

The Commercial Arbitration Centre for the States of the Cooperation Council
for the Arab States of the Gulf

**The Arbitration Mechanism
of the Commercial Arbitration Centre
for the States of the Cooperation Council
for the Arab States of the Gulf**

An Analytical Study of the Statute and Rules of Arbitration of the Centre

Mohammad Hussein Bashayreh



Dar Al Karar

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Foreword

The GCC Commercial Arbitration Centre has commenced its operation since 19 March 1995. The number of cases referred to the Centre has been increasing over the past twenty years. Even though the jurisdiction of the Centre requires a personal connection of, at least, one party to the dispute with a Member State of the Cooperation Council for the Arab States of the Gulf, the arbitration mechanism of the Centre is relevant for the business community in Non-member States which enter into transactions with their counterparts *from* the Arab States of the Gulf regardless of the place where the transaction has been made or where the pertinent business is carried on. This is, of course, in addition to enhancing trade between the Member States of the Cooperation Council.

The rules of arbitration of the Centre contained in, or issued pursuant to, its Statute are effective in the Arab States of the Gulf as *legal rules* deriving from a regional convention. Hence, the explanation of these rules is akin to examining a *law* or, to illustrate further, the Washington Convention of 1965. Yet, this book explains how arbitration at the Centre may interact with the legal systems of Member as well as Non-member States: The seat of arbitration does not have to be in a Member State; awards may be enforced in any country pursuant to its own law or the New York Convention of 1958.

The main benefit contemplated under the rules of arbitration of the Centre is making a final award by a neutral forum and that cannot be annulled by the courts of the Member States. The enforcement of an award of the Centre may be refused in these States only on the basis of

certain grounds specified in the Centre's rules of arbitration. By virtue of the rules of the Centre, the jurisdiction of the courts of the Member States of the Gulf Cooperation Council is excluded by an arbitration agreement submitting disputes to the Centre. Predictability, which is a main concern for parties to any contract or dispute, is therefore highly respected. Predictability is underlined both in terms of the enforceability of the award and the avoidance of otherwise possible retention of jurisdiction by courts of a Member State of the Cooperation Council.

The arbitration mechanism of the Centre contributes to the ever developing principles of commercial arbitration. Remarkably, the rules of arbitration of the Centre can propel the idea of delocalized awards. The present book, which marks the twentieth anniversary of the launching of the Centre, elucidates different aspects of this mechanism, associating them with relevant principles of commercial arbitration. Some rules are interpreted by the author and may be susceptible of different views. In a number of cases, certain rules have been tested in courts; other rules have not. It is hoped, therefore, that this book will trigger further discussion and commentary on the rules of arbitration of the Centre. Views from practitioners and academics, in addition to lessons learned from the practice of arbitral tribunals, enable the Centre to explore in what ways its rules can be modified to respond to new problems and to adapt to the needs of the users of arbitration services.

Ahmed Najem Abdulla Alnajem

Secretary General

The GCC Commercial Arbitration Centre (*Dar Al-Karar*).

Acknowledgment

I owe thanks to everyone who has helped me complete this book. Special thanks go to HE Mr Ahmed Alnajem, the Secretary General of the Commercial Arbitration Centre for the States of the Cooperation Council for the Arab States of the Gulf, and the staff of the secretariat of the Centre, for their invaluable assistance in providing essential data upon which this book has relied. Thanks go, too, to those who helped me through their suggestions and views regarding matters that should be addressed. However, any mistake remains my sole responsibility.

I extend enormous thanks to my wife and children for their patience and support.

Mohammad Hussein Bashayreh

Introduction

Arbitration has become a widely used means for the settlement of commercial disputes. National legislatures have been responsive to this fact; many countries have reformed their arbitration laws. The Member States of the Cooperation Council for the Arab States of the Gulf ⁽¹⁾ are no exception. They have recognized arbitration under their respective laws of civil procedure or by virtue of a special legislation. Some of these States have introduced modern legislation relating particularly to international commercial arbitration. For instance, the Sultanate of Oman and the Kingdom of Bahrain have adopted the UNCITRAL Model Law for international commercial arbitration.

Regulating arbitration, however, is not confined to national law. It has also been recognized and regulated internationally. The New York Convention of 1958 for the Recognition and Enforcement of Foreign Arbitration Awards is a leading example for multilateral conventions on arbitration. At the regional level, the Cooperation Council for the Arab States of the Gulf has realized as early as the 80's of the twentieth century that arbitration is vital for the promotion of international trade. Hence, the Centre for Commercial Arbitration has been established under the umbrella of the Gulf Cooperation Council in 1993.

The arbitration mechanism of the Centre constitutes an institutional arbitration governed by special rules. It is true that institutional arbitration is growing under domestic laws through, for instance, the chambers of

(1) The Member States of the Cooperation Council are: Saudi Arabia, Kuwait, Bahrain, Qatar, United Arab Emirates, and the Sultanate of Oman.

commerce and industry.⁽¹⁾ Yet, the institutional arbitration at the Centre is unique in that its rules derive from the Statute of the Centre which has been sanctioned as an international convention in the context of the Cooperation Council. Remarkably, the Statute of the Centre aims to ensure the recognition and enforcement of the arbitration awards in the Member States, whereas arbitration awards issued under the rules of other institutions remain subject to the provisions of national arbitration laws or the Convention for the Enforcement of Judgments among the member States of the Cooperation Council.

The special status of the arbitration conducted under the auspices of the Centre triggers a number of questions about the nature of its mechanism. The relationship between the Statute of the Centre and the arbitration rules issued pursuant to it and the national legal systems of the Member States of the Cooperation Council merits investigation. Further questions arise as to the requirements for establishing the jurisdiction of the Centre and the legal nature of the resulting arbitration award. Answering these questions can reveal in what ways arbitration at the Centre may be more favorable than arbitration under other arbitral regimes, particularly from the perspective of enforcement proceedings in the Member States.

To answer these and other pertinent questions it is necessary to explain the rules of arbitration of the Centre which are contained in the Statute of the Centre and the Regulation of the Rules of Arbitration Procedures issued according to it. Although twenty years have passed since the Centre has commenced its activities and operation, I could not find a comprehensive explanation of the arbitration mechanism under its

(1) Recently, the Saudi Council of Chambers has established the “Saudi Centre for Commercial Arbitration” which was launched in May 2014. Earlier, “the Bahrain Chamber for Economic, Financial and Investment Dispute Resolution” has been established in 2009. Plans to set up similar Centres of arbitration in other Member States are being considered.

rules. Therefore, this book aims to analyze and explain the arbitration rules of the Centre.

The explanation of the rules of arbitration of the Centre rests mainly on the text of these rules (Statute and Regulation of the Centre), available documents relating to the *travaux préparatoires* of the Statute of the Centre, excerpts of arbitral awards relating to procedural aspects of arbitration and pertinent points of law, annual reports of the Centre, and relevant decisions and data of the General Secretariat of the Centre. With the exception of the Statute and Regulation of the Rules of Procedure of Arbitration and the Centre's annual reports, unpublished documents of the Centre are kept in its archive. Translation of quoted Arabic texts is the author's own translation.⁽¹⁾ The present author is offering his interpretation of many aspects of the rules of arbitration of the Centre and his own understanding of the relationship between these rules and the national laws of Member States. It goes without saying that this explanation of the said rules of arbitration is not a legal advice for a specific set of circumstances.

Since this work seeks to analyze and explain the provisions of Statute and the Procedural Regulation, it will not focus on the general theory of arbitration. This book is not, however, a mere handbook to the rules of arbitration of the Centre. It elaborates critically on some aspects of these rules, putting them in the context of relevant general principles of international commercial arbitration so as to ascertain the contribution of the Centre in this regard. Besides, some aspects of the arbitration mechanism of the Centre, *e.g.*, the scope of its jurisdiction, the formation of the arbitral tribunal, will be compared to other institutional rules of

(1) An exception is that The English version of the Economic Agreement of the Gulf Cooperation Council as published on the official Web Site of the Council has been used.

arbitration, like The ICC Rules. However, a comprehensive comparison is not an objective of this book.

To examine the various aspects of the mechanism of arbitration of the Centre, this book is organized as follows:

Chapter 1: The Institutional Framework of the GCC Commercial Arbitration Centre.

Chapter 2: The Jurisdiction of the GCC Commercial Arbitration Centre.

Chapter 3: The Arbitral Proceedings.

Chapter 4: The Arbitration Award.

It is appropriate to set out here some terminology and abbreviations that will be used throughout the book. The name of the “Commercial Arbitration Centre of the States of the Cooperation Council for the Arab States of the Gulf” will be abbreviated as “the GCC Commercial Arbitration Centre” or simply as “the Centre.” Also, the Statute establishing the Centre will be referred to as “the Statute of the Centre” or the “Statute.” And the “Regulation for the Rules of Arbitration Procedures” as in force, which is issued under the Statute, will be referred to as “The Procedural Regulation” or the “Regulation.” Finally, the Cooperation Council for the Arab States of the Gulf will be referred to as the “Cooperation Council” while “Member States” means the members of the said Council.

The Author

Chapter 1

The Institutional Framework of the GCC Commercial Arbitration Centre

I. Background to the Establishment of the Centre

The Statute setting up the GCC Commercial Arbitration Centre has been approved by the Supreme Council of the Cooperation Council in 1993. The Statute was the culmination of a decade-long efforts and studies. The work for establishing the Centre was initiated in 1983 by virtue of a draft statute proposed by the State of Bahrain. This initiative was driven by a desire to facilitate trade between the Member States of the then newly born Cooperation Council. As will be seen from the evolution of the drafting process described in the following paragraphs, a participatory and inclusive approach was followed whereby the competent authorities as well as the private sector of Member States had their contribution to the establishment of the Centre.

The Bahraini proposal was presented to the first meeting of the Ministers of Justice of the member States held in al-Riyad, Saudi Arabia, on 27th and 28th of December 1983. The Ministers of Justice recommended to approve the proposal in principle and requested the General Secretary to procure the comments of the member States on the Bahraini proposal.

Based on comments solicited from the Member States, the General Secretariat prepared an amended version of the draft statute. A meeting of legal experts was then concluded at the Secretariat in December 1983 to review that amended draft. A further revised draft was thereafter

prepared by the Secretariat and resent to the committee of legal experts in January 1984. Subsequently, the draft was submitted to the second meeting of the Ministers of Justice of the member States held in January 1984, and the Ministers relegated the draft to the Ministers of Trade of the member States. The General Secretary followed up with further consideration of the draft by the Committee for Commercial Cooperation in the Cooperation Council, which held a meeting to review the draft in June 1985.⁽¹⁾

In October 1985, upon request from the Committee of Commercial Cooperation, the Secretary General circulated among the chambers of commerce and industry of the Member States a memorandum accompanied with the draft statute. The memorandum explained the importance of establishing an arbitration Centre. The Secretary General underpinned each Member State's interest in promoting arbitration as an alternative means of dispute resolution, which interest had been manifested in the adoption of national laws regulating arbitration.

Indeed, the initiative for establishing the Centre was not the only manifestation of the Member States' interest in promoting arbitration. The memorandum prepared by the Secretary General in 1985 referred to the acceptance by the governments of Member States of arbitration in disputes relating to customs. It stated that:

“Whereas the trade exchange is of main concern and constitutes a prominent aspect of cooperation among the Member States, and whereas the greater the trade exchange is, the more problems arise for which there must be a means of settlement; the Committee for Economic and Financial Cooperation has focused on finding such a means. Therefore,

(1) Memorandum of the General Secretary of the Cooperation Council number 54/M/2 held in the archive of the GCC Commercial Arbitration Centre. All documents relating to the travaux préparatoires of the Statute referenced in this book can be found in the archive of the Centre.

in its nineteenth meeting, it has approved the procedures and measures proposed by the General Directors of Customs. However, those measures were not sufficient since they were non-mandatory. Then, the Committee decided in its twenty-second meeting in 1989 to add a provision to the customs procedures to the effect that disputes could be referred to arbitration. [. . .] It could be said that the Ministerial Board aspires to sanctioning arbitration as a means to settle cases of commercial transactions by the agreement of the two parties to a dispute instead of the approach of the Committee for Economic and Financial Cooperation which considers a dispute submitted to it and may decide to refer it to arbitration as it deems necessary.”

The above-mentioned memorandum of 1985 clarified that the arbitration mechanism it was seeking aimed at avoiding “prolonged disputes and failure of reaching a solution when it was most needed in cases of urgency involving disputes over commercial transactions . . .”. The brief preamble to the draft statute of the Centre, which was attached to the said memorandum, highlighted the justifications for establishing the Centre and its objectives. Thus The Supreme Council of the Cooperation Council for the Arab States of the Gulf, *recognizing* that:

“The rapid growth of relationships among the Member States in economic, commercial, and construction fields may give rise to disputes between their respective governments, organizations and citizens and, therefore, there should be established a system of arbitration that ensures just and speedy resolution of these disputes; And *considering* the significance of arbitration for the resolution of the disputes that may arise in the context of the implementation of

the provisions of the Unified Economic Agreement; And *appreciating* the advantages of arbitration in terms of expediting the resolution of these disputes ...”.

However, the draft statute of the Centre which was attached to the memorandum of 1985 (the “1985 draft”)⁽¹⁾ was influenced by some rules of domestic public policy of Member States. For example, the draft referred to the necessity of applying Islamic Fiqh and commercial custom, provided such custom did not contravene the former (article 8 of the 1985 draft). This approach was probably due to the fact that the jurisdiction of the Centre initially related to disputes as between governments in respect of the application of the Unified Economic Agreement of 1981 signed between the Member States, or between governments and their subjects, or between citizens and other parties (article 2 of the 1985 draft). Article 9 of the 1985 draft provided for the finality of the arbitration award and the obligation of the Member States to enforce it as if it were a national, enforceable judgment.

In addition to the substantive and procedural aspects of arbitration, part of the *travaux préparatoires* of the statute concerned the financing of the

(1) In fact, the draft statute of the Centre of 1985 was not the first draft. The State of Bahrain (now the Kingdom of Bahrain), which pioneered the call for establishing the Centre, submitted a draft in 1983. This draft was presented to the Ministers of Justice of the Member States and was later amended by the Secretariat upon consultation with a committee of legal experts. A revision of the draft was conducted in 1984 based on comments from Member States. However, the draft statute of 1985 can be regarded as expressing an initial consensus which was the basis of open consultation with chambers of commerce which culminated in the final version of the statute. Hence, the discussion in the text focuses on the 1985 draft.

proposed arbitration Centre.⁽¹⁾ The chambers of commerce and industry of the Member States showed willingness to finance the Centre. The approach taken by the Ministerial Committee, reaffirmed in its meeting held in 1986, in stressing the need for consulting the chambers of commerce and the latter's offer to finance the Centre demonstrate the fact that the promotion of arbitration meets the needs of the business community.⁽²⁾

In 1988, the Secretariat of the Cooperation Council conducted a study of the arbitration laws of the Member States upon request from the Committee for Commercial Cooperation. This study was intended to contribute to drafting arbitration rules of the Centre once established. The study of domestic arbitration laws covered the provisions of these laws (as in force at the time of the study) in respect of the arbitration agreements, the enforcement of national and foreign arbitration awards, challenging arbitration awards and the power of courts to amend or annul the award. It is noteworthy that the study pointed out that domestic arbitration under national laws covered commercial disputes as well as all disputes that were capable of amicable settlement (compromise), "whereas the draft statute of the arbitration Centre which [was] being considered [was] limited to commercial arbitration between the Member States."⁽³⁾

Restricting the jurisdiction of the Centre to commercial disputes was explained as follows:

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- (1) Letter of the Secretary General dated 16/11/1986 addressed to the Chamber of Commerce of Bahrain.
 - (2) The Secretariat continued its consultations with the chambers of commerce in 1987. Letter of the Secretary General dated 24/12/1986 addressed to the Chamber of Commerce of Bahrain and the Union of Chambers of Commerce.
 - (3) The study of domestic arbitration laws of the Member States, The General Secretariat of the Centre, 1988.

“[Arbitration at the Centre] is part of international commercial arbitration which concerns usually only international commercial disputes relating to an international commercial transaction whether between private natural or juridical persons of different nationalities or between public entities, such as a State or its organizations or establishments on one side and foreign natural or juridical persons on the other side. Also, a dispute is regarded as concerning international trade such disputes that arise between a public entity with commercial or industrial nature which is affiliated to one State and similar entities in other States where the dispute relates to contracts of international trade, often called international economic contracts.”⁽¹⁾

It was intended to conclude the proposed statute as an international convention.⁽²⁾ In its letter addressed on 26 December 1990 to its working committee of arbitration, expertise, and custom, the Chamber of Commerce and Industry of Bahrain requested the committee to study the draft statute of the Centre with a view to drafting it as an international convention following the example of the Convention for the Arabian Gulf University and the Gulf Investment Corporation signed by the Member States.

In 1990, the Bahraini government took the view that the statute was to be submitted to the Supreme Council of the Cooperation Council so as to be issued as an international, regional convention. This view was expressed by the State Ministry of Legal Affairs of Bahrain in a memorandum supplementing the 1985 draft. This memorandum focused

(1) Ibid.

(2) The Committee of legal experts that studied the proposal submitted by the State of Bahrain in 1983 described the proposed draft as a draft international convention. (The Memorandum of the General Secretary of the Cooperation Council number 54/M/2.)

on some rules that were overlooked in the draft, and which were to be covered in a convention governing an arbitration regime.

These supplementary rules included the autonomy of the Centre and its juridical personality, clarifying its jurisdiction over the disputes relating to the Unified Economic Agreement and the disputes arising between citizens of Member States or between citizens and other parties, the relationship between arbitration at the Centre and the national courts of Member States. The Ministry of Legal Affairs of Bahrain suggested that the statute should preclude resort to courts if an arbitration agreement submitting to the Centre existed. Also, it was suggested that the arbitration award issued under the Statute of the Centre should not be subject to challenge before national courts. The Bahraini comments contained details relating to the issuance of the arbitration award, its content, and the duration of the arbitral proceedings, rules relating to the appointment and challenge of arbitrators, and the immunities of the Centre.

It appears that the new draft proposed by the Bahraini Ministry of Legal Affairs in 1990 has superseded the 1985 draft. Indeed, the 1990 draft, as subsequently supplemented by the comments of the Bahraini Chamber of Commerce and Industry, was more comprehensive and consistent with the declared objectives of the proposed Centre.⁽¹⁾ Further consideration of the draft statute was based on the 1990 draft as the Committee for Economic Cooperation requested comments thereupon from Member States in its meeting held in May 1992.

The efforts aiming at establishing the Centre were not pursued in isolation of the Cooperation Council's endeavors to realize economic integration among its Member States. The Unified Economic Agreement

(1) The Memorandum of the Ministry of Legal Affairs of Bahrain number 439/1990 dated 30/10/1990.

for the Cooperation Council of 1981 has laid down the cornerstone for the establishment of the Centre, since the Agreement targeted, among other things, the coordination in the field of dispute resolution. One commentator has suggested that the Economic Agreement of 1981 served “as a basic step in the preparation for a common market through establishing a number of joint economic and social entities that constitute essential chains in the march towards the common market, such as the Standards Commission for the Member States, the GCC Commercial Arbitration Centre, and the Gulf Investment Corporation.”⁽¹⁾

The Unified Economic Agreement has been revised in Muscat. A new Economic Agreement was signed on 31/12/2001 to supersede the Agreement of 1981. The new Economic Agreement treated the existing Arbitration Centre as an institution of the Cooperation Council. Article 27 of the 2001 Agreement States that:⁽²⁾

- “1 - The Secretariat General shall hear and seek to amicably settle any claims brought by any GCC* citizen or official entity, regarding non-implementation of the provisions of this Agreement or enabled resolutions taken to implement those provisions.
- 2 - If the Secretariat General could not settle a claim amicably, it shall be referred, with the consent of the two parties, to the GCC Commercial Arbitration Centre to hear the dispute according to its Statute.

(1) Najeeb Al-Shamesi, a commentary published at http://www.aleqt.com/2009/10/06/article_284048.html last visited on 29/12/2013.

(2) The text of the Economic Agreement of 2001 can be accessed at <http://sites.gcc-sg.org/DLibrary/index-eng.php?action=ShowOne&BID=168> last visited on 14/10/2014.

* i.e., the Gulf Cooperation Council.

Should the two parties not agree to refer the dispute to arbitration, or should the dispute be beyond the competence of the Centre, it shall be referred to the judicial body set forth in Paragraph 3 of this Article.

- 3 - A specialized judicial commission shall be formed, when deemed necessary, to adjudicate disputes arising from the implementation of this Agreement or resolutions for its implementation. The Financial and Economic Committee shall propose the statute of this commission.
- 4 - Until the statute of the commission referred to in paragraph(3) above comes into force, all disputes which the two parties do not agree to settle through arbitration and which could not be amicably settled by the Secretariat General, shall be referred to the competent GCC committees for settlement.”

Article 32(1) of the same Agreement provides that “The provisions of this Agreement shall have prevail if found in disagreement with local laws and regulations of the Member States.”

