.R.) firm*, (1978) III YBCA 274, (Germany, Hamburg District court 1977); *Not indicated (Syria) v Not indicated*, (2004) XXIX YBCA 663, (Germany, Hamburg Court of Appeal 1998); Gary Born, *International Arbitration: Cases and Materials* (Kluwer 2011) 478; Patricia Nacimiento, ‘Article V(1)(a)’ in Herbert Kronke and Patricia Nacimiento, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer 2010) 221.

¹⁷ English AA 1996 s 7.

¹⁸ Born (n 1) 339.

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instance, where the underlying contract is asserted as void, then this could also affect the arbitration agreement.¹⁹ The arbitration agreement may be considered void in a situation where the parties have failed to reach any agreement, and it would then be a question of fact as to whether the parties had reached an agreement or not in relation to the arbitration clause.²⁰

However, with the recent widespread acceptance of the doctrine, the approach of the English courts has changed. The English courts first considered the doctrine in *Harbour v Kansa* and held that an arbitration agreement was valid even though the main contract was alleged to be illegal.²¹ Recently, the English court held in *Fiona* case that ‘the claims of fraudulent inducement (bribery) of underlying contract did not impeach the arbitration clause contained within that contract’.²² It can therefore be said that the English courts are now embracing a very expansive application of the separability doctrine.

1.2.2 The Doctrine of Separability under Shari’ah and Yemeni law

The doctrine of separability is not manifestly addressed under Shari’ah. However, the Holy Qur’an contains the main principles for any contract, stating:

¹⁹ *Soleimany v Soleimany* [1998] 3 WLR 811, (CA).

²⁰ *Tweeddale and Tweeddale* (n 10)126.

²¹ *Harbour Assurance Co. (U.K.) Ltd. v Kansa General International Insurance Co. Ltd.*, [1992] 1 Lloyd's Rep 81 (QB Comm Ct); See also *Continental Enterprises Ltd v Shandong Zhucheng Foreign Trade Group Co* [2005] EWHC 92, (QB Comm Ct): For the origins of the doctrine of separability in courts practice, see *Heyman v Darwins* [1942] 1 All ER 337

²² *Fiona Trust & Holding Corp. v Privalov* [2007] EWCA (Civ) 20, [2007] 1 All ER 891; Adam Samuel, ‘Agora: Thoughts on Fiona Trust - Separability and Construing Arbitration Clauses: the House of Lords’ decision in Premium Nafta and the Fiona Trust’ (2008) 24 Arb Int'l 475; Mark Mcneill and Ben Juratowitch, ‘Agora: Thoughts on Fiona Trust - The Doctrine of Separability and Consent to Arbitrate, (2008) 24 Arb Int'l 499

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When you deal with each other in transactions involving future obligations in a fixed period of time, reduce them in writing. Let a scribe write down faithfully as between the parties.²³

The Qur'an further indicates:

O you who believe! Fulfil (all) obligations...²⁴

The general rules of Shari'ah apply to arbitration agreements, whether such agreements are a condition of a main contract or take the form of a separate document. The overriding principle in these two verses of the Qur'an is that of encouraging and protecting the intention of the parties. The only additional requirement is that the terms and conditions of the arbitration agreement be documented in writing, to avoid any further disputes with respect to the agreement.²⁵ Accordingly, Shari'ah accepts the recording of any terms and conditions in an arbitration agreement in separable status as long as those terms and conditions are not prohibited.²⁶

It is submitted that if the arbitration clause constitutes a valid arbitration agreement under Shari'ah, it should be considered an ordinary contractual commitment and should be treated autonomously. It is further argued that the binding effect of the arbitration agreement as a separate contract does not conflict in any way with the Qur'an or the Sunnah. According to Saleh, 'regardless of the absence of the notion of an arbitration clause in Shari'ah, it seems that it would not be possible to cure the revocable nature of an arbitration clause. An arbitration agreement would only become irrevocable when confirmed by the court, or by making provision for remuneration of arbitrators, or by any other means recognized by Shari'a.'²⁷ It must therefore be emphasised that Shari'ah is

²³ Surah Al-Baqarah ; verse, 282.

²⁴ Surah Al-Mā'idah ; verse, 1.

²⁵ Ahmed Alkenain, 'Tadween Almorafa'a Alqadaiyah' (in Arabic, 1999) 2 Al-Adl Journal 76.

²⁶ See Chapter 3 point 3.3.1 page 126.

²⁷ Samir Saleh, *Commercial Arbitration in the Middle East* (2nd edn, Hart Publishing 2006) 39

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not static when dealing with the doctrine of separability in today's evolving practice in the field of arbitration, and hence has sufficient flexibility to accommodate the doctrine.

Interestingly, the separability doctrine is noticeably articulated in YNDAA. Art. 16 addresses separability by providing that:

An arbitration clause shall be treated as an agreement independent from the other terms of the contract. The arbitration clause shall survive the expiry of the contract or its nullity, rescission or termination, provided such clause is valid per se.²⁸

One key argument for embracing the doctrine of separability here is that it gives effect to the parties' intentions when concluding their arbitration agreement, notwithstanding the invalidity of their main contract. Although the article stipulates that, the arbitration agreement is autonomous from the main contract, this being a cornerstone of international commercial arbitration, the drafting is curiously ambiguous. Therefore, some key observations follow.

First, Art. 16 under the YNDAA articulates the importance of the doctrine by declaring a confirmatory rule requiring the arbitration agreement to be considered independent from the main contract to assure the competence-competence principle.²⁹ However, the article fails to provide conflicts rules similar to that of Art V(1)(a) of the NYC, in order to determine which law is applicable to the arbitration agreement where it is governed by a different law to that of the main contract.³⁰ It can sometimes be preferable that the same law should govern both agreements,³¹ but there should nonetheless be some clear

²⁸ YNDAA Art. 16

²⁹ YNDAA Art. 27 (provides: 'the autonomy of the arbitration clause operates with respect to defects in the main contract which might otherwise taint the arbitrator's jurisdiction. The doctrine of competence-competence on the other hand gives the arbitrator the right to pass upon even alleged infirmities in the arbitration clause itself').

³⁰ Art V(1)(a) of the Convention (reads that 'the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made').

³¹ van den Berg (n 8) 627.

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guidance in the YNDAA to direct the court. Applying Art. II and Art V(1)(a) of the NYC would remove such confusion and would better support the functional purpose of the doctrine.

Moreover, the second sentence of the article reflects the essential character of the separability doctrine when circumstances occur that may affect the validity of the arbitration agreement. It provides that ‘the nullity, rescission or its termination, provided such clause is valid per se’. By this way, the Act accepts the essential consequence of the separability doctrine providing that the invalidity, in general, of the main contract does not necessarily affect the validity of the arbitration agreement. However, the Act does not specifically provide that, as another essential consequence of the doctrine of separability, different law or different legal rules than those of the main contract should govern an arbitration agreement. Instead, the Act allows, but does not stipulates, arbitral tribunals and courts to treat the arbitration agreements distinctly. Analytically, this can be best understood as imposing the limits of the doctrine only to the competence of the tribunal and ignores the other important consequences of the doctrine on deciding the question of the validity of the arbitration agreement.³² In contrast, Art. V(1)(a) of the NYC recognise the separability doctrine with its two important consequences and also expressly provides that the validity of the arbitration agreement should be governed by choice-of-law rules that is distinct from the main contract.

Second, Art. 16 only envisages the scenario in which the arbitration agreement forms part of the main contract. Notably, it ignores the possibility of the arbitration agreement being a separate document in its own right. Although the Act does acknowledge the validity of a separate arbitration agreement by virtue of Arts. 13(2)³³ and 13(3),³⁴ the drafting of Art.

³² *Union Exp.-Import Assoc. Sojuznefteexport v JOC Oil Ltd*, (1993) XVIII YBCA 92, (ICAC Award 1984); Born (n 1) 354-359

³³ Art. 13(2) (provides that ‘the arbitration agreement may be made prior to the occurrence of the dispute, in the form of an arbitration clause in a contract or in the form of a separate agreement even if a lawsuit in this respect was brought to court. In such case, the agreement must specify the matters included for arbitration; otherwise, it is deemed to be void’).

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16 remains problematic. This is clear from using the wording ‘independent from other term’ of Art. 16 and the wordings ‘in a form of an arbitration clause in a contract or in a form of a separate agreement’ under Art. 13 (2).

Alternatively, it may be necessary, to avoid any ironic and sometimes potential confusion, to recognise the doctrine of separability in broader terms within the same article much as in section 7 of the English AA, which provides that ‘an arbitration agreement which forms or was intended to form part of another agreement’. In addition, by way of international comparison, the French Supreme Court has put it clear that ‘in international arbitration, the agreement to arbitrate, whether concluded *separately or included* in the main contract to which it relates, is always safe in exceptional circumstances’.³⁵

Unlike the English AA and the NYC, the YNDAA treats the arbitration agreement as a separate agreement only for determining the competence of the tribunal in order to affirm its authority to govern the validity of the arbitration agreement. Nonetheless, the act fails to give effect to the choice-of-law rule to the arbitration. It must be therefore submitted that the YNDAA ought to apply the doctrine of separability in accordance with general international practice and clearly express its two purposes, so as to avoid any confusion by the Yemeni courts.

To summarize, the latitude of the separability doctrine under the YNDAA is ambiguous since it lacks a conflict-of-rules approach for the arbitration agreement and limits the full scope for the doctrine. As such, the NYC provides a useful guide for improving the efficacy of the YNDAA. Moreover, if the scope of the doctrine under the YNDAA were to be increased to correspond with section 7 of the English AA, the Yemeni courts would be able to apply the full legal extent of the doctrine, particularly at the enforcement stage.

³⁴ Art. 13(3) (provides that ‘the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement, provided that the reference is such as to make that clause part of the contract’).

³⁵ Cass. Civ. Lere, 7 (French Supreme Court 1963) 545, 545 (emphasis added).

1.3 The Law Applicable to the Validity of International Arbitration Agreements

Generally, the intention of the arbitral parties is the guiding principle for determining which law is applicable to their arbitration agreement.³⁶ However, if the arbitral parties have not indicated any choice of law, then the law applicable to their agreement become more difficult to ascertain. According to Art. V(1)(a) of the NYC, the validity of the arbitration agreement is governed by either the law that is specifically selected by the parties or, if the parties have failed to provide any choice-of-law in their agreement, the law of the country in which the award was made.

Unfortunately, YNDAA fails to provide any clear indication with respect to either situation. While the YNDAA provides that in the absence of any choice-of-law by the parties, the law applicable to the merits of the dispute is to be determined according to the law closest to the dispute in the case,³⁷ the YNDAA makes no reference to the formal and substantive validity of the arbitration agreement in the absence of an expressed choice-of-law by the parties.

Some commentators do not differentiate between formal validity and substantive validity when addressing the issue of applicable law.³⁸ However, a careful distinction between these two forms of validity certainly engenders a clearer understanding of the concepts and issues at hand. To be sure, assessing the law governing formal validity at the enforcement stage is considerably different from the law governing substantive validity.³⁹ Therefore, this chapter will now examine these two forms of validity in relation to arbitration agreements, treating them individually.

³⁶ Nacimiento (n16) 225.

³⁷ YNDAA Art. 47(2).

³⁸ David St John Sutton and others, *Russell on Arbitration* (23rd edn, Sweet & Maxwell 2007) 371; Tweeddale and Tweeddale (n10) 126.

³⁹ Nacimiento (n16) 226-227.

1.3.1 The Law Applicable to Formal Validity

Although the question of formal validity is usually regulated directly by most international conventions⁴⁰ as well as by some national laws,⁴¹ most challenges remain unsolved.⁴² This sub-section will address the approach of the NYC in determining the question of the law applicable to formal validity, including the English perspective. It will then consider the same issue under Yemeni law, and in doing so, will critically assess Yemen's approach.

1.3.1.1 The Law Applicable to Formal Validity under the NYC

While the law applicable to formal validity is governed in substantial measure by the NYC, there remains some disagreement as to whether Art. II or Art. V(1)(a) governs the form of international arbitration agreement at the enforcement stage. The main complexity stems from the mere fact that Art. II comprises a uniform substantive rule to the form requirements of international arbitration agreements, which provides that arbitration agreement must be in writing and 'signed by the parties or contained in an exchange of letters or telegrams.'⁴³ Art. V(1)(a), however, provides a clear indication to choice-of-law provision that governs both formal or substantive validities of the arbitration agreement, and also makes a clear reference to Art. II of the Convention governing the formal validity of the arbitration agreement. In seeking a better conception, each of these views is considered in turn.

⁴⁰ NYC Art. II; The ML 1985 Art. 7; The European Convention 1961 Art. I(2)(a).

⁴¹ English AA s 5; Switzerland PIL Art. 178; Germany ZPO s 1031.

⁴² Lew and others (n 3) para 26-75 (pointing out that 'many cases have been refused since the arbitration agreement validity is ambiguous').

⁴³ NYC Art. II(2).

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The first view is that Art. V(1)(a) is applicable and thus formal validity is governed by the law selected by the arbitral parties or the law of the place of arbitration, where no choice-of-law has been made. The rationale of this view is that the wording of the article clearly grants primacy to party autonomy when they choose a particular law to govern their agreement. In addition, in the absence of a choice of law, the law of the place of the arbitration should govern. This is because the arbitration agreement is procedural in nature rather than substantive, and thus its formal validity should be governed by the most applicable procedural law, which is often the law of the seat of arbitration. In addition to that, national laws may include more lenient form requirements than that of Art. II of the NYC. Thus, these two rules provide a solution to any dispute about the law applicable to formal validity, and consequently the reference in Art. V(1)(a) to Art. II is deemed superfluous.⁴⁴

Under this interpretation, this analysis applies only at the enforcement stage and not at other stages such as the substantive hearing before the tribunal. By virtue of this article, it is only applicable when enforcement of the arbitral award is challenged on the grounds that it was based on invalid arbitration agreement. Consequently, Art. II relates only to the form requirements of an arbitration agreement and its enforceability, whereas the provisions of Art. V apply only at the stage of enforcement. The argument to support this reading is that there is no practical need to make reference to other articles in the NYC on the same matter, which would only result in further ambiguity. Hence, this view has been largely adopted and has attracted the support of many authorities⁴⁵ since, as G. Born observes, ‘this choice of applicable law, under Art. V(1)(a), which is binding on courts

⁴⁴ Lew and others (n 3) para 26-77.

⁴⁵ Domenico Di Pietro and Martin Platte (eds), *Enforcement of International Arbitration Awards: The New York Convention of 1958* (1st edn, Cameron May 2001) 83; Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer 1999) para 271

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in contracting States, is sensible and reflects the parties' likely intentions in most cases'.⁴⁶

The second and alternative view is that Art. II of the NYC provides uniform rules governing the formal validity of international arbitration agreements subject to the Convention. The rationale for this view is that Art. V(1)(a) of the NYC made particular reference to Art. II of the Convention, which regulates the form requirements of arbitration agreements.⁴⁷ In addition, it is unanimously recognised that the NYC establishes the maximum form requirements for arbitration agreements and would not be supplemented by stricter requirements of formal validity under national law.⁴⁸ Thus, the Supreme Court of Greece held in one decision that:

Art. II(2) of the New York Convention, in order to facilitate the need for easier and faster conduct of international commercial transactions, explicitly established the possibility of concluding an arbitration agreement also by means of an exchange of correspondence or telegrams or telexes. This provision introduced a directly applicable substantive rule, which binds the State-Parties and does not allow the court, in the field of application of the Convention, the possibility to resort to another rule of substantive or private law in order to confirm the validity of the form of the conclusion of the agreement to arbitrate.⁴⁹

Consequently, Art. II has been recognised and applied in the enforcement stage and in so doing has been given clear preference over any national law that might otherwise apply.⁵⁰ Professor Sanders has expressed similar view, arguing that Art. II of the NYC establishes uniform rules on the form requirements of arbitration agreements and leaves no room for other requirements under national law that may be more stricter than those in Art. II.⁵¹ He further argued that since the arbitral award is to be enforced under one jurisdiction, no

⁴⁶ Born (n 1) 460.

⁴⁷ The wordings 'the said agreement' of Art. V(1)(a) refers to Art. II

⁴⁸ Born (n 1) 536; Lew and others (n 3) para 6-39; van den Berg (n14) 178-179.

⁴⁹ *ANC Maritime Co. v The West of England Shipowners Mut. Prot. and Indem. Ass'n Ltd*, (1998) XXIII YBCA 654, 655 (Greek Supreme Court 1997)

⁵⁰ *Trading company (Israel) v Buyer (Germany)*, (2005) XXX YBCA,557(Germany Court of Appeal 2004)

⁵¹ Pieter Sanders (ed), *Consolidated Commentary Vols. V-VI* (VI YBCA, Kluwer 1981) 202-211

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other criteria should apply to formal validity than the requirements set in Art. II, to which Art. V(1)(a) explicitly refers.⁵² Consequently, the law of arbitration seat indicated in Art. V(1)(a) should apply only to substantive issues and not to any issues of form requirements.

The arguments in favour of the second and alternative reading of Art. II of the NYC seem convincing and well-reasoned. Art. II is more favourable as the applicable provision for determining the question of formal validity. That is to say, formal validity by its nature ought to be determined through clear and direct rules rather than by the choice-of-law provided under Art. V(1)(a). Hence, it is submitted that the form requirement of the arbitration agreement should be governed entirely by Art. II and not by Art. V, so long as the other country is a party of the NYC,⁵³ and these requirements trump any national requirements as to form.⁵⁴

Moreover, applying the requirements of Art. II will certainly help improve uniformity, this being one of the main goal of the NYC, and will assist several States bring their national laws in line with these requirements. Therefore, it is becoming increasingly widely recognised that Art. II of the NYC establishes a ‘substantive requirement for formal validity of arbitration agreements which contracting States cannot replace or supplement with more demanding or stringent national law rules of formal validity’.⁵⁵

The English AA allows the parties to choose the law that is to govern their arbitration agreement, like most contemporary arbitration legislation.⁵⁶ In addition, the English AA, where applicable, regulates the form requirements in a way that corresponds to those

⁵² *ibid* 202-211.

⁵³ Jenny Power and Gábor Fejes, ‘The Arbitration Procedure - National Law Hurdles in Arbitrating “Domestic” Disputes in Christian Klausegger and Peter Klein, et al. (eds), *Austrian Arbitration Yearbook 2007* (C.H. Beck, Stämpfli & Manz 2007) 210-211.

⁵⁴ *Not indicated v Not indicated*, (2006) XXXI YBCA 652, 656 (Germany Court of Appeal 2000)

⁵⁵ Born (n 1) 536.

⁵⁶ English AA s 4; See also The Rome Convention Arts 1, 3, 7.

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under Art. II of the NYC.⁵⁷ From a common law perspective, the English courts have also explicitly upheld the parties' intention to choose the law that should govern their agreement. For instance, the English High Court has stated:

[i]t is a general principle of English private international law that it is for the parties to choose the law which is to govern their agreement to arbitrate and the arbitration proceedings, and that English law will respect their choice. ... Parties' freedom of choice includes freedom to choose different systems of law to govern different aspects of their relationship.⁵⁸

The English AA applies the choice-of-law rules under Art. V(1)(a), which correspond to those under 103(2)(b)⁵⁹ of the Act.⁶⁰ It would therefore appear that English law accords with the first view on the NYC's interpretation. The English AA permits the arbitral parties to choose the law applicable to their arbitration agreement. However, as we shall see, the words 'the country where the award was made', as an alternative test when there is an absence of choice of law, would appear to have an altogether different interpretation under English law.

In *Hiscox v Outhwaite*⁶¹, the House of Lords held that an arbitral award is made at the place where it is signed. This would appear to be a clear violation of the principle of party autonomy, frustrating the parties' intentions, since in choosing the place of the arbitration they would have selected a place deemed to have some connection to their procedures in one way or other regardless of the place where the award is signed. In addition, section 101(2)(b) of the English AA provides that 'an award shall be treated as made at the seat of the arbitration, regardless of where it was signed, despatched or

⁵⁷ English AA s 5.

⁵⁸ *XI Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500, 506 (QB Comm Ct).

⁵⁹ English AA Art. 103(2)(b) (provides that '[T]he arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made').

⁶⁰ *Peterson Farms Inc. v C&M Farming Ltd*, [2004] EWHC 121 (Comm), [2004] 1 Lloyd's Rep 603.

⁶¹ [1991] 3 WLR 297; For the criticism of this approach see Okezie Chukwumerije 'Is an Arbitration Award "Made" Where it is Signed?' (1992) 20 Can Bus L J 305.

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delivered to any of the parties'. In this regard Kerr LJ considers the connection between the law governing the arbitration agreement and other laws relating to the arbitration in general. His lordship concluded in the *Naviera* case that the law of the arbitration agreement was more frequently linked to the law of the seat of the arbitration, *the lex arbitri*, than the law governing the main contract.⁶²

Although the NYC does not provide any direction for determining the place where an arbitral award is made, many commentators have provided tests for this determination.⁶³ Professor van den Berg, for instance, argues that the place where the award is made is the place 'which is indicated in the award as the place where the awards is rendered.'⁶⁴ He further suggests that the place of arbitration, in the legal sense, 'must be mentioned in the arbitral award as the place where the award is made'.⁶⁵ It may, of course, also be argued that the place of arbitration is the place where all the arbitral parties meet for the arbitration process, including not only the arbitrators but also the business parties, who are in most cases from different countries. Therefore, it seems the method of determination in *Hiscox v Outhwaite* case is highly unusual in international arbitration practice, since the arbitrators and business parties in a dispute will generally come from different parts of the world.

1.3.1.2 The Law Applicable to Formal validity under Shari'ah and Yemeni Law

Under Shari'ah, there is extensive doctrinal debate about the law applicable to arbitration agreements, including the law governing disputes. In pre-Islamic time, the arbitrators were entitled to resolve a dispute on the basis of their experience and wisdom. In Islamic

⁶² *Naviera Amazonica Peruana SA v Compania Internacional De Seguros del Peru* [1988] 1 Loyd's Rep 116, (CA Civ).

⁶³ Francis A. Mann, 'Where is an Award 'Made'?' (1985) 1 Arb Int'l 107; Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer 1981) 295.

⁶⁴ van den Berg (n 14) 295.

⁶⁵ Albert Jan van den Berg, 'When is an Arbitration Award Nondomestic Under the New York Convention of 1958' (1985) 6 Pace Law Review 25, 45.

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time, by contrast, arbitrators became bound by Shari'ah.⁶⁶ The general principle, under Shari'ah procedures, is that no law other than Shari'ah should govern the disputes between Muslims and non-Muslim, as Islam must dominate and not be dominated.⁶⁷ In this respect, Redfern and Hunter have correctly stated that 'questions concerning the applicable law do not apply; an arbitration governed by the Shari'ah is subject to the procedural and substantive laws of Shari'ah wherever the arbitration is held'.⁶⁸ Since the arbitral parties agreed to choose Shari'ah to govern their disputes, they have in fact isolated their dispute from the provisions of any other legislation, whether domestic or international.⁶⁹

Most Shari'ah schools of thought refer generally to Shari'ah without distinguishing between the procedural and substantive rules in the arbitration agreement. *Shafi'i*, *Hanbal'i* and *Malik'i* scholars do not usually state how they apply such rules explicitly. The *Hanafi'i* school, by contrast, substantiates the mandatory application of procedural and substantive rules with regards to the arbitration agreement. The basic principles as indicated by the *Hanafi'i* school is to apply the three strict rules of evidence under Shari'ah: testimony, admission and denial '*bayyina, iqrar, nukul*'.⁷⁰ As a result, the party who denies the existence of the arbitration agreement or disputes the validity of the arbitration agreement will be restricted to the above three rules. However, these three rules can be mitigated by the possibility of applying the form of conciliation known in Western countries as *amiable composition*, which shares certain similarities, at least in its outcome.⁷¹

⁶⁶ Muhammed Madkur, *Al-Qada Fil Islam* (in Arabic, Dar Al-Nahdah Al-Arabiyyah 1964) 131.

⁶⁷ See Surah An-Nisā'; verse, 141.

⁶⁸ Alan Redfern and others, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 1991) 110.

⁶⁹ Madkur (n 66) 131.

⁷⁰ Muhammed Ibn Abidin, *Umar, Radd al-Muhtar ala al-Durr al-Mukhtar* (in Arabic, vol: VI, Al-Matba'at Al-Amira 1299 H) 482.

⁷¹ Samir Saleh, *Commercial Arbitration in the Middle East* (2nd edn, Hart Publishing 2006) 43.

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The question that emerges in this respect is what rules should apply when there is a conflict of laws between Shari'ah schools of thought? To answer this question it should be noted first that the problem of conflict of laws does not arise where there is conflict between Shari'ah schools and other national or international legislation, since this would be resolved simply by applying the conflict of rules approach that is applied in judicial practice. Rather, the problem most likely occurs in three situations: (1) when there is a conflict of laws between the Shari'ah schools, (2) when one of the arbitral parties is a non-Muslim or both parties are non-Muslims, and (3) when non-Islamic law governs the arbitration agreement.

1. With regard to the first situation, when the parties agreed to apply Shari'ah rules, they are not allowed to challenge the award on the basis that the award does not comply with the party's own school of thought. Thus, as Ibn Farhun pointed out, when there is a conflict between two Shari'ah schools in the field of arbitration, it has to be referred to the primary rule by which the arbitrator will apply the rules of his own school to govern the disputed matter.⁷² The rationale of this approach is that the parties to the arbitration are not permitted to challenge an arbitral award that does not conform to the rules of the school of the parties. Accordingly, this approach has the benefit of simplifying 'the procedure by avoiding the application of Shari'ah rules of evidence and even some of the substantive rules that do not pertain to scriptural source'.⁷³ Nonetheless, this approach has some appeal because it solves the conflict of laws between differing Shari'ah schools, but it still does not provide a logical justification for violating the principle of party autonomy. That is, in many cases parties are expecting the tribunal or national courts to govern their arbitration agreement by the law of the seat of their arbitration as the most

⁷² Ibrahim Ibn Farhun, *Tabsirat al- Hukkam fi Usul al-aqdiya* (in Arabice, Maktabat al-Kulliyat al-Azhariyah 1301 H) 44.

⁷³ Saleh (n 71) 45.

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linked law to their agreement. Thus, issues of form requirement are always subject to particular choice-of-law rules as clearly indicated under the NYC.

2. With regard to the second situation, the *Shafi'i* and *Hanbal'i* schools do not apply any particular rules regarding this issue of conflict of laws, and the *Malik'i* and *Hanaf'i* schools apply the general rules of conflicts to determine which rules are applicable in the arbitral matter where one of the parties is non-Muslim.⁷⁴ In the absence of a clear rules that should apply in case of conflicts between Shari'ah schools and other foreign body of laws, it is submitted that the approach of the *Malik'i* and *Hanaf'i* schools could be considered as a good step to be adopted by the other schools. This will help to harmonize a general rule in this area and provide clear guidance for arbitrators, whether both parties are Muslims or otherwise.

It may also be recommended that most of Shari'ah schools emphasise the liberal quality of arbitral proceedings, including the law applicable to the arbitration agreement; but it would be more appropriate for the procedural rules and rules of fair trial in arbitration to be the same as national litigation practice. This would overcome the complications under Shari'ah when applying different rules to different arbitral proceedings. Besides, the more complex arbitral rules would be tend to be interpreted as favouring refusal of the arbitral award rather than favouring enforcement.

3. With regard to the third situation (that is, when non-Islamic law governs the arbitration agreement), the argument of removing non-Islamic law to the parties' disputes is actually unsatisfactory. The application of non-Islamic laws is particularly well-recognised for the application to issues of the form of

⁷⁴ Abdulrahman Al-Subaihi, 'International Commercial Arbitration in Islamic Law, Saudi Law and the Model Law' (PhD Thesis, the University of Birmingham 2004) 77-84.

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international arbitration agreement. Although some stricter Islamic countries still conduct arbitration only in accordance with Shari'ah law,⁷⁵ some others embrace non-Islamic law in their legislation, which may also be allowed to govern arbitration agreements.⁷⁶ In recent years, the expansion of the investment sector and wide liberalization in different aspects of life have encouraged many countries to change their views on this issue.⁷⁷ In addition, governments have adjusted their functions to value arbitration as alternative method for settlement. Such transparency has helped encourage a degree of compatibility between non-Islamic laws and Shari'ah principles.⁷⁸ Therefore, Middle Eastern legislation has developed alongside the international system and has been influenced by international trends in terms of recognising and adopting many supranational principles. As Gemmell aptly states that, Qur'an provides no particular rule with regard arbitration procedures, rather it provide main directions toward the use of arbitration and thus 'if there is a doctrinal void or doctrinal gap as to the use of commercial arbitration, the use of international private law to fill the void or fill in the *lacunae* should be considered'.⁷⁹

⁷⁵ Nancy Turck, 'Dispute Resolution in Saudi Arabia' (1988) 22 International Law 415.

⁷⁶ Elizabeth Mayer, 'Conundrums in Constitutionalism: Islamic Monarchies in an Era of Transition' (2002) 1 JINEL 183 ; John Donboli and Farnaz Kashefi, 'Doing Business in the Middle East: A Primer for U.S. Companies' (2005) 38 Cornell Int'l L J 413.

⁷⁷ Elizabeth Mayer, 'Conundrums in Constitutionalism: Islamic Monarchies in an Era of Transition' (2002) 1 JINEL 183.

⁷⁸ The 4th Review Committee, decision No. 187/T/4 dated 1413 H (1992) ; The 4th Review Committee, decision No. 156/T/4 dated 1413H(1992); The 4th Review Committee, decision No. 155/T/4 dated 1415H (1994) and The 3rd Review Committee, decision No. 15/T/3 dated 1423H(2002) in Waleed Al-Tuwaigri, 'Ground for Refusal of Enforcement of Foreign Arbitral Awards under the New York Convention 1958 with special reference to the Kingdom of Saudi Arabia' (PhD thesis, University of Glasgow 2006) 120 fn. 148.

⁷⁹ Arthur Gemmell, 'Commercial Arbitration in the Islamic Middle East' (2006) 5 Santa Clara J Int'l L 169, 192.

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The YNDAA plainly affirms the parties' autonomy to choose the law applicable to the arbitration agreement.⁸⁰ Art. 47(1) provides as follows:

The arbitral tribunal shall, in international commercial arbitration, settle the dispute in accordance *with such rules of law as are chosen by the parties*. If the parties agreed on a law of a specific State, the substantive law of that State and not its conflict of laws rules shall be applied, unless otherwise agreed.⁸¹

Clearly, the effect of Art. 47(1) is to permit the arbitral parties to choose their preferable rules for governing their disputes, whether these disputes are procedural or substantive. Despite the general recognition of the principle, the YNDAA does not provide any choice-of-law provisions under any article. Unlike the NYC, which contains provisions for choosing the law applicable to the arbitration agreement, the YNDAA limits this determination specifically to the agreement of the parties. Surprisingly, Art. 47(2) then allows the arbitral tribunal to choose the law applicable to the merits of the dispute where there is an absence of any indication by the arbitral parties. Art. 47(2) states:

Failing any designation by the parties on the rules of law applicable to the merits of the dispute, the arbitral tribunal shall apply the provisions of the substantive law which it considers most closely related to the dispute.

This specific provision in the YNDAA will be analysed further and critiqued carefully, but before doing so, it is important to address two scenarios that may arise.

1. The first scenario is where the parties have agreed that their arbitration agreement should be governed by the YNDAA provisions. The law applicable to the formal validity is directly stated when the arbitral parties express a choice-of-law to govern their disputes by virtue of Art. 47(1). The formal validity accordingly will be governed by the YNDAA under Art. 15, which provides:

⁸⁰ YNDAA affirms the parties' autonomy under several provisions; see for instance Arts 3, 5, 6, 7, 12, 19, 22, 29 and 31.

⁸¹ (emphasis added).

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The arbitration agreement shall be made in writing otherwise it is deemed to be void. An arbitration agreement is made in writing if its content is recorded in any document signed by the parties, or in their mutual exchange of letters, telexes, or by any other means of written communication.

This provision sets forth form requirements for the international arbitration agreement. It is to be noted that this provision is not as explicit as the NYC's wordings in Art. II with respect to form requirements. Although the provision recognises modern means adopted worldwide, it has shortcomings in terms of language and interpretations. These deficiencies will be considered in detail in the next chapter of this thesis.⁸²

2. The second scenario is where the parties have not explicitly chosen the law that is to govern the validity of the arbitration agreement and Yemen is the place of enforcement. In this situation, the courts will adopt the following different approaches in determining the law applicable to the formal validity.

First, the applicable law that governs the formal validity of the arbitration agreement would be the law of the enforcement state, which in this case is Yemen. This is where the litigation regarding the putative arbitration agreement is pending.⁸³ This approach has been adopted by several countries, including Switzerland, the United States and England. These countries have set requirements for formal validity that appear to be applicable to any litigation relating to a putative arbitration agreement, undertaking any further analysis of applicable law.⁸⁴ France has adopted the same approach under the substantive provisions of its international law, which provides an application of choice-of-law to the formal validity of an arbitration agreement.⁸⁵

⁸² See Chapter 2 point 2.4.2 page 97.

⁸³ Born (n 1) 548.

⁸⁴ The PIL Art 176(1) & 178(1); FAA, Art. 9; English AA s 5(3).

⁸⁵ *Bargues Agro Industrie SA v Young Pecan Cie*, (2005) XXX YBCA 499, (France, Paris Court of Appeal 2004).

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Second, the law applicable to the form requirements of an arbitration agreement is the law applicable to its substantive validity. This approach offers the benefits of simplicity and efficiency in determining the law applicable to the formal validity of an arbitration agreement and helps overcome the ambiguous ramifications that may affect international arbitration agreements.⁸⁶ Accordingly, the law selected by the parties to govern their substantive agreement should apply to the form requirements of their agreement to arbitrate and also govern its validity. However, further difficulties arise if the parties have not actually chosen a particular law to govern their substantive agreement.

Ultimately, it is submitted that Art. 47(1) provides a confusing approaches which are unsatisfactory since it does not evidently indicates a clear function to be followed by both tribunals and courts when determining the form requirements question in the absence of any indication by the arbitral parties. On the contrary, Art. V(1)(a) of the NYC provides a clear and direct guidance for the formal validity to be governed by the uniform requirements of Art. II of the Convention. This approach, at least in the first instance, may resolve concerns over which law applies, and it is an approach that has been widely adopted by many courts in their decisions.⁸⁷ Thus, it is evident that Art. II has a better scope in contrast to YNDAA and to other laws that may correlate to the arbitration agreement.

⁸⁶*Not indicated v Not indicated*, (2006) XXXI YBCA 679, (Germany, Federal Supreme Court 2005).

⁸⁷ *Empresa Colombiana de Vías Férreas (Ferrovías) (Colombia) v Drummond Ltd. (US)*, (2004) XXIX YBCA 643, (Colombia Council of State 2003); *Pulsarr Industrial Research B.V. (Netherlands) v Nils H. Nilsen A.S. (Norway)*, (2003) XXVIII YBCA 821, (Norway Enforcement Court 2002); *Smita Conductors Ltd. v Euro Alloys Ltd.*, (2002) XXVII YBCA 482, (India, The Supreme Court 2001).

1.3.1.3 Some Critical Remarks on the YNDAA's Approach

As mentioned previously, Art. 47(2) of the YNDAA provides, 'Failing any designation by the parties on the rules of law applicable to the merits of the dispute, the arbitral tribunal shall apply the provisions of the substantive law which it considers most closely related to the dispute'. This article can sometimes negatively impact the principle of party autonomy and is further inadequate with respect to the nature of arbitration in three ways.

First, and by analogy, if we consider the same approach to be followed as for the formal validity of the arbitration agreement since there is a lack of such indication under the law, there will be inconsistency with the consensual character of international arbitration. Besides, there is no reasonable basis for applying such law since the arbitration agreement should be treated as a contract that is independent of the main contract. In other words, the aim and objectives of the main contract are different from those of the arbitration agreement.⁸⁸ Accordingly, there will be no basis for the arbitral tribunal to apply the law of the main contract to the arbitration agreement itself. Therefore, it would be artificial to apply the law of the substantive dispute as an alternative test in determining the law applicable to formal validity.

Moreover, where the parties choose a particular law to be applied to their substantive disputes, they may not be aware at the time that the law will be utilized at the enforcement stage, which is a clear contravention of their intention. Furthermore, from legal standpoint, the reasons and the factors that drive the parties to choose the law that is to apply to the substantive contract are distinct from those that may cause the parties to choose the law applicable to the validity of their arbitration agreement.⁸⁹ More importantly, in some cases where the parties choose a place for their arbitration process to be held, they would expect the law of that place to apply to all aspects of the

⁸⁸ van den Berg (n 14) 293.

⁸⁹ Leonardo Graffi, 'Law Applicable to the Validity of the Arbitration Agreement' in Franco Ferrari and Sefan Kroll (eds), *Conflict of Laws in International Arbitration* (De Gruyter Sellier 2010) 28.

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arbitration process instead of as the law governing the main contract, and this would therefore run counter to their expectations.⁹⁰

Second, the clear wording of the article leaves the matter to the arbitral tribunal to apply the closest law related to the dispute. This drafting is unsatisfactory, if the tribunal has the authority to choose the law, it would be more likely to opt for the law of the main contract to govern the validity of the arbitration agreement since it would be more convenient to limit the applicable law to that of a single jurisdiction. Although, it may be common in arbitration that the same law should apply to both contracts, the doctrine of separability will be rendered nugatory and certainly lose its effect. As a result, the arbitral tribunal may determine the disputes in both contracts in the same manner. It does require much effort, however, to understand the underlying reasons for leaving such choice to the arbitral tribunal, since there is a strong tendency to privilege the place of arbitration. The parties have selected it impliedly simply by selecting the place of the arbitration. Some courts often interpret the parties' choice of a particular place for arbitration as an implicit choice of the law governing their arbitration agreement.⁹¹

Third, Art. 47(2) of the YNDAA relates to the arbitration process, and the concern outlined above remains unresolved with respect to the enforcement process, if the same analysis were to be applied. It would be unreasonable for the tribunal to select the law applicable for the enforcing court in order to determine the validity of the arbitration agreement. In other words, the arbitral tribunal's autonomy should be neither followed by the parties' autonomy nor by the national court's autonomy. Ultimately, Art. 47(2) creates complexities over the matter of the law applicable to the arbitration agreement and may not serve the parties' intention in using international commercial arbitration.

⁹⁰ Decision of November 17, 1971, in *Chukwumerije* (n 61) 35.

⁹¹ *Consortium member A v Consortium member B (Switzerland)*, (2008) XXXIII YBCA 553, (Greece, Court of First Instance of Rodopi 2005)

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In summary, considering the legal implication of Art. V(1)(a) of the NYC, which is notably absent under YNDAA, it would appear difficult to understand why the Yemen's legislators failed to stipulate any choice-of-law rules and further why they failed stipulate explicitly what law is to govern the validity of arbitration agreements. Therefore, it must be submitted that the lack of clear direction as to the law applicable in the absence of a choice by the parties is problematic. By contrast, the NYC provides a gap-filling article to direct the courts in matters relating to the law applicable more particularly where the parties' choice-of-law is absent. Furthermore, the NYC provisions are directly binding on the courts of contracting States and not on arbitral tribunals.⁹² As a result, if Yemen were to ratify the Convention, Art 47(2) would be rendered superfluous and ineffectual.

1.3.2 The Law Applicable to the Substantive Validity of Arbitration Agreements

Like the case of the law applicable to the formal validity, Art. V(1)(a) of the NYC directs that the law chosen by the parties should govern the substantive validity of the arbitration agreement. Unlike the case of formal validity, however, in the absence of such indication by parties, Art. V(1)(a) does not provide uniform rules for the law applicable to the substantive validity similar to those under Art. II(2). Rather, it leaves the determination of the law applicable to substantive validity to the national conflict-of-laws rules.⁹³ Unfortunately, the situation under the YNDAA is paradoxical and uncertain since the YNDAA is silent on the law applicable to the substantive validity of the arbitration agreement. Thus, Art. V(1)(a) of the NYC can offer an optimal solution.

Art. V(1)(a) states clearly that 'the law of the country where the award was made' is the law of the seat of arbitration, which should govern the validity of the arbitration

⁹² ICC Case no 5730 of 1988, (1990) 117 J du Droit Intl 1029.

⁹³ Dorothee Schramm and Elliott Geisinger, 'Article II' in Herbert Kronke, Patricia Nacimiento, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, (Kluwer 2010) 55.

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agreement. This begs the question of whether only the substantive law of the seat of arbitration applies⁹⁴ or whether the seat of arbitration's conflict-of-laws rules apply also.⁹⁵ For this reason, the issue of the law applicable to the substantive validity has given rise to some controversy and this has led to different approaches for determining the law that is applicable.⁹⁶ Nonetheless, the conflict rules provided in Art. V(1)(a) of the NYC are uniform and this is another noticeable benefit of this article.⁹⁷

Generally, the national courts have adopted many different approaches to determine the law applicable to the substantive validity of the arbitration agreement, where no choice-of-law has been expressed by the arbitral parties. These different approaches privilege the law governing the main contract,⁹⁸ the autonomous legal principle,⁹⁹ the traditional conflict-of-law rules, and the seat of arbitration approach. Due to the limits of the present study, the sub-section that follows will examine only the seat of arbitration approach as exemplified by the NYC along with English law and practice. Thereafter, it will examine the traditional conflict-of-laws approach by focusing on Yemeni law, and will then go on to analyse the Shari'ah position specifically.

⁹⁴ *Dallah Real Estate & Tourism Holding Co v Pakistan* [2010] UKSC 46, [2011] 1 All ER 485.

⁹⁵ Werner Wenger and Christoph Muller, 'Article 178' in Heinrich Honsell eds., *Basler Kommentar Internationales Privatrecht* (2nd edn, Basel: Helbing & Lichtenhahn Verlag 2007) para 1523.

⁹⁶ Klaus Berger, 'Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?* (ICCA Congress Series, No.13, Kluwer 2007) 301 – 334.

⁹⁷ van den Berg (n 14) 296.

⁹⁸ *Union of India v. McDonnell Douglas Corp* [1993] 2 Lloyd's Rep 48; *Tonicstar Ltd v American Home Assurance Co* [2004] EWHC 1234(Comm), [2005] Lloyd's Rep IR 32; Fraser Davidson, *Arbitration* (W Green 2000) 393; Julian Lew, 'The Law Applicable to the Form and Substance of the Arbitration Clause' in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, (ICCA Congress Series, No. 9, Kluwer 1999) 136.

⁹⁹ Also so-called (the French approach) see Nigel Blackaby and Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 172; Tweeddale and Tweeddale (n 10) 218.

1.3.2.1 The Law of the Seat of Arbitration (the NYC and English approaches)

By virtue of Art. V (1)(a), the Convention clearly adopts, in the absence of an expressed choice-of-law by parties, the position that the law governing their agreements should be the law of the seat of arbitration. The rationale of this approach is primarily based on the doctrine of separability of the arbitration agreement.

The doctrine, as discussed above, considers the arbitration agreement as a separate agreement from the main contract.¹⁰⁰ Thus, it is more appropriate to link the arbitration agreement to the law of the seat of arbitration rather than to the law of the main contract. In addition, it is widely accepted that the seat of the arbitration is not only a question of geographical location, but is rather the meeting point of several factual connecting elements related to the contract, such as contractual rights and obligations between the arbitral parties and the arbitral tribunal.¹⁰¹ Therefore, the seat of the arbitration approach has been followed by many leading conventions¹⁰² and several commentators¹⁰³, as well as by national courts.¹⁰⁴

In the *Naviera* case, for instance, Lord Kerr has stated that ‘the law of the arbitration agreement was more usually linked to the law of the seat of the arbitration than the law governing the substantive contract.’¹⁰⁵ Likewise, in ICC Case No. 6162, the tribunal held that when the parties had failed to indicate the law that should govern their arbitration

¹⁰⁰ See Chapter 1 point 1.2.1 page 24.

¹⁰¹ Catherine Raymond, ‘Where is an arbitral award made ?’(1992) 108 LQR 1.

¹⁰² NYC Art. V(1)(a); the European Convention Art. VI(2) and the ML 1985, Art 20(2).

¹⁰³ van den Berg (n 14) 293; Raymond (n 101) 1.

¹⁰⁴ *Telenor Mobile Communications AS v Storm LLC*, 524 F. Supp. 2d 332 (U.S District Court for the Southern District of New York 2007); *Dalmine SpA v M & M Sheet Metal Forming Machinery AG*, (1999) XXIV YBCA 709, (Italy, The Supreme Court 1997); *Plamavergne S.A v Kalle Bergander I Stockholm AB*, (2002) XXVII YBCA 554, (Sweden, Court of Appeal 2001).

¹⁰⁵ *Naviera Amazonica Peruana SA v Compania Internacional De Seguros del Peru* [1988] 1 Lloyd’s Rep 116,(CA Civ).

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agreement, and where the ICC Rules were silent, then Swiss law, the law of the seat of arbitration, would apply to the arbitration agreement.¹⁰⁶

One noticeable benefit of this approach is that having the law of the seat of arbitration govern the validity of the arbitration agreement could reduce a number of risks that may hinder enforcement. For instance, the arbitration agreement could be considered invalid under the law of the main contract, but it might nonetheless still be valid under the law of the place of arbitration.¹⁰⁷ Therefore, most arbitral awards and court decisions have relied upon this approach when the parties by implication selected the law of the arbitration seat to govern their agreement.¹⁰⁸

Several commentators have, however, indicated some reservations to this approach.¹⁰⁹ It has been said that the application of the law of the seat of arbitration is exclusively focused on the procedural issues of arbitration and ignore the contractual aspects of the arbitration agreement.¹¹⁰ Similarly, the arbitration agreement is indeed connected to the main contract in some instances, as in the case of a ‘corporate charter’ or ‘real estate transaction’, and thus the application of the law governing these type of contracts to the arbitration clause is particularly difficult to ignore.¹¹¹ Others have gone further and opined that when the parties have chosen a particular place they did not intent to choose the law of the place to govern their arbitration contract.¹¹²

¹⁰⁶ *Consultant (France) v Egyptian Local Authority* (1992) XVII YBCA 153, (ICC Case no. 6162, 1990).

¹⁰⁷ *ibid*153.

¹⁰⁸ *Bulgarian Foreign Trade Bank, Ltd v A.I. Trade Fin.*, (2001) XXVI YBCA 291, (Sweden, Supreme Court 2000); *Isaac Glicer v Moses Israel Glicer & Estera Glicer-Nottman, President, Rechtbank*, (1996) XXI YBCA 635, (Netherlands, Court of First instance 1994); *Coceria G. De Maio & F. snc v EMAG AG*, (1996) XXI YBCA 602, (Italy, The Supreme Court 1995).

¹⁰⁹ Nigel Blackaby and Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009)181; Born (n 1) 477.

¹¹⁰ Born (n 1) 478.

¹¹¹ *ibid*.

¹¹² Gaillard and Savage (n 5) para 42; 4Blackaby and Partasides (n109) 634.

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There is some legitimacy to this line of reasoning, since in choosing a particular place for their arbitration the arbitral parties are likely to consider the procedural and substantive laws of that particular jurisdiction. In addition, the parties will often seek a location that is neutral and unconnected to any of the parties or the contract itself.¹¹³ Such neutrality cannot be achieved unless the parties themselves have a clear idea about the legal system of the place of arbitration and how it might affect their agreement.

At this juncture, it can be questioned whether only the substantive law of the seat of arbitration applies as directed by virtue of Art. V(1)(a) or whether the seat of arbitration's conflict-of-laws rules applies also. A satisfactory answer to this question seems especially difficult in the enforcement context before the court than in the case of a tribunal. This is because the enforcing court may frequently face the daunting task of deciding such an issue since neither the conflict-of-law rules nor the NYC provides any clear direction on this matter.¹¹⁴

Another concern is that few judges can truly apply the complex mechanism for choice-of-law when determining the law applicable to the substantive validity of the arbitration agreement.¹¹⁵ Thus, 'determining the arbitration clause that meets all the legal requirements and establishing which laws are relevant can be a frustrating task for a court that is not familiar with both the private international law methodology and the specific features of international arbitration'.¹¹⁶ This also leads some national courts to avoid using the private international law rules and alternatively to apply their own substantive laws, *lex fori*, to govern the validity of the arbitration agreement.¹¹⁷

¹¹³ *West Tankers v RAS (the Front Comor)* [2007] UKHL 4, [2007] 1 Lloyd's Rep 391 [12] (Lord Hoffman).

¹¹⁴ Graffi (n 89) 48.

¹¹⁵ Graffi (n 89) 48.

¹¹⁶ Von Mehren, 'International Commercial Arbitration and Conflict of Laws' (1992) 3 Am Rvw Int Arb 57.

¹¹⁷ Tetley, A 'Canadian Looks at American Conflict of laws Theory and Practice, Especially in the Light of the American Legal and Social Systems (Corrective vs. Distributive Justice)' (1999) 38 Colum JTL 299; Graffi (n 89) 50.

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One can try to assume that Art. V(1)(a) provides guidance as to the substantive law of the seat of the arbitration as an alternative to its conflict-of-law rules, which will ordinarily be the best solution and the most convenient for both the tribunal and the courts. In practice, however, there are only some exceptional domestic substantive laws that provide detailed guidance to help both tribunals and courts to determine the law applicable to the arbitration agreement.¹¹⁸ Thus, the Tokyo High Court stated, ‘If the parties’ will is unclear we must presume, as it is the nature of arbitration agreements to provide for given procedures in a given place, that the parties intend that the law of the place where the arbitration proceedings are held will apply.’¹¹⁹ Equally, in the Interim Award in ICC Case No. 6149, the tribunal adopted the same approach by concluding as follows:

If ... the proper law of the three arbitration agreements could not necessarily be derived from the proper law of the three sales contracts themselves, the only other rule of conflicts of laws whose application would seem appropriate ... would be the application of the law where the arbitration takes place and where the award is rendered. This conclusion would be supported also by Art. V(1)(a) of the [New York Convention].¹²⁰

It seems clear that the substantive law of the seat of arbitration would be the better solution where the parties failed to make a particular choice-of-law to govern their arbitration agreement. Indeed, as G. Born points out, the Convention ‘points the way towards a reasonably straightforward approach to choice-of-law issues, well-grounded in applicable international instrument and well-suited to provide for the effective enforcement of the international arbitration agreement’.¹²¹ It does the same for the enforcement of arbitral awards. Indeed, the uniform conflict-of-law provision in Art.

¹¹⁸ Swiss PIL Art. 178 (2).

¹¹⁹ *Japan Educational Corporation v Kenneth J. Feld*, (1995) XX YBCA 745, 747 (Japan, Tokyo High Court 1994).

¹²⁰ *Seller v buyer*, (1995) XX YBCA 41, 44-45 (ICC Interim award Case no. 6149, 1990).

¹²¹ Born (n 1) 460.

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V(1)(a) is often referred to as '*la grande conquête*'¹²² of the NYC. This significant attribute is particularly marked in English law and practice.

English law and practice reflect the approach of the NYC. The comparable provision under the English AA concerning the law applicable to the arbitration agreement, which is equivalent to Art. V(1)(a) of NYC, is section 103(2)(b)—which refers to 'the arbitration agreement [not being valid] under the law to which the parties subjected it or, failing any indication thereon, *under the law of the country where the award was made*'.¹²³ Two issues should be addressed about this section regarding the law applicable to the arbitration agreement. First, the law applicable to the arbitration agreement is the law that has been clearly indicated by the parties in their agreement. Second, in the absence of such indication, then the law of the seat of arbitration will apply to the arbitration agreement's validity. With regard to the first issue, the English AA clearly affirms the parties' autonomy to choose the law governs their arbitration agreement.¹²⁴

With respect to the second issue when there is absence of agreement by the parties as to the law applicable to their arbitration agreement, English law makes it clear that the law of the seat of arbitration will apply.¹²⁵ This approach has been adopted in many cases and supported by several judges. Mustill J., for instance, has stated that 'the parties when contracting to arbitration in a particular place consented to having the arbitration process governed by the law of that place is irresistible'.¹²⁶ The English AA goes further than many contemporary laws on arbitration by defining what is meant by the seat of

¹²² Jean-Denis Bredin, 'La Convention de New York du 10 juin 1958 pour la reconnaissance et l'exécution des sentences arbitrales étrangères' (1960) 87 JDI 1003 in van den Berg (n 14) 282.

¹²³ English AA 1996, s 103(2)(b)(emphasis added).

¹²⁴ *XI Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500, [506](QB Comm Ct).

¹²⁵ English AA 1996, s 103(2)(b).

¹²⁶ *Channel Tunnel Group v Balfour Beatty Ltd*, [1993] A C 334, [357] (HL).

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arbitration.¹²⁷ In *Black-Clawson v. Papierwerke*, the English CA stated that ‘it would be a rare case in which the law of the arbitration agreement was not the same as the law of the place or seat of the arbitration.’¹²⁸ This approach was further reflected in the recent decision in *C v. D*, in which the English CA made it clear that ‘[a]n arbitration agreement “is more likely” to be governed by the law of the seat of arbitration than the law of the underlying contract’.¹²⁹

From the above authorities, it can safely be concluded that this approach is compatible with Art. V(1)(a). It could therefore be considered that this approach is the most favourable approach for determining the law applicable to an arbitration agreement. This would be on the basis of the fact that more factors are entirely relevant and absolutely persuasive to link the arbitration seat and the arbitration agreement. Furthermore, this approach fundamentally supports one of the principal goals of the NYC, which is the uniformity of international arbitration procedures.

By contrast, the YNDAA has long unequivocally affirmed the parties’ intention to select the law that governs their arbitration agreement. Art. 47(1) indicates that ‘the arbitral tribunal shall apply the rules agreed by the parties to the subject matter of the dispute’, which refers the question of the applicable law governing the arbitration agreement to the substantive law of the main contract. One key argument for the law applicable to the arbitration agreement under this article is that the absence of expressed choice-of-law by the parties as states under Art.47(2) may create some uncertainty in the choice-of-law issues. The interpretation of the article may provide two options for determining the law that governs the whole contract and subsequently rule the arbitration agreement including the form and substantive requirements.

¹²⁷ English AA, ss 2, 3 and 52(2).

¹²⁸ *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*, [1981] 2 Lloyd’s Rep 446 [483] (QB Comm Ct).

¹²⁹ *C v D* [2007] EWCA (Civ) 1282, [2008] 1 Lloyd’s Rep 239; See also for the importance of the seat of arbitration *Weissfisch v Julius* [2006] EWCA Civ 218, [2006] 1 Lloyd’s Rep 716 and *West Tankers v RAS (the Front Comor)* [2007] UKHL 4, [2007] 1 Lloyd’s Rep 391.

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It could be understood from the wording of this article ('the arbitral tribunal shall apply the substantive rules of the law it deems most closely connected to the dispute') that the legislators impliedly adopted the position of applying the law of the seat of the arbitration to govern the arbitration agreement as well as to govern the main contract.

It could also be understood from the article that the most closely connected law to the dispute is the law that the parties are presumed to have intended to choose for their main contract. There is a certain artificiality in selecting substantive rules for the parties and then attributing this to their implied choice-of-law. Furthermore, the parties might very well not intend to link their arbitration with the substantive law that might be applicable to their main contract. For instance, the parties might choose one place for concluding their agreement and another for performance. Thus, it seems very difficult to ascertain which law is more closely connected to the main contract unless the tribunal applies a conflict of laws approach, which may itself engender a new set of problems and lead to ambiguity.

The preferable approach in this respect is to apply the law of the seat of arbitration in view of the fact that it is the most closely connected law to the parties' contract. Additionally, the parties have chosen a particular place to settle their dispute not only as a geographical concern; rather, they are deemed impliedly to apply the law of the seat to rule to their main contract, including the arbitration agreement.¹³⁰ Further, determining the validity of the arbitration agreement by the law of the seat of arbitration may reduce the risk of issuing an unenforceable award in the view of the national courts.¹³¹

It is therefore recommended that the Yemeni legislators endeavour to provide clear direction on what law that should govern the parties' contractual relationship, particularly in arbitration agreements where the parties have not selected the law that is to apply. By comparison, the NYC states unequivocally that in this situation the applicable law is the law of the arbitration seat.

¹³⁰ van den Berg (n 14) 293-294.

¹³¹ Lew and others (n 3) para 6-71.

1.3.2.2 The Traditional Conflict of Laws Approach (Yemen's approach)

Several authorities have, where the parties have not made any choice of law, applied the traditional choice-of-law rules approach, applying mainly the 'most significant relationship' and 'closest connection' criteria to the arbitration agreement.¹³² This approach is based principally on the fact that the arbitration agreement is being subjected either to the law of the main contract or to the law of the seat of arbitration.¹³³ Thus, in the case of invalidity of the arbitration agreement under one of these laws but not under the other, it will remain enforceable in due course.

Accordingly, when the tribunals and national courts apply conflict-of-laws rules, they try to assert which law is the closest and most connected to the arbitration agreement.¹³⁴ In addition, the courts may consider other laws with strong connections to the arbitration agreement, such as the law of the place where the parties are resident, or the law of the place of the performance of the main contract, or the seat and the language of the arbitration and the like. It would appear that this approach favours broadening the law applicable to arbitration agreements, whereas the NYC approach provides a single method for determining such an issue. That is to say, the seat of arbitration approach reflects the best interests for the arbitral parties since it 'is fortuitous and neutral and has no real connection to the parties, the arbitrators or the facts in dispute'.¹³⁵ Nonetheless, it is argued that the seat of arbitration will normally trump connecting factors.¹³⁶

¹³² *seller v buyer*, (1995) XX YBCA 41, (Interim Award, ICC Case No. 6149, 1990); Marc Blessing, *The Law Applicable to the Arbitration Clause* in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series, No. 9, Kluwer 1999) 168 – 188.

¹³³ Lew, (n 98)114 – 145.

¹³⁴ Bernard Hanotiau, 'What law Governs the issue of Arbitrability?' (1996) 12 Arb Int'l 391.