The GCC Commercial Arbitration Centre is thus an organ of the Cooperation Council. It is one of the joint or common entities, like the Gulf Investment Corporation located in Kuwait; the Standardization Commission for the Cooperation Council located in Al-Riyad; the Technical Bureau for Telecommunications located in Bahrain; and other Bureaus, Committees and entities. It can, therefore, be said that the establishment of the Centre reinforces the legal nature of the Cooperation Council as an international, regional organization with

general jurisdiction.⁽¹⁾ The regional, ‘a-national’ character of the Centre is underlined by the fact that it does not constitute part of the Bahraini legal and judicial system of Bahrain, although the Statute provides that its headquarters are located in the Kingdom of Bahrain.⁽²⁾

II. The Incorporation of the Statute of the Arbitration Centre into the Legal Systems of the Member States

Pursuant to the Supreme Council’s approval of the Statute of the GCC Commercial Arbitration Centre, each Member State had to take necessary steps to put the Statute into implementation in accordance with its constitutional rules.⁽³⁾ In the Kingdom of Saudi Arabia, for instance, the Council of Ministers has passed the resolution number 102 of 20/4/1423 H (2002 AD) to implement the Statute provided that the enforcement of an arbitration award under article 15 of the Statute may not be ordered unless it is ascertained that it does not contravene Islamic law. As far as the State of Bahrain is concerned, a decree was issued on 25/4/2000 promulgating the Law number 6 of the year 2000 which incorporated the Statute. This law has been published in the Official Gazette.

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- (1) Sayyed Ibrahim Al-Dusouqi, ‘Al Ṭabī’ah al-Qanūniya li-Majlis al-Ta’āwun li-Dual al-Ḳalij al-‘Arabiya’ (The legal nature of the Cooperation Council for the Arab States of the Gulf), *The Cooperation Journal*, number 82 (2004) p. 17.
 - (2) The Supreme Court of Bahrain confirmed that the GCC Commercial Arbitration Centre is “an independent adjudication forum on its own, although its headquarters are in the State of Bahrain.” Appeal number 101/2010, 2 April 2012, *Majallat Al-Taḥkīm Al’Alamiyah* (the Global Arbitration Journal) (2013) issue 18, p. 277, at 279.
 - (3) The sovereign acts taken by the Member States to approve the Statute are summarized in the *Journal of Arbitration and Gulf Law*, issue number 15, April 2012, p. 10.

Similarly, The Kuwaiti legislature has passed the Law number 14 of the year 2002, ratifying the Statute. The explanatory notes to the bill of the said Kuwaiti Law stated that the Statute was an international convention for the purposes of article 70 of the Constitution and, consequently, had to be ratified by the Parliament.

The Council of Ministers of the Sultanate of Oman, too, has passed its resolution number 10/2000 of 4/4/2000 to receive the Statute into the Omani legal system. Accordingly, the Statute has been declared to be applicable in Oman by virtue of a decision of the Minister of Justice published in the Official Gazette of Oman on 11/7/2000. The decision of the Minister of Justice invoked the Omani Law number 47/97 relating to arbitration in civil and commercial matters since this law recognizes international arbitration which takes place at permanent Centres or organizations outside of Oman.

The United Arab Emirates has adopted the Statute by virtue of the resolution number 5 of the year 2001 issued by the Council of Ministers. In justifying the adoption of the Statute, the resolution of the Council of Ministers referred to the Economic Agreement, signaling that the establishment of the Centre was in furtherance of the economic cooperation and integration between the Member States.

In Qatar, the Council of Ministers requested the Ministry of Justice to consider the Statute and to take necessary legislative steps to implement it. The author did not find a legislation or decree that formally incorporates the Statute into the legal system of Qatar. Nevertheless, it can be assumed that the Statute is binding for Qatar since any State may not invoke its own constitutional rules to invalidate an international convention or to

justify non-compliance therewith.⁽¹⁾ Further, the Annual Report of the Centre for the year 2013 mentioned that the Centre has communicated with the Ministry of Justice of Qatar in 2013 to affirm the legal status of the Centre as a regional arbitration regime that overrides domestic laws of Member States.⁽²⁾

The applicability of the Statute in the Qatari legal system has been asserted by an arbitration tribunal in the arbitral case number 67/2013. In this case, the arbitration tribunal endorsed the view that the Statute overrides the domestic law of Qatar as well as the national laws of other Member States. Therefore, invoking the Statute and the Procedural Regulation as the procedural law of arbitration, the tribunal refused to apply the Qatari law of civil procedure although the seat of arbitration was in Qatar. Thus, excluding the national law of civil procedure, the tribunal found that the arbitration award was not required to be issued in the name of the head of State. The arbitration tribunal reasoned that:

“As regards the fact that the award was not to state that it is issued in the name of a particular authority, the arbitrator points out that it has been established in the present arbitration that the law of Qatar governed the merits (*i.e.*, determining the proprietor of the right and the scope of that right). However, with respect to arbitral procedures, commencing with the filing of the request for arbitration, presenting the facts and evidence of the dispute until the issuance of the award and its enforcement, the arbitration is governed by the rules of arbitration applicable at the GCC Commercial Arbitration Centre of the Member States of the Cooperation

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- (1) Articles 27 and 46 of the Vienna Convention on the law of treaties. Mohamed Y. Olwan, *Al-Qanūn al-Dawli al-Ām, al-Muqaddima wal-Maṣadir* (Public International Law, Introduction and Sources), 3rd ed., Dar Wail, Amman, 2007, pp 205, 301-302.
- (2) Annual Report of the Centre (2013), at p. 13.

Council of the Arab States of the Gulf, and which are set out in the Statute and the Regulation of Arbitral Procedures of the Centre. These rules have a special rank in the order of legislative precedence; they override the legal rules applicable in the six Member States of the Gulf Cooperation Council since the rules of the Centre have the same value of an international convention as they derive from a regional, sovereign, multilateral source, namely the joint will of the leaders representing the six States (the resolution of the Supreme Council of the Cooperation Council issued in Al-Riyad during the fourteenth summit, 22 December 1993). Consequently, the form of the issued award is not subject to any provision of the Qatari law of civil procedures, the award being issued in the context of the collective will of the six Member States . . . ”⁽¹⁾

The decision of the arbitration tribunal in the case number 67/2013 is consistent with the ruling of the Kuwaiti courts to the effect that the Kuwaiti law of civil procedure is inapplicable to the arbitration taking place in Kuwait under the Statute of the Centre.⁽²⁾ (This issue will be further clarified through examining the relationship between the Statute and domestic law of Member States in section VIII (b) of this Chapter.)

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- (1) Award in the arbitral case number 67/2013 at the Centre, 21/8/2013, quoting the opinion of Adviser Dr. Magdy Ibrahim Kassim previously submitted to the GCC Commercial Arbitration Centre regarding the relationship between the arbitration at the Centre and the national legal systems of the Member States.
 - (2) Appeal number 668 of the year 2006, 10 February 2008, *Majallat Al-Taḥkīm Al’Alamīyah* (2009) 3, pp. 451-454.

III. The Autonomy of the GCC Commercial Arbitration Centre and Its Organs

The GCC Commercial Arbitration Centre has an autonomous juridical personality, even though it is a spin-off the Cooperation Council.⁽¹⁾ The autonomy of the Centre *vis-à-vis* the governments of Member States can be demonstrated from the administrative, financial, and professional aspects.

Administrative and Financial Autonomy

At the administrative level, the Centre has a Board of Directors comprising six members, one from each Member State. The members of the Board are not appointed by the governments of their respective countries; rather, each member is nominated by the relevant national chamber of commerce and industry. The tenure of the members of the Board is three years, renewable for one additional term. The Board elects a president and vice-president from among its members. The presidency of the Board is held by a member from a different Member State in turn. The Board of Directors convenes upon invitation from the president or vice-president, and its decisions are taken by the majority of the members attending the meeting, if not passed unanimously.⁽²⁾

The Board of Directors draws the administrative and financial policy of the Centre. The duties of the Board also include supervising the implementation of the Centre's policy. The Board has the power to approve the administrative and financial bylaws of the Centre, which are prepared by the Secretary General and the Centre's administrative staff. Further, the Board appoints the Secretary General and approves the annual balance sheet and report of the Centre's activities.⁽³⁾

(1) Article 1 of the Statute.

(2) Articles 5 and 6 of the Statute.

(3) Article 7 of the Statute.

The administrative and financial autonomy of the Centre in relation to the governments of Member States is augmented by the fact that the financing of the Centre is not dependent on governmental support. The budget of the Centre is financed through its fees, grants and donations that the Board of Directors may accept, and proceeds of selling its publications. The Centre received contributions provided equally by the chambers of commerce and industry in the Member States,⁽¹⁾ until the Board of Directors has decided in its fiftieth meeting held at the Centre to stop these contributions so that the Centre will depend on its own financial resources. Thus, the Centre has become fully self-financed since January 2011.

Professional Autonomy

Professional autonomy means the guarantees of the independence of arbitrators from the Centre in their performance of the arbitral mission. The Statute emphasized the professional autonomy by naming the arbitration tribunal formed in accordance with the Statute as one organ of the Centre by virtue of article 4 thereof.

An arbitration tribunal is composed in accordance with the agreement of the parties to a dispute. Like the role of courts in respect of the composition of arbitral tribunals, the Centre assists in the appointment of arbitrators if assistance is needed. (The rules of the composition of an arbitral tribunal will be explained in Chapter 3 of this book.)

Moreover, to reinforce their independence, the Statute grants the arbitrators immunities and privileges as afforded by article 24 to the members of the Board of Directors and the Secretary General. Thus, the members of an arbitral tribunal enjoy immunity against any legal action in matters relating to the performance of their duties. Although

(1) Articles 19 and 20 of the Statute.

arbitrators are regarded generally to have immunity as afforded to judges, the Statute explicitly enshrines such immunity, unlike the domestic arbitration laws of Member States.

As a result of the immunities of the Secretary General and the arbitral tribunal, national courts lack jurisdiction to hear petitions for interim orders to compel the Centre to stay arbitration proceedings on the basis that no arbitration agreement existed. Likewise, national courts are barred from hearing claims against the Centre for compensation on grounds of Centre's wrong registration or refusal of a request for arbitration.⁽¹⁾

Further, article 24(b) of the Statute affords the Secretary General and the members of the arbitral tribunals the immunities and privileges applicable to diplomats in respect of movement, exchange, and transfer of money. Obviously, these immunities and privileges will apply if the seat of arbitration is in a Member State. It should be mentioned that these immunities and privileges belong to the Centre, and the Board of Directors may lift them.

One additional aspect of professional autonomy is the confidentiality of arbitration. Article 13(c) of the Statute provides for the confidentiality

(1) Cf Samia Rashed: *Al-Taḥkīm fi Itār Al-Markiz Al-Iqlīmi bil-Qāhira wa Mada Ḥuḍū'ih lil-Qanūn Al-Maṣri* (Arbitration at Regional Centre in Cairo and Whether It Is Subject to Egyptian Law), Al-Ma'aref Establishment, Alexandria (1986), pp 62-63 (hereinafter: Samia Rashed, Regional Centre). Dr Samia Rashed points out, at p. 70, that, instead of suing the Regional Centre for wrong registration of an arbitration case, a party denying the existence of an arbitration agreement may bring an action in court against the other party on the merits or to obtain a declaration that no arbitration agreement exists, invoking a defence of nullity of the arbitration agreement if the other party asks the court to stay the action in favor of arbitration. It is obvious that the same analysis holds with respect to the GCC Commercial Arbitration Centre as will be further explained in Chapter 2.

of the documents and papers submitted by the parties to the arbitral proceedings; just the parties and the arbitrators may access them or take copies thereof. Third parties may only access them by consent of the parties or if the arbitral tribunal deems it necessary to decide the case, as if expert evidence is required. Besides, article 26 of the Statute protects the papers, documents and archive of the Centre against any legal action whatsoever. The protection against any legal action “whatsoever” can be interpreted as ruling out inspection, confiscation, and even subpoenas which could otherwise be issued under domestic laws of procedure and evidence to request testimony or the provision of documents. The general reference to the archive of the Centre covers the papers and submittals filed in arbitration proceedings. As such, the confidentiality of case files at the Centre is perpetual.

Finally, arbitrators’ fees and their expenses incurred in fulfilling their duties are exempted from all types of taxes and custom duties regardless of the nationality of arbitrators.⁽¹⁾ It follows that, the arbitrators’ remunerations and compensations payable to them in return for their arbitral mission are not subject to income tax laws and withholding taxes that may otherwise apply in Member States.

The General Secretariat of the Centre

The General Secretariat of the Centre consists of the Secretary General and the executive staff subordinate to him.⁽²⁾ It includes the secretariat of the arbitral tribunal which undertakes the duties of a court clerk and docket. Thus, the secretariat of the arbitral tribunal receives petitions, written submissions, records them and administers the exchange of the same between the parties and follow up with the implementation of

(1) Article 27 of the Statute.

(2) Articles 8 and 9 of the Statute.

the procedural decisions of the tribunal regarding the organization of hearings ⁽¹⁾.

The Secretary General, who must be a qualified national of a Member State, is appointed by the Board of Directors. The Secretary General plays an important role in the executive management of the Centre and overseeing its services and activities. Under the Statute, the Secretary General has powers to assist the parties and the arbitral tribunal during arbitral proceedings. It can be said that the General Secretariat of the Centre carries out a supportive, as opposed to an interventionist, role for arbitration as exercised by the courts in accordance with modern arbitration laws. This supportive role includes the assistance in the appointment of arbitrators as well as deciding on applications filed to challenge them.

However, the Statute does not authorize the Secretary General to intervene in the arbitral proceedings, ensuring the autonomy of arbitrators.⁽²⁾ Chapter 3 of this book examines the powers of the Secretary General with respect to applications to challenge arbitrators and the extension of the duration of arbitration.

IV. A Preview of the Functions of the Centre and Its Rules

In order to identify the rules governing the functions of the Centre, a general description of these functions is needed.

A. The Functions of the Centre

The Centre has been established mainly to offer an arbitration mechanism that is independent from the Member States, while leading

(1) Articles 17 and 18 of the Statute.

(2) The Secretary General had the power of deciding on applications to annul arbitration awards under article 38 of the Procedural Regulation, which has been abolished by virtue of the amended Procedural Regulation of 1999.

to awards enforceable therein. In order to achieve this objective, the Statute and the Procedural Regulation determine the jurisdiction of the Centre in terms of both the kind of disputes (jurisdiction *ratione materiae*) and the parties to the dispute (jurisdiction *ratione personae*). The jurisdiction of the Centre will be explained in detail in chapter 2 of this book.

In addition to the arbitration services, the Centre offers services in *ad hoc* arbitration cases as opposed to institutional arbitration submitted to the rules of the Centre. Thus, if parties to a dispute agree to settle it through *ad hoc* arbitration, *i.e.*, without submitting to institutional rules of the Centre, the parties may seek the assistance of the Centre to facilitate the conduct of their arbitration by providing a venue and administrative services. The basis for the provision of such services is found in article 22 of the Statute which provides that:

“If the two parties mutually agree on settling their dispute by arbitration but not through the Centre, the Centre’s Secretary General may, upon a written application from the parties, provide or arrange the necessary facilities and assistance for the arbitration proceedings requested by the two parties. The necessary facilities and assistance may include providing an appropriate venue for holding the arbitral tribunal’s sessions, and assisting with secretarial duties, translations and the submission of documents and papers.”

Like other arbitration Centres, the Centre collects fees in return for its services. These fees are fixed in accordance with article 21(b) of the Statute, taking into consideration the administrative expenses of

the Centre, the volume of its work, and the actual cost incurred in the provision of services. It should be mentioned that the arbitration tribunal would decide on the allocation of fees, costs and expenses between the parties.⁽¹⁾

Article 40 of the Procedural Regulation lists certain bases for calculating the applicable fees. The Board of Directors issued a bylaw regulating the fees and expenses of arbitration on 27 September 1995 which was amended several times and has ultimately been superseded by the Bylaw Regulating Arbitration Expenses which came into force as from 1st of January 2012.⁽²⁾

Thus, fees have been fixed for filing a request for arbitration, administrative fees, and arbitrators' fees, whether in respect of a claim or a counter claim. Other fees are payable upon services offered in assistance of *ad hoc* arbitration, such as appointing arbitrators and use of Centre's facilities. Other services or expenses, including translation and secretarial services, may be determined by the Secretary General. In short, the bases for calculating the Centre's fees and arbitrators' fees are regulated by schedules following the general practice of other arbitration Centres, such as the International Chamber of Commerce.

Besides, as part of its function, the Centre promotes the culture of arbitration through holding specialized conferences, symposia and workshops as well as issuing scholarly publications. Also, the Centre organizes training and professional certification programs for arbitrators.

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- (1) Article IV(9) of the Bylaw Regulating Arbitration Expenses, which supplements the Procedural Regulation.
 - (2) According to the Bylaw Regulating Arbitration Expenses of 2012, these expenses include the Centre's fees, the administrative fee, arbitrators' fees, travel and stay expenses of the arbitrators and witnesses, fees of experts and translators, and other expenses.

B. The Rules Governing the Functions of the Centre

The organizational aspects of the Centre are governed by special provisions contained in the Statute and the internal bylaws issued by the Board of Directors. As far as the arbitration process is concerned, it is governed by the rules of arbitration contained in the Procedural Regulation adopted by the Committee for Commercial Cooperation of the Cooperation Council.⁽¹⁾ The said Committee has issued the Regulation of Arbitration Procedures on 16 November 1994, which has been subsequently amended on 5 October 1999.

While the Committee for Commercial Cooperation of the Cooperation Council has the authority to prescribe the Procedural Regulation and to amend it, the Board of Directors is empowered to interpret this Regulation.⁽²⁾ The author takes the view that the decisions of the Board of Directors issued to interpret the Procedural Regulation should be binding for arbitration proceedings that commence after the issuance of the relevant interpretive decision. As such, an interpretive decision can be regarded as specifying a general rule that forms an integral part of the Procedural Regulation. By contrast, if a question of interpretation of the Procedural Regulation arises during an ongoing arbitration process, the relevant arbitral tribunal should have the power to decide on it. This is to safeguard the autonomy of arbitrators since it would seem singular if the interpretive power of the Board of Directors could interfere with an ongoing arbitration.

(1) Article 13(a) of the Statute; article 4 of the Procedural Regulation.

(2) Article 42 of the Procedural Regulation.

V. The Immunities and Privileges of the Centre

Under article 17 of the Statute of the Cooperation Council for the Arab States of the Gulf, the Cooperation Council and its organs enjoy legal personality and such immunities and privileges as required for the achievement of its goals.⁽¹⁾ The sixth chapter of the Statute sets out the immunities and privileges afforded to the Centre and its representatives. Thus, article 24 of the Statute provides that the president and members of the Board of Directors, the Secretary General and the staff of the secretariat of the arbitration tribunal have immunity against any legal action in relation to the performance of their duties, unless the Board of Directors decides to lift this immunity.

As explained above, these immunities and privileges extend to the members of an arbitral tribunal. Further, the representatives and employees of the Centre as well as the arbitrators enjoy the immunities and privileges as are afforded to diplomats with respect to travelling and transfer and exchange of money.⁽²⁾

The property and assets of the Centre are, too, protected against administrative and judicial actions by virtue of article 25 of the Statute. And the confidentiality of its documents and archive are enshrined in article 26 of the Statute.

The Centre also has financial privileges. Its properties, monies, financial resources, and transactions required for the execution of its functions are exempted from all types of taxes and custom duties in all Member

(1) The immunities of the Centre and its representatives are similar to those afforded to the International Centre for the Settlement of Investment Disputes by virtue of articles 18-24 of the Washington Convention of 1965.

(2) However, article 24 of the Statute stipulates that the immunities and privileges provided by the Statute do not apply to the citizens of the State in which the Centre has its headquarters.

States. Tax exemptions extend to remunerations, expenses, and fees payable by the Centre to the Secretary General, arbitrators, and the staff of the secretariat of the arbitral tribunal, except for those who hold the nationality of the State hosting the Centre (Bahrain). It is noteworthy that arbitrators benefit from tax exemptions as already mentioned.

VI. The Relationship between the Centre and the Parties to the Arbitration Proceedings

When parties to a dispute submit it to arbitration at the Centre, a relationship arises as between them and the Centre, involving rights and obligations. On one hand, the Centre undertakes to provide secretarial services to the arbitration tribunal and to execute the procedures relating to the service of notices and submittals on the parties. On the other hand, the parties to a reference to arbitration are bound to pay the applicable fees and expenses to the Centre. As such, a contractual relationship seems to emerge between the parties and the Centre.

Although one can consider the relationship between the parties and the Centre as a contractual one, it should be realized that this contract is non-nominated; it is a contract *suis generis*. This is because normal contractual remedies do not apply in respect of the liability of either party thereto. For instance, the remedy available for the parties' failure to pay the applicable fees and expenses may be a procedural remedy, namely the suspension or termination of the arbitral proceedings.⁽¹⁾

Conversely, if the liability of the Centre is at issue, the general rule under article 24(a) of the Statute is that the Centre, the Board of Directors, the Secretary General and staff of the secretariat are immune from

(1) Article 41(2) of the Procedural Regulation. However, the Centre can in principle sue the parties for unpaid expenses if pre-paid amounts do not cover all the actual expenses as calculated at the end of the arbitral process. See article 23 of the Statute and article 41 of the Procedural Regulation.

judicial actions in relation to their duties and functions. Likewise, the properties and assets of the Centre are protected against any legal action according to article 25 of the Statute. It follows that parties may not, generally, be able to sue the Centre or its representatives on grounds relating to the registration of requests for arbitration, service of notices and submissions, or any decisions within the powers of the Centre.

Nevertheless, article 24(a) of the Statute authorizes the Board of Directors to lift the immunity of any representative or employee of the Centre. As such, if a representative or employee of the Centre commits gross negligence or willful misconduct, their personal liability, as opposed to the liability of the Centre, may arise under general principles of civil liability. In such a case, the Board of Directors may lift the immunity to allow prosecution or lawsuits against the concerned person in Member States.

However, the author takes the view that simple negligence committed in good faith by a representative or employee of the Centre should not trigger the personal liability of that person. This view can be justified on the ground that lifting the immunity in cases of simple negligence could encourage dissatisfied parties to sue a representative of the Centre if parties believe that he took a wrong action in the course of exercising his powers, such as a decision by the Secretary General on a challenge of an arbitrator.

The immunities afforded to the Centre and its representatives and employees bind the courts of the Member States. However, the applicability of these immunities before the courts of other States remains subject to the principles and rules pertaining to the immunity of States and international organizations. This issue falls outside the scope of this book.

VII. The Legal Nature of the Statute of the Centre and Its Procedural Regulation

The Statute of the Centre is an international convention that has been signed and approved in the context of the Cooperation Council for the Arab States of the Gulf. And the Centre is considered an organ of the Cooperation Council. This international character of the Statute gives rise to a question as to the relationship between the Statute and the Procedural Regulation, on one hand, and the agreement of the parties on the other hand. Further, the position of the Statute in relation to the national legal systems of the Member States should be examined. This will, in turn, elucidate the nature of the Centre and its rules in the eyes of the courts of Non-member States. These questions will be examined in the following sub-sections.

A. The Relationship between the Statute and the Agreement of the Parties

The Statute of the Centre constitutes legal rules as opposed to contractual terms agreed by the parties to a dispute. Indeed, the role of the arbitration agreement is to declare the parties' acceptance of submission to the provisions of the Statute. The autonomy of the parties, therefore, operates in respect of matters that are not governed by mandatory rules of the Statute.

The nature of the Statute as legal rules implicates the Procedural Regulation. This is demonstrated by the fact that certain provisions of the Procedural Regulation may not be derogated from by the agreement of the parties. For instance, paragraph (1) of article (2) of the Regulation provides that "[a]n Arbitration Agreement made in accordance with the provisions of these Rules before the Centre shall preclude the reference of the dispute to any other authority or any challenge to the arbitration award before it." The rule contained in article 2(1) of the Regulation

cannot be of a contractual nature. This is because the jurisdiction of national courts is determined by national laws, not private agreement. Therefore, the legal value of the Regulation must be tantamount to binding legal rules recognized in the relevant national legal system. It also follows that the arbitration agreement must be consistent with the mandatory rules that may be contained in the Regulation.

By contrast, institutional rules of arbitration that are neither international conventions nor national laws are deemed to be incorporated into the arbitration agreement that submits to the relevant institution or organization, like the ICC. The parties can, usually, modify such rules of arbitration as they deem fit. As institutional rules of arbitration form part of the agreement of the parties, these rules will be considered to be subject to the national law which governs the parties' agreement of arbitration.

This can be illustrated by article 34(6) of the ICC Arbitration Rules of 2012, which provides that “. . . By submitting the dispute to arbitration under the Rules, the parties [. . .] shall be deemed to have waived their right to any form of recourse *in so far as such waiver can validly be made*” (emphasis added). The emphasized phrase indicates clearly that a waiver of the right to any form of recourse can be valid only to the extent permitted by the law of the seat of arbitration. To put in another way, article 34(6) of the ICC Rules will be ignored if it conflicts with a mandatory rule of law of the seat of arbitration.⁽¹⁾

Contrary to the status of institutional rules contractually adopted by the parties, arbitral tribunals at the Centre have confirmed the nature of the

(1) The rules of arbitration of the Cairo Regional Centre for international commercial arbitration have been characterized as contractual rules subject to Egyptian law. Decision of the Court of Appeal of Cairo, 7th Chamber, on the application number 27/130 for an interim order to halt arbitral proceedings, 15/5/2013, *Majallat Al-Taḥkīm Al'Alamīyah* (2013) issue 20, pp. 658-660.

Statute and its Procedural Regulation as the procedural law (*lex arbitri*) of arbitration.⁽¹⁾ In one case, in applying the Statute to determine the validity of the service of arbitration notices, the arbitral tribunal took the view that the Statute was “the *law* governing the procedures of arbitration according to the explicit agreement of the parties contained in the contract at issue.”⁽²⁾

However, it should be born in mind that the Statute and Regulation leave wide latitude for the autonomy of the parties to determine the procedural rules of arbitration and the law governing the merits of the dispute. Thus, article (4) of the Procedural Regulation states that “[a]rbitration before the Centre shall take place pursuant to these Rules unless there is a provision to the contrary in the Arbitration Agreement. The parties may select further procedural rules for arbitration before the Centre, provided that such rules shall not affect the powers of the Centre or Arbitral Tribunal set out in these Rules.” (Article 4 of the Procedural Regulation will be examined in detail in Chapter 3).

B. The Relationship between the Statute of the Centre and the Legal System of Member States

Since the Statute of the Centre embodies an international convention, its legal value *vis-à-vis* national law of the Member States depends on the solution adopted by the relevant legal system. To begin with the Kingdom of Bahrain, an international convention comes into force in accordance with article 37 of the Constitution by virtue of a decree notified to the Council of Consultation and the House of Deputies or, depending on the type of the convention as detailed in article 37, through

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- (1) Arbitration award of 20/5/2008, arbitration case number 20/2007 at the Centre.
 - (2) Arbitration award of 31/10/2009, arbitration case number 30/2008 at the Centre. (emphasis added)

passing a law sanctioning it. The convention must then be published in the Official Gazette.⁽¹⁾

According to article 37 referred to above, an international convention has the same legal value as a national law enacted by the Parliament. Consequently, national courts can interpret the convention as they do with national law. Also, an international convention is capable of repealing or overriding a provision of national law conflicting with it.⁽²⁾ The Constitutional Court of Bahrain has decided that the constitutional rules contained in article 37 apply to the conventions concluded in the context of the Cooperation Council.⁽³⁾

Similarly, an international convention has the legal value of a national law in the rest of Member States upon completion of relevant constitutional requirements. This is confirmed by article 67 of the Constitution of Kuwait of 1962; article 80 of the Basic Regulation (constitution) of the Sultanate of Oman; and article 68 of the Constitution of the State of Qatar of 2004.⁽⁴⁾

Article 70 of the Basic Regulation of Ruling in Saudi Arabia (issued in 1412 H/1992 AD), too, provides that an international convention is promulgated by virtue of a Royal Decree as with national Regulations (domestic laws). By the same token, article 125 of the Constitution of the United Arab Emirates provides that an international convention or treaty concluded by the federal government is binding on the governments

(1) Wa'il Ahmed Allam, 'Al-Mu'āhada al-Dawliya fi Dustūr Mamlakat al-Baḥrain' (The International Convention under the Constitution of the Kingdom of Bahrain,' *Majallat Dirasāt Dustūriyah* (Journal of Constitutional Studies), (2013) issue 1, p. 44, at 48-50 (hereinafter: Allam).

(2) Ibid, pp. 52-53.

(3) For example the decision of the Constitutional Court of Bahrain number D/5/07, 19/4/2010, for the judicial year 5. Cited in Allam, p. 53.

(4) Allam, pp. 51-52.

of the Emirates (states of the federation); each state has to promulgate laws, regulations, and decisions to enforce it.⁽¹⁾

It can, then, be stated that the Statute of the Centre has been received into, and has acquired the same legal value as the domestic law of, each Member State that has ratified it.

It is pertinent to point out here that the Economic Agreement among the Member States, which was signed in Muscat on 31/12/2001, recognizes the binding effect of the Statute in each Member State. Article 27(2) of The Economic Agreement states that “[if] the Secretariat General could not settle a claim amicably, it shall be referred, with the consent of the two parties, to the GCC Commercial Arbitration Centre to hear the dispute according to its Statute. . . .” Besides, paragraph (1) of article 32 of the aforementioned Agreement provides that “[t]he provisions of this Agreement shall prevail if found in disagreement with local laws and regulations of the Member States.” As such, the Economic Agreement endorses that the Statute is recognized by Member States and binding thereupon. So much so that it is envisaged that domestic laws of arbitration or civil procedure will not apply to arbitration proceedings at the Centre relating to the Economic Arbitration.

(1) Some Member States of the Cooperation Council have promulgated laws or decrees incorporating the Statute. In Kuwait, the Law number 14/2002 relating to the ratification of the Statute was promulgated on 3 February 2002. The explanatory notes to the bill of the said law asserted that the Statute was a convention in the sense referred to in article 70 of the Constitution; hence, a law ratifying it was required. In the Kingdom of Bahrain, the Decree number 6 of the year 2000 was issued on 25/4/2000 and the Statute was published in the Official Gazette, Issue number 2422. As regards the Sultanate of Oman, the Statute has been brought into force by virtue of a ministerial decision taken by the Minister of Justice on 11/7/2000, which decision was published in the Official Gazette number 676, p. 145.

That the Statute overrides national laws of the Member States has been upheld by courts of some Member States. In an action brought before a Kuwaiti Court to challenge an arbitrator appointed under the Statute, the Supreme Court of Kuwait (commercial chamber) ruled that, even though the seat of arbitration was in Kuwait, Kuwaiti courts lacked jurisdiction to decide on that challenge, to which the Kuwaiti law of civil procedure was inapplicable as the arbitral proceedings were governed by the Statute. In reasoning its decision, the Supreme Court said that the parties have agreed to:

“submit the arbitration procedures [. . .] to the rules and provisions of the GCC Commercial Arbitration Centre and to the law of civil procedure in respect of matters not regulated by the arbitration agreement [. . .] Whereas the State of Kuwait has agreed to the establishment of this Centre by virtue of the Law number 14 of the year 2002, this Law is a special law that governs the dispute and binds the application of the general law [the Kuwaiti law of civil procedure] save in respect of matters not regulated by this special law.”⁽¹⁾

The Supreme Court of Kuwait has followed the same reasoning in a case involving an application to annul an arbitration award issued in Kuwait in accordance with the Statute. The application to annul the award rested on the ground that the award violated the Constitution and law of civil procedure in that it was not made “in the name of the Emir of the State,” which is a mandatory rule regarding the form of judgments. Affirming the dismissal of the application, the Supreme Court held that the relevant arbitration was subject to the Statute and Procedural Regulation of the Centre, which the State of Kuwait has approved, and which are equivalent to domestic law; consequently the

(1) Majallat Al-Taḥkīm Al’Alamīyah (2009) issue 2, pp. 303-304. See also Supreme Court of Kuwait (commercial), appeal number 671/2004, 23/11/2005, Majallat Al-Taḥkīm Al’Alamīyah (2009) issue 3, pp. 461-464.

arbitration was not subject to the formalities relating to national courts (and arbitration).⁽¹⁾

The Saudi Board of Grievances (*Diwān Al-Mazālim*) has taken the same position. It has decided that the Statute constitutes a special regulation (law) whose application takes precedence over the Decree implementing the Convention for the Enforcement of Judgments.⁽²⁾ Further, the Saudi Regulation (law) of Arbitration indicates that the Statute of the Centre overrides national law as section 2 of the Saudi Regulation of Arbitration⁽³⁾ defining the scope of its application “without prejudice to the provisions of Islamic *Shari’ah* and the provisions of international conventions to which the Kingdom is a party . . .”; as such the Statute, being an international convention, overrides the Saudi Regulation of Arbitration.

Furthermore, the Supreme Court of Bahrain has affirmed the superior rank of the Statute and the Procedural Regulation over the domestic law. The Court has ruled that:⁽⁴⁾

“Whereas the GCC Commercial Arbitration Centre [. . .] is, according to its Statute [. . .] which the State of Bahrain has approved by the legislative decree number 6 of the year 2000, an independent adjudication authority on its own, although its headquarter is located in the State of Bahrain,

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- (1) Supreme Court of Kuwait (commercial), appeal number 668/2006, 10 February 2008, *Majallat Al-Taḥkīm Al’Alamīyah* (2009) issue 3, pp. 451-454.
 - (2) Saudi Board of Grievances, 4th Chamber, decision number 348/D/4 for the year 1432 H (2012 AD).
 - (3) The Saudi Regulation of Arbitration issued by the Royal Decree number M/34 on 24/5/1433 H (2013 AD). It should be realized that domestic laws in Saudi Arabia that are equivalent to laws passed by the legislature in other countries are formally called “Regulations.”
 - (4) Appeal number 101/2010, 2 April 2012, *Majallat Al-Taḥkīm Al’Alamīyah* (2013) issue 18, pp. 277, 279.

and it has jurisdiction over commercial disputes among the subjects of the [Member States] and third parties if the disputants agree to arbitration at the Centre; and arbitration is conducted in accordance with the rules of the Regulation of Procedures of the Centre so that no resort may be made to the laws of [Member States] regarding the awards issued by the Centre, except to the extent permitted under the Statute or the Regulation of Procedures.”

One arbitration tribunal, too, has asserted that the Statute overrides domestic law, while recognizing that the law of the seat of arbitration may be applied only to supplement the Statute. The tribunal decided that the Statute was “the law governing the procedures of arbitration according to the explicit agreement of the parties contained in the contract at issue, but also guidance [would] be gained from the relevant provisions of the arbitration law of Bahrain as the law of the seat of arbitration.”⁽¹⁾ (It should be noted that Chapter 3 of this book will show that the role of domestic law of Member States in supplementing the Statute and Procedural Regulation is in fact very limited.)

Indeed, one objective of the Statute is to exclude the application of national law, in principle, and to avoid the role of courts regarding the arbitration process. This is evinced through article 14 of the Statute, which precludes the jurisdiction of courts if a dispute is referred to arbitration at the Centre, as will be explained in Chapter 2. This objective would be undermined had the courts of the Member States not recognized the supremacy of the Statute.

The significance of the international character of the Statute and the Procedural Regulation may become more evident through a comparison

(1) Arbitration award of 31/10/2009, arbitration case number 30/2008 at the Centre.

between the Centre and the Cairo Regional Centre for International Commercial Arbitration. The Cairo Regional Centre was not established by an international convention. Rather, it was set up pursuant to a decision of the Asian-African Legal Consultative Committee,⁽¹⁾ and the Egyptian government has agreed to host the Centre as an international organization affiliated with that Committee. The fact that the headquarters of the Regional Centre are in Cairo renders Egyptian law relevant as the law of the seat of arbitration held at the said Centre. This is because the constituent document for the Regional Centre does not override national law; the rules of arbitration of the Regional Centre have been determined by an administrative decision of the Centre adopting the UNCITRAL Rules.⁽²⁾ This has been recently affirmed by the Court of Appeal of Cairo, holding that the rules of arbitration at the Cairo Regional Centre form contractual part of the parties' agreement subject to the mandatory procedural rules of Egyptian law.⁽³⁾

To sum up the above analysis, the Statute takes precedence over any contrary domestic laws of Member States. While courts of Member States have referred to their respective national laws as being supplementary to the Statute, this does not detract from the legal value of the Statute as its provisions, together with the Procedural Regulation, cover the aspects of the arbitration process in such a comprehensive way that averts, practically, the need for supplementary rules of domestic laws. (This will be further clarified in Chapter 3 of this book.)

(1) Samia Rashed, Regional Centre, pp. 22-24. The Asian-African Legal Consultative Committee has become "the Asian-African Legal Consultative Organization" since 2001. See : <http://www.aalco.int>

(2) Samia Rashed, Regional Centre, p. 29.

(3) Decision of the Court of Appeal of Cairo, 7th Chamber, on the application number 27/130 for an interim order to halt arbitral proceedings, 15/5/2013, *Majallat Al-Taḥkīm Al'Alamīyah* (2013) issue 20, pp. 658-660.

C. The Statute and Procedural Regulation before the Courts of Non-member States

A State is not bound by international conventions to which it is not a party. Therefore, it goes without saying that the courts of a State that is not a member of the Cooperation Council will not apply the Statute as an international convention. However, the Statute may still be applicable before the courts of Non-member States in two scenarios. First, if arbitration is seated in a Non-member State, the agreement of the parties by which they choose arbitration at the Centre incorporates the provisions of the Statute and the Procedural Regulation as rules of institutional arbitration. Thus, the provisions of the Statute and Procedural Regulation can be applied by courts of Non-member States on a contractual basis as with other institutional rules of arbitration. Contractual provisions, however, are subject to the mandatory rules of the law of the seat of arbitration.

To illustrate, suppose that arbitration takes place in the Jordanian city of Amman in accordance with the rules of the Centre. A Jordanian court would recognize the Statute and Procedural Regulation as part of the parties' agreement since the Jordanian Arbitration Law empowers the parties to agree to procedural rules of their choosing or to submit to an institutional arbitration.⁽¹⁾ The contractual basis for the application of the Statute before courts of Non-member States gives rise to the possibility of disregarding provisions of the Statute and Procedural Regulation in favor of mandatory rules of the law of the seat of arbitration. Thus in respect of the example arbitration conducted in Amman, the significant provisions of the Statute protecting the award from a nullification procedure may not be recognized by a Jordanian court since Jordanian law invalidates waiver of an action to challenge the award unless such waiver is made after the award has been issued.

(1) Sections 5 and 24 of the Jordanian Arbitration Law number 31 of the year 2001.

Alternatively, a court of a Non-member State may recognize the Statute as part of the law of the seat of arbitration. This situation may occur if arbitration is conducted in a Member State and, subsequently, the enforcement of the award is sought in a Non-member State. The enforcement court will apply the Statute since it is effective as legal rules in the seat of arbitration.

Going back to our example arbitration conducted in Amman under the Statute of the Centre, a Jordanian court may consider that the parties have chosen the law of Bahrain as the procedural law of arbitration, presumably because the headquarters of the Centre are in Bahrain. It is recalled that since arbitration here is submitted to the Centre, the applicable Bahraini law will be the Statute as it has become part of the laws of Bahrain. Further, if the agreement of the parties is interpreted as choosing Bahrain as a juridical seat of arbitration, as opposed to the geographical location of arbitration, a Jordanian court would simply treat the arbitration conducted in Amman according to the Statute as being outside of the scope of application of Jordanian arbitration law.⁽¹⁾ It is submitted that the same analysis would ensue if arbitration was conducted in Cairo or London.⁽²⁾

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- (1) Section 3 of the Jordanian Arbitration Law number 31/2001 provides that “The provisions of this Law apply to each agreement-based arbitration conducted in the Kingdom . . .” Section 3 indicates clearly that it envisages a juridical seat of arbitration in Jordan for the Jordanian law to be applicable; designating a venue for the hearings in Jordan is not sufficient to trigger the application of Jordanian arbitration law. Conversely, the juridical seat can be Jordan while the place of hearings can be different according to section 27 of the Jordanian Arbitration Law.
- (2) Under section 1 of the Egyptian Arbitration Law number 27/1994, arbitration conducted outside Egypt under Egyptian law is considered domestic arbitration. By implication, section 1 recognizes the concept of juridical seat of arbitration. Similarly, the English Arbitration Act of 1996 adopts the concept of the juridical seat of arbitration, which is the seat designated by the parties regardless of the place of hearings or the place where the award is issued. See: Robert Merkin and Louis Flannery, *Arbitration Act 1996*, 5th ed., Informa law, New York (2014) at. P. 19.

As the courts of Non-member States may regard arbitration at the Centre to be governed by the law of the seat of arbitration, *i.e.*, the Statute as integrated into the legal system of the seat, it is submitted here that this preserves the finality of awards that are not subject to a nullification procedure under the Statute (as will be detailed in Chapter 4). Thus, the enforcement of the award in a Non-member State will not be delayed pending a challenge to the award in the seat of arbitration (as envisaged by article 5(1) (e) of the New York Convention). Nor will enforcement be refused on grounds of nullity of the award in the seat of arbitration⁽¹⁾ - No means of recourse against the award exists in Member States according to the Statute.

Equally, the treatment by courts of Non-member States of arbitration procedures and awards governed by the Statute should not affect the legal value of the award and its enforceability in Member States. In other words, if, say, a Jordanian or Egyptian court assumes jurisdiction to decide on the nullity of a Statute-based award issued within its national jurisdiction, the courts of Member States remain bound to recognize and enforce the award, though it was issued in a Non-member State and even if the courts of that State nullify it.

A question may arise as to whether an award issued in a Non-member State could be regarded as a foreign award in Member-States and,

(1) Albert Jan van den Berg: *The New York Convention of 1958, Towards a Uniform Judicial Interpretation*, Kluwer Law and Taxation Publishers, Deventer, 1981, pp. 342-346 (hereinafter: Berg, *The New York Convention*); Magdy Ibrahim Kassim, 'Al-Aṭār al-Dawli li Ḥukm al-Taḥkīm al-ṣādir 'an Markiz al-Taḥkīm al-Tijārī' (The International Effect of the Arbitration Award Issued at the GCC Commercial Arbitration Centre) *Journal of Arbitration and Gulf Law*, June 2012, p. 18, at 23 (hereinafter: Kassim, *Arbitration Award*).

consequently, enforced under the New York Convention, to which all Member States are parties. Article 7 of the New York Convention provides an answer to this question. It allows enforcement of foreign arbitration awards in accordance with any regime for enforcement that may be more favorable (for enforcement) than the provisions of the Convention. Since the Statute facilitates the enforcement of awards in the Member-States, it can be applied so long as the award was issued pursuant to it, albeit in a Non-member State. As such, it can be safely assumed that the differences between the Statute and the New York Convention cause only apparent inconsistency of no practical significance.