¹³⁵ Lew, (n 98)138.

¹³⁶ Gaillard and Savage (n 5) para 425.

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The fact remains that the application of the traditional conflict-of-laws approach may lead to some deficiencies, though adopted by leading jurisdictions and in many arbitral awards. One of the main obstacles that may occur when applying different laws to the arbitration agreement in different national courts, which will ultimately create a lack of uniformity and legal certainty.¹³⁷ Another obstacles that may also arise is difficulty in ascertaining the law applicable to the arbitration agreement where the parties have clearly selected the seat of the arbitration and the law applicable to the main contract.¹³⁸ It is submitted therefore that this approach, which has been adopted in Yemen, is less desirable than the approach of the NYC.

Art 47(2) of the YNDAA requires the arbitral tribunal to apply the conflict-of-law rules that are ‘most closely related to the dispute’ in order to determine the law applicable to the merits and presumptively to the substantive validity of the arbitration agreement. This provision, in addition to critique of it made in foregoing section, merits further observations from the perspective of substantive law.

First, it should be noted at the outset that there is in fact a considerable distinction between determining the law applicable to substantive validity by the arbitral tribunal and by the enforcement courts, although the latter is the main concern here. Generally, the tribunal determines the law applicable to the arbitration agreement only where there is a dispute relating to its jurisdiction based on competence-competence principle. In doing so, the tribunal, where there is no expression by the parties as to which law should be applied, will apply the law of the seat of the arbitration based on territoriality principle, and this would be the substantive law of the State. This is because the tribunal has no *lex fori* similarly to the enforcement court.

¹³⁷ Forster, ‘Arbitration Agreement and the Conflict of laws: A Problem of Enforceability’ (1966) 21 Arb J 129.

¹³⁸ Born (n 1) 481.

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However, it is uncommon under national arbitration laws to provide such conflict-of-law rules for a tribunal.¹³⁹ Therefore, in many cases, the tribunal should develop its own conflict-of-law rules in order to determine the law applicable to the substantive validity of the arbitration agreement.¹⁴⁰ These rules are either inspired by the national legislations' conflict-of-laws rules or by international instruments such as the NYC and the ML.¹⁴¹

Unfortunately, Art 47(2) of the YNDAA neither contains such conflict-of-law rules nor includes a satisfactory approach for directing tribunals as to which choice-of-law should be applied. Furthermore, it is not self-evident under this provision how the tribunal should apply test of 'the substantive law which is considered most closely related to the disputes'. As such, the tribunal will most likely apply the conflict-of-law rules under the *lex arbitri*. However, this approach does not make sense under jurisdictions that provide substantive rules of private international law and can direct the tribunals to the law governing the substantive validity of the arbitration agreement. Alternatively, the tribunal under the YNDAA may determine the law governing the substantive validity in accordance with the classical conflict-of-law rules. This is largely unsatisfactory since the tribunal will be required under the YNDAA approach to apply no less than nine different theories in considering the most closely related law to the dispute.¹⁴² Art. V(1)(a), on the other hand, reflects the current prevailing approach and provides a single

¹³⁹ The Swedish Arbitration Act of 1999 Art.18 (provides that 'In the absence of an agreement between the parties on the choice of law, the arbitral tribunal shall decide what substantive law should apply. The established practice in Sweden is that a tribunal decide the applicable substantive law based on Swedish choice of law principles, although the trend in international cases is that a tribunal can make the decision by other methods than applying *lex arbitri* conflict of law rules')

¹⁴⁰ Klaus Berger, 'Re-examining the Arbitration Agreement: Applicable Law – Consensus or Confusion?' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?* (ICCA Congress Series. No.13, Kluwer 2007) 4.

¹⁴¹ The ML 1985 Art. 36 (1)(a)(i); Berger (n 140) 4.

¹⁴² Blessing (n 132) 168-188.

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set of conflict-of-law rules for determining the law applicable to the substantive validity of the arbitration agreement.¹⁴³

Second, the courts at the enforcement stage, when determining the law applicable to substantive validity, will have to look at two methodologies. They can apply the conflict-of-law rules of *lex fori*, although this will lead to the result of many laws expected to be applied to the same agreement under different jurisdictions.¹⁴⁴ Alternatively, they can apply conflict-of-law rules inspired by international instruments such the NYC and the ML. This will again lead back to an application of the conflict-of-law rules in Art. V(1)(a), although only the courts of contracting States will be empowered to do so. Unfortunately, since Yemen is a non-contracting State of the NYC, the court will never attempt to implement the clear conflict-of-law rules provided in the Convention. The alternative is that the Yemeni courts will apply the classical conflict-of-law rules, leading to delays and inconsistent decisions at the enforcement stage.

Third, the wording ‘most closely related to the dispute’ is ambiguous and needs further analysis. Arguably, including these words in Art. 47(2) begs the important question of whether the rules of private international law, where there is no express choice-of-law by the parties, will also apply in determining the law applicable to the arbitration agreement or whether the arbitration agreement requires special treatment. Unlike the transaction disputes in which the courts may apply the law most connected to the contract, in the sphere of arbitration this approach can be different.¹⁴⁵ That is to say, it is often the law of the place of the arbitration that is considered the law most closely linked to the parties’ agreement to arbitrate. As Mr Justice Cooke states,

¹⁴³ Berger (n 140) 10.

¹⁴⁴ *ibid* 4.

¹⁴⁵ As so-called the ‘centre of gravity’ or ‘most significant contacts’ theory of the contract conflict of laws. For further detail see A. F. M. Maniruzzaman, ‘International Commercial Arbitration: The Conflict of Laws Issues in Determining Applicable Substantive Law in the Context of Investment Agreements’ (1993) 2 Netherlands Int’l L R 201

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[A]n agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate, than with the place of the law of the underlying contract, in cases where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place.¹⁴⁶

Therefore, applying the rules of private international law will lead to more complexity and uncertainty in the field of arbitration. Also, the Yemen's legislators do not provide any clear interpretation of what exactly 'most closely' means. Rather, it seems they left the matter to the discretionary power of the tribunals and courts. Under English court practices, for instance, the 'most real connection' or 'closest link' is identified as the 'the proper law test'.¹⁴⁷ The test is simply related to 'what country has the transaction the closest and most real connection'.¹⁴⁸

The above observation leads us to reach the conclusion that the complexity in Art 47(2) of the YNDAA is not only unfortunate, but also unnecessary. As a result, the Yemeni courts, at the enforcement stage, will be hesitant to apply the appropriate factors when deciding the applicable law, which may lead to disappointing decisions. Art. V(1)(a) of the NYC is the only sensible cure for this complexity and reasonably achieves the expectations of the parties. Therefore, it is submitted that the potential implementation of the NYC in the Yemeni arbitration legislation would override the current uncertainty and help reach a clear legal resolution in determining the law applicable to both the formal and substantive validity of international arbitration agreements.

1.3.2.3 The Law Applicable to Substantive Validity under Shari'ah

Under Shari'ah, choice-of-law rules that should apply to any agreement simply do not exist.¹⁴⁹ In fact, Qur'anic injunctions enjoin that believers settle their disputes by what

¹⁴⁶ *C v D* [2007] EWCA Civ. 1282, [2008] 1 Lloyd's Rep 239.

¹⁴⁷ A. F. M. Maniruzzaman, 'International Commercial Arbitration: The Conflict of Laws Issues in Determining Applicable Substantive Law in the Context of Investment Agreements' (1993) 2 Netherlands Int'l L R 201.

¹⁴⁸ Frederick Mann, 'The Proper Law in the Conflict of Laws' (1987) 36 ICLQ 437.

¹⁴⁹ Faisal Kutty, 'The Shari'ah Factor in International Commercial Arbitration' (2006) Loy L A Int'l & Comp L R 565; and this has led some international tribunals and courts to try to avoid using Shari'ah as an

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Allah (swt) has revealed: ‘And judge, [O Muhammad], between them by what Allah has revealed and do not follow their inclinations and beware of them, lest they tempt you away from some of what Allah has revealed to you’.¹⁵⁰ This clarifies why some Islamic States did not accept international conflict-of-laws principles and automatically apply their own laws (i.e. Shari’ah).¹⁵¹ This interpretation is based on the argument that the verse expressly instructs believers to follow what Allah (swt) has revealed to humankind. However, this in no way states or implies that any foreign rules that are compatible with what Allah (swt) has revealed should be considered inapplicable within Muslim jurisdictions. Thus, this verse requires further elucidation.

First, the verse seems to be directed merely at the Prophet Muhammad (saws) in a particular circumstance. It can be said that when Allah (swt) directs this verse to the Prophet, there was not at the time any legislation in place except Qur’anic injunctions. However, today there is a large body of legislation in force in different parts of the world, including Islamic countries. The Qur’anic injunctions themselves are regarded as clear and applicable to all humankind at different times and in different places, but if there is any legislation complying with these injunctions that does not, without more, render them in opposition to Islamic principles. The Holy Qur’an states in another verse, ‘O you who believe! Fulfil (all) obligations’.¹⁵² This verse indicates that there should not be any violation of Shari’ah principles if the parties have selected a foreign law to govern their obligations, unless the contrary can be demonstrated. For instance, if the parties were to choose to apply a law that permits gambling or allows *Riba* (interest) in their agreement, then this would clearly violate Shari’ah principles. Notwithstanding these two prohibited activities are irrelevant to the agreement to arbitrate since they are normally

applicable law to the arbitration agreements. For more discussion see *Arbitration Between Petroleum Dev. (Trucial Coast) Ltd. v Sheikh of Abu Dhabi*, (1951) 1 ICLQ 247, 250–51; *Ruler of Qatar v International Marine Oil Co. Ltd.*, (Arbitral Award, 1953) in (1957) 20 Int’l Law Rep 534; see also *Shamil Bank of Bahrain EC v Beximco Pharm. Ltd.*, [2004] EWCA (Civ) 19 [2004] 1 WLR 1784, [1787].

¹⁵⁰ Surah Al-Mā'idah; verse, 49.

¹⁵¹ David Karl, ‘Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know’ (2009) 25 GW J Int’l L & Econ 31.

¹⁵² Surah Al-Mā'idah; verse, 1.

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committed within the commercial and financial contracts. Arbitration agreements only treat procedural and substantive issues relating to the arbitration process. Hence, parties should be allowed to fulfil their contractual obligations under such an agreement as long as these obligations are not in violation of Shari'ah principles.¹⁵³

Second, Shari'ah, by virtue of Qur'anic wordings and Sunnah application, provides guidelines for what can be accepted and what is prohibited. These guidelines have a wide horizon for including any adjustment for the potential harmonisation between Shari'ah rules and any choice-of-law, whether made explicitly or impliedly. This analysis has substantial basis from the verses stated above, as well as from the words of Prophet Muhammad (saws) where he stated that 'the Muslims are bound by their stipulations'.¹⁵⁴ Also, the risk to include any foreign law as inapplicable under Shari'ah jurisdictions would be associated with the risk that many foreign courts would refuse to apply Shari'ah principles under their jurisdictions based on the reciprocity principle. This risk will also exist through many multinational tribunals that make considerable efforts dedicated to Shari'ah compliance with international arbitration. Therefore, current legislations and court practice should accommodate their interpretation with international trends unless they specifically contradict the main principles of Shari'ah. As Mr Al-Jasser, the governor of the Saudi Arabian Monetary Agency, has rightly put it, 'it is offensive to me to talk about "we" against "them". We have richness in diversity. The essence in Islam is permissibility. The genesis of things is permissibility. Everything is permissible unless it is shown to contravene Islamic tenets'.¹⁵⁵

Finally, in Islamic countries the ultimate decision on the law applicable to the arbitration agreement and on whether or not a rule is compatible with Shariah rests with the courts.

¹⁵³ Ibn Taymiya, *The Fatawa* (III, King Fahad Publication Center 2007) 326 (indicating that 'Muslims must comply with contractual provisions except for those which authorise what is forbidden or forbid what is authorised').

¹⁵⁴ Sunan Abu Daoud Hadith No. 3596.

¹⁵⁵ Mushtak Parker, *Islamic Finance is Growing at a Phenomenal Pace: Al-Jasser*, (Arab Newsb 2009) in Julio Colón, 'Choice of Law and Islamic Finance' (2011) 47 TILJ 411, 416.

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Therefore, the absence of any contradiction between Shari'ah and foreign law should remove any barriers to applying that law to the parties' agreement. Allah (swt) has commanded people to follow what he has revealed, and he has revealed justice in all situations. In the author's point of view, it would be going too far to exclude any law, whether foreign or domestic, from that justice, simply because all systems of law have as their overriding purpose the enforcement of justice.

Accordingly, the view of Islamic countries on the subject of the law applicable to an arbitration agreement ultimately depends on their leniency or conservatism in applying Shari'ah principles. Some Islamic countries, which are considered conservative in applying Shari'ah rules, set aside conflict-of-law rules and apply only their own national law (i.e. Shari'ah law).¹⁵⁶ Others, such as Yemen, require the arbitrator to apply the law that has been chosen by the parties and to apply conflict-of-law rules where there is an absence of an express choice by the parties. From the author's perspective, it is not Shari'ah law per se that is in opposition to an application of non-Islamic law, or vice versa, but rather it is the diverge applications of Shari'ah principles among Islamic countries that generates the resistance and intransigence.

1.4 Conclusion

The following conclusions can be drawn from the foregoing discussion:

- Although the NYC does not directly refer to the separability doctrine, there is a strong presumption under several articles in favour of its application. These articles affirm the main purposes of the separability doctrine in the international arbitration arena

¹⁵⁶ Kutty, (n 149) 565; David Karl, 'Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know' (2002, Retrieved 2009) 25 GW J Int'l L & Econ 131.

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by encouraging the competence-competence doctrine and, specifically at the enforcement stage, by providing a single conflict-of-law rule concerning the validity of arbitration agreements. Like the NYC, the English AA supports the main purposes of the doctrine of separability for the competence of the tribunal and for determining the validity of the arbitration on agreement. Unlike the NYC and the English AA, however, it seems the YNDAA treats the arbitration agreement as separable from the main contract for the purpose of tribunal's competence only and ignores the essential consequence of the doctrine to the validity of the arbitration agreement. As discussed above, the NYC and English Act follow a better-reasoned approach since separability mostly plays an important role in issues relating to the validity of the arbitration agreement. The YNDAA, however, disregards this significant consequence of the doctrine of separability, a consequence that is 'evident in the role of the place of arbitration as a connecting factor where the parties have not chosen any law'.¹⁵⁷

- With respect to the law applicable to formal validity, under the NYC it is the law specifically selected by the arbitral parties. In the absence of such choice, there is strong support in favour of applying Art. II(2) since the article provides uniform rules for the form requirements of arbitration agreements that are now accepted by many authorities and supported by court practice.
- The English AA parallels the NYC and permits the parties to choose the law applicable to their arbitration agreement. In the absence of such choice, however, the courts determine the law applicable to their agreement by applying the law of the seat of arbitration. Although the English courts have decided what constitutes the 'seat of arbitration' in different ways, it is now generally well-settled that the seat of arbitration is the place where the award is issued.

¹⁵⁷ Lew and others (n 3) para 6-23.

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▪ As regards the Yemen's position, although the YNDAA expressly states how to deal with the law applicable to the merits of disputes, it is silent on the question of law applicable to the formal validity of arbitration agreements. Due to the absence of such legislative guidance, the determination of the applicable law under the YNDAA is not a simple task and will trouble the courts in the enforcement context. The only relevant provisions are under Art. 47(1) and Art. 47(2), which focus principally on the law applicable to the merits of disputes, but can apply by analogy to the validity of the arbitration agreement. These provisions recognise the principle of party autonomy but do not provide any clear guidance for the enforcement court where the parties have not expressed any choice-of-law because it is directed only at the arbitral tribunal. Therefore, it is submitted that the NYC provides welcome guidance under Art. V(1)(a) to fill this gap.

▪ With respect to the law applicable to substantive validity, the NYC does not contain any uniform rules similar to those of Art. II(2) that set out the form requirements of an arbitration agreement. Rather, the Convention leaves the applicable law for determining substantive validity to the national courts by applying a single conflict-of-law rule based on Art. V(1)(a). Under the YNDAA, by contrast, there is confusion relating to this issue in the enforcement context, and this confusion seems even more difficult to resolve than that on the law governing formal validity. This is occasioned by a complete absence of any legislative guidance in the YNDAA for dealing with this issue. As discussed previously, Art. 47(2) is directed at the tribunal, and it only deals with law applicable to the merits of disputes. In addition, the YNDAA still adopts the most unattractive approach in modern international arbitration. Art. 47(2) requires the tribunal to apply the traditional conflict-of-law rules by selecting 'the most closely related law' where the parties have not made any choice of law. Instead of applying a single method, the provision applies a dated method that creates further uncertainty. If the courts speculatively apply the same approach in the enforcement action, this will cause misleading and unproductive decisions, creating still further confusion, particularly where the "most closely related" rule remains problematic. Hence, it is submitted that the

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the approach of the YNDAA in determining the law applicable to both formal and substantive validity is out of step with contemporary international trends.

By contrast, Art. V(1)(a) of the NYC provides a clear single conflict-of-law rule to be applied by the enforcement court, which is to select the law of the seat of arbitration. As discussed this approach is the most attractive approach for determining the law applicable to substantive validity where the parties have made no express choice-of-law in their arbitration agreement. This approach has clearly been adopted in English law and by the English courts. It is submitted, therefore, that Art. V(1)(a) provides a significant ingredient for resolving the deficiencies of the YNDAA, which will also serve to restrict the discretionary power of the Yemeni courts through clear direction on the selection of the law applicable to substantive invalidity as a ground for refusal.

- Finally, under Shari'ah, the conflict-of-law rule on the substantive validity of an arbitration agreement does not arise, since Shari'ah is deemed all-encompassing. However, Shari'ah does permit the parties to choose the law applicable to their contract in general, as long as the chosen law does not contradict Shari'ah principles. In addition, the law applicable to the arbitration agreement under Shari'ah becomes multi-dimensional since it regulates many schools that are not always in agreement on certain matters, especially when confronted with the foreign and nuanced complexities of international arbitration law.

Also, Shari'ah has many possible interpretations and Islamic countries are not in agreement on certain matters, especially when they cover what are regarded as “foreign” or “unconventional” issues. A uniform interpretation of Shari'ah principles in such a way that it is flexible enough to recognise foreign laws in Islamic countries, where these laws do not contradict the basic principles of Shari'ah, is desirable but needs further examination. Non-Islamic law may almost certainly be allowed to govern an arbitration

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agreement, provided that such law is not incompatible with Shari'ah principles. This should encourage international instruments to be accepted in Islamic jurisdictions.

Chapter 2

The Formal Grounds of Invalidity of the International Arbitration Agreement

The New York Convention ensures that all Contracting States have a uniform understanding of the foundation [of the arbitration agreement] and attach legal effects to it, thereby making arbitration proceedings and thus arbitral awards possible.¹

The advantage of applying article VII(1) would be to avoid the application of [any stricter requirements] and, as States would enact more favourable provisions on the form requirement for arbitration agreements, would allow the development of rules favouring the validity of arbitration agreements in a wider variety of situations.²

2.1 Introduction

The previous chapter examined the doctrine of the separability and the law applicable to the international arbitration agreement. This chapter deals with the formal grounds of invalidity of the international arbitration agreement. Art. II of the NYC stipulates certain requirements as to form that must be satisfied in order for both an arbitral agreement and an arbitral award to be enforceable.³ This is because the formal validity of an arbitration agreement is essential in the international commercial sphere since it is closely correlated to the question of whether the parties essentially consented to

¹ Dorothee Schramm and Elliott Geisinger, et al., 'Article II' in Herbert Kronke and Patricia Nacimientos, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer 2010) 39(emphasis added).

² UNGA 'Settlement of commercial disputes-Preparation of uniform provisions on written form for arbitration agreements- Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958): Note by the Secretariat' 44th session (2006) UN Doc A/CN.9/WG.II/WP.139 para 36(hereinafter SG Report)(emphasis added).

³ Jean Francois Poudret and Sebastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell 2007) para 72 (stating that 'Art. II addressed to the contracting States' enforcement court); see also *Nanosolutions, LLC, et al. v Rudy Prajza, et al.*, (2011) XXXVI YBCA 474,477 (US District Court, District of Columbia 2011) ; CLOUT Case No.1174 *Slovenia: Vrhovno sodišče Republike Slovenije, Sklep Cpg 2/2009* (Supreme Court of Republic of Slovenia 2009)(stressing that 'the Contracting States of the NYC are bound by Article II to recognize a written arbitration agreement').

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arbitration or not.⁴ Hence, lacking one or more of those requirements may establish a ground to invalidate the arbitration agreement and subsequently lead to a refusal to enforce the arbitral award.

The Convention's form requirements have two main purposes. The first is to ensure the parties intended to use arbitration as an alternative to litigation⁵, and the second is to provide basic uniform rules on the formal validity requirements of international arbitration agreements that can be adhered to by all the courts of all the contracting States.⁶ Nevertheless, due to the considerable progress in the field of international commerce and electronic communications, there is also a development in contracting States' interpretations relating to Art. II(2).⁷ Although the Convention impliedly made allowance for international modern practices in the light of electronic communications, the variation in the interpretation of national courts has led to divergent treatments of this issue and has created a lack of uniformity.⁸

Therefore, the UNCITRAL's thirty-ninth session in 2006 (hereinafter the Recommendation), in addition to the UNCITRAL Model Law 2006 (with amendments as adopted in 2006, hereinafter ML 2006), provide a considerable change in the form requirements relating to a uniform interpretation of Art. II(2). The Recommendation's

⁴ For further debate on this issue, see Domenico Pietrodi, 'Incorporation of Arbitration Clauses by Reference'(2004) 21 J Int Arb 439; Gerold Herrmann, 'Does the World Need Additional Uniform Legislation on Arbitration?'(1999) 15 Arb Int'l 211.

⁵ *Tradax Export SA v Amoco Iran Oil Co*(1986) XI YBCA 532, (Switzerland Supreme Court 1984); Andreas Reiner, 'The Form of the Agent's Power to Sign an Arbitration Agreement and Art. II(2) of the New York Convention' in Albert Jan van den Berg, (ed), *Improving the Efficiency of Arbitration and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series No.9, Kluwer 1999) 85–88; Philipp Habegger, 'Extension of Arbitration Agreements to Non-signatories and Requirements of form'(2004) 22 ASA Bulletin 405; Toby Landau, 'The Requirement of A Written Form for An Arbitration Agreement: When "written" means "Oral"' in Albert Jan van den Berg (ed), *International Commercial Arbitration Important Contemporary Question* 19(ICCA Congress Series No.11, Kluwer 2003) 24.

⁶ Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer 1981) 173.

⁷ Stephan Wilske and Christina Scheidle, 'Seals, Stamps, And Signatures In International Arbitration Agreements'(2011) 1 Contemporary Asia Arbitration Journal 37;see also Adam Samuel, *Jurisdictional Problem in International Commercial Arbitration. A Study of Belgian, Dutch, English, French, Swedish, USA and West German Law* (Schulthess 1989) 79.

⁸ SG Report paras 11-30; See also Guillermo Alvarez, 'Article II(2) of the New York Convention and the Courts' in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, (ICCA Congress Series No. 9, Kluwer 1999) 67.

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main objective is to encourage a liberal interpretation of the written form that is required in Art. II(2). In addition, the Recommendation promotes a liberal use of Art. VII(1) of the Convention to apply more favourable law at the stages of both the enforcement of the arbitral award and the enforcement of the arbitration agreement.⁹

While the YNDAA has filled some gaps with respect to the formal validity of arbitration agreements, the old-fashioned approaches remain unchanged and this, notably, includes complete ignorance of the full implication of modern form requirements. By contrast, the main features of Art. II(2) of the NYC and Art. 7 of the ML 2006 are significantly more comprehensive than the YNDAA with respect to the form requirements. Additionally, the provisions of both instruments not only provide a clearer framework for form requirement and better practice, but they also establish modern international standards that have been followed by many States. Further, these issues create underlying tensions from the perspective of Shari'ah law because of the use electronic communication tools for concluding arbitration agreements.¹⁰

In view of that, this chapter has two principal aims. The first is to provide a comparative critical analysis of the form requirements under Art. II of the NYC and Art. 7 of ML 2006 on the one hand and under the YNDAA provisions on the other. The second principal aim of this chapter is to point out the underlying problems of the YNDAA's form requirements and then put forward some dynamic and feasible alternatives in order to improve the Yemeni Act in the light of international legal norms and English practice. Of course, the Shari'ah position on this matter will be also examined carefully in the course of this analysis.

To that end, this chapter is divided into three main sections. The first section deals with the form requirements under the NYC; the second considers the form requirements

⁹ Dorothee Schramm and Elliott Geisinger, 'Article II' in Herbert Kronke and Patricia Nacimiento, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer 2010) 40.

¹⁰ Norazlina Zainul and others, 'E-Commerce from an Islamic perspective'(2004) 3 Electronic Commerce Research and Applications 280; Alzaagy Abdulrahman, 'The Islamic Concept of Meeting Place and its Application in E-Commerce'(2007) 1 MUJLT 1.

under the English law; and the third examines the form requirements under Shari'ah and the YDNAA.

2.2 Form Requirements under the NYC

Art. II(1) and Art. II(2) of the NYC provide as follows:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

In the interpretation of the Swiss Supreme Court, arbitration clauses are valid under the NYC 'which are either contained in a signed contract or in an exchange of letters, telegrams, telexes and other means of communication'.¹¹ Accordingly, Art. II(2) provides two possible methods in order to satisfy the writing requirements. The first is where an arbitration agreement is signed by the parties and the second is where an arbitration agreement is contained in an exchange of letters or telegrams. The following discussion looks at the written form requirement under Art. II(2) by examining the above two methods, and then goes on to examine the international interpretation of Art. II(2).

¹¹ *Compagnie de Navigation et Transport SA v MSC- Mediterranean Shipping Company SA.*, (1996) XXI YBCA 690, 697 (Switzerland, The Supreme Court 1995).

2.2.1 The Written Form Requirement of Art. II(2)

2.2.1.1 Signature Requirement

There are two possible options for satisfying the signature requirement under the NYC: the first is where an arbitration clause is included in a signed contract, and the second is where an arbitration agreement takes the form of an independent contract. The first option does not raise any challenges¹², whereas the second option lead to different sets of outcomes and potential difficulties.

When an arbitration clause forms part of a contract that has not been signed by the parties, it leads invariably to the invalidity of the arbitration agreement. The existence of an arbitration agreement in this case depends ultimately on the existence of the main contract of which it forms a term. Therefore, an unsigned contract results in an unsigned arbitration agreement and the invalidity of the main contract automatically would invalidate the arbitration agreement.¹³

It may, of course, be argued that the invalidity of the main contract does not affect the validity of the arbitration agreement, by virtue of the separability doctrine. However, the doctrine has been established principally for the case where the underlying contract is invalid rather than non-existent.¹⁴ That is to say, if there is no agreement in the main contract based on the doctrine of the parties' autonomy and demonstrated by a signed contract or any means of communications, there would not be any agreement to

¹² *Not indicated v Not indicated*, (2006) XXXI YBCA 652, (Germany Court of Appeal 2000); Adam Samuel, *Jurisdictional Problem in International Commercial Arbitration. A Study of Belgian, Dutch, English, French, Swedish, USA and West German Law* (Schulthess 1989) 137; Toby Landau and Salim Moollan, 'Article II and the Requirement of Form' in Emmanuel Gaillard and Domenico Di Pietro(eds), *Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention 1958 in Practice* (Cameron May 2007)198.

¹³ *Sojuznefteexport (SNE) (USSR) v JOC Oil Ltd.* (1990) XV YBCA 384, 410(Bermuda Court of Appeal, 1989); *Dodwell & Co. Pty v Moss Security, Moss Security Pty (formerly Wilrac Pty) v Kevin McDonnell*, (1990) XIX YBCA 615, 631 (Federal Court of Australia, N S W D R 1990).

¹⁴ Domenico Di Pietro and Martin Platte (eds), *Enforcement of International Arbitration Awards: The New York Convention of 1958* (1st edn, Cameron May 2001) 144

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arbitrate in the first place.¹⁵ Thus, contracts with subsequent invalidity are subject to the separability doctrine but not contracts that have never existed in the first place.¹⁶

Now if an arbitration agreement takes the form of a separate contract and has also not been signed by the parties, a different set of issues may arise under Art. II(2) of NYC. Consequently, the courts have adopted different approaches in this situation. For instance, some courts held that a general reference to separate arbitration agreement is sufficient to establish a valid arbitration agreement.¹⁷ A similar view has been adopted by some other courts, which have concluded that no signatures or specific reference to the arbitration agreement are required when concluding the main contract.¹⁸ Nonetheless, other courts have adopted the view that both, the main contract and the arbitration agreement, must be signed by the parties where they are not included in an exchange letters or telegrams and thus explicit reference to the arbitration agreement is required.¹⁹

The latter view seems to provide greater certainty in terms of the literal interpretation and where courts strictly applied the signature as defined under Art. II(2) of the NYC. There is no objection per se to ensuring the parties' clear intention for using arbitration as a resolving method by a clear signature. It is, however, objectionable to oblige the parties to sign some incorporated terms, such as an arbitration clause, where they have already incorporated it by reference in their main contract or where their unequivocal intention to use arbitration is expressly stated in the main contract. Accordingly, Clarke

¹⁵ *Islamic Republic of Pakistan v Rizzani De Eccher SpA, et al.*, (2008) XXXIII YBCA 600, 601 (Italy, The Supreme Court 2007) (holding that 'the doctrine of separability does not apply if the underlying contract is non-existent rather than invalid); *Tanning Research Laboratories, Inc. v Hawaiian Tropic de Venezuela, C.A.*, (2008) XXXIII YBCA 1228, 1239 (Supreme Court of Justice of Venezuela 2006).

¹⁶ van den Berg (n 6) 145.

¹⁷ *G. SA v T. Ltd.*, (1990) XV YBCA 509, (Switzerland Supreme Court 1989); *Ibeto Petrochemical Industries, Ltd. v. M/T BEFFEN*, 412 F. Supp. 2d 285, (US, SDNY 2005).

¹⁸ *SA X v Mr. Y*, (1988) XIII YBCA 512, (Spain Supreme Court 1986); *Bomar Oil NV v Enterprise Tunisienne d'Activites Petrolieres*, (1990) XV YBCA 447, (French Supreme Court 1990) 490.

¹⁹ *Trygg Hansa Insurance Co Ltd v Equitas Ltd* [1998] 2 Lloyd's Rep 439 (QB Comm Ct); *AIG Europe (UK) Ltd v Ethniki*, [2000] 1 All ER (Comm) 65, (CA); *American International Specialty Lines Insurance Co v Abbott Laboratories*, [2002] EWHC 2714 (Comm), [2004] Lloyd's Rep IR 815.

J. In the *Habas* case has pointed out that the parties are free to agree to incorporate any terms they choose by any method they choose and therefore there are no absolute rules.²⁰ Hence, the prevailing view is that a signature is not essential providing that either the arbitration clause or as separate agreement is in writing.²¹

2.2.1.2 Exchange of Letters, Telegrams and Electronic Communications

As an alternative to the signature, an exchange of ‘letters’ or ‘telegrams’ also satisfies the requirements of Art. II(2), although these expressions can be extended to include other forms of communications.²² The question that now needs to be determined is whether the letters or telegrams also need to be signed or not? According to the majority of commentators and court decisions, the prevailing view is that letters, telegrams and other similar forms of communication do not need to be signed to fulfil the requirements of Art. II(2).²³ This is because letters and telegrams are not normally signed in commercial practice, nor are other modern forms of communication, which are mostly sent electronically. Accordingly, reference to an arbitration clause or agreement in subsequent correspondence between the parties would be sufficient.²⁴

Thus, the better interpretation of Art. II(2) that either an arbitration clause included in the contract or an arbitration agreement in a separate document would be formally valid where it is signed or accepted in an exchange of letters or other written form of

²⁰ *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] EWHC 29, [2010] 1 All ER 1143, (QB Comm Ct).

²¹ Nigel Blackaby and Constantine Partasides, et al, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 90.

²² See for instance, *Ruler of Qatar v International Marine Oil Co. Ltd.*, (Arbitral Award, 1953) in (1957) 20 Int'l Law Rep 534.

²³ *Overseas Cosmos, Inc. v NR Vessel Corp.*, 1997 US Dist LEXIS 19390 (US, SDNY 1997); *Earthtrade, Inc. v Gen. Brands Int'l Corp.*, 1996 US Dist LEXIS 1520 (US, SDNY 1996); See also *Dixie Aluminum Prod. Co. v Mitsubishi Int'l Corp.*, 785 F.Supp. 157 (US, NDGa 1992); Gary Born, *International Commercial Arbitration* (Kluwer 2009) 592; van den Berg (n 6) 191; for the contrary view see *Finangrain Compagnie Commerciale Agricole et Financière SA v Patano snc*, (1996) XXI YBCA 571, 572–573, (Italy, Court of Appeal of Bari 1989).

²⁴ S.I. Strong, ‘What Constitutes an “Agreement in Writing” in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act’ (2011) 48 Stan J Int'l L 1.

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communication, whether signed or not. In this connection, it has been correctly stated that the written form requirement is satisfied where the parties 'exchange one and the same document even if only one of them signs it.'²⁵

The question that emerges, then, is whether an exchange of new electronic communications can be also satisfy Art. II(2)'s form requirement? As G. Born states that the Convention's reference to 'telegrams' and not to the new electronic mediums of communication creates the opportunity for a necessarily wide interpretations of Art. II(2).²⁶ Accordingly, contracting States' courts apply a broad interpretation to include broadly all forms of electronic communication. For instance, the Court of Appeal of Celle has interpreted Art. II(2) in such a way that more recent forms of electronic communications such as telefax may be considered within the scope of Art. II(2).²⁷ Likewise, in some courts decisions they were held that it is generally recognised that telexes and telefaxes and exchange emails just like telegrams, are equivalent to letters.²⁸ However, an issue that arises is whether these electronic forms of communication would be enough to fulfil Art. II(2)'s requirement when the parties' arbitration agreement is neither signed by both parties nor contained in an exchange of written documents. It has been indicated that oral or tacit acceptance of a written offer to arbitrate does not fulfil the requirement of Art. II(2). This issue will be discussed below.

²⁵Ulrich Haas, 'The Convention on the Recognition and Enforcement of Foreign Arbitral Awards' in Michael Bühler and Frank-Bernd Weigand (eds), *Practitioner's Handbook on International Arbitration* (C.H. Beck 2002) 442.

²⁶ Born (n 23) 597.

²⁷ *Buyer v Seller*, (2005) XXX YBCA 528, (Germany, Celle Court of Appeal 2003).

²⁸ *Shipowner v Time charterer*, (2000) XXV YBCA 714, (Germany, Hamburg Court of Appeal 1998); *Charterer v Shipowner*, (2002) XXVII YBCA 519, 521 (Norway, Hålogaland Court of Appeal 1999); *Bitumenes Orinoco, S.A. v New Brunswick Power Holding Corp.*, (2007) XXXII YBCA 991, 993 (US, Dis Ct SDNY 2007).

2.2.1.3 Oral and Tacit Acceptances of Arbitration Agreements

The requirements under Art. II(2) of an “exchange of letters or telegrams” was drafted to exclude an oral and tacit acceptance.²⁹ Nevertheless, an oral or tacit acceptance of a written offer, which contains a written arbitration agreement, could be considered under some legislation as creating a binding contract and could therefore give rise to a valid arbitration agreement. As a result, commentators and national courts are divided in their views on this issue.

With respect to oral acceptance, some support the view that oral acceptance of a written offer cannot give rise to a valid arbitration agreement.³⁰ Professor van den Berg states that Art. II(2) does not leave any doubt regarding this issue and cannot indicate anything else than that the exchanges letters or telegrams should be in written form.³¹ Therefore, the NYC would not be applicable where the arbitration clause in the parties’ communications had not been established in written form.³² According to this view, by way of example, the French Supreme Court held that Art. II(2) would not be fulfilled by tacit acceptance of a letter referring to the conditions that included the arbitration clause.³³

On the other hand, the contemporary view is that an oral agreement to arbitrate would be adequate in order to validly conclude the arbitration agreement since current commercial practice requires swift and immediate correspondence between the parties. In addition, there are many contracts relating to large sums of money that are still concluded by oral acceptance, so why would it be more complicated with respect to an

²⁹ Howard Holtzmann and Joseph Neuhaus, *A Guid to the UNCITRAL Model law on International Commercial Arbitration: Legislative History and Commentary* (vol: I, Kluwer 1995) 262.

³⁰ van den Berg (n 6) 196; Frederick Mann, ‘An ‘Agreement in Writing’ to Arbitrate’(1987) 3 Arb Int’l 171.

³¹ van den Berg (n 6) 196.

³² *H. Small Ltd v Goldroyce Garment Ltd*, [1994] 2 HKC 526 (Hong Kong High Court).

³³ *Sté Confex v Ets. Dahan*, (1987) XII YBCA 484, (France, The Supreme Court 1986); *DITF Ltd v RF AG* (1996) XXI YBCA 685, (Swiss Court of Appeal 1994) ; See also *Tracomin SA v sudan Oil Seeds Co.*, (1985) XII YBCA 511, (Switzerland, The Federal Supreme Court 1985).

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arbitration agreement? Hence, it has been stated that a ‘multi-million dollar contract which will be considered to be valid but for the arbitration clause would be invalid of whether it can be established that the parties actually agreed on arbitration’.³⁴

The latter view seems to provide greater certainty. Since the ultimate purpose of the form requirement is to ensure that the arbitral parties assented to use the arbitration method, oral conclusion would be acceptable if they expressly evidenced their consent. Put differently, if the parties can achieve a certain degree of evidential record for their agreement of regardless the method adopted, it would be overly formalistic to deny the validity of their agreement if conducted orally. Therefore, some contemporary arbitration legislation in developed jurisdictions either recognises an arbitration agreement that has been made orally³⁵ or omits the requirement that the arbitration agreement be in written form.³⁶

With respect to the tacit acceptance of an arbitration agreement, the classical case of tacit agreement is where the one of the parties sends the contract containing an arbitration agreement and the other party acts and performs accordingly without responding to the first party in writing or without acknowledging the recipient.³⁷ In such a case, it may be considered, under some jurisdictions, as a valid means of concluding the arbitration agreement as a condition within the main contract.³⁸ On the other hand, this view is not commonly accepted under NYC practice.³⁹

³⁴ Julian Lew and others, *Comparative International Commercial Arbitration* (Kluwer 2003) para 7-8; see also *Israel Chemicals & Phosphates Ltd. v N.V. Algemene Oliehandel*, (1976) I YBCA 194, (Netherlands Court of first instance of Rotherdam 1970).

³⁵ The New Zealand Arbitration Act 1996 Art. 7(1), and the UNCITRAL ML 2006 Art. 7

³⁶ The Swedish Arbitration Act of 1999 s 1.

³⁷ *Zambia Steel & Building Supplies Ltd. v. James Clark & Eaton Ltd.*, (1989) XIV YBCA 715, (English Court of Appeal 1986).

³⁸ The German ZPO s 1027(2).

³⁹ Domenico Di Pietro and Martin Platte (eds), *Enforcement of International Arbitration Awards: The New York Convention of 1958*(1st edn, Cameron May 2001) 77-78.

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It could be argued that the tacit agreement as a mean of concluding a contractual relationship may lead to the conclusion that the main contract is valid, but the critical question that remains is whether the same holds true for the arbitration agreement. Considerably two different views are found on this question.

The first view does not consider the tacit agreement as a sufficient means to conclude the arbitration agreement since it does not fulfil the requirements of Art II(2).⁴⁰ The key argument of this view is that a tacit agreement is normally accepted for the main contract, whereas the arbitration agreement needs to be self-evident in written form and should be considered carefully and differently from other condition in the main contract.⁴¹ Besides, the written form ensures that the parties intended to enter into an arbitration agreement and further supports the doctrine of separability.⁴² Therefore, many courts of contracting States have concluded that the NYC is inapplicable if the arbitration agreement has not been affirmatively accepted in written form by the other party, and as a result a tacit agreement does not satisfy the requirements of Art. II(2).⁴³

The second view, on the other hand, considers a tacit agreement to be sufficient since it is used in other legal contracts. Professor Lew clearly points out that the arbitration agreement shares the destiny of the main contract, and thus it would not be appropriate to enforce the substantive contract while being able to ignore the arbitration agreement when concluding the contract orally or tacitly.⁴⁴ Some national courts have supported this view, particularly where the seller exchanges with the buyer a written sales agreement that includes an arbitration agreement and does not receive any objection

⁴⁰ *Seller v Buyer*, (2005) XXX YBCA 536, (Germany, Celle Court of Appeal 2003); *Not indicated v Not indicated*, (2002) XXVII YBCA 543, (Spain, The Supreme Court 1998).

⁴¹ Neil 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'l 28.

⁴² *Manufacturer (Netherlands) v Buyer (Germany)*, (2007) XXXII YBCA 351, (Germany, Frankfurt Court of Appeal 2006).

⁴³ *Not indicated v Not indicated*, (2006) XXXI YBCA 679, (Germany, The Federal Supreme Court 2005); *Buyer v Seller*, (2005) XXX YBCA 528, (Germany, Celle Court of Appeal 2003).

⁴⁴ Lew and others (n 34) para 7-8.

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after delivering the goods nor returns the written acceptance to the sender.⁴⁵ For instance, in the *Genesco* case, the US Second Circuit court held that where there has been an exchange between the parties of telexes that contain an arbitration agreement and where there has been no objection by the receiving party, the requirement of Art. II have been satisfied.⁴⁶ Thus, this view would also be in line with the universal trend towards liberalizing the form requirement of arbitration agreements.

Clearly, the form requirements of Art. II(2) can be interpreted either strictly or liberally. The next section will attempt to clarify how contracting courts apply Art. II(2)'s form requirements in the light of the more practical approach that conforms with international trends and that achieves a higher degree of uniformity and has great potential for improving Yemeni law.

2.2.2 The International Interpretation of Art. II (2) of the NYC

It is almost unanimously accepted that Art. II(2) requires substantive standards of form requirements that contracting States cannot replace with other stringent forms under their other national laws.⁴⁷ Nonetheless, form requirements under the Convention are not necessarily always in line with modern business practice and do not always run parallel to the provisions of some national arbitration laws,⁴⁸ and thus may defeat an agreement to arbitrate.⁴⁹ This will lead us to the critical question of whether the NYC provides minimum form requirements, under a strict approach, or whether it provides maximum form requirements, under a liberal approach.

⁴⁵ *Israel Chemicals & Phosphates Ltd. v N.V. Algemene Oliehandel*, (1976) I YBCA 194, (Netherlands, Court of first instance of Rotterdam 1970).

⁴⁶ *Genesco, Inc. v T. Kakiuchi & Co.*, 815 F 2d 840, 846, (US, Court of Appeals 2d Cir 1987).

⁴⁷ Born (n 23) 582; Di Pietro and Platte (n 14) 81; Paul Friedland, 'U.S. Courts' Misapplication of the 'Agreement in Writing' Requirement for Enforcement of an Arbitration Agreement under the New York Convention' (1998) 13 Int'l Arb Rep 21; van den Berg (n 6) 287.

⁴⁸ William W. Park, *Arbitration of International Business Disputes : Studies in Law and Practice* (OUP 2006) 304; Di Pietro and Platte (n 14) 84; See for instance German ZPO s 1027(2).

⁴⁹ Lew and others (n 34) para 7-8.

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Under the strict approach, the contracting State courts apply Art II(2)'s form requirements exhaustively.⁵⁰ In other words, courts strictly apply the requirements as defined under Art. II(2) and granted enforcement of arbitral awards only when either the contract containing the arbitration clause or the arbitration agreement was signed by the parties or was contained in an exchange of letters or telegrams.⁵¹ According to this view, Art. II(2) provides both maximum and minimum standards as to form, which the courts cannot supersede by other less demanding or generous form requirements under national law. Therefore, it has been said that the courts may request neither more onerous nor less onerous requirements than those stipulated by Art. II(2).⁵² In supporting this view, it has been held by one court as follows:

Article II sets not only a maximum but also a minimum requirement. Obviously, a Contracting State may not set stricter requirements as to form, nor can it accept less far-reaching formal requirements. ... That provision does not allow for acceptance of the validity of an arbitration clause which does not meet the said requirements⁵³

Obviously, under this view, the oral and tacit acceptance of an arbitration agreement will lead to non-enforcement of arbitral awards where the NYC applies. Therefore, some contemporary arbitration legislation, which accepts oral or tacit agreements, would not enforce their form requirements as alternatives for those indicated under Art. II(2) where the Convention applies.

The contemporary view, on other hand, holds that Art. II(2) does not comprise minimum requirements for the formal validity of international arbitration agreements,

⁵⁰ *Chloe Z Fishing Co. v Odyssey Re (London) Ltd.*, (2001) XXVI YBCA 918, 919 (US Dis Ct SDC 2000); *Hih Casualty and General Insurance Limited (in liquidation) v R J Wallace et al.*, [2006] NSWSC 1150, 135 (Australia, SCNSW 2006).

⁵¹ SG Report (n 2) para 12.

⁵² van den Berg (n 6) 178; see also Vera Houtte van, 'Consent to Arbitration through Agreement to Printed Contracts: The Continental Experience' (2000) 16 Arb Int'l 1.

⁵³ *DITF Ltd v RF AG* (1996) XXI YBCA 685, 688, (Swiss Court of Appeal 1994).

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but actually constitutes maximum requirements.⁵⁴ According to this view, Art. II(2) permits, but does not oblige, a contracting State's court to accept less onerous requirements, though the NYC still remains applicable.⁵⁵ Therefore, Art. II(2) establishes a non-exhaustive list in order to satisfy the form requirements.⁵⁶ Many respected commentators including Professor Berg, who was in favour of the first view, has changed his opinion in favour of this view.⁵⁷ In addition, there is mounting judicial authority in support of this view. For instance, the Queen's Bench Division of the Commercial Court in England has stated that:

where a stay of court proceedings was sought invoking an arbitration agreement; the court cited the English Arbitration Act and held that the Act provided for a very wide meaning of the words "in writing" which was even wider than article 7(2) of the UNCITRAL Arbitration Model Law but was said to be still consonant with article II(2); the court held that, if an arbitration clause was incorporated in a document and if it was proven that the party was bound by an agreement which included the terms of that document, no further proof of the arbitration agreement was required.⁵⁸

From the above, it can be submitted that the better view is that Art. II(2) of the Convention needs to be interpreted liberally rather than literally, since there has been a revolution in modern means of communications. Therefore, the author supports the view that the form requirements under the Convention should not be considered as minimum formal hurdle but rather it should be construed as maximum form requirements. To be sure, the principal goal of the Convention is to promote legal

⁵⁴ Peter Kucherepa, 'Reviewing Trends and Proposals to Recognize Oral Agreements to Arbitrate in International Arbitration Law' (2005) 16 Am Rev Int'l Arb 409; Keba Mbaye, *Arbitration Agreement: Conditions Governing Their Efficacy* in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICC Congress Series, No.9, Kluwer 1998) 100.

⁵⁵ van den Berg (n 6) 178.

⁵⁶ *Aloe Vera of America, Inc. v Asianic Food Pte Ltd.*, (2007) XXXII YBCA 489, (Supreme Court of Singapore 2006).

⁵⁷ Lew and others (n 34) para 6-39; Emmanuel Gaillard and John Savage(eds), *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer 1999) para 614; Domenico Di Pietro and Martin Platte (eds), *Enforcement of International Arbitration Awards: The New York Convention of 1958*(1st edn, Cameron May 2001) 81; Albert Jan van den Berg (ed), *The New York Convention-Consolidated Commentary- Cases Reported in Volumes XXII (1997) - XXVII (2002)*' (XXVIII YBCA, Kluwer 2003) 584-587.

⁵⁸ *Abdullah M Fahem and Co (Yemen) v Mareb Yemen Insurance Co and Tomen (UK) Ltd* (1998) XXIII YBCA 789, (QB Comm Ct 1997).

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certainty rather than restrict the enforceability of arbitral awards. Therefore, applying the strict approach would be inconsistent with the core objective of the Convention as a constitutional instrument, which is intended to develop over time.⁵⁹

Following the interpretation and court application of Art. II(2)'s written form requirement, it may be concluded that although Art. II of the NYC intended to achieve a uniform interpretation and application among all contracting States, such uniformity would be challenging, as the above discussion shows. This is merely because courts in different jurisdictions have applied divergent approaches, which generates more confusion and discrepancy.⁶⁰ Therefore, the Secretary General of the UN indicates that:

[i]t has been repeatedly pointed out by practitioners that there are a number of situations where the parties have agreed to arbitrate (and there is evidence in writing about the agreement), but where, nevertheless, the validity of the agreement is called into question because of the overly restrictive form requirement. The conclusion frequently drawn from those situations is that the definition of writing, as contained in [various] international legislative texts, is not in conformity with international contract practices and is detrimental to the legal certainty and predictability of commitments entered into in international trade.⁶¹

In order to attain predictable and higher uniformity and due to the changing needs of international commercial practices, the UNCITRAL has adopted a Recommendation concerning the interpretation and application of Art. II(2) concurrent to and in connection with the ML amendments. Both the Recommendation and the ML 2006's amendments constitute a 'friendly bridge' between the NYC and modern means of communications as well as current business practice needs. In addition, they provide straightforward insight for contracting States on how to interpret and apply the

⁵⁹ Born (n 23) 541-544; Herbert Kronke, 'Introduction: The New York Convention Fifty Years on: Overview and Assessment' in Herbert Kronke and Patricia Nacimiento, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer 2010) 11.

⁶⁰ SG Report paras 11-23

⁶¹ UNGA, 'Report of the Secretary General on Settlement Of Commercial Disputes-Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement' 32nd session (2000) UN Doc A/CN.9/WG.II/WP.108/Add.1 para 7.

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Convention's form requirements. Hence, both instruments are regarded as authoritative sources that have substantial weight when applying Art. II(2) of the Convention.⁶²

2.2.2.1 International Interpretation of Art. II(2) under the UNCITRAL Recommendation

The Recommendation is relatively brief in its provisions, stating the following:

1.*Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2.*Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.⁶³

The Recommendation establishes a 'friendly bridge' between the NYC and the new amended provision of ML 2006. Nonetheless, the Recommendation is merely a guidance or a non-binding direction to be used by courts in the application of the NYC.⁶⁴ It is suitable, also, and indeed necessary, as highly persuasive insight for certain States that may still not be a party to the NYC, such as Yemen.⁶⁵

The Recommendation simply urges the contracting States to apply the liberal approach in interpreting the form requirements, and thus Art. II(2) constitutes non-exhaustive

⁶² Landau and Moollan (n 12) 255.

⁶³ UNGA 'Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session, Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' 61st session (2006) UN Doc. A/61/17, Annex 2 , (hereinafter the UNCITRAL Recommendation) 62.

⁶⁴ UNGA 'Settlement of commercial disputes-Draft declaration regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the New York Convention: Note by the Secretariat' 39th session (2006) UN Doc A/CN.9/607, para 12.

⁶⁵ See Chapter 2 point 2.4.2 page 97.

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form requirements.⁶⁶ Furthermore, to apply Art. VII(1) of the NYC⁶⁷ in order to allow ‘any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.’⁶⁸

The Recommendation has been considerably well-received by many contracting States which helps reinforce the liberal approach of interpreting Art. II(2) of the NYC.⁶⁹ Several factors have been considered by the UNCITRAL prior to issuing this instrument. These factors should be also considered by the courts when potentially adopting this Recommendation. For instance, the Recommendation states in some parts of its draft:

Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958, has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

Taking into account article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

Considering the wide use of electronic commerce,

Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, particularly with respect to article 7, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts,

Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing

⁶⁶ *Aloe Vera of America, Inc. v. Asianic Food Pte Ltd.*, (2007) XXXII YBCA 489, 493, (Supreme Court of Singapore 2006).

⁶⁷ *Shipowner v Charterer (Germany)*, (2007) XXXII YBCA 372, 378, (Germany, Celle Court of Appeal 2006).

⁶⁸ The Recommendation (n 63) 61.

⁶⁹ UNGA ‘Settlement of commercial disputes Recommendation regarding the interpretation of article II, paragraph (2), and article VII, paragraph (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (“New York Convention”) Compilation of comments by Governments’ 41st session (2008) UN Doc A/CN.9/661/Add. 1, 2 and 3. (hereinafter UNGA Addendum Note).

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arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,⁷⁰

Given these motivating factors, it is clear that the UNCITRAL recognised the urgent need for the NYC's form requirements to be conformed to both the needs of international trade and practice. Therefore, the rationales of the above factors ultimately directed to the national courts in order to give effect of modern form requirements when interpreting and applying Art. II(2) of the NYC. As rightly stated by one commentator, the motivating factors under the Recommendation have been noticeably indicated in order to show that it is established on the basis of both international consensus and the wide adoption of electronic commerce in current practice.⁷¹

In addition to that and to ensure a higher degree of uniformity, the above rationales have encouraged the courts to consider not only their own national legislation but also the international practices in different parts of the world.⁷² Ultimately, the Recommendation generally has many potential impacts, one of the most significant being to encourage contracting States to recognise international arbitration agreements on the grounds of the liberal approach and further help adopt in their national arbitration legislations Art. 7 of the ML 2006 as a liberalized model that includes contemporary standards of form requirements of arbitration agreements, pursuant to Art. VII(1) of the NYC.⁷³

2.2.2.2 International Interpretation of Art. II(2) in the Light of Art. 7 of the UNCITRAL ML 2006

The UNCITRAL ML 1985 adopted the written form requirement parallel to, even though intended to be more liberal than, Art. II(2) of the NYC.⁷⁴ Yet, these

⁷⁰ The UNCITRAL Recommendation (n 63) 61-62.

⁷¹ Strong (n24) 1.

⁷² The UNCITRAL Recommendation (n 63) 61.

⁷³ Schramm and Geisinger (n 9) 78 (highlighting that 'this technique in order to avoid the application of Article II(2)').

⁷⁴ Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (2nd edn, Sweet & Maxwell 2005) para 2-015; UNR 'Report of the UNCITRAL on the

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requirements, at the time, have only provided modest developments on interpreting the NYC's requirements, in particular when compared with other more liberal approaches under some other national arbitration laws.⁷⁵ Accordingly, and due to the excessive changes in the international trade's practices, there have been several proposals for an actual revision to the ML 1985's including Art. 7's form requirements.⁷⁶ Subsequently, the UNCITRAL issued the Recommendation in connection with Art. 7 of the UNCITRAL ML 2006, revised version, on the interpretation of Art. II(2) and VII(1) of the NYC.⁷⁷ As revised in 2006, Art. 7 of the ML simply contains two options with regards the form requirements:

Option I provides that:

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

(2) The arbitration agreement shall be in writing.

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

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

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the

Work of Its Eighteenth Session(Vienna, 3-21 June 1985)' YBUNCTL vol: XVI, UN Doc A/40/17 para 82.

⁷⁵ Neil 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'l 28.

⁷⁶ Sundaresh Menon and Elaine Chao, Reforming the Model Law Provisions on Interim Measures of Protection (2006) 2 Asian International Arbitration Journal 1; UNGA 'Report of the Working Group on Arbitration and Conciliation on the work of its forty-fourth session (New York, 23-27 January 2006)' 39th session (2006) UN Doc A/CN.9/592 para 84.

⁷⁷ Yemen has not adopted either the original 1985 or amended 2006 version of the ML into its New Arbitration Act particularly the form requirements issues.

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existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.⁷⁸

Option II provides that:

“arbitration agreement” is “an agreement to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”⁷⁹

Notably, the wordings of Option II is concise and straightforward, providing a simple definition of an arbitration agreement without any reference to a written form requirement. Rather, it indicates that it would be sufficient to include only agreement by the arbitral parties to submit all or certain of their disputes and dispenses with any written form requirement as those under Art. II(2) of the NYC. Instead, option II focuses only on the consent of the arbitral parties when concluding their agreement. Option I, on the other hand, gives rise to some substantial and significant issues.

Initially, Option I provides a more liberalized definition of the written form requirement and thus many other arbitration agreements would undeniably fall under these requirements. For instance, Art. 7(3) includes more ways than those accepted under Art. II(2) of the NYC for concluding an arbitration agreement. It has been said, in this vein, that using such a liberal definition would be useful in encouraging a liberal interpretation of the form requirement under Art. II(2) of the NYC,⁸⁰ and thus Art. 7 plays the role of an assistance tool to the NYC. Both options allow oral and tacit agreements instead of a written agreement to arbitrate, and they further exclude the NYC ‘exchange’ and ‘signature’ requirements as alternatives to written form. As indicated by the UNCITRAL, both option I and option II confirm that the NYC’s

⁷⁸ The ML 2006, Art. 7 (Option I)

⁷⁹ The ML 2006, Art. 7 (Option II)

⁸⁰ UNGA ‘UN Doc A/CN.9/592’ (n 76) para 54.

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current ‘writing’ requirement is ill-suited for modern commercial transactions⁸¹ and thereby Art. 7 has come to improve its requirements liberally.

Concerning the issue of Art. II(2)’s interpretation in the light of Art. 7 of the ML 2006 is debatable since the Recommendation left this issue to the national courts to deal with.⁸² Although the Recommendation clearly intends to support this trend, it does not plainly make a positive indication in this matter. However, there is a strong view supporting that the UNCITRAL has issued the revised provision in favor of the broadest possible interpretation of Art. II(2).

This can only be done by using the alternative approach, which is the more-favorable law provision of Art. VII(1).⁸³ For instance, the Recommendation refers, in some part, to the use of electronic commerce and many legal instruments that deal with electronic communications. This unequivocal indication would encourage ‘an interpretation of Art. II(2) in the light of Art. 7(4) of the ML 2006, namely that electronic communication meets the ‘in writing’ requirement if the information contained therein is accessible so as to be useable for subsequent reference.’⁸⁴ As the Supreme Court of India has held, courts should refrain from demanding form requirements of validity of arbitration agreements that are not enumerated under Art. 7 of the ML 2006.⁸⁵ Nonetheless, Art. 7(3) remains controversial⁸⁶ since an oral agreement may affect other provisions in the Convention itself⁸⁷ and further it is still not commonly accepted when concluding international arbitration agreements.⁸⁸

⁸¹ Born (n 23) 606.