D. The Legal Nature of Arbitration under the Statute of the GCC Commercial Arbitration Centre

In light of the status of the Centre and its Statute, a question arises regarding the characterization of the arbitration at the Centre. That is to say, is the arbitration at the Centre a domestic arbitration in one Member-State and a foreign arbitration in another? Or is it just an international or even a delocalized arbitration? To answer this question, a brief explanation of these kinds of arbitration is first examined.

National arbitration v. foreign arbitration

Arbitration is considered to be national if it involves a legal relationship that is localized in one country. An award resulting from such arbitration will not usually be regarded as an international award even if enforcement is sought in a country other than the country of origin. However, in the eyes of the enforcement court, such an award will be considered a foreign one. The enforcement of foreign awards is governed by the New York Convention of 1958. It follows that the foreign or national

character of an award is a relative concept: the same award is national in one country while it is treated as a foreign one in another.⁽¹⁾

International arbitration

Generally, international arbitration is defined on the basis of an economic criterion as that which concerns international trade. French courts have elaborated this economic criterion, taking the view that it envisages a legal relationship involving the movement of money, goods, or services across borders.⁽²⁾ According to the economic criterion, arbitration can be international even from the perspective of the State in which arbitration occurred and the pertinent award was issued.⁽³⁾ The Lebanese law of civil procedure adopts the economic criterion in section 809 thereof which provides that “It shall be considered as international the arbitration which concerns the interests of international trade.”

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- (1) Kassim, Arbitration Award, *Journal of Arbitration and Gulf Law*, June 2012, p. 18, at 20.
 - (2) Hafiza al-Haddad: *Al-Mujaz fil Naẓariya al-‘Āmmah fit-Taḥkīm at-Tijāri ad-Dawli* (A Concise Treatise on the General Theory of International Commercial Arbitration), 1st ed., al-Halabi Legal publications, Beirut (2004) pp.102-104 (hereinafter: al-Haddad, General Theory). There are also geographical criteria for the internationality of arbitration. These criteria are provided for in the UNCITRAL Model Law of International Commercial Arbitration of 1985 and some national laws adopt them independently from the economic criterion. See article 1(3) of the UNCITRAL Model Law which corresponds to section 3 of the Egyptian Arbitration Law of 1994 and section 1(5) of the Bahraini law relating to international commercial arbitration of 1994. See Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed., Sweet & Maxwell, London (2004) p. 16.
 - (3) Alan Redfern and Martin hunter, *Law and Practice of International Commercial Arbitration*, 4th ed., Sweet and Maxwell, London (2004) pp. 12-16.

The distinction between international and national arbitration is accentuated when a State introduces a special arbitration regime for each kind of arbitration. This is traditionally the case in France.⁽¹⁾ On the other hand, if a national legal system provides a unified arbitration law governing international and national arbitration, the international character of arbitration becomes of less importance. This is the situation, for example, in Jordan and England.

Even if international arbitration is subject to a special set of legal rules that minimizes the judicial control over it compared to national arbitration, it remains attached to a national legal system. For instance, the Lebanese Law of Civil Procedure includes certain provisions that apply to international arbitration that takes place in Lebanon. According to section 819 of the said Lebanese law, an international arbitration award is subject to challenge before the courts. In this regard, courts will take into account international public policy, not domestic public policy.⁽²⁾

Further, an international arbitration taking place in one country would be considered as a foreign arbitration in another country but domestic in the former for purposes of enforcement. This is because whether an arbitration award is foreign or not depends on the place where it was made. Therefore, the international character of arbitration is not necessarily associated with foreign arbitration. Yet, the law of the

(1) Al-Haddad, *General Theory*, pp. 103-104.

(2) Sté PT Putrabali Adyamulia, French Court of Cassation, civ. 1, 29 June 2007. Cited and annotated by Philippe Pinsolie, 'The Status of Vacated in France: the Cour de Cassation Decision in Putrabali' *Arbitration International* 24(2) (2008) 277.

country of the seat of arbitration may classify the arbitration as a foreign arbitration if it is international in the economic sense.⁽¹⁾

Delocalized arbitration

A modern strand of legal thought has dispensed with the attachment of arbitration to a national legal system, adopting the theory of ‘delocalized arbitration.’ According to this theory, the characterization of arbitration as foreign or national should be abandoned on the ground that if arbitration is international it is no longer subject to a national law. Instead, arbitration can, and should be, governed by the principles of international trade law.⁽²⁾

The French courts have repeatedly held that arbitration concerning international trade is governed by the principles of international trade law instead of submitting it to a national law.⁽³⁾ It follows that a French judge will not examine the validity of an award under the law of the seat of arbitration and may grant an order for enforcement of the award even if it has been declared null by the courts of the seat. Such an arbitration award not governed by any national law is called a floating, delocalized, or *anational* award.

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- (1) e.g. Lebanese Law of Civil Procedure. Also, the New York Convention applies if the State where the arbitration award is issued does not treat the award as domestic on the ground that it is issued in accordance with a foreign law.
 - (2) Mohammad Bashayreh, ‘Ḥukm al-Taḥkīm al-Mursal: Mafhūmuh wa Tanfīḍuh’ (The Delocalized Arbitration Award: Its Concept and Enforcement), Law Journal (Majallat al-Ḥuqūq) (2007) 31(3), p. 241.
 - (3) Sté PT Putrabali Adyamulia, French Court of Cassation, civ. 1, 29 June 2007. Cited and annotated by Philippe Pinsolie, ‘The Status of Vacated in France: the Cour de Cassation Decision in Putrabali’ Arbitration International 24(2) (2008) 277.

The special international character of arbitration at the GCC Commercial Arbitration Centre

Arbitration at the GCC Commercial Arbitration Centre does not fall readily under any type of arbitration described above. In fact, arbitration at the Centre can be distinguished from each type of arbitration in at least one aspect. It is submitted, therefore, that arbitration at the Centre has a special international character.

To elaborate, arbitration at the Centre differs from the international arbitration described above in that, for a dispute to be arbitrated at the Centre, it does not have to involve interests of international trade.⁽¹⁾ As such the Statute of the Centre applies to an arbitration relating a domestic relationship if the conditions of the jurisdiction of the Centre are satisfied.

However, the arbitration at the Centre can be depicted as ‘international’ based on the fact that the rules governing it derive from an international source, *i.e.*, the international convention embedded in the Statute. In this sense, the arbitration at the Centre resembles the mechanism of the International Centre for the Settlement of Investment Disputes (ICSID) which is subject to special procedural rules laid down pursuant to the Washington Convention.⁽²⁾ It can be said, therefore, that arbitration at the Centre is “truly” international commercial arbitration that is subject to international rules. “Truly” international arbitration in this sense was proposed by the ICC in 1953 during the negotiations of the New York

(1) Also, unlike the UNCITRAL Model Law of International Commercial Arbitration, the Statute does not require the elements of the legal relationship submitted to arbitration to be localized in more than one State.

(2) Cf Kassim, Arbitration Award, p. 23.

Convention, but that proposal was never adopted as the Convention links arbitration with the law of the seat of arbitration.⁽¹⁾

It is worth noting that arbitration at the Centre may be perceived as “international” in one sense or another according to the domestic law of some Member States. For example, the Saudi Regulation of Arbitration characterizes as “international” the arbitration which is subject to rules of a permanent institution outside Saudi Arabia (section 3(3) of the Saudi Regulation of Arbitration). This entails that if Saudi law is resorted to as the general law with respect to arbitration at the Centre, it is those legal rules relating to international arbitration that will be applied, not those governing domestic arbitration. The same view holds in respect of the Omani Arbitration Law number 94/97 (sections 1 and 3).

Arbitration at the Centre has a characteristic of delocalized arbitration when it comes to the enforcement of the award. Like a delocalized arbitral award, an award issued at the Centre is not subject to review by the courts of the seat of arbitration. The award can only be reviewed by the court from which enforcement is sought. As such, the Statute avoids the dual judicial review of the award at both the seat of arbitration and the State where enforcement is requested.

Nevertheless, arbitration at the Centre is not entirely delocalized. While it can be regarded as “truly international”, it remains subject to the Statute as an international convention adopted by the Member States.

(1) Berg, *The New York Convention of 1958*, p. 7. By introducing a truly international arbitration, the Statute can be equated with the Washington Convention of 1965 which has established a regime of arbitration that is governed by the Convention with respect to the arbitration agreement, the procedures of arbitration, the legal value of the award. However, the two mechanisms of arbitration diverge as to the direct enforceability of the award in the State-parties which is adopted by the Washington Convention but not the Statute of the GCC Commercial Arbitration Centre.

The award is not subject to a nullification procedure by virtue of the provisions of the Statute and not as a result of an inherent characteristic of it. By contrast, delocalized arbitration is perceived to be subject to principles of international trade law, detached from national laws as a result of it involving international trade.⁽¹⁾ It follows that the theory of delocalized arbitration can be embraced by a State without there being a binding convention requiring it to do so. However, a universal recognition of the awards of the Centre as delocalized is far from possible since Statute is binding only on the Member States; not all legal systems recognize the category of delocalized awards; and awards of the Centre may concern purely domestic transactions.

Arbitration under the Statute of the Centre still has similarities with domestic arbitration. This is because the national law of the Member State in which the seat of arbitration is designated supplements the provisions of the Statute. Each Member State treats the Statute as a specific law forming part of its legal system, while its own law of arbitration operates as a general law; the Statute will apply according to the maxim that “the specific binds the general.” For instance, the provisions of the (general) national law may be needed to fill in gaps relating to the form of the arbitration agreement. (This will be revisited in Chapter 2 of this book.)

Based on the above discussion of the characterization of arbitration at the Centre, the author submits that arbitration at the Centre is an international arbitration of a special nature. It is not “international” pursuant to the criteria implicating the economic aspect of the underlying legal relationship or the geographical distribution of its elements. Nor is arbitration at the Centre delocalized in the sense that it is subject only to the principles of international trade law. Rather, it is international in that

(1) Al-Haddad, *General Theory*, pp. 181 et seq. For an elaborate account of the theory of delocalization, see Emmanuel Gaillard: *Legal Theory of International Arbitration*, Martinus Nijhoff, Leiden (2010) pp. 52 et seq.

the rules governing it derive from an international source, a convention; and its special nature stems from the dispensation by the Statute of the challenge of the award before the courts of the seat of arbitration.

Indeed, an award issued in accordance with the Statute may be multifaceted. Thus, the award will be treated as international from the perspective of Member States, and the classification of the award as foreign may be irrelevant. For Non-member States, the award may be international depending on the criterion of the internationality of arbitration as adopted by the relevant national law. And the Non-member State in which enforcement of the award may be sought, may regard the award as a foreign award. (Chapter 4 will discuss these possibilities.)

Finally, the special international nature of arbitration at the Centre should be recognized even if the arbitration at the Centre involves a purely domestic dispute arising from a domestic legal relationship between citizens of the same Member State. Such a dispute can be submitted to arbitration at the Centre because the jurisdiction of the Centre does not require the underlying relationship to be international - the Statute does not adopt a criterion of internationality of disputes.

As such, the special nature of the arbitration under the auspices of the Centre manifests itself through the differences between the scope of application of the Statute and other conventions regulating arbitration. The scope of the Statute is broader than the scope of application of the Geneva conventions relating to arbitration agreements (the 1923 convention) and the arbitration award (the 1927 convention) as these two Geneva Conventions are limited to situations in which the parties are subjects of different Contracting States. Also, the Statute of the Centre applies even in respect of the enforcement of the award in the Member State in which it was made, unlike the New York Convention

which applies in respect of foreign awards issued outside of the country of enforcement.⁽¹⁾

E. The Relationship between the Statute of the Centre and Other Relevant Conventions

Under the general rules of conflict between international treaties, if two States were parties to two conflicting international conventions, the later convention takes precedence over the earlier.⁽²⁾ Accordingly, the Statute of the Centre overrides the conventions for judicial cooperation previously concluded in the context of the Cooperation Council. The Saudi Board of Grievances has affirmed that the Statute is a special legal regime that prevails over the Convention for the Enforcement of Judgments concluded between Member States.⁽³⁾

The Member States are parties to the Arab Convention for Judicial Cooperation (Al-Riyad Convention), which is a regional and broader convention concluded in the context of the Arab League. The Statute overrides Al-Riyad Convention, the former being a specific convention that binds the latter.

As regards the relationship between the Statute and the New York Convention of 1958, it is submitted that the Statute overrides the New York Convention in respect of the enforcement in one Member State of an award issued in another. This is for two reasons. First, the Statute constitutes a specific convention, whereas the New York Convention is a general one; since the specific binds the general, the Statute prevails. In addition, the New York Convention itself contains a saving provision in article 7(1) that favors other treaties binding on the State parties.

(1) Cf Berg, *The New York Convention of 1958*, p. 8.

(2) Article 30(2) of the Vienna Convention for the Law of Treaties.

(3) The Saudi Board of Grievances, 4th circuit, decision number 348/D/4 of the year 1432 H (2011 AD).

Also, article 7 of the New York Convention allows the party seeking enforcement of the award to invoke any rules in the State of enforcement that are more favorable. Since the Statute facilitates enforcement, it can be applied instead of the New York Convention.

The next chapters will elucidate the characteristics of the arbitration mechanism at the Centre and its rules

Chapter 2

The Jurisdiction of the GCC Commercial Arbitration Centre

The consent of the parties is a cardinal principle in commercial arbitration. Therefore, the jurisdiction of the GCC Commercial Arbitration Centre cannot be triggered unless the parties agree to submit their dispute to arbitration at the Centre. However, while the existence of an arbitration agreement is an essential requirement for the jurisdiction of the Centre, it is not a sufficient condition. The Statute further stipulates certain conditions regarding the parties to the arbitration agreement and the kind of dispute submitted to arbitration.

Article 2 of the Statute provides that:

“The Centre shall have jurisdiction over commercial disputes between GCC nationals, or between them and others, whether they are natural or juridical persons, as well as over commercial disputes arising from the implementation of the provisions of the GCC Unified Economic Agreement and the Resolutions issued for the implementation thereof, provided the two parties agree in writing within the contract or in a subsequent agreement on arbitration under the framework of this Centre.”

The following requirements for the jurisdiction of the Centre to be established can be discerned from article 2 quoted above. (1) The existence of a written arbitration agreement between the parties to the

relevant dispute; (2) the dispute must concern a commercial relationship, including commercial disputes arising from the implementation of the Economic Agreement; and (3) one or more of the parties must be nationals of a Member State.

To explain the conditions of the jurisdiction of the Centre, this Chapter is organized as follows:

The arbitration agreement submitting to the Centre. The substantive and formal conditions of the arbitration agreement under the Statute and Procedural Regulation will be examined with reference to areas in respect of which a national law may supplement the Statute.

The scope of the jurisdiction of the Centre *ratione personae*.

The scope of the jurisdiction of the Centre *ratione materiae*.

The exclusive jurisdiction of the Centre.

I. The Arbitration Agreement

The Statute and Procedural Regulation contain some rules relating to the validity of the arbitration agreement. Thus, some conditions relating to the form of the arbitration agreement can be derived, explicitly or implicitly, from articles 2 and 14 of the Statute and articles 3, 9, 19, 20, 36(2)(a) of the Regulation.

A. The Formality of the Arbitration Agreement

A.1. The requirement of writing

Article 2 of the Statute provides that the Centre assumes jurisdiction “if the two parties agree in writing within the contract or in a subsequent agreement on arbitration within the framework of this Centre.”

And article 1 of the Procedural Regulation defines the arbitration agreement as “The agreement made in writing by the parties to submit to arbitration before the emergence of the dispute (arbitration clause) or after the dispute had arisen (agreement to arbitrate or ‘submission agreement’).”

As such, an arbitration agreement must be made in writing. The Centre may not have jurisdiction on the basis of an oral agreement.⁽¹⁾ This is confirmed by article 9 of the Regulation which requires the claimant to file a copy of the arbitration agreement together with his request for arbitration. The formality of writing is satisfied if the arbitration agreement takes the form of a clause inserted in a contract in respect of future disputes. Equally, a submission agreement is valid if it is entered into to refer a specific dispute that had arisen to arbitration.

A.2. The broad meaning of “writing”

The written form of the arbitration agreement suggests that the expression of the will of each party (offer and acceptance) is made in writing. A question arises here as to whether both the offer and acceptance have to be contained in one document and whether the signature of the parties to the document containing an arbitration clause is required. Further, it is asked whether the Statute recognizes arbitration agreements made via electronic means of telecommunications.

The Statute and the Procedural Regulation do not contain explicit answers to these questions. It is necessary, therefore, to search for a national law to govern these aspects of the arbitration agreement. It is recalled that the courts of Member States have held that the Statute applies as a specific law that is supplemented by the arbitration law

(1) An oral arbitration agreement is void under the national laws of Member States which consider the written form to be a constituent element of a valid arbitration agreement.

of the relevant Member State, the latter being the general law.⁽¹⁾ And the law of the seat of arbitration is generally presumed to govern the arbitration agreement.⁽²⁾ It is noteworthy that the Procedural Regulation has stressed the designation of the seat of arbitration by the agreement of the parties or, failing such an agreement, by the arbitration tribunal.⁽³⁾ The designation of the seat of arbitration indicates that the law of the seat can be resorted to to supplement the rules of arbitration of the Centre.

In the arbitration case number 29/2008, the arbitral tribunal found that the Saudi Regulation of Arbitration was applicable to matters in respect of which the Statute was silent. Thus, the tribunal held that an arbitration clause referring to the Centre constituted a valid arbitration agreement according to the Saudi Regulation even though no specific reference of a particular dispute was signed at the beginning of the arbitral proceedings.

Generally speaking, the requirement of writing is interpreted liberally. It includes an arbitration clause contained in a signed contract or evidenced by an exchange of correspondence between the parties, using conventional or electronic means. An arbitration agreement can also be concluded if incorporated by reference to a document containing

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- (1) Supreme Court of Kuwait (commercial), appeal number 668 of the year 2006, 10 February 2008, *Majallat Al-Taḥkīm Al'Alamīyah* (2009) issue 3, pp. 451-454; decision number 348/D/4 of the year 1432 H (2011 AD), the Saudi Board of Grievances, 4th circuit.
 - (2) Mustafa Al-Gammal and Ukasha Abdel-Aal: *Al-Taḥkīm fil 'Alaqāt al-Ḥaṣa Al-Dawliya wa al-Daḥiliya* (Arbitration in Private International and Internal Relationships), 1st ed., Al-Halabi Legal Publications, Beirut (1998), p. 312 (hereinafter: *Al-Gammal and Abdel-Aal, Arbitration*); Al-Haddad, *General Theory*, pp. 155-156.
 - (3) Article 6 of the Procedural Regulation.

an arbitration agreement.⁽¹⁾ It can be said that the laws of arbitration of Member States are very close to each other in terms of a broad meaning of the written form of arbitration agreements, which is also adopted by article 3(2) of the New York Convention of 1958.⁽²⁾ It seems, therefore, that no ambiguity arises from the lack of explicit provisions defining the form of writing under the Statute, and the positions of the courts of Member States will most likely be in harmony with the widely accepted liberal meaning of writing.

A.3. An arbitration agreement concluded pending an action in court

Many national arbitration laws recognize arbitration agreements that may be concluded by the parties in a pending action and recorded before

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- (1) Hamza Haddad: *Al-Taḥkīm fil Qawānīn al-‘Arabiya* (Arbitration under Arab Laws), 1st ed., Dar al-Thaqafa, Amman (2010) pp. 98-101, 107 (hereinafter: Hamza Haddad, Arbitration); Ahmed Abdel-Karim Salameh, ‘Markiz al-Taḥkīm al-Tijārī Li-Duwal Majlis al-Ta’āwun Li-Duwal al-Ḥalīj al-‘Arabiya, Dirāṣa Ta’šīliya li Ba’d Jawānib al- Taḥkīm al-Tijārī al-Dawli wifq Niẓām al-Markiz wa Lā’iḥatih’ (The GCC Commercial Arbitration Centre of the Member States of the Cooperation Council for Arab States of the Gulf: A Synthesis of some Aspects of International Commercial Arbitration under the Statute and Regulation of the Centre) *Cooperation Journal*, issue 48 (2004) pp 24-25 (hereinafter: Salameh, Centre of Arbitration); Berg, *The New York Convention of 1958*, pp. 190 et seq.
 - (2) Section 7 of the Bahraini Law for International Commercial Arbitration number 9 of the year 1994; section 232 of the Law of Civil and Commercial Procedures of Bahrain number 12 of the year 1971 (relating to domestic arbitration); section 203 of the Law of Civil Procedures of the United Arab Emirates number 11 of the year 1992; section 12 of the Omani Law of Arbitration in Civil and Commercial Disputes number 47/1997; section 190 of the Law of Civil and Commercial Procedures of Qatar number 13/1990; section 173 of the Law of Civil and Commercial Procedures of Kuwait number 38/1980; section 9 of the Saudi Regulation of Arbitration number M/34 of 1433 H.

the relevant court. The judicial record of the arbitration agreement is deemed to be a written arbitration agreement, even if the parties did not sign the record. A judge will refer the parties to arbitration upon conclusion of an arbitration agreement in the proceedings before him. The Statute does not preclude this form of arbitration agreements, although it does not recognize it explicitly.

The Grand Third Civil Court of the Kingdom of Bahrain has confirmed that the parties to an action brought before it may agree to submit their dispute to arbitration at the Centre. Thus, the defendant requested in its submissions to refer the dispute to the Centre. The Plaintiff did not make any objection to that request in his counter submission. The Court held that an arbitration agreement had thus been made by the parties and, accordingly, referred the parties to arbitration.⁽¹⁾

In another case, the same Bahraini Court has even referred litigants to arbitration at the Centre upon a broad interpretation of a vague arbitration agreement. Thus, a party filed an application with the court requesting the appointment of an arbitrator. The relevant agreement of the parties stated that disputes were to be settled through arbitration under the arbitration law of Bahrain. The Grand Third Civil Court interpreted this agreement as a reference to the Centre, and referred the parties thereto. Although the Statute of the Centre has become part of the Bahraini legal system (as explained in Chapter 1), it is submitted here that the Court has boldly imposed a special regime of arbitration upon the parties without sufficiently examining whether the parties intended to arbitrate at the Centre.

Indeed, it is not clear how a request for the appointment of an arbitrator under the laws of Bahrain could lead to the referral of the parties to the

(1) Decision of 27/12/2012 in the case number 2/2012/10332/2, Grand Third Civil Court of Bahrain.

Centre, let alone appointing a *juridical entity* as an *arbitrator*. Therefore, the author suggests that an arbitration agreement referring generally to arbitration under the law of a Member State, should not be interpreted as referring to the Statute of the Centre. Arbitration at the Centre should be founded upon a clear agreement of the parties, especially because the regime of arbitration at the Centre involves waiving some rules contained in national laws, like challenging the arbitrators as well as the ultimate award before the courts.

However, the ruling of the Grand Third Civil Court of Bahrain to designate the Centre as “the arbitrator” does not bind the Centre itself. As with any arbitrator appointed by the court, the Centre may accept or decline the arbitral mission. So, the Centre may decline to exercise jurisdiction if it is not satisfied that an arbitration agreement exists. The Centre should, however, notify the court of such refusal so that an alternative arbitrator may be appointed.

A.4. The wording of the arbitration agreement

The Statute and the Procedural Regulation do not prescribe a particular wording for the arbitration agreement.⁽¹⁾ An arbitral tribunal has accepted jurisdiction on the basis of an arbitration clause referring disputes between the parties to “arbitration in Bahrain through the procedures of the arbitration commission of the Member-States of the Cooperation Council.”⁽²⁾ The arbitral tribunal did not consider this wording as ambiguous despite the reference to the “arbitration commission” instead of the “arbitration Centre.”

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- (1) Article 2(2) of the Procedural Regulation recommends a general wording along these lines “All the differences arising from this contract or which is connected thereto shall be finally resolved in accordance with the Statute of the GCC Commercial Arbitration Centre for the States of the Cooperation Council of the Arab States of the Gulf.”
 - (2) Arbitration case number 13/2004 at the Centre.

Also, the jurisdiction of the Centre has been established on the ground of an arbitration clause to the effect that disputes were to be settled amicably or “by compromise or special arbitration” and that the arbitrators were to be appointed by the parties or the Centre of the Member States of the Cooperation Council.⁽¹⁾ It is noteworthy that the parties, the Centre and the arbitral tribunal did not take issue with the apparent meaning of the clause in that it simply referred to the Centre as an appointing authority without choosing its rules of arbitration.

It can be inferred from the above-mentioned examples that arbitral tribunals and the Centre prefer to interpret arbitration agreements according to the “business efficacy” principle. That is to say ambiguities in arbitration agreements may well be resolved in favor of arbitration, with the choice of the rules of the Centre being discerned from the intentions of the parties despite the absence of any specific reference to the correct name of the Centre.

A.5. Describing the dispute specifically

National arbitration laws usually stipulate that for a submission agreement concluded after a dispute had arisen to be valid, it must specify the relevant dispute clearly. By contrast, an arbitration clause concerning future disputes is valid if it simply specifies the relevant legal relationship, *e.g.*, the contract containing the arbitration clause.⁽²⁾ Obviously, if a dispute has already arisen between the parties, they should be able to define it in their arbitration agreement, and they can

(1) Arbitration case number 16/2006 at the Centre.

(2) Ahmed Abu Al-Wafa: *Al- Taḥkīm Al-Iḥtiyārī wal-Ijbārī*, (Consensual and Compulsory Arbitration), 5th ed., Al-Ma’arif Establishment, Alexandria (2001), pp. 37-38 (hereinafter: Abu Al-Wafa, Arbitration). For the position of arbitration laws of Member States regarding the description of the relevant dispute see Hamza Haddad, *Arbitration*, pp. 113 et seq.

be presumed to have intended to arbitrate the particular dispute which made them concluded the arbitration agreement.⁽¹⁾

However, the Procedural Regulation did not require explicitly a specific description of the dispute even in respect of an arbitration agreement concluded after the dispute had arisen. Nevertheless, it is submitted here that an arbitration agreement made after the occurrence of a dispute must specify the dispute clearly. This view is supported by the general principle of uncertainty which may taint the arbitration agreement made upon the occurrence of a dispute without specifying the scope of the reference to arbitration. Further, the arbitration laws of Member States require such an agreement to specify the relevant dispute.⁽²⁾ The Procedural Regulation may have overlooked this requirement because arbitration clauses are more common in practice.⁽³⁾

The view that an arbitration agreement made in relation to an existing dispute must specify this dispute clearly can be supported by article 36(b) of the Procedural Regulation. Article 36(b) authorizes the courts of Member States to refuse enforcement of an award if it has been made on an agreement that did not specify the dispute. (Grounds for refusal of enforcement of the award will be examined in Chapter 4 of this book.) It can be inferred by necessary implication that article 36(b) relates only to arbitration agreement made following the occurrence of a dispute. This is because extending article 36(b) to arbitration clauses would

(1) Abu Al-Wafa, *Arbitration*, p. 37.

(2) Section 190 of the Law of Civil and Commercial Procedures of Qatar; section 173 of the Law of Civil and Commercial Procedures of Kuwait; section 10(2) of the Omani law of arbitration in relation to civil and commercial disputes; section 203 of the Law of Civil Procedures of the United Arab Emirates; section 9(1) of the Saudi Regulation of Arbitration.

(3) The New York Convention of 1958 did not mention the arbitration agreement concluded after a dispute had arisen. It makes no distinction between different forms of arbitration agreements. See Berg, *The New York Convention of 1958*, pp. 202-204.

be inconsistent with article 2(2) of the Procedural Regulation which explicitly recognizes arbitration clauses in respect of future disputes which are indeterminable at the time of contract.

B. The Substantive Conditions of the Validity of the Arbitration Agreement

Some substantive conditions for the validity of the arbitration agreement under the Statute can be gathered by implication from the provisions of the Statute and Procedural Regulation. These conditions will be examined in turn.

B.1. The capacity of the parties to enter into an arbitration agreement

According to article 36(2) (b) of the Procedural Regulation the enforcement of an arbitration award may be refused if either party to the relevant arbitration agreement lacked capacity. It is recalled that the parties to an arbitration agreement may be natural or juridical persons. However, the Procedural Regulation does not contain a rule of conflict of laws to indicate the law governing the capacity of the parties.

Consequently, the court of each State in which enforcement of an award is sought will determine the capacity of the parties to make an arbitration agreement under the applicable law as indicated by the court's rules of conflict of laws. It should be borne in mind that the laws of Member States take the same approach to the determination of the applicable law based on the nationality of the concerned party, or the seat of the juridical person.⁽¹⁾ The question of the capacity of the parties to an arbitration agreement will not, as a matter of law, give rise to different conclusions by the courts of different Member States so long as the same law will be applied to determine parties' capacity.

(1) The rules of conflict of laws in the Member States are found in their respective civil codes.

B.2. Making an arbitration agreement by proxy

Generally, for an agent to bind the principal with an arbitration agreement, the agent must have an explicit and specific authorization to do so.⁽¹⁾ The law governing the arbitration agreement can be applied to supplement the Statute and Procedural Regulation in this regard.

In the arbitration case number 19/2006, the Board of Directors of the claimant authorized a representative of the company to enter into arbitration agreements and to grant powers of attorney for this purpose. The authorized agent appointed an attorney and empowered him to enter into an arbitration agreement, which he eventually did, submitting disputes to the Centre. Subsequently, the attorney filed a request for arbitration with the Centre. One of the members of the Board of Directors revoked the authorization. And the defendant relied on this revocation of authority to argue that the attorney has filed the request for arbitration without a valid power of attorney to arbitrate.

Dismissing the defendant's argument, the arbitral tribunal decided that under the Company Law of the country of the seat of the claimant company, it was the Board of Directors acting collectively which had authority to appoint agents and attorneys; a subsequent revocation of authority by an individual member of the Board did not affect the power of attorney issued by the Board. Hence, the request for arbitration was valid and effective.⁽²⁾

(1) Hamza Haddad, *Arbitration*, pp. 88-89.

(2) Provisional Decision of 8 April 2007 in the arbitration case number 19/2006 at the Centre. It should be mentioned that, while an arbitration tribunal has authority to examine the validity of a power of attorney, if a party to the proceedings alleges that the power of attorney attributed to him is void, and that the purported agent could not bind him, the tribunal lacks jurisdiction to determine this question since it relates to the agency agreement between the relevant party and his purported agent. See Abu Al-Wafa, *Arbitration*, p. 230.

B.3. The separability of the arbitration agreement

Article 19 of the Procedural Regulation provides that “[u]nless there is an express agreement to the contrary, an arbitration agreement shall be deemed as independent from the disputed contract. If the contract is invalidated or terminated for any reason, the arbitration agreement shall remain valid and effective.” The aforementioned article recognizes the principle of the separability or autonomy of the arbitration agreement in relation to the main contract containing it. This principle means that the validity or nullity of the arbitration agreement, its effectiveness or termination, is not necessarily associated with the main contract.⁽¹⁾ Many national laws and institutional rules of arbitration recognize this principle.⁽²⁾ Indeed, French courts have pronounced that the separability of the arbitration agreement is a principle of international trade law.⁽³⁾ By virtue of article 19 of the Procedural Regulation, the separability principle applies regardless of the law governing the main contract or the arbitration agreement.⁽⁴⁾

The Saudi Board of Grievances has applied the separability principle in respect of an arbitration agreement under the Statute of the Centre. An award debtor resisted an action brought for the enforcement of the award on the ground that the main contract containing the relevant arbitration clause was void. The Board of Grievances dismissed that

(1) Al-Haddad, *General Theory*, pp. 142-148.

(2) Examples of national laws recognizing the separability principle include: section 23 of the Omani law of arbitration in relation to civil and commercial disputes; section 21 of the Saudi Regulation of Arbitration. Examples of institutional rules of arbitration include article 6(9) of the ICC Rules of Arbitration of 2012.

(3) *Comité Populaire de la Municipalité de Khoms El Mergeb v Société Dalico Contractors*, French Court of Cassation, civ., 20 December 1993, *Journal du Droit International* 121 (1994) 432.

(4) Salameh, *Arbitration Centre*, p. 34.

argument. It has reasoned that the determination of the validity of the main contract would entail a review of the merits of the dispute, which was not permitted by law.⁽¹⁾ This reasoning demonstrates that the decision of an arbitral tribunal on the validity of the main contract relates to the merits of the dispute and is, therefore, treated as a final award not subject to judicial review. By corollary, allegations of the invalidity of the main contract do not strike the root of the jurisdiction of the arbitration tribunal, *i.e.*, the arbitration agreement.

It is noted that article 19 quoted above does not distinguish between an arbitration clause inserted in a contract and an arbitration agreement concluded physically as a separate document. This approach keeps up with the diminishing distinction between these two forms of the arbitration agreement from a legal perspective.

Further, it is noteworthy that article 19 empowers the parties to exclude the application of the separability principle by an *express* agreement. It follows that, the separability principle cannot be ruled out by discerning the implicit intention of the parties. Thus, the requirement of an express agreement to contract out of article 19 leaves no room for interpreting an arbitration agreement referring disputes “arising out of” a contract to arbitration on the ground that, for instance, the wording “arising out of a contract” pre-supposes the existence of the relevant contract and that, consequently, the arbitration agreement could not operate in respect of a dispute over the validity of that contract.

As a result of this approach, the Procedural Regulation militates in favor of joining intertwined matters in the arbitral proceedings, even if some of them do not fall directly within the ambit of the arbitration agreement. In other words, the Procedural Regulation encourages a broad interpretation of an arbitration agreement. This approach matches

(1) Decision number 348/D/4 of the year 1432 H (2011 AD).

the prevailing practice of interpreting arbitration agreements broadly in international commercial arbitration.

A broad interpretation of the arbitration agreements rests on the presumption that parties would reasonably expect all related matters to be tried in one forum. Thus, as they have agreed to refer certain disputes to arbitration, they must have intended to take all pertinent matters to arbitration as well. The House of Lords (now the Supreme Court of the UK) has embraced the broad interpretation of arbitration agreements in 2007, departing from a line of previous judgments that attempted to interpret each arbitration agreement based on the particular terms used.

In the *Fiona Trust* case,⁽¹⁾ the House of Lords held that a sound interpretation of an arbitration agreement assumed that all inter-related disputes between the parties had to be submitted to the arbitration tribunal unless the parties agreed expressly to the contrary. As such, English courts no longer have to dwell on the particular wording of an arbitration agreement and whether it referred to disputes “arising from” or “related to” a contract.

The ruling of the House of Lords in the *Fiona Trust* bears on the interpretation of section 7 of the English Arbitration Act of 1996 which contains the separability principle. Section 7 of the said Act allows the parties contract out of separability so that a dispute over the validity of the main contract would implicate the arbitration clause inserted in it. Yet, the House of Lords dismissed the vessel owner’s argument that the relevant arbitration clause did not cover a dispute over the validity of the charter-party since it referred to disputes “*arising out*” of the charter-party, which indicates that the arbitration clause was to operate

(1) *Fiona Trust & Holding Corp. v. Privalov* (sub nom *Fili Shipping Co Ltd v. Premium Nafta Products Ltd*) [2007] UKHL 40.

only if the contract was valid. The House of Lords rested its decision on the ground that section 7 of the Arbitration Act (like article 19 of the Procedural Regulation) had to be interpreted as requiring an express agreement to exclude the separability principle so that disputes over the validity of the main contract could not be arbitrated.

Finally, article 19 of the Procedural Regulation seemingly suggests that an arbitration agreement may never be affected by the invalidity of the main contract. However, an arbitration agreement may fall together with the main contract if the cause of invalidity strikes at both agreements, *e.g.*, as when the document containing the contract and its arbitration clause was signed under compulsion.

C. The Presumption of the Validity of the Arbitration Agreement

Article 3 of the Procedural Regulation states that “[a]ll agreements and submission agreements referring to arbitration at the Centre shall be presumed to be valid unless proof of the invalidity of the same is established.” Based on article 3, if a written arbitration agreement is filed with the Centre, it shall be deemed valid unless and until the contrary is established. In other words, the party seeking arbitration is required to present an arbitration agreement that appears to valid in its form, *e.g.*, filing a signed document containing an arbitration clause. Then, the burden of proof shifts to the respondent who, if denying the jurisdiction of the Centre, will have to prove that no valid arbitration agreement existed. This presumption of the validity of the arbitration agreement harmonizes with the general policy of promoting commercial arbitration by restricting tactical jurisdictional defences that aim to delay the proceedings.

The presumption of the validity of the arbitration agreement has a significant impact on the role of the General Secretariat of the Centre in examining requests for arbitration. Thus, it will suffice for the Secretary

General to register a request for arbitration and refer the case to an arbitral tribunal if there is *prima facie* a valid arbitration agreement. Then, it is the arbitral tribunal that will decide on the validity of the relevant arbitration agreement, exercising the power known as “competence-competence” that will be considered in Chapter 3.

The role of the Secretary General is, therefore, restricted to examining the apparent evidence based on the filed documents and if it seems probable that a valid arbitration agreement exists, arbitration can be commenced. This is, actually, the same approach under article 6(4) of the ICC Rules of Arbitration of 2012, which states that “. . . The arbitration shall proceed if and to the extent that the Court is *prima facie* satisfied that an arbitration agreement under the Rules may exist.”

The arbitration case number 13/2004 can illustrate the presumption of the validity of the arbitration agreement. In that case, the respondent argued that the arbitration agreement was invalid, alleging that it was signed by a person lacking authority. The Arbitral tribunal rejected the argument, saying that the arbitration agreement presented before it was presumed to be valid until evidence is furnished to the contrary; and the respondent has failed to prove that the agreement was invalid.

D. Pre-Arbitration Procedures

The Statute does not regulate means of dispute resolution that the parties may agree to use before resorting to arbitration, such as conciliation or mediation.⁽¹⁾ However, since arbitration is subject to the agreement of the parties, they may well agree to attempt an amicable settlement or mediation to resolve a dispute before requesting arbitration. An

(1) The General Secretariat of the Cooperation Council pointed out in its memorandum number 54/M/2 relating to the draft statute of the Centre of 1984 to the importance of considering inserting provisions on conciliation as an amicable pre-arbitration procedure.

agreement on pre-arbitration procedures does not in itself affect the validity or enforceability of the relevant arbitration agreement. Yet, if the parties intended that the exhaustion of pre-arbitration procedures is a condition precedent to arbitration, then the arbitration agreement becomes inoperative until such procedures have failed.

The Supreme Court of Bahrain has upheld the binding effect of agreements involving pre-arbitration procedures. In one case,⁽¹⁾ an award debtor argued that the award was invalid because arbitration was commenced without referring the dispute first to an adjudication board to settle the dispute in accordance with the agreement of the parties. The Court of Appeal annulled the award on the ground that the arbitral tribunal has exceeded its jurisdiction. The Supreme Court affirmed the decision, noting that the respondent had invoked the defence of pre-arbitration procedure before the arbitration tribunal.

By contrast, in the arbitration case number 49/2011,⁽²⁾ the respondent argued that the request for arbitration was premature on the ground that the contract provided for a negotiation period before the reference to arbitration, and that negotiations were not exhausted. However, the arbitration tribunal held that the reference to arbitration was valid since the use of negotiations was optional and not a condition to arbitration. The tribunal justified its finding on the basis that the contract did not provide any specific mechanism for negotiations. Further, the tribunal found that the correspondences between the parties indicated that the dispute was so severe that negotiations were not feasible.

II. The Jurisdiction of the Centre *Ratione Personae*

Article 2 of the Statute refers to commercial disputes not related to the Economic Agreement of the Cooperation Council, and commercial

(1) Appeal number 127/2007, 25/2/2008, the Supreme Court of Bahrain.

(2) Arbitration case number 49/2011, award of 1 September 2012 at the Centre.

disputes arising out of the implementation of the said Agreement. It is necessary, therefore, to determine the parties that may submit to the jurisdiction of the Centre in both situations.

A. The Parties to Commercial Disputes Not Related to the Economic Agreement

The initiative to establish the GCC Commercial Arbitration Centre was based on the needs of the business community represented by the chambers of commerce in the Member States as well as the objective of facilitating trade between Member States. In light of these regional considerations, the jurisdiction of the Centre *ratione personae* depends on there being at least one national of a Member State involved in the dispute.

A.1. The advantages of restricting the personal jurisdiction of the Centre

The Centre has jurisdiction over commercial disputes to which at least one party is a subject of a Member State or a juridical person having its seat in a Member State. If this condition is satisfied, the nationality or seat of the other party or parties is irrelevant for the jurisdiction of the Centre.

The requirement of a personal connection of one party with a Member State is consistent with the objectives of the Centre. To elaborate, since the Statute guarantees the enforceability of the arbitration award in the Member States, it is likely that parties from outside the Member States would accept the submission to the Centre, especially because that party will be mostly interested in the enforcement of the award in a Member State where the assets of the party connected with a Member State would generally be located.

Moreover, arbitration at the Centre facilitates trade between Member States. This is because by submitting to the Centre, the parties choose one

and exclusive forum to settle their disputes. By contrast, in the absence of an arbitration agreement referring disputes to the Centre, an issue will arise as to which Member State has judicial jurisdiction. Even the Convention of the Enforcement of Judgments and Judicial Delegations and Notices in the Member States of the Cooperation Council does not guarantee one and exclusive forum. While it defines bases for the jurisdiction of the courts of the Member States, such as the domicile of the defendant and the place of execution of the contract, the said Convention leaves it possible for the courts of more than one Member State to assume jurisdiction.⁽¹⁾ Consequently, conflicting judgments may be delivered, and a judgment issued in one Member State might be refused enforcement in another Member State if the courts of that State have assumed jurisdiction over the same dispute.⁽²⁾ Further, if parties choose arbitration outside the Centre, the award will be subject to the same limitations under the Convention of the Enforcement of Judgments according to article 12 of the Convention.