⁸² The UNCITRAL Recommendation (n 63) paras 13-14

⁸³ UNGA ‘UN Doc A/CN.9/592’ (n 76) paras 82-88.

⁸⁴ Schramm and Geisinger (n 9) 79.

⁸⁵ *Great Offshore Ltd. v Iranian Offshore Engineering & Construction Company*, Supreme Court, India, 25 August 2008, available at <http://www.indiankanoon.org/doc/394001/> accessed on 10-10-2012

⁸⁶ Schramm and Geisinger (n 9) 79.

⁸⁷ Art. IV concerning the submitted documents prior enforcement procedures which should be in written form.

⁸⁸ *Zambia* (n 37); some national arbitration legislation adopt less demanding written form requirements, see also for instance German ZPO s 1031(2); New Zealand Arbitration Act Art. 7(1); Swedish Arbitration Act s 1.

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Unfortunately, it may be said that the Recommendation and Art. 7 of the ML 2006 will not lead to a uniform interpretation of Art. II(2) by courts and thus some countries still propose a straightforward modification of Art. II(2), given the greater degree of legal certainty that this would guarantee.⁸⁹ However, this argument misses the point. It is a mere fact that the Recommendation with the Art. 7 of ML 2006 were intended to provide a uniform interpretation of Art. II and this would obviously need time to be achieved. In addition, it is undoubtedly accepted that both instruments have achieved a high degree of uniformity of form requirements by simply solving the main issue concerning the application of the strict approach of interpreting Art. II of the NYC, discussed above.⁹⁰ Accordingly, the Recommendation, together with Art. 7, has developed straightforward expressions to guide the national courts to adopt only one approach, which is the liberal interpretation. Thus, it has been rightly stated that the ML 2006 establishes a technologically updated definition of the written form requirement.⁹¹

Moreover, much contemporary arbitration legislation has adopted the UNCITRAL approach, although it was the 1985 version but with the 2006's liberal definition.⁹² Furthermore, adopting the Recommendation and the ML 2006 creates more legal certainty.⁹³ That is to say, without these instruments the divergent interpretations and applications of Art. II(2) of the NYC would be overwhelming and thus unwelcome. It is more sensible, therefore, to read the uniformity rule of both instruments from a long-term approach and logical perspective. Indeed, for achieving a higher degree of uniformity both the ML 2006 and the Recommendation should be read side by side.⁹⁴ The English AA is one of the leading examples of adopting both instruments' approach, though it came into force ten years earlier.

⁸⁹ Schramm and Geisinger (n 9) 79.

⁹⁰ See Chapter 2 point 2.2.2 page 80.

⁹¹ Born (n 23) 598.

⁹² Bangladeshi Arbitration Act of 2001, Art. 9(2)(b) (embracing the 'writing approach' of the NYC and the UNCITRAL ML1985, respectively, and including 'e-mail' as mode of writing; See also Turkish International Arbitration Law, Art. 4(2).

⁹³ The practical impact of these materials to Yemen's legislation and court's practice is discussed somewhere later in this chapter.

⁹⁴ The UNCITRAL Recommendation (n 63) Annex 2.

2.3 Form Requirements under English Law

Essentially, Art. 7 of the ML 2006 is based on section 5 of the English AA1996, though it is not identical with it. Section 5 of the English AA technically preserves the writing requirement, but nonetheless refers to oral communication or silence as valid means concluding an agreement subject to several conditions.⁹⁵ Hence, the English AA is to be considered a leading example of modern legislation that adopts the liberal approach towards form requirements,⁹⁶ although there has been a movement towards eliminating the ‘writing’ requirement from the Act completely.⁹⁷ Nevertheless, these submissions were ultimately abandoned in favour of the wider prospective view in defining ‘writing’. Section 5(2) of AA merely states the following:

(2) There is an agreement in writing: (a) if the agreement is made in writing (whether or not it is signed by the parties), (b) if the agreement is made by exchange of communications in writing, or (c) if the agreement is evidenced in writing.⁹⁸

Section 5(3) goes further to add that ‘where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing’, whereas section 5(4) provides an opportunity for the arbitral parties to evidence their agreement in writing and gives them another opportunity to record their agreement.⁹⁹ The liberal view of the writing requirement that has been adopted by the English Act’s provisions,

⁹⁵ English AA, s 5; See for the written form preservation’s discussion, Mark Oliver Saville Of Newdigate Lord, ‘Departmental Advisory Committee on Arbitration Law’(1997) 13 Arb Int’l 275.

⁹⁶ Born (n 23) 611.

⁹⁷ The Departmental Advisory Committee in England gave consideration to the advisability of eliminating the written form requirement in the Arbitration Act, 1996. U.K. Departmental Advisory Committee on Arbitration Law, 1996, *Report on the Arbitration Bill (February 1996)*, reprinted in, (1997)13 Arb Int’l 275 (The Committee ultimately rejected this proposal, reasoning: ‘An arbitration agreement has the important effect of contracting out the right to go to the court i.e., it deprives the parties of that basic right. To our minds an agreement to such importance should be in some written form.)

⁹⁸ English AA, s 5(2).

⁹⁹ English AA, s 5(4).

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which includes any “signature” or “exchange” and which acknowledges writing as evidence of the arbitration agreement, provides a very good model for considering the importance of other evidence to record the confirmation of an arbitration agreement. Accordingly, in the *Bermuth* case, the English Court stated that:

The writing requirement of S5(1) of the English Arbitration Act, 1996, can be satisfied by magnetic and electronic recording, such as a tape or email and other forms of computerized records.¹⁰⁰

In this regard, Landau rightly indicates that Art 5 of the English AA in effect provides that ‘writing has now been defined as oral’.¹⁰¹ The English AA confirms that the written form requirement relates to all phases of the arbitration, including the major issues of arbitration such as the arbitration seat, the applicable rules and the like.¹⁰² It is noticeable that the Act follows the foremost rationale behind the writing requirement, which is to make clear that the parties are consciously choosing to renounce recourse to domestic litigation to resolve disputes.¹⁰³

Consequently, the English AA does not consider oral acceptance as a valid conclusion for the arbitration agreement unless it was made by reference to terms that are in writing; or alternatively ‘is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.’¹⁰⁴ Put differently, the English AA adopts the liberal interpretation of the writing form when the Act considers an oral agreement as the same as writing where that oral agreement is recorded or evidenced by any means. It

¹⁰⁰ *Bernuth Lines Ltd v High Seas Shipping Ltd (The Eastern Navigator)* [2005] EWHC 3020 (Comm), [2006] 1 Lloyd’s Rep 537 in Gary Born, *International Commercial Arbitration* (Kluwer 2009) 612 fn.655.

¹⁰¹ Landau (n 5)24.

¹⁰² English AA, s 5(1).

¹⁰³ UNGA ‘Report of the Working Group on Arbitration on the work of its thirty-second session (Vienna, 20 – 31 March 2000)’ 33rd session(2000) UN Doc A/CN.9/468 para 88.

¹⁰⁴ English AA, s 5(4).

is clear, therefore, that the Act adopts a more liberal approach to the written requirements.¹⁰⁵ On the other hand, despite the fact that the English AA indicates ‘signature’ or ‘exchange’ and ‘recorded by one party’ requirements as evidence of an arbitration agreement, there is still some doubt as to whether or not it is possible to enforce a purely oral agreement under these provisions. This remains a point of uncertainty.

By contrast, under the common law oral acceptance is considered to be valid and enforceable. The English Court of Appeal held that ‘if it is established that a document with an arbitration clause in writing forms part of a contract between the parties, the assent by one party orally to the contract is sufficient.’¹⁰⁶ Another judicial authority for this view is the decision of Wilcox J. In the *A&D Maintenance & Construction* case, on which he considered an oral agreement to be as valid as a written agreement on the basis that no objection was made by the other party.¹⁰⁷ Furthermore, in a more recent case Clarke J. held that ‘it is unwise to formulate definitive categories’ in order to conclude the parties’ agreements.¹⁰⁸ Indeed, English legislation has tackled the form requirements of international arbitration agreement using a liberal approach under the statutory provisions, and thus can provide a leading example for Yemen’s legislation.

2.4 Form Requirements under Shari’ah and Yemeni Law

Although Shari’ah does not substantially elaborate the form requirements of an arbitration agreement, some form requirements may be necessary. The YNDAA, on the other hand, stipulates some stringent requirements unlike much contemporary

¹⁰⁵ English AA, s 5(6).

¹⁰⁶ *Zambia* (n 37) 720.

¹⁰⁷ *A&D Maintenance & Construction Ltd v Pagehurst Construction Services Ltd*, [2000] 16 Const LJ 199, (QB TCC)

¹⁰⁸ *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] EWHC 29 (Comm), [2010] Bus LR 880.

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arbitration legislation. The section will start by examining the form requirements under Shari'ah law. It will then critically analyse the interpretation of the formal requirements under Art. 15 of the YNDAA, and then conclude by proposing ways in which Yemen's legislation can be developed and ameliorated with respect to the form requirements of arbitration agreements.

2.4.1 Form Requirements under Shari'ah

Under Shari'ah, the form requirements of any contractual relationship are succinctly addressed in the wording of the Holy Qur'an as follows:

O you who believe! When you deal with each other, in transactions involving future obligations in a fixed period of time, record it in writing. You should not become weary to write it (the contract), whether it be small or big, for its fixed term, that is more just with Allah; more solid as evidence, and more convenient to prevent doubts among yourselves, except when it is a present trade which you carry out on the spot among yourselves, then there is no blame on you in not writing it down. But make witness whenever you make a commercial contract.¹⁰⁹

This verse clearly indicates that all transactions should be in writing and further recommends writing for commercial transactions, particularly in order to evidence the intent of the parties in the event there should be any future disputes. Nonetheless, it should be noted that Shari'ah requires no particular form requirements for concluding a commercial contract except that it should be witnessed by any method that is applied and approved by current customs. This would be sufficient to enumerate the intention of the parties to conclude their contract. It is a fact that Shari'ah requirements depend ultimately on the consent of the parties.

¹⁰⁹ Surah Al-Baqarah; verse, 282

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It should be noted that the foregoing verse of the Qur'an is interpreted under Shari'ah as a straightforward recommendation and not as an obligatory rule.¹¹⁰ Traditional Shari'ah scholars always indicate that oral testimony is the primary means of proof and prevails over other means under Shari'ah law.¹¹¹ As a result, an arbitration agreement is like any other type of contract under Shari'ah and therefore should not be treated any differently. Moreover, any way of concluding an arbitration agreement (writing, oral and any modern means) is acceptable, on condition that it is applied and approved by customs that are acceptable under Shari'ah.¹¹² It should be noted also that the use of the electronic communication is satisfactory under Shari'ah, and this has been approved by the Islamic *Fiqh* Academy,¹¹³ which has stated the following:

If the agreement is made between parties who are not present in one place, and one cannot directly see and hear another, and the communication means between them is writing, letter, messenger, telegram, telex, fax, or computers, in such a case the agreement would be validly concluded once the offer is accepted by the offeree after arrives to him.¹¹⁴

The question whether an arbitration agreement must be in writing or can be oral has not been addressed by any of the Shari'ah schools. However, in a recent example in Saudi Arabia, a leading Middle Eastern country that is still governed by Shari'ah, it was held that 'the contract of pledge in Saudi Arabia, still governed by Shari'ah, must be embodied in notarised deed, in addition to the mere possession of the pledged article by creditor pledge'.¹¹⁵ This not to say, of course, that the written form is strictly required under Shari'ah, but rather the less demanding form requirements would not affect the validity of any contract since it can be evidenced by any means.

¹¹⁰ Samir Saleh, *Commercial Arbitration in the Middle East* (2ed, Hart Publishing 2006) 41

¹¹¹ Subhi Mahmasani, *The General Theory of Law of Obligations and Contracts under Islamic Jurisprudence* (Dar Al-Ilm Lil-Malayin 1972) 340.

¹¹² Ali Al-Qaradghi, 'The General Principles of Arbitration in Islamic Fiqh' (Symposium of Arbitration in Islamic Shari'ah, 2001) 15

¹¹³ The Islamic Fiqh Academy (IFA) is formed under the auspices of the organization of the Islamic Conference (OIC) that represents all Muslim Countries around the world.

¹¹⁴ The Islamic Fiqh Academy, 'Decision No. 52(3/6) about Concluding Contracts by Modern Means Communications' (1990) 2 (6) *The Islamic Fiqh Academy Journal* 785.

¹¹⁵ Saudi Regulation on Notaries Public No 1083 of 19/8/1364 H, Art. 8. in Samir Saleh, *Commercial Arbitration in the Middle East* (2ed, Hart Publishing 2006) 41.

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Accordingly, the principle of establishing the existence of an arbitration agreement can be accepted under the rules of evidence adopted under Shari'ah. By way of example, many Islamic scholars have stated that oral agreements and any means of communication that indicate a clear intention of the parties to enter into a mutual agreement is sufficient for a contract to be validly concluded.¹¹⁶ The basis of their argument lies in the words of Allah (swt), which declare, 'O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent.'¹¹⁷ Accordingly, the consent of the parties is the foundation of the legitimacy of any contract and not the formality, and therefore if the parties have a common intention to arbitrate, any form that common intent may take is of little or no relevance or concern.

Consequently, it can be said that Shari'ah pays particular attention to the principle of party autonomy and stipulates no specific form requirements for an agreement, since the only requirement is that the agreement is evidenced in some way so that its existence can be established, and the form in which the agreement takes is largely irrelevant. As Ibn Taymiyah indicates, no specific form is required by the Holy Qur'an and Sunnah, and thus modern means of communication that are not indicted in traditional Islamic books can validly be used to conclude contracts.¹¹⁸ Although Shari'ah recognises the written form of any agreement, this is only treated like oral testimony used as evidence.¹¹⁹ From the above, it is clear that modern means of concluding arbitration agreements do not in any way conflict with Shari'ah principles. Therefore, it can be

¹¹⁶ Ibn Qudama, *'Al-Mughnai : wa yaliht Alsharh Alkkabir* (in Arabic, vol: 5, Dar Al- Hadith 1996) 246; Ibn Qasim, *'Haashiyat Al rrawd Almurbi : Sharh Zaad Al-mustaqni* (in Arabic, vol: 4, Foaad nBauno 1996) 329; Ahmed Ibn Taymiyah , *'Majmau' Al-Fatawaa Shaykh Al Islam Ahmed ibn Taymiyya*(in Arabic vol: 29,Al- Maktabah Al-Amiriyyah 1980) 5-21; see also Syed Rashid, 'Alternative Dispute Resolution in the Context of Islamic Law'(2004) 8 Vindobona J Int'l Com L 95.

¹¹⁷ Surah An Nisa; verse, 29.

¹¹⁸ Ibn Taymiyah , *Majmau' Al-Fatawaa Shaykh Al Islam Ahmed ibn Taymiyya*(in Arabic, vol 29,Al- Maktabah Al-Amiriyyah 1980) 17-20.

¹¹⁹ Abdul Hamid El Ahdab and Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer 2011) 25.

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suggested that countries such as Yemen adopt the progressive provisions of the NYC and UNCITRAL, which would not only help create uniformity and be helpful for these countries, but would also not result in any conflict with traditional Shari'ah principles.

2.4.2 Interpretation of Art 15 of the Yemeni Act - Difficulties and Dilemmas

Like many national arbitration legislation, Art. 15 of the YNDAA contains certain form requirements relating to the validity of international arbitration agreements. Art. 15 simply codifies the requirements of the NYC, providing as follows:

... the arbitration agreement shall be made in writing otherwise it is deemed to be void. An arbitration agreement is made in writing if its content is recorded in any document signed by the parties, or in their mutual exchange of letters, telexes, or by any other means of written communication.¹²⁰

Unlike the YCAA,¹²¹ which differentiates between the validity of the agreement on the one hand, and using writing as evidence on the other, the YNDAA makes a step forward by providing a definition of the term 'writing' that accords with contemporary business practice.¹²²

Therefore, it can be understood that the Yemeni legislators took the position that it would be unwise to exclude the writing form in the arbitration agreement's requirement. Like the NYC, the written form under the YNDAA stipulates some requirements i.e. 'signed' documents or 'exchanges of letters, telexes' or by other means of written

¹²⁰ YNDAA Art. 15.

¹²¹ YCAA Arts. 4 and 15.

¹²² El Ahdab and El Ahdab , (n 119) 837-838; ('highlighting that the Yemeni new act provides that the arbitration agreement is made in writing if it is made by virtue of an arbitration submission agreement, an arbitration clause, telegrams, letters or any other modern means of communication. Thus, an exchange of letters, telegrams, telexes or faxes are acceptable (written) means to prove the existence of the arbitration clause or agreement').

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communication between the parties, for the validity of the arbitration agreement.¹²³ Nonetheless, Art. 15 of the YNDAA is somewhat ambiguous in its drafting and therefore merits some critique.

First, the words ‘the arbitration agreement shall be made in writing or else it is deemed to be void’ led us to consider the fact that Yemen’s legislators are of the view of adopting the strict approach to the formal validity of international arbitration agreements.¹²⁴ This view is similar in substance to that in favour of the strict approach of Art. II(2) of the NYC.¹²⁵ Therefore, the key question that need to be addressed is whether the types of written agreement in Art. 15 are exhaustive or non-exhaustive. That is, does Art. 15 either require an arbitration agreement to fulfil the definition of the arbitration agreement set out therein only, or alternatively, does it provide non-exhaustive types of written forms to be included under its provision?

The apparent rational of the words ‘otherwise it is deemed to be void’ is that the provision requires the arbitration agreement to be made in written form in order to be valid and not only for the existence of the agreement. Therefore, the writing requirement is *ad validitatem* and not only a matter of evidence for the record.¹²⁶ In this vein it has been said with respect to Art. 12 of the Egyptian Arbitration Act, which corresponds to Art. 15 of the Yemeni Act, that due to its strict requirements ‘there is currently a tendency to go back to the more flexible approach prior to this law.’¹²⁷ Unlike the Art. II(2) of the NYC which can be applied by courts in certain jurisdictions non-exhaustively (i.e. the liberal approach) to include certain ways to fulfil ‘in writing’

¹²³ NYC Art. II(2) and YNDAA Art. 15.

¹²⁴ See the corresponding view under the Egyptian law Mahmoud Hashem, *General theory on arbitration in civil and commercial disputes* (in Arabic, Dar El Fikr El Arabi 1990)78

¹²⁵ See Chapter 2 point 2.2.2 page 80.

¹²⁶ ‘Case No. 36/1430, the Supreme Court at the Capital City of Sana’a-Civil and Administration Circuit, 2009’ (in Arabic, the author’s translation).

¹²⁷ Saleh (n 110) 379, fn 151.

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requirements.¹²⁸ As one commentator rightly put it, ‘the written form requirement is for many a formality that is no longer justified’.¹²⁹

A second observation that should be made to the form requirement under Art. 15 is that the provision does not only require an arbitration agreement to be in written form but also this agreement should be either ‘recorded in any document signed by the parties’ or included in their ‘mutual exchange of letters, telexes.’ Literally, the provision excludes any oral or tacit agreement or even tacit acceptance of a quotation including arbitration provision, whereas those means may be accepted under some liberal interpretations of the NYC.¹³⁰ Arguably, however, it is ambiguous as to whether the signature requirement stated in the provision applies to all types of arbitration agreements or merely to arbitration agreements and not to arbitration clause.

It can be understood, by virtue of the term ‘recorded’, which obviously refers to the arbitration agreement, that the provision excludes unsigned written agreements to arbitrate, whether in separate agreement or contained in a main contract as an arbitration clause. While this can be accepted under the liberal interpretation of Art. II(2), it seems under YNDAA is far from being an ideal in this matter. For instance, many authorities have reached the conclusion that Art. II(2) should apply although the relevant letters accepting an unsigned contract are unsigned, providing that the letters or other correspondence are in written form and are also exchanged.¹³¹ In addition, the Recommendation suggests for the interpretation of Art. II(2) of the NYC that ‘agreements that were neither signed nor contained in an exchange of such documents

¹²⁸ *Aloe Vera of America, Inc. v Asianic Food Pte Ltd.*, (2007) XXXII YBCA 489, (Supreme Court of Singapore 2006); *Proctor v Schellenberg*, (2003) XXVIII YBCA 745, 750, (Canada, Court of Appeal of Manitoba 2002); See also the Recommendation (n 63) paras 13-14.

¹²⁹ Peter Kucherepa, ‘Reviewing Trends and Proposals to Recognize Oral Agreements to Arbitrate in International Arbitration Law’ (2005) 16 Am Rev Int’l Arb 409, 409.

¹³⁰ *Kabushiki Kaisha Ameroido Nihon v Drew Chemical Corporation*, (1983) VIII YBCA 394, 397 (Japan, District Court of Yokohama 1980) (recognising that an arbitration agreement in writing, and renewed without writing, could meet the requirement of the New York Convention’).

¹³¹ *Tracom SA v Sudan Oil Seeds Co.*, (1985) XII YBCA 511, (Switzerland Supreme Court 1985); *J. A. van Walsum N.V. v Chevelines S.A.*, (1976) I YBCA 199, (Switzerland, Geneva Court of First Instance 1967); *Dutch seller v Swiss buyer*, (1979) IV YBCA 309, (Switzerland Court of Appeal 1971); *Dutch seller v German (F.R.) buyer*, (1979) IV YBCA 262, (German Court of First Instance 1978).

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nevertheless can meet Article II's form requirement'.¹³² This would leave no doubt that the Yemeni Act merely adopts the strict requirements approach, whilst the NYC may be interpreted liberally or strictly, as discussed above.¹³³

Further, despite the fact that the YNDAA recognises the validity of an arbitration agreement by reference, such reference must be expressly stated in written form.¹³⁴ The difficulty here is that the provision does not provide any guidance as to the degree required to fulfil a valid arbitration agreement through the effective incorporation method. For instance, it should be clearly stated in the wording of the provision that where an arbitration clause expressed as a general term or condition of the main contract or where one agreement is incorporated to another that includes an arbitration clause or even via reference to the original agreement. Nevertheless, the provision's language contains no substantive requirements on how the reference should be made. It must be submitted that the concerns raised by the arbitration agreement by reference under the YNDAA should be standardized under the uniform interpretation of Art. II of the NYC.

With respect to judicial example, the Egyptian Supreme Court, for instance, has considered that reference made in the bill of lading to an arbitration clause constitutes a valid agreement since it was explicitly indicated.¹³⁵ Therefore, any circumstances surrounding the arbitral parties that may not prove their clear intention to arbitrate would be invalid under the court interpretation as well as under Egyptian law. The same reasoning likely applies in the Yemeni context since the court will tackle the issue in the same manner.¹³⁶ It can be submitted therefore that failure to fulfil Art.15's written requirement will definitely issue invalid arbitration agreement and thus the Act adopts the strict approach.

¹³² Schramm and Geisinger (n 9) 39.

¹³³ See Chapter 2 point 2.2.2 page 80.

¹³⁴ YNDAA Art. 13(3) which precisely tracks Art. 7(2) of the UNCITRAL Model Law 1985 (stating that the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement, provided that the reference is such as to make that clause part of the contract).

¹³⁵ Challenge 453 of Judicial Year 41, (Egypt, The Supreme Court 1983).

¹³⁶ The Egyptian Arbitration Act No. 27 of 1994, Art. 10(3) corresponding to the YNDAA, Art. 13(3).

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Third, it is worth noting the words ‘by any other means of written communication’. The main problem with the language here is that the term ‘any other’ reflects general and wide scope of methods, but nowhere in the Act are these methods actually set out. Although the words ‘of written communication’ would narrow the unduly wide scope, some clear guidance would be preferable. Thus, this drafting will create considerable opportunity for confusion among courts as what exactly can be included under the terms ‘other means of written communications’.

It can be assumed that the Yemen’s legislators may have intended to encompass in this drafting modern means of communications such as telefaxes and emails and the like. However, the Yemeni courts, and other courts where the YNDAA is applicable, will always require, over time, to formulate what other means of written communications can be accepted beyond those specified in Art. 15. In addition, the sweeping language of the provision needs to be qualified to indicate what types of other means to establish the formation of an agreement to arbitrate. This will again raise a crucial question of whether other means of unwritten communication that are accepted under some modern arbitration legislations¹³⁷ would also fulfil the requirements set out in Art. 15. The following two main possibilities would be expected:

- 1- Art. 15 refers to written means only and thus cannot be expanded to include other modern electronic forms, though they remain valid under other jurisdictions. Under this possibility it can be assumed that not only must be a written offer to arbitrate but rather there must be also a written acceptance from the other arbitral party. Hence, referring to the offer by email or text message would not be sufficient under Art. 15 of the Yemeni Act. Also, oral agreements, even though they are evidenced in written form, will not fulfil the form requirements of the Yemeni Act. This view runs counter to the international trend in interpreting the form requirements.¹³⁸ Therefore, Yemen’s legislators

¹³⁷ English AA’s liberal requirements and ZPO s 1027(2).

¹³⁸ Born (n 23) 613 (stating that ‘the decisive issue for increasing number of developed national laws, is simply whether the parties agreed to arbitrate – whether orally or in writing, and whether expressly or

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should take a modern step to liberalize the terms ‘other means of written communications’ by at least referring more broadly to other means of telecommunications which provide a record of the agreement.¹³⁹ In this way it should be clear for the courts how to interpret the above drafting in a more consistent manner.

- 2- Alternatively, Art. 15 can be interpreted liberally to include other means of unwritten forms of communication, as accepted in other jurisdictions. However, following this approach appears not to be convincing since Art. 15 expressly requires a written form for a valid arbitration agreement. Under this scenario, without solid evidence to support it, the Yemeni courts will certainly face difficulties. The courts need to be constrained through clear wording in the provision to include unwritten means as a valid method for concluding an arbitration agreement. The lack of such expressed provision on this point would be treated as uncertainty, thus rendering the Act still more problematic.

In the light of the above observations, it may conclude that the form requirements of Art. 15 give rise to confusion and increase the opportunity for disparity in both interpretation and application. Therefore, it is submitted that in order to improve predictability and consistency in the form requirements under Yemeni law and practice it would be helpful to consider the existing form requirements in both the NYC, under the liberal approach, and the ML 2006.

impliedly – with the writing requirement being reformulated as an evidentiary principle, rather than a rule of formal validity’).

¹³⁹ See for instance: the ML 2006 , Art. 7(3); and Swiss PIL Art. 178(1).

2.4.3 Directions for Yemeni Law Concerning the Form Requirements

Given that the YNDAA needs to conform with current and modern international practice demonstrated by the liberal approach of interpreting the NYC's form requirements in the light of the UNCITRAL Recommendation and the ML 2006, Yemen may wish to consider the three proposals set out below:

2.4.3.1 Ratifying the NYC

The first proposal by which improvements can be made to the YNDAA, concerning the form requirements' interpretation, is that Yemen is to ratify the NYC. This would be helpful since the Convention provides an international definition of the agreement in writing unlike Yemen's domestic laws, including the YNDAA. This would encourage Yemen's courts to adopt into their interpretation Art. II(2) of the NYC from international perspective 'internationally-minded approach' and to recognise the uniform approach based on the practices of the courts of numerous contracting States. One way of doing this is by adopting the form requirement in Art. II(2) in the light of the Convention's spirit of pro-enforcement and this would empower the Yemeni courts to encompass other electronic means of contracting in the modern business practice. Indeed, the Convention contains some uniform provisions, which supersede national law and 'Art. II(2) in one of the superseding provision that is to be interpreted uniformly across contracting States'.¹⁴⁰

Besides, although both Art. II(2) of the NYC and Art. 15 of the YNDAA share to some extent the same objectives of the form requirements, a notable difference that remains is the divergent interpretation of the two texts. Art. 15 of the YNDAA provides a clear

¹⁴⁰ Schramm and Geisinger (n 9) 50.

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indication to be read as exhaustive, whereas Art. II(2) can be read as either exhaustive or non-exhaustive. However, the universal trend and better-reasoned authorities support the view that Art. II(2) should be read as non-exhaustive. In other words, the Yemeni Act expresses only one strict approach and provide no allowance for courts to adopt any other liberal approaches, while the NYC expresses two different approaches depending on court's worldly interpretation. This would help the Yemeni courts consider other types of 'agreements in writing' that have been added to the international catalogue of those listed in Art. II(2)'and this is consistent to the objective of the NYC as a constitutional instrument, meant to develop over time'.¹⁴¹

Moreover, the NYC was intended to provide uniform form requirements and has in large measure succeeded in doing so. Admittedly, there still remains much variation in the way its form requirements are interpreted and applied, but many studies suggest that there are several contracting States that are moving to liberalise their treatment of the form requirements under Art. II(2).¹⁴²

Furthermore, ratifying the NYC will allow the Yemeni courts to rely on the more-favourable provision under Art. VII(1) of the Convention. The significance of this impact is that it enables the application of other less demanding from requirements where it is more favourable for the party who seeks enforcement than any more demanding form requirements even under the Convention. Therefore, a Yemeni court may apply Yemeni Act requirements as to form if it finds that law to be more favourable than Art. II(2) of the Convention. Needless to say, this will provide a certain flexibility in Yemen's legislation and lead to the country being considered an arbitration-friendly State.

Finally and most importantly, ratifying the NYC by Yemen will ultimately open the door for the Yemeni courts to consider the international interpretation of form

¹⁴¹ Born (n 23) 544.

¹⁴² Strong (n 24) 1; Landau (n 5)51.

requirements under Art. II(2) in the light of the UNCITRAL Recommendation. The following two directions may clarify this.

2.4.3.2 Adopting the Liberal Reading of Art. II(2) in the Light of the UNCITRAL Recommendation

The second proposal is essentially correlated to the first proposal. It is simply suggested that the Yemeni courts explicitly adopt the liberal reading of Art. II(2) of the NYC in the light of UNCITRAL Recommendation providing that Art. II(2) of the NYC should ‘be applied recognising that the circumstances described therein are not-exhaustive.’¹⁴³ In addition, the Recommendation has been well-received and noticeably confirmed by many States, including many Islamic countries.¹⁴⁴ For instance, the Government of Malaysia has indicated, in relation to the Recommendation’s comments, that ‘both Recommendations may be of assistance to the national courts in interpreting the requirement for an ‘agreement in writing’ in a more liberal manner and in cases where any interested parties are seeking recognition of the validity of any arbitration agreements’.¹⁴⁵

Thus, there will not be substantial barriers between Shari’ah and the Recommendation. In other words, Shari’ah as discussed above, requires no certain form requirements for concluding an agreement. At this point, the Yemeni courts will be more willing to consider some modern interpretations as highly persuasive consultant concerning the liberal interpretation of Art. II(2). Should the Convention applies, Art. II(2) is the sole source of authority as to the form requirements of the arbitration agreement.¹⁴⁶ The impact of this proposal is that the Yemeni courts can interpret the writing requirement

¹⁴³ The UNCITRAL Recommendation (n 63) paras 13-14.

¹⁴⁴ The UNGA Addendum Note (n 69).

¹⁴⁵ The UNGA Addendum Note (n 69).

¹⁴⁶ Schramm and Geisinger (n 9) 73.

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to include another unwritten method of concluding arbitration agreements. This may include tacit or oral acceptance of written offers or even orally concluded contracts referring to a written arbitration agreement. Encouraging the Yemeni courts to adopt this approach would certainly provide a helpful means of achieving greater uniformity and alignment with the general trend in international arbitration law, which is also responsive to the needs of international business practice.

2.4.3.3 Adopting Art. 7(2) of the UNCITRAL ML 2006 in the Light of the UNCITRAL Recommendation

The third proposal for resolving the problems associated with the form requirements under the YNDAA is to adopt Art. 7 of the ML 2006 in the light of paragraph 2 of the Recommendation. The main purposes of this paragraph was to encourage contracting States to adopt into their national arbitration laws Art. 7 of the ML 2006 and also to recognise arbitration agreements ‘based on their now-liberalized national law’, pursuant to Article VII(1).¹⁴⁷ Accordingly, it has been indicated that in order to import Art. 7 of the ML 2006 into the NYC without amending the latter, ‘UNCITRAL resorted to a back-door approach: the more-favourable-law provision of Art VII(1).’¹⁴⁸ This will have the benefit of addressing the interpretation of the form requirements, particularly the writing requirement, in more liberal, comprehensive and consistent manner by the Yemeni courts to include oral and tacit and other means that go in line with the international trend.

Here again, the Recommendation, specifically paragraph 2, states that ‘Article VII(1) should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be

¹⁴⁷ The UNCITRAL Recommendation (n 63) paras 13-14.

¹⁴⁸ Schramm and Geisinger (n 9) 78.

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relied upon, to seek recognition of the validity of such an arbitration agreement'. This would essentially benefit the Yemeni courts in both respects. On the one hand, it permits the courts to follow the more flexible and uniform international form requirements when enforcing an arbitration agreement, and it also facilitates the courts practice by adopting the appropriate understanding of the those requirements where the enforcement of the arbitral awards are sought in Yemen. As the 'UNCITRAL's explicit recommendation provides that Article VII(1) be relied upon by national courts to increase the enforceability of arbitral awards and agreements is highly persuasive evidence of the proper reading of the Convention, even if it is enunciated post ratification.'¹⁴⁹

An example of how the Yemeni courts will benefit from adopting this approach is where the parties have concluded their arbitration agreement with only one signature. In this scenario, the Yemeni courts will have to apply either Yemeni law, particularly Art. 15, which requires the signature of both parties, or Art. II(2) of the NYC, which can be interpreted liberally so as to accept one party's signature. By adopting the Recommendation's approach, the Yemeni courts will face the possibility of invoking the more-favourable-law provision and certainly apply Art. II(2) as the more favourable provision. For that reason, numerous national courts have already adopted this approach to Art. VII(1) so as to be able to interpret form requirements by reference to more favourable national law.¹⁵⁰

Finally, adopting the UNCITRAL Recommendation does not in any way violate Shari'ah since the more-favourable law approach can be accepted provisionally under Shari'ah. As stated above, Shari'ah requires no certain formality for the communications between the offer and acceptance to be effective and valid. Accordingly, an arbitration agreement, like any other contract, can be concluded by joining an offer and acceptance, and it will be binding once the offer has been accepted.

¹⁴⁹ *Medellin v Texas*, 552 US 491, 507 (US Supreme Court 2008); *Telenor Mobile Zicherman v Korean Airlines Co Ltd.*, 516 US 217, 226 (US Supreme Court 1996).

¹⁵⁰ *XI Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500, (QB Comm Ct); *Seller v Buyer*, (1996) XXI YBCA 535, (Germany, Court of Appeal of Cologne 1992).

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This can usually be accomplished in writing or orally, or can be implied by conduct and other suitable means of communication.¹⁵¹ Hence, the Yemeni courts can apply the Shari'ah form, if there is any, when it requires less demanding requirements than those under the applicable law.

2.5 Conclusion

In relation to the form requirement of arbitration agreement, the expected uniformity has proved elusive in current practice with the continuous developments in technology and in international business practices. Therefore, in order to attain a higher degree of uniformity and due to the changing needs of international commercial practices, the UNCITRAL has adopted a Recommendation concerning the interpretation and application of Art. II(2) concurrent to the ML 2006 amendments. The most beneficial aspect of the Recommendation is that it constitutes a 'friendly bridge' between the NYC and the modern means of communications as well as the needs of current practice. This is by providing straightforward insights to the contracting States on how to liberally interpret and apply the Convention's form requirements. Hence, both instruments are considered to be authoritative sources that have substantial weight when applying Art. II(2) of the Convention.

On the other hand, English legislation and court practice have tackled the form requirements consistently with the Recommendation's approach before it even existed. Thus, the English AA is a leading example of modern legislation that has adopted a liberal approach and dispensed with almost all written requirements. This is due to the fact that English law and practice correctly adopt the approach that overly strict form

¹⁵¹ Rashid (116) 95; ; Nudrat Majeed, 'Good Faith and Due Process: Lessons from the Shari'ah' (2004) 20 Arb Int'l 97, 103 (noting that 'contracts in the Shari'ah encompass not only mutual agreements between parties but extend also to gratuitous dispositions and due to this broad scope, Islamic commercial law displays an inherent flexibility in contracts').

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requirements are no longer required in the today's business practice. Surprisingly, the English approach is consistent with the Shari'ah approach in this matter.

Under Shari'ah, there are no specific form requirements and thus an arbitration agreement can be made by orally, tacitly and by any means of conduct that is used in trade or customary business practice. Despite the fact that the Qur'an clearly indicates that all agreements should be in writing, the prevailing view among Islamic scholars is that this verse serves only as a recommendation rather than an essential requirement. Accordingly, the form requirement under Shari'ah law remains an evidential matter only and Shari'ah solely considers whether the party in fact had the intention to arbitrate or not. Therefore, Shari'ah pays particular attention to the principle of party autonomy and focuses on the arbitral parties' intention regardless of the method utilized in making their agreement. In view of that, Shari'ah in principle accepts modern means of communications to enter into any agreement in general and no restrictive requirements are needed for arbitration agreements providing that the methods used are accepted in general commercial practice and custom. Thus, no tension exists between Shari'ah and the NYC in this regard.

Although the YNDAA fills some gaps in relation to form requirements, the archaic requirements previously adopted under the YCAA are mostly remain unchanged. The relevant provision of the YNDAA is obviously behind the times with its unduly restrictive approach, ill-drafted with its uncertain reference to 'any other mean of communications', and in many respects ambiguous and challenging to interpret clearly and consistently. In addition, the definition of the arbitration agreement does not appear to conform with modern practice in international trade, since the written form has been widely abandoned by much contemporary arbitration legislation. This would definitely continue to pose many obstacles for interpreting the form requirements under the Yemeni Act and thus an arbitration-friendly attitude will remain far from being achieved. Ultimately, the NYC and the UNICTRAL Recommendation jointly with Art. 7 of the ML 2006 are excellent instruments that reveal the direction in which the YNDAA might be reformed. Particularly, the two latter instruments provide very useful

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insights on how contracting States should interpret the form requirement of the NYC using a liberal approach.

Therefore, ratifying the NYC by Yemen would have considerable and practical significance in the context of Yemen's legislation on arbitration, especially by providing the dual benefit of (1) following the more liberal approach adopted by the contracting States and opening the door for Yemen to consider the UNCITRAL Recommendation and amendments altogether and (2) bringing Yemen into closer conformity with the prevailing international trend in the field of arbitration.

Having examined the formal grounds of invalidity of international arbitration agreements under the NYC and the corresponding provisions of the YNDAA, this thesis will now turn to the substantive grounds of invalidity, a topic that is critically examined in Chapter 3.

Chapter 3

The Substantive Grounds of Invalidity of the International Arbitration Agreement

The Convention sets forth a ‘pro-enforcement’, ‘pro-arbitration’ regime, which rests on the presumptive validity – formal and substantive – of arbitration agreements pursuant to Art. II.¹

[Therefore,] several courts have held that, having regard to the “pro-enforcement-bias” of the Convention, the words [of article II(3)] should be construed narrowly and the invalidity of the arbitration agreement should be accepted in manifest cases only.²

3.1 Introduction

The international arbitration agreement is, like other contracts, ‘a creature of consent, and that consent should be freely, knowingly and competently given.’³ Accordingly, the substantive grounds of invalidity applicable to international arbitration agreements are generally similar to the substantive grounds of invalidity that are ordinarily applicable to other contracts.⁴ Unlike its formal validity, the substantive validity of an international arbitration agreement is to be determined under the law applicable to the agreement pursuant to Art. V(1)(a) of the NYC (i e under the law to which the parties have

¹ Neil Kaplan, ‘Introduction’ in, ICCA’s Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges (Kluwer 2011) 37.

² Albert Jan van den Berg, ‘An Overview of the New York Convention of 1958’ in Emmanuel Gaillard and Domenico di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2008) 52 (emphasis added).

³ *Dell Computer Corp. v Union des consommateurs*, SCC 34, 51 (Canadian Supreme Court 2007); Margaret Moses, *The Principle and Practice of International Commercial Arbitration* (CUP 2008) 18; For more details on the consent in arbitration agreement see Andrea M. Steingruber, *Consent in International Arbitration* (OUP 2012) 99.

⁴ Gary Born, *International Commercial Arbitration* (Kluwer 2009) 707.

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subjected the arbitration agreement or, failing any indication thereon, under the law of the country where the award was made).⁵

It is true, in theory, that the courts may apply general applicable rules of duress, mistake, error, fraud, lack of consideration, impossibility and frustration to determine the substantive validity of international arbitration agreements.⁶ However, it is generally well-settled that the substantive grounds of invalidity of an arbitration agreement that are normally invoked in practice are those limited to Art. II(3).⁷ Accordingly, the prevailing view, which is supported by the majority of authorities, is to apply the conflict-of-law rules under Art. V(1)(a) to govern the substantive invalidity grounds contained in Art. II(3) (i.e. null and void, inoperative and incapable of being performed)⁸ (hereinafter, the substantive validity exceptions). Therefore, the existence of one or more of these exceptions may establish a ground for invalidity of the arbitration agreement and subsequently constitute a refusal ground for enforcement of a foreign arbitral award.

Art. II(3), of the Convention serves a significant aim in two ways. On the one hand, it simply requires the courts of contracting States to refer the arbitral parties to arbitration instead of national litigation. In the enforcement context, on the other hand, the Convention provides certain uniform and limited standards of exceptions to be applied when determining the substantive validity of international arbitration agreements.⁹ Although different views have been noted and courts in the contracting States have

⁵ See Chapter 1 point 1.3.2.1 page 50.

⁶ Born (n 4) 707.

⁷ *Bautista v Star Cruises*, (2005) XXX YBCA 1302, (US, Court of Appeals 11th Cir 2005).

⁸ Albert Jan van den Berg (ed), *The New York Convention-Consolidated Commentary- Cases Reported in Volumes XXII (1997) - XXVII (2002)* (XXVIII YBCA, Kluwer 2003) 621; Julian Lew and others, *Comparative International Commercial Arbitration* (Kluwer 2003) para 6-58; Dorothee Schramm and Elliott Geisinger, 'Article II' in Herbert Kronke and Patricia Nacimiento, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer 2010) 105

⁹ Born (n 4) 710; Christa Roodt, 'Conflicts of procedure between courts and arbitral tribunals with particular reference to the right of access to court' (2011) 19 AJICL 236

applied various approaches when interpreting Art. II(3),¹⁰ many courts still confirm their compliance with the principle that the exceptions set out in Art. II(3) are to be construed narrowly. In addition, there is underlying tension between this part of the NYC and Shari'ah, specifically when it comes to the substantive validity of an arbitration clause that relates to non-existing disputes.¹¹

This chapter examines how exceptions related to the substantive validity under Art. II(3) of the NYC have been dealt with by the courts of contracting States. As such, it analyses how implementation of the Convention reflects its pro-enforcement policy with respect to Art. II(3)'s narrative interpretation and application. In addition, it evaluates the corresponding exceptions related to substantive validity under the YNDAA; on such account, it assesses the potential impact of ratifying the NYC in assisting Yemen's legislation to be in line with the international interpretation and application in relation to the said exceptions.

This chapter begins by examining the substantive validity exceptions of the international arbitration agreement under NYC, paying particular attention to the practice of the English courts when applying these exceptions. This chapter then critically examines the substantive grounds of invalidity under Shari'ah and the YNDAA.

3.2 Substantive Validity Exceptions of the International Arbitration Agreement under the NYC

Art. II(3) of the NYC provides:

The court of a Contracting State, when seized of an action in a manner in respect of which the parties have made an agreement within the meaning of this article at the

¹⁰ Vesna Lazić, *The Commission's Proposal to Amend the Arbitration Exception in the EC Jurisdiction Regulation: How 'Much Ado about Nothing' Can End Up in a 'Comedy of Errors' and in Anti-suit Injunctions Brussels-style* (2012) 29 J Int Arb 19

¹¹ Abdul Hamid El Ahdab and Jalal El Ahdab, *Arbitration with the Arab Countries*, (Kluwer 2011) 21; Abdulrahman Baamir, *Shari'a Law in Commercial and Banking Arbitration* (Ashgate Publishing Limited 2010) 74

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request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Initially, it must be noted that the clear wording of the provision's substantive validity exceptions may only be applied during the arbitration proceedings in order to ensure the existence of a valid arbitration agreement. Nonetheless, authorities addressing the validity of the arbitration agreement under Art. V(1)(a) also generally apply the exceptions in Art. II(3).¹² Therefore, Art. II in general is applicable at both the stages of enforcement of international arbitration agreements and awards. It must be also noted that the words 'null and void, inoperative or incapable of being performed' refer merely to the arbitration agreement, and thus the existence of any of those exceptions in relation to the main contract does not necessarily affect the validity of the arbitration agreement.¹³

At first sight, the provision furnishes limited direction to help identify these exceptions. It offers neither a set of definitions nor any further elaboration on any of these exceptions.¹⁴ Generally speaking, these exceptions would appear to cover a broad range of grounds in which an arbitration agreement may be considered invalid. However, having regard to the pro-enforcement bias of the NYC, these exceptions should be interpreted narrowly, and 'the invalidity of the arbitration agreement should be accepted in manifest cases only.'¹⁵ Thus, contracting States are not allowed to fashion different or additional exceptions in order to invalidate an arbitration agreement but are subject to the mandatory and limited exceptions under Art. II(3).¹⁶

¹² *Buques Centroamericanos, SA v Refinadora Costarricense de Petroleos, SA*, 1989 US Dist LEXIS 5429 (US, SDNY 1989); *Carbomin S.A. v Ekton Corporation*, (1987) XII YBCA 502, (Swiss Court of Appeal 1983) ; *J. A. van Walsum N.V. v Chevelines S.A.*, (1976) I YBCA 199, (Switzerland, Geneva Tribunal of First Instance 1967); Born (n 4) 428-431, 460-466; Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer 1981)282-96; Patricia Nacimiento, 'Article V(1)(a)' in Herbert Kronke and Patricia Nacimiento, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer 2010) 216.

¹³ See Chapter 1 point 1.2.1 page 24.

¹⁴ Born (n 4) 709.

¹⁵ van den Berg (n 12) 155.

¹⁶ Born (n 4) 710.

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Although these exceptions can overlap in some cases and examining their precise meaning independently may be of limited practical value,¹⁷ many authorities have endeavoured to distinguish between them in the field of practice.¹⁸ For a clearer understanding, which will aid the critical comparative analysis of Yemeni law, this chapter will examine each exception in turn, albeit briefly.

3.2.1 Null and Void

The terms ‘null’ and ‘void’ are used in statutes and international conventions simultaneously, despite the fact that they hold the same meaning and can thus be considered a tautology when used together.¹⁹ These exceptions may refer to situation where the arbitration agreement was invalid from the basis.²⁰ For instance, the arbitration agreement that lacks the actual consent of the parties due to a fraud, duress, misrepresentation, undue influence, waiver,²¹ or that lack of capacity of one of the parties,²² or further where the agreement is overly vague and is not clear from its wordings.²³

¹⁷ Lew and others (n 8) para 14-41.

¹⁸ Moses (n 3) 33; van den Berg (n 12) 154-161; Domenico Di Pietro and Martin Platte (eds), *Enforcement of International Arbitration Awards: The New York Convention of 1958* (1st edn, Cameron May 2001) 104-119; For the counter-view, see Stefan Kröll, ‘The ‘Incapable of Being Performed’ Exception in Art. II(3) of the New York Convention’ in Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2008) 328.

¹⁹ van den Berg (n 12) 155 (It is to be noted here that the French and Spanish text of the Convention use one word for the two terms ‘caduque’ and ‘nulo’).

²⁰ van den Berg (n 12) 156.

²¹ *Apple & Eve, LLC v Yantai North Andre Juice Co. Ltd.* 610 F Supp 2d 226 (US, EDNYC 2009).

²² Nigel Blackaby and Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 79-99; In contrary, Born argues that ‘defects in formation or consent, lack of capacity or formal validity are not included in the null and void category’ in Born (n 4) 711, For more details in the capacity discussion see also 628.

²³ *Teck Guan SDN BHD v Beow Guan Enterprises PTE Ltd.*, [2003] 4 SLR 276 (Singapore High Court 2003); Bernard Hanotiau and Olivier Caprasse, ‘Public policy in International Commercial Arbitration’ in Emmanuel Gaillard and Domenico di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2008) 799; Musleh Tarawneh, ‘Recognition and Enforcement of Foreign Arbitration Agreements under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958’ (Phd Thesis, University of Aberdeen, UK 1998) 286-303.

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Essentially, both exceptions apply as uniform international rules where they are generally applicable under the contract law principles, and the courts should not impose particular exceptions to avoid enforcement of an arbitration agreement or award. This is, national law exceptions that require unusual substantive requirements such as, a particular font for the agreement, special approval for the agreement to arbitrate from particular authorities,²⁴ selected types of arbitration are only permitted, or arbitration agreements relating to future disputes being invalid, are all impermissible under the exception of 'null and void'.²⁵ Accordingly, many courts have interpreted the 'null and void' exception narrowly in the light of the pro-enforcement bias of the Convention. For example, the US Court of Appeal for the Third Circuit has held as follows:

[T]he meaning of Art. II(3), which is most consistent with the overall purposes of the Convention is that an agreement to arbitrate is 'null and void' only (a) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver [references omitted], or (b) when it contravenes fundamental policies of the forum State. The 'null and void' language must be read narrowly, for the signatory nations have jointly declared a general policy of enforceability of agreements to arbitrate.²⁶

In more recent case, the US District Court, Southern District of Florida, has adopted a similar perspective, stating the following:

In applying the Convention, however, the Court found it to be 'strongly persuasive evidence of congressional policy' in favour of uniform enforcement of arbitration agreements, despite the potential presence of parochial policies present in other parts of the U.S. Code. Thus, to nullify the arbitration provision here would hinder the purpose of the Convention and subvert congressional intent.²⁷

The same result was also reached by an English court in the *Marques de Bolarque* case, in which Hobhouse J. refused the argument that Spanish's public policy is in conflict

²⁴ *Arabe des Engrais Phosphates v Gemanco srl*, (1997) XXII YBCA737, (Italy, Bari Court of Appeal 1993).

²⁵ Born (n 4) 711.

²⁶ *Rhône Méditerranée Compagnia Francese di Assicurazioni (Italy) v Achille Lauro, et al(Italy)*, (1984) IX YBCA 474, 481 (US, Court of Appeals 3rd Circuit 1982).

²⁷ *Inacio Eufemio Lobo (Portugal) v Celebrity Cruises, Inc.*, (2008) XXXIII YBCA 820, 838(US Court of Appeals 11th Cir 2007).

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with the agreement at hand at the time and thus rendered the agreement ('null' and 'void'). The judge stated that due to the NYC to which Spain is a party, this argument is no longer valid.²⁸ In a more recent case also, the Indian Supreme Court made it clear that the courts will enforce arbitration agreements if they are not 'patently void'.²⁹

From the foregoing cases, it can generally be said that the courts of contracting States interpret and apply ('null' and 'void') with the restriction that they should encompass serious grounds that are internationally recognised. Besides, their interpretations and applications should be in light of the pro-enforcement bias of the Convention. Therefore, many States have succeeded in applying the Convention's policy and rarely accept a defence under the 'null' and 'void' exception.³⁰ In fact, as Bishop and others have observed, in several jurisdictions 'there is a legal presumption that arbitration agreements should be construed to have as broad a scope as possible, so that any doubt is resolved in favour of arbitration.'³¹

3.2.2 Inoperative

'Inoperative' arbitration agreements are those agreements that lose their effect to a certain dispute if barred by *res judicata*³² or they have ceased to have effect because of the revocation of the agreement to arbitrate or the dispute between the parties has been previously settled in another legal forum.³³ This would also include cases of a repudiation, waiver and where the time limits for demanding arbitration expired, or a

²⁸ *Cia Maritima Zorroza SA v Sesostris SAE (The Marques de Bolarque)* [1984] 1 Lloyd's Rep 652

²⁹ *Shin-Etsu Chemical Co. v M/S. Aksh Optifibre Ltd.*, (2006) XXXI YBCA 747, 761, (India, The Supreme Court 2005)

³⁰ Joseph McLaughlin and Laurie Generro, 'Enforcement of Arbitral Awards Under the New York Convention-Practice in U.S. Courts' (1986) 3 Intl Tax & Bus Law 249.

³¹ Doak Bishop and others, 'The 'Null and Void' Provision of the New York Convention' in Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2008) 328.

³² Lew and others (n 8) para 14-45.

³³ Moses (n 3) 34.

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termination of the arbitration agreement.³⁴ In addition, another justification seems to be clear from the term where the parties have utilized multitier arbitration agreement; this could be occurred if the parties applied mediation before applying their disputes to arbitration mechanism.³⁵ As a judicial example for a clear justification of the word ‘inoperative’ can be found in the *Shanghai Foreign Trade Corp v. Sigma Metallurgical Co* in which it was stated that ‘settlement agreement without arbitration clause rendered arbitration clause in earlier agreement ‘inoperative’.’³⁶

Although ‘inoperative’ may include a number of different situations, many courts have construed this exception narrowly in the light of the spirit and policy of the Convention and have recognised this exception only in serious cases. The Supreme Court of Spain, for instance, held, in the context of the recognition and enforcement of an arbitral award, that ‘an application to a state court for interim protective measures did not constitute a waiver of arbitration’³⁷ and consequently the arbitration agreement was still operative and valid. Similarly, the Supreme Court of New South Wales has affirmed the narrow interpretation of ‘inoperative’, holding that ‘an application for document production, although invoking the arbitration agreement, did not constitute a waiver.’³⁸

Likewise, the Indian Supreme Court has applied this same narrow approach in refusing a decision that was ‘totally erroneous in law’ rendered by a lower court, stating that an

³⁴ Carolyn Lamm and Jeremy Sharpe, ‘Inoperative Arbitration Agreement Under the New York Convention’ in Emmanuel Gaillard and Domenico di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2008) 297-322

³⁵ Di Pietro and Platte, (n 18)113; See also Hans Stenberg, ‘Arbitration agreements and the writing requirement’(Master’s thesis, Jönköping University 2009) 25.

³⁶ *Shanghai Foreign Trade Corporation v Sigma Metallurgical Co. Pty Ltd, Pang Kee Lee and Chi Ju Chan*, (1997) XXII YBCA 609, 614(Australia, NSW S Ct 1996).

³⁷ *Scandlines, AB (Sweden) and others v Ferrys del Mediterráneo, S.L.* (2007) XXXII YBCA 555, 562, (Spain, The Supreme Court 2002).

³⁸ *ACD Tridon, Inc. v Tridon Australia Pty Ltd.*, (2004) XXIX YBCA 533, 550, (Australia, The Supreme Court of New South Wales 2002).

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arbitration clause is ‘inoperative’ on the basis that a dispute had been referred to arbitration previously in Paris and Stockholm. The Supreme Court went on to stress that:

The plaintiff by merely entering into other contracts with different parties cannot prejudice or defeat the rights of the different party under the different contract, particularly when the right to foreign arbitration has been provided by Parliament as an indefeasible right in which the court does not have any kind of discretion.³⁹

The above attitude has helped encourage courts in different States towards increasingly unifying their interpretation and application of the ‘inoperative’ exception. From the cases above, when courts interpret the ‘inoperative’ exception, it appears they do so in a fairly uniform manner in that they favour of pro-enforcement policy. Thus, this parallel interpretation demonstrates that the courts of contracting State have affirmed the presumptive validity of arbitration agreements and have not ruled that an agreement is inoperative unless there is manifest evidence to prove otherwise.

3.2.3 Incapable of Being Performed

Of the above two exceptions under Art. II(3), this exception may encompass the ‘null and void’ and ‘inoperative’ exceptions. Put differently, an arbitration agreement that is ‘incapable of being performed’ may also be ‘inoperative’ and ‘null and void’ in some cases.⁴⁰ This would be sufficient to explain why courts are allowed to undertake a full review of whether an arbitration agreement is ‘incapable of being performed’ more generally than other exceptions.⁴¹ Nonetheless, some may argue that the courts could be limited to a *prima facie* review until the tribunal decides on its own jurisdiction.⁴²

³⁹ *Svenska Handelsbanken v and others, Indian Charge Chrome Ltd. and others*, (1996) XXI YBCA 557, 566, (India, The Supreme Court 1994).

⁴⁰ *Moses* (n 3) 34.

⁴¹ Pieter Sanders, *The Work of UNCITRAL on Arbitration and Conciliation* (2nd edn, Kluwer 2004) 74.

⁴² *Lew and others* (n 8) para 14-49.

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Irrespective of these arguments, it is important to note that the courts should also take into account the Convention's objective of ensuring the enforcement of both arbitration agreements and awards, when considering this exception in the same manner as with above exceptions. More importantly, 'while the notion is not interpreted autonomously, the Convention at least establishes the framework within which the courts may act when determining the actual content of the notion of 'incapable of being performed'.'⁴³ Thus, a narrow interpretation should also be given to this exception, as illustrated in the following cases.⁴⁴

In *National Iranian Oil Co v Ashland Oil, Inc*, the defendant refused to participate in the arbitration proceedings in Iran, which took place in 1979, on the grounds that this represented a danger to life for Americans at the time. The US court noted that despite 'the political atmosphere in Iran that renders arbitration there impossible or impracticable' and despite 'the maelstrom of chaos and confusion engendered during the Islamic Revolution in Iran, these circumstances were deemed insufficient to render an arbitration agreement incapable of being performed.'⁴⁵

In addition, in some cases arbitral parties refer in their agreement to non-existing arbitration centres or institutions, such as 'German Central Chamber of Commerce'⁴⁶ and 'Belgrade Chamber of Commerce'.⁴⁷ Thus, such indication may lead their agreement to be considered 'incapable of being informed'. However, some courts normally interpret such missing direction as referring to the leading arbitration in the country or to the place indicated in their agreement.⁴⁸ Furthermore, in one case the parties had not even mentioned the place of arbitration or provided any direction as to any country elsewhere.

⁴³ Kröll, (n 18) 324.

⁴⁴ *ibid* 330 -352.

⁴⁵ *National Iranian Oil Co v Ashland Oil, Inc*, 817 F2d 326 , para [12] (US, Court of Appeals 5th Cir 1987).

⁴⁶ *Not indicated v Not indicated* (2001) XXVI YBCA 328, (Germany, Berlin Higher Regional Court 1999).

⁴⁷ *Epoux Convert v Drogo* (1984) 4 Rev arb 483, 484, (Paris Supreme Court 1983).

⁴⁸ *CNIEC Henan Corp v Liaoning Bohai Nonferrous Metals I/E Ltd* Int'l Arb L R N11, 2001 (China, Supreme People's Ct. 2000)

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Regardless of the absence of this essential information, the court considered the arbitration clause to be valid and ultimately held that:

[T]he arbitration clause sufficiently indicated the parties' intention to arbitrate. It held that the reference to an unspecified third country, to a non-existent organization and to non-existent rules did not render the arbitration agreement inoperative or incapable of being performed since arbitration could be held in any country other than the countries where the parties had their places of business and under the law of the place of arbitration, which could be chosen by the plaintiff.⁴⁹

Again, the rationale behind such reasoning is that the courts of contracting State adopt a very narrow construction of the 'incapable of being performed' exception by limiting the exception to very serious considerations only. It is true that the Convention leaves the interpretation to the courts, and this may differ from one court to another. Nonetheless, the courts attempt to save the arbitration agreement from its uncertain substantive grounds of invalidity and to give the agreement the maximum legal effect wherever possible and thus make arbitration possible and a reliable recourse.

3.2.4 The Uniform Standards of Interpretations of the Exceptions under Art. II(3) of the NYC

Although the NYC does not provide any guidance with regards to the substantive validity exceptions and leaves them undefined, it has drawn a framework for their interpretation and application. As mentioned previously, several courts have held that, considering the 'pro-enforcement bias' of the NYC, the substantive validity exceptions 'should be construed narrowly and the invalidity of the arbitration agreement should be accepted in manifest cases only.'⁵⁰ The persuasiveness of that narrative interpretation is reinforced by three main factors as follows:

⁴⁹*Lucky-Goldstar International (H.K.) Limited v Ng Moo Kee Engineering Limited*, (1995) XX YBCA 280, 280, (Hong Kong High Court 1993).

⁵⁰ van den Berg (n 2)52.

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- a) When States adopt the Convention, they apply the substantive validity exceptions under Art. II(3) in the light of the Convention's purpose, which is to facilitate the enforcement of international arbitration agreements to the same extent as arbitral awards.
- b) Contracting States consider arbitration agreements 'presumptively' valid and to be subject only to the limited exceptions under Art. II(3). In applying this policy, courts reaffirm the only stated exceptions and do not exceed their discretion to include additional exceptions even where provided in their national legislation. Indeed, leading commentaries note that in the context of the NYC an autonomous interpretation should supersede, which serves to exclude national 'idiosyncrasies', and thereby such a policy can lead to the uniformity intended by the Convention.⁵¹
- c) In the light of the Convention's purpose, particularly in the context of the enforcement of the arbitral awards, the courts should always try to have particular regard for the parties' consent and consider their agreement as null and void, inoperative or incapable of being performed where there have been complete, or at least serious, violation of the substantive validity under the general applicable rules. Accordingly, not all arbitration agreements that contain superfluous deficiencies should be considered as substantively invalid. As Lamm and Sharpe put it clear, 'not every "pathological" arbitration clause is sufficiently serious as to render the arbitration agreement null and void, inoperative or incapable of being performed'.⁵²

⁵¹ Lew and others (n 8) para 14-41.

⁵² Lamm and Sharpe (n 34) 310.

Conformance with the above factors should be taken into consideration so that the substantive validity exceptions are interpreted in a consistent manner, thereby encouraging the courts to adopt a uniform interpretation and application. This uniformity is another example of the success of the Convention in action.

3.2.5 English Legal Practice in Relation to the ‘Null and Void, Inoperative and Incapable of Being performed’ Exceptions

The English courts have also interpreted these exceptions narrowly in the light of the presumptive validity of the arbitration agreement. A few examples of case law observations may clarify the point.

In *Star Shipping SA v China National Foreign Trading Transportation Corp (the Star Texas)*⁵³, the arbitration agreement between the parties stated that ‘any disputes arising under the charter is to be referred to arbitration in Beijing or London in defendant’s option.’ It is clear from the wording that the parties failed to indicate explicitly the arbitration rules, thus rendering the arbitration agreement uncertain. Subsequently, the plaintiff alleged that the arbitration agreement was null and void on the ground that it provided for a floating proper law, which was a concept English law would not countenance. Steyn L.J. stated in his observation that ‘in a case when there are realistic alternative interpretations of an arbitration clause, the court will always tend to favour the interpretation which gives a sensible and effective interpretation to the arbitration clause.’⁵⁴ The Court of Appeal rejected the plaintiff’s argument and thus held that the arbitration agreement was valid. The court further concluded the following:

There was no doctrinal reason why the law governing the arbitration had to be fixed at the time of making the arbitration agreement and policy reasons strongly supported the validity of an arbitration clause containing a floating curial law; a

⁵³ [1993] 2 Lloyd’s Rep 445(CA).

⁵⁴ *Star Shipping SA v China National Foreign Trading Transportation Corp (the Star Texas)* [1993] 2 Lloyd’s Rep 445, [452] (CA).

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contract without a proper law could not exist but an arbitration agreement could perfectly exist without it being known at the time the agreement was entered into what law would govern the arbitration procedure.⁵⁵

Moreover, the English courts have also applied the ‘inoperative’ exception narrowly, although it was argued that the term ‘has no accepted meaning in English law.’⁵⁶ Under English practice, arbitration agreements that are expansive, inconvenient or burdensome to implement are not considered ‘inoperative’.⁵⁷ For instance, the English Court of Appeal in *Janos Paczy v Haendler & Natermann GmbH* held that the plaintiff could not ‘rely on his own inability to carry out his part of the arbitration agreement as a means of securing a release from the arbitration agreement’.⁵⁸ Also, it can be argued that arbitration agreements that do not cover all claims submitted or all arbitral parties concerning the disputes are ‘inoperative’. Although these arguments have been accepted in some cases,⁵⁹ under English practice such arguments may create inconvenience but this in itself does not render the arbitration agreement ‘inoperative’.⁶⁰

Furthermore, in *Sumitomo Heavy Indus. Ltd v. Oil and Natural Gas Commission*⁶¹, the exception that an agreement is ‘incapable of being performed’ has also been narrowly applied. The arbitral parties agreed to arbitrate using two arbitrators and an umpire governed by the ICC Rules on Arbitration. One party wished to appoint an umpire to chair the arbitral tribunal but the ICC refused to proceed with the arbitration proceeding on the basis that the ICC Rules did not authorize using an umpire. The English Court

⁵⁵ *Star Shipping SA v China National Foreign Trading Transportation Corp (the Star Texas)* [1993] 2 Lloyd’s Rep 445 (CA); see also *Sonatrach Petroleum Corp (BVI) v Ferrell International Ltd* [2002] 1 All ER 627, (QB Comm Ct).

⁵⁶ Michael Mustill and Stewart Boyd, *Commercial Arbitration* (2nd edn, Butterworths 1989) 464

⁵⁷ Lamm and Sharpe (n 34) 310. 306.

⁵⁸ [1981] 1 Lloyd’s Rep 302 .

⁵⁹ *Prince George (Cirt) v McElhanney Engineering Services Ltd and AlSims and Sons Ltd* (1995) 9 WWR 503, (Canada, British Columbia Court of Appeal 1995).

⁶⁰ *Lonrho Ltd v Shell Petroleum Co Ltd et al* [1981] 2 All ER 456.

⁶¹ [1994] 1 Lloyd’s Rep 45 (QB Comm Ct).

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held, in response to the allegation that the ICC's rejection make the arbitration agreement incapable of being performed, that the agreement remained in effect – with a tribunal of two arbitrators and an umpire applying the ICC Rules, either with or without the ICC's participation as administering authority.⁶² In another more recent case, the English court held that even a 'deliberate failure to comply with a tribunal's discovery orders, by improperly withholding material documents, did not amount to a repudiation of the arbitration agreement', and thus did not render the agreement incapable of being performed.⁶³

Thus, it seems clear that the English practice embodies the narrow interpretation of the substantive validity exceptions. Therefore, it can be said that the pro-enforcement bias of English practice in its interpretation of the exceptions of 'null and void, inoperative or incapable of being performed' is to be considered a model for other courts to follow, particularly those States that remain reluctant to ratify the NYC, such as Yemen.

3.3 Substantive Validity Requirements of the International Arbitration Agreement under Shari'ah and Yemeni Legislation

This section begins by examining the substantive validity requirements under Shari'ah. It focuses on the substantive requirements rather than the exceptions since Shari'ah succinctly provides certain requirements for the substantive validity of an arbitration agreement and is silent as to specific exceptions. This section then analyses the substantive validity exceptions under the YNDAA.

⁶² *Sumitomo Heavy Indus. Ltd v Oil and Natural Gas Comm'n* [1994] 1 Lloyd's Rep 45 (QB Comm).

⁶³ *Elektrim SA v Vivendi Universal SA* [2007] EWHC 11 (Comm), [2007] 1 Lloyd's Rep 693 ; see also *JSC BTA Bank v Ablyazov and others* [2011] EWHC 1136 (Comm), [2011] 1 WLR 2996.

3.3.1 The Substantive Validity Requirements under Shari'ah

Under Shari'ah, substantive grounds of validity of the arbitration agreement have not been substantially elaborated.⁶⁴ This is because Shari'ah does not have a general theory of contracts. Rather, certain nominated contracts that are considered (*Mulizim*⁶⁵) were elaborated by several Islamic scholars without any further direction or analysis.⁶⁶ Thus, many scholars consider the arbitration agreement to be part of those *Mulizim* contracts, and hence subject to certain specific requirements.

Also, the terms 'inoperative and incapable of being performed' are nowhere mentioned under Shari'ah. This is not to say that these exceptions are not present in Islamic law or that they are incompatible with the Shari'ah spirit when interpreting those exceptions. Rather, Shari'ah provides several requirements and the lack of one of these requirements is functionally equivalent to null and void, inoperative and incapable of being performed under the NYC.

According to the Islamic treaties, the prerequisites for the substantive validity of an arbitration agreement under Shari'ah⁶⁷ are the following:

- a) The existence of a given dispute. It is of no importance whether the dispute is pending before the courts or has not yet reached that stage.⁶⁸
- b) The consent of the parties to refer the dispute to arbitration.

⁶⁴ Abdel Razzak al-Sanhury, *Masadir al Haq fil Fiqh al Islami* (in Arabic, vol I, Al-Halabi 1998) 77

⁶⁵ Functionally equivalent to the term binding.

⁶⁶ El Ahdab and El Ahdab (n 11) 18 (highlighting that 'islamic Law only provides for these nominate contracts and that any agreement which is not part of these contracts would not be binding, but it would even be invalid').

⁶⁷ For more about Arbitration under Shari'ah and Arbitration in Western context see, George Sayen, 'Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia' (1997) 9 U Pa J Int'l Bus L 211.

⁶⁸ For more discussion regarding the differences between the Arbitration clause and the Arbitration agreement under Shari'ah see El Ahdab and El Ahdab (n 11) 18-24; Samir Saleh, *Commercial Arbitration in the Middle East* (2nd edn, Hart Publishing 2006) 39-41.

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- c) The appointment of an arbitrator duly qualified under Shari'ah to determine the dispute.⁶⁹

With regard to the first requirement, three primary points should be addressed. First, although arbitration clauses, which contain future disputes, are not mentioned under Shari'ah, they are still enforceable and respected. Several Islamic commentaries concluded that an arbitration clause is binding and has fully effect based on the principle of *pacta sunt servanda*,⁷⁰ which is recognised and well-accepted under Shari'ah.⁷¹ Accordingly, the non-existence of a disputes in the arbitration clause is considered a non-fundamental substantive requirement of arbitration agreement.⁷² This is also based on the following Qur'anic verses:

‘O you who believe! Fulfil (your) obligations’⁷³ and ‘And fulfil the Covenant of Allâh (*Bai'ah*: pledge for Islâm) when you have covenanted, and break not the oaths after you have confirmed them - and indeed you have appointed Allâh your surety. Verily! Allâh knows what you do’⁷⁴

The statement of Al-Jazaeri commenting on the above verses highlights that this would apply to any and all agreements concluded by parties, excluding matters that the Qur'an has deemed ‘void or unenforceable’.⁷⁵ The Prophet (saws) also stated that ‘Muslims conditions are valid’⁷⁶ and further emphasised that ‘Muslims are bound by their

⁶⁹ Saleh, (n 68) 41; El Ahdab and El Ahdab (n 11) 19; see also Syed Rashid, ‘Alternative Dispute Resolution in the Context of Islamic Law’(2004) 8 VJ 95, 105.

⁷⁰ As an Islamic maxim *Al Aqd Shari'at al muta'aqqidin*.

⁷¹ For more details on this point, see Saleh (n 68) 39; Serge Setrakian, ‘Arbitration under the Legal Systems of the Middle Eastern Countries (1978) 1 Middle East Executive Reports 8.

⁷² Muhammad Ibn Abidin, *Umar, Radd al- Muhtar ala al- Durr al- Mukhtar* (in Arabic, vol 4,Cairo, 1881) 482; Muhammed Madkur, ‘ *Al- Qada Fil Islam*’ (in Arabic, Cairo 1964) 131.

⁷³ Surah Al-Mâ'idah; verse, 1.

⁷⁴ Surah An-Nahl; verse, 91.

⁷⁵ Shaikh Ismail al Jazaeri, *Ayat-al-Ahkam* (Arabic text) 124 in Faisal Kutty, ‘the Shari'ah Factor in International Commercial Arbitration’(2006) 28 Loy LA Int'l & Comp L R 565 fn251.

⁷⁶ Sahih A-Tarfady Al-Albany, vol. II, A valid Hadith stipulating: ‘Compromise between Muslims is authorized unless such compromise bans a legal action (Halal) or validates a banned action (Haram). And

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agreements.⁷⁷ Shari'ah provides general directions on contractual relationship and disapproves any breach of the parties' obligations. Accordingly, any contractual obligation under Shari'ah law should be performed within their contractual conditions except those conditions contradict the Shari'ah principles. Indeed, the practical effect of this interpretation is to make most of the agreements binding and enforceable so long as they are in conformity with Shari'ah.

Therefore, it is now well-recognized that both arbitration agreements and arbitration clauses are enforceable and legally binding under Shari'ah law.⁷⁸ As Al-Sanhury concludes, 'the nominate contracts mentioned by the scholars are those which were known in their time. If the present civilization has given rise to new contracts fulfilling the conditions required by the Fiqh, these new contracts must be considered as legal, i.e. binding.' Undeniably, due to the development of domestic and international commercial trades, 'arbitration clauses are now widely used and they are recognized in several modern legislations in Arab and Islamic countries',⁷⁹ since they do not contravene Shari'ah principles.

Second, the matters that may be made subject to arbitration are not clear-cut under Shari'ah. Some may argue that arbitration should be utilized only in commercial and property matters,⁸⁰ while others say it can be also used for non-commercial disputes such as civil matters.⁸¹ However, the prevailing view is that arbitration may validly be utilized in all cases that 'do not involve Shari'ah fixed punishment '*Hudood*' and criminal

Muslims' conditions are valid, except those conditions banning what is legal (Halal) and validating what is banned (Haram).' in El Ahdab and El Ahdab (n 11) 20 fn.77

⁷⁷ Sahih Al Bukhary, 'The Prophet Said that Muslims are bound by their agreements' Ibn Hajar, Fath Al Kadir, (Vol: IV, 451) in El Ahdab and El Ahdab (n 11) 20 fn.78.

⁷⁸ Kutty (n 75) 565.

⁷⁹ El Ahdab and El Ahdab (n 11) 21

⁸⁰ *Hanafis*, *Hanbalis* and *Shafi'is* schools, although the minority of Hanafis school of thought still use arbitraion if criminal matters that involve *Qisas*, see Saleh (n 68) 37.

⁸¹ Rashid (n 69) 95.

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sanction '*Qisas*'.⁸² Commercial matters therefore fall within the scope of the arbitral matters that are legally acceptable under Shari'ah. This is broadly in line with Art. I(3) of the NYC, which provides that 'it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.'

Finally, it should be mentioned that Shari'ah does not provide any mandatory provisions to stay any judicial proceedings while the tribunal looks into the dispute. Unlike, the NYC and most modern arbitration legislation including some Middle East laws, the national court must stay the proceeding and the parties must be prevented from going to the national court when the matter is already under the purview of the arbitral tribunal.⁸³ This may lead to some uncertainties for arbitration proceeding, and thus it is recommended that a stay of judicial proceeding can be applied when the parties willingly choose to resolve their dispute by arbitration only.

Regarding the second requirement, the consent of the parties to refer their disputes to arbitration is considered an essential ground for the validity of the arbitration agreement under Shari'ah law. In other words, an arbitration agreement is like any contract under Shari'ah law and needs clear consent to be validly concluded. This consent 'would only be valid if it is not defective and if it is given by a person having the necessary capacity required for the type of contract in question.'⁸⁴ Thus, the arbitral parties' consent must be clear, free of any vagueness and uncertainty, and the lack of any of these requirements would render the agreement null and void.

In order to reach a valid consent, and consequently conclude a valid arbitration agreement under Shari'ah, the parties must fulfil the following elements:

⁸² Saleh, (n 68) 37.

⁸³ *ibid* 41.

⁸⁴ El Ahdab and El Ahdab (n 11) 25.

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The first element is that the arbitral parties should have proper capacity including both (i) the capacity to dispose of a right (*ahliat al wujub*) and (ii) the capacity to exercise such right (*ahliat al ada*).⁸⁵ By contrast, a person under incapacity is ‘any natural or juristic person who may not acquire or exercise rights due to a lack of understanding, abnormal behaviour or a material incapacity which prevents such persons from performing certain acts or actions themselves’.⁸⁶ Although there is ongoing controversy between the Islamic scholars with respect to the age of capacity, the *Mejellah* has fixed the age for the person to have full capacity at 12-15 years for boys and 9-15 years for girls.⁸⁷

The second element is the existence of an explicit will between the parties, which needs to be demonstrated by a valid offer and a valid acceptance. Of course, the parties’ clear and explicit will in an arbitration agreement is their consent to use arbitration and not have their disputes subject to judicial authority.⁸⁸ From both elements, it is obvious that Shari’ah requires the parties to have full capacity to reach an arbitration agreement. Thus, an arbitration agreement concluded by infant, by a person who is insane or intoxicated, and even by a minor are considered null and void under Shari’ah.⁸⁹ Likewise, any arbitration agreement influenced by duress or misrepresentation is considered null and void.⁹⁰

In relation to the third requirement, an arbitrator who is duly qualified under Shari’ah is an arbitrator who is mentally and physically competent. Under Shari’ah an arbitrator must be ‘a male, an adult, wise, free, a Muslim, and fair... [A] woman, minor, slave, non-

⁸⁵ *ibid.*

⁸⁶ Anuar Al-Khatib, ‘The Protection of Persons Devoid of Capacity’ in Abdul Hamid El Ahdab and Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer 2011) 26.

⁸⁷ El Ahdab and El Ahdab (n 11) 28; See also *Majallah al-Ahkām al-adliyyah* available in Arabic at [http://www.ajournal.co.uk/HSpdfs/HSvolume6\(2\)/HSVol.6%20\(2\)%20Article%205.pdf](http://www.ajournal.co.uk/HSpdfs/HSvolume6(2)/HSVol.6%20(2)%20Article%205.pdf) accessed 20 August 2012.

⁸⁸ Mohamed Chalhoun, *The Judicial Annulment of the Arbitral Award in Light of Islamic Law* (2012) 4 Int’l J Arab Arb 3.

⁸⁹ Saleh (n 68) 21.

⁹⁰ van den Berg (n 12)155.

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Muslim and corrupt person cannot be appointed as an arbitrator.’⁹¹ These traditional elements appear to be greatly restrictive and call for some observations. It may be said that Islamic scholars have indicated the above elements in order to ensure just proceedings during the arbitration process. At the same time these restrictive elements, particularly those relating to religion and gender, seem to violate the international trend in international commercial practice and also to conflict with international human rights norms.⁹²

Furthermore, with regard to the restrictions on women, it seems this approach is based, by analogy, on the testimony requirement under Shari’ah,⁹³ even though this is still not unanimously established among all the scholars of Islamic law. It is alleged that women may lack memory or are generally weak in character and display some incompetence.⁹⁴ However, this argument misses the fact that many Shari’ah rules have been transmitted by the Prophet’s wives, specifically *Um Al-Mumineen* Aisha (May Allah be Pleased at her).⁹⁵ Besides, applying the testimony approach by analogy also misses the fact that many women have been nominated as judges in many jurisdictions including some Middle Eastern courtiers which apply Shari’ah in their jurisdictions, including Yemen, and therefore why should arbitration be treated any differently?⁹⁶ Indeed, as Asifa Quraishi argues, ‘This limitation of testimony exclusively to men appears to be an incorporation into Islamic law of an antiquated custom which has now changed and in Islamic law, all rules in the Shari’ah [Islamic law] that are based upon customs change

⁹¹ Rashid (n 69) 105.

⁹² Kutty (n 75) 565.

⁹³ Shari’ah Law, in classical jurisprudence, requires two women equally to one man when they provide testimony.

⁹⁴ Asifa Quraishi, ‘Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective’ (1997) 18 Mich J Int’l L 287; See for instance, Egyptian Arbitration Act of 1994 Art. 16 and Omani Arbitration Act of 1997 Art. 16.

⁹⁵ Kutty (n 75) 565.

⁹⁶ The Yemeni Judicial Authority Act No. 1 of 1991 Art. 57.

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when customs change.’⁹⁷ In addition, and unsurprisingly, many women have become eminent arbitrators in modern arbitration practice.⁹⁸

With respect to non-Muslims restrictive requirements, it seems this requirement is based on the view that only a Muslim judge can resolve disputes between two Muslims, so arbitration should follow the same approach. Here again, this analogical approach raises some fundamental concerns. It is a fact that, as Neal and Hasan put it, ‘Islam is very much built on a principle of human equality; and in nearly every respect, a dhimmi’s [non-Muslim] legal capacity is intended to match that of a Muslim peer.’⁹⁹ Thus, some Islamic scholars have interpreted a verse from the Holy Qur’an to allow non-Muslims to arbitrate in disputes between parties.¹⁰⁰ As Professor Askari points out:

It seems unmistakably clear that with regard to the Muslim attitude towards non-Muslims, both globally and within a Muslim society, the classical juristic position is not only irrelevant but also misleading, for the historical situation in which that tradition originated is no longer the same. In other words, we are called upon to derive fresh values and rules from both the explicit and over-all normative framework of the Qur’an and the Sunnah. It appears that these values and rules, irrespective of the specific details, would actualize the potentiality for a universalist perspective already present in the Islamic sources.¹⁰¹

Similarly, some other scholars emphasise that the ‘fundamental principle of equality in Islam, the historical evidence and the emphasis given to freedom to contract and contractual obligations provide sufficient justification to reassess the Islamic position

⁹⁷ Asifa Quraishi, ‘Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective’ (1997) 18 Mich J Int’l L 287, 308.

⁹⁸ For instance, Margaret Rutherford QC in England, Professor Bastid in France, Madame Simone Rozés as an ICC arbitrator and Judge Birgitta Blom as an arbitrator at the SCC, in V. V. Veeder, ‘Gala Dinner Address: Memories from ICCA’s First Fifty Years’ in Albert Jan van den Berg (ed), *Arbitration: The Next Fifty Years* (ICCA Congress Series, No. 16, Kluwer 2012) 9; also Dr Samiha Al Kalyoubi in Egypt.

⁹⁹ David Neal and Ashraful Hasan, “Distinctions Between Muslims and Dhimmis: The Human Rights of Non-Muslims Under Islamic Law,” in Ashraful Hasan (ed) *Human Rights Dilemmas in Contemporary Times: Issues and Answers* (Austin & Winfiel 1998) 32-33.

¹⁰⁰ Surah An-Nisā’; verse, 35; for more discussion on this matter see Rashid (n 69) 106.

¹⁰¹ Hasan Askari, Comment on AbdulHamid AbuSulayman’s book *Al-Dhimmah and Related Concepts in Historical Perspective*, Vol. IX: No. 1 published in *Journal Institute of Muslim Minority Affairs*, Vol. 10:1, Jan. 89 at 112 (no further information) in Kutty (75) 608.

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when it comes to non-Muslims and women.’¹⁰² Professional women and non-Muslims experts who have experience in resolving commercial disputes can, of course, achieve the ultimate goal of utilizing arbitration, so there is no plausible reason for excluding them from such appointments. In addition, it there seems to be no direct verse in Holy Qur’an or Hadith in Sunnah that provides such a restrictive requirement. Consequently, some Middle East States have abandoned these restrictive requirements and no longer require an arbitrator to be Muslim or male in their arbitration legislation.¹⁰³ As an example of judicial practice, the Egyptian Supreme Court held that arbitration in Egypt can be submitted to non-Egyptians and there is no condition of gender or religion.¹⁰⁴ In a more recent case, the Fujairah Federal Court of First Instance in the UAE enforced a Foreign Arbitral Award under the Convention and the arbitration proceedings were conducted in accordance with the LMAA¹⁰⁵ procedural rules and accordingly the arbitrator was appointed as a sole arbitrator with no conditions of religion and gender.¹⁰⁶

Apart from these arguments, applying such restrictive requirements for arbitrators would be contrary to the party autonomy doctrine since the parties may choose any person in accordance with their mutual consent. It is submitted therefore that such requirements reflect negative implications in achieving the potential uniformity between Shari’ah and international commercial norms in arbitration since they are merely subject to the Islamic scholar ideology toward restricting the substantive validity of the arbitration agreement. Moreover, the Qur’an and the Prophet Muhammad (saws) are noticeably clear in directing Muslims to fulfil their obligations towards others since these obligations do not contradict with Shari’ah principles. No such contradictory exist with choosing a woman or non-Muslim arbitrator to resolve disputes.

¹⁰² Kutty (n 75) 606; Najib Ghabbian, ‘Islamists and Women in the Arab World: From Reaction to Reform?’(1995) 12 AJSMS 19, 27

¹⁰³ See, for instance, UAE Arbitration Rules, The Civil Procedure Code No. 11 of 1992 Art. 206(1); See also ‘Arbitration in Egypt’ in El Ahdab and El Ahdab (n 11)181(stating that ‘in Egyptian Law, there is no condition of religion and woman may be appointed as arbitrator’).

¹⁰⁴ Cass., Case No. 369/22, 2/4/1956 in El Ahdab and El Ahdab (n 11)181.

¹⁰⁵ London Maritime Arbitrators Association Procedural Rules (2006).

¹⁰⁶ *Shipowners v Charterers*, (2011) XXXVI YBCA 353, (UAE, Fujairah Court of First Instance 2010)

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In the light of the above analysis, it can be concluded that Shari'ah has certain unusual and restrictive substantive requirements that may need to be satisfied for the validity of an arbitration agreement. National courts, where Shari'ah is applicable, will probably encounter difficulties in apply such requirements, not only because they are restrictive requirements but also because their application is against the international trend. Accordingly, it is observed that some of these traditional requirements have become redundant and have been abandoned by Islamic scholars as well as by some Islamic countries, including Yemen.

Therefore, it must be acknowledged that the consent of the arbitral parties remains the core and essential requirement of the substantive validity of the arbitration agreement and serious affect to this requirement may render the agreement null and void, inoperative or incapable of being performed. It must be also acknowledged that applying and interpreting the Shari'ah substantive requirements should always be very narrow in view of the contemporary trend towards bring a higher degree of uniformity between Shari'ah and international commercial arbitration. This would also help encourage the consistency between Shari'ah and international convention such as the NYC and would further 'give effect to the arbitration agreement of the parties wherever possible.'¹⁰⁷ In view of that, the NYC's substantive exceptions would be compatible with Shari'ah and no considerable difference is recognised when interpreting and applying such exceptions.

3.3.2 The Substantive Validity Exceptions under the YNDAA

The YNDAA contains no express article with regard to referring the matters to arbitration if the national courts find that the arbitration agreement contains substantive

¹⁰⁷ Norbert Horn, 'The Arbitration Agreement in Light of Case Law of the UNCITRAL Model Law (Arts 7 and 8)' (2005) Int'l ALR 146.

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grounds of invalidity. Alternatively, the YNDAA recognises the competence of the tribunal to settle any dispute concerning its own jurisdiction during the arbitral process including the existence and the nullity as well as the scope of the arbitration agreement.¹⁰⁸

On the other hand, the YNDAA binds the court seized of a dispute governed by an arbitration agreement to reject the case upon a plea of the respondent that is raised prior to any request or defence on the merits.¹⁰⁹ Accordingly, the court is not empowered to establish that the arbitration agreement is substantively invalid. Therefore, the YNDAA recognise the competence of the tribunal to govern all disputes including the existence, nullity and extinguishment of the arbitration agreement.¹¹⁰

Moreover, the YNDAA does not mention the invalidity of the arbitration agreement as a ground for refusal of a foreign arbitral award¹¹¹ and is entirely silent when the court shall determine the substantive validity of the arbitration agreement after the award is rendered. However, the only provision that expresses the substantive validity exceptions is Art. 59(1) of the YNDAA, which concerns setting aside an arbitral award. Art. 59(1) provides:

An arbitral award can only be set aside in the following cases:

- If the arbitration agreement is inexistent or extinguished due to the expiry of its term or void in accordance with the law;

The YNDAA has adopted Art. 59 from the YCAA, though with several amendments thereto.¹¹² It is worth noting that the exceptions for setting aside of arbitral awards under

¹⁰⁸ See Chapter 2 point 1.2.1 page 24 Chapter 2 point 12.2 page 27.

¹⁰⁹ YNDAA Art. 18.

¹¹⁰ YNDAA Art. 27.

¹¹¹ YNDAA Art. 66.

¹¹² YCAA Art. 53 and YNDAA Art. 59.

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the YCAA have in general been restrictively listed and cannot be liberally interpreted,¹¹³ so the same interpretation likely applies under Art. 59(1) of the NDAA. In view of that, this portion attempts to examine the substantive validity exceptions under Art. 59(1), with the correlated articles, under the YNDAA in order to assess their interpretation and application in contrast to Art. II(3) of the NYC.

Based on a purely textual analysis, Art. 59(1) of the YNDAA contemplates setting aside of an arbitral award if the arbitration agreement is ‘inexistence or extinguished due to the expiry of its term or void in accordance with the law.’¹¹⁴ Equivalent to Art. II(3) of the NYC, the article provides no guidance as to the content of these exceptions and refereeing to these exceptions in wide range terms without offering elaboration or definition. The article prescribes the substantive validity exceptions for of the arbitration agreement into three main parts, each will be evaluated in turns. Thereafter, a brief comparison between Art. II(3) of the NYC and Art. 59(1) of the YNDAA will be highlighted.

3.3.2.1 The Non-existence of the Arbitration Agreement

The term ‘inexistence’ refers to arbitration agreements which have not ever been concluded. It also may refer to the cases where the arbitration agreements are affected by some invalidity from the outset—for example, the lack of the consent of the arbitral parties, misrepresentation or duress connecting to their agreement. Presumptively, the ‘inexistence’ of an arbitration agreement could be also occurring where the main contract

¹¹³ ‘Case No. 21634, the Supreme Court at the Capital City of Sana’a -Commercial Circuit, 2005’ (2009) 1 Int’l J Arab Arb 529-531; *Company C v Shops K*, ‘Case No. 22517, the Supreme Court at the Capital City of Sana’a -Commercial Circuit, 2005’ (2009) 1 Int’l J Arab Arb 536-538; ‘Case No: 32799, the Supreme Court at the Capital City of Sana’a -Commercial Circuit, 2008’ (2009) 1 Int’l J Arab Arb 301 – 318

¹¹⁴ Surprisingly, the same basic exceptions to the validity of international arbitration agreements exist under the European Convention on International Commercial Arbitration identical to those under Art . 59(1) of the YNDAA, but in the enforcement context. Article V(1) of the European Convention permits non-recognition of an arbitration agreement that was ‘either non-existent or null and void or had lapsed’.

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did not exist from the beginning. Although it may be argued that the separability doctrine applies where there are disputes in relation to the validity of the main contract and the arbitration agreement, the doctrine is directed at contracts with subsequent invalidity, and not contracts that have initial non-existence including arbitration clauses or agreements.¹¹⁵

It is an open question, in this connection, how court should determine this exception since the arbitral tribunal has already determined the issue. Put differently, the ‘inexistence’ of an arbitration agreement should also invalidate the arbitral proceedings from the beginning and therefore how the national court would determine its validity after an award is rendered, which might also be invalid. Some may say that ‘the court must first determine whether an arbitration agreement ever existed *at all*.’¹¹⁶ This is true where the parties have not yet engaged in arbitral proceedings or at least where the proceedings are in action and the courts may determine the validity of their agreement to decide whether to stay proceeding or refer the parties to arbitration. However, after an award is rendered the situation would be questionable and challengeable at the same effect. As the European Convention rightly provides: ‘The party which intends to raise a plea as to the arbitrator's jurisdiction based on the fact that the arbitration agreement was either non-existent or null and void or had lapsed shall do so *during the arbitration proceedings*.’¹¹⁷

¹¹⁵ van den Berg (n 12) 145.

¹¹⁶ Nicholas Pengelley, ‘Albon v. Naza Motor Trading: Necessity for a Court to Find that there is an Arbitration Agreement Before Determining that it is Null and Void’ (2004) 24 Arb Int'l 171,171.

¹¹⁷ The European Convention on International Commercial Arbitration 1961, Art. V(1)(emphasis added).

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Indeed, a non-existent contract can never lead to valid and effective proceedings, as ‘something cannot come from nothing.’¹¹⁸ The existence of a valid arbitration agreement is the cornerstone of the entire international arbitration processes and ‘absent a valid agreement to arbitrate, there is generally no basis for requiring arbitration or for enforcing an arbitral award against a party.’¹¹⁹ The arbitration agreement may lack one of its main elements to render it as invalid, rather than the entire absence of an arbitration agreement. In this manner, the Egyptian Supreme Court has held that in the case of an entire absence of an arbitration agreement there would not be a valid arbitral award.¹²⁰

Therefore, it must be submitted that this exception is both superfluous and unusual. First, it is superfluous in the sense that, its scope of interpretation is closely linked to the terms ‘void’ as set forth under the same article.¹²¹ Although it can be considered a fundamental and essential ground for setting aside an arbitral award, it more frequently leads to arbitration agreements and awards being considered null and void at the same time.¹²² So why would the Yemen’s legislation adopt two distinguished exceptions since they both have the same meaning and equal practical effect? Hence, it has been pointed out that the extinguishment and nullity of an arbitration agreement occur more common than the complete absence of an arbitration agreement.¹²³

¹¹⁸ Peter Sanders, ‘L’autonomie de la Clause Compromissaire’ in ICC (ed.), *Hommage à Frédéric Eisenmann* (Liber Amicorum 1978) 31-43 in Jean-Francois Poudret and Sebastien Besson, *Comparative Law of International Arbitration*, (2nd edn, Sweet & Maxwell 2007) 134.

¹¹⁹ Gary Born, *International Commercial Arbitration: Commentary and Materials* (2nd edn, Transnational Publisher 2001) 53.

¹²⁰ Case No 2186, (Egypt Supreme Court 1986).

¹²¹ See Chapter 3 point 3.3.2.3 page 141.

¹²² Samiha Al Kalyoubi, ‘The Role of the Egyptian Judiciary in Securing the Efficiency of Arbitration Agreements in Jalal El Ahdab (ed)’ (2010) 2 Int’l J Arab Arb 17, 19.

¹²³ Saleh (n 68) 406 fn. 271.

Second, it is unusual in the sense that the existence and validity of any agreement including the arbitration agreement must be determined mainly in the light of the common intent of the contracted parties.¹²⁴ This common intention as the cornerstone of the arbitration agreement is usually arises in the beginning of the arbitral proceedings where the parties resist arbitration, for instance. This is because when the tribunal starts hearing the dispute, it first determines whether the contract including an arbitration agreement exists or not. In this case the cause on non-existence would directly affect the arbitral proceedings and thus the arbitral tribunal must declare it to be invalid and decline its jurisdiction accordingly. Therefore, as Haining and Zeller point out, in the case of ‘an alleged non-existent agreement—pursuant to contract theory—the agreement has never come into existence. That is, there was never an agreement about any of the clauses in the alleged contract and therefore no consent to any of the terms’.¹²⁵

3.3.2.2 The Arbitration Agreement has Extinguished

The term ‘extinguished’ or may be sometimes so-called ‘lapsed’¹²⁶ refers to the case where the arbitral parties have agreed for fixing time to resolve their disputes and have not performed accordingly. The arbitration agreement could also become ‘extinguished’ where it is affected by the termination of the main contract notwithstanding the rule of the separability doctrine¹²⁷ or if waived by the arbitral parties or the agreement is directly

¹²⁴ *Société études et représentations navales et industrielles (SOERNI) et autres vs. Société Air Sea Broker limited (ASB)*, (July 8, 2009, Case no. 08-16025)(France, The Supreme Court 2009); see also C. von Krause, *Existence and Validity of an Arbitration Agreement: The French Supreme Court Confirms that the Validity of an Arbitration Agreement Depends Primarily on the Common Intent of the Parties* (Kluwer 2009) 1.

¹²⁵ Kristy Haining and Bruno Zeller, ‘Can Separability save Kompetenz-Kompetenz When there is a Challenge to the Existence of a Contract?’(2010) 3 Arb 493, 494

¹²⁶ Both terms contain the same meaning and are used interchangeably as evidenced by Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, (Kluwer 1999) para 727.

¹²⁷ Saleh (n 68) 406.

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affected by a defect causing it to be void.¹²⁸ The interpretation of this exception also runs in parallel to the ‘inoperative’ exception in Art. II(3) of the NYC since an arbitration agreement can cease to be extinguished where the time limit for initiating the arbitration or rendering the award has expired,¹²⁹ providing that it was the parties' intent no longer to be bound by the arbitration agreement due to the expiration of this time limit.¹³⁰ For instance, Art. 51 of the YNDAA addresses the action for rendering the arbitral award by the tribunal within six months from the first constitutional meeting or starting the proceedings of the tribunal unless otherwise agreed by the parties.¹³¹ The time limit begins to run with service of the arbitration proceeding and to rather improve the prompt enhancement of the arbitration mechanism.

Accordingly, the Yemen's legislators try to respect the finality and binding effect of the arbitral awards unless the delay of the time limit was produced by force majeure. In such circumstances, the Yemeni court held that doing beyond the time limit by the tribunal based by reason of force majeure would not affect the validity of the award.¹³² In addition, the Yemen's Supreme Court held that ‘if a party continues with the arbitral proceedings after the expiry of the arbitration time period, by submitting claims, defences and pleadings, this would be considered an acceptance of extending the time-period for arbitration.’¹³³ This means Yemeni courts interpret this exception *in favorem validitatis* of the arbitration agreement.

¹²⁸ Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, (Kluwer 1999) para 735

¹²⁹ Challenges no. 64/73, 5745, 6467/75, rulings rendered in the hearing of 21/12/2005 – Egyptian Lawyer Review (in Arabic, 5th and 6th issues 2007) in Samiha Al Kalyoubi, ‘The Role of the Egyptian Judiciary in Securing the Efficiency of Arbitration Agreements’ (2010) 2 Int'l J Arab Arb 17 fn 28.

¹³⁰ Lew and others (n 8) para 14-45.

¹³¹ YNDAA Art. 51 .

¹³² Case No. 33036, the Supreme Court at the Capital City of Sana'a- Commercial Circuit, 2009 (in Arabic, 2009) 4 Journal of Arbitration (Majallat Attahkim) 547; Case No. 33323, Supreme Court at the Capital City of Sana'a- Commercial Circuit, 2009 (in Arabic, 2010) 4 Journal of Arbitration (Majallat Attahkim) 518.

¹³³ *JSA v MMA*, Case No, 22516, the Supreme Court at the Capital City of Sana'a Commercial Circuit, 2005 (2009)1 Int'l J Arab Arb 534.

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Another example that illustrates the same interpretation between the two terms can be found in the case where the party waive the right to arbitrate by applying to courts for security for costs.¹³⁴ Likewise, the arbitration agreement is ‘inoperative’ or ‘extinguished’ where, for example, it lost effect if there was previously been a decision or arbitral award with *res judicata* effect in relation to the same subject matter of disputes.¹³⁵ From these, it can be said that several grounds might be still fit into the ‘extinguished’ scenario and also fit under the term ‘inoperative’, and thus both exceptions overlap and have the same general import.

3.3.2.3 The Arbitration Agreement is Void

The scope of the terms ‘void’ depends primarily on the provision of the applicable law. If Yemeni law is applicable, the term ‘void’ generally refers to contracts that are not binding or that are invalid, e.g. general contracts that contains violation of Yemen’s public policy or of morals or Shari’ah law.¹³⁶ Similar rules to these exceptions expressed in Yemen’s civil law are also applicable to arbitration agreements. Besides, an arbitration agreement can be ‘void’ where the defect based on the fact that the disputes capable of being resolved under it are non-arbitrable or the incapacity of the arbitral parties or the incapacity of the arbitrators.¹³⁷ In this vein, Art. 8 of the YNDAA provides that arbitration is not permitted in the following matters:

- a- Penal sanctions and termination of marriage contracts;
- b- Challenge of judges;
- c- Disputes relating to enforcement;
- d- Disputes relating to nationality;
- e- Any matter which may not be subject to conciliation;
- f- Matters relating to public policy.

¹³⁴ *Pan Australia Shipping Pty Ltd v The Ship COMANDATE (NO 2)*, (2007) XXXII YBCA 224, 237, (Federal Court of Australia 2006).

¹³⁵ Lew and others (n 8) para 14-45; see also Saleh (n 68) 382.

¹³⁶ Yemeni Civil Law No.14 of 2002, Art. 186

¹³⁷ Gaillard and Savage (n 128) para 737

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With regard to the capacity requirements, the YNDAA stipulates that only natural or judicial persons having full capacity to dispose of rights under the law governing capacity may enter into a valid agreement.¹³⁸ Therefore, if any party does not fulfil such capacity, under the applicable law, this would lead to a void arbitration agreement. Bearing in mind that an arbitration clause is considered an agreement independent from the other provisions of the contract, ‘the expiry, nullity, rescission or termination of the contract does not affect the arbitration agreement contained therein if the arbitration agreement is valid per se.’¹³⁹

Concerning the capacity of the arbitrators, the arbitrator must not be a minor, judicially declared incapable, deprived of his civil rights after being convicted of a crime violating honour and good morals, or being declared bankrupt unless he was been rehabilitated.¹⁴⁰ Also, the judge cannot be chosen as an arbitrator in a case brought before the court where he works in even if the parties themselves requested him to do so.¹⁴¹ Hence, it is not required that the arbitrator be a Yemeni, male or a Muslim. Women and foreigners may thus validly be appointed as arbitrators. Curiously, the YNDAA does not mention the arbitrator's religion or gender, even though Shari’ah, according to the traditional and restrictive approach, requires that the arbitrator should be a Muslim male. This means that under the YNDAA there is no condition of religion or gender and arbitration cases can be submitted to non-Muslims and women. Accordingly, the YNDAA follows the international trend in this matter.

It must be noted that in addition to Art. 59(1) concerning setting aside the arbitral awards, the term ‘void’ has been expressly indicated in several occasions under the YNDAA. Art. 24(4) provides that ‘the arbitral proceedings conducted after the reasons of challenge have arisen shall be considered as null and void.’ Art. 45(2) concerning the arbitral

¹³⁸ YNDAA, Art. 14.

¹³⁹ YNDAA, Art. 16.

¹⁴⁰ YNDAA, Art. 20(1).

¹⁴¹ YNDAA, Art. 21.

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proceedings also states ‘the interruption of the arbitration procedure stays all the time limits and proceedings, which are deemed to be void if made during this period.’ Moreover, Art. 15(1) concerning the form requirement provides ‘the arbitration agreement shall be made in writing otherwise it is deemed to be void.’ Furthermore, Art. 13(2) states ‘the arbitration agreement may be made prior to the occurrence of the dispute, in a form of an arbitration clause in a contract or in a form of a separate agreement even if a lawsuit in this respect was brought to court. In such case, the agreement must specify the matters included in arbitration; otherwise, it is deemed to be null and void’. Finally, Art. 19(2) provides that ‘the number of arbitrators should be odd otherwise the arbitration is deemed to be null and void’.¹⁴² According to these provisions, the term ‘void’ would appear to encompass a broad range of grounds for which an arbitration agreement can be invalid. Accordingly, the arbitral proceedings in such occasions would be affected and lose the main aim of arbitration. Therefore, this can be understood that another liberal interpretation of the void exception would be in action by the judiciary. The Yemeni courts have adopted in some cases a very liberal approach when interpreting these terms.

For example, the Yemeni Supreme Court has found that an arbitral award that is signed by one arbitrator while the two others are absent is considered void.¹⁴³ In addition, the relevant Yemeni court held that when the arbitration agreement lacks the subject matter to arbitrate, it will subsequently be void and invalid. The absence of such terms can be adequately analysed as a substantive requirement since it is focusing in the arbitral subject. Thus, it has been held in the case no. 20837 that the absence of the arbitral subject within the arbitration agreement would ultimately lead to the invalidity of the arbitration agreement.¹⁴⁴ This goes in the opposite direction of the NYC trend when the courts of many contracting States construe the term ‘void’ narrowly. Accordingly, the

¹⁴² El Ahdab and El Ahdab (n 11) 843.

¹⁴³ ‘Case No. 32884, the Supreme Court at the Capital City of Sana’a -Commercial Circuit, 2008’ (2009) 1 Int’l J Arab Arb 230.

¹⁴⁴ See, *Civil and Judicial Legal rules series* (in Arabic) issued from Yemeni Supreme Court for the period 14 July 2003 to 21 June 2005, appeal number 20837 Year 1424 AH 92.

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wide range of occasions in which the 'void' exception may be invoked leads to the perception that national courts may interpret it in a very liberal manner, which will open the door for more grounds of invalidity of arbitration agreements and further possibility for setting aside and not enforcing arbitral awards.

The problem arises out of the way in which these substantive validity exceptions in the above provisions are, or would be, interpreted by the Yemeni courts in contrast to the exceptions' uniform interpretation under the NYC. One may investigate to what extent a court can produce a valid international arbitration agreement when seeking to enforce a foreign arbitral award in Yemen. In other words, what will be the consequences of a failure to fulfil the substantive validity requirements that are expressly regulated in the YNDAA? Presumably, in the light of the Yemeni courts' conclusions above, the general provisions relating to 'void' exception would be extensively interpreted by Yemen courts. It should always be borne in mind that not every subtle ground affecting the arbitration agreement deserves the same treatment. It is submitted in this respect that the Yemeni courts should always support the validity of the arbitration agreement and focus mainly on the consent of the arbitral parties. As Margaret L. Moses observes, the 'validity of an arbitration agreement is for the most part a question of consent, and whether there is consent is governed by ordinary principles of contract law.'¹⁴⁵

Pursuant to the interpretation of the cases above as well as the absence of a clear goal of favouring arbitration under the YNDAA and, it can be said that the YNDAA does not adopt a pro-arbitration attitude. The author believes this liberal approach to interpretation will render the arbitration agreements invalid in most cases. Of course, the situation would be different in the event that Yemen ratifies the NYC. In that case, the substantive grounds of invalidity would be 'construed narrowly and the invalidity of the arbitration agreement would be accepted in manifest cases only'.

¹⁴⁵ Moses (n 3) 65.

3.3.2.4 Art. II(3) of the NYC *vs* Art. 59(1) of the YNDAA

In the light of the foregoing discussion, certain differences have been noticed in interpreting the substantive grounds of invalidity under Art. 59(1) of the YNDAA in contrast to Art. II(3) of the NYC. From these, some points may be drawn as follows:

- a) In contrast to the exceptions of Art. II(3) and their narrow interpretation, Art. 59(1) of the YNDAA has adopted a liberal approach of interpreting the exceptions for the validity of an arbitration agreement, which is also contrary to the narrative approach adopted in many other jurisdictions.¹⁴⁶
- b) Whilst Art. II(3) of the NYC is most frequently interpreted in the light of the ‘pro-arbitration’ attitude of the Convention, which relies on the presumptive substantive validity of arbitration agreements, Art 59(1) of the YNDAA sets out an array of grounds which may affect the invalidity of the arbitration agreement. Pursuant to many provisions in the YNDAA, the arbitration agreement will be deemed void in many cases and this is due to the wide range of meanings of the term ‘void’ under the Act. It is clear that the YNDAA does not adopt a ‘pro-arbitration’ attitude and that Yemen’s legislators should rather mainly consider the arbitral parties’ intention as indicated in their agreement to arbitrate. With the proviso that the arbitral parties’ intentions to conduct arbitration are evidently set out in an accepted method of communication, ‘reflect the parties’ consent, and do not breach public order, the arbitration agreement should be valid.’¹⁴⁷
- c) Considering the judicial practice in Yemen in determining the substantive grounds of invalidity of the arbitration agreement, it is clear that the courts have some difficulty in adopting the narrative approach in favour of the validity of the

¹⁴⁶ Derek Auchie, ‘The Liberal Interpretation of Defective Arbitration Clause in International Commercial Contract: a Sensible Approach?’ (2007) Int’l ALR 206.

¹⁴⁷ Zhu Weidong, ‘Determining the Validity of Arbitration Agreements in China: Towards a New Approach in (2010) 6 AIAJ 44,61.

arbitration agreement, unlike the courts of contracting States, which continued to support narrative approach on interpretation the validity exceptions. That is, many courts in different jurisdictions when determining the validity of the arbitration agreement attempt to give effect to the arbitration agreement to a higher degree of possibility¹⁴⁸ and, more particularly, consider that ‘any and all ambiguities must be interpreted to support arbitration.’¹⁴⁹

3.4 Conclusion

Under the NYC, the limited nature of the substantive validity exceptions set out in Art. II(3) provide another example of uniformity of interpretation. The case law and international commentaries on Art. II(3) suggest that the narrative construction of its exceptions represents the pro-enforcement bias policy of the Convention. Many States have succeeded in applying this policy and rarely accept a defence under these exceptions. From this, the courts of contracting State have affirmed the presumptive validity of arbitration agreements and have not held that arbitration agreements are substantively invalid except in manifest cases. Hence, the courts have generally been reluctant to refuse the enforcement of both arbitration agreements and awards under those exceptions. The same is also true under English law and practice.

Shari’ah law, on the other hand, emphasises the importance of three contractual requirements in relation to the substantive validity of an arbitration agreement, such as the existence of the disputes, the consent of the parties and the appointment of an arbitrator duly qualified under Shari’ah to determine the dispute. Depending upon these three contractual requirements the status of the substantive validity of the arbitration

¹⁴⁸ Norbert Horn, ‘The Arbitration Agreement in Light of Case Law of the UNCITRAL Model Law (Arts 7 and 8)’ (2005) Int’l ALR 146.

¹⁴⁹ Anthony Dileo, ‘The Enforceability of Contractual Agreements to Arbitrate: A Survey of the Last Three Years of Jurisprudence’ (2008) 56 La Bar J 174, 177.

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agreement will be either valid or null and void. However, out of the three requirements, it seems the consent of the arbitral parties probably has the greatest weight according to the majority of Islamic scholars. Hence, others restrictive requirements have been abandoned by many Middle East arbitration laws, including those of Yemen.

Under the YNDAA, the substantive validity exceptions are slightly different in contrast to Art. II(3) of the NYC, but are greatly in another direction in terms of their interpretations. Art. 59(1) of the YNDAA stipulates three exceptions to substantive validity and contains no guidance on the contents of these exceptions. The provision only requires the examination of these terms in broad terms with no further elaboration. Considering the judicial practice in Yemen in determining those exceptions, it is clear that the courts have some difficulty in adopting the narrative approach in favour of the validity of the arbitration agreement. Although such case law is regarded under the setting aside of arbitral awards, one should assume that a similar conclusion will be reached under the enforcement stage since the YNDAA is entirely silent in this issue.

Accordingly, there is a higher risk facing the substantive validities of international arbitration agreements under the YNDAA and hence arbitral awards may ultimately be rendered invalid in most cases. Put different, it is clear that the YNDAA does not adopt a pro-enforcement bias attitude in this matter. Thus, the author believes that Yemen should follow the NYC contracting State's approach when interpreting the substantive validity exceptions of the arbitration agreement and abandon some of the superfluous exceptions of the YNDAA. The only way of doing so is by ratifying the Convention. In that case, the substantive grounds of invalidity would be narratively construed and the invalidity of the arbitration agreement would be only accepted in the manifest cases.

The preceding chapters in Part I of this thesis have examined the invalidity of the arbitration agreement as a ground for refusal of the enforcement of foreign arbitral award and focused particularly on the doctrine of separability and the law applicable to the

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international arbitration agreement (Chapter 1), the formal grounds of invalidity of the international arbitration agreement (Chapter 2), the substantive grounds of invalidity of the international arbitration agreement (Chapter 3), and the important role the NYC can play in the Yemeni context regarding those issues.

The above grounds of invalidity of international arbitration agreements may in some cases be covered by the public policy ground, a catch-all provision contained in Art. V(2)(b) of the NYC.¹⁵⁰ The public policy ground is one of the most controversial grounds of enforcement of foreign arbitral awards and therefore has been likened to an ‘unruly horse and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail.’¹⁵¹

The chapters in Part II of this thesis attempt to examine the public policy violation as another crucial ground for refusal of the enforcement of foreign arbitral awards under the NYC and the YNDAA. Ultimately, these chapters will also attempt to uncover several lessons that Yemen’s legislation and the Yemen’s judicial system can learn from the interpretation and application of the public policy exception by the courts of contracting States. Thus, Chapter 4 examines the consensus understanding of the public policy defence in international commercial arbitration, Chapter 5 analyses how the classifications of public policy constrict the scope of the public policy exception, and Chapter 6 focuses on the judicial exercise of the application of public policy from the international perspective and how the courts of contracting States apply a pro-enforcement policy.

¹⁵⁰ Hanotiau and Caprasse (n 23) 798.

¹⁵¹ *Richardson v Mellish* [1824-34] All ER 258, [266] (Court of Common Pleas) Burrough J

PART II

Public Policy Violation

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Considering the Unruly Horse - The Notion of Public Policy

... [A] mere violation or incompatibility with local laws does not cause an award to violate public policy.¹

4.1 Introduction

Art. V(2)(b) of the NYC stipulates the following:

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

One of the most controversial challenges under the public policy exception as a ground for refusing to enforce a foreign arbitral award is the lack of a definite notion,² and thus some may consider the public policy exception to be a ‘vague and variable phenomenon’.³ The NYC leaves the enforcing court to determine the public policy notion and thereby Art. V(2)(b) establishes an acknowledgement of the essential right of the courts of a contracting State to determine what constitute public policy within their own jurisdiction.⁴ However, this exception creates a loophole that can undermine the Convention’s objective.⁵

¹ Dirk Otto and Omaia Elwan, ‘Article V(2)’ in Herbert Kronke and Patricia Nacimiento, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer 2010) 365.

² James Fry, ‘De’sordre Public International under the New York Convention: Wither Truly International Public Policy’ (2009) 8 Chinese J Int’l L 81.

³ Monrad Paulsen and Michael Sovern, ‘Public Policy in the Conflict of Laws’ (1956) 56 Colum L Rev 969, 973.

⁴ Pierre Mayer and Audley Sheppard, ‘Final ILA Report on Public Policy as A Bar to Enforcement of International Arbitral Award’ (2003) 19 Arb Int’l 249.

⁵ Audley Sheppard and Clifford Chance, ‘Public Policy and the Enforcement of Arbitral awards: Should there be a Global Standard?’ (2004) 1 TDM para 3.

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For this reason, the International Law Association Committee⁶ (hereinafter the ILA) decided to prioritize work on the interpretation and application of the public policy exception by the courts of the NYC contracting States. This work concluded with two reports, the Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, and the Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards⁷ (hereinafter, the ILA Interim Report and the ILA Final Report).⁸

Under Shari'ah, on the other hand, the notion of public policy as a ground for refusing the enforcement of international arbitral awards is a major concern to foreign investors.⁹ This is mainly because Shari'ah prohibits *Riba* (usurious interest) and *Gharar* (speculative contracts), which lead to foreign arbitral awards not being enforced under the public policy exception.¹⁰

This chapter examines the approaches taken by the contracting States when dealing with public policy content under the NYC. It also explores the scope and content of public policy in the contexts of Shari'ah and Yemeni law in order to define the extent of compliance of the NYC's public policy, as interpreted by contracting States, with Shari'ah principles. On such account references are made to relevant Middle Eastern contracting States that adopt Shari'ah in their legislation, such as Saudi Arabia, with a view to acquire a better understanding of the content of public policy as an exception at the enforcement stage.

⁶ International Law Association Committee on International Commercial Arbitration on the topic of Public Policy as a Ground for Refusing Recognition and Enforcement of International Arbitral Awards.

⁷ Audley Sheppard, 'Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 Arb Int'l 217; Mayer and Sheppard (n 4).

⁸ This Final Report should be read together with the Interim Report, see Mayer and Sheppard (n 4) 249.

⁹ Nancy Turck, 'Dispute Resolution in Saudi Arabia' (1988) 22 International Law 415; Mary Ayad, 'Harmonisation of International Commercial Arbitration Law and Sharia'(2009) 6 MqJBL 93; Charles Brower & Jeremy Sharpe, 'International Arbitration and the Islamic World: The Third Phase' (2003) Am J Int'l L 643.