The benefit of the arbitration at the Centre is, therefore, ensuring one forum to settle disputes by a decision that can be enforced in all Member States. This, in turn, enhances trade between Member States, and helps attract investors from other regions to the Member States. Such investors may also be encouraged to accept arbitration at the Centre since the opportunity of enforcement of awards under the Statute in Member States remains higher than enforcing awards obtained under other rules of institutional arbitration that do not constitute binding international conventions.

Likewise, investors from a Member State making investments in Non-member States may enter into agreement with the contracting entity in

(1) Articles 4, 5, 6 of the Convention of the Enforcement of Judgments between the Member States of the Cooperation Council.

(2) Article 2 of the Convention of the Enforcement of Judgments between the Member States of the Cooperation Council.

the host country to submit disputes to the Centre, especially if the host country has a bilateral investment treaty with the Member State of the investor.⁽¹⁾

Arbitration at the Centre between a citizen or a company of one Member State and an entity in another country hosting an investment of that citizen or company would be beneficial to the parties. For the host country, it will benefit from the guarantees of enforcing a favorable award in Member State in which the investor has assets. This is because enforcement under the Statute may be refused for limited grounds for refusal of enforcement compared with enforcement according to the New York Convention of 1958 or a national law.

On the other hand, the citizen or company of a Member State will benefit in that a favorable award can be enforced in a Member State or a Non-member State, where the New York Convention is very likely to be applicable with the advantage that the ground of refusal of enforcement for the nullity of the award in the country of origin is inconceivable by virtue of the Statute which does not provide for a nullification procedure. Besides, the investor coming from a Member State will, at least, avoid arbitration in other institutions which may be more expensive than arbitrating at the Centre.⁽²⁾

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- (1) For instance, article 9(3)(c) of the Treaty for the Promotion and Protection of Mutual Investments of 2001 between the State of Kuwait and the Hashemite Kingdom of Jordan allows resolving disputes by arbitration under the rules of arbitral commission which the parties choose. Such a provision is usually found in bilateral investment treaties. The said article stipulates that arbitration shall take place in a State that is party to the New York Convention. This requirement is understood to aim to ensure a good opportunity of enforcement of the arbitration award. Therefore, the parties may be able to agree to submit to the Centre since it is not less favorable than the New York Convention in terms of the finality and enforceability of awards.
- (2) Salameh, Arbitration Centre, p. 19.

Needless to say that the objectives of the Centre do not concern the settlement of disputes between parties not connected with a Member State. For such parties, the Centre may provide administrative and logistical services to facilitate their arbitration without being legally subject to the provisions of the Statute.

A.2. Personal jurisdiction depends on the consent of the parties (the issue of non-signatories)

It is recalled that the jurisdiction of the Centre depends on the existence of a valid arbitration agreement submitting to the rules of the Centre. As such, the Centre may not assume jurisdiction over a person that never consented to arbitrate under the rules of the Centre. This gives rise to a question as to disputes that are covered by an arbitration agreement while, at the same time, implicating non-signatories to that agreement.

In international commercial arbitration (*i.e.*, arbitration concerning interest of international trade), non-signatories have been held by French courts to be bound by an arbitration agreement in certain circumstances. These circumstances include non-signatory members of a group of companies that were bound by an arbitration agreement signed by the parent company, or vice versa, if the concerned non-signatories had knowledge about the arbitration agreement or were involved in the negotiations or execution of the contract containing it.⁽¹⁾ It seems that this issue is subject to evolving principles of international commercial arbitration and it remains to be seen whether arbitration tribunals at the Centre and courts of Member States will subscribe to these principles.⁽²⁾

(1) Al-Haddad, General Theory, pp. 242 et seq.

(2) The author has argued in another place that Jordanian courts seem to be very formalistic in determining the parties bound with an arbitration agreement, thus requiring an unequivocal consent and signature of the agreement. Courts of the Member States could, possibly, take a similar approach. See Mohammad Bashayreh, 'Lex mercatoria and arbitration agreements: Perspectives from

However, a problem may arise in a possible situation where a party, which is not connected with a Member State, participates in arbitration proceedings at the Centre and files related claims against a third party who is not connected with a Member State. To illustrate, suppose that a French exporter commences arbitration at the Centre against a Bahraini company for the price of goods exported to Bahrain. In the course of the proceedings, the French exporter files a pertinent claim against a British manager of the Bahraini company on ground of joint liability with the company. The problem here is that, while the dispute arising between the French party and the Bahraini company falls under the jurisdiction of the Centre, the claim raised by the French party against the British manager does not – neither the French exporter nor the British manager satisfies the requirement of personal connection with a Member State.

Two points have to be determined to solve the above-described problem. First, it should be determined whether the manager of the company has signed the relevant contract in his personal capacity (*e.g.*, as a guarantor) or just on behalf of the company. Obviously, the manager would not be personally liable on contract if he signed it solely on behalf of the company. The second point is whether the manager who is not a citizen of a Member State can be subject to the jurisdiction of the Centre, assuming he is bound by the contract.

It is submitted that article 2 of the Statute does not extend the jurisdiction of the Centre to non-citizens who are domiciled in a Member State. In short, in the hypothetical problem above, the Centre would not have jurisdiction over the claim between a French claimant and a British respondent if either of them was not signatory (in his personal capacity) to the arbitration agreement and, in any event, because neither of them

Greek and Jordanian Law,' *Revue Hellenique De Droit International*, v.61(3), pp. 157-198.

has a personal connection with a Member State within the meaning of article 2 of the Statute.

Finally, governmental and public entities of Member States may be parties to commercial contracts. They can, therefore, enter into arbitration agreements submitting to the jurisdiction of the Centre. This is because article 2 of the Statute includes juridical persons in general without limiting the provision to private law entities.

B. Parties to Commercial Disputes Arising from the Economic Agreement

Disputes relating to the implementation of the Economic Agreement of the Member States, and the resolutions issued pursuant thereto, may involve a public entity of a Member State and a private entity. As with other cases, the parties have to have an arbitration agreement submitting their dispute to the Centre. It can be said that, by entering into an arbitration agreement, a governmental entity waives State immunity in respect of arbitration proceedings.

Notably, the delegation of the United Arab Emirates that participated in reviewing early drafts of the Statute suggested that the jurisdiction of the Centre over matters relating to the Economic Agreement should require the consent of the relevant public authority if the dispute arose between a citizen and a public authority and not solely between citizens. This suggestion was not adopted.

If a dispute relating to the Economic Agreement arises between two Member States, and they have failed to settle it amicably, the jurisdiction of the Centre can be triggered by request from either party to the dispute without the need for the consent of the other State in accordance with article 27 of the Economic Agreement. The cases involving State organizations will be examined further in the next subsection.

By comparison with other arbitral institutions, the personal jurisdiction of the Centre is narrower than the scope of jurisdiction of the ICC. The ICC provides arbitration services to parties regardless of nationality. On the other hand, the personal jurisdiction of the Centre is broader than the personal jurisdiction of ICSID which is concerned with disputes involving a Contracting State and a foreign investor.⁽¹⁾

III. The Jurisdiction of the Centre *Ratione Materiae*

Article 2 of the Statute of the Centre specified the kinds of disputes capable of being submitted to the Centre. IT states that “[t]he Centre shall have jurisdiction over commercial disputes [. . .] as well as over commercial disputes arising from the implementation of the provisions of the GCC Unified Economic Agreement and the Resolutions issued for the implementation thereof . . .” As article 2 refers to “commercial disputes,” a question arises regarding the meaning of “commercial.” More specifically, does the Statute cover only matters that are characterized as “commercial” in the strict sense, as opposed to “civil matters” under the laws of Member States?

Also, what disputes may arise from the Economic Agreement of Member States and the pertinent resolutions? Finally, article 2 does not mention any criteria for the internationality of disputes. So, it will also be asked whether the Centre can have jurisdiction even over purely domestic relationships.

(1) Moshe Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes*, M. Nijhoff (1993) p. 62 et seq (hereinafter: Moshe Hirsch, *The Arbitration Mechanism*); Abdullah Abdel-Karim Abdullah, *The Settlement of Investment Disputes, A Study of the Washington Convention for the Settlement of Investment Disputes and the Scope of Its Operation*, Series of Strategic Studies, issue 134, The Emirates Centre for Studies and Strategic Research, Abu Dhabi, 2008, pp/. 26-37.

A. The Meaning of “Commercial” Disputes

The national laws of the Member States relating to *domestic* arbitration recognize arbitration in both civil and commercial matters. Section 2 of the Saudi Regulation of Arbitration permits arbitration in all civil and commercial matters but not disputes involving family law or matters not capable of compromise. Also, section 1 of the Omani Law for arbitration in civil and commercial matters does not distinguish between civil and commercial disputes.

Likewise, section 203(4) of the Law of Civil and Commercial Procedures of the United Arab Emirates defines the scope of arbitrable matters as including all matters capable of compromise, which covers civil and commercial disputes. The same approach is taken by the Laws of Civil and Commercial Procedures of Qatar, Kuwait, and Bahrain (sections 190, 173, 233 respectively).

However, some Member States have introduced special legislation governing international commercial arbitration. These special legislations refer only to *commercial* arbitration.⁽¹⁾ Thus, section 1(5) of the Bahraini Law of 1994 relating to international commercial arbitration provides that “international commercial” arbitration is that which involves a dispute of commercial nature; and “the relationships of commercial nature include, without limitation: commercial transactions for the supply or exchange of goods or services, distribution agreements, commercial agency, management of third party’s rights, capital lease, . . .” The Omani Arbitration Law takes a similar approach in defining commercial matters in relation to international commercial arbitration.

(1) Cf: Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed., Sweet & Maxwell, London (2004) p. 17.

In light of the legal distinction between civil and commercial transactions as far as international commercial arbitration is concerned, a potential difference in the interpretation of the scope of the jurisdiction of the Centre may arise between courts of Member States. To clarify, the laws of some Member States (e.g., Oman and Bahrain) define the international commercial arbitration as including arbitration submitted to a permanent Centre or organization. As such, from the perspective of the courts of these States, arbitration at the Centre may be supplemented by their respective laws relating to international commercial arbitration. Consequently, they may limit the jurisdiction of the Centre to disputes involving commercial matters in the strict legal sense. This possible interpretation may be supported by the fact that the drafters of article 2 of the Statute referred only to “commercial” disputes although national laws of the Member States draw a distinction between commercial and civil transactions. Also, the objectives of the Centre concern facilitating trade between Member States, which indicates that the Centre is interested in disputes involving commercial transactions.

By contrast, Member States whose laws recognize arbitration, international and domestic, in civil and commercial matters may be open to interpret the scope of the jurisdiction of the Centre as including both commercial and civil disputes. This broad interpretation may be based on the fact that the Statute envisaged arbitration between individuals and, as will be explained later, purely domestic disputes not involving trade between Member States.⁽¹⁾

The *travaux préparatoires* of the Statute militate in favor of a narrow interpretation of the jurisdiction of the Centre, confining it to commercial matters in the strict sense. To recap on the background of

(1) Cf. Berg, *The New York Convention of 1958*, pp. 51 et seq.

the establishment of the Centre (explained in Chapter 1), the initiative of setting up the Centre involved the chambers of commerce of the Member States.

In addition, early drafts of the Statute mentioned only commercial disputes arising from the Economic Agreement. Subsequently, the draft has been broadened to include other commercial disputes. Thus, in the draft statute of 1985, the jurisdiction of the Centre was limited to disputes relating to the Economic Agreement; an amended draft in 1986 included commercial disputes between the citizens of the Member States and between them and others from outside the Member States. The latter scope of jurisdiction has been retained in the final draft, albeit with a modified wording.

Nevertheless, a broad interpretation of the term “commercial” disputes that includes civil matters is consistent with the general practice in commercial arbitration. For example, the New York Convention of 1958, while referring to arbitration in commercial matters, is interpreted as applying in respect of arbitration in civil matters. This is why article 1(3) of the Convention allows States to make reservations to limit the application of the Convention to “commercial matters” in the strict sense under their legal systems.⁽¹⁾

In fact, it has been submitted that the jurisdiction of the Centre extends to “all transactions and commercial dealings as well as all aspects of economic activities aiming at making profit.”⁽²⁾

(1) Ibid.

(2) Ahmed Alnajem, ‘Commercial Arbitration in the Member States of the Cooperation Council and the Experience of the GCC Commercial Arbitration Centre of the Member States of the Cooperation Council for the Arab States of the Gulf’ a paper presented at a seminar on “arbitration and ADR”, Yarmouk University, Jordan, 17/6/2014, at p. 11.

Apart from the distinction between commercial and civil matters, a question arises regarding the jurisdiction of the Centre over “administrative contracts.” An administrative contract is, generally speaking, a contract to which a public or governmental authority is a party and which is subject to special rules of administrative law. Examples of administrative contracts include: a contract for the construction of a governmental school, supplying goods or services to a ministry or public authority, or to run a public utility, such as government-owned modes of public transportation. Since these contracts are governed by special rules of administrative law which aim to protect public interest and not merely to govern private interests of the contracting parties, it is debatable whether they can be referred to arbitration in the absence of an express legislative permission.

Apparently, an administrative contract, formed between a public authority of a Member State and one of its subjects falls outside the ambit of the Centre’s jurisdiction. However, an administrative contract involving a Member State and a subject of another Member State may be capable of submission to the Centre if the pertinent dispute implicates the Economic Agreement. It should be realized that the mere fact that one party to a commercial contract is a public authority does not necessarily preclude arbitration at the Centre if the contract itself is not characterized as an administrative one. This is because a contract may be commercial and subject to commercial law, as opposed to administrative law, even though it is entered into by a public authority.

To sum up, the jurisdiction of the Centre, based on the plain meaning of article 2 of the Statute, covers commercial disputes in the strict legal sense as commonly defined under the laws of Member States

(*e.g.*, transport, construction, industrial activities, etc.).⁽¹⁾ For instance, according to the annual report of the Centre for the year 2013, thirteen requests for arbitration have been registered at the Centre at the value of 42 million US dollars, mostly relating to real estate development projects and other investment agreements.⁽²⁾ Accordingly, the Centre lacks jurisdiction over civil matters, such as employees' claims under labor contracts and pecuniary disputes under family law. However, it remains to be seen whether the arbitral and courts' jurisprudence will adopt a broad interpretation of the scope of jurisdiction of the Centre over commercial matters.

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- (1) It is pertinent to point out here that while contracts can be categorized as commercial or civil under the laws of Member States, some transactions may be regarded as commercial from the perspective of one party while being, at the same time, "civil" from the perspective of the other party. For instance, a sale of goods between a supplier of goods and a consumer is commercial for the supplier, civil for the consumer. This is described as a "mixed transaction." The Law of Commerce of the United Arab Emirates expressly treats "mixed" transactions as if they were simply commercial for all the parties thereto. Thus, courts of the UAE will accept the jurisdiction of the Centre over disputes arising from "mixed" contracts. However, in the absence of express legislative solution for "mixed contracts" in other Member States, it is an open question whether the Centre has jurisdiction over all disputes relating to such contracts. Generally, commercial law applies to the commercial obligations under a mixed contract, whereas civil law governs civil obligations ensuing from the same contract. The author suggests that the Centre can have jurisdiction if arbitration is requested in respect of the commercial obligations under a mixed contract; and if civil counter-claims are raised in the arbitral proceedings, the Centre may assume jurisdiction over them as ancillary matters closely connected with the main action or, alternatively, the dispute may be split between courts and arbitration as will be examined in subsection IV of this chapter.
- (2) The Annual Report of GCC Commercial Arbitration Centre, 2013, at p. 17.

B. Commercial Disputes Arising from the Implementation of the Economic Agreement

The Economic Agreement of the Member States of the Cooperation Council was signed in 1981 and, subsequently, superseded by the Economic Agreement of 2001. This Agreement provides that the each Member State shall afford national treatment to the citizens of other Member States in respect of the access to the market, the carrying on of business and all forms of investment, and the movement of capital (article 3 of the Economic Agreement). Also, the Agreement aims to facilitate transportation and navigations services (articles 21 and 22 of the Economic Agreement).

Disputes might, then, arise regarding the relationship between a citizen of one Member States and the authorities of another. For instance, suppose that a governmental authority of one Member State revokes a license to carry on a particular business granted to a citizen (or company) of another Member States, or expropriates assets belonging to the business. In such a situation, the investor may seek compensation. The investor may claim that the decisions detrimental to him violate the Economic Agreement.

According to article 27(1) of the Economic Agreement, claims based on non-compliance by one Member State with the Economic Agreement or the final resolutions passed pursuant to it should be referred to the General Secretariat of the Cooperation Council, which would seek an amicable settlement of the claims at issue. If an amicable settlement is not reached, the relevant dispute shall be referred to the GCC Commercial Arbitration Centre by virtue of paragraph (2) of the same article 27. This applies whether claims based on non-compliance with the Economic Agreement are brought by a Member State or a subject of a Member State.

As such, a dispute involving the Economic Agreement may arise as between two Member States or one Member State and subjects (individual citizens or companies) of another Member State. It is recalled that a contract between a governmental entity of one Member State and an investor from another Member State is capable of giving rise to disputes involving the Economic Agreement and referable to the Centre even if the relevant contract is characterized as an administrative contract under the law of the concerned Member State. However, for a dispute on an administrative contract to be submitted to arbitration at the Centre, it must be of a commercial nature.

It should be realized that not all disputes implicating the Economic Agreement are of commercial nature. For instance, a challenge to an administrative decision of the government of a Member State, by which a license to carry on business has been revoked, maybe subject to judicial review in that State; it may not fall within the jurisdiction of the Centre as it is of an administrative nature governed by the public law of the concerned State. Yet, a claim for damages based on the allegation that the said decision violated the Economic Agreement can be regarded as being commercial and, as such, within the Jurisdiction of the Centre.

Similarly, a dispute between two Member States as to the liability of either one under public international law or regarding the interpretation of the Economic Agreement is outside the jurisdiction of the Centre. This view is supported by the *travaux préparatoires* of the Statute of the Centre. In its comments of 26 December 1990 regarding the draft Statute, the Chamber of Commerce and Industry of Bahrain indicated that the draft included commercial disputes arising from the implementation of the Economic Agreement but not the disputes over the interpretation of the Agreement that could arise between Member States or between subjects of one Member State and another Member State. And the delegation of the United Arab Emirates unsuccessfully proposed that the jurisdiction of the Centre in relation to the Economic Agreement should require the consent of the relevant Member State in the instance of claims filed by citizens of another Member State.

Under article 27 of the Economic Agreement, the submission of a dispute to the Centre is subject to the consent of the parties to the dispute. It is recalled, however, that the said article includes a pre-arbitration stage of amicable settlement through the General Secretariat of the Cooperation Council. If parties do not agree to arbitration at the Centre, article 27 calls for establishing a special court with compulsory jurisdiction.⁽¹⁾ It has been suggested that by establishing a mechanism for the settlement of disputes under the Economic Agreement through the organs of the Cooperation Council, including the GCC Commercial Arbitration Centre and, as envisaged, a special court, manifest the maturity of the regional cooperation and success of integration among the Member States.⁽²⁾

C. Non-Arbitrable Matters under the National Laws of Member States

It is not unusual that national laws may prohibit arbitration in respect of certain matters. These matters, which are described as being non-arbitrable, may belong to public policy or simply justified on the controversial assumption that public interest is better served through courts.⁽³⁾ For instance, article 6 of the federal law of the United Arab Emirates number 18 of the year 1981 relating to commercial agency provides that courts shall have exclusive jurisdiction over disputes arising over commercial agency contracts despite any agreement to the contrary. A question arises, then, as to whether the Centre can have

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- (1) According to article 27(3) of the Economic Agreement, if the parties fail to agree to arbitration at the Centre, the dispute shall be referred to a special court to be established.
 - (2) Salameh, Arbitration Centre, p. 18.
 - (3) The Statute of Procedural Regulation do not contain any public policy-based restrictions on the arbitrability of disputes. This may be due to the fact that commercial matters, which fall under the jurisdiction of the Centre, rarely raise public policy issues. Also, since the concept and rules of public policy at the Member States are generally homogeneous, no serious risk may arise among their courts regarding the validity of arbitration agreements.

jurisdiction regarding a dispute between a commercial agent in UAE and the foreign company.

It is recalled that the Statute is an international convention among the Member States concerning commercial disputes. Since contracts of commercial agency or distributorship are of commercial nature, they fall within the ambit of the Statute, which overrides any domestic law to the contrary. It follows that domestic laws prohibiting arbitration of certain commercial matters do not bar arbitration agreements submitting such disputes to the Centre. This view is reinforced by article 36 of the Procedural Regulation does not mention the non-arbitrability of disputes as a ground for the refusal of enforcement of an award.

It is submitted that commercial matters remain arbitrable under the Statute even if arbitration is seated in the Member State whose law declares the relevant dispute as being not capable of submission to arbitration. Thus in the above example from the law of UAE, if arbitration concerning a commercial agency takes place in Abu Dhabi according to the Statute, the relevant arbitration agreement should remain valid. Although it was said earlier that the law of the seat of arbitration supplements the Statute, it supplements it so as to give efficacy to the arbitration agreement; the law of the seat should not be resorted to in a way that hinders arbitration at the Centre.