¹⁰ Mark Wakim, 'Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East' (2008) 21 NY Int'l L Rev 25; Faisal Kutty, 'The Shari'ah Factor in International Commercial Arbitration' (2006) 28 Loy LA Int'l & Comp L R 565.

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The chapter begins by outlining the importance of the public policy exception in the enforcement context and under Shari'ah. It then examines the definition and understanding of the doctrine of public policy, and addresses the public policy exception under the NYC, focusing especially on its application in English judicial practice. Finally, this chapter analyses the notion under Shari'ah and Yemeni arbitration legislation, drawing also on the interpretation of the notion in Saudi Arabia as an Islamic contracting State.

4.2 The Importance of Public Policy in the Enforcement Context and from the Shari'ah Perspective

The public policy exception in the context of private international law provides an escape strategy designed to defend the fundamental, mandatory policies of national legal systems.¹¹ It is considered one of the most notable principles in international relationships since it provides a degree of protection of the States forum and endeavours to thwart any 'fundamental moral convictions or policies of the forum'.¹² Similarly, in the enforcement context, the function of the public policy exception is to identify the limits between the interests of the forum, on the one hand, and the respect of party autonomy as a principle in private settlement of disputes and the finality of foreign awards, on the other hand.¹³

In this respect, it must be noted that the enforcement court should not determine whether the entire award violates the public policy of the State, but rather it must only consider whether the enforcement itself would lead to a result that violates public policy.¹⁴

¹¹ Lawrence Collins and others (ed) et al, *Dicey, Morris & Collins on the Conflict of Laws* (14th ed, Sweet & Maxwell 2006) 230-237.

¹² Gary Born, *International Commercial Arbitration Commentary and Materials* (2nd edn, Transnational publisher. Inc and Kluwer 2001) 816

¹³ Sheppard and Chance (n 5) para 1.

¹⁴ Otto and Elwan (n 1) 365-366.

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Therefore, the significance of public policy in Art. V(2)(b) appears to be that it acknowledges the power of the contracting State to have the ultimate say in the matter of a foreign arbitral award where it is sought to be enforced.¹⁵

However, the public policy exception is considered a ‘helpful tool’ and also a ‘dangerous weapon’.¹⁶ On one hand, it is considered helpful when it protects the forum’s interest and allows the court to reject the enforcement of a foreign arbitral award where it finds there is a serious violation to its fundamental principles if the award is enforced.¹⁷ For this reason, it has been described as a ‘safety valve’¹⁸ and an ‘escape device’.¹⁹ On the other hand, it can be considered a dangerous weapon when it offends policies of other jurisdictions or is misused by national judges.²⁰ For instance, Yelapaala argues that the public policy exception ‘constitutes a potentially treacherous tool for judges at times too eager to reach subjective rather than legal conclusion’.²¹ Thus, some argue that the public policy exception in Art. V(2)(b) can undermine the NYC’s central objective and should therefore be removed.²²

¹⁵ Julian Lew and others et al, *Comparative International Commercial Arbitration* (Kluwer 2003) para 26-114.

¹⁶ Loukas Mistelis, ‘Keeping the Unruly Horse in Control or Public policy as a Bar to Enforcement of (Foreign) Arbitral Awards’ (2000) 2 Intl L FORUM dr Int’l 248, 248.

¹⁷ Peter Turner and Jan Paulsson, ‘Grounds for Refusal of Recognition and Enforcement Under the New York Convention: A Comparative Approach’ (UNCITRAL, Experts Group Meeting on Disputes Resolution and Corporate Governance, Vienna 2003) 7.

¹⁸ Susan Choi, Note, ‘Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions’ (1997) 28 NYU J Int’l L & Pol 197.

¹⁹ Gary Born, *International Commercial Arbitration* (Kluwer 2009) 2828.

²⁰ Jane Paulsson, ‘The New York Convention in International Practice- Problems of Assimilation’ in Marc Blessing (ed), *New York Convention of 1958* (ASA Special Series, No.9 1996) 100; Egbedi Tamara, *An Analysis Of The Effect Of Public Policy On Party Autonomy In International Arbitration* (2008) CEPMLP Annual Review 1.

²¹ Kojo Yelapaala, *Restraining the Unruly Horse: The use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California*, (1989) 2 Transnat’l Law 394.

²² Kristin Roy, ‘The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?’ (1995) 18 Fordham Int’l L J 924.

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However, this argument quite plainly misses the mark, since Art. V(2)(b) empowers the courts to assure that their basic principle, interests, religion and morals are protected from any serious offense.²³ So, why do most private international law conventions and many national private international law legislation encompass similar provisions to the public policy exception?²⁴ The role of public policy under the NYC is particularly important in the sense of providing clear guidance for articulating the position of fundamental principles in the forum. For that reason, there is ample case law to show that public policy violation under Art. V(2)(b) requires proving that the award is manifestly irreconcilable with a fundamental principle of national law.²⁵ It is not surprising then that 148 States have ratified the NYC as they intended to safeguard their fundamental interests in the international context by the public policy provision.

Shari'ah likewise embodies this same consideration regarding the important role of the public policy exception, although differences between public policy under Shari'ah and public policy in the non-Islamic countries still exist.²⁶ Therefore, most of the existing laws, which prevent arbitration on certain subject matters, often refer to the public policy exception.²⁷ Public policy under Shari'ah is, in its essence, no more than a response to the practical and basic needs of each society, although it is considered 'nebulous and ambiguous entities which may at times overlap with Sharia, and at other times contradict it'.²⁸ Accordingly, the exception opens the door to enforcing the courts' interpretation in evaluating whether there is a violation of Shari'ah principles in the State or not. This has

²³ Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer 1981) 360.

²⁴ Inter-American Convention, Art. 5(2)(b); Washington Convention of 1965, Art.52 and Art. 53(1); English AA 1996, s103(3); Swiss PIL, Art. 194; Japanese Arbitration Law, Art. 45(2)(ix).

²⁵ *Thales Geosolutions Inc. (US) v Fonseca Almeida Representações e Comércio Ltda. - FARCO (Brazil)*, (2007) XXXII YBCA 271, (Brazil Superior Court of Justice 2006); *Construction company (UK) v Painting contractors (Germany)*, (2006) XXXI YBCA 722, (Germany, Munich Court of Appeal 2005); *Buyer (Austria) v Seller (Serbia and Montenegro)*, (2005) XXX YBCA 421, (Austria, The Supreme Court 2005).

²⁶ Kutty (n 10).

²⁷ Mary Ayad, 'International Commercial Arbitration Award Enforcement at the Crossroads of Sharia Law and Order Public in MENA: Paving the Golden Path towards Harmonization' (2009) 10 JWIT 723

²⁸ *ibid* 735.

a great impact at the stage of enforcement to protect the Islamic countries' fundamental principles.

4.3 The Definition and Understanding of the Doctrine of Public Policy

The vagueness of the public policy definition has been the subject of debate in the enforcing courts' interpretation and among commentators.²⁹ From its origin, public policy appears to have been the subject of efforts to reach an accurate definition.³⁰ Thus, the author agrees with the prevailing view of many commentators that public policy is controversial in numerous circumstances and remains notoriously problematic to define.³¹ Some, such as Yelpaala, argue that it is 'vague, nebulous, intractable, and lacks meaningful and consistent contours that can guide its definition and application'.³² Others, such as Winfield, further described it as a 'chameleon, it seems to be seriously influenced by its environment, surrounding circumstances, and the purpose for its use'.³³ Furthermore, in the words of one judge, the public policy exception is the 'Ghost of Banquo which slips in when least expected'.³⁴ There is no doubt that public policy is a vague expression and it is not a prevalent term in commercial matters, hence it is considered an ambiguous term in the legal field. It embraces many features with different contents from one state to another and defies a definite and consistent understanding.

However, in order to have a better understating of this controversial exception, one may attempt to find the reasons behind the elusiveness of the notion of public policy. One way

²⁹ Arthur Nussbaum, 'Public Policy and the Political Crisis in the Conflict of Laws' (1940) 49 Yale L J 1027.

³⁰ Percy Winfield, 'Public Policy in the English Common Law' (1928) 42 Harv L Rev 76.

³¹ Born (n 19) 2827; Bernard Hanotiau and Olivier Caprasse, 'Public policy in International Commercial Arbitration' in Emmanuel Gaillard and Domenico di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2008) 788; Sheppard and Chance (n 5) para 2; Lew and others (n 15) para 26-115.

³² Yelpaala (n 21) 381.

³³ Winfield (n 30) 94.

³⁴ Goodrich, 'Foreign Facts and Local fancies' (1938) 25 Va L Rev 25, 25.

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of doing that is by giving particular attention to different contracting States' jurisdictions that attempt to identify the public policy exception and that have to some extent created a limited framework of the notion.

For instance, in the US, public policy is defined as 'the most basic understanding by courts of morals and justice'.³⁵ The use of the words 'understanding by court' indicates that public policy must be analysed only by the national court, conferring full power upon the national court to determine what should be included in the term public policy and what should not. Accordingly, the US Second Circuit Court of Appeals pointed out that public policy would be breached only if it violates the forum 'most basic notions of morality and justice'.³⁶ It is critical, however, that the language of the US standards where acknowledging public policy exception is merely based on the grounds of domestic conception. That is to say, most of the US courts cite this language as a standard for their interpretation.³⁷ Admittedly, this language could be very helpful in providing clear guidance to enforcement courts. It may be argued that the US Courts³⁸ applying this standard appear solely to say 'was is' not 'part of' the 'most basic notions of morality and justice' in a piecemeal fashion.³⁹ However, this view appears to be overly simplistic rather than realistic. Providing these standards, when dealing with the public policy exception, would help create a uniform understanding of public policy defence in

³⁵ Pavlova, 'Some Grounds for Refusal to Recognize and Execute Foreign Arbitral Awards' in Official Edition of Higher Arbitration Court (HAC) of the RF' (*Vestnik VAS of the RF*, special edition to No. 3, 1999) 22–23 in Diana Tapola, 'Enforcement of Foreign Arbitral Awards: Application of the Public Policy Rule in Russia' (2006) 22 *Arbitration International* 151, 151 fn.1.

³⁶ *Parsons & Whittemore Overseas Co. Inc. v Société Générale de l'Industrie du Papier (RAKTA), Bank of America*, 508 F.2d 969, para [9] (US, Court of Appeals 2nd Circuit 1974).

³⁷ *Victrix S.S. Co. v Salen Dry Cargo AB*, 709 F.2d 825, (US SDNY 1986); *Waterside Ocean Nav. Co. v International Nav.*, 737 F.2d 150 (US, Court of Appeals 2nd Circuit 1984); *McDonnell Douglas Corp. v Kingdom of Denmark*, 607 F. Supp 1016 (US, ED Missouri 1985).

³⁸ Joel Junker, 'The Public Policy Defense to the Recognition and Enforcement of Foreign Arbitral Awards' (1977) 7 *California Western ILJ* 228.

³⁹ *Konkar Indomitable Corp. v Fritzen Schiffsagentur und Bereederungs-GmbH*, 1981 US Dist LEXIS 9637, (US, SDNY 1981).

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many States. As Stewart asserts, this type of standard is seen as making the US approach to the public policy defence ‘increasingly internationalist’.⁴⁰

Moreover, a Russian court has concluded in defining the term public policy that when the basic political and legal system of the Russian Federation would be violated, it is considered a case of public policy violation.⁴¹ Likewise, in Canada, the public policy was indicated, in the arbitration scenario, to be the incompatibility of the award with the fundamental principles of public morals.⁴² In Germany, a similar idea has been adopted, as public policy is indicated as being what does not undermine ‘good customs and the purposes of German law’.⁴³ Furthermore, public policy can be primarily affected by culture and religions, as Andrew points out:

On grounds of faith some sorts of crimes considered horrendous are punishable by the severing of limbs in some countries operating Sharia Law, while in some other countries the severance of limbs is not only against public policy but is in itself punishable as a crime, based equally on religious considerations. Public policy principles are not always notable for objectivity or rationalism therefore. They also shift easily based on the mood of the society or its leaders or rulers. In the heydays of the cold war it would be against public policy in Europe and the USA for instance to have some sorts of dealings with a government corporation or even a resident of a member of the Warsaw Pact whereas it would not be so today.⁴⁴

It can be said that although all definitions share one comprehensible idea of public policy as connected to the basic principles of the State, the term remains very difficult to define for the following reasons. First, most of above definitions contain such essentially contested concepts as morals, justice, basic notions, basic principles of the political and social system as well as fundamental principles and good customs of each society. These

⁴⁰ David Stewart, ‘National Enforcement of Arbitral Awards under Treaties and Conventions’ in Richard Lillich and Charles Brower (eds), *International Arbitration in the 21st Century: Towards “Judicialization” and Uniformity?* (Hotei Publishing 1994) 166; Born, *Commentary and Materials* (n 12) 827.

⁴¹ *Kotraco v V/O Rosvenshtorg*, (1998) XXIII YBCA 735, (Russian Federation, Moscow District Court 1995).

⁴² Doak Bishop, *Enforcement of Awards under the New York Convention* (Cameron May 1990) 19.

⁴³ D. V. Tapola, ‘Enforcement of Foreign Arbitral Awards: Application of the Public Policy Rule in Russia’ (2006) 22 Arb Intl 151.

⁴⁴ Andrew Okekeifere, ‘Public Policy and Arbitrability under the UNCITRAL Model Law, (1999) 2 Int ALR 70, 71.

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are concepts of sufficient complexity as to generate continuous and independently unresolvable debate as to their precise meaning and scope. Although these concepts can be shared by most developed arbitration jurisdictions,⁴⁵ their sources of interpretations and applications commonly differ from one State to another. This is because the notion of public policy is essentially relative and depends on time and place for its meaning and scope. In other words, the notion is both geographically relative and chronologically relative.⁴⁶

Second, the public policy notion can be territorial or extraterritorial in its scope. Territorial is intended for a national relationship and this relation does not contain foreign factors, whereas the extra-territorial is intended for an international relationship, which encompasses foreign factors. This diversity would make the notion more unruly since it is too complex to be restricted.⁴⁷

Third, the notion of public policy is always connected to the basic principles and morality of any society which the enforcing court is bound to protect; however, these principles are also variable and continuously evolving. These fundamental concepts are constantly in flux based on, for instance, the evolving attitude of the society or the regime ruling that society.⁴⁸ Indeed, public policy is a 'particularly fleeting' notion, which in the words of Hanotiau and Caprasse, 'probably borrows part of its majesty from the mystery by which it is surrounded'.⁴⁹

⁴⁵ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, (4th edn, Sweet and Maxwell 2004) 497.

⁴⁶ *De Santis v Russo* [2001] QSC 65(Australia, Queensland Supreme Court 2001) para 20, Atkinson J; Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer 1987) 262-263.

⁴⁷ Salah Al-Den Jamal Al-Den, 'The Public Policy Concept in private International Relations-between National Legislation and Shari'ah' (in Arabic, 1st edn, Dar Al Fikr Al Jamaei 2004) 26-32 (the author's translation).

⁴⁸ For more details on Relativity, Extra-territoriality and Fundamentality nature of public policy see Winnie (Jo-Mei) Ma, 'Public Policy In The Judicial Enforcement of Arbitral Awards: Lessons For and From Australia' (PhD Thesis, Bond University, United Kingdom 2005) 59-68; See also Salah Al-Den Jamal Al-Den, ' the Public Policy Concept in private International Relations-between National Legislation and Shari'ah' (in Arabic, 1st edn, Dar Al Fikr Al Jamaei 2004) 26-32 (the author's translation).

⁴⁹ Hanotiau and Caprasse (n 31) 788.

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For these reasons, considerable efforts have been made by the ILA to attempt to define public policy on the ground of ‘violations of basic notions of morality and justice’. The ILA Committee tried to observe how public policy is applied from international prospective as well as national legislations. Hence, ‘[i]t appears that there is one universally accepted definition of public policy. It is clear that [it] reflects the fundamental economic, legal, moral, political, religious, and social standards of every state or extra-national community’.⁵⁰

Furthermore, in an attempt at harmonisation, the ILA Committee sets out guidance for classification of public policy as a bar to enforcement into procedural or substantive. Procedural public policy could likely include the following: fraud in the composition of the tribunal; breach of natural justice, lack of impartiality, lack of reasons in the award, manifest disregard of the law, manifest disregard of the facts, annulment at place of arbitration.⁵¹ Substantive public policy, on the other hand, includes the following: mandatory rules, fundamental principles of law, actions contrary to good morals, and national interests.⁵² Although this classification could be considered clear guidance, it is not widely accepted since it has been established from case law in a limited number of States. Hence, it is may be argued that regardless of these efforts, public policy remains by its nature dynamic, so the suggested classification can crystallise public policy only at a certain period of time.⁵³ However, the ILA interim report, at least, provides some clear guidance for the courts to follow when determining the public policy exception.

The question that arises then is what sources of standards can be used to determine States’ interests, political, religious and basic notions of morality and justice? The best approach to answer this question could be found in the Chinese experience. Chinese law refers to the ‘social and public interest’, which is considered a potentially more oblique

⁵⁰ Matti Kurkela & Hannes Snellman, *Due Process in International Commercial Arbitration* (Oceana Publications 2005) 11.

⁵¹ Sheppard (n 7) 238.

⁵² *ibid* 244.

⁵³ Lew and others (n 15) para 26-117.

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concept, rather than to 'public policy'.⁵⁴ Thus, the Supreme People's Court has issued a statement of criteria on which the 'social and public interest' term can be interpreted, stating that 'under what circumstances does the principle of public policy interest apply? The principle of public interest can apply where breaches of fundamental principles of Chinese law, notational sovereignty or national security, or breaches of the principle of social ethics and fundamental moral value'.⁵⁵ By substantiating these principles, it will be appropriate to clarify and simplify the meaning of public policy in the enforcing state. Also, it could be more appropriate to state the breaches of these fundamentals by available examples beforehand for any party that wishes to enforce an arbitral award in that territory. These would be of practical importance since the NYC provides no particular definition of the term public policy and offers no clear guidance to how this term is to be applied.

Accordingly, it is submitted that this approach can provide a good illustration for some other jurisdictions, particularly Yemen, in order to indicate within their constitutional law or even provide some guidelines for the enforcement courts to be followed regarding the public policy issues. Chang-fa Lo argues that since public policy is about collective morals and fundamental values of a society, it unquestionably can be formed jointly by the community and thus needs a legal arrangement of the country itself.⁵⁶ Indeed, society plays a major role in deciding what public policy should encompass.

Ultimately, the notion of public policy is considered a collective of principles in each community; thus, it may include many aspects of culture and social affairs or further embrace a new value for the community when it is frequently practiced as a public policy concern.⁵⁷ It is clear, therefore, that understanding the conception of public policy differs from country to another and commonly emerges as a traditional defence from the court

⁵⁴ Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 660.

⁵⁵ Friven Yeoh, 'Enforcement of Dispute Outcomes', in Moser (ed), *Managing Business Disputes in Today's China* (Kluwer 2007) 259, 274 in Blackaby (n 54) 660. fn.161.

⁵⁶ Chang-fa Lo, 'Principles And Criteria For International And Transnational Public Policies In Commercial Arbitration' (2008) 1 *Contem Asia Arb J* 67.

⁵⁷ *ibid.*

analysis, which may create hurdles at the enforcement stage of arbitral awards. It may be further added that a comprehensive definition of public policy can never be proffered; nonetheless, the notion of public policy should be approached with extreme caution.⁵⁸ Therefore, in the context of enforcement under the NYC, Art. V(2)(b) of the NYC, public policy is given a narrower meaning than the ordinary meaning discussed above.

4.4 Public Policy under Art. V(2)(b) of the NYC

Again, the NYC explicitly recognises the significance of the public policy exception in the international arena and further respects the domestic interest of each contracting State where enforcement is sought. Pursuant to Art. V(2)(b), the enforcing State may refuse to enforce an arbitral award if it violates the State's public policy. Unlike the Geneva Convention,⁵⁹ the NYC does not contain an indication to 'principles of law'.⁶⁰ In essence, this has been interpreted as a limitation of the public policy's scope to only fundamental matters; therefore, any violation of national laws should not be considered a violation of its public policy.⁶¹ This interpretation is of particular importance since it isolates the fundamental issues relating to national laws from a restricted understanding of public policy under the Convention. However, a considerable conflict would arise between the main objective of the Convention to produce a uniform enforcement regime, on the one hand, and the powers it grants for the enforcing courts in Art. V(2)(b) to maintain superior control over the international arbitral process, especially at the refusal stage, on the other hand.⁶²

⁵⁸ *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras Al-Khaimah National Oil Company* [1987] 2 Lloyd's Rep 246, (CA)

⁵⁹ Convention on the Execution of Foreign Arbitral Awards, Geneva of 1927, Art. 1.

⁶⁰ Albert Jan van den Berg (ed), *50 Years of the New York Convention; ICC International Arbitration Conference* (Kluwer 2009) 365.

⁶¹ van den Berg (n 23) 360.

⁶² Lew and others (n 15) para 26-142.

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Therefore, the public policy notion in international relationships should be narrowly construed in order to promote a global and consistent understanding of this term. This limitation can also be understood from the modification of the Geneva Convention since the drafters intended to limit the public policy clause as far as possible.⁶³ Nonetheless, some commentators are of the view that there remains disagreement regarding this interpretation, since the Convention did not define public policy directly.⁶⁴ As mentioned previously, attempting to clarify the possible interpretation of the notion of public policy under the Convention, the ILA interim Report sought to limit the interpretation of public policy to some particular cases in which enforcement would distinctly be ‘contrary to the basic principles of the legal system of the country where the award is invoked’.⁶⁵ Indeed, the ILA provides excellent direction and source of guidance for the enforcing courts when examining the public policy exception.⁶⁶

Therefore, the Convention’s significance in this matter is that it provides a distinction between national public policy and international public policy. As Professor van den Berg observes:

[This distinction] means that what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. According to this distinction, the number of matters considered as failing under public policy in international cases is smaller than that in domestic ones. The distinction is justified by the differing purpose of domestic and international relations.⁶⁷

Domestic public policy is considered and identified by national legislation and national judges and this varies from one country to another. International public policy, by

⁶³ van den Berg (n 23) 361-368.

⁶⁴ Fry (n 2).

⁶⁵ Sheppard (n 7)

⁶⁶ Christopher Gibson, ‘Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law’ (2009) 113 Penn State L Rev 101

⁶⁷ Albert Jan van den Berg, ‘The New York Convention: Summary of Court decisions’ in Marc Blessing (ed), *The New York Convention of 1958* (ASA special Series No. 9, 1996) 47

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contrast, as defined by the Luxembourg Superior Court is ‘all that affects the essential principles of the administration of justice or the performance of contractual obligations’.⁶⁸ In addition, the ILA has sought to offer a definition of international public policy as ‘part of the public policy of a state which, if involved, would prevent a party from invoking foreign law or foreign judgment of foreign award’.⁶⁹ The ILA simply suggests a narrow description of international public policy to certify that public policy is ‘rarely a ground of refusing enforcement of international arbitral awards’.⁷⁰ Further, the ILA intended to limit the public policy exception when it applies at the enforcement stage rather than at the time when the award itself was rendered.⁷¹ The ILA favours resolving the relative nature of the notion and hence public policy in international cases is treated more narrowly than in domestic cases. For this reason, the majority of court decisions adopt the approach that the NYC refers to the concept of ‘international public policy’ rather than ‘domestic public policy’.⁷²

It is true, the clear language of Art. V(2)(b) indicates an application of domestic public policy of the enforcing forum in the context of enforcement proceedings when the arbitral award would be contrary to the public policy of that country. Nonetheless, the critical preliminary issue is whether public policy stated under the NYC refers solely to domestic public policy or to a more international public policy.⁷³ Hence, it is important to reconcile the discrepancies on this matter in the following discussion in order to help reduce these interpretational inconsistencies.

⁶⁸ *Kersa Holding Company Luxembourg v Infancourtage, Famajuk Investment and Isny*, (1996) XXI YBCA 617, 624, (Luxembourg Court of Appeal 1993)

⁶⁹ Mayer and Sheppard (n 4) 251.

⁷⁰ *ibid* 253.

⁷¹ *ibid* 228.

⁷² See Chapter 5 point 5.2.2 page 194

⁷³ *Smart Systems Technologies Inc. v Domotique Secant Inc.*, (2008) XXXIII YBCA 464, (Canada, Quebec Court of Appeal 2008); Michael Pryles, “Reflections on Transnational Public Policy” (2007) 24 J Int’l Arb 1; Micheal Hwang & Andrew Chan, ‘Enforcement and Setting Aside of International Arbitral Awards-The Prespective of Common Law Countries’ in Albert Jan van den Berg ed, *International Arbitration and National Courts: The Never Ending Story* (Kluwer 2001) 156.

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Many eminent scholars approve the application of international rather than domestic public policy for the purpose of the enforcement of arbitral awards under Art. V(2)(b).⁷⁴ More recently, Dirk Otto and Omaia Elwan support this interpretation of public policy within Art. V(2) of the NYC.⁷⁵ As judicial support, the Paris Court of Appeals, like many other national courts, has held that ‘a breach of domestic public policy, assuming that it has been established, does not provide the grounds of which appeal against a ruling granting enforcement in France of a foreign arbitral award’.⁷⁶ Further, several national arbitration statutes embodied the application of ‘international public policy’ in the context of enforcement proceeding under Art. V(2).⁷⁷

In contrast, some scholars and courts, as well as some national legislation, have adopted the view that the relevant public policy under Art. V(2)(b) is the public policy of the enforcement forum. Redfern and Hunter, for instance, argue that the public policy referred to in the NYC is the enforcing State’s public policy based on the clear wording of Art V(2)(b) itself.⁷⁸ In terms of judicial support for this approach, the Austrian Supreme Court, for instance, has refused to enforce a Dutch award as it violated the Austrian public policy prohibiting a purchase on a margin basis (*Differenzgeschäfte*).⁷⁹ The Court held that no distinction between domestic and international public policy under Art. V(2)(b) of the NYC could be made since the wording of the article ‘refers clearly to cases where an award is contrary to the public policy of the country where it

⁷⁴ Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard and Goldman on International Commercial Arbitration* (Kluwer 1999) para 1711; Mayer and Sheppard (n 4) ; Jane Paulsson, ‘The New York Convention in International Practice- Problems of Assimilation’ in Marc Blessing (ed), *New York Convention of 1958* (ASA Special Series, No.9 1996) 100-133; Albert Jan van den Berg, *The New York Convention of 1958* (Kluwer 1981) 382.

⁷⁵ Otto and Elwan (n 1) 366.

⁷⁶ *Intrafor Cofor v Gagnant*, (1985) Rev arb 299 (Paris Court of Appeals 1985) in Gaillard and Savage (n 74) para 1502 fn. 203.

⁷⁷ French New Code of Civil Procedure, Art. 1502(5); Lebanese New Code of Civil Procedure, Art. 817(5) and Algerian Code of Civil Procedure, Art. 458 para 23(h); Portuguese Code of Civil Procedure, Art.1096(f); in addition to the Romanian Law 105/1992 on the Settlement of Private International Law Relations, Art. 168(2) and Art. 174.

⁷⁸ Redfern and Hunter (n45) 457-458; see also Jamal Ogniah, ‘Enforcement of Foreign Arbitral Award; Comparative Study’(in Arabic, PhD Thesis, Dar Al Nahdah 2009) 257.

⁷⁹ *Not Indicated v Not Indicate*, (1985) X YBCA 421, (Austria Supreme Court 1983); *Sarhank Group v Oracle Corp.*, 404 F3d 657 (US, Court of Appeals 2nd Circuit 2005).

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shall be enforced.’⁸⁰ Additionally, much national legislation now refers simply to the ‘public policy of the state’, providing that an arbitral award may be denied enforcement when it would be contrary to the public policy of the State.⁸¹ Thus, according to this view, Art. V(2)(b) of the NYC refers merely to the public policy of the enforcement State.

Whereas the first argument highlights the importance of international public policy from international sources towards a uniform approach, the second argument warns against the unreliability of excluding the public policy from the domestic public policy in which the enforcing country should apply since there is nothing to state that the expression of public policy under Art. V(2)(b) refers to international public policy. It is submitted that although the seemingly residual character of Art. V(2)(b) may refer to the public policy of the country in which the award is set to be enforced, the more satisfactory view of applying the international understanding of the term public policy would be more practical for a number of reasons.

First, for an attempt at harmonisation, the field of using public policy through international cases can be narrower than the field of domestic cases. For instance, where there is no guidance provided under the national legislations for the meaning of public policy, it might be very useful to implement some clear guidance from the national courts of other contracting States, in order to show a narrow reading of the term public policy.⁸²

Second, there seems to be a major acceptance of using public policy from an international perspective and this is expressly and implicitly confirmed by the decisions of numerous courts and commentators.⁸³ Third, this view has affected the use of the term

⁸⁰ *Not Indicated v Not Indicate*, (1985) X YBCA 421, (Austria, the Supreme Court 1983); *Sarhank Group v Oracle Corp.*, 404 F3d 657 (US, Court of Appeals 2nd Circuit 2005); See also *Renusagar Power Co. Ltd v General Electric Co.*, (1995) XX YBCA 681, (India, The Supreme Court 1993); *Buyer (Austria) v Seller (Serbia and Montenegro)*, (2005) XXX YBCA 421, (Austria, the Supreme Court 2005).

⁸¹ German ZPO, s 1061(1); Swiss PIL, Art. 194; Belgian Judicial Code, Art. 1723(2) and Japanese Arbitration Law, Art. 45(2)(ix).

⁸² *Yang v S & L Consulting* [2009] NSWSC 223.

⁸³ *Khaled El Fares and the Kuwaiti Global Marketing Group v La Maison du Café and Café Najjar*, (Beirut Court of Appeals, Third Chamber 2008) (2009) 1 Int'l J Arab Arb 310; *Manufacturer (Slovenia) v*

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public policy from an escape mechanism for domestic legislation, which may vitiate the main objective of the NYC, into another form of harmonised international criterion.⁸⁴

Finally, and most importantly, the interpretation of international public policy under the Convention can also mean that the national court, where the award is set to be enforced, ‘may consider the public policy of its forum, but only if those policies are consistent with international principles recognized in various nations as constituting vital public policies’.⁸⁵ Accordingly, certain national courts commenced to consider some relevant public policies of several other States, not only its national public policy.⁸⁶ Put differently, the ultimate right of the enforcing State can be safely exercised and the ultimate goal of uniformity can also be fulfilled simply by adopting international public policy.

Therefore, the narrower concept of public policy on an international scale should be applied to the foreign arbitral award rather than the domestic norm, as it should ‘invoke something more than contravention of domestic law’ to not be enforced.⁸⁷ In this sense, Mistelis pointed out that public policy ‘should operate only as a shield to the enforcement of foreign awards which bear unwanted solutions, and should not become a sword in the hands of those who want to limit the mobility or finality of international awards’.⁸⁸ This leads to the phrase ‘international public policy’, which must be embodied to the contracting States’ statutory sources of law. It is hoped that this guideline will prevent conflicting sources for determining public policy in the light of the NYC and will ensure that the public policy exception is appropriately and narrowly applied among the contracting States and potential contracting States such as Yemen.

Exclusive distributor (Germany), (2004) XXIX YBCA 687, (Germany, Schleswig Court of Appeal 1999); van den Berg (n 23) 359-368.

⁸⁴ Otto and Elwan (n 1) 366.

⁸⁵ Born (n 19) 2836.

⁸⁶ *Northrop Corporation. v Triad International Marketing*, 811 F 2d 1265 (US, Court of Appeals 9th Cir 1987).

⁸⁷ Born (n 19) 2836.

⁸⁸ Mistelis (n 16) 248.

4.5 Public Policy under the English System

The English AA generally follows the same approach to the public policy defence found in the NYC. English legislation concerning arbitration expresses the position of public policy directly regardless of whether the arbitral award is domestic,⁸⁹ a NYC award,⁹⁰ or even should be enforced at common law.⁹¹ However, the pro-enforcement bias of NYC has been examined faithfully by the English courts.⁹² It can be said in general terms that the English courts have impliedly embraced the notion of international public policy based on the narrow interpretation of the public policy exception.⁹³

The definition of public policy under the English system is difficult, if not impossible, to be defined in any definite terms. For instance, Winfield has noted a definition of public policy as ‘... a principle of judicial or legislation or interpretation founded on the current need of the community’.⁹⁴ It is clear from Winfield’s definition that in employing the term ‘current’, he is pointing to the flexibility of using public policy in line with the changing interests and developments of a particular society. He went further to clarify that ‘the definition means that the interest of the whole of the public must be taken into account, even though, in reality, many decisions based on public policy may only affect one section of the community’. Hence, this attempt by Winfield has provided, to some extent, the setup for the ambiguousness of the term public policy, and this has helped encourage judges to evaluate the societal interests in applying public policy

⁸⁹ English AA s 68 (2) (g), ss 66 and 81(1)(c).

⁹⁰ English AA s 103 (3).

⁹¹ *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223, (CA).

⁹² Redfern and Hunter (n 45) 542.

⁹³ See Chapter 5 point 5.2.2 page 162.

⁹⁴ Winfield (n 30) 91-92.

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considerations. Thus, he emphasized that ‘judges are bound to take notice of it and of the changes which it undergoes’.⁹⁵

Knight has also noted that public policy is no less than:

.....the one principle rule at the foundation of the whole system of English law, of the State itself.....the essential elements in the idea of the King’s justice, it is, in actual fact as well as in principle, the ever-obliging authority and available instrument for what may be nothing other than positive judicial legislations, independent, absolutely, in the absence of statute⁹⁶

The two definitions may share some acceptance regarding the essential rule of the judicial interpretation in public policy consideration, but nevertheless they are not necessarily consistent in their approach. Winfield’s main focus was the public interest and he states that public policy remains part of the ‘whole spirit’ of English law,⁹⁷ whereas Knight’s point of view is that public policy plays the main role at the foundation of the English law system. Considering the two views, in general, it can be said that the use of precedent has a major role in considering the public policy term under English law system and thus public policy identification is primarily inspired by ‘judge-made’ regulation. Thus, as Tarlington points out, ‘public policy reflects the overall public good and that there is a duty on courts to ascertain and apply it’.⁹⁸ However, the use of public policy as a notion has its own particular dangers based on the fact that ‘varying notions of public expediency would make it impossible to see its extent and would set up great uncertainty in ascertaining legal rights’.⁹⁹ This very lenient and flexible view regarding its concept depending on the morals, manners and economic conditions may lead to the notion being used as an excuse by judges to invalidate legal relationships they dislike.

⁹⁵ *ibid* 92-93.

⁹⁶ Knight WSM, ‘Public Policy in English Law’ (1922) 38 LQR 219.

⁹⁷ Winfield (n 30) 92-93.

⁹⁸ John Tarlington, ‘International Commercial Arbitration and Public Policy ‘with principle reference to the laws of Australia, France, Switzerland, the United Kingdom and the United States’ (PhD Thesis, University of Technology 2003) 80.

⁹⁹ Winfield (n 30) 89

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For this reason, efforts have been made either explicitly or impliedly to standardize the English public policy consideration.

Recently, Malhotra has drawn attention to the fact that the present attitude of courts regarding the public policy consideration shows a compromise between the flexibility nature of the notion and the necessity for certainty in the commercial sphere.¹⁰⁰ The notion itself is open and flexible, and this nature caused the judicial censure. He further indicated that this result has come about because the concept is variable from one nation to another and also from one generation to another within the same nation, and also because the notion is differently represented by legal jurists and judges.¹⁰¹

For example in *Lemenda Trading Co Ltd v African Middle East Petroleum Co.*, Phillips J. Stated the following:

The English court should not enforce an English contract which falls to be performed abroad where (i) it relates to an adventure which is contrary to a head of English public policy which is founded on general principles of morality; and (ii) the same public policy applies to the country of performance so that the agreement would not be enforceable under the law of the country. In such situation, international comity combines with English domestic policy to militate against enforcement¹⁰²

The influence of public policy has taken many shapes based on the general principles of morality as well as considering foreign public policies when analysing international public policy influence. Courts may sometimes make a closer examination as to what exactly may affront the English principles of justice and morality. Accordingly, some authors have classified the cases where English courts reject the enforcement of arbitral awards on the ground of public policy defence, and more particularly the violation of moral principles, as follows: where the fundamental conceptions of justice are

¹⁰⁰ O. P Malhotra, 'The Scope of Public Policy under the Indian Arbitration and Conciliation Act 1996' (2005) 71 Arb 36.

¹⁰¹ *ibid.*

¹⁰² *Lemenda Trading Co Ltd v African Middle East Petroleum Co* [1988] 1All ER 513, 523 (QB Comm Ct)

disregarded; where the English conception of morality are infringed; where a transaction prejudices the interest of the United kingdom or its good relations with foreign power; where a foreign law or statute offends the English conceptions of human liberty and freedom of actions.’¹⁰³ This narrow classification also indicates that the English courts are willing to adopt international public policy as arguably provided under the NYC.

4.6 Public Policy under Shari’ah and Yemen’s Legislation

4.6.1 Public Policy under Shari’ah

The Islamic notion of public policy is that of general interest, known as *Maslahah*.¹⁰⁴ According to *Al-Ghazali*, the general interest under Shari’ah is fundamentally established to protect the Six Higher Objectives (*Maqasid al-Shari’ah*), or the principal objectives of Shari’ah.¹⁰⁵ *Al-Shatibi* indicated that *Maslahah* is ‘the only overriding objective of the Shari’ah which encompasses all measures beneficial to people’.¹⁰⁶ These Six Objectives are identified as ‘preservation of life, property, family, religious, honour or dignity and *al aql* (reason of knowledge)’.¹⁰⁷ For Middle Eastern States that are deeply rooted in Shari’ah, matters of public policy run interchangeably with these Objectives.¹⁰⁸

¹⁰³ James Fawcett and Janeen Carruthers, *Cheshire, North & Fawcett: Private International Law* (14th edn, OUP 2008) 131-133.

¹⁰⁴ Arthur Gemmell, ‘Commercial Arbitration in the Islamic Middle East’ (2006) 5 Santa Clara J Int’l L 169; Faisal Kutty, ‘The Shari’ah Factor in International Commercial Arbitration’ (2006) 28 Loy LA Int’l & Comp L R 565.

¹⁰⁵ Kutty (n 10) 602.

¹⁰⁶ *ibid* 602.

¹⁰⁷ *ibid* 583.

¹⁰⁸ Khalid Abo El Fadl, ‘The Place of Ethical Obligation in Islamic Law’(2004) 4 Vcl’a J Islam & Near E L 1.

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Although the Islamic definition of *Maslahah* is quite clearly broad, there are some particular rules which indicate those matters that are prohibited and those matters that are permissible under Shari'ah. As far as international commercial arbitration is concerned, *Maslahah* is evidently relevant to international transactions.¹⁰⁹ These concerns are commonly included in *Riba* (usurious interest) and *Gharar* (speculative contracts or deception). However, these two Islamic terms may be interpreted differently by different Islamic schools.¹¹⁰

Any contract that contains *Riba* is strictly forbidden under Shari'ah.¹¹¹ In principle, *Riba* is described as 'any unjustifiable increase of capital whether in loans or sales' or 'generally any unlawful or unjustified gain'. In this sense, according to Kutty, any contracts 'which include an excessive profit margin will also be considered as a form of *Riba* if it is exploitative, oppressive, or unconscionable'.¹¹² Despite this clear prohibition of *Riba*, some Islamic countries have developed methods to allow the charging of interest in certain transactions.¹¹³

For instance, the Egyptian Civil Code indicates that '[w]hen the object of an obligation on the payment of sum of money of which the amount is known at the time when the claim is made, the debtor shall be bound, in case of delay in payment, to pay the claimant, as damages for the delay, interest...'.¹¹⁴ In addition, Moroccan law follows an unusual approach as it differentiates between individuals and entities in order to reach the conclusion that 'charging interest is prohibited a transaction between Muslims

¹⁰⁹ Wakim (n 10).

¹¹⁰ Gemmell (n 104); Roy (n 22) 926.

¹¹¹ Chetan Phull, 'The Concept of Riba in Islamic Banking Law: An Introduction' (2011) 10 JIBLR 405.

¹¹² Kutty (n 10) 605; John Esposito (ed), *The Oxford Dictionary Of Islam* (OUP 2003) 264-266.

¹¹³ Kimberly Tacy, 'Islamic Finance: A Growing Industry in the United States' (2006) 10 NC Banking Inst 355, 357 (commenting on the difference of unacceptable risk, from high risk); John Donboli & Farnaz Kashefi, 'Doing Business in the Middle East: A Primer for U.S. Companies' (2005) 38 Cornell Int'l LJ 413, 424 ('arguing the Islamic systems approach regarding *riba* and *gharar*').

¹¹⁴ Egyptian Civil Code Art. 226 in John Gotanda, 'Awarding Interest in International Arbitration' (1996) 90 Am J Int'l L 40.

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individuals whereas entities such as banks and companies may freely charge interest'.¹¹⁵ This approach may also apply to any transactions between individuals and entities.¹¹⁶

However, it would be a mistake to make a distinction between the contracting parties and ignore the final unjustifiable income which is the highly important concern in the *Riba* which is also, under all circumstances, expressly prohibited in the Qur'an: 'Allāh has permitted trading and forbidden *Riba*'.¹¹⁷ Therefore, those modern developments are now questionable and have been criticised as being contrary to Shari'ah principles.¹¹⁸ The Supreme Court of Pakistan, for instance, made it clear in a detailed judgment that 'all prevailing forms *Riba* either in banking transaction or in private transactions' are contrary to the injunctions of Shari'ah.¹¹⁹

The second consideration under Shari'ah public policy is that of *Gharar*.¹²⁰ It is stated by Kamali¹²¹ that the meaning of *Gharar* is, literally, fraud; however, in the sphere of transactions it is 'often been used to mean risk, uncertainty and hazard'.¹²² This may indicate that any contract containing speculation, or contract clauses that turns on the happening of a specified but unsure event, is void. Under this doctrine, insurance contracts as we know them in the West would be void under Shari'ah.¹²³ Accordingly, this principle impliedly states that 'an element of risk in a contract is the equivalent of a gamble and results in immoral gain. Strictly speaking, Shari'ah prohibits agreements to

¹¹⁵ Fatima Akaddaf, 'Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?' (2001) 13 Pace Int'l L Rev 1, 55.

¹¹⁶ *ibid* 55.

¹¹⁷ Surah Al- Baqarah; verse. 275.

¹¹⁸ Akaddaf (n115) 54.

¹¹⁹ *Dr. M. Islam Khaki & Others v Syed Muhammad Hashim & Others*, PLD 2000 SG 225, 760, 770 (Supreme Court 225) (Pakistan, The Supreme Court of 1999).

¹²⁰ Peter Sloane, "The Status of Islamic Law in the Modern Commercial World," (1988) 22 Int'l Law 743

¹²¹ Mohammad Kamali, *Islamic Commercial Law, An Analysis of Future and Options* (The Islamic Texts Society 2001) 84-85.

¹²² Rohullah Azizi Grounds for Refusing Enforcement of Foreign Arbitral Awards under the New York Convention (A comparison of the US and Sharia Law) (2010) 38 <<http://ssrn.com/abstract=1616746>> accessed 7 June 2012.

¹²³ Kutty (n 10) 606-607.

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arbitrate future disputes or disputes not yet in existence. If such an agreement is included in a contract, the contract is void'.¹²⁴ In practice, on the other hand, 'agreements to arbitrate future disputes are enforced, but arbitral awards upholding aleatory contracts or aleatory clauses, other than the arbitration clause itself, may be considered contrary to public policy'.¹²⁵

This concept indicates a very broad interpretation and this may affect many approved types of transaction contracts. As previously discussed, under Shari'ah, the future disputes can be resolved by arbitration and this could be found in most of the major international commercial arbitration rules including national arbitration laws of many Islamic jurisdictions.¹²⁶ Therefore, it is submitted that there should be consistency in the sensible interpretation of *Gharar* in some particular cases and this would be strong enough to establish a general trend of clear conceptualization of *Gharar*. It should also be emphasised that arbitration agreements and awards that may involve speculation and uncertainty (*Gharar*) are not technically unenforceable.¹²⁷

From the above, it can be concluded that the definition of Shari'ah public policy is also vague and nebulous since it cannot be clearly set out in writing. However, some regulations established by Islamic schools can identify what is prohibited and what is not. *Riba* and *Gharar* are the most common examples, and are subject to significant debate in relation to international transactions. They both play a major role in Shari'ah public policy, as they are highly important objectives under Shari'ah principles. While Islamic principles need to be protected, this can be achieved by Muslim practitioners and scholars adopting a narrow reading of *Maslahah* under Shari'ah. In this situation, public policy and *Maslahah* should not be distinguished from each other and should be treated on par. The question of *Riba*, or usurious interest, remains a controversial matter and is subject to different interpretations, even though it is firmly prohibited by the Holy

¹²⁴ Azizi (n 122).

¹²⁵ Kutty (n 10) 606-607.

¹²⁶ See Chapter 3 point 3.3.1 page 126.

¹²⁷ Wakim (n 10) 43.

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Qur'an.¹²⁸ Interpretation is a very important tool in Shari'ah and has beneficial features that can be adaptable with international treaties and more particularly international commercial ones.

Nonetheless, the gap between Islamic and non-Islamic jurisdictions with regards to the notion of public policy can be distinctly seen in the application of the exception in the enforcement context. Arguably, the Islamic countries that are signatories to the NYC have noticeably different approaches in their application of public policy when they apply *Maslahah* in their interpretation.¹²⁹ This gap is produced when international public policy may contradict with Islamic countries domestic legal system (i.e. Shari'ah). Therefore, it is argued that some Islamic signatory States are "traditionally hostile" when refusing the enforcement of foreign arbitral awards finding these awards contradict with their domestic public policy.¹³⁰ However, other Islamic signatory States are described as "not traditionally hostile" to international arbitration because they are contemplating the modernization in their arbitral enforcement system.¹³¹ This difference can only indicate that these States have different interpretations of the public policy exception and hence it cannot be relied of their ratification of the Convention.

It is submitted that these different interpretations of public policy notion can be handled by a uniform approach, at least among the Islamic countries. In view of this, the interpretation of Shari'ah public policy can reach a great uniformity based on the same source of standards when applying the public policy exception. This is evident by the fact that many Islamic countries have adopted the NYC's international public policy as an exception to refuse the enforcement of foreign arbitral awards and have followed contemporary developments in the field of international arbitration without any

¹²⁸ The prohibition of *Riba* is indicated in five different verses in the Holy Qur'an: See Surah Al-Baqarah, verses 275, 276 and 278; Surah Āl- Imrān verse, 130; Surah Ar Rum verse, 39.

¹²⁹ Kutty (n 10).

¹³⁰ Roy (n 22) 922; Thomas Carbonneau, 'The Ballad of Transborder Arbitration' (2002) 56 U Miami L Rev 773, 794.

¹³¹ Roy (n 22) 935-936; Charles Brower & Jeremy Sharpe, 'International Arbitration and the Islamic World: The Third Phase' (2003) 97 AJIL 643, 651.

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contradiction with their domestic policies.¹³² This is because the notion of public policy is based mainly on the spirit of Shari'ah and its sources as well as its central principles, which are mainly to protect individual rights and agreements unless they forbid what is authorized or authorize what is forbidden by Shari'ah.¹³³

Thus, when some scholars describe Shari'ah public policy as a serious and irreconcilable barrier to conformity with the international trend in international commercial arbitration,¹³⁴ such an evaluation is only superficial and lacks careful analysis. Shari'ah is capable of adapting to changing times and circumstances in the life of Muslims and its original and primary aim is to protect fundamental human rights and principles. From an international perspective, this adaptability can be illustrated by the fact that many Islamic countries in recent times have adopted international conventions that not only govern procedural issues, such as the NYC, but also that govern the substantive issues of international contracts.¹³⁵ Accordingly, Shari'ah provides its own methodology for evolution and re-interpretation to meet the challenges of the modern era.¹³⁶ Thus, there is no valid reason that prevents Shari'ah from accommodating contemporary developments in any field of law, particularly arbitration.

Moreover, Shari'ah accepts and recognises the international fundamental principles of justice and fairness between all humans regardless of their religion and origin. As Prophet Muhammad (saws) has always emphasised the importance of justice, particularly between the tribes and clans of the time. This can be illustrated by referring

¹³²Elana Levi-Tawil, 'East Meets West: Introducing Sharia into the Rules Governing International Arbitrations at the BCDR-AAA'(2011) 12 Cardozo J Of Conflict Resolution 609.

¹³³ See Sahih Al Bukari, Hadith No, 1946 ; The Abu-Dhabi Court of Appeal has emphasised on this principle in *A.A Commercial Co. v. S. Motors Ltd Co. and D. Industrial Ltd Co.*, No. 10007/1981 unpublished.(UAE, The Abu-Dhabi Court of Appeal 1981).

¹³⁴ Ayad (n 9) 643; Wakim (n 10) 25; Kutty (n 10) 565; Tarek Badawy, 'The General Principles of Islamic Law as the Law Governing Investment Disputes in the Middle East'(2012) 29 J Int Arb 255; see also David Westbrook, 'Islamic International law and Public International Law: Separate Expressions of World War' (1993) 33 Van J Int'l L 849.

¹³⁵ States that ratified CISG, such as Saudi Arabia, Egypt; See for more details, Ismaeel AlJeriwi, 'The Compatibility of Saudi Domestic Law with the Seller's Obligations under the Vienna Convention (CISG)' (PhD Thesis, Newcastle University 2010).

¹³⁶ Kutty (n 10).

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to *Hilf al-Fudul* (Alliance of Virtuous).¹³⁷ The main reasons for the establishment of this alliance were (1) the suppressing of injustices suffered by the merchants and (1) the vindication of the rights of the weak and destitute.¹³⁸ The Prophet said about this alliance, 'It was more appealing to me than herds of cattle. Even now in the period of Islam I would respond positively to attending such a meeting if I were invited.'¹³⁹

Furthermore, the majority of Islamic scholars agree that Shari'ah can be construed to provide support for the protection of basic human principles in any circumstance as these protections form part of Shari'ah public policy (i.e. *Maslaha*).¹⁴⁰ Finally and most importantly, the Holy Qur'an is explicit in its positive approach to protect international public policy by emphasising justice between people on the ground of their humanity. The basis of this can be found in the following Qur'anic verse:

Verily! Allâh commands that you should render back the trusts to those to whom they are due; and that when you judge between men, you judge with justice. Verily, how excellent is the teaching which He (Allâh) gives you! Truly, Allâh is Ever All-Hearer, All-Seer.¹⁴¹

Given that Shari'ah generally accepts the international principles and authorises States to abstain from any violation of principle of justice, a claim of any contradiction between international public policy and Shari'ah public policy has no foundation, Shari'ah consists mainly of principles rather than written forms, and thus it can accommodate international trends and developments, provided there is no manifest contradiction with Shari'ah main sources (i.e. Qur'an and Sunnah). As Kutty explains:

It may not be very realistic to expect that international commercial arbitration rules will be consistent with all Islamic interpretations. Yet, given the

¹³⁷ Zakaria Bashier, *Life of the Prophet in Makkah* (3rd edn, the Islamic Foundation 2007) 66.

¹³⁸ Safi-ur-Rahman Al-Mubarakpuri, *Ar-Raheeq Al-Makhtum* (Dar-us-Salam Publications 1996) 61.

¹³⁹ Ibn Hisham 1/113, 135 in Safi-ur-Rahman Al-Mubarakpuri, *Ar-Raheeq Al-Makhtum* (Dar-us-Salam Publications 1996) 61. fn3.

¹⁴⁰ See Chapter 4 point 4.6.1 page 170.

¹⁴¹ Surah An-Nisā'; verse, 58.

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flexibility inherent in the Shari'a, it is equally unrealistic to expect that international commercial arbitration rules and practice will continue to have legitimacy in the Middle East and the larger Islamic world if Shari'a principles and methodology are completely ignored or undermined.¹⁴²

This is particularly true since the modern trend of international arbitration in Islamic countries has been accepted, helping to establish that there is compliance between international norms and the main principles of Shari'ah. Ultimately, international public policy can include Shari'ah principles because it is fact that Shari'ah has become one of the major legal systems of the international legal community¹⁴³ and thus any contradiction with this fact is based on scholars' unnecessarily narrow or archaic interpretations of Islamic principles. It is now evident, as Kutty argues, that 'the fundamental principle of equality in Islam, the historical evidence, and the emphasis given to freedom to contract and contractual obligations provide sufficient justification to reassess the Islamic position'.¹⁴⁴ Accordingly, Shari'ah shares common principles with, and is able to accommodate, modern developments in the field of international arbitration.

As will be seen in the discussion that follows, some Islamic countries such as Saudi Arabia accept international public policy, notwithstanding that their main legal system is grounded in Shari'ah. It is true, as Gemmell observes, that 'the day will inevitably come when mutual commercial interests will intertwine and become so interdependent that international private law and Islamic law will stand where neither dominates the other'.¹⁴⁵

¹⁴² Kutty (n 10) 622-623.

¹⁴³ T.S Twibell, Implementation of the CISG Under Shar'ah (Islamic Law): Will Article 78 of the CISG Be Enforced when the Forum Is in an Islamic State ?' (1997) 9 Int'l Repsp. 25, 33.

¹⁴⁴ Kutty (n 10) 606-607.

¹⁴⁵ Gemmell (n 104)193.

4.6.2 Public Policy under Yemen's Legislation

The public policy exception is a traditional ground for refusal of enforcement of foreign judgments and foreign arbitral awards under Yemeni laws.¹⁴⁶ Unfortunately, this exception is widely considered as the main obstacle that affects the enforcement of foreign arbitral awards in Yemen as same as many Islamic countries.¹⁴⁷

Art. 59 of the YNDAA lays down that:

An action to procure the nullity of the arbitral award is admissible only in the following cases: (g) it does not contradict public policy in the Republic of Yemen.

Also, Art. 63(b) of the same law provides as follows:

The court seized with the action for nullity shall rule *sua sponte* for the annulment of the arbitral award if its contents violate public policy in the Republic of Yemen.

Art. 66 further stipulates that:

Enforcement of the arbitral award pursuant to this law may not be ordered except after verifying that: (b) It does not contradict public policy in the Republic of Yemen.¹⁴⁸

Textually, it is clear that Yemen's legislation is in favour of affirming national public policy instead of international public policy. This is, of course, in opposition to the international trend exemplified by the NYC, and may put at risk the entire enforcement system. Yemeni law provides only one option to follow, i.e. the public policy of the

¹⁴⁶ The Yemeni Procedural Act of 2002 Art. 494; The YNDAA Art. 66.(providing that 'Enforcement of the arbitral award pursuant to this law may not be ordered except after verifying that: It does not contradict public policy in the Republic of Yemen').(the authors translation).

¹⁴⁷ Roy (n 22).

¹⁴⁸ The YCAA went further than the YNDAA providing distinction between the Shari'ah and Yemen's public policy and hence requires the award must comply not only with public policy but also with the provisions of the Islamic Shari'a. A distinction seems to be made between public policy and Shari'a. Therefore, such requirement would have a wide scope of implementation; See Art 53(g) and Art. 55 (b).

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Republic of Yemen, whereas the NYC arguably provides two options, i.e. national or international public policy.

Accordingly, several matters related to public policy, which have already been interpreted by Yemeni domestic courts, also fall under public policy in relation to the enforcement of foreign arbitral awards.¹⁴⁹ In general, there are concerns about the interpretation of the YNDAA and the nebulous attempt of separating Shari'ah from public policy since the YNDAA is based on a hybrid of legislation, civil law and Shari'ah, but deeply established in religious norms.¹⁵⁰ Irrespective then, public policy matters under the Yemeni jurisdiction would be uniquely affected by religious consideration, just as they would be in most of Middle Eastern countries.¹⁵¹ As Hamid and Lara have drawn attention to the problem as follows:

The Arbitration law further states that in all case, the arbitral tribunal 'shall take into account the social customs and usages and the customs and usages of the trade applicable to the transaction, subject always to compliance with the provisions of the Sharia. This is consistent with public policy requirements contained in most arbitration laws and conventions. It is thus not the requirement itself that causes concern but rather the way in which it is applied. Here again, one can only hope that it be applied fairly in a manner consistent with business requirements and the legitimate expectations of foreign investor.'¹⁵²

Hence, the question that needs to be taken into consideration is how the inference of the Shari'ah notion of public policy is encompassed within the Yemeni legislation.

¹⁴⁹ 'Case No. 35344, the Supreme Court at the Capital City of Sana'a- Commercial Circuit, 2009'(2010) 2 Int'l J Arab Arb 246; 'Case No. 39413, the Supreme Court at the Capital City of Sana'a -Commercial Circuit, 2010' (2011) 3 Int'l J Arab Arb 101.

¹⁵⁰ Mohamed Mattar, 'Unresolved Questions in the Bill of Rights of the New Iraqi Constitution: How Will The Clash Between "Human Rights" and "Islamic Law" Be Reconciled in Future Legislative Enactments and Judicial Interpretations?' (2006) 30 Fordham Int'l LJ 126. (Commenting that 'Yemen is a primarily religious nation that uses Shari'ah Law as the main source of legislation'.)

¹⁵¹ Amir Koury, 'Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks' (2003) 43 JL & Tech 151(asserting that 'many Middle Eastern countries do not separate religion and politics from legislations').

¹⁵² Gharavi Hamid and Karam Lara 'Arbitration in Yemen' (2006)17 ICC International Court of Arbitration Bulletin 41, 44.

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According to Art. 1 of the Yemeni Constitutional Law ‘The Republic of Yemen is an Arab, Islamic and independent sovereign state’. Also, Art. 3 of the same Law emphasises that ‘Islamic Shari’ah is the source of all legislation’.¹⁵³ This means that the Yemeni legal system is essentially based upon Shari’ah and all legislation have to be in accordance with Shari’ah principles. This also means the Holy Qur’an and Sunnah have precedence over Yemen’s legislation and thus Shari’ah principles constitute Yemen’s public policy. However, it seems there is no clear-cut definition of public policy under Yemeni law. In an attempt to define the notion for Islamic countries in general, Abdul Hamid El Ahdab and Jalal El Ahdab point out that:

In Muslim Law, the concept of public policy is based on the respect of the general spirit of the Shari’a and its sources (the Koran and Sunna, etc.) and on the principle that “individuals must respect their clauses, unless they forbid what is authorized and authorized what is forbidden.”¹⁵⁴

In addition, Al-Ahdab attempts to define public policy in the Yemeni context as ‘the rules that could affect the forbidden issues to be lawful or those lawful issues to be forbidden’.¹⁵⁵ Again, this notion is profoundly inspired by Shari’ah as the main recourse for all Yemen’s legislation. However, this definition is quite plainly unfortunate since it does not provide any precise principles of what should be included under public policy and what should not. The definition briefly addresses the general issues in more of a religious manner rather than attempting to provide any clear explanation of public policy under Yemeni legal system. It is true that the concept of public policy is based on respect for the general spirit of Shari’ah and its sources, which is entirely agreeable. The author does not challenge the existence of religious grounds as a main principle that must be included under the notion of public policy. According to the Prophet (saws), ‘Muslims

¹⁵³ The Constitution of the Republic of Yemen of 1994.

¹⁵⁴ Abdul Hamid El Ahdab and Jalal El Ahdab, *Arbitration with the Arab Countries*, (Kluwer 2011) 49.

¹⁵⁵ Abdel Hamid El Ahdab ‘The Enforcemnt of Arbitral Awards in Arab Countries’ (2002 Sana’a Yemen) 7.

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must comply with the conditions, provided by Shari'ah, because no condition ever forbade a good action or authorized as evil one'.¹⁵⁶

What the author does challenge, however, is the notion that isolates some other main principles since public policy content is by its very nature nebulous. In this sense, according to Al- Marzouqi, public policy could be identified under Islamic jurisdiction as 'a collection of political, social and economic foundations that a society stands upon in a certain time'.¹⁵⁷ This definition may include 'religious' and 'moral' principles in addition to the forgoing aspects which could be in favour of an ideal definition of public policy under Shari'ah. Therefore, the significant crisis facing the enforcement of foreign awards under some Shari'ah jurisdictions is the definition of public policy under Shari'ah. In addition, public policy is sometimes identified in a very expansive manner by the national courts of some Islamic countries, which often indicates that arbitral award enforcement faces numerous difficulties.¹⁵⁸

One way to deal with this issue is that Yemen's legislation and judicial practice can have a major rule to trace the scope of the exception and construe the concept of public policy from an international perspective. Judges and legislators can modify the basic contents falling under public policy. In this sense, the Yemeni courts when examining the public policy exception will have regard to these contents with public policy characterizations when there is no further underlying religious or social interests that can be considered as public policy violations. To this end, the Yemeni courts will be free to evaluate the nature of the public policy exception under a clear framework in the light of legal provisions or precedent. Another significant role in that case is to be predicted by scholars and legislators as the main tools to fill out the blanks, and this could be achieved through analogy with foreign laws. Indeed, in order to invoke the public policy rule correctly 'one

¹⁵⁶ Sunan Al Tirmizi Hadith No. 3950, (Translated by Waleed S. A. Al-Tuwaigri, 'Ground for Refusal of Enforcement of Foreign Arbitral Awards under the New York Convention 1958 with special reference to the Kingdom of Saudi Arabia' (PhD Thesis, University of Glasgow 2006) 297.

¹⁵⁷ Muhammed Al- Marzouqi, *Legislative Authority in the Kingdom of Saudi Arabia* (in Arabic, Obeikan 2004) 83.

¹⁵⁸ Abdul Hamid El-Ahdab, 'Arbitration in Saudi Arabia under New Arbitration Act, 1983 and its implementation Rules of 1985' (Part2,1986) 3 J Intl Arb 27.

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should rely on doctrinal interpretation'.¹⁵⁹ According to the ILA Final Report, a court which examining the question of a public policy violation may consider the laws of other countries to ascertain whether there is consensus of opinion regarding the same matter.¹⁶⁰ This would be a useful suggestion for the Yemeni courts, particularly when the violation of public policy is fundamental.

Another way to deal with the issue can be that public policy must also be known by the arbitral tribunal committee concerning the enforcing State where the arbitral award is sought to be relied upon in order to reduce the risk of refusal of enforcement as much as possible. Certainty, if possible when seeking to render a foreign arbitral award, will come about through understanding, experience and familiarity. This will help ensure a degree of consistency regarding public policy transparency in a uniform manner for such countries facing difficulties when dealing with the public policy exception, such as Yemen. In all cases, the tribunal should respect public policy in Yemeni and the principles of Shari'ah; otherwise, the arbitral award it renders will be at risk of not being enforced.

In summary, unfortunately and yet unsurprisingly there is no definite definition of the public policy notion under Yemen's legislation, nor has the limits of the concept been delineated clearly through judicial practice. The majority of States that have ratified the NYC, however, adopt a narrower interpretation of public policy, which is to apply international public policy as an exception for refusal of enforcement. The Convention draws a distinction between an enforcement of awards that merely violates national public policy and awards that violate international principles that are universally accepted. In order to secure a higher degree of success in international commercial arbitration, Yemen should ratify the Convention.

In view of that, the Yemeni courts have two possibilities open to them: applying international public policy or national public policy of the Republic of Yemen. In both

¹⁵⁹ Lunts and Marysheva, *International Private Law* (Moscow 1976) 31.

¹⁶⁰ Mayer and Sheppard (n 4).

cases, there would not be inconsistency with Shari'ah principles because in the former case, the Convention would simply refer to the national public policy of the enforcement State, which is Yemen's national public policy. In the latter case, if the Yemeni courts apply international public policy, this would also not be inconsistent with Shari'ah principles because Shari'ah is part of this notion.¹⁶¹ The application of the Convention has greatly influence the development of public policy understanding and content under some Islamic contracting States. It is useful therefore to highlight an example of an Islamic country experiences, namely, those of Saudi Arabia, when interpreting the notion of public policy in the context of the public policy exception under the NYC.

4.6.3 Public Policy under Saudi Arabian Practice in the Light of the NYC

Saudi Arabia adopted the NYC on April 19, 1994.¹⁶² Upon adoption, Saudi Arabia, as one of the Islamic leaders country in Middle East, achieved one ultimate goal of modernizing the Saudi Arabia's international dispute resolution methods.¹⁶³ In view of that, embracing Art. V(2)(b) of the NYC empowered Saudi Arabia to actualize two important needs: the need to improve its standing in the international community and the need to protect its religious beliefs and historic principles.¹⁶⁴

Saudi Arabia's legal system, like the legal systems of most Middle Eastern countries, is profoundly rooted in Shari'ah.¹⁶⁵ Thus, the Shari'ah constitutes Saudi public policy when enforcing a foreign arbitral award. However, Saudi Arabia interprets the public policy notion, in the enforcement of foreign arbitral awards, more narrowly than does the Yemeni law. This is evident by the drafting of Art. 3 of the Circular of Grievance Board,

¹⁶¹ Ali Ahmad, 'The Role of Islamic Law in the Contemporary World Order, (2001) 6 J Islamic L & Culture 157(discussing the role and the application of Shari'ah in different part of the world).

¹⁶² See, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

¹⁶³ John Hoppe, *Saudi Arabia, in Legal Aspects of Doing business in the Middle East* (Dennis Cambell ed, 1986) 157,192.

¹⁶⁴ Daniel Lubetzky, 'Incentives for Peace and Profits: Federal Legislations to Encourage U.S Enterprises to invest in Arab-Israli Joint Ventures' (1994) 15 Mich J Int'l L 405, 413

¹⁶⁵ Saudi Basic Law of Governance of 1992. Arts. 1 , 7 and 48; See also Saudi Arbitration Law of 1983 Art. 20.

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which states that ‘it is not possible in any case to grant execution of any foreign award that violates any general principle of Shari’ah’.¹⁶⁶ It is clear from this that not every violation of the Shari’ah rules would constitute a public policy violation under the Saudi perspective. This would obviously not include the Six Objectives of Shari’ah discussed above¹⁶⁷ since those objectives are considered the heart of Shari’ah. The question then is whether Saudi law distinguishes between international public policy and national public policy. In this respect, some commentators asserts that Saudi law recognises the narrow interpretation of public policy in the context of enforcement.¹⁶⁸ For instance, although it has been indicated in the ILA Interim Report that the Saudi courts may refuse to enforce an arbitral award rendered by non-Muslim arbitrators,¹⁶⁹ by applying the distinction between international and national the Saudi courts are now considering awards rendered by non-Muslim arbitrators as enforceable. This is exemplified by several decisions of the Saudi Court of Appeal in which it was held that when the arbitral parties agreed to resolve their disputes by arbitration in the US, France and Austria, that indicated that the parties clearly agreed to use arbitration in those countries and therefore the Saudi parties could not deny these agreements.¹⁷⁰

Further, by applying the distinction between international and national public policy the Saudi courts recognise the arbitral awards that are governed by non- Islamic law. For instance, the Saudi courts enforce many awards that are based on agreements between a Saudi party and a foreign party governed by non-Islamic law such as US or French law.¹⁷¹ In fact, the Saudi courts have distinguished between violations of Shari’ah principles, which may constitute a violation of public policy, and violation of Shari’ah

¹⁶⁶ The Circular of the Grievance Board regarding Enforcement Foreign Judgments and Arbitral Awards, No 7 (1985) Art. 3.

¹⁶⁷ See Chapter 4 point 4.6.1 page 170.

¹⁶⁸ Al-Tuwaigri (n 156) 298.

¹⁶⁹ Sheppard (n 7).

¹⁷⁰ The 4th Review Committee, decision No. 43/T/4 (Saudi Arabia 1995); The 4th Review Committee, decision No. 18/T/4 (1992); The 3rd Review Committee, decision No. 15/T/4 (Saudi Arabia 2002).

¹⁷¹ The 4th Review Committee, decision No. 43/T/4 (Saudi Arabia 1995); The 4th Review Committee, decision No. 187/T/4 (1992); The 4th Review Committee, decision No. 208/T/4 (Saudi Arabia 1997).

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general rules, which is not to be deemed a violation of public policy, and this is due to the country's ratification of the NYC.¹⁷²

The Saudi experience suggests that Saudi Arabia as a contracting Islamic country of the NYC intended to take into account international public policy in relation to the enforcement of foreign arbitral awards, and its approach is therefore now significantly narrower than that of Yemeni law. This also suggests that international public policy does not contradict with Shari'ah principles. In fact, the opposite is true: the Convention provides incentives for the enforcing courts to protect their basic principles and fundamental interests. This consequently means that adopting Art. V(2)(b) of the Convention not only allows the Saudi Arabia to develop its legal system in line with the international community, but also to protect its basic principles of Shari'ah. As Abderrahmane puts it clearly, the ratification of the NYC by Saudi Arabia indeed a major move forward and has positively affected Saudi international trade relationships.¹⁷³

4.7 Conclusion

The unavoidable conclusion is that public policy is an unclear notion and contains uncertain boundaries. The notion itself is ambiguous and lacks precise rules of understanding. This is because the content of public policy depends on the enforcement court's perception and varies from one State to another. The notion by its nature is relative, extra-territorial and fundamental. Therefore, the NYC empowers the national enforcing courts to examine public policy and does not contain any reference to principles of law for determining a public policy violation. Although the NYC does not spell out any definition of the notion, it serves two significant aims in the enforcement context. First, the Convention help protects the State's fundamental and most basic

¹⁷² Al-Tuwaigri (n 156) 206.

¹⁷³ Dahmane Ben Abderrahmane, ' Saudi Arabia's Ratification of the New York Convention- What Pratical Effect will it Have' (1995) Middle East Executive Reports 9.

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principles; and second, it provides a distinction between international and national public policy.

The definition of public policy Shari'ah is also vague and nebulous since it cannot be clearly set out in written form. Nonetheless, the Shari'ah public policy is standardised under the notion of *Maslahah* (Six Higher Objectives), and thereby any contradiction with any of these objectives would undoubtedly constitutes a violation of Shari'ah public policy. The concepts of *Riba* and *Gharar* are the most prominent examples that have led to controversy and debate in international transactions and play a major role in Shari'ah public policy, as they are fundamental objectives under Shari'ah principles. However, the interpretation of these concepts varies between different Islamic schools, even though it is firmly prohibited by the Holy Qur'an. Out of this prohibition there are diverse interpretations of Shari'ah principles that either have sufficient latitude to accommodate the needs of international arbitration or, alternatively, that apply traditional rules in a way that is limiting and dated. After all, the idea of public policy under Shari'ah is parcel of the international public policy since Shari'ah is one of the major legal systems over the worlds and the idea of international public policy finds support in its two main sources: Qur'an and Sunnah.

Like the NYC, Yemeni law does not adequately concern itself with providing any precise definition of public policy, nor does it anywhere clearly set out the scope of this notion. However, since Shari'ah is the main source of Yemen's legislation, it is submitted that Shari'ah constitutes Yemen's public policy. The main shortcoming under Yemeni law is that it pays regard to national public policy only, which is entirely counter-productive in the international arena. The author argued in favour of adopting the notion of international public policy, i.e. the NYC approach, in the enforcement context instead of Yemen's current approach.

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This shortcoming would be resolved by ratifying the NYC, and would provide the added benefit of introducing the restrictive approach in interpreting the notion of public policy, which broadly reflects the international consensus on this matter. This approach is not only more workable, but has also been supported by many States including those of some Islamic countries such as Saudi Arabia. Consequently, the allegation that this approach can be in conflict with Shari'ah principles is tenuous and unsupported. In addition, international public policy and Shari'ah public policy (*Maslahah*) share the same purpose which is protecting the basic principles of justice and fundamental values of each States. Thus, there is no necessary conflict between the two notions is founded.

Therefore, by adopting the NYC, the public policy notion under Yemeni arbitration system would not be an unruly horse, but rather Yemen will follow the international community and modernize its arbitration system, notably the enforcement mechanism, without rejecting its national public policy. The next chapter will examine the notion of public policy of the NYC in relation to other connected notions that may occur in the enforcement context.

Controlling the Unruly Horse – The Complexities of the Public Policy Exception

Although Article V, Paragraph 2(b) is not explicit on this point, there is no doubt that the reference in that provision to public policy is in fact a reference to the international public policy of the host jurisdiction.¹

5.1 Introduction

Public policy has been expressed as ‘multi-faceted’², ‘open-textured and flexible’³, having ‘various guises’⁴, and consequently can be described as having ‘great diversity in the vocabulary and ambiguities’.⁵ As discussed in the foregoing chapter, the content of the public policy exception ultimately depends on national legislation and court’s observation of what comprises public policy. Therefore, different legal systems and their national courts have devised various classifications for the public policy exception, taking into account that not all public policies fall within the public policy exception. Although the ILA Report provides clear guidance for the public policy classification as substantive and procedural,⁶ it seems this classification has not been universally

¹ Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, (Kluwer 1999) para 1710.

² *Hebei Import & Export Corporation v Polytek Engineering Company Limited*, (1999) XXIV YBCA 652, 670, (China, Hong Kong Court of Final Appeal 1999).

³ *Renusagar Power Co. Ltd v General Electric Co.*, (1995) XX YBCA 681, 696 (India, The Supreme Court 1993).

⁴ Duncan Miller, ‘Public Policy in International Commercial Arbitrations in Australia’(1993) 9 Arb Int’l 167, 195.

⁵ Pierre Lalive, ‘Transnational (or Truly International) Public Policy and International Arbitration’ in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer 1987) 260.

⁶ Audley Sheppard, ‘Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards’ (2003) 19 Arb Int’l 217, 247.

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accepted,⁷ whereas the distinction between national, international and supranational public policies is indeed helpful and well established.⁸

Accordingly, this chapter will not elaborate the distinction between substantive and procedural public policies as suggested by the ILA Report. Rather, for better understanding, it aims to assess the various classifications for public policy notions that are used in the enforcement context and focus in depth on what notion of public policy the NYC requires enforcement States to apply, thereby try to distinguish the NYC's notion from other perplexing connected notions. As such, the differences between these notions will be pointed out and their application will be discussed. Ultimately, developing the idea of that distinction will indicate how Yemeni law can benefit by adopting the NYC's workable notion of public policy rather than unhelpfully adopting the national public policy of Yemen.

In view of that, this chapter deals with the public policy classifications and closely analyses the existing debate with respect to this issue (5.2). As such, a brief comparison will be highlighted between public policy's connected notions under each debate. Thereafter, it critically analyses Yemeni law's level of public policy and provides a normative argument, for the success of arbitration in Yemen, to adopt international public policy when determining to enforce a foreign arbitral award as advocated by the NYC(5.3).

⁷ Julian Lew and others, *Comparative International Commercial Arbitration* (Kluwer 2003) para 26-117.

⁸ Nigel Blackaby and Constantine Partasides, et al, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 659; James Fry, 'De'sordre Public International under the New York Convention: Wither Truly International Public Policy' (2009) 8 Chinese J Int'l L 81.

5.2 Classifications of Public Policy

There are five levels of public policy: national public policy, international public policy, transnational public policy, regional public policy and truly public policy. The last three types can be categorised under the broader heading of supranational public policy. Some of these types are easy to define and distinguish, and in other cases their defining features are open to debate. Therefore, the real challenge is determine the content and nature of the public policy that is particularly relevant during the enforcement phase.

Initially, it may be necessary to point to the fact that, as Bockstiegel observes, the literatures on this subject comprise ‘a great variety of issues, of nuances, of basic and technical solutions indifferent countries, of nomenclature indifferent writings’.⁹ Thus, many authors have attempted to categorise public policy into different levels.¹⁰ However, an initial question at this point is whether the NYC itself stipulates which public policy may be invoked to resist enforcement of an award by the competent authority or whether the NYC instead leaves the matter to the national requirement, which can be a great challenge in the enforcement context.

The distinction could be particularly useful in determining the public policy exception in order to address a legal challenge. In addition, comparing and contrasting the public policy notions based upon legal precedence will succinctly portray their relevant elements and further reinforce the uniform standard of the application of the public policy exception in different jurisdictions. Hence, the universal call for a narrow approach to the public policy exception principally relies on the distinction between the various levels of public policy. This can be seen only through a comparative analysis of

⁹ Karl-Heinz Bockstiegel. ‘Public Policy and Arbitrability’ in Peter Sanders, (ed), *Comparative Arbitration and Public Policy in Arbitration* (Kluwer 1987) 204.

¹⁰ Bernard Hanotiau and Olivier Caprasse, ‘Public policy in International Commercial Arbitration’ in Emmanuel Gaillard and Domenico di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2008) 788; Pierre Lalive, ‘Transnational (or Truly International) Public Policy and International Arbitration’ in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer 1987) 260; Julian Lew, *Applicable Law in International Commercial Arbitration: a Study in Commercial Arbitration Awards* (Dobbs Ferry, 1978) para 404.

these levels at the enforcement stage. On such account, this section will now examine national, international and supranational public policy independently in turn.

5.2.1 National Public Policy

National public policy is commonly seen as the fundamental notions of morality and justice determined by a national State through legislation or court practice in order to apply those notions to the purely national disputes within the State's jurisdiction.¹¹ As such, these fundamental (mandatory) rules are intended to protect the national public interest and are generally established in the State's laws.¹² Therefore, some assert that national public policy is 'only a subset of mandatory law'.¹³

Considering the importance of the distinction between national policy and international public policy¹⁴, it can be said that national policy rules are deemed to be highly important as far as arbitration is concerned, because in domestic relations the rule of public policy as such is regarded as principles of law. Moreover, national public policy is deemed to be the most conservative approach to the exceptions indicated under Art. V(2)(b) for enforcing foreign arbitral awards.¹⁵ According to Professor van den Berg, the matters considered as falling under national public policy cases are greater than in international public policy.¹⁶ In view of the fact that the enforcement court may or may not apply the same standards of national public policy when examining a foreign arbitral award that

¹¹ Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (2nd Rev.edn, Kluwer 2001) 506

¹² Marc Blessing, 'Mandatory Rules of Law Versus Party Autonomy in International Arbitration' (1997) 14 *J Int'l Arb* 23

¹³ Philip McConaughay, 'The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration' (1999) 93 *North-western University LR* 453, 476, fn.95.

¹⁴ See Chapter 5 point 5.2.2.1 page 197.

¹⁵ John Wires, 'The Public Policy Sword and The New York Convention Quest for Uniformity' (Working papers series, Bond University 2009) 7.

¹⁶ Albert Jan van den Berg, 'New York Convention of 1958 : Refusals of Enforcement' (2007)18 *ICC International Court of Arbitration Bulletin* 18.

may violates its public policy. Hence, it should be pointed out that the national public policy exception may no longer be considered a private issue.

In using the notion of national public policy, it may refer to a ‘theoretical construct’. As Dr. Wolf states, ‘it is a course of action, yes, but action that is anchored in both a set of values regarding appropriate public goals and a set of beliefs about the best way of achieving those goals’.¹⁷ Unlike the concept of international public policy that operates to unify the collective principles from many legal systems that share common culture with similar background, which is also often be applied by numerous courts for the success of arbitration.¹⁸

With regard to the courts’ application, violation of national public policy was found, for instance, in the case of *Eco Swiss China Time Ltd v Benetton International NV*, where the Dutch Court of Appeal held that Art. 81 of the EC Treaty was a provision of public policy within the meaning of Art. 1065(e) of the Netherlands CCP. The court’s decision was to confirm that ‘constitute a fundamental provisions which is essential to the accomplishment of the tasks entrusted to the Community and for proper functioning of internal market.’¹⁹

Under the NYC, the ILA Report noted that it is deliberately important to limit the extent of the public policy exception to cases in which enforcement would be ‘distinctly contrary to the basic principles of the legal system of the country where the award is invoked,’ and therefore apply a narrow notion of public policy.²⁰ However, this intention may miss the point that these national rules and laws of the hosting country can be unfavourable to the winning party’s priority aim. Since national public policy only presents those national standards and rules that arbitral parties may ‘contract out of or

¹⁷ Definition of Policy Analysis by Dr. Robert Wolf, School of Policy Studies, Queen's University in Sulbha Rai , ‘How Do or Should Arbitrators Deal With Domestic Public Policy or Regulatory Issues. Does It Affect Arbitrability?’(Research Paper, King’s College 2009) 8.

¹⁸ See Chapter 5 point 5.2.2 page 194.

¹⁹ *Eco Swiss China Time Ltd v Benetton International NV* [1999]2 All ER (Comm) [1999] ECR 1-3055 para 36 (CJEU 1999).

²⁰ Sheppard (n 6).

derogate from'.²¹ These standards do not only comprise that indicated rules in the national legislative but also include the recognised policy in customary law.²²

It can, of course, be argued that the concept of national public policy is intended to lead to a narrow application of the public policy exception stated in Art. V(2)(b) and thus very few national courts employ a domestic concept of public policy in regard to the exception outlined in Art. V(2).²³ Therefore, the elusiveness of the national public policy application will open the door for national judges to apply subjective interpretations and further ill-considered decisions in some cases, particularly judges who may view arbitration as an unwelcome encroachment upon their territory and who may easily find justification in the words, 'it was contrary to the policy of law'.²⁴ Upon the application of national public policy the uncertainty arise as to when the national public policy of the State should clearly apply. At this stage the public policy becomes 'cumulative' and this must be avoided by the national courts. That is to say, contravention of a pure national public policy cannot by itself lead to non-enforcement of an award under the public policy exception.

Regardless of the clear wording of the Convention, which refers to the national public policy of the enforcement State, the fear is well-founded in the international context, since the application of national public policy in relation to enforcement of foreign arbitral awards is more liberal than the application of international public policy. In such circumstances the questionable assumption is that national public policy is appropriately narrower than international public policy which is not well-settled in courts practice since it is against judicial consistency from country to another. In this respect, the Turkish court in a remarkably wrong decision denied the enforcement of Swiss arbitral award

²¹ Karl-Heinz Bockstiegel, 'Public Policy and Arbitrability' in Peter Sanders, (ed), *Comparative Arbitration and Public Policy in Arbitration* (Kluwer 1987) 177.

²² Julian Lew, 'The Law Applicable to the Form and Substance of the Arbitration Clause' (ICCA Congress Series No. 9, 1998) para 405.

²³ *The Estate of Tung Jean and Peter Wong v Wires Jolley LLP*, (2010) BCSC 391, (Supreme Court of British Columbia 2008); see also Fifi Junita, 'Judicial Review of International Arbitral Awards on the Public Policy Exception in Indonesia' (2012) 29 J Int Arb 405.

²⁴ *Scott v Avery* [1856] 10 ER 1121, [1128] (HL), Lord Campbell.

based on that the arbitrators have violated the Turkish national public policy by applying Swiss procedural law.²⁵ Although the decision applied the national public policy exception, it violated the NYC objective and the practice of the contracting States.²⁶

In fact, the development of national public policy leads to an ineffective implementation of the Convention. Most importantly, the reference to national public policy in Art. V(2)(b) of NYC does not necessarily indicate that international public policy should be excluded. Perhaps national public policy is irrelevant to international commercial arbitration and international public policy is more desirable for being considered in certain circumstances. This could be the reason why most commentators have approved the application of international public policy rather than of national public policy in the enforcement context as will be examined in the following discussion.

5.2.2 International public policy

International public policy applies not only to the pure internal issues but also to the issues with foreign elements in which other States could be affected. Accordingly, international public policy is also concerned with the application of morality and the basic principle of each society.²⁷ As mentioned above, national public policy is interpreted as principles of morality and justice as well as of culture and religion, whereas international public policy is described to be:

...those principles of the country's domestic public policy that it will insist on applying in an international relationship or relationship involving different nationalities. They constitute those issues of domestic public policy that the

²⁵ *Osuuskunta Matex V.S. v T.K.K. General Directorate*, (File Nr. 94/662, Decision Nr. 95/140, unreported 4th Commercial Court of Ankara).

²⁶ The Convention requires the State to invoke only the specifically- articulated fundamental public policy of the State and this not at the case at hand.

²⁷ Pierre Mayer and Audley Sheppard, 'Final ILA Report on Public Policy as A Bar to Enforcement of International Arbitral Award' (2003) 19 *Arb Int'l* 249.

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country feels so strongly about as to insist that transactions or awards that have a connection with the country must conform with.²⁸

In this sense, Professor Lew points out that international public policy can include the maintenance of human rights, preventing terrorism, avoiding abuses by multinational entities, corruption and eliminating bribery.²⁹ Gaillard and Savage have also provided examples that can be considered international public policy violations, which include corruption, customs offences, antitrust violation, customs offence, breaches of embargoes and drug trafficking.³⁰ From these examples it can be said that every conduct that affects the interests and rights of the international community may be considered as falling within the remit of international public policy violation.

However, international public policy should always be interpreted and construed narrowly bearing in mind that matters that can be considered part of national policy should not necessarily belong to international public policy.³¹ In other words, international public policy is not entirely autonomous of the principles of national public policy where enforcement is sought; it is merely understood to be narrower than the latter.³² It is a national public policy, then, but from an international perspective. According to Lalive, international public policy enables a State to enforce its observing of proper regulations concerning international matters.³³

In view of that, the level of international public policy has been affirmed by much legislation and supported by many courts and commentators.³⁴ It is often called the

²⁸ Andrew Okekeifere, 'Public Policy and Arbitrability under the UNCITRAL Model Law' (1999) 2 Int ALR 70, 71.

²⁹ Julian Lew (ed), *Contemporary Problems in International Arbitration* (Martinus Nijhoff 1987) 83.

³⁰ Gaillard and Savage (n 1) para 1521.

³¹ Albert Jan van den Berg, *Distinction Domestic-International Public Policy* (XXI, YBCA 1996) 502.

³² Gaillard and Savage (n 1) para 1712.

³³ Lalive (n 5) 273.

³⁴ French New Code of Civil Procedure of 1981 Art. 1498 and Art.1502; Lebanese New code of Civil Procedure of 1983 Arts. 814 and 817; *Parsons & Whittemore Overseas Co. Inc. v Société Générale de l'Industrie du Papier (RAKTA)*, *Bank of America*, 508 F2d 969,(US, Court of Appeals 2nd Circuit 1974). *Kersa Holding Company Luxembourg v Infancourtage, Famajuk Investment and Isny*, (1996) XXI YBCA 617, (Luxembourg Court of Appeal 1993); Katherine Lynch, *The Forces of Economic*

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French approach since the French national statutes refers to international public policy rather than purely national public policy. Art. 1502(5) of the French New Code of Civil Procedure states that an appeal of a court decision granting recognition of enforcement is only available if recognition or enforcement is contrary to international public policy.

Under the NYC, on the other hand, Art. V(2)(b) provides no certain guidelines for clarifying the level of international public policy; it merely refers to the public policy of the country where the enforcement is sought. In one commentator's view, there is a huge body of court decisions under the Convention that have considered the distinction between national and international public policy, either explicitly or implicitly.³⁵ Furthermore, in this context it is submitted that despite the words of the Convention, public policy can also be international but merely not as a 'genuinely international public policy' rooted in the law of the community of nations'.³⁶ Hence, there is nothing to prevent each State from adopting, as part of its notion of international public policy, principles that are accepted universally, whether willingly or in order to fulfil its international commitments.³⁷ In terms of judicial support, for instance, the German Supreme Court held that 'what is required is rather an infringement of international public policy. ... The recognition of foreign arbitral awards thus is governed normally by a less stringent regime than domestic awards'.³⁸

It can be clearly understood from the above that adopting the national public policy approach would create considerable uncertainty and have undesirable ramifications; therefore, the better view is to implement the international public policy approach under

Globalization: Challenges to the Regime of International Commercial Arbitration (Kluwer 2003) 134; Pieter Sanders, *Consolidated Commentary* (IV YBCA, Kluwer 1979) 251.

³⁵ Albert Jan van den Berg, *The New York Arbitration Convention of 195: Towards a Uniform Judicial Interpretation* (Kluwer 1981) 362; see for instance *Adviso N.V. v Korea Overseas Construction Corp.*, (1996) XXI YBCA 612, (South Korea Supreme Court 1995); *Seller v Buyer*, (1992) XVII YBCA 503, (Germany, Federal Supreme Court 1990); see also Troy Harris, "The 'Public Policy' Exception to Enforcement of International Arbitration Awards under the New York Convention" (2007) 24 J Int'l Arb 9.

³⁶ Gaillard and Savage (n 1) para 1712.

³⁷ *ibid.*

³⁸ *Seller v Buyer*, (1992) XVII YBCA 503, 505, (Germany, The Supreme Court 1990).

the NYC and national courts should endorse this approach, which would help promoting more judicial consistency.

5.2.2.1 International Public Policy vs National Public Policy

This distinction has practical significance which is to differentiate between the elements that falling within the scope of national public policy and do not necessarily constitute public policy in international relations.³⁹ As Lalive noted, the distinction is established ‘in the very nature of private international law, a branch of the law which is based on a fundamental distinction between “domestic” situations and “international” situations’.⁴⁰ These distinctions can also be found within the statutory law and regulations of several countries.⁴¹ It should be noted that where the statutory law is silent, national courts may impliedly or expressly affirm the distinction through legal precedent, as is the case in England.⁴²

Yet again, it must be stated that international public policy is part of national public policy. Accordingly, international public policy is more fundamental and covers the central part of national public policy. Unlike national public policy, international public policy merely covers the transactions that involve a foreign element.⁴³ Accordingly, international and national public policy may be referred to as ‘external-territorially and internal-territorially’ public policies, respectively. Therefore, the scope of international public policy is distinct from that of national public policy.

³⁹ van den Berg (n16).

⁴⁰ Lalive (n 5) 260.

⁴¹ For instance, Greece International Commercial Arbitration Law No. 2735 of 1999 , Art. 34(2)(b)(ii); the French Procedure Civil Art. 1484 deals with domestic arbitration disputes refers to the domestic public policy whereas Article 1502 refers to the international public policy.

⁴² LJ Bingham, ‘Reasons and Reasons for Reasons’ (1988) 4 Arb Int 141.

⁴³ Jose Rosell, ‘The Challenge of Arbitrators’ (2003)10 Croatian Arbitration Yearbook 151, 164; Albert Jan van den Berg , *Distinction Domestic-International Public Policy* (XXI, YBCA, Kluwer 1996) 502.

Therefore, some national legislation such as the French Civil Procedure Code, for instance, provides that incompatibility of enforcement with international public policy could be one of the grounds for the refusal of recognition and enforcement of foreign arbitral awards.⁴⁴ In such occasion, it would be more accurate to say that international public policy remains an essential factor of any State's legal system and this reflects its significance in the realm of arbitration. Indeed, the main aim of such distinction between national and international public policy under the NYC is to encourage national courts to opt a narrow interpretation of public policy exception in order to help prevent an arbitral award from being unenforced.⁴⁵

5.2.2.2 The Significance of International Public Policy

International public policy as defined by the ILA Resolution represents an appropriate approach for keeping the 'unruly horse' under control. In addition to the ILA's persuasive reasons⁴⁶, one may add several further grounds for adopting the international public policy approach in the enforcement context as follows.

First, the distinction, as set out above, leads to the conclusion that international public policy is always used as a narrative approach that helps achieve the main purpose of facilitating the enforcements mechanism.⁴⁷ The case law survey according to the ILA shows sufficient judicial recognition of the significance of the distinction between

⁴⁴ Gaillard and Savage (n 1) para 1648; Rubino-Sammartano (n 11) 532.

⁴⁵ Rubino-Sammartano (n 11) 532; Julian Lew, *Applicable Law in International Commercial Arbitration: a Study in Commercial Arbitration Awards* (Dobbs Ferry 1978) 85.

⁴⁶ UNGA 'Report of the Working Group on Arbitration on the work of its thirty-eighth session (New York, 12-16 May 2003)' 36th session (2003) UN Doc A/CN.9/524 paras 51-52; Sheppard (n 6).

⁴⁷ Philip Daniels, *Analyse the Role of Public Policy as a Ground for Opposing Recognition and Enforcement of International Arbitration Awards in the New York Convention and Model Law* (LLM Thesis, University of Queensland 1994) 18; Sanders (n 33) 251.

national and international public policy.⁴⁸ Hence, some courts have expressly confirmed that ‘the public policy exception is very narrow. ...An expansive construction of this defence would vitiate the Convention’s basic effort to remove preexisting obstacles to enforcement’.⁴⁹

Second, international public policy would prevail over any conflicting national public policy simply because the latter is inapplicable with regard to the judicial enforcement of foreign arbitral awards.⁵⁰ Put differently, national public policy is flexible and unbounded concept that varies from one State to another, unlike international public policy, which when applied can lead to greater legal certainty and simplicity in the enforcement context. For this reason, the international public policy approach has the effect of transforming the exception from an ‘escape device’ for domestic law into a useful and consistent international standard.⁵¹

Third, it is commonly recognised that Art. V(2)(b) refers to international public policy and not purely national public policy⁵². As Professor Lew argues, it refers to ‘national international policy’.⁵³ Therefore, it would be implausible to isolate national public policy from international public policy.

Fourth, as Rubino-Sammartano points out that ‘international public policy represents that part of public policy which is more vital for the legal system, its principles which are more jealously adhered to and which cannot be affected by the access into that legal system of a foreign provision (or decision) which conflicts with them’.⁵⁴ These words can be interpreted to mean that international public policy becomes part of the State’s

⁴⁸ Mayer and Sheppard (n 27).

⁴⁹ *Parsons & Whittemore Overseas Co. Inc. v Société Générale de l'Industrie du Papier (RAKTA), Bank of America*, 508 F2d 969, para [8] (US, Court of Appeals 2nd Circuit 1974).

⁵⁰ Winnie (Jo-Mei) Ma, ‘Public Policy In The Judicial Enforcement of Arbitral Awards: Lessons For and From Australia’ (PhD Thesis, Bond University, United Kingdom 2005) 84.

⁵¹ Gary Born, *International Commercial Arbitration* (Kluwer 2009) 2836; see also Michael Tilbury and others, *Conflict of Laws in Australia* (OUP 2002) 392.

⁵² Gaillard and Savage (n 1) para 1710.

⁵³ Lew, *Contemporary Problems* (n 29) 83.

⁵⁴ Rubino-Sammartano (n 11) 506.

legal system and is used to guard its basic principles. It also brings us to the main point about the significance of international public policy, particularly under the NYC, which is the protection of a State's morality and justice, and this cannot be universally in conflict.

Fifth, bearing in mind the legislative history of Art. V(2)(b) and that, as Professor van den Berg observes, 'the Convention can be said to refer to international public policy as distinct from national public policy',⁵⁵ this does not necessarily mean that the national public policy is meant to be used under this provision. It simply suggest that there are two types of public policy and one of them is narrower since it applies the most basic notions of the State, i.e. a clear direction to the international public policy that should be applied under the NYC wordings. Further, the clear majority of States in the world share most of these principles and attitudes and thus it has been described as a 'selfish character'.⁵⁶ Therefore, it is submitted that international public policy should always be adopted when the NYC applies, and national courts should achieve a consensus interpretation in this matter.

Indeed, for the reasons already given, using international public policy is both necessary and fundamental within the NYC context and would promote further enforceability and consistency for the arbitral awards. Therefore, national courts need to pay due regard to this matter. In order to shed further light on the practical significance of international public policy, a few case illustration will now be examined briefly.

⁵⁵ van den Berg (n 35) 361.

⁵⁶ Mark Buchanan, 'Public Policy and International Commercial Arbitration' (1988 Re- published 2007) 26 Am Bus LJ 511, 514.

5.2.2.3 Case Illustrations

There is ample case law where the national courts have taken the view that Art. V(2)(b) of the NYC should be interpreted using the concept of international public policy. For instance, the Milan Court of Appeal stated that ‘we must say where the consistency [with public policy] is to be examined, reference must be made to the so-called international public policy, being a body of universal principles shared by nations of similar civilization, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions’.⁵⁷ This indication clearly removes unwarranted barriers to the view that Art. V(b)(2) merely refers to the national public policy of the enforcing State. The court expressly thought that it would be wrong if the interpretation of the said article should be against the universally accepted principles and further respected the ultimate purpose of the NYC. The rationale of this decision was not only that a breach of the State’s own principle can be considered as a public policy violation, but the breach of international principles should be taken in account.

In addition, it is not always evident that when the national courts adopt a very expansive view of the national public policy interpretation under the Convention it would protect the State’s central principles. Notably, in *Westacre Investment Inc v Jugoimport-SPDR Holding Co Ltd*,⁵⁸ it was held that the arbitral award can be enforced even though it contradicts the enforcing State’s public policy. The case establishes two categories of public policy violations under two main types as follows:

The first type of violation is to international public policy which can lead to the non-enforcement of the arbitral award by the English court in any circumstance. The second type of violation is to national public policy, in which case enforcement will be denied only where the underlying contract is illegal under both the proper law of the contract and under the *Lex arbitri*. In other words, the illegality of contract under the enforcement

⁵⁷ *Allsop Automatic Inc v Technoski snc*, (1997) XXII YBCA 725, 726 (Italy, Milan Court of Appeal 1992)(emphasis added).

⁵⁸ *Westacre Inv. Inc. v Jugoimport-SPDR Holding Co. Ltd* [1999] 2 Lloyd's Rep 65, (CA).

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State's legal system would not affect the enforcement of the award as long as it was legal under the law of the contract and the law of the place where the arbitration is to take place. Therefore, Waller LJ stated the following in this respect:

It is legitimate to conclude that there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view.⁵⁹

Moreover, in *Hebei Import & Export Corp v Polytek Engineering Co. Ltd*, the court carefully explained what truly constitutes international public policy as follows:

Does ['international public policy'] mean some standard common to all civilized nations? Or does it mean those elements of a State's own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other States are affected? I think that it should be taken to mean the latter. If it were the former, it would become so difficult of ascertainment that a court may well feel obliged as the Supreme Court of India did in *Renusagar* ...to abandon the search for it.⁶⁰

The court further emphasised that the public policy grounds under the NYC should be constructed narrowly. It held that the test of international public policy was whether the issue of public policy contravened the State's own principles which are 'fundamental to notions of morality and justice'.⁶¹ Justice Bokhary PL explains as follows:

In some decisions, notably of courts in civil law jurisdictions, public policy has been equated to international public policy. As already mentioned, Article V. 2(b) specifically refers to the public policy of the forum. No doubt, in many instances, the relevant public policy of the forum coincides with the public policy of so many other countries that the relevant public policy is accurately described as international public policy. Even in such a case, if the ground is made out, it is because the enforcement of the award is contrary to the public policy of the forum.⁶²

⁵⁹ *Soleimany v Soleimany* [1998] 3 WLR 811, (CA).

⁶⁰ *Hebei* (n 2) 676.

⁶¹ *Renusagar* (n 3) 699.

⁶² *Hebei* (n 2) 668.

The rationale behind this judgment furthers the Convention's goal of unifying the international public policy standards even though it can be difficult to ensure that such standards are fully accepted by other States.⁶³

Ultimately, the above decisions do not necessarily mean that an interpretation of Art. (2)(b) of the NYC should abandon all considerations of national public policy. It means rather that the national courts should not automatically assume that public policy is violated from a national perspective only and should consider other connected notions that may violate the States fundamental principles. It should also engage the international principles that show nations' attitudes and international weighty values based on the international public policy principles. Therefore, the ILA Final Report and specifically Recommendation 2(b) specifically states that a court when deciding whether the arbitral award contravenes the international public policy may look to other States' legal practice and experience to find whether there is a 'consensus of opinion'.⁶⁴

5.2.3 Supranational Public Policy

The third type of public policy is called supranational public policy. Simply put, it is public policy that is formulated from supranational sources⁶⁵ and is comprised of transnational and regional public policy.

⁶³ Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law Practice* (OUP 2007) 427.

⁶⁴ Mayer and Sheppard (n 27).

⁶⁵ Buchanan (n 56) 514; Kenneth Curtin, 'An Examination of Contractual Expansion and Limitation of Judicial Review of Arbitral Awards, (2000) 15 Ohio St J Disp Resol 346; James Fry, 'De'sordre Public International under the New York Convention: Wither Truly International Public Policy' (2009) 8 Chinese J Int'l L 81.

5.2.3.1 Transnational Public Policy

Transnational public policy or sometimes so-called truly international public policy⁶⁶ ‘is the one that establishes universal principles, in various fields of international law and relations, to serve the higher interests of the world community, the common interests of mankind, above and sometimes even contrary to the interests of individual nations’.⁶⁷ It contains the ‘fundamental rules of natural law, the principles of universal justice, *jus cogens* (compelling law) in public international law, and the general principles of morality accepted by civilised nations’.⁶⁸ It merely comprises the principles that are regularly applied in the law of international trade, and thus it is assumed to have international consensus. Therefore, it is also described as the ‘public policy based of international customs and international law’.⁶⁹ Examples of transnational public policy issues include the prevention against slavery, racial discrimination, terrorism, destruction of cultural heritage, and violation of basic human rights.⁷⁰

It can be argued that transnational public policy can be similar in content to international public policy in terms of the universally accepted rules. However, there is one clear difference. International public policy concerns itself with and is based on the State’s individual view, unlike the transnational public policy which is based on rules that are

⁶⁶ Some commentators refer to this type as the truly international public policy. For more details, see Pierre Mayer, ‘Effect of International Public Policy in International Arbitration?’ in: Loukas Mistelis and Julian Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer 2006) 61- 63; John Gotanda, ‘Charting Developments Concerning Punitive Damages: Is the Tide Changing?’ (2007) 45 Colum J Transnat’l L 507, 512; See also Jacob Dolinger, ‘World Public Policy: Real International Public Policy in the Conflict of Laws’(1982) 17 Texas Int L J 167; Rachel Engle, ‘Comment, Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability’ (2002) 15 Transnational Law 323, 342; Vesselina Shaleva, ‘The Public Policy Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia’ (2003) 19 Arb Int’l 67.

⁶⁷ Jacob Dolinger, ‘World Public Policy: Real International Public Policy in the Conflict of Laws’ (1982) 17 Texas Int L J 167, 172; see also *State agency A and State owned bank B v Consultant X*, (1996) XXI YBCA 172, 178, (Swiss Supreme Court 1994).

⁶⁸ Mayer and Sheppard (n 27) 259.

⁶⁹ Domenico Di Pietro and Martin Platte (eds), *Enforcement of International Arbitration Awards: The New York Convention of 1958* (1st edn, Cameron May 2001) 181-182.

⁷⁰ Hans van Houtte, ‘From a National to a European Public Policy’ in James A. R. Nafziger and Symeon Symeonides (eds), *Law & Justice in a Multistate World – Essays in Honour of Arthur T Von Mehren* (Nijhoff 2002) 841, 846.

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recognised by the universal community.⁷¹ This has led to international public policy being considered a part of transnational public policy. Hence, it should be noted that the set of legal rules that comprise transnational public policy are also included in the same rules of the *lex mercatoria*⁷² and *lex sportiva, lex electronica*⁷³, as well as all other non-State bodies of law.⁷⁴

It is clear that transitional public policy is ‘a hybrid between international public policy and the *lex mercatoria*’.⁷⁵ Based on the significant relationship between the three norms, transnational public policy has appropriately clear prospects of being applied as the enforcement State’s international public policy even though it is unambiguous in the sense that it can be fitted and interpreted as Art. V(2)(b) of the NYC’s applicable public policy.⁷⁶ This can easily be explained by the resource of this type of public policy, which involves international public policy and *lex mercatoria*. As a result, transnational public policy can become international public policy and international public policy can also become transnational public policy.⁷⁷ However, the notion and application of transnational public policy contain some appeals.

First, the notion’s uncertainty itself may lead to conflation with the other types of public policies discussed above, and also the lack of court practice in this matter may lead to an

⁷¹ Peter Turner and Jan Paulsson, ‘*Grounds for Refusal of Recognition and Enforcement Under the New York Convention: A Comparative Approach*’ (UCITRAL, Experts Group Meeting on Disputes Resolution and Corporate Governance, Vienna 2003) 7.

⁷² The law of International Merchants, for more details see A. F. M. Maniruzzaman, ‘The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?’ (1999) 14 Am U Int’l L Rev 657.

⁷³ Curtin (n 65)

⁷⁴ *ibid* 348, (providing that consideration of transnational public policy can be only when *lex mercatoria* applied and seemingly when other State bodies of law are also involved).

⁷⁵ Kenneth Curtin, ‘Redefining Public Policy in International Arbitration of Mandatory National Laws’(1997) 64 Defense Counsel Journal 271.

⁷⁶ For case application of this type of public policy see Audley Sheppard and Clifford Chance, ‘Public Policy and the Enforcement of Arbitral awards: Should there be a Global Standard?’ (2004) 1 Transnat’l Disp Mgmt para 3.

⁷⁷ Buchanan (n 56)511, 520 (stating that ‘international public policy of any given State would be influenced by an emerging consensus not yet a part of the State’s public policy’) this impliedly means the transnational public policy can be become a part of the international public policy that applied from the State’s national perspective’).

undesirable consequences. The clear wording of the NYC leaves no doubt by referring to the State's public policy and not the nation's public policy. Therefore, it is logical for the enforcement States to adopt the basic considerations of its own legal system, or international public policy which can be a part of the State's law and practice.⁷⁸

Second, the scope and application of transnational public policy are still unlimited, not clear and remains identifiable, which can lead to indefinite conclusions by national courts. Thus, it is said that where transnational public policy may appear, scholars should take additional consideration to shed a bitter tear.⁷⁹ Also, achieving a uniformity for international commercial arbitration does not involve such a malleable consideration since all national system including judicial practice give priority to protecting the fundamental principles of justice and basic human rights within their territories.⁸⁰ Thus, applying the transnational public policy with the enforcement context would lead to unexpected destinations and perhaps introduce some unwarranted complexities in the application of Art. V(2)(b).

It must be noted that despite the perceived benefits of applying transnational public policy in the field of arbitration, the time has clearly not yet arrived for the Yemeni legal system to envisage the idea of transnational public policy into the field of arbitration since the system primarily needs to include the idea of international public policy in the first place. This is because the transnational public policy remains undeveloped in many Middle Eastern States, understandably because it may supersede their national public policies. It is true, the extent of transnational public policy may sometimes be narrower

⁷⁸ Gaillard and Savage (n 1) para 1712.

⁷⁹ Alan Redfern, 'Comments on Commercial Arbitration and Transnational Public Policy' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?*, (ICCA Congress Series, No. 13, Kluwer 2007) 871.

⁸⁰ W. Michael Reisman, Law, International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?*, (ICCA Congress Series, No.13, Kluwer 2007) 855-856.

than the international public policy⁸¹ but it is still identifiable, while the latter is universally accepted and comes into play obviously in the field of enforcement.

Furthermore, facing the difficulty to articulate an adequate frame for transnational public policy or even shed some light on the phenomenon, some scholar does not agree as to what essentially constitutes the elements of transnational public policy.⁸² Finally and most importantly, as far as Yemeni legal technique is concerned, international public policy acceptance would not conflict with Shari'ah legal principles since it has been applied in some identical forums, such as Saudi Arabia.⁸³ Thus, the author suggests that applying international public policy should, at least currently, be sufficient to connect Yemeni public policy with common denominators of public policy that are widely recognised among many jurisdictions including Islamic countries.

5.2.3.2 Regional Public Policy

Regional public policy, sometimes called multinational public policy, is expressed as a level of public policy that includes the fundamental principles of economic, political and even cultural interests that are shared within particular region.⁸⁴ In view of that, this level is more than national and less than completely international. Thus, it may sometimes prevail over the national public policy of those States within the region.⁸⁵

⁸¹ Fry (n 65) (concluding that there are perceived benefits to relying on truly international public policy for the enforcement State) .

⁸² Redfern (n 79) 873.

⁸³ See Chapter 4 point 4.6.3 page 182.

⁸⁴ Emmanuel Gaillard, 'Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules' (1995) 10 ICSID Rev-FILJ 208 .

⁸⁵ (Jo-Mei) Ma (n 50) 97.

Regional public policy derived its legitimacy from international conventions or legal agreements between States and consequently the regional entity came into force. The better examples of this level can be found in the EU and the Middle East.⁸⁶ The significance behind this level is its primacy influence between the contracting States. Moreover, it has a combination of the best features of national and international public policy. For instance, it is national since it becomes part of the State's public policy when it enters into regional conventions with other States and it is international also because it contains an extra-territorial function.⁸⁷

Case law illustration for this level can be found in the *Eco Swiss* case in which the CJEU referred in its decision to the 'European public policy' as a ground for annulment of the arbitral award.⁸⁸ The CJEU rendered its decision on the ground that the arbitral award contradicts the anti-trust provision of the Treaty of Rome,⁸⁹ and therefore represents a violation of the EU's public policy.⁹⁰ It is clear therefore that regional public policy has a supervisory role in the regulations of States within a region.⁹¹

Three observations are worth considering. First, each court within the EU States is obligated to apply the EU's public policy into its national legal system as it becomes a part of its national public policies. Accordingly, the EU national courts should enforce the EU's public policy regardless its consistency with their national public policy.⁹² Second, although the *Eco Swiss* case concerned the annulment of an arbitral award when it breached the EU's public policy, the case should be also be treated as relating to the public policy exception for the non-enforcement of an arbitral award. Thus, the CJEU

⁸⁶ As Muslims States have a common sharing and understanding of public policy as indicated in Shari'ah; ; See for instance, Amman Convention on Commercial Arbitration of 1987: The Riyadh Arab Convention on Judicial Co-operation of 1983.

⁸⁷ Jean-Hubert Moitry, 'Right to a Fair Trial and the European Convention on Human Rights: Some Remarks on the Republique de Guinde Case'(1989) 6 J Int'l Arb 115.

⁸⁸ *Eco Swiss* (n 9).

⁸⁹ Treaty Establishing the European Community 1957 (Rome, 25 March 1957).

⁹⁰ *Eco Swiss* (n 9).

⁹¹ Lew and others (n 7) para19-25.

⁹² *Eco Swiss* (n 9).

emphasized that Art. 81 of the Treaty of Rome may be regarded a matter of public policy within the meaning of the NYC since it is mandatory in nature.⁹³ Third, it is obvious that regional public policy, when it exists, prevails over a State's national public policies and is considered a further step for facilitating and unifying the enforcement grounds effectively. Indeed, regional public policy is an obligatory consideration for national courts in some part of the world and this noticeably applies to the EU.

That said, regional public policy is still controlled by the interests of the region and this may contradict with other extra-territorial public policies and may also affect the interests of the world community. By contrast, international public policy can cover large issues and can also include regional public policy. It must be noted that the contents of regional public policy form part of international public policy, and thus maintaining this level of public policy would lead to uncertain consequences. It is submitted, therefore, that regional public policy is superfluous in the existent of intentional public policy. The question that now emerges is what really constitutes a truly international public policy that should be endorsed in a global context and how can the scope of such a policy be determined.

5.2.3.3 Supranational Public Policy vs International Public Policy

Despite the similarities of both levels as they are constructed from extra-territorial scope and cross-border character of national boundaries, they may to some extent enjoy different functional characteristics. First, the theoretical meaning of international is 'between or among nations', the meaning of transnational is 'beyond nations'.⁹⁴ This expresses the ideal that transnational public policy may enjoy universal characteristics more than the international public policy, since international public policy may involve national interests, being part of national public policy. In other words, transnational

⁹³ *ibid.*

⁹⁴ Fernando Serrano, 'Towards a Transnational Procedural Public Policy' (2004) 20 *Arb Int'l* 333,335.

public policy reflects the most fundamental principles of the international community, whereas international public policy embodies a particular nature of public policy within the state entity.⁹⁵ Thus, transnational public policy is considered more narrative and restrictive than international public policy.

Second, international public policy functions in the field of private international law, and is therefore subject to the choice-of-law process.⁹⁶ As a result, it applies the forum law in priority rather than any applicable foreign law. According to Winnie, its application is 'conditional upon its law area being the relevant forum, or its law area's law being the applicable or governing law'.⁹⁷ Transnational public policy, on the other hand, is applicable regardless of whether any law other than the forum law is applicable. Its application is not conditional on private international law since it is mainly conducted in the field of public international law.⁹⁸

There is also one distinction that has not been addressed in the literature, and this is that transnational public policy plays a key role in the context of the enforcement of international arbitral awards through its imperative nature, whereas international public policy does not have the same binding authority on the national courts. Therefore, Fry has identified, in theory at least, 'a type of supranational norm that enforcement courts must apply when deciding whether to refuse to recognize or enforce an international arbitral award under the public policy defence'.⁹⁹ Fry is referring to transnational public policy, as this is the only type of public policy that may have an imperative nature among other supranational public policies. However, reliance on transnational (truly) public

⁹⁵ Buchanan (n 56).

⁹⁶ Mayer and Sheppard (n 27).

⁹⁷ (Jo-Mei) Ma (n 50) 88.

⁹⁸ Curtin (75).

⁹⁹ Fry (n 65).

policy would help mitigate some of the adverse side effects of globalisation, although there are important reasons that also prevent such reliance.¹⁰⁰

To sum up, the better view is that international public policy should be adopted, in particular for some Middle Eastern countries such as Yemen. Although it is increasingly recognised that there should be a truly international public policy or transnational public policy¹⁰¹, there are still some hurdles that may prevent some countries from embracing this notion in their jurisdiction. The difficulties appear; first, for arbitral parties, where the evidentiary difficulty in establishing a certain principle's universality; and second, for arbitrators, ambiguity as to the degree of universal recognition required before the principle becomes truly international.¹⁰² Thus, most authorities have interpreted the public policy that applies under the Convention as being international public policy instead of the transnational (truly) public policy.

5.3 National Public Policy under Yemeni Law

The YNDAA specifically Art. 66 provides:

Enforcement of the arbitral award pursuant to this law may not be ordered except after verifying that:

(b) The award does not contradict public policy in the Republic of Yemen.¹⁰³

¹⁰⁰ One of these negative effects would be the emasculation of the NYC itself. See for further discussion, Fry (n 65) 82-134; see also Gaillard and Savage (n 1) paras 1648, 1712.

¹⁰¹ Okekeifere (n 28).

¹⁰² Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2006) *Melbourne Journal of International Law* 9; Mayer and Sheppard (n 27).

¹⁰³ Art. 66(b).

Chapter 5

The question to be examined here is what level of public policy the YNDAA requires enforcing court to apply. Before considering this question, it is noteworthy that Yemeni legislators did not include public morals and Shari'ah violation within this provision as compared to some other Middle Eastern countries.¹⁰⁴ It can be understood, however, that the legislators impliedly intended to include these two criteria as part of Yemeni public policy in general. Dealing with public policy concerns would automatically entail the recognition of Shari'ah and public morals as a part of this public policy for any Middle Eastern State since the public policy exception is normally interpreted in a broad sense. In addition, Art. 494(1) of the Yemeni Civil and Procedures Act, with regard to the enforcement of foreign court judgments and writs of execution indicates that 'the judgment should not violate the Shari'ah principles, the public morals and the public policy rules of Yemen',¹⁰⁵ in order to be enforced in Yemen. Thus, the same approach likely applies in the enforcement of the foreign arbitral awards. In contrast, the NYC does not include any religious or moral rules and merely provides the public policy exception.

Referring to the YNDAA, the main concern with the above provision is that no distinction is made between Yemeni public policy and international public policy. Therefore, Yemeni courts when considering the enforcement of an arbitral award would take into account the national public policy only, in view of the fact that the YNDAA clearly states the public policy of Republic of Yemen. Despite the fact that international public policy is considered part of national public policy and consequently part of Yemeni public policy. This study therefore suggests that when Yemeni courts have to make a decision on enforcement issues, they should consider international public policy, which is the fundamental part of the whole scope of the Yemeni public policy as

¹⁰⁴ The Egyptian Code of Civil and Commercial Procedures No. 13 of 1968 Art. 298(4); The Bahraini Law No. 12 of 1971 on Civil and Commercial Procedures Art 252; the Qatari Law of Civil and Commercial Procedures. Art. 380(d).