To put in another way, the purposes of the Statute should be taken into consideration when deciding whether a domestic law is consistent with the Statute, and hence could supplement it.⁽¹⁾ The Statute overrides national law of Member States not only if they conflict with its provisions

(1) Article 31 of the Vienna Convention on the law of treaties provides that the purposes of a treaty and its objectives bear on the interpretation of the treaty. Also, article 27 of the same Convention provides that a State may not use its national law to justify non-compliance with an international treaty.

but also if they fly in the face of the spirit and purposes of the Statute, which aims to promote arbitration in commercial matters.

D. A Brief Comparison between the Jurisdiction of the Centre and other Arbitral Institutions

Specialized arbitral institutions whose subject-matter jurisdiction is defined under their rules are not uncommon. There exist a number of sectorial arbitral institutions that provide arbitration services in trade disputes in particular sectors. Examples of such institutions include arbitration in cotton trade disputes at the International Cotton Association, located in Liverpool, and the Singapore Chamber of Maritime Arbitration. As such, limiting the jurisdiction of the Centre to commercial matters (even if interpreted narrowly to exclude civil matters) is understandable and may even be desirable. After all, arbitration has developed mainly in the context of international trade.

However, the scope of jurisdiction of the Centre is narrower than the scope of matters capable of submission to the ICC. Under the ICC Rules of Arbitration of 2012, there is no distinction between civil, commercial or administrative contracts. On the other hand, the Centre has jurisdiction over a wider range of disputes than the ICSID has. According to the Washington Convention of 1965, ICSID has jurisdiction, *ratione materiae*, in respect of foreign investment hosted in a Contracting State. “Investment” under the Washington Convention is generally defined as involving a long-term contract, movement of foreign capital to the host Contracting State, and a degree of business risks undertaken by the investor.⁽¹⁾ Obviously, the Statute of the Centre covers investment

(1) Moshe Hirsch, *The Arbitration Mechanism*, pp. 57-60; K. V. S. K. Nathan, *ICSID Convention, The Law of the International Centre for Settlement of Investment Disputes*, Juris Publishing, New York, 2000, pp. 111-113, 123 (hereinafter: Nathan, ICSID).

disputes and other matters arising under international contracts as well as domestic contracts.

IV. The Exclusive Jurisdiction of the Centre

An arbitration agreement has two salient legal effects. First, it removes the relevant dispute from the jurisdiction of the court. This can be described as a negative effect. The second effect, which is a positive one, is conferring jurisdiction onto the arbitrators. In order to enforce an arbitration agreement, national arbitration laws require the court before which a party brings an action in disregard for an existing arbitration agreement to stay the action if the defendant invokes the arbitration agreement.⁽¹⁾ The New York Convention of 1958 states that the court shall refer the parties to arbitration.⁽²⁾

The Statute of the Centre, while ensuring the above-mentioned effects of an arbitration agreement, augments the jurisdiction of the arbitral tribunal by vesting it with an *exclusive* jurisdiction according to article 14. The exclusive jurisdiction entails that an arbitral tribunal is empowered to (A) hear the claim and all applications connected therewith procedurally or on the merits, precluding the jurisdiction of court over such matters, (B) decide first on its own jurisdiction, and (C) applications relating to conservatory and interim measures. These aspects of the exclusive jurisdiction will be explained in the following paragraphs.

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- (1) Section 11 of the Saudi Arbitration Regulation; section 8(1) of the Bahraini Law relating to International Commercial Arbitration number 9 of the year 1994; section 203 of the UAE law of civil procedures number 11 of the year 1992; section 173 of the Kuwaiti law of civil and commercial procedures number 38 of the year 1980.
 - (2) Article 2(3) of the New York Convention. See Berg, *The New York Convention of 1958*, pp. 128 et seq.

A. Precluding the Courts from Hearing the Action and Applications Connected therewith

Article 14 of the Statute ensures the enforcement of the arbitration agreement. It provides that:

“The agreement of the two parties to submit the dispute to the arbitration tribunal at the Centre, and the determination by this tribunal on its jurisdiction to hear the dispute, shall preclude the submission of this dispute or any measure ensuing from arbitrating the same to any other judicial authority in any State; also precluded shall be the challenge to the arbitral award . . .”

According to article 14, an arbitration agreement entails under the Statute the same negative and positive effects as other arbitration agreements, although article 14 does not spell out expressly the duty of a court to stay an action brought in breach of the arbitration agreement upon request from the defendant. Indeed, the jurisdiction of courts is precluded by an arbitration agreement governed by the Statute.

Not only are courts barred from hearing the dispute submitted to arbitration under the Statute, but they are also deprived of jurisdiction to examine any application connected with that dispute. Article 2(1) of the Procedural Regulation affirms this, providing that “An agreement to arbitrate at the Centre in accordance with this Regulation precludes the submission of the dispute to any other authority or to challenge the award of the tribunal before it.” For instance, the Judicial Arbitral Commission of Kuwait has declared that it lacked jurisdiction to hear a claim brought by a contractor under the Kuwaiti Law number 11/1995 on the ground that the relevant contract contained an arbitration clause

according to which disputes had to be submitted to the GCC Commercial Arbitration Centre.⁽¹⁾

As far as the merits of the dispute are concerned, the exclusive jurisdiction of the arbitration tribunal under the Statute coincides with the effects of arbitration agreements in general. However, by providing that the arbitration agreement precludes the submission of the dispute to courts, the Statute seems to favor the view that the negative effect of an arbitration agreement (removing the jurisdiction of the courts) constitutes a non-admissibility defence, as opposed to a lack-of-jurisdiction defence, against an action brought before a court.

In other words, an arbitration agreement deprives the parties thereto from the right to litigate in court, while the court remains competent, at law, to try similar disputes as the one covered by the arbitration agreement. This analysis is consonant with the fact that courts can retain an action if the relevant arbitration agreement has lapsed or been waived by the parties.⁽²⁾ Thus, the parties may be deemed to have waived the arbitration agreement implicitly if either party brings an action in court and the other party fails to invoke the arbitration agreement timely. This is why a court is not required to stay an action on its own motion even if an arbitration clause is contained in the contract.⁽³⁾

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- (1) Decision of the Kuwaiti Judicial Arbitration Commission cited in the arbitration award of 16/4/2003 issued in the arbitration case number 4/2002 at the Centre.
 - (2) Abu Al-Wafa, *Arbitration*, p. 125; Salameh, *Arbitration Centre*, pp. 29-30. Section 11 of the Saudi Arbitration Regulation is consistent with the analysis in the text, since it provides that if an arbitration agreement exists the court has to decide that the action is not admissible.
 - (3) Salameh, *Arbitration Centre*, p. 30. Section 173 of the Kuwaiti law of civil and commercial procedures provides that the courts lack jurisdiction over disputes referred to arbitration. The same section points out that if either party to the arbitration agreement brings an action in court without the other party invoking the arbitration agreement, the court may then retain the action.

The exclusive jurisdiction of the arbitration tribunal over the dispute gives rise to a question as to whether arbitration can take place if a third party brings an action in court against a party to the arbitration agreement involving the merits of the dispute. In this scenario, two solutions are generally suggested. First, the dispute can be bifurcated so that the parties bound with the arbitration agreement must be referred to arbitration (upon request of either party thereof). This solution has been followed in some English cases.⁽¹⁾ Alternatively, it has been suggested that if the dispute between the parties to an arbitration agreement is involved in an action between one or all the parties thereto and a third party, then all parties should stay in court to avoid conflicting judgments and awards; arbitration becomes, accordingly, inoperative.⁽²⁾

Under the Statute, however, article 14 is better understood as favoring the bifurcation of proceedings if a third party is involved in the dispute and does not consent to arbitration with the parties to the arbitration agreement. This is because the exclusive jurisdiction of the arbitral tribunal is expressed as a mandatory provision so that arbitration could not be inoperative unless all the parties waive the arbitration agreement. Bifurcation of proceedings is supported by some commentators who argue that the enforcement of the will of the parties to the arbitration agreement is paramount.⁽³⁾ In addition, the concern that an award may conflict with a judgment in pertinent proceedings is of little practical significance because the effect of each of the award and the judgment will be restricted to the parties of each proceedings.

The jurisprudence of the arbitration tribunals at the Centre supports the above analysis of bifurcation of proceedings and that the existence of court proceedings involving matters referred to arbitration does not bar

(1) Berg, *The New York Convention of 1958*, p. 163.

(2) Italian courts followed this solution in some old cases. See Berg, *The New York Convention of 1958*, p. 162.

(3) Al-Gammal and Abdel-Aal, *Arbitration*, pp. 564-566.

the continuity of the arbitral proceedings. In the arbitration case number 28/2008, a dispute involved a contract for the supply of services entered into by the claimant and the respondent. The claimant also brought an action in court against a bank that had issued a bond in favor of the respondent and in relation to the same contract submitted to arbitration. The bank asked the court to join the respondent. Despite the fact that the claimant and the respondent had been implicated in the court proceedings, the arbitration tribunal asserted its jurisdiction over the dispute between the claimant and the respondent.

Likewise, in the arbitration case number 49/2011, the respondent (a contractor) asked the arbitration tribunal to suspend the arbitral proceedings pending a decision of the competent court in an action it has brought against a third party (a sub-contractor). The respondent argued that the third party it has sued was liable for the damages suffered by the claimant who requested arbitration and that suspending the arbitral proceedings was necessary to avoid conflicting awards and judgments. The arbitration tribunal dismissed the respondent's request on the ground that the request for arbitration and the action in court were based on different causes of action, *i.e.*, two separate contracts (main contract and a sub-contract), even though the execution of both contracts was inter-related.

Further, courts of Member States are precluded from deciding on applications connected with the arbitral proceedings. This includes challenges to arbitrators. The Supreme Court of Kuwait has affirmed the exclusive jurisdiction of the Centre over challenges to arbitrators.⁽¹⁾

It should be pointed out that, despite the wording of article 14 "The agreement of the two parties to submit the dispute to the arbitration

(1) Supreme Court of Kuwait (commercial), *Majallat Al-Taḥkīm Al'Alamīyah* (2009) issue 2, pp. 303-309.

tribunal . . .”, this article should not be interpreted as requiring the consent of the parties to the actual reference of a dispute to arbitration. The existence of an arbitration agreement is sufficient and enforceable by either party. In other words, an arbitration agreement is a binding agreement that can be invoked by either party; it is not a promise to make an arbitration agreement in the future.

B. The Priority of the Arbitration Tribunal’s Decision on its Own Jurisdiction

It is a settled principle in commercial arbitration, both international and domestic, that an arbitration tribunal has the power to decide on its own jurisdiction. This power is referred to as the competence-of-competence principle. Jurisdictional questions that can be determined by the arbitrators include the existence of an arbitration agreement, its validity and interpretation. However, in practice different models of the competence-of-competence principle have emerged.

While national laws seem to accept that a decision by arbitrators on their own jurisdiction is not final and is subject to examination afresh by the courts, they diverge on the timing of courts’ intervention to examine the jurisdiction of the arbitrators. Thus, a court seized with the dispute may, upon the defendant’s request to refer the case to arbitration, examine the jurisdiction of arbitrators to ascertain whether there is a ground to stay the action. Or, national laws may require a court seized with the dispute to defer to arbitrators so that they have the first, albeit not final, say on their jurisdiction. Alternatively, national laws may allow parallel arbitral and court proceedings regarding the arbitral jurisdiction - neither courts nor the arbitrators are required to stay the proceedings pending the other forum’s decision.⁽¹⁾

(1) Hamza Haddad, *Arbitration*, pp. 289 et seq.

The Statute did not overlook the organization of the roles of courts and arbitrators with respect to the determination of the latter's jurisdiction. Article 14 stipulates that a determination by the arbitration tribunal on its jurisdiction precludes the submission of the dispute to any other authority. It follows that if the arbitration tribunal at the Centre is seized with the dispute, courts may not retain any action on the merits or any application relating to the ongoing arbitration. Yet, the decision of the arbitral tribunal is not final. Rather, it is subject to review if the award debtor resists enforcement of the award on the ground that no valid arbitration agreement existed or that the tribunal exceeded its jurisdiction (article 36 of the Procedural Regulation).

C. Applications for Conservatory and Interim Measures

The exclusive jurisdiction of the arbitration tribunal under article 14 of the Statute suggests that it is only the tribunal that can grant interim orders (or provisional measures). This is because article 14 prevents recourse to courts for “*any measure*” relating to the arbitral proceedings. Article 28 of the Procedural Regulation endorses the power of the arbitral tribunal to decide on applications for interim orders. It states that:

“The tribunal may, upon request from either party, order such interim measures as it may deem necessary in respect of the subject matter of the dispute, including measures to preserve the goods in dispute, such as handing them over to a third party or selling perishable goods in accordance with the procedural rules of the country chosen to take the interim measure in.”

Article 28 clearly demonstrates that an arbitral tribunal has jurisdiction to make decisions regarding interim measures, while the execution of these measures is subject to the procedural rules of the State in which

the measures will be taken. It is submitted, therefore, that the courts of Member States are barred from determining interim measures if the arbitral tribunal has been composed. In this case, courts only enforce the decisions of the arbitral tribunal without reviewing them.⁽¹⁾ However, since interim measures may be urgent, if the arbitral tribunal is yet to be composed, courts may assume jurisdiction in respect of such measures.

A distinction should be made here between interim measures and conservatory measures. Interim measures falling within the jurisdiction of the arbitral tribunal - according to the above-mentioned interpretation of article 28 - includes urgently needed measures which, if delayed, may be rendered futile, like the sale of perishable goods or ordering a party to advance a financial guarantee. For example, in the arbitration case number 11/2003, the arbitral tribunal considered an application for the appointment of a guardian for a company. The tribunal found that the requirements for the appointment of a guardian were not present as the relevant company had incurred severe losses that exhausted its capital and, consequently, there was no property for which a guardian could be meaningfully appointed.⁽²⁾

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- (1) The decisions of the arbitration tribunal relating to conservatory and interim measures may, it is submitted, be considered as enforceable judgments for the purposes of the Convention for the Enforcement of Judgments and Judicial Notices of Member States of the Cooperation Council. Article 1(b) of the said Convention provides that "It shall be treated as a judgment [. . .] each decision, whatsoever called, issued pursuant to judicial or administrative or residual proceedings by courts or any competent agency of a Member State." Thus, an arbitration tribunal constituted at the GCC Commercial Arbitration Centre is a competent agency recognized by the Member States.
- (2) Arbitration award of 23/3/2003, arbitration case number 11/2003 at the Centre.

By contrast, conservatory measures include, for instance, freezing assets. The Statute and Procedural Regulation do not refer to conservatory or precautionary measures. Therefore, the author submits that an arbitration agreement does not prevent either party from seeking a court order of conservatory measures. The arbitral tribunal, too, may instruct either party to resort to the competent court to obtain an order of conservatory measures. Indeed, a conservatory measure is widely perceived as an act of a public authority.⁽¹⁾

Recognizing the courts' jurisdiction over conservatory measures relating to arbitration proceedings harmonizes with the author's opinion, set out earlier, that the Statute can be interpreted as characterizing the impact of an arbitration agreement on courts' jurisdiction as rendering the action non-admissible; it does not abrogate the jurisdiction of the court over the subject matter as such. Therefore, courts' jurisdiction over conservatory measures does not contradict the exclusive jurisdiction of the arbitration tribunal.

Also, the interpretation adopted above regarding conservatory measures can be supported by the practice under the Rules of Arbitration of London Court of International Arbitration. Article 25 of these Rules provides for the power of the arbitral tribunal to issue orders relating to certain interim and conservatory measures; namely, ordering the respondent to provide security for all or part of the amount in dispute, storage or sale of property relating to the subject matter of the dispute, and any relief which could be granted in an award, like the payment of money. The same article 25 prevents the parties from applying to courts for such measures if the tribunal has been formed. However, the Rules do not cover all conservatory measures, thus leaving other measures within the jurisdiction of the courts, while requiring the parties to inform the tribunal or obtain its permission to do so after the formation

(1) Hamza Haddad, *Arbitration*, p. 357.

of the tribunal. Thus, the Rules of LCIA insinuate that the jurisdiction of courts regarding conservatory measures is not repealed by arbitral jurisdiction.

The *travaux préparatoires* of the Statute support the view that courts of Member States retain jurisdiction over conservatory measures. Article 14 of the Statute did not appear in the 1985 draft; It was inserted in the draft as amended in 1990 pursuant to a memorandum of the Ministry of Legal Affairs of Bahrain (reference number 439/90 of 30/10/1990). This memorandum explained that the new article 14 aimed to prevent the courts of any State from intervening in the dispute referred to, or decided by, the arbitration tribunal.

The draft article 14 first introduced in 1990 contained a sentence to the effect that the exclusive jurisdiction of the arbitral tribunal extended to “interim and urgent measures.” This sentence was retained in the draft considered by the drafting committee in its meeting in October 1992. However, that sentence has been omitted from the draft in 1993.

As such, article 14 was intended mainly to avoid judicial intervention in the subject-matter of the dispute, whether before or after the formation of the arbitral tribunal. Obviously, conservatory measures do not go to the heart of the subject-matter of the dispute. It follows that these measures do not necessarily conflict with the exclusive jurisdiction of the arbitral tribunal. It can be assumed, therefore, that the omission of the reference to conservatory measures from article 14 indicates that the exclusive jurisdiction of the arbitral tribunal was meant to be restricted to the subject-matter of the dispute.

Contrary to the interpretation of article 14 set out above in respect of conservatory measures, an arbitral tribunal took the view that interim measures under article 28 included conservatory measures, such as

conservatory seizure in respect of accounts and assets. Commenting on article 28 of the Procedural Regulation, the tribunal said that:

“This article did not define the interim measures and the conditions for ordering them. Yet, there is no doubt that these measures refer to provisional measures or conservatory measures urgently needed by the nature of the dispute and which do not affect the merits thereof. And these measures are subject to the same condition as the urgent measures ordered by State courts, including the state of urgency and not implicating the merits of the dispute.”⁽¹⁾

Accordingly, the arbitral tribunal assumed jurisdiction to consider an application for conservatory seizure of monies and accounts and businesses of the respondent. However, the tribunal refused to grant the requested measure on the ground that the conditions for conservatory seizure, particularly the state of urgency, were not satisfied.

Presumably, the aforementioned opinion of the tribunal might rest on the fact that the Statute is an international convention that has the legal value of domestic law in the Member States. As such, the source of the power of the arbitral tribunal to impose conservatory seizure, which is normally exercised by public authorities, is *the law* and not the agreement of the parties. And, consequently, the concern that conservatory seizure requires an order of a public authority could be obviated if the arbitral tribunal order is considered to be an order of a competent agency that is enforceable in the Member States under the Convention for the Enforcement of Judgments and Judicial Notices.

If the opinion of that arbitral tribunal is correct, the exclusive jurisdiction of the arbitral tribunal formed under the Statute would extend to conservatory measures. This corresponds to the exclusive jurisdiction

(1) Provisional award of 8 April 2007 in the arbitration case number 19/2006 at the Centre.

afforded to ICSID by virtue of the Washington Convention of 1965. ICSID has an exclusive jurisdiction to make orders of conservatory measures, including seizure of property, while preventing State courts from making such orders.⁽¹⁾

It is noteworthy, however, that Rule 39 of the ICSID Rules of Procedure for Arbitration Proceedings explicitly provides that the arbitral tribunal has the power to issue directions regarding conservatory measures. Rule 39(6) stresses that the parties may not apply to a court for conservatory measures unless they have stipulated otherwise in the arbitration agreement. In the absence of such an express agreement, the courts are not allowed to intervene according to article 47 of the Washington Convention.⁽²⁾

Unlike the provisions of the Washington Convention and ICSID Arbitration Rules, the wording of article 14 of the Statute falls short from expressly depriving State courts from their power in relation to conservatory measures. In any event, some commentators take the view that even orders of conservatory measures issued at ICSID are dependent on court assistance to enforce such orders. This reduces the difference between an arbitral tribunal at ICSID and a tribunal at the GCC Commercial Arbitration Centre or under national laws, where arbitration tribunals may instruct the parties to apply to a court for a specific conservatory measure.⁽³⁾

To conclude, an arbitration agreement conferring jurisdiction on the Centre precludes the intervention of the courts of Member States in the arbitral proceedings. The next Chapter will explain how, then, the arbitral proceedings are conducted, including the verification of the jurisdiction of the Centre.

(1) Georges R. Delaume, 'ICSID arbitration proceedings' *Berkely Journal of International Law* (1986) 4, p. 218, at 226.

(2) Moshe Hirsch, *The Arbitration Mechanism*, p. 31.

(3) Nathan, ICSID, pp. 65-66.

Chapter 3

The Arbitral Proceedings

The arbitral proceedings involve the submission of claims, counter claims, pleadings, defences, and evidence before the arbitral tribunal, and the conduct of the procedures by the arbitral tribunal. The conduct of procedures includes the organization of hearings, their venue, the language to be used, and the deliberations ending with the issuance of the award.

However, to examine these proceedings and the conduct thereof, it is necessary to explain first the action that triggers the arbitral process, *i.e.*, the request for arbitration. Then, the formation of the arbitral tribunal and pertinent guarantees for due process should be studied.