¹⁰⁵ The author's translation.

discussed above, and hence will be binding on all other courts. This distinction has been recognised by many Middle Eastern countries.¹⁰⁶

For instance, the Egyptian Supreme Court, in some decisions, has clearly distinguished between national public policy and international public policy in the enforcement of foreign arbitral awards.¹⁰⁷ The court recognised international public policy and applied the narrower interpretation of public policy concern which includes any prohibition of universally unaccepted activities such as bribery, corruption and drug smuggling.¹⁰⁸

Since there is insufficient case law for both Yemeni Arbitration Acts, it becomes more complicated and ambiguous when the question of the scope of public policy arises in the enforcement context. Almost certainly, it would be more accurate if the phrase ‘international public policy’ drafted within the public policy of Yemen in order to avoid any controversy and confusion over its interpretation. However, in legislative drafting, it is not always the case that an explanation of ‘public policy in the Republic of Yemen’ can be encompass international public policy or even regional public policy as it may vary from one State to another when they share the same system of law notably Islamic jurisdictions. It is only direct the explanation that intended to clarify certain points and keep it for restricted interpretation.

Otherwise, closer analysis of the said provision would show an open a wider interpretation for public policy of Yemen and this may include international public policy. The word ‘may’ indicates the discretionary power that is accorded to the national court merely to extend the meaning of public policy and may include what is harmful and lawful for Yemen as a State. For instance, the word ‘may’ in Art. 66 of YNDAA can

¹⁰⁶ The Lebanese New Code of Civil Procedure Art. 814(1); the Tunisian Arbitration Code Art. 81; the new Algerian Code of Civil and Administrative Procedure Art. 1056(6).

¹⁰⁷ Egyptian Supreme Court (Civil), Judgment of 26 April 1982, Case No.714/Judicial year 47; see also, Cairo Court of Appeals, Case No. 97/119, commercial circuit 91, 27/7/2003 in Abdul Hamid El Ahdab and Jalal El Ahdab, *Arbitration with the Arab Countries* (Kluwer 2011) 157, 178.

¹⁰⁸ Mohamed Aboul-Enein, ‘Egypt’ in Jane Paulsson (ed.), *International Handbook on Commercial Arbitration* (Kluwer 2002) 36.

include other connected notions of public policy as injustice or public interest of the Republic of Yemen. In this way, it can open interpretation for other international public policy notions.

For an objective analysis, it is imperative to understand the rationale of the provision when the legislators open the wording for further interpretation. First, it is clear that the provision reflects the public policy of the country, and hence invalidates an arbitral award that is counter to Yemeni public policy. Second, it opens the doors for some judicial control over the way in which these awards may be accepted and enforced in this jurisdiction, although judicial review is not permissible under Yemeni court practices.¹⁰⁹ Put differently, certain provisions of law are vague and still require judicial application for their accurate interpretation in some cases, and this is the case of public policy, which can include concepts such as morality and justice that are applied to international matters. Therefore, it can be logically argued that the public policy provision is inserted under the YNDAA to ‘cover those contingencies and eventualities which could not be covered by other provisions of the arbitration law’.¹¹⁰

While the term ‘public policy of Republic of Yemen’ needs to be construed with caution and analysed with care, at the same time it is equally essential to appreciate the role of precedent through the Yemeni national courts regarding the correct balance of the relationship between national public policy and international public policy. Unfortunately, so far there has not been case law to clarify these complex issues under both the YCAA and, of course, the YNDAA. However, it is predictable that when such questions arise in the context of enforcement, there will not be an easy solution since the YNDAA expressly requires compliance with the public policy of the Republic of Yemen.

Accordingly, the author submits that it is of particular importance for Yemen to ratify the NYC. The ratification of the NYC affords the Yemeni arbitration system several practical

¹⁰⁹ ‘Case No. 33922, the Supreme Court at the Capital City of Sana'a - Commercial Circuit, 2009’ (2010) 2 Int'l J Arab Arb 243.

¹¹⁰ Sidharth Sharma, ‘Public Policy Under the Indian Arbitration Act’ (2009) 26 J Int'l Arb 133, 137.

advantages in this context. First, Yemen's legislation as well as the Yemeni courts will consider the productive approach of international public policy. This is evident by the legal framework that the Convention provides when setting out the public policy exception. Second, ratification by Yemen would eventually ensure greater harmony between Yemen's public policy and the emerging international public policy. Third, the Convention has been applied for more than fifty years since its entry into force and this has created a very useful body of case law, which Yemeni courts can refer to when confronted with public policy issues, as suggested by the ILA Report.

Considering the above enumerated potential advantages of the NYC to Yemen, the Yemeni courts will, for the sake of hypothesis, have to make decisions on the public policy exception through a consideration of the following factors:

1. International public policy should be applied as a part of the national public policy: these criteria are basically recognised in many courts decisions, as discussed above, and this method helps apply the public policy exception in a narrower manner since international public policy can cover more than merely domestic principles. It has been stated that 'those principles of the country's national public policy that it will insist on applying in an international relationship or relationship involving different nationalities. They constitute those issues of national public policy that the country feels so strongly about as to insist that transactions or awards that have a connection with the country must conform with'.¹¹¹ Thus, it is submitted that at least in some instances the intervention and discretionary power for the Yemeni national court can be permissible and highly favourable. The courts should adopt some practical consideration through the following factors:

- a) Considering the ramifications of applying international public policy in the realm of arbitration: If it has been long established among many countries that international public policy should be applied in the enforcement sphere, then it must be embedded into the Yemeni legal system since international

¹¹¹ Okekeifere (n 28) 71.

public policy is accorded greater acceptance in international practice. That said, the negative ramification must also be considered for not applying international public policy and hence challenges the foundation of international commercial arbitration in Yemen. Concisely, the courts must evaluate the possible ramifications in favour of a pro-enforcement bias.

- b) The international precedents on international public policy must be taken into account by the Yemeni courts. This factor would encourage Yemeni courts to consider how courts of other States have applied public policy test and, to the ultimate extent possible, to apply the test consistently.¹¹² Therefore, the Yemeni courts can scrutinize a foreign arbitral award on the ground of public policy violation, but with some limitation.¹¹³
2. Determining the national public policy should not result in an immediate and automatic ruling of public policy violation to refuse enforcement; the violation of the most fundamental policy and of justice should be considered as a framework for any violation of Yemeni public policy. This should give the courts a power to make a further examination of the fundamentals of a society before refusing or annulling a foreign arbitral award.
 3. There should also be standards for revision that the judicial authority may adopt in relation to interpretation of public policy as a ground for refusal.¹¹⁴ These standards can be met only through some precedents, which are unfortunately lacking in Yemen. This is a principle of importance at the enforcement stage in order to simplify international arbitration. Although the Yemeni legal system does not follow this method, it would to some extent guarantee certainty of accuracy in all judicial decisions regarding the enforcement of foreign arbitral awards.

¹¹² Mayer and Sheppard (n 27).

¹¹³ *Shipowners v Charterers*, (2011) XXXVI YBCA 353, (UAE, Fujairah Court of First Instance 2010) .

¹¹⁴ One way of doing that is by applying the “second look” doctrine, for more details see, Homayoon Arfazadeh, ‘In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception’ (2002) 13 Am Rev Int’l Arb 43.

These factors are basically in line with many leading commercial states that follow the narrow interpretation of public policy and include international public policy within their national public policy. As proposed by Berger, ‘applying the restrictive notion of international public policy may well induce domestic courts to use a comparative approach in determining the contents of the *ordre public* international of their legal system and look to other jurisdictions for guidance which may in the long run help to develop a truly international order public by the domestic international public policy “feeding” its transnational counterpart.’¹¹⁵

The rationale is to help the Yemeni national courts make a reasonable interpretation when determining public policy for the purpose of refusing the enforcement of arbitral awards. Ultimately, the use of these factors indicates, in fact, some practical effect to the enforcement of foreign arbitral awards in Yemen. Undoubtedly, the use of a wide interpretation of national public policy will be diminished in the realm of international arbitration in Yemen. It will be clear for the national courts that international public policy is not merely about the values and principles of Yemeni society, but rather should be interpreted as being the most basic and fundamental values of humankind that are recognised internationally.

Another practical effect can be seen through the future interpretation of international public policy by the Yemeni courts, which can establish the basic database for any enforcement hurdles in the future since the legislature has clearly conferred this power to the judiciary to protect the public policy of the Republic of Yemen. These precedents will offer clear guidance in determining the scope of the fundamental rights and basic principles enshrined in the Yemeni constitution. Finally and most importantly, the practical effect is shown by adopting the international trend of a pro-enforcement bias.

Yemen could only therefore invoke the public policy exception under Art. 66(b) where specific statutory or basic principles that affect the national public policy exist when this violation is consistent with the NYC’s main objectives. This analysis goes in line with

¹¹⁵ Klaus Berger, *International Economic Arbitration* (Kluwer 1993) 675.

the international call on shifting the general consideration of national public policy and establishing the explicit public policy for the State. Therefore, an arbitral award can be denied enforcement when it merely violates the fundamental and mandatory laws of Yemen. The same approach has been followed in many jurisdictions, supporting the view that ‘public policy is not a vehicle for court’s objective views and must only be applied the basic of articulated, fundamental policies’.¹¹⁶

It is quite clear that Yemen’s ratification of the Convention would facilitate the adoption of the foregoing guidelines by the Yemeni courts and would also render more effective the enforcement of foreign arbitral awards, by providing the judiciary with an important interpretative tool in the realm of international arbitration.

5.4 Conclusion

It seems that the public policy exception is easier to illustrate than to identify. In the light of the analysis conducted, it is clear that there are diverse levels of public policy that may be applied in the enforcement context. Given these levels’ positive and negative controlling functions has helped to reduce the uncertainties and ambiguity of the public policy exception in term of its intended scope. Although the Convention’s public policy is indicated as being the national public policy of the enforcing States, ‘the structure and objectives of the New York Convention ... should be interpreted as imposing some limits on contracting States’ applications of national public policy.’¹¹⁷

Hence, as this chapter illustrates, international public policy is the appropriate level of public policy in the context of international commercial arbitration under the Convention. This approach simply suggests that the enforcing courts should be expected to refuse the

¹¹⁶ *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH v Ras Al-Khaimah National Oil Company* [1987] 2 Lloyd’s Rep 246, (CA).

¹¹⁷ Born (n 51) 2838.

enforcement of arbitral awards only where there involves a violation of the most basic principles of that State. Besides, it ensures that arbitral parties do not rely on this exception to delay the enforcement of arbitral awards unless there is a fundamental violation of the State's basic principles. Therefore, the courts of many contracting States construe public policy in a very narrow manner and in a way consistent with the Convention's spirit of facilitating the enforcement process (i.e. pro-enforcement bias).

By contrast, the YNDAA explicitly indicates national public policy instead of international public policy. Despite the benefits of relying on this approach, there are significant reasons against such reliance. Essentially, this approach provides broader scope than international public policy and thus it is not in harmony with a narrow construction of the public policy exception under the NYC. Unfortunately, so far there has not been any Yemeni case law to clarify this concern, but it is expected, pursuant to Art. 66(b) of the YNDAA, that the courts would tend to apply merely the national public policy of Yemen. This would also encourage the Yemeni courts to apply much less of a pro-enforcement approach than that adopted by the NYC contracting States, as Yemeni law focuses exclusively on the national public policy. The author suggests that in order to be in harmony with the narrow construction of the public policy exception, Yemen should ratify the NYC. This will result in the dual benefit of (1) help Yemeni courts to apply international public policy instead of national public policy, thereby avoid problems arising from YNDAA's current approach, and (2) delimit the scope of public policy exception in more productive and practical approach, thereby bringing Yemeni arbitration system into closer conformity along with international norms.

The next chapter examines the application of international public policy by the contracting States of the Convention and how the courts' application of this narrow approach promotes the pro-enforcement policy of the NYC.

Chapter 6

Shackling the Unruly Horse – Applications, Treatments and Practical Solutions for the Public Policy Exception

In fact, not only is the Convention one of the few international treaties in respect of which the courts look at what the courts have done in other Contracting States, but [t]here appears to be much more cross-referencing of judicial decisions involving international arbitration cases than there is in any other area of the law.¹

6.1 Introduction

Initially, the infamous ‘unruly horse’ metaphor reveals that it can carry its rider to an impulsive destination.² Accordingly, courts in different developed jurisdictions have been very unenthusiastic to invoke the public policy exception to refuse enforcement of international arbitral awards.³ The courts try emphasising and embracing the narrow application of the public policy exception in the enforcement proceedings to avoid unjust consequences. Hence, the UNCITRAL Secretariat, in the light of ILA Reports, has recommended further consideration on how the NYC contracting States construe the public policy exception narrowly.⁴

This chapter examines the application of public policy exception under Art. V(2)(b) in the light of the narrow approach as intended by the NYC. It establishes the need to avoid applying the national public policy application under Yemeni arbitration legislation in order to keep the public policy under control and thereby confront with the international trend and support the achievement of an arbitration-friendly jurisdiction. The chapter also

¹ Carolyn Lamm and Jeremy Sharpe, ‘Inoperative Arbitration Agreement Under the New York Convention’ in Emmanuel Gaillard and Domenico di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2008) 299 fn.10.

² Jonathan Harris & Frank Meisel, ‘Public Policy and the Enforcement of International Arbitral Awards: Controlling the Unruly Horse’ (1998) 1 LMCLQ 568.

³ Gary Born, *International Commercial Arbitration* (Kluwer 2009) 2841.

⁴ UNGA ‘Interim Report on the Survey relating to the Legislative Implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Note by the Secretariat’ 38th session(2005) UN Doc A/CN.9/585 para 61.

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demonstrates some practical solutions and clear guidelines to help the Yemeni courts in their deliberation, when confronted with an application to deny recognition and enforcement of arbitral awards on the ground of public policy violation.

To that effect, this chapter begins by critically analysing the judicial interpretations of public policy exception under Art. V(2)(b) of the NYC through the lens of domestic court practice by contacting States. It then highlights some further considerations on the most common grounds of public policy violations. Finally, this chapter examines how the public policy exception is applied in Yemeni judicial practice and further suggests how the Yemeni courts can be in line with global practice by considering the narrative application of the public policy exception.

6.2 Judicial Interpretations of Public Policy Exception in the Enforcement Phase

6.2.1 Narrow Interpretation of Public Policy

The narrow interpretation of the public policy exception means that the enforcement court should merely refuse enforcement in certain ‘exceptional circumstances’ or ‘extreme cases’.⁵ This narrow interpretative approach has been derived from international sources that encourage the enforcement of foreign arbitral awards in the State’s territory⁶ and thus described as a ‘reflective of deference to international considerations’.⁷ Many contracting States have adopted this interpretation of public policy through their judicial practice. This approach was, for instance, explicitly applied in the noteworthy case of

⁵ *Hebei Import & Export Corporation v Polytek Engineering Company Limited*, (1999) XXIV YBCA 652, (China, Hong Kong Court of Final Appeal 1999)(emphasised added).

⁶ Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer 2000) 827.

⁷ Joel Junker, ‘The Public Policy Defense to the Recognition and Enforcement of Foreign Arbitral Awards’ (1977) 7 California Western ILJ 228, 234.

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Parsons & Whittemore Overseas Co. Inc. v Societe Generale de l'Industrie du Papier, in which a US Court of Appeals held as follows:

The general pro-enforcement bias informing the [New York] Convention... points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement.⁸

This statement embodies the prevailing judicial perception that the pro-enforcement policy of the NYC entails adopting the narrower approach of the public policy exception by applying the test of 'international public policy', which is narrower than 'national public policy'.⁹ Broadly speaking, it is the nature of the Convention to establish a quasi-uniform public policy application through the narrow reading of the exception. For this reason, more contracting States are likely to adopt a narrow interpretation of this exception in order to uphold the enforceability of foreign arbitral awards.¹⁰ The narrower interpretation has also come to be regarded as a practical tool to help maintain a healthy enforcement regime under the NYC.¹¹ Therefore, many national courts and commentators support the narrow approach in the enforcement context.¹²

⁸ *Parsons & Whittemore Overseas Co. Inc. v Société Générale de l'Industrie du Papier (RAKTA)*, Bank of America, 508 F2d 969, para [8] (US, Court of Appeals 2nd Circuit 1974).

⁹ R Fathallah, 'International Law Association Resolution on the Application of Public Policy as a Ground for Challenging Arbitral Awards' (2003) 16 White & Case International Dispute 3,3; see also Winnie (Jo-Mei) MA - Public policy in the judicial enforcement of arbitral awards : lessons for and from Australia (PhD thesis, Bond University, 2005) 51.

¹⁰ Stewart Shackleton, 'The Internationalization of English Law' (2000) 11 ICA Bulletin 16,17; *Industrial Risk Insurers v M.A.N. Gutehoffnungshutte GmbH*, 141 F3d 1434, (US, Court of Appeals 11th Circuit 1998).

¹¹ James Fry, 'De'sordre Public International under the New York Convention: Wither Truly International Public Policy' (2009) 8 Chinese J Int'l L 81.

¹² Albert Jan van den Berg, *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer 1981) 361; Eric A. Schwarz, 'Globalization and Harmonization of the Basic Notions in International Arbitration: Arbitration Awards – Challenge and Enforcement', (Conference of the International Federation of Commercial Arbitration Institutions held (IFCAI, Hong Kong, 1995) 20–21; Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer 1987) 273.

Likewise, under English judicial practice the narrow interpretation approach is adopted. In *Westacre Investments Inc v Jugoinport SDPR Holding Co Ltd*¹³, the Court of Appeal has asserted that the application of public policy should be construed narrowly when one of the parties sought to resist enforcement on the basis of illegality in the main contract, and that this was something that must be counter-balanced against the competing public policy issue of the finality of the award.¹⁴ In the same manner, the national courts and legislation of many Middle Eastern countries have tended to apply the narrow approach and have adopted international public policy instead of their national public policy. Kuwait, Syria and Saudi Arabia, for instance, have all embraced the NYC and adopt within their domestic rules and legislation the NYC's main goal and policies(i.e. narrow interpretation of public policy exception).¹⁵

In relation to Shari'ah law concerning the application of public policy, Islamic principles are considered the highest and most fundamental notion of justice in Islamic countries. Therefore, by way of analogy, any violations to these principles may lead to non-enforcement of an arbitral award. This may be considered a part of the narrow interpretation of the public policy exception in the enforcement context. Therefore, some may argue that in order to gain the confidence of the international community, Islamic contracting States 'may choose to give the public policy defence set forth in Art. V(2)(b) of the NYC a narrow reading'.¹⁶ Indeed, what is needed for Yemen is to apply public

¹³ *Westacre Inv. Inc. v Jugoinport-SDPR Holding Co. Ltd* [1999] QB 740, (QB Comm Ct).

¹⁴ John Tarlinton, 'International Commercial Arbitration and Public Policy(with principle reference to the laws of Australia, France, Switzerland, the United Kingdom and the United States)'(PhD Thesis, University of Technology, Sydney, 2003) 165-166.

¹⁵ Frank Bannon & Simon Chapple, 'The Balancing Act: International Arbitration's Developing Role in the Middle East' (2005) Mondaq Bus Briefing

<http://www.claytonutz.com/publications/newsletters/international_arbitration_insights/20041103/the_balancing_act_international_arbitrations_developing_role_in_the_middle_east.page> accessed on 20 June 2012; Charles Brower and Jeremy Sharpe, 'International Arbitration and the Islamic World: The Third Phase, (2003) 97 AJIL 643, 649 (remarking on some Middle Eastern contracting States that apply the narrow approach of public policy application).

¹⁶ Kristin Roy, 'The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral awards?'(1995) 18 Fordham Int'l L.J. 920, 955-956; see generally Samir Saleh, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States

policy in narrative approach to gain the confidence of the international commercial community. This is because the fact that the narrower the public policy that is applied, the more promising it is for the foreign arbitral award to be enforced.

6.2.2 Broad Interpretation of Public Policy

On the other hand, some scholars and national courts have adopted a broad or liberal construction of the public policy exception.¹⁷ The broad interpretation simply applies the public policy exception in the context of enforcement with a more liberal attitude. Put differently, public policy has to be applied in the light of national public policy, rather than international public policy. The rationale behind the broad approach is that by adopting an interpretation like that of the US courts, which limits the public policy exception to the ‘basic notions of morality and justice’, the national courts would, in practice, leave the exception ‘without meaningful definition’.¹⁸

Therefore, the proponents of a broader interpretation allege that the narrow interpretation may arguably encourage the arbitral parties to ignore national laws and domestic regulations.¹⁹ Moreover, it can be argued that arbitrators are not necessarily sensitive to the public interest and therefore the tribunal should construct their arbitral decision by

of the Arab Middle East’(1985) 1 Arab LQ 19, 26(noting the elements of Islamic public policy application that applied in several Islamic States).

¹⁷ *Kimberley Construction Ltd v Mermaid Holdings Ltd* [2004] 1 NZLR 38 392 (High court of New Zealand 2004); *Amaltal Corp. Ltd v Maruha (NZ) Corp. Ltd* [2004] WL 234, (New Zealand Court of Appeal 2nd Circuit Court 2004); *Methanex Motunui Ltd. v Spellman* [2004] 3 NZLR 454, (The New Zealand Court of Appeal); Mark Kantor, ‘International Project Finance and Arbitration with Public Sector Entities: When is Arbitrability a Fiction?’ (2000) 24 Fordham Int’l L J 1122; see also Michael Hwang and Andrew Chan, ‘Enforcement and Setting Aside of International Arbitral Awards: The Perspective of Common Law Countries’ in Albert Jan van den Berg (ed), *International Arbitration and National Courts: The Never Ending Story* (ICCA Congress Series, No.10, Kluwer 2001) 45.

¹⁸ Joel Junker, ‘The Public Policy Defense to the Recognition and Enforcement of Foreign Arbitral Awards’ in (1977) 7 Cal W Int’l L J 228, 245.

¹⁹ *ibid.*

not limiting the decisions for legitimate concerns of the society.²⁰ Furthermore, this approach ultimately is in favour of giving the national courts the power to resolve public policy issues on its own.²¹ Nevertheless, the broad approach has been generally criticized due to its vagueness and lack of consistency.²² Ideally, the narrow interpretation would induce the national courts to follow a method of consistency where they seek to prevent only violations of the most fundamental principles of society. Unlike the broader approach which creates the possibility, much more in practice, to the national judges to refuse the enforcement based on unreasonable basis. As Cardozo J. points out:

The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or of fairness. They do not close their doors unless help would violate some fundamental principles of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal.²³

Regarding the interpretation by the Yemeni national courts, it seems that the broad interpretation has been adopted when the YNDAA states that ‘enforcement of an arbitral award pursuant to this law may not be ordered except after verifying that it does not contradict public policy in the Republic of Yemen’.²⁴ The interpretation of this article can obviously indicate the liberal construction of national public policy exception. Hence, failure to respect the international public policy limits may extinguish ill-considered interpretations by national judges to what is really meant by the public policy exception. It runs counter to the widely accepted proposition that the drafters of the NYC favoured the narrow interpretation of the public policy exception.²⁵ Consequently, it can be said that this option should be abandoned for several reasons.

²⁰ Kantor (n17).

²¹ *Transmarine Seaways Corp v Marc Rich & Co.*, 480 F Supp 352, 358 (US South District of New York 1979).

²² Hwang and Chan (n 17)157.

²³ *Loucks et al v Standard Oil Company of New York* 224 NY 99 (US, CANY 1918).

²⁴ Art. 66(b).(the author’s translation).

²⁵ van den Berg (n 12) 366.

Initially, the liberal interpretation of public policy gives rise to hesitation, especially regarding whether it isolates the national public policy of each State from the consistency approach. Additionally, faced with difficulty of articulating a uniform application of public policy may lead to insufficient principles for a great number of States and may negatively lead the national courts to favour or privilege their own national laws in applying the public policy exception. For instance, political and religious values may be ignored when they contradict other policies of the States or oppose national interests.²⁶

Therefore,, it seems desirable for the Yemeni arbitration system to adopt the narrower approach in order to minimize the public policy exception with the intention of achieving the desired result of an arbitration-friendly jurisdiction. Such an approach by the Yemeni courts will minimize challenges to the enforcement of the foreign arbitral awards, through an application of both Art. V(2)(b) of the NYC²⁷ and the principles of Shari'ah.

6.3 The Common Grounds of Public Policy Violation

There is a substantial overlap and considerable paradox between Art. V(2)(b) and other grounds under Art. V in general. It is not possible within the limited scope of this research to look into all the numerous grounds that pertain to public policy in relation to the enforcement of arbitral awards. It may suffice, therefore, to examine only the most frequent issues raised in the case law, from the perspective of international judicial practice, regarding the narrow application of public policy, which will be compared to relevant Shari'ah case law, including that of Yemen. It needs to be emphasised here that the NYC approach ultimately favours the enforcement of arbitral awards by adopting a restrictive view of public policy violations. Therefore, the following issues may

²⁶ Anthony Cioni, 'The First Pancake Always Has Lumps: Alberta Petroleum Companies, Arbitration And Arbitral Award Enforcement In The Russian Federation' (1997) 35 *Alta L Rev* 726.

²⁷ Eloise Bouzari, 'The Public Policy Exception to Enforcement of International Arbitral Awards; Implications for Post-NAFTA Jurisprudence' (1995) 30 *TILJ* 205.

commonly be encountered in practice as violations of public policy under Art. V(2)(b), but the courts can nonetheless choose to enforce arbitral awards, despite this conflict with national public policy.

6.3.1 Illegality as a violation of Public Policy

Illegality and public policy are closely connected in the enforcement context.²⁸ However, the alleged illegality of a contract is insufficient without more to establish a violation of public policy as a ground for refusal. The national courts need to examine the nature of the illegality or violation of public policy and how the alleged illegality can affect the relevant law of the main contract, the law of the place of performance, or the law where the enforcement is sought.²⁹ Moreover, illegality may cover many issues that are most frequently raised in international case law in the context of enforceability, such as bribery, corruption and fraud. For example, the Federal Arbitration Court for the District of Tomsk, in the Russian Federation, refused to enforce an ICC award rendered in France on the ground that the award had been rendered based on ‘an illegal arrangement between companies of the same group and that the dispute was simulated’.³⁰

In the context of enforceability of allegedly illegal contracts, a weighing and balancing approach needs to be employed in a way that ultimately favours the policy of ‘preventing injustice and the enrichment of one party at the expense of the other’.³¹ Under English law, for instance, the courts have not recognised foreign arbitral awards that ‘ignore

²⁸ *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras Al-Khaimah National Oil Company* [1987] 2 Lloyd's Rep 246,[254] (CA); see also UNR ‘Report of the UNCITRAL on the Work of Its Eighteenth Session(Vienna, 3-21 June 1985)’ YBUNCTL vol: XVI, UN Doc A/40/17, para 297.

²⁹ Andrew Tweeddale, ‘Enforcing Arbitration Awards Contrary to Public Policy in England’ (2000) 17 ICL Rev159.

³⁰ *Yukos Capital S.A.R.L. v OAO Tomskneft VNK*, (2010) XXXV YBCA435, 437(Russian Federation, Federal Arbitration Court 2010).

³¹ *Nelson v Nelson* (1995) 184 CLR 538, 612-613, McHugh J. (High Court of Australia1995).

palpable and indisputable illegality’.³² In some other cases, however, the courts have refused to re-examine the illegality already examined by the tribunal. Put differently, when an arbitral tribunal has examined the arguments based on public policy or alleged illegality and rejected them, the English courts will not normally re-open an arguments on the basis of these grounds. This can be illustrated by following two cases:

a) *Westacre Investments, Inc. v. Jugoinport-SPDR Holding Co Ltd*³³

The English courts refused to re-examine determinations of illegality by foreign tribunals where the arbitrators had already scrutinized arguments based of public policy and illegality and rejected them. Thus, the English courts will not normally consider renewed arguments based on these grounds.³⁴ The facts of the case concerned an allegation that a consultancy agreement envisaged that the claimants would bribe Kuwaiti officials in order to conclude contracts to buy military products. Then, after arbitration was commenced and an ICC arbitral award rendered, the claimant alleged that the consultancy agreement was illegal and that alleged bribery rendered the agreement invalid. The respondents appealed to the Swiss Federal Court, which upheld the award. The claimants consequently obtained leave under section 26 of the Arbitration Act of 1950 to enforce the award and commenced enforcement proceedings, seeking a writ of execution on the awards itself. The respondent challenged the enforcement on the grounds of public policy violations. The respondent argued that at common law, public policy is a defence to an action on an award and that, in any event, the order for

³² *Westacre* (n 13) [768].

³³ *Westacre* (n 13).

³⁴ *Westacre* (n 13) [784](QB Comm) (stating the “no merit review” or “judicial non-intervention” principle).

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enforcement should be set aside by reasons of section 5(3) of the Arbitration Act of 1975.³⁵

Colman J., at first instance, held that the public policy of sustaining international arbitration awards from reputable international bodies, on the facts of the case, outweighed the public policy consideration of discouraging international commercial corruption. Therefore, the respondent's arguments did not encompass the public policy violation to the enforceability of the award under section 5(3) of the Arbitration Act of 1975. The respondent appealed. The Court of Appeal reached the same conclusion and upheld the decision at first instance since it was obvious from the award that the alleged bribery had been the main issue before the tribunal.³⁶ The Court of Appeal also concluded that although the case of *Soleimany v. Soleimany* allowed the court to consider the issue of the illegality of the main contract at the enforcement stage, an attempt to re-examine facts that had already been decided upon by the arbitral tribunal should be dismissed.³⁷

This case indicates that national courts should not consider issues that have already been determined by the arbitral tribunal, particularly when these issues are closely related to the public policy exception. Also, international commercial corruption is not on par with other serious international illegal activities.

In the same manner, the Yemeni courts should bear in mind that not all allegedly illegal contracts are unenforceable on the ground of public policy violation. It is clear from an analysis of the *Westacre* case that the English judicial system differentiates between serious illegality, which in fact affects the public policy of the forum, and mere illegality,

³⁵States that 'Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award'.

³⁶ *Westacre* (n 13).

³⁷ *Tweeddale* (n 29).

which is insufficient to establish a violation of public policy of the forum and subsequently does not lead to the unenforceability of the arbitral award.³⁸

The English courts examine the illegality issue only where the agreement involves matters with a high degree of seriousness such as ‘fraud, drug trafficking, prostitution or paedophilia such as to merit the opprobrium of the English court’.³⁹ Thus, the English approach continues to demonstrate a narrow reading of the public policy exception. The Yemeni courts should adopt a similar approach in order to enforce arbitral awards as far as possible.

b) *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd*⁴⁰

In Hilmarton, the Court of Appeal again refused to look behind a Swiss Arbitral Award and examine the issue of the illegality of the underlying contract, which is assumed to be illegal under the law of the place of contract performance but remained on valid under the proper law. The facts of the case related to a commissions contract between OTV and Himlarton in order to assist OTV to obtain contract in Algeria. Such contracts, which included the intervention of middlemen in negotiations, is prohibited by Algerian legislation. The underlying contract was governed by Swiss law and included an arbitration agreement, which allocated Switzerland as the place of arbitration.

Disputes subsequently arose over the payment of fees by OTV to Himlarton Ltd. The Swiss tribunal held that there was no corruption involved in the underlying contract by the claimant, Himlarton Ltd, since breach of the Algerian statute which is designed to protect the Algerian industry from foreign competition, does not establish an illegality

³⁸ Jonathan Hill, ‘Illegality Under the Law of the Place of Performance and the Enforcement of Arbitration Awards’ (2000) LMCLQ 311.

³⁹ Ewan Brown, ‘Illegality and Public Policy – Enforcement of Arbitral Awards in England: Hilmarton v Omnium de Traitement et de Valorisation S.A’ (2000) 3 Int ALR 31, 33

⁴⁰ [1999] 2 Lloyd's Rep 222(QB Comm Ct).

issue. Moreover, the tribunal found that there was insufficient evidence to establish a corruption related to the commission agreement.⁴¹ It would therefore not oppose the public policy of Switzerland to uphold the contract, and an award was made against OTV. OTV sought an order in England that the award should be refused enforcement in England under section 103 of the English AA. The plaintiff's principal argument was that the award should not be enforced because enforcement would be contrary to English public policy.

The English court reaffirmed the principle that the English courts will not normally re-examine arguments on the ground of illegality that have already been determined by an arbitral tribunal.⁴² As Walker J. pointed out, in the context of the NYC it is insufficient to prove that the underlying contract is unlawful in its place of performance. Rather, it is necessary to establish that the illegality “infects the award as well”.⁴³ He further confirmed that in regard to the award's enforceability such enforcement would not offend “international comity” as it was not a direct enforcement of the underlying contract.⁴⁴ As Walker J. explained:

An arbitration award, made under a foreign proper and curial law, which had specifically found that there was no corrupt practice should be enforced in England even if English law would have arrived at a different result on the ground that the underlying contract breached public policy because its performance involved a breach of statutory regulation in the place of performance.⁴⁵

This decision makes it clear that it is the duty of the tribunal to determine claims of illegality that might be connected to a public policy consideration. In practice, however, the arbitral tribunal is normally constrained to apply the national public policy of either

⁴¹ *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222 [224] (QB Comm)(providing that ‘an arbitration award made under a foreign proper and curial law, which had specifically found that there was no corruption practice should be enforced in England even if English Law would have arrived at a different result on the ground that the underlying contract breached public policy because its performance involved a breach of statutory regulation in the place of performance’).

⁴² Gary Born, *International Commercial Arbitration* (Kluwer 2009) 2850.

⁴³ *Omnium* (n 41) [224].

⁴⁴ *ibid.*

⁴⁵ *ibid*

the place of performance or the place where the award is sought to be enforced. Furthermore, the decision distinguishes between two factors: first, the performance of the contract is being illegal, and second the performance is being contrary to the public policy. For instance, it was held in *Soleimany v. Soleimany* case where it was apparent from the face of the award that the tribunal was dealing with illicit enterprise for smuggling contracts.⁴⁶

The idea of restricting national court intervention when there is alleged illegality in the underlying contract is also accepted under Yemeni jurisprudence. In the Case No: 32799/1428 the Supreme Court of Sana'a held that 'The Court of Appeals only examines whether or not arbitral awards are in conformity with the provisions of the Arbitration Law'.⁴⁷ In other words, the implication coincides to some extent with the English principle in that what has already been determined by the tribunal should not be re-examined by the national courts.

The English cases support the pro-enforcement bias by considering the level of illegality that should not lead to a refusal to enforce a foreign arbitral award. It is clear from the *Westacre* and *Hilmarton* cases that the English courts are willing to enforce arbitral awards that may nonetheless be illegal under the law of the place of performance since the tribunal found that the contracts were valid under the proper law. Thus, the Yemeni courts should be allowed to consider the illegality issue very carefully, though liberally, when it comes to enforceability. The policy of encouraging the enforcement of international arbitral awards should outweigh the policy of discouraging international corruption.⁴⁸

⁴⁶ *Soleimany v Soleimany* [1998] 3 WLR 811 (CA).

⁴⁷ 'Case No: 32799/1428 H, the Supreme Court at the Capital City of Sana'a -Commercial Circuit, 2008' (2009) 1 Int'l J Arab Arb 319, 319.

⁴⁸ *Henderson v Henderson* [1843-60] All ER Rep 378, (Ch); *ED&F Man (Sugar) Ltd v Haryanto (No.2)* [1991] 1 Lloyd's Rep 429, (CA).

6.3.2 Irregularity of Procedure

While irregularity of procedure is a separate ground for refusal under Art. V(1)(b) of the NYC⁴⁹, it is normally considered a violation of public policy. In general terms, the two provisions are closely connected.⁵⁰ However, irregularity of procedures is considered one of most important ground for refusal under the NYC because it ensures that arbitration process has been properly conducted and procedures have been fairly directed. As Blackaby points out, ‘if parties from different countries are to have confidence in arbitration as a method of dispute resolution it is essential that the proceedings should be conducted in a manner that is fair, and that is seen to be fair’.⁵¹

The trend in judicial application seems to be that the national courts have their own notion of what constitutes irregularity of procedures. National judges normally examine this violation in accordance with their own domestic laws.⁵² However, the national courts of contracting States are usually willing to apply the requirements of Art. V(1)(b) of the NYC as international standards for irregularity of procedures.⁵³ The NYC rule provides limited and globally recognised standards for irregularity of procedure as a part of international public policy directly of the enforcing State⁵⁴ instead of applying domestic standards of irregularity procedure. Thus, the Paris Court of Appeal stated that

⁴⁹ *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39, [48] (China, Hong Kong Court 1993) (where here Kaplan J indicates that ‘If the defendants do not establish that they were prevented from presenting their case, the question of public policy does not enter the equation. If the defendants established this ground then public policy is irrelevant’).

⁵⁰ *X(Syria) v X* (2004) XXIX YBCA 663, 668, (Germany Court of Appeal 1998) (stats that ‘the violation of due process in the arbitral proceedings is not only ground for refusal under Art. V(1)(b) but also under Art. V(2)(b) of the convention’.); See also *Hebei Import & Export Corp v Polytek Engineering Co. Ltd* [1999] 1 HKLRD 552 (China, Hong Kong Court of Final Appeal 1999).

⁵¹ Nigel Blackaby and Constantine Partasides, et al, *Redfern and Hunter on International Arbitration* (5th edn, OUP 2009) 643.

⁵² *Carters Ltd v Francesco Ferraro* (1979) IV YBCA 275, (Italy, Court of Appeal 1975).

⁵³ *Consonico Rive SA De CV v Briggs of Cancun Inc* 134 FSupp2d 789 (US, District Court for Eastern District of Louisiana 2001).

⁵⁴ Giorgio Gaja, *International Commercial Arbitration: New York Convention* (Oceana, Dobbs Ferry 1978) para I.C.4.

‘compliance with the fundamental notions of due process, within the French understanding of international public policy’.⁵⁵

The rule of the national court in the place of enforcement is to decide whether there has been a fair process and an equal hearing during the arbitral process in the light of Art. V(1)(b).⁵⁶ It therefore behoves the competent national courts to give further attention to what exactly can be considered a serious irregularity of procedure, as part of international public policy that derived directly from Art. V(1)(b) as international uniform standards.⁵⁷ While irregularity of procedure can covers many procedures aspects, the NYC mainly addresses this defence in two ways: (a) a lack of proper notice and (b) an inability to present the case. Each of these will be briefly examined.

a) Lack of proper notice as irregularity

A lack of proper notice of the appointment of the arbitrator or of the arbitration proceedings is a violation that generally leads to an unenforceable arbitral award on the ground of public policy. Thus notice must always be given in a timely and appropriate manner. Most contracting States adopt a narrative approach in considering irregularity in both judicial decisions and national arbitration statutes. For instance, the Mexican Court of Appeal has held that Mexican law was relinquished as the arbitral parties had opted for the arbitration method. Furthermore, the award is enforceable in view of the fact that the arbitral parties complied with the requirements provided by the applicable arbitration

⁵⁵ *Sluzer v Somagcc et al.*, (1989) Rev Arb, 62 (France, Paris Court of Appeal 1987).

⁵⁶ Julian Lew and others, *Comparative International Commercial Arbitration* (Kluwer 2003) para 26-81; Frank-Bernd Weigand (ed), *Practitioner's Handbook on International Arbitration* (2002) 494-495 (stating that “*Lex fori*” means the law of the forum. Despite the continuing debate on which law applies to the interpretation and therefore content of Art V(1)(b), there is a general consensus that the enforcement court can be guided by the principles forming the minimum standards of its *lex fori* in its review of the mandatory due process standards under Art V(1)(b)’).

⁵⁷ *Excelsior Film TV v UGC-PH* (1999) XXIV YBCA 643, 644 (France Supreme Court 1998) (where the court have decided that ‘various due process requirements are part of their international public policy’).

rules.⁵⁸ Moreover, many developed national laws demand certain minimum requirements of procedural fairness in arbitration proceedings. These requirements are frequently formulated in accordance with the procedural standards of the NYC.⁵⁹ Therefore, a more narrative interpretation of judicial and national requirements are needed in Yemen.

b) Inability to present the case

One of the fundamental rights in the arbitration process is the right to present a defence before the courts and tribunals.⁶⁰ Although many national courts may include some factors to be considered under this argument⁶¹, others adopt a narrow approach when irregularities in procedure that violate the enforcement State's public policy.⁶² Under English law, for instance, the tribunal should act fairly and impartially between the arbitral parties.⁶³ It is worth examining some cases that expressly allow the enforcement of foreign arbitral awards that did not seriously affect the forum's public policy. The English courts refused the irregularity defence when the respondent alleged that the tribunal find a new evidence through its investigation. The court pointed out that the respondent was given an opportunity to ask for the disclosure of evidence at the issue and comment on it, but had refused to do so. As a result, the court believed that 'the due

⁵⁸ *Malden Mills Inc (USA) v Hilaturas Lourdes SA (Mexico)* (1979) IV YBCA 302, (Mexico Court of Appeal 1977).

⁵⁹ Ramona Martinez, 'Recognition and Enforcement of International Arbitral Awards under the United Nations Convention of 1958: The "Refusal" Provisions' (1990) 24 Int'l Law 487.

⁶⁰ *Dubois & Vanderwalle v Boots Frites BV*, (1999) XXIV YBCA 640, (France, Paris Court of Appeal 1995); *Kanoria and others v Guinness* [2006] EWCA (Civ) 222, [2006] Arb LR 513; Gabrielle Kohler and Henry Peter, 'Formula 1 Racing and Arbitration: The FIA Tailor-Made System for Fast Track Dispute Resolution' (2001) 17 Arb Int'l 173.

⁶¹ Such as the participation in discovery, conflicting orders, time limits, necessity for hearings, standards of adversarial proceedings, adjournment, fraud, and estoppel, see generally Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (1st edn, Cameron May 2001) 152-158.

⁶² *Cytec Industries BV (Netherlands) v SNF sas*, (2008) XXXIII YBCA 489, (France, the Supreme Court 2008).

⁶³ England AA s 33(1)(a).

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process defence to enforcement was not intended to accommodate circumstances in which a party had failed to take advantage of an opportunity duly accorded to it'.⁶⁴

Another example of an unsuccessful attempt to rely on this defence is the case of *Technofrigo*⁶⁵, in which the Bologna Court of Appeal decided to grant enforcement of a Hungarian Award when the losing party argued that he had not been able to present his case in respect of an expert report. The court refused the claim and granted enforcement on the basis of the facts that the respondent's statement indicated that he had been able to fully present his case in arbitration. The Italian Supreme Court affirmed the decision and further added that 'there had been no violation of due process as *Technofrigo* had ample opportunity to present its case in the arbitration. The court noted that in respect of the expert report in particular *Technofrigo* was granted successive time periods in which to present its questions, examine the report and file observations'.⁶⁶ Similarly, the German Court of Appeal of Celle has reached the same conclusion, holding that 'there is a violation of international public policy only when the consequences of the application of foreign law in a concrete case is so at odds with German provisions as to be unacceptable according to German principles. This is not the case here.'⁶⁷ The above cases present the main goal of the Convention and reflect the pro-enforcement nature of its system and this is particularly obvious from the judicious application by the courts of contracting States.

Under the YNDAA, Art. 36 expressly declares that copies of memoranda, documents or papers submitted by one party to the arbitral tribunal shall be communicated to the other party. In addition to sending to both parties copies of experts' reports or documents or any other evidence adduced to the arbitral tribunal. Thus, the YNDAA corresponds with the current trend when it indicates that the tribunal is required to treat arbitral parties

⁶⁴ *Minmetals Germany GmbH v Ferco Steel Ltd.*, (1999) XXIV YBCA 739, , 745 (QB Comm Ct 1999).

⁶⁵ *Industrie Technofrigo Dell'Orto SpA (Italy) v PS Profil Epitoipari Kereskedelmi SS Szolgasztató KFT (Hungary)*, (2007) XXXII YBCA 406, (Italy, The Supreme Court 2006).

⁶⁶ *ibid*, 407: See also *Jorf Lasfar Energy Company, S.C.A. (Morocco) v AMCI Export Corporation (US)*, (2007) XXXII YBCA 713, (US, Dis Ct WDP 2006).

⁶⁷ *Seller v Buyer*, (2007) XXXII YBCA 322, 326 (Germany, Celle Court of Appeal 2005).

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equally in allowing each to present and defend their case in a fair manner.⁶⁸ However, the Act does not define ‘equality and fairness’ in a clear legal terms. It can be understood from the drafting that the scope depends on the judicial understanding and interpretation of irregularity of procedural requirements. Therefore, the courts should consider only serious irregularity of procedures that violates Yemeni public policy as relevant in the enforcement context.

The Yemeni Supreme Court held that ‘the violation of the rights of defence and of the principle of due process by the arbitrator constitutes a violation of the fundamental rules of procedure, leading to the annulment of the proceedings and of the ruling based thereon, because it is related to the public policy’.⁶⁹ It goes without saying that rights of defence and to present one’s case are fundamental requirements under Yemeni legislation and judiciary practice. However, the important point is that the Yemeni courts are prepared to recognise the irregularity of procedures under the public policy consideration. While the presumption is that the law and the courts conform to the international trend, it is highly important to follow the narrative interpretation adopted by many contracting States in this matter as well.

Moreover, under Shari’ah, procedural fairness generally goes in line with the international trend. Shari’ah considers the procedures aspect of dispute resolution as dependent upon the main principles of fair trial in Islam.⁷⁰ These principles form the essence of Shari’ah natural justice.⁷¹ First, the principle is that implementation a strict equal opportunity of treatment. This can, for example, be seen in the manner in which the arbitrator (*Hakim*) conducts the arbitration process.⁷² The procedural fairness in Shari’ah

⁶⁸ YNDAA Art. 38.

⁶⁹ ‘Case No. 35344, the Supreme Court at the Capital City of Sana’a- Commercial Circuit, 2009’(2010) 2 Int’l J Arab Arb 246.

⁷⁰ Samir Saleh, *Commercial Agency and Distributorship in the Arab Middle East: A Study in Shari’a and Statute Law* (2nd Rev. edn, CQ Press 1995) 67.

⁷¹ Nudrat Majeed, ‘Good Faith and Due process: lessons from the Shari’ah’ (2004) 20 Arb Int’l 97.

⁷² *ibid.*

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is underpinned by the basic principles of justice and equal treatment as indicated in the Holy Qur'an:

O you who believe! Stand out firmly for justice, as witnesses to Allâh, even though it be against yourselves, or your parents, or your kin, be he rich or poor, Allâh is a Better Protector to both (than you). So follow not the lusts (of your hearts), lest you avoid justice; and if you distort your witness or refuse to give it, verily, Allâh is Ever Well-Acquainted with what you do.⁷³

Second, the *Hakim* should always give equal opportunity to both arbitral parties to present their case. Only in exceptional circumstances may the *Hakim* dismiss the case in the first hearing.⁷⁴ According to Saleh, part of these two principles is the duty of the tribunal to allow the parties to submit their evidence, pleas and defence.⁷⁵ Indeed, the Shari'ah principles do not contain any conflict with the Convention's main standards, but a more narrative interpretation by the Yemeni courts is required.

To sum up, it is well settled that the prevailing judicial trend including Shari'ah principles regarding the irregularity consideration accords with the NYC's pro-enforcement bias. Also, Art. V(1)(b) coupled with Art. V(2)(b) provide a truly effective international rule that has been tried and tested across many jurisdictions. Moreover, the judicial interpretation of Art. V(2)(b) regarding the irregularity issue has established an international standard and a baseline of procedural fairness for arbitral parties. Therefore, the Yemeni courts should adopt the same approach and take into account the private nature of the international arbitration process and of international practices of fairness and equality. In addition, the Yemeni courts should embrace the international perspective regarding the irregularity of procedure by accepting a violation of this ground only in serious cases in the light of the narrow construction embodied in the NYC.⁷⁶

⁷³ Surah An-Nisā'; verse, 135.

⁷⁴ If the arbitral matter is prohibited under Shari'ah.

⁷⁵ Saleh (n 70) 67.

⁷⁶ Blackaby and Partasides (n 51) 644.

6.3.3 Lack of Impartiality of the Arbitrator

The impartiality of the arbitrator is another primary requirement in the domain of arbitration.⁷⁷ The arbitrator should be independent from the arbitral parties and have no personal interest under the case in dispute.⁷⁸ While the lack of impartiality of arbitrators is addressed under Art. V(1)(b) or Art. V(1)(d), it most often asserted as constituting a public policy violation.⁷⁹ Thus, many contracting States have paid more consideration where the impartiality of arbitrator has been raised, but mostly enforcement was granted.⁸⁰ Two cases may help illustrate this.

In a recent case, the English High Court overturned a decision dismissing the application to remove an arbitrator and set aside the arbitral award. The respondent alleged that an arbitrator should be impartial or independent in accordance to the LCIA rules, which the parties had chosen as the governing arbitration rules. However, the arbitrator had in fact previously received instruction from counsel for both parties. Flaux J. decided that the fair-minded and informed observer would conclude that there was no real possibility of apparent or unconscious bias. He further observed that ‘disclosure and apparent bias are two distinct things, and mere failure to disclose did not amount to a real possibility of apparent bias if the fair-minded and informed observer would not have thought there was anything that needed to be disclosed.’⁸¹ Therefore, it was held that the late disclosure was not a serious irregularity that caused substantial injustice, and the application to remove the arbitrator was therefore dismissed.⁸²

⁷⁷ *Sociedad de Valores, S.A. v Banco Santander, S.A. AS*, Delforca 2008. Case No. 3/2009, (Madrid Court of Appeals 2011).

⁷⁸ van den Berg (n12) 376.

⁷⁹ *ibid.*

⁸⁰ *Hebei* (n 5).

⁸¹ Flaux J applied *Helow v Secretary of State for the Home Department* [2008] UKHL 62.

⁸² *Gallagher International Ltd v Tlais Enterprises Ltd* [2008] EWHC 804 (QB Comm).

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Similarly, the Swiss Supreme Court chose to enforce a US award after considering the impartiality issue. The losing party argued that the arbitrator had practised before the US court with the winning party's counsel and he had also accompanied the arbitrator's daughter to a social event once and on that occasion he had met her father at her residence. The Geneva Court of Appeal dismissed the argument and the appeal altogether, deciding that 'The appellant's late filing of evidence was inadmissible and that in any case it did not cast doubt on the arbitrator's impartiality'.⁸³ The Federal Supreme Court confirmed the decision and further stated the following:

[T]he objection of bias of the sole arbitrator was meritless. The fact that the arbitrator and counsel for the other party met socially on two occasions and practiced before the same circuit in the United States was no indication of bias meeting the strict requirements of international public policy.⁸⁴

The rationale behind the foregoing cases is that lack of impartiality of arbitrators should be examined very carefully and refusal can be established only where a major violation of international public policy exists. Also, proving the lack of impartiality should include evidence that the arbitrator had influenced the case unjustly to further his own interests, or at the very least the court should establish a reasonable apprehension of bias through personal links with any of the arbitral parties.

Under the YNDAA, the arbitrators must be impartial and independent. The arbitrators may only be challenged if serious circumstances affecting their impartiality or if they stop to fulfilling one of the criteria of competence required by law.⁸⁵ Art. 20(2) of the same Act further emphasises that an arbitrator must undertake his mission in writing, and must also disclose from the time of his acceptance any circumstances likely to give rise to doubts as to his impartiality or independence. As regards the judicial practice, there

⁸³ 'Switzerland No. 41. Tribunal Fédéral [Federal Supreme Court], 28 July 2010' (2011) XXXVI YBCA, 337, 338 (Swiss Supreme Court 2010).

⁸⁴ 'Switzerland No. 41. Tribunal Fédéral [Federal Supreme Court], 28 July 2010' (2011) XXXVI YBCA, 337, 337 (Swiss Supreme Court 2010); see also *Tesco & others v Neoelectra*, Cases No. 09/28537 579, (France, Paris Court of Appeal 2011) (where the court rejected the argument that the Chairman was a "Face-book friend" with the opposing counsel).

⁸⁵ YNDAA Arts. (23) and (24)(2).

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has not been any published case regarding the impartiality issue. However, the arbitration law's provisions stipulate that the courts must consider the impartiality of the arbitrator seriously and further the Yemeni courts intend to take into account the narrower interpretation of this issue in exceptional cases only. It is clear that the narrow interpretation of these provisions can be considered an invitation to adopt the international public policy in the enforcement context.

Under Shari'ah, the principle of impartiality and the independence of the judge (*Qadi*) is also highly important, and the same approach exists for the *Hakim* in the dispute resolution mechanism. The principles of equality of treatment and that neither of the arbitral parties should be privileged are very important. More importantly, strict equality should be applied in the course of hearing the pleas of the parties and should be reflected in the way the *Hakim* addresses the arbitral parties.⁸⁶ This essential procedural rule has been strictly stated by Prophet Mohammed (saws):

I am only a man, and when you come pleading before me, it may happen that one of you will be more eloquent in his pleading and, as a result, I will adjudicate in his favour according to this speech. If it so happens and I give an advantage to one of you by granting him a thing which belongs to his opponent, he had better not take it because I would be giving him a portion of hell.⁸⁷

It is clear from above *Hadith* that Shari'ah adopts equally the impartiality of the judge and the arbitrator when deciding any disputes. It further reveals that the parties must be treated equally during their hearing. Ultimately, the Shari'ah does not restrict the procedural rules of arbitration, but rather provides some guidance to ensure fairness and justice in very flexible manner.

⁸⁶ Saleh (n 70) 67-68. (stating that 'it is not even permitted for the *qadi* to salute one party with undue warmth or hold a personal discussion with him so as to create discomfort to the other party').

⁸⁷ Sahih Al Bukari Hadith No. 2326 (Translated by Nudrat Majeed, 'Good Faith and Due process: lessons from the Shari'ah' (2004) 20 Arb Int'l 97, 107).

6.3.4 Lack of Reasons in Award

One of the widely accepted examples of public policy violation is a lack of reasons in an arbitral award, although it is very rare that an award is successfully refused under this ground.⁸⁸ Under some arbitration regimes, it is mandatory requirements for the arbitral awards to be reasoned.⁸⁹ In other countries, however, national arbitration regimes may allow an unreasoned arbitral award to be enforced and recognised in their jurisdictions even though this requirement is clearly stipulated in the parties' agreement or under their chosen law.⁹⁰ Other arbitration regimes require reasons in awards only where the parties specifically request it.⁹¹

The question emerges at this juncture is whether unreasoned arbitral awards can be refused on the ground of public policy violation? The answer would depend upon the national court's interpretation. The rationale is that when the tribunal provide valid reasons for its award, the arbitral parties are less likely to dispute the arbitrators decision or allege that the arbitrators acted beyond the scope of the arbitration agreement.⁹² Put differently, the parties' right to know how the tribunal has reached its decision should be protected.⁹³ Also, when the award contains reasons it may substantially hamper the parties from asserting that the arbitrators were wrong in their decision.

⁸⁸ Lew and others (n56) para 26-118.

⁸⁹ Chinese Arbitration Act of 1994, Art. (54) and Brazilain Arbitration Act of 1996 Art (26)(II); *Smart Systems Technologies Inc. v Domotique Secant Inc.*, (2008) XXXIII YBCA 464, (Canada, Quebec Court of Appeal 2008)

⁹⁰ *Euro'n Grain & Shipping Ltd v Seth Oil Mills Ltd*, (1984) IX YBCA 411, (India, Bombay High Court 1983); *Food Services of America, Inc. (carrying on business as Amerifresh) (US) v Pan Pacific Specialties Ltd*, (2004) XXIX YBCA 581, (Canada, The Supreme Court of British Columbia 1997)

⁹¹ Indian Arbitration and Conciliation Act of 1996, s 31(3)(a).

⁹² Dirk Otto and Omaia Elwan, 'Article V(2)' in Herbert Kronke and Patricia Nacimiento , et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer 2010) 376.

⁹³ Born (n 3)2453.

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Thus, this ground is considered to be to the advantage of both sides and forms part of the public policy consideration in most arbitrations' regimes.⁹⁴ The Italian Court of Appeal held that a violation of public policy must be assessed on the basis of the decision itself, and not on the basis of its reasoning.⁹⁵ In this respect, Professor van den Berg makes the following important point:

[I]f reasons are given, there is the slight chance that they may contain something which is fundamentally in violations of public policy (e.g., approval by the arbitrator of bribes by a party) , which is not apparent in the decisional part of the award. In this case, such reasoning in the award should be vindicated.⁹⁶

In practice, however, the issue of a lack of reasons has commonly been raised and narrowly construed, although some courts have been reluctant to observe the reasoned awards in which the tribunal based its decision upon. What is merely disputed here is that when the parties have agreed that reasons are not to be given, particularly if the reasons do not affect the award's content, does this mean the enforcement is also affected? It can be argued that no such reasons are required pursuant to the UNCITRAL ML where the parties have agreed to waive this requirements.⁹⁷

In a recent case, the Ontario Superior Court decided that arbitrators have no obligations to provide reasons in their award where the parties agreed that no reasons need to be given.⁹⁸ In upholding the arbitral award's enforceability, Perell J. held that 'the award should be enforced in Ontario despite the absence of reasons'. He further added, however, that before doing so the Court must 'fairly determine ... that the arbitration award did not deal with a dispute beyond the terms of the submission and that the award

⁹⁴ Di Pietro and Platte (n 61)190.

⁹⁵ *Inter-Arab Investment Guarantee Corporation v BAIL - Banque Arabe et Internationale d'Investissements SA*, (1998) XXIII YBCA 644,(France, Paris Court of Appeal 1997).

⁹⁶ van den Berg (n 12) 382.

⁹⁷ UNCITRAL ML 1985 Art 31 (2).

⁹⁸ *Activ Financial Systems, Inc. v Orbixa Management Services Inc.*, 2011 ONSC 7286 (Canada, Ontario Superior Court of Justice 2011).

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was not contrary to the public policy of Ontario. Justice Perell concluded that these conditions were satisfied in the present case.’⁹⁹

Two observations can be made about this decision: first, it illustrates an important condition to enforce unreasoned arbitral awards where the enforcement court finds that the tribunal has exceeded its scope of jurisdiction, which is considered a major violation of the parties’ agreement. This is understandable as the NYC expressly directs the courts to consider this issue under the irregularity of procedures.¹⁰⁰ Second, and more importantly, the court separates the lack of reasons in arbitral awards from the public policy violation, notably when it is agreed by the arbitral parties. If, for instance, the court finds that there was no agreement between the parties regarding the reasons of the award, would the court still enforce the award?

Let’s assume that the arbitral tribunal does not deal with disputes beyond the agreement and that there was no violation of the State’s public policy. The enforcement court is entitled to view this lack reasons as insufficient to refuse enforcement under the public policy exception, since the lack of reasons is not considered a major violation. Therefore, if the court wishes to refuse enforcement, it may be more appropriate to do so for a major and valid ground. The point that should be made is that providing reasons in awards when required by law is not obligatory when the parties have agreed otherwise. In addition, some countries, such as England, permit the enforcement of unreasoned arbitral awards.¹⁰¹ While reasons in awards may be mandatory under the legislation of such countries, these awards should be valid under the law of the seat of arbitration.¹⁰² Accordingly, an examination of whether the reasons would merely affect the award itself is appropriate and should be closely considered.

⁹⁹ *ibid.*

¹⁰⁰ See Chapter 6 point 6.3.2 page 233.

¹⁰¹ Bingham, ‘Reasons and Reasons for Reasons’ (1988) 4 *Arb Int'l* 141, 145; English AA, s 52(4).

¹⁰² *Seller v German Buyer* (2010) XXXV YBCA 386, 388 (Germany, Düsseldorf Court of Appeal 2009).

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Unfortunately, under the YNDAA the legislators have taken the view that arbitral awards can be set aside if such awards do not contain reasons, unless the law governing the arbitration proceedings requires that reasons not be stated.¹⁰³ However, the provision seems to be superfluous since it adds a separate ground for setting aside the arbitral award that can be considered under the public policy violation.¹⁰⁴ Moreover, the provision does not refer to the arbitral parties' right to agree that no reasons should be given in the award. Therefore, in some case the Yemeni Supreme Court held that unreasoned arbitral awards are invalid.¹⁰⁵

It is worth noting in this respect that the parties' procedural autonomy should be respected by both the tribunal and the national courts in view of the fact that it is considered as a foundation of the arbitration mechanism and thus parties may agree in accordance with their convenience and needs for flexibility. Furthermore, this deficiency may lead the Yemeni courts to be more reluctant when examining the unreasoned awards. For instance, it would be inappropriate to apply the rules of the chosen law which has no connection with the Yemeni jurisdiction and override the party autonomy principle in particular when it is initially established to protect the arbitration proceeding.

That said, it seems very difficult to see why the parties under Yemeni law cannot waive the right to a reasoned award since the better view is that the parties should be able, either impliedly or expressly, to agree that no reason should be given in their award to avoid any risk of rejection under Art. V(2)(b) of the NYC. The suggestion also remains that the Yemeni legislators should adopt the desirable narrative approach provided in the NYC¹⁰⁶ that the parties have a right to agree that no reasons are to be given in an award. Ultimately, a lack of reasons may lead to a refusal to enforce an arbitral award, but an agreement by the parties to waive this requirement can in turn lead to due enforcement.

¹⁰³ YNDAA, Art. 59(e).

¹⁰⁴ YNDAA, Art. 59(g).

¹⁰⁵ 'Case No. 37/1430, the Supreme Court at the Capital City of Sana'a-Civil and Administration Circuit, 2009' (in Arabic, the author's translation)

¹⁰⁶ Although the Convention does not directly state the issue of reasoned awards, it expressly address the party autonomy principle in different provisions, see for instance, Art. II (1) and Art. IV(1)(b).

6.3.5 Case Law Analysis and Lessons for Yemen

The foregoing cases show that many courts have furthered the pro-enforcement policy of the Convention. The courts generally accept the above issues only in very serious cases and judiciously acknowledged that only international public policy should be applied at the enforcement stage. It is clear that an expansive approach to public policy application in Yemen is not only based on statutory basis, but also stems from the courts' embracement of national public policy.

Consequently, it is imperative that the Yemeni courts, like the English courts in the *Westacre* and *OTV* cases, only examine whether or not arbitral awards are in conformity with the provisions of arbitration law and avoid re-examining the issue of illegality when the arbitral tribunal has already determined this issue. Also, the Yemeni courts should take a cautious approach when examining the irregularity issues. Their function is not to examine whether the award is correct or to look behind its merits; rather, their function is simply to examine whether the arbitration itself has been conducted according to basic rules of procedural fairness, in particular by giving proper notice to the parties and by giving both parties a proper chance to present their case. The same applies to any question about the lack of impartiality of the arbitrators.

Furthermore, and most importantly, although there is no a uniform rule under Yemen's national arbitration legislation that an award should be reasoned, the YNDAA shows some deficiencies here. The Act does not refer at all to the parties' intention on the subject of unreasoned awards, and thus discount their right to have an unreasoned award. Under the Convention's narrow approach, however, lack of reasons is not normally sufficient to non-enforcement. In this sense, Professor van den Berg states that 'by applying the distinction between domestic and international public policy, the courts of

the countries under the law of which the giving of reason is mandatory, generally enforce awards without reasons made in countries where such awards are valid'.¹⁰⁷

Finally, uniformity in the application of the public policy exception can be difficult to achieve in all cases. It is, however, possible in accordance with contemporary arbitration legislation and national court practice, as discussed above, that the pro-enforcement bias of the NYC can be harmonised depending on the courts' and legislators' understanding of the narrative approach. This is also clear from the fact that arbitral awards are only rarely refused enforcement on the ground of international public policy violation.

6.4 Treatments and Practical Solutions for Yemen's Application of the Public Policy Exception

According to Art. 66(b) of the YNDAA, the major potential difference in court application between the Yemeni courts and those of the NYC contracting States concerns the application of international public policy and the courts' discretion in the enforcement context. Court decisions, as discussed above, reflect the approach that public policy can be invoked only where the fundamental public policy of the State is violated, which is consistent with the Convention's main objective. The broad approach to the public policy exception in Yemen is not only derived from statute, but also stems from national legal pluralism.¹⁰⁸ The situation becomes potentially more problematic by a lack of acceptance of the international public policy notion by the Yemeni courts.

The questions that need to be considered are the following: How is the discretion of the Yemeni courts to be exercised? And under what standards should the Yemeni courts exercise their discretions in the enforcement context? These questions are not merely

¹⁰⁷ Albert Jane van den Berg, *The New York Convention-Consolidated Commentary- Cases Reported in Volumes XXII (1997) - XXVII (2002)* (XXXVIII YBCA 2003) 668.

¹⁰⁸ Yemeni Civil Procedural Act of 2002 Art. 494.

theoretical ones and the answers to them have a profound effect in the application of public policy violations by the Yemeni courts. For answers to these questions, we should refer to the ILA Committee Reports.

6.4.1 The ILA Report on Public Policy

The ILA Reports embrace a methodical and modern view of public policy application, establishing substantial recommendations that are regarded as consistent by academic and practitioners.¹⁰⁹ In addition, the Reports are a significant source of guidance for supervisory courts as they tackle the application of the public policy exception.¹¹⁰ This has helped ensure greater uniformity in the use of the narrative approach and consequently encouraged a pro-enforcement bias.¹¹¹ The Reports were intended to guide the exercise of the national courts' discretion in the four ways outlined below.

6.4.1.1 Emphasising the Exceptional Nature of the Public Policy Exception

The ILA Reports clearly indicate that the finality of arbitral awards should be respected save in exceptional circumstances.¹¹² Exceptional circumstances can particularly be found to exist when international public policy is violated.¹¹³ International public policy is to be understood in the sense given to it in the field of private international law; namely, that part of the public policy of a State which, if violated, would thwart a party

¹⁰⁹ Audley Sheppard and Clifford Chance 'Public Policy and the Enforcement of Arbitral Awards: Should there be a Global Standard' (2004) 1 *Transnat'l Disp Mgmt* 1.

¹¹⁰ Christopher Gibson, 'Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law' (2009) 113 *Penn St L R* 101.

¹¹¹ Sheppard and Chance (n 109) 1; Pierre Mayer, Audley Sheppard, 'Final ILA Report on Public Policy as A Bar to Enforcement of International Arbitral Award' (2003) 19 *Arb Int'l* 249.

¹¹² ILA Final Report Recommendation 1(a).

¹¹³ ILA Final Report Recommendation 1(b).

from invoking a foreign law. It is not to be understood as referring to a public policy which is part of public international law.¹¹⁴ In this view, international public policy is commonly considered to more restricted in scope than national public policy. The ILA Committee considered that this concept was ‘now sufficiently well established to be used as the test of enforceability to be used by State courts’.¹¹⁵

The Yemeni courts should apply the same test when assessing foreign arbitral awards. In addition, the courts should consider this test irrespective of whether the seat of arbitration was located in the same territory or not.¹¹⁶ The main challenge remains, however, that the Yemeni courts still do not accept the distinction between national and international public policy in their context. Although in Yemen statutory interpretation is essential, a series of courts decisions can acknowledge the importance of international public policy in the enforcement sphere, much as in the English system.¹¹⁷ This does not necessarily mean that the Yemeni courts should be obliged to adhere to previous decisions, but rather to consider how the courts have applied the public policy test in the light of the above standards.

6.4.1.2 Cataloguing the Elements of International Public Policy

It is already settled that defining public policy is notoriously difficult in the enforcement context. It is also understood that international public policy is narrower than national public policy. The ILA Reports attempted to provide some elements that should be considered by the the enforcement courts. These include fundamental principles, the

¹¹⁴ Mayer and Sheppard (n 111).

¹¹⁵ Mayer and Sheppard (n 111) 252 fn.17.

¹¹⁶ ILA Final Report Recommendation 1(f).

¹¹⁷ Audley Sheppard, ‘Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards’ (2003) 19 Arb Int’l 217.

State's public policy rules, and international obligations ratified by the enforcement State.¹¹⁸ Each will be briefly examined in turn.

a) Fundamental Principles

Fundamental principles pertain to justice or morality that an enforcement State wishes to protect even when it is not directly concerned.¹¹⁹ These principles are considered to be fundamental within a State's own legal system rather than in the context of the law governing the contract, the law of the place of performance of the contract, or the law of the seat of the arbitration.¹²⁰ This ensures that the national court when applying the international public policy exception takes into account the relative characteristic of its public policy and thereby any contradiction with other States' public policies should not be construed as a public policy violation. Professor Bockstiegel indicated that in Germany, violation of foreign rules of law cannot lead to the annulment of awards.¹²¹ It has also been commented that no account should be taken of the national public policy rules of a foreign jurisdiction.¹²² Although this approach is widely adopted, the position under English law might be an exceptional case.¹²³ In this respect, the Hong Kong Court of Final Appeal has emphasized that public policy should include 'those elements of a State's own public policy which are so fundamental to notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other States are affected.'¹²⁴

¹¹⁸ ILA Final Report Recommendation 1(d).

¹¹⁹ ILA Final Report Recommendation 1(d)(i).

¹²⁰ ILA Final Report Recommendation 2(a).

¹²¹ Sheppard (n 117) 234 fn.165.

¹²² Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer 1999) para 1647.

¹²³ *Soleimany v Soleimany* [1998] 3 WLR 811, (CA).

¹²⁴ *Hebei Import & Export Corporation v Polytek Engineering Company Limited*, (1999) XXIV YBCA 652, 676 (China, Hong Kong Court of Final Appeal 1999).

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In Yemen, fundamental principles run parallel with Shari'ah principles. It has been said that Shari'ah is the basic ethical and moral public policy of an Islamic legal system.¹²⁵ Nevertheless, other principles are historically constituted from the immutable rules of Islamic judicial law.¹²⁶ Examples include 'the strictly equal treatment of the parties to the judicial or arbitral action, the prohibition against a judge or arbitrator deciding a dispute without hearing both plaintiff and defendant and the prohibition against a judge or arbitrator making his judgment or award without giving the parties the opportunity to submit their evidence, pleas, and defences'.¹²⁷

It can be noted that these principles are parallel to the NYC provisions, particularly Art. V(1)(a) and Art. V(1)(b), which clearly means that Shari'ah principles do not conflict with the universal norms of fairness. As El-Ahdab states, the fundamental principles of arbitral process are due process and justice.¹²⁸ Thus, the Yemeni enforcement court will perhaps turn on religious interpretation as much as it does on legal interpretation when considering public policy violation. Remarkably, where a party could have relied on a fundamental principle before the tribunal but failed to do so, it should not be entitled to raise that fundamental principle as a ground for refusing recognition or enforcement of the award.¹²⁹ Nonetheless, the arbitral parties must be aware of the fundamental principles of the enforcement forum before the issuance of such an award.

¹²⁵ Khaled Abou El Fadl, 'The Place of Ethical Obligation in Islamic Law' (2004) 4 *Ucla J Islamic & Near E L* 1, 8.

¹²⁶ Samir Saleh, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East' (1985) 1 *Arab LQ* 19.

¹²⁷ *ibid* 26.

¹²⁸ Abdul Hamid El-Ahdab, *Arbitration In Arab Countries* (Kluwer 1998) 45.

¹²⁹ ILA Final Report Recommendation 2(c).

b) Public Policy Rules

In essence, public policy rules of a State are those designed to serve the essential political, social or economic interests of that State, these being also known as *lois de police*.¹³⁰ Anti-trust law, such as EU competition law¹³¹, currency controls, price fixing rules and environmental protection laws are examples of public policy rules.¹³² Discrepancy with a rule that is considered a mandatory rule of the forum should not *per se* be a basis for the non-enforcement of an award; rather, the violation of such rules, which are at the same time *lois de police*, may be a ground for refusing enforcement.¹³³ In adopting the narrow approach to the public policy exception under this ground, the court should only refuse enforcement of an award when: (i) the scope of the rule is intended to encompass the situation under consideration; and (ii) recognition or enforcement of the award would manifestly disrupt the essential political, social or economic interests protected by the rule.¹³⁴ In order to examine such a violation, the courts may be allowed to scrutinising the facts of the case of the arbitral award.¹³⁵

Under the YNDAA, the Yemeni courts are required to undertake a reassessment without adjudicating on the merits of such awards, subject to consistency with the Yemeni mandatory rules. The position is quite similar but more complicated to the ILA approach. For instance, the Supreme Court expressly declared that ‘the court examining the challenge cannot rely on the merits of the dispute. The court controls the arbitral proceedings and the validity of what the arbitrator did on the legal level without dealing with the merits of the dispute or with the findings of the arbitral award’.¹³⁶ In addition, the public policy rules founded in Yemeni legislation may be used to widen the scope of

¹³⁰ ILA Final Report Recommendation 1 d(ii).

¹³¹ EC Art. 81.

¹³² Sheppard (n 117).

¹³³ ILA Final Report Recommendation 3(a).

¹³⁴ ILA Final Report Recommendation 3(b).

¹³⁵ ILA Final Report Recommendation 3(c).

¹³⁶ ‘Case No 29, the Supreme Court at the Capital City of Sana’a- Commercial Circuit, 2003’ (2009) 1 Int’l J Arab Arb 318, 318.

the public policy exception since the courts examine the apparent review of the arbitral award. Notably, the YNDAA impliedly excludes from the courts' purview such scrutiny of facts of the arbitration case.¹³⁷ This means that reviewing of arbitral awards needs to be empowered by the passing of new provisions in arbitration legislation. Furthermore, the features of Shari'ah public policy rules cannot be identified, unless such facts and procedures relating to an award can be examined.

c) International Obligations

The enforcement State has the duty to respect its obligations towards any ratified international conventions or treaties.¹³⁸ Such obligations when ratified become immediately bindings on member States and thus the courts of contracting States may refuse enforcement of an award where such enforcement would constitute a manifest infringement of such obligations.¹³⁹ For instance, UN members must act in accordance with the resolution of Security Council based on Chapter V and Art. 25 of the UN Charter. Also, the members of the OECD¹⁴⁰ Convention on Combatting Bribery of Foreign Officials in International Transactions¹⁴¹ should abide by its obligations, which prohibit such bribery in any transactions.¹⁴²

¹³⁷ 'Case No. 21636, the Supreme Court at the Capital City of Sana'a -Commercial Circuit, 2005' (2009) 1 Int'l J Arab Arb 532; Recourse No 31448/1428, the Supreme Court at the Capital City of Sana'a - Commercial Circuit, 2008 (2009) 1 Int'l J Arab Arb 322.

¹³⁸ ILA Final Report Recommendation 1(e).

¹³⁹ ILA Final Report Recommendation 4.

¹⁴⁰ The Council of the Organisation for Economic Co-operation and Development.

¹⁴¹ The OECD Anti-Bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions. Available at http://www.oecd.org/document/21/0,3746,en_2649_34859_2017813_1_1_1_1,00.html. accessed on 4 February 2012.

¹⁴² Pierre Maye and Audley Sheppard, 'Final ILA Report on Public Policy as A Bar to Enforcement of International Arbitral Award' (2003) 19 Arb Int'l 249, 263.

In Yemen, these types of international and regional obligations also exist. For example, Yemen ratified the UN Convention against Corruption¹⁴³ and should therefore abide by its anti-corruption regulations. Also, Yemen is a party to the Al-Riyadh Convention on judicial Co-operation between Arab States and should also abide by its provisions. In pursuing a narrow approach of public policy exception, Yemen, as any other State, respects its obligations towards these international and regional instruments and has a duty not to allow any enforcement of arbitral awards that clearly infringe the laws of the Yemeni forum or that are manifestly incompatible with Yemen's obligations.

6.4.1.3 Articulating the Source of Law of Public Policy

The source of public policy is a critical preliminary issue in the enforcement context. Generally speaking, national and international legal principles are the source of public policies.¹⁴⁴ However, there can be a little doubt that mandatory rules are of greater importance here. The mandatory laws under the legislation of the enforcement forum play a significant role within the narrow application of international public policy. Accordingly, relying on arguments based on the violation of national mandatory laws will, in the enforcement context, potentially lead to unpredictable and even more expansive application. For this reason, this sub-section is separate from the above discussion.¹⁴⁵ There is considerable debate on violations of mandatory laws in relation to public policies that are applicable under the foregoing standards.¹⁴⁶ The ILA Reports

¹⁴³ See UNGA 'Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on the work of its first to seventh sessions' 58th session (2003) UN Doc A/58/422 Ratified by Yemen on 7 Nov 2005.

¹⁴⁴ Gary Born, *International Commercial Arbitration* (Kluwer 2009) 2832.

¹⁴⁵ According to ILA Final Report, Recommendations III: Mandatory rules are considered as a part of public policy rules.

¹⁴⁶ Gary Born, *International Commercial Arbitration* (Kluwer 2009) 2173- 2193.

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state that a mandatory rule means an imperative rule of law that cannot be excluded by agreement of the parties. In this respect, the Report clearly states the following:

[A]n award's violation of a mere "mandatory rule" (*i.e.* a rule that is mandatory but does not form part of the State's international public policy so as to compel its application in the case under consideration) should not bar its recognition or enforcement, even when said rule forms part of the law of the forum, the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration.¹⁴⁷

To some extent in reaction to this, the courts in many countries have taken a very restrictive approach as to whether a mere infringement of national mandatory rules can be considered a public policy violation.¹⁴⁸ For instance, a decision by the Paris Court of Appeal has refused to annul an award where the tribunal decision arguably violated EU competition law.¹⁴⁹ Two points should be made in this respect. First, the arbitral parties should not raise the issue of violations of mandatory law using the public policy argument at the enforcement stage, since they have had the opportunity to do so before the tribunal but had not done so. Second, inconsistency with a mandatory rule should not *per se* be a ground for annulling or refusing to enforce an arbitral award. Rather, a conflict with these mandatory rules, which are at the same time *lois de polic*, may constitute a ground for refusing enforcement.¹⁵⁰

In the Yemeni context, the lesson to be taken therefore from the above restrictive approach is that fundamental violations of mandatory rules as a part of international public policy should only apply in the enforcement proceedings. The courts of many NYC contracting States have adopted a similar approach. In two Chinese cases, the

¹⁴⁷ ILA Final Report Recommendation 3(a).

¹⁴⁸ *Marketing Displays International Inc. (US) v VR Van Raalte Reclame B.V.* (2006) XXXI YYBCA 808, 820 (Netherlands, The Hague Court of Appeal 2005).

¹⁴⁹ *SNF SAS (France) v Cytec Industries BV (Netherlands)* (2007) XXXII YBCA 282, (France, Paris Court of Appeal, 2006).

¹⁵⁰ ILA Final Report Recommendation 3(a).

Higher Peoples' Court has established the principle that violation of mandatory laws of China does not necessarily lead to a violation of public policy.¹⁵¹ For Yemen, the discrepancies between mandatory rules and public policy violations can be resolved by specifying the source of law that is considered and should be respected when courts deal with public policy violation as recommended by the ILA Report. In short, mandatory rules under Yemeni legislations can be, but need not to be, a concern of public policy. As emphasised in the ILA Interim Report, 'put most simply: every public policy rule is mandatory, but not every mandatory rule forms part of public policy.'¹⁵²

6.4.1.4 Consulting the Case Law of Foreign Courts

In an attempt at consistency, the ILA Report has principally encouraged national courts to look to the practice of the courts of other States in relation to public policy application.¹⁵³ The rationale is that the courts may examine the views of other courts to consider how these courts have applied the public policy test to the greatest extent possible for consistency's sake.¹⁵⁴ This noticeable objective would enhance the national courts' narrow applications when they are guided by the approach of other courts. While many national courts merely refer to national legislation when dealing with the public policy application, the ILA recommendation envisages that the courts of other jurisdiction can provide helpful guidance. For instance, some courts set out their way of reasoning and explain what source of law they have applied in order to narrow the public policy application. This can be great of benefit in achieving a consensus approach in this matter.

¹⁵¹ *ED&F Man (HK) v China Sugar and Wine Company (Group)* [2003] Min Si Ta Zi 3, (China, Beijing Higher People's Court, 2003); *Mitsui Co. (Japan) v Hainan Textile Industry General Co.* [2001] Min Si Ta Zi (Civ)12, (China, Hainan Higher People's Court 2005).

¹⁵² Sheppard (n 117) 231.

¹⁵³ ILA Final Report Recommendation 1(g).

¹⁵⁴ ILA Final Report Recommendation 1(c).

In Yemen, following this approach would lead to a better ability to envisage and apply the public policy exception. It would also help discourage speculative challenges and would reflect a pro-enforcement bias in the Yemeni jurisdiction. Judicial experience from other jurisdictions is necessary, particularly as there is little or no precedent in Yemen in relation to public policy application. This principle is enshrined in many developed jurisdictions. The US courts, for instance, have clearly emphasised that ‘public policy cannot be derived from general considerations of supposed public policy interest, but must be based upon explicit and clearly defined laws and legal precedents’.¹⁵⁵

6.4.2 Further Guidance for the Yemeni Court’s Discretion

Undeniably, the ILA Final Report’s recommendations are intended to guide the exercise of discretion by the enforcement courts. It is clear from the wordings of ILA’s Reports that an enforcement court must carry out a balancing exercise between finality and justice. The NYC permits such an exercise by making the court’s power discretionary, i.e. enforcement ‘may’ be refused.¹⁵⁶

It is commonly accepted that a review of the merits of an award is strictly superfluous. In the enforcement context, however, the ‘no merit review’ or ‘judicial non-intervention’ principle may sometimes be unavoidable. The Yemeni courts, as discussed above, have firmly rejected this approach under any circumstance. Moreover, the NYC expressly provides a non-intervention principle by the courts of contracting States at the enforcement stage. This is clear from the main goal of the Conventions and the exhaustive nature of Art. V.¹⁵⁷

¹⁵⁵ *W.R. Grace & Co. v Local Union 749*, 461 US 757 (US Supreme Court 1983); see also *Tjart v Smith Barney, Inc.*, 28 P3d 823 (US, Wash App Ct 2001)

¹⁵⁶ ILA Final Report Recommendation 1(a).

¹⁵⁷ Michael Bühler and Frank-Bernd Weigand (ed), *Practitioner’s Handbook on International Arbitration* (C.H. Beck 2002) 436.

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Accordingly, it is generally accepted that the drafters of the NYC intended to prevent the enforcement courts from using Art. V to undertake a review of merits in the enforcement context. Nevertheless, it may be argued that the word ‘may’ in Art. V can imply a different interpretation, as follows.¹⁵⁸ Basically, it can be understood that the Convention empowers the enforcement court to consider a minimal intervention in some exceptional circumstances where, for instance, the courts believe that enforcement would contravene its public policy. This uncertainty cannot be assuaged unless the courts can carry out an examination of the award. This approach is supported by the ILA’s Reports, which state that the court may need to carry out a wider enquiry in the case of public policy violation.¹⁵⁹

This does not necessarily mean that the Yemeni courts should undertake a full examination in such cases, but rather they should ascertain whether the award does or does not contravene its public policy. It is argued that the Yemeni courts should adopt the following approach:

1. When a lack of conflict with public policy is manifest from the face of the award, no examination is required in the enforcement context. The enforcement will be refused if it is plain from the award that it would seriously violate the public policy of Yemen.
2. When the violation of public policy is ambiguous and enforcement is being resisted, the court should take into account the following factors:

¹⁵⁸ Faris Al- Malahmeh, ‘The Deficiencies of The New York Convention of 1958’ (PhD Thesis, University of Leicester, UK).

¹⁵⁹ Mayer and Sheppard (n 111) 262; Sheppard (n 117) 246.

- i. The courts should conduct a ‘weighing and balancing’ exercise through scrutiny of the facts relating to the award.¹⁶⁰ The process of ‘weighing and balancing’ is intended to assess whether the violation of public policy involved in the enforcement is sufficiently serious or not. The rationale is that the national courts should conduct a balancing of interests from two sides; on one hand, the interest of the arbitral parties, and on other hand, the interest of the Yemeni forum. In many circumstances, the parties’ transactions are widely recognised and practised in many countries and would likely be permissible in Yemen too. If not, the consequences of applying such enforcement should be further examined.¹⁶¹ In other words, the Yemeni courts should assess the results of the application or non-application of a public policy examination to refuse such enforcement.
- ii. Since the public policy is a fluid concept and difficult if not possible to define under both Yemeni legislation and Shari’ah, it is also not easy task to address the scope of fundamental and serious violations in Yemeni context. These complexity are not very helpful in providing any real guidance for the Yemeni courts. Thus, it may be helpful for the Yemeni courts to consider the following four elements in order to narrow down the above vague concepts: First, what constitutes an infringement of Yemeni interests? Second, what are the basic notions that make up Yemeni society? Third, what violation of mandatory law and Shari'ah has taken place? Fourth, what violation of Yemen's judicial sovereignty and the jurisdiction of the Yemeni courts has taken place? These four elements can achieve a desirable narrow approach of public policy in the Yemeni context under both legislation and court precedent and possibly provide more workable method in order to reach a clear consideration of what really constitutes fundamental and serious violations where enforcement is being scrutinized by the Yemeni courts.

¹⁶⁰ Chang-fa Lo, ‘Principles And Criteria For International And Transnational Public Policies In Commercial Arbitration’ (2008) 1 *Contem Asia Arb J* 67, 88.

¹⁶¹ Brower and Sharpe (n 15).

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- iii. Additionally, the Yemeni Supreme Court may provide certain guidance and principles in order to direct the lower courts when dealing with public policy issues and thereby help facilitate its application, at least to some extent.
- iv. Perhaps another solution would be to establish a National Court of International Arbitral Awards Enforcement in Yemen. Whereas the YNDAA provides fluid direction as to what court is competent in international commercial arbitration, this can lead to further complexities and inconsistency in court decisions.¹⁶² Although it signalled that the commercial division of the Court of Appeal in the capital city shall have jurisdiction, the other part of the provision rendered it imprecise by including other courts of appeal in the Republic of Yemen when the parties have agreed otherwise. This overlap of competent courts in one jurisdiction would make the application of any international issue in relation to arbitration more complicated. The proposal of having only one court with jurisdiction and primarily specialised on international commercial arbitration would be great step for establishing Yemen as an arbitration-friendly country. From a legal standpoint, the Yemeni Judicial Authority Act allows the establishment of any specialized courts by a proposal of the Minister of Justice when the need arises.¹⁶³ The idea of a specialized arbitration court has been adopted in many developed jurisdictions and has proved to be a success.¹⁶⁴

These factors and the proposal of a specialized court in Yemen are actually in line with the pro-enforcement policy of the NYC and are well-suited to the narrow application of

¹⁶² YNDAA Art (5) (stating that in the case of international commercial arbitration, whether conducted in the State or abroad, the Commercial chamber of the Court of Appeals in the capital city shall have jurisdiction unless the parties agree on the competence of the Commercial chamber of another Court of Appeals in the State).

¹⁶³ Yemeni Judicial Authority Law of 1991. Art 8(b); See also Arts. 39 and 43.

¹⁶⁴ For instance: The Supreme Court of Arbitration of the Russian Federation which supervise the arbitration issue and provides interpretation of arbitration laws and any concern regarding their applications.

the public policy exception. As already mentioned, it is also recommended that Yemen ratify the NYC and adopt the ILA's recommendations. They are formulated to limit the application of the public policy exception in Yemen and further help to reach inconsistency with the pro-enforcement bias. Together, these recommendations would support the Yemeni court in making reasonable and arbitration-friendly decisions and in creating judicious precedents in relation to the public policy exception.

6.5 Conclusion

Indeed, national courts play the role of safeguarding their forums' public policies. Thus, in the case of any violation in the enforcement context, the courts would consider an appropriate application of this exception. The narrative approach is the most favourable and most widely accepted approach in this respect. This analysis accords with the pro-enforcement bias of the NYC and seeks to facilitate the finality of the arbitral award. The NYC as the inspiration of the narrative approach has succeeded in driving the contracting States' arbitration systems to the desired destination in the field of arbitration.

That said, national courts, including Yemeni courts, may nonetheless exercise some minimal control over arbitral awards, and this in itself does not necessarily affect the finality of the award and the pro-enforcement principle. Hence, the legal considerations and the factual circumstances of the award need to be examined by the national courts to avoid a superficial refusal of enforcement. As Loquin argues, 'it is justifiable and desirable that the principle of the absence of a control on the merits diminish behind the absolute necessity of the respect of international public policy, otherwise this control will only be an illusion'.¹⁶⁵ In the same vein, Gaillard and Savage indicates that '[i]t therefore would seem appropriate for the trust placed by the courts in the arbitrators as a matter of principle to be accompanied by a subsequent review of the award which prevents the

¹⁶⁵ E. Loquin, in R.T.D. Com. 265 (2005) (free translation) in Bernard Hanotiau and Olivier Caprasse, 'Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention' (2008) 25 J Int Arb 721, 738 fn.95.

arbitrators from avoiding censure by the courts through careful reasoning based on the facts alone'.¹⁶⁶ Thus, Yemen has adopted the view that an examination of the arbitral award should not look behind the award, since the tribunal has already scrutinized the issue of public policy.

Although the nature of Art. V (2)(b) of the NYC may overlap with other exceptions in Art. V, the narrow interpretation favours the enforcing of arbitral awards. There may also be inconsistency in court application of the public policy exception, but this is not a convincing rationale against the general trend towards a pro-enforcement bias. The English experience provides a helpful example of this approach and further reflects a pro-enforcement bias as endorsed by the NYC. This is also the logical position under Shari'ah, which accords with this international tendency.

The Yemeni courts can pursue this international trend simply by an understanding of the narrative approach. It is clear that Art. 59(g) and Art. 66(b) of the YNDAA tend to be interpreted broadly in the enforcement context. As mentioned previously, the Yemeni courts tend to apply national public policy instead of international public policy, which can make the application of public policy even more unruly. The NYC and the ILA, on the other hand, help to standardize the public policy exception through a narrative approach. Within this context, this chapter has attempted to shackle the unruly horse under the Yemeni jurisdiction in four ways: first, by advocating that Yemen ratify the NYC; second, by adopting the ILA Reports' recommendations regarding the public policy exception; third, by looking to the experience of the courts of other NYC contracting States in this matter in order to adopt a narrative application of the public policy exception; and fourth, by considering the recommendations presented, which are especially well-suited to the Yemeni judicial system.

Ultimately, it is recommended that Yemen's arbitration legislation and judicial system apply international public policy as a point of departure when deciding whether to

¹⁶⁶ Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer 1999) para 1605.

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enforce a foreign arbitral award, since it is well established that international public policy plays a cornerstone role in international commercial arbitration. This thesis therefore suggests that, from the Yemeni perspective, ratifying the NYC together with the approaches set out in this chapter represent progressive steps for Yemen. Moreover, this thesis further suggests that the establishment in Yemen of a Court of International Arbitral Awards Enforcement could also go a long way to establishing Yemen as an arbitration-friendly jurisdiction.

Conclusion

Conclusion

Fifty-[four] years on, the New York Convention has established itself as one of the most important instruments governing international commerce and the most important instrument governing international arbitration. The Convention's adherents (now numbering 14[8]) include not only the world's leading commercial States, but States from all legal traditions and at all stages of legal development.¹

1. Introduction

The specific aims of this thesis were to closely examine the grounds of (a) the invalidity of arbitration agreements and (b) the public policy exception embodied in Arts V(1)(a) and V(2)(b) of the NYC in the light of their corresponding provisions in the YNDAA. The general aim of this thesis was to examine through careful analysis whether or not the provisions of the NYC relating to the grounds of invalidity and the public policy exception are compatible with the principles of Shari'ah. This was to establish whether or not there are any serious barriers to Yemen's ratification of the Convention.

The purpose of this concluding chapter is not to reproduce the conclusions that were made in each of the previous chapters; rather it will merely address the main findings of the thesis and the implications of ratifying the NYC for the Yemeni arbitration system.

2. Findings

2.1 The YNDAA Contains Several Shortcomings

This thesis unveils several shortcomings in the YNDAA in relation to the grounds of invalidity of arbitration agreements and the public policy exception.

¹ Carolyn Lamm and Jeremy Sharpe, 'Inoperative Arbitration Agreement Under the New York Convention' in Emmanuel Gaillard and Domenico di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2008) 297.

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With regards to the invalidity of arbitration agreements, one major shortcoming is that the YNDAA does not contain a provision that governs the invalidity of an arbitration agreement as a ground for refusal of a foreign arbitral award. Rather, the Act refers only to the invalidity of an arbitration agreement as a ground for setting aside the arbitral award as one of the grounds listed under Art. 59, namely, Art. 59(1). The list of grounds under Art. 59 is almost identical to those of Art. V of the NYC, which also corresponds to the provisions of Arts. 34 and 36 of the ML. It is well settled that authorities relating to Art. V of the NYC are also applicable to the equivalent provisions in Arts. 34 and 36 of the ML.² In view of that, the examination in this thesis has focused on the invalidity of arbitration agreements under Art. V(1)(a) of the NYC *vis-à-vis* that under Art. 59(1) of the YNDAA, and in doing so has critically examined and compared relevant provisions under the two instruments.

Another shortcoming of the YNDAA is that while it expressly recognises the doctrine of separability of the arbitration agreement, the Act limits the significant consequences of the doctrine only to the competence of the arbitral tribunal and ignores its vital role in determining the validity of the arbitration agreement. Another main shortcoming is that the Act is completely silent on the question of applicable law to the validity of the arbitration agreement where no choice-of-law has been expressly made by the parties to govern their arbitration agreement. The Act only empowers the tribunal under Art. 47(2) to determine the law applicable in the arbitral process and is entirely silent with regards to the enforcement process. An additional shortcoming of the YNDAA is that it does not contain a single set of choice-of-law rules to be applied by a tribunal, or by the enforcing court if the court applies the same approach, to determine the law applicable to an arbitration agreement where the parties have not expressly made any choice-of-law. Rather, the Act stipulates that the tribunal is to apply traditional conflict-of-law rules pursuant to Art. 47(2), which requires the tribunal to apply ‘the substantive law which it considers most closely related to the dispute’.

² Gary Born, *International Commercial Arbitration* (Kluwer 2009) 2563.

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A further shortcoming of the YNDAA is the form requirement under Art. 15, which essentially requires an arbitration agreement to be in written form and thereby excludes any less restrictive form requirements (i.e. oral arbitration agreement). This is obviously a dated approach as several commercial contract are not infrequently concluded orally as long as evidenced by any permitted methods of evidence. Hence, the YNDAA approach is clearly not in conformance with the international trend in this matter. In addition, the definition of what constitutes an arbitration agreement in written form (i.e. 'if its content is recorded in any document signed by the parties, or in their mutual exchange of letters, telexes, or by any other means of written communication') does not seem to conform with international current practice and international trade, as these form requirements have evolved considerably. As Mr. Van Hoogstraten points out to the fact that 'it was not customary in international commerce to have documents signed by the two parties, even in very important transactions. An agreement which required a clause in writing would not meet present-day needs and would not be acceptable in international commerce'.³

A final shortcoming of the YNDAA in relation to the invalidity of arbitration agreements is that although the Act provides three exceptions to the substantive validity of an arbitration agreement, it does not provide any clear definition of, or elaboration on, the terms it uses and leaves the determination of these exceptions to the competent court. The liberal terms of these exceptions do not reflect the policy of presumptive validity in favour of the arbitration agreement. This will lead to legal and commercial uncertainty and to unhelpful and inconsistent court decisions. It will help increase the adoption of a liberal approach in interpreting these exceptions, which will in turn reduce conformity with current trends in international arbitration, which generally support the NYC's pro-enforcement policy.

In contrast to the invalidity of arbitration agreements, Art. 59(g) and Art. 66(b) of the YNDAA expressly provide that a violation of public policy is a ground for both setting aside and refusing to enforce arbitral awards. Despite the fact that the YNDAA

³ UNESCO 'United Nation Conference On International Commercial Arbitration' Summary Record of The 13th Meeting (1985) UN Doc E/CONF.26/SR.13, 13.

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recognises the importance of this ground in protecting the fundamental policies of Yemen's legal system, this thesis reveals some shortcomings in the YNDAA's approach to the public policy exception. One major shortcoming is the absence of a definition of, or elaboration on, what constitutes public policy violations in Yemen. Although Yemeni law shares this problem with many contemporary legal systems, the YNDAA does not circumscribe the scope of the notion in order to guide and limit the enforcing courts. Indeed, the notion of public policy under the Yemeni legislative framework is highly ambiguous in terms of its meaning and contents. There is a strong case to be made that Shari'ah principles represent the public policy of Yemen, and hence any violation of Shari'ah principles would violate Yemen's public policy. However, under Shari'ah the notion can sometimes be applied in a very expansive manner, which does not engender the arbitration-friendly environment that would benefit Yemen in the globalized commercial world.

An additional shortcoming of the YNDAA is that it adopts national public policy instead of international public policy in seeking to apply the public policy exception. This inevitably leads to a very broad interpretation of the public policy exception and a move away from the narrow construction under the NYC and other contemporary arbitration legislation. Additionally, this approach will encourage the enforcing courts to apply much less of a pro-enforcement policy than that advocated in most jurisdictions today, which will also lead to uncertainty and a lack of uniformity in the interpretation and application of the public policy exception.

Although these perceived shortcomings of the YNDAA have been established simply by analysing the drafting of the Act's provisions, the YCAA contains the same shortcomings and hence its case law remains relevant. That is to say, the YNDAA has adopted the same provision as in the YCAA, with all its perceived shortcomings. In view of that, it is important to examine and try to resolve these shortcomings and bridge the gap between the YNDAA and contemporary international arbitration practices. It is not recommended that the YNDAA's shortcomings are cured by way of amendments or by issuing fresh

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legislation. This is because any amendments will not attain the level of proficiency and success that the Convention has already achieved worldwide. Therefore, it is recommended that Yemen ratify the NYC instead, which would resolve these current shortcomings and provide a practical solution for improving Yemen's arbitration system.

2.2 The NYC is the Panacea

The NYC contains an exclusive list of the grounds on which a foreign arbitral award may be refused enforcement. Parts of these grounds are the invalidity of arbitration agreements and the public policy violation embodied in Arts V(1)(a) and V(2)(b), respectively. This thesis analyses the legal discussion and court application by contracting States of these specific grounds, paying particular attention to English judicial practice. In doing so, this thesis reaches a number of interesting conclusions.

With regard to the invalidity of the arbitration agreement, although the NYC does not provide an article that directly expresses the separability doctrine, there is a strong presumption under several articles of the NYC to support its application. Art. V(1)(a) expressly affirms the main purposes of the separability doctrine in international commercial arbitration by encouraging the competence of the arbitral tribunal to govern its own jurisdiction. Then, at the enforcement stage, Art. V(1)(a) provides a clear choice-of-law provision to govern the validity of the arbitration agreement (i.e. the law of the country in which the awards were made), where no express of choice-of-law was made by the parties. The choice-of-law provision in Art. V(1)(a) represents one of the great strengths of the NYC.⁴

With regard to the formal grounds of invalidity of an arbitration agreement, Art. II(2) of the Convention requires certain form requirements to be fulfilled, which are almost identical to those set out in Art. 15 of the YNDAA. However, the UNCITRAL has

⁴ Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer 1981) 282.

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produced an important Recommendation concerning the interpretation and application of Art. II(2) in conjunction with the ML 2006 amendments in relation to these form requirements. This Recommendation together with the ML amendments constitute a ‘friendly bridge’ between the NYC and modern methods of communication, as well as the needs of current practice. This is because it offers straightforward guidance to the contracting States on how liberally they may interpret and apply the Convention’s form requirements exhaustively. Moreover, by applying the ‘more favourable right’ provision in Art VII(2), which allows the arbitral parties to take advantage of requirements which are less strict than those of the Convention under the domestic law or any treaty of the country in which the awards are sought to be enforced. Both instruments are today regarded as authoritative sources that have substantial weight when applying Art. II(2) of the Convention in a liberal manner.

Regarding the substantive grounds of invalidity, Art. II(3) of the Convention provides certain substantive validity exceptions that should be interpreted exclusively. The courts generally construe these exceptions narrowly in the light of the pro-enforcement policy of the Convention. Therefore, many courts have succeeded in applying this policy and have rarely accepted a defence under these exceptions. From this, the courts of contracting State have affirmed the presumptive validity of arbitration agreements and have not held that an arbitration agreement is substantively invalid except in manifest cases. Therefore, the nature of Art. II(3), which limits the enforcing courts to certain substantive exceptions, is another example of the pro-enforcement bias of the NYC. Indeed, ‘Art II(3) proviso must not only observe the strong policy favouring arbitration, but must also foster the adoption of standards which can be uniformly applied on an international scale’.⁵

Finally, with regard to public policy violation, the Convention leaves the determination of public policy violation to the courts of the contracting States in which enforcement is sought. This expressly indicates that the Convention respects all the main principles and

⁵ *Podar Brothers v I.T.A.D. Associates, Inc.*, (1982) VII YBCA 379, 381 (US, Court of Appeals 4th Circuit 1981).

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traditions of different parts of the world. In addition, the Convention contains no reference a choice-of-law rules to examine the issue of public policy violation and hence this is considered as limiting the scope of public policy to certain fundamental issues only. Although the NYC does not provide a definition of the notion, it serves two significant aims in the enforcement context. First, it helps protect the State's fundamental and most basic principles, and second, it provides a distinction between international and national public policy. According to the theoretical considerations and courts' application, the prevailing view is that Art. (2)(b) tends to refer to international public policy when determining public policy violations in the enforcement context.

Furthermore, the ILA Reports offer important recommendations to contracting States on how to interpret and apply the public policy exception under the Convention. These recommendations have been widely accepted and have helped courts to narrowly construe the exception, and hence a mere conflict with local laws or non-fundamental principles of an enforcing State does not in itself constitute a public policy violation under the Convention. Therefore, in view of the general pro-enforcement policy of the NYC, the courts will generally take a narrow reading of the public policy exception by refusing enforcement only in 'exceptional circumstances' and only in very 'extreme cases'. This narrow scope of public policy helps States achieve a uniform interpretation and application of this exception, and this is another example of the Convention's success in the field of international arbitration. Indeed, the ILA Recommendations in relation to the public policy exception are 'increasingly being regarded as reflective of the best international practices'.⁶ Based on these findings, it can be seen that the NYC provides an alternative framework to that of the YNDAA and resolves its shortcomings.

⁶ ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, (International Council for Commercial Arbitration 2011) 107.

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2.3 The Compatibility between the NYC and Shari'ah

Finally, the thesis also establishes that the NYC, at least within the specific remit of this study, does not conflict with Shari'ah principles. In fact, Shari'ah principles are consistent with most principles of international commercial arbitration and share many common doctrines with the NYC. This is evidenced by the operation of the Convention in some Islamic contracting States, such as Saudi Arabia, and also by the following findings.

First, Shari'ah principles permit the arbitral parties to choose the law applicable to their agreement, and thus respects the doctrine of party autonomy. In addition, Shari'ah is very flexible in relation to form requirements, and there are no particular requirements for concluding an international arbitration agreement. This flexibility can be seen clearly in the means by which arbitration agreements may be concluded under Shari'ah, which recognises oral and tacit agreements, as well as any other means of communications, if this follows accepted trade and business practices. Therefore, Shari'ah accepts the NYC's form requirements and is also able to accept more lenient requirements than those set out in the Convention. Shari'ah requires only that there is clear and mutual consent between the arbitral parties for their agreement to be substantively valid, and other substantive requirements are regarded as superfluous. Thus, no tension has been founded between Shari'ah and the NYC with regard to the invalidity of arbitration agreements.

Second, concerning the public policy exception, it has been seen that Shari'ah principles are protected by the Convention itself and thus any contradiction regarding this issue is not well founded. This is because the Convention simply refers to the enforcing court to determine the public policy, and thus the court should apply its legal principles whether that is Shari'ah rules or any other system of law. Moreover, the *Maslahah*, or Shari'ah public policy, is consistence with the main objectives of international public policy. That is to say, both notions protect and safeguard the basic interests of the society, the common interests of humankind, and most the basic principles of the world community.

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Prohibited transactions under Shari'ah include *Riba* (usurious interest) and *Gharar* (speculative contracts). These two kinds of transactions are frequently linked to commercial contracts and not to arbitration agreements. Nevertheless, where enforcement is sought of an arbitral award that contains one of these kinds of transactions, such enforcement would be most likely be refused under Shari'ah, though both terms have been interpreted differently by various Islamic countries. Ultimately, Shari'ah and international public policy reflect the main interests of the international community. This is because the fact that Shari'ah is wide enough as to be capable of accommodating changing circumstances in a way that promotes the development of human civilization throughout time.⁷ In the case of NYC interpretation and application, the thesis seeks to demonstrate that there is no necessary tension between the NYC and Shari'ah principles. In doing so, the thesis suggests that there is no barrier on that account to Yemen's ratification of the Convention. Therefore, Yemeni judges should have no obstacles with applying international public policy as suggested by the NYC at the enforcement stage since it is already applied in many Islamic countries.

3. Predicted Implication of Yemen's Ratification of the NYC to Yemen's Arbitration System

In the light of the above findings, this thesis principally recommends that Yemen take steps to ratify the NYC. Through such ratification, Yemen will enjoy the following three principal benefits, which will progressively enhance Yemen's arbitration system.

⁷ Abdulrahman Alzaagy, 'The Islamic Concept of Meeting Place and its Application in E-Commerce' (2007) 1 MUJLT 27, 38.

3.1 Ratifying the NYC is a Curative Remedy for the YNDAA's Shortcomings

In relation to the specific area of this study, it is to be predicted that the ratification of the NYC by Yemen will result in substantial improvements on the two grounds in terms of their interpretations and applications. In addition to the practical impact that ratification will have on rectifying the shortcomings of the YNDAA, as outlined above, ratification will also have further benefits. First, the Convention will reveal a wider influence to the validity of the arbitration agreement than it is given under the YNDAA. This is because arbitration agreements under the NYC are most frequently interpreted in the light of the 'pro-arbitration' attitude of the Convention, which relies on the presumptive substantive validity of arbitration agreements. This will also encourage Yemeni court to adopting the pro-enforcement policy of the Convention and applying the strong policy in favour of arbitration. The NYC's successful regime is based primarily on a valid arbitration agreement that confirms the parties' agreement to be bound by uniform and globally recognised form and substantive requirements designed for a valid arbitration agreement and subject only to limited exceptions. As Professor van den Berg aptly pointed out, 'the general trend in court decisions is that the courts adopt a rather favourable attitude towards international arbitration in general and the NYC in particular'.⁸

Also, concerning the public policy provision, it can be predicted that the shortcomings in the YNDAA will be resolved since the NYC suggests a more proactive approach (i.e. narrow approach), meaning that the Yemeni enforcing court will only invoke the public policy exception in exceptional cases. On such account, although public policy violation can include several circumstances, under the Convention policy, they were most frequently without success.⁹ The Convention will always remind the Yemeni courts that their decisions on public policy issues should not cause injustice and will always shackle

⁸ Albert Jan van den Berg, 'The 1985 New York Arbitration Convention Revisited' in *Arbitral Tribunal or State Courts- Who must defer to whom?*(ASA Special Series No. 15, 2001) 125.

⁹ Bernard Hanotiau and Olivier Caprasse, 'Public policy in International Commercial Arbitration' in Emmanuel Gaillard and Domenico di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2008) 826.

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its ‘unruly nature’, ensuring that it corresponds to international interpretation and application. This is because the Yemeni courts will not only protect Yemen’s national interests but rather the compelling public interests of the international community, and hence the public policy exception will no longer be an ‘unruly horse’ in the context of Yemen. It is true, therefore, that ‘the rules established by the NYC represent a collective, pro-enforcement movement by the international community’¹⁰, and the policy that inspires the NYC is *favour arbitrandum*, as evidenced by the application of the public policy exception by the courts of contracting States.¹¹

3.2 Ratifying the NYC will Provide a Clear List of Grounds for Refusal of Enforcement of Arbitral Awards to be Embodied in the YNDAA

Since the YNDAA does not contain a clear provision regarding the grounds for refusing the enforcement of foreign arbitral awards, the ratification of the Convention will afford an exclusive ground embodied in Art. V of the Convention to the YNDAA. The implication here is twofold.

First, as far as the interpretation and application of Art. V is concerned, the courts of contracting States have always adopted a pro-enforcement policy. This is because the purpose of Art. V, as the ‘heart’ of the Convention, is to facilitate enforcement by reflecting a pro-enforcement bias. Using the grounds of Art. V as a benchmark for refusing the enforcement of foreign arbitral awards will improve the proficiency and effectiveness of the Yemeni arbitration system, since Art. V of the Convention constitutes a favourable obligation to recognise and enforce foreign arbitral awards, subject to limited grounds, but not to provide an affirmative obligation to deny

¹⁰ Emmanuel Gaillard, *The Present – Commercial Arbitration as a Transnational System of Justice: International Arbitration as a Transnational System of Justice* in Albert Jan van den Berg (ed), *Arbitration: The Next Fifty Years* (ICCA Congress Series, No.16, Kluwer 2012) 71.

¹¹ Bernard Hanotiau and Olivier Caprasse, ‘Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention’ (2008) 25 J Intl Arb 721.

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recognition and enforcement.¹² The words ‘may be refused’ in Art. V regulate the discretionary power of the national courts of contracting States by directing them to limited and exclusive grounds. Art. V indicates that it is not obligatory for the enforcement court to refuse recognition or enforcement of the arbitral award even though one of the grounds exists.¹³ In a nutshell, Art. V of the NYC contains permissive rather than obligatory language directed to the enforcing courts. This is evident by the fact that out of 700 cases under the Convention, in 32 volumes of the YBCA, only in 70 cases has enforcement been refused. This 10% result is a testament to the success of the NYC in the domain of international arbitration.¹⁴ Yemen’s legislature should take the positive step of ratification, allowing the Yemeni courts to share the same policy by the application of these limited grounds of refusal.

Second, adopting Art. V of the Convention will release Yemen’s arbitration system from the parochial resistance and archaic limitations embodied in Art. 494 of the Yemeni Civil Procedural Law. This is because the Convention’s grounds are exhaustive and will be interpreted by the Yemeni enforcing courts according to the spirit of the Convention, which is to facilitate, not limit, the enforcement of foreign arbitral awards. Furthermore, the Yemeni courts will share the uniform and consistent interpretation and application of this list of grounds with other contracting States. Therefore, the Yemeni courts will enforce foreign arbitral awards more readily than currently, based solely on the provisions of Art. V of the Convention, thereby making the NYC a ‘lighthouse in the ever-so-rough sea of transnational commercial law’.¹⁵

¹² Gary Born, *International Commercial Arbitration* (Kluwer 2009) 2723.

¹³ Hanotiau and Caprasse (n 11).

¹⁴ Albert Jan van den Berg, ‘New York Convention of 1958: Refusal of Enforcement’ (2007) 18 ICC International Court of Arbitration Bulletin 1, 35.

¹⁵ Herbert Kronke, ‘Introduction: The New York Convention Fifty Years on: Overview and Assessment’ in Herbert Kronke and Patricia Nacimiento, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer 2010) 5.

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3.3 Ratifying the NYC will Position Yemen as a Truly Arbitration-friendly State with International Arbitration Norms

From an international perspective, two main implications can be drawn as follows:

(1) The most common impact is that the ratification of the NYC will bring Yemen into the international community of arbitration facilities that set up to provide unified standards to enforce foreign arbitral awards rendered throughout signatory States from different parts of the world. The Convention goes beyond the enforcement of arbitral awards to reach an international effectiveness in international arbitration as a successful method of resolving disputes. This will have two immediate consequences. If a foreign arbitral award is issued outside Yemen and the parties seek to enforce that award in Yemen, the Yemeni courts will consider the matter in accordance with the NYC. Likewise, arbitral awards made outside Yemen but that relate to Yemeni disputes will also be enforced in accordance with the NYC.¹⁶ Moreover, the structure of the NYC is simple, clear and highly comprehensible, with logical order to its provisions, facilitating easy understanding and application by judges and lawyers. This will help the Yemeni courts to participate in the uniform project of interpretation and application in the global community. Besides, the ample case law and wealth of literature in relation to the NYC will provide helpful guidance for the Yemeni courts in order to facilitate the enforcement mechanism in Yemen. This is because the Yemeni courts will likely look to foreign court decisions and their reasoning when seeking to apply the provisions of the Convention.

The Convention provides certain uniform rules that are accepted by the international community. The Yemeni judges therefore will begin to familiarise themselves with the international standards of recognising and enforcing foreign arbitral awards. As Gerold Herrmann indicated in his address to the 1998 ICCA Congress on the NYC, forty years after its establishment:

¹⁶ NYC, Art I(1). (stating that ‘This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought’).

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Adherence constitutes, in essence, a sign or signal to the world that the State accepts international standards and that it joins the global network of States which enforce, within very narrow and justified limits, arbitral awards and, equally important, respect the parties' agreement to arbitrate.¹⁷

Upon ratification, the Yemeni legislators and judges will increasingly bring Yemen's arbitration system into line with international practice and produce a favourable environment for the development of international arbitration in Yemen. This will end Yemen's isolation from international practice and Yemen will gain confidence in increasing its role in the modern international arbitration community.

(2) Yemen will increase investment and commercial contracts within its borders and will further advance the successful practice of international commercial arbitration by both Yemeni and non-Yemeni investors. Based on a pro-enforcement policy, the NYC facilitates and protects the enforcement of both 'arbitration agreements and arbitral awards and in doing so serves international trade and commerce and provides an additional measure of commercial security for parties entering into cross-border transactions'.¹⁸ Therefore, there is a pressing need for the positive step of ratification by Yemen in the face of growth in international investment in Yemen in several areas, particularly in the oil and natural gas sectors. As Levine explains, ratifying the Convention 'will likely mean that settlement of international business disputes will be handled more effectively and their outcomes will be more predictable'.¹⁹

Accordingly, ratification will ensure that Yemen is joining the international community in dealing with arbitral awards, and this will make Yemen a more attractive forum for international investment. Besides, it represents a great development in the Yemeni

¹⁷ Gerold Herrmann, 'The 1958 New York Convention: Its Objectives and Its Future' in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series No. 9, Kluwer 1999)19.

¹⁸ Neil Kaplan, 'Introduction' in ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, (International Council for Commercial Arbitration 2011) xi.

¹⁹ Stanley Levine, 'United Nations Foreign Arbitral Awards convention: United States Accession' (1971) 2 Ca W Int'l LJ 67, 82.

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arbitration system to better link Yemen's business and commerce with international arbitration standards. Ultimately, Yemeni and foreign investors will have more confidence and flexibility when concluding their international commercial contracts in the Yemeni context.

4. Concluding Remarks

A reliable enforcement mechanism for foreign arbitral awards is becoming increasingly important in Yemen, as the country continues its rapid progress in international investment relations. On the basis of the findings of this thesis as well as the predicted implications of the NYC, it can be concluded that the ratification of the NYC is a pressing need for Yemen. The Convention has been ratified by 148 nations from different legal traditions, including the leading trading nations of the world. In addition, the Convention has become an international instrument that creates environments in which 'cross-border economic exchange could flourish'²⁰ and hence has made a great contribution to the development of international commercial arbitration as well as international commerce and investment.

In view of this, ratifying the NYC by Yemen will not only rectify the YNDAA's shortcomings, but also will surely strengthen the Yemeni arbitration system and ensure Yemen's engagement with the international community in the field of international commercial arbitration, which consequently will have a very helpful impact on investment relations. This will be a significant step forward in creating an arbitration-friendly environment and will reflect a pro-enforcement policy in Yemen's arbitration system. Ultimately, it is hoped that this humble work will provide some useful insights

²⁰ Robert Briner and Virginia Hamilton, 'The History and General Purpose of the Convention: The Creation of an International Standard to Ensure the Effectiveness of Arbitration Agreement and Foreign Arbitral Awards' in Emmanuel Gaillard and Domenico di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2008) 21.

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for the Yemeni government on the compatibility and importance of the Convention, so that Yemen can also share in the success story of the Convention as soon as possible and establish itself within the global community as a centre for excellence in the field of international commercial arbitration.

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