I. The Initiation of the Arbitral Process (Request for Arbitration)

To initiate the arbitration process, the party seeking arbitration must file a request for arbitration. The request for arbitration names the respondent and sets out the nature of the claim. The General Secretariat of the GCC Commercial Arbitration Centre examines the request for arbitration and, upon verifying that it satisfies the requirements of the Statute, registers it and notifies the same to the respondent so that the case can be referred to the arbitral tribunal.

This section will elucidate the initial phase of filing a request for arbitration and how it is considered by the General Secretariat of the Centre.

A. The Filing of the Request for Arbitration

A claimant seeking arbitration files a request for arbitration with the General Secretariat of the Centre. The Secretary General will examine the request to ascertain whether it contains the requirements under article 9 of the Procedural Regulation. These requirements are:

The name of the claimant (or claimants) and the respondent (or respondents), their titles, legal standings, nationalities, and addresses. Specifying the nationality of the parties is important in order to verify the jurisdiction of the Centre which depends on one party, at least, being a citizen or juridical person duly existing in a Member State.

The legal standing of the parties means whether a named party is suing or being sued in its personal capacity or as a legal representative of another person.

A description of the dispute, pertinent facts and evidence, together with specific remedies sought. Notably, the Procedural Regulation assumes that a claimant would submit a statement of claim along with the request for arbitration. However, the parties may agree on special rules for submitting claims and counter claims, while a request for arbitration may describe the dispute, the value of the claim, and the remedies sought in general terms.

The name of the arbitrator nominated by the claimant, if any. (The formation of the arbitral tribunal will be explained later.)

A copy of the arbitration agreement and the documents relating to the dispute. Obviously, this is an essential element of a request for arbitration since the Centre cannot have jurisdiction in the absence of an arbitration agreement.

As to the form of the request for arbitration, article 9 of the Procedural Regulation stipulates that the request must be in writing. Yet, the Statute

and Procedural Regulation do not specify the number of copies of the request for arbitration and whether electronic means of communication may be used to file the same. It is submitted that, for clear practical reasons, a claimant will be required to file as many copies of the request for arbitration as there are respondents in addition to two extra copies; one for the record of the General Secretariat and the other to be subsequently referred to the arbitral tribunal.⁽¹⁾ It should be noted that, in exercising his power to examine and register the request for arbitration, the Secretary General may request a number of copies as he deems necessary. Failure by the claimant to file the requested number of copies may render his request incomplete, delaying the registration process.

Further, while supplying the General Secretariat with original copies may be required for record keeping at the Centre, the General Secretariat may communicate with the parties through electronic means that are capable of providing authentic, retrievable records. Yet, article 10 of the Procedural Regulation assumes that the respondent will be notified by registered mail against receipt. By contrast, article 3(2) of the ICC Rules of Arbitration of 2012 broadly permits communications and notifications addressed to the parties to be made by “delivery against receipt, registered post, courier, email, or any other means of telecommunication that provides a record of the sending thereof.” It seems that electronic means of communication with parties can be used under the Statute of the Centre and the Procedural Regulation so long as it satisfies the intended purpose of recording and proof of the communication.

Article 9 of the Procedural Regulation makes no reference to the language of the request for arbitration. This raises no problem, since the parties should use the language specified in their arbitration agreement.

(1) Cf article 3(1) of the ICC Rules of Arbitration of 2012, which requires the claimant to file a number of copies of all relevant documents sufficient to provide one copy for each respondent, arbitrator, and the General Secretariat.

Even if the claimant files the request for arbitration in a language other than the one agreed upon, one arbitral tribunal has indicated that the claimant could rectify the filing by a subsequent submission of the statement of claim in the stipulated language.

Thus, in the arbitration case number 9/2003, the relevant arbitration agreement provided that the language of arbitration shall be English. The claimant filed a request for arbitration in Arabic. After the formation of the arbitral tribunal, the respondent took issue with the validity of the filing of the request for arbitration arguing that it had to be filed in English. The arbitral tribunal dismissed the respondent's argument, saying that the filing of a request for arbitration in a language other than the language specified under the arbitration agreement did not invalidate the procedure provided that the claimant submitted the statement of claim and the pertinent documents in the specified language. The claimant complied with this in the first session in this case.

It is submitted that the view of the arbitral tribunal in the case number 9/2003 is sound. This is because a procedural irregularity should not render the procedures null unless that irregularity puts a party at a disadvantage or is considered by a specific provision as a ground for nullification of the procedure. In the said case, it was not established that any harm or disadvantage had been caused to the respondent, especially that documents were resubmitted in the required language.

The Centre collects a non-refundable registration fee upon each request for arbitration.⁽¹⁾ Upon the filing of the request for arbitration and payment of the applicable fee, the Secretary General examines the request and notifies the respondent thereof.⁽²⁾

(1) According to article 39 of the Procedural Regulation the applicable fee is 50 Bahraini dinars or an equivalent amount in another currency.

(2) Article 10 of the Procedural Regulation.

B. The Examination of the Request for Arbitration by the Secretary General

The Secretary General examines the request for arbitration to verify that it is complete. Particularly, the Secretary General will look at the arbitration agreement. However, the view of the Secretary General regarding the existence of an arbitration agreement conferring jurisdiction on the Centre does not bind the arbitral tribunal. The tribunal has the power to determine on its jurisdiction as will be further explained later. Thus, like the role of the General Secretariat of the Court of Arbitration of the ICC, the Secretary General of the Centre only conducts a *prima facie* examination of the arbitration agreement.

To explicate further, the Secretary General may refuse to register the request for arbitration and refrain from notifying the respondent if the request for arbitration lacks some information and documents required under article 9 of the Regulation or if it is *obvious* that no arbitration agreement exists. The archive of the Centre reveals that in some cases the Secretary General found there was no arbitration agreement referring to the Centre. Thus, a request for arbitration was refused on the ground that the relevant agreement referred to arbitration at the Chamber of Commerce and Industry of Bahrain, not the Centre. The Secretary General could not, apparently, interpret the agreement as meaning the GCC Commercial Arbitration Centre, although the Chamber mentioned in the agreement did not offer arbitration services. Similarly, the Secretary General found that an agreement referring to “Saudi national arbitration” was not a valid basis for the jurisdiction of the Centre.

The power of the Secretary General to examine requests for arbitration and to refuse to register the same corresponds to the role of his peer at ICSID. Article 36(6) of the Washington convention of 1965 empowers the Secretary General to refuse registration of requests for arbitration. Affording this power to the Secretary General of ICSID did not face

criticism,⁽¹⁾ although the decisions of the Secretary General of ICSID are not subject to challenge or review. This may be justified by the need to relieve ICSID from frivolous requests for arbitration. The same analysis holds true with respect to the GCC Commercial Arbitration Centre.

However, since the Procedural Regulation lays down a presumption of the validity of the arbitration agreement (as explained in Chapter 2), a decision of the Secretary General to refuse to admit a request for arbitration on grounds of the absence of an arbitration agreement ought to be reasoned. It is recalled that for the jurisdiction of the Centre to be established there must be an arbitration agreement that satisfies the jurisdictional requirement *ratione personae* and *materiae*. Therefore, it would be expected that a refusal to register a request for arbitration has to specify which condition for the jurisdiction of the Centre is not present.⁽²⁾

If the Secretary General registers a request for arbitration, and subsequently refers it to the arbitral tribunal, the tribunal may decline jurisdiction nevertheless. On the other hand, a question arises as to whether the tribunal could accept jurisdiction in respect of matters that the Secretary General initially found to be beyond the jurisdiction of the Centre. To illustrate, suppose that a sub-contractor requests arbitration against the main contractor and the project owner claiming damages and repayment of a loan previously offered to the main contractor. The Secretary General finds that the project owner is not a party to the arbitration agreement contained in the sub-contract and, therefore, refused to register the request for arbitration against him. Suppose further that arbitral proceedings have commenced, however, as between

(1) Moshe Hirsch, *The Arbitration Mechanism*, pp. 28-29; Nathan, *ICSID*, pp. 127-129.

(2) The Secretary General of ICSID normally makes reasoned decisions in case of refusal to register a request for arbitration. See: Nathan, *ICSID*, p. 129.

the sub-contractor and the main contractor over the sub-contract solely, excluding the irrelevant loan agreement.

In the above example case, can the arbitral tribunal uphold a new application from the sub-contractor to join the project owner to the proceedings or to admit the sub-contractor's claim on the loan agreement? The Procedural Regulation is silent as to this question.

To answer that question, guidance may be gathered from the ICC Rules of Arbitration of 2012. Article 6(5) of these Rules provide that “[i]n all matters decided by the Court under Article 6(4), any decision as to the jurisdiction of the arbitral tribunal, *except as to parties or claims with respect to which the Court decides that the arbitration cannot proceed*, shall then be taken by the arbitral tribunal itself” (emphasis added). Accordingly, the arbitral tribunal cannot reverse a Secretary General's negative finding on jurisdiction. Article 6(6) of the ICC Rules indicates that such a negative finding could only be reversed if the party seeking arbitration obtains a decision from a competent State court that there is a binding arbitration agreement in respect of certain matters.

Although the Procedural Regulation does not contain a provision similar to article 6(5) and (6) of the ICCR Rules of Arbitration, it is argued here that the same effect ensues from the provisions of the Procedural Regulation read together. The Statute and the Procedural Regulation stipulate that an arbitral tribunal is seized with the case filed with the Centre upon reference of the case to the tribunal by the Secretary General. It follows that if a tribunal assumes jurisdiction in respect of matters not referred to it by the Secretary General, it violates the mechanism of reference under the Statute and the Regulation. Such a violation may result in refusal of the enforcement of the award in Member States according to article 36 of the Regulation. Therefore, an arbitral tribunal should restrict its mission to the matters duly referred to

it in accordance with the Statute and Regulation (and such matters that the Regulation empowers it to adjudicate upon, *e.g.*, counterclaims).

While an arbitral tribunal is required - according to the above-mentioned interpretation of the Regulation - to defer to the finding of the Secretary General on the lack of Centre's jurisdiction, the issue may take a different manner if the Centre's position conflicts with a decision of a State court referring a dispute to arbitration at the Centre. Thus, if the Secretary General refuses to retain a request for arbitration, finding there to be no arbitration agreement, the claimant may bring an action in court. Then, if the defendant invokes the purported arbitration agreement, asking the court to stay the action, the court may uphold the defendant's request. The claimant or the defendant will then file a new request for arbitration with the Centre.

The archive of the Centre indicates that the Centre has received two decisions of Bahraini courts referring the parties to arbitration at the Centre, although the Secretary General was satisfied that the relevant agreements did not concern the Centre. To resolve the issue, taking into account the interests of the parties and the need for ensuring consent to arbitration under the rules of the Centre, the Secretary General invited the parties to sign an agreement to arbitrate (a submission agreement). If all the parties cooperated, arbitral proceedings were commenced. Conversely, if a party resisting arbitration fails to sign a specific arbitration agreement to consent to the jurisdiction of the Centre, the Secretary General may still refuse to register the request for arbitration despite a previous finding by a court that the Centre had jurisdiction. In this case, it is submitted that the claimant may bring an action again on the ground that the disputable arbitration agreement is, in any event, inoperative as a result of the Centre refusing to accept the arbitral mission.

C. Notifying the Respondent, the Submission of the Statement of Defence

Upon the decision of the Secretary General to register a request for arbitration, he notifies the respondent with a copy of the request within seven days from the date of registration. Notification to the respondent must be through registered mail against receipt of delivery. Initially, the respondent's address as indicated in the request for arbitration is used. If it turns out that this address is invalid, the claimant will have to provide a new address.

In the arbitration case number 51/2011 at the Centre, it appeared that the only address known for the respondent was incorrect. However, since that address was in fact the last known, valid address of the respondent, the arbitral tribunal deemed the notification valid. However, if another address could be found, notification should also be addressed thereto. Thus, in the arbitration case number 56/2011 at the Centre, following the failure of notification at the respondent's address known to the claimant, the arbitral tribunal decided to use another address that appeared in old correspondences and in a contract filed by the claimant in the case.

The Secretary General may resort to notifying the respondent through publishing notices in daily papers in the country where the respondent is known to be located. This approach was taken in the arbitration cases number 52/2011 and 35/2011. Arbitral tribunals may also request the Secretary General to publish notices for the respondent of future hearings in daily papers as well. An arbitral tribunal followed this means of notification in the arbitration case number 56/2011 at the Centre.

The respondent is required to file, within twenty days from the date of notification, his statement of defence, including defences and counterclaims, if any, together with pertinent supportive documents. The answer to the request for arbitration must also contain the name of

the arbitrator nominated by the respondent. The Secretary General may, upon request from the respondent, extend the twenty-day period for filing the answer, provided the extended period may not exceed additional twenty days starting from the last day of the original agreement.⁽¹⁾ If there are counter claims, each counterclaim is treated as if it were a claim for purposes of applicable fees in accordance with article IV (6) of the Bylaw Regulating Arbitration Expenses of the year 2012.⁽²⁾

D. Referring the Case File to the Arbitral Tribunal

The arbitral tribunal is formed following the completion of the registration and notification procedures describe in the previous subsection. The composition of the tribunal and appointment of the arbitrators will be explicated in section II of this Chapter. Significant for the arbitration procedure under the Statute and Procedural Regulation is the action of referring the file of the case to the formed tribunal. Article 16 of the Procedural Regulation provides that “[t]he Secretary General shall refer the file of the dispute to the tribunal within seven days from the date of formation of the tribunal [. . .] and the tribunal shall commence its mission within fifteen days from the date of receipt of notification of the same.”

Determining the date of reference of the file of the case to the tribunal is important in a number of ways. The arbitration proceedings are deemed to have started as from the date of reference of the case file to the arbitral tribunal. Unlike some national laws which may link the commencement of the arbitral proceedings with the date of the formation of the arbitral tribunal (*e.g.*, the Jordanian Arbitration Law of 2001) or with the date of the request for arbitration (*e.g.*, the Egyptian Arbitration Law of 1994),

(1) Article 11 of the Procedural Regulation.

(2) Cf article 36 of the ICC Rules of Arbitration of 2012.

the Procedural Regulation makes the commencement of the proceedings dependent on an action within the control of the Secretary General.

As from the date of commencement of the arbitration proceedings, significant jurisdictional consequences are triggered. The arbitral tribunal becomes exclusively competent to examine its own jurisdiction subject to judicial review at the stage of enforcement of the award. Also, the Secretary General ceases to exercise his role in conducting initial examinations of applications or counterclaims relating to the case referred to the tribunal.

In one arbitration case, the claimant petitioned the Secretary General to object to the admissibility of a counterclaim submitted by the respondent before the arbitral tribunal. The claimant argued that the respondent was required to submit counterclaims together with the answer to the request for arbitration according to article 11 of the Procedural Regulation. Having failed to do so, the claimant argued further, the respondent lost the right of raising counterclaims. Rejecting the claimant's objection, the Secretary General, Mr Ahmed Alnajem, has confirmed that once the arbitral tribunal is constituted, the Secretary General may no longer examine the admissibility of claims. The Secretary General correctly - it is submitted - said that article 11 of the Procedural Regulation:

“Regulates the first stage of arbitration, which can be called the administrative stage, and which aims to prepare the file of the arbitration case; this phase precedes the formation of the arbitral tribunal, and throughout it the Secretary General decides on the said preparation. However, once the arbitral tribunal has been formed the judicial stage in arbitration begins, during which it is the arbitral tribunal that decides on applications and counterclaims [. . .] and has jurisdiction over the arbitration process in its entirety except for matters

excluded under an explicit provision or restricted by the agreement of the parties.”⁽¹⁾

Further, marking the date of commencement of the arbitral proceedings, the reference of the file of the case to the arbitral tribunal constitutes the starting point against which the duration of arbitration is fixed. Thus, article 32 of the Procedural Regulation provides that “in all circumstances, the award shall be issued not later than one hundred days from the date of the reference of the file of the case to the arbitral tribunal unless the parties have agreed on another period for the issuance of the award . . .”. The aforementioned provision indicates that the maximum period of arbitration is one hundred days starting from the date of referring the file of the case to the arbitral tribunal. (The period of arbitration can be extended as will be discussed in Chapter 4.)

The tribunal is required by virtue of article 16 of the Regulation to start its mission within fifteen days from the date of reference. The combined effect of articles 32 and 16 of the Regulation is that for the file of the case to be duly referred to the arbitral tribunal, the tribunal should be in a position where it is able to start its mission. Otherwise, it would be inconsistent to trigger the fifteen-day period (article 16) for the actual commencement of hearing the case upon the reference of the file of the case to the tribunal if the tribunal is, for some reason, inoperative at the time of reference.

Accordingly, it is submitted that if the Secretary General refers the file of the case to a tribunal the formation of which is yet to be completed, the above-mentioned consequences of the reference should be deferred until the tribunal is duly composed. For instance, in the arbitration case number 13/2004, an arbitrator was nominated by one respondent while there was another respondent whose confirmation of the appointment

(1) Decision of the Secretary General number Q/2013/130, 28/10/2013.

was required. The file of the case was sent to the three nominated arbitrators pending the confirmation of the appointment of that arbitrator by the second respondent.

Subsequently, the arbitral tribunal decided that the period of arbitration was to be calculated as from the date when the formation of the tribunal was settled upon receipt of the needed confirmation from the second respondent. The tribunal reasoned that it was unable to actually begin the proceedings during the period when the formation of the tribunal was provisional.⁽¹⁾

The position of the arbitral tribunal in the above-mentioned case should be followed. Indeed, article 16 implicitly supports this position since it requires the Secretary General to refer the case to the arbitral tribunal upon its formation “in accordance with the preceding articles.” The reference to the “preceding articles” involves the procedures of appointment of arbitrators and objections to the appointment. As such, referring the case to the tribunal under article 16 envisages final appointment of the arbitrators with any objections thereto having been resolved.

Based on the above interpretation of articles 32 and 16 of the Regulation, the reference of the file of the case to the arbitral tribunal can be defined as getting the arbitral tribunal seized with the case in such a manner that enables it to actually begin the arbitral proceedings. Therefore, the sending of the file to the arbitral tribunal while the president of the tribunal is yet to be appointed does not constitute a due reference of the case, and the consequences of the reference under the Regulation will not ensue. Conversely, the fact that the formation of the arbitral tribunal has been duly completed does not trigger the period of arbitration under article 32 unless and until the file of the case is sent to the tribunal.

(1) Award of 14/11/2005 in the arbitration case number 13/2004 at the Centre.

Finally, it should be mentioned that the period of seven days upon the formation of the tribunal, during which the Secretary General is required to refer the file to the tribunal is – it is argued – organizational. That is to say, non-compliance with that period does not taint the arbitration process with a serious irregularity that might jeopardize the validity or enforceability of the award. It is clear, however, that, by limiting a period of seven days for the file to be referred to the tribunal, the Procedural Regulation urges the General Secretariat to expedite the procedure.

II. The Formation of the Arbitral Tribunal

Articles 10 and 11 of the Statute of the Centre contain a general framework for the formation of the arbitral tribunal. The relevant procedures are set out in more detail under the Procedural Regulation.

A. The Number of Arbitrators

According to article 10 of the Statute, the arbitral tribunal may be composed of a sole arbitrator or three arbitrators as the parties may agree in “the agreement of submission or the contract.” While article 10 refers to the contract, it seems that it means an arbitration clause inserted in the contract since the other possibility mentioned in the same article is “an agreement of submission” which indicates an arbitration agreement concluded separately from the main contract.

While article 10 empowers the parties to determine the number of the arbitrators, the parties are actually called to choose between a sole arbitrator and a three-member tribunal. This is affirmed by article 8 of the Procedural Regulation. Although the parties are not afforded ‘full autonomy’ to compose the tribunal of more than three members or of two members, it is believed that the number of arbitrators envisaged by the Statute is consistent with the prevailing practice whereby arbitration is conducted by a sole arbitrator or three arbitrators. As such, the approach

of the Statute regarding the number of arbitrators is not necessarily a restriction on ‘party autonomy,’ at least from the practical perspective.

If the parties fail to agree on the number of the arbitrators, article 8 of the Procedural Regulation provides that the Secretary General shall appoint a sole arbitrator, unless he considers that the nature of the dispute requires a tribunal comprising three arbitrators. This helps strike balance between the perceived interest of the parties in minimizing the costs of arbitration by appointing a sole arbitrator, on one hand, and the need to ensure justice which may be better served by a tribunal of three arbitrators in case of, for example, a complex subject matter that may warrant a multispecialty tribunal.

B. The Conditions of Arbitrators

The autonomy of the parties in commercial arbitration empowers them to choose arbitrators. National laws tend to avoid placing special conditions or qualifications of the arbitrator. However, article 11 of the Statute provides that arbitrators must satisfy three general conditions. These conditions are discussed in turn.

B.1. Specialization and experience:

According to article 11, an arbitrator must be a qualified lawyer or judge or a person with advanced experience or broad knowledge in trade, industry or finance. These qualifications harmonize with the subject-matter jurisdiction of the Centre relating to commercial disputes and the Economic Agreement. Notably, article 11 suggests that judges may be appointed as arbitrators, without distinguishing between serving and retired judges.

By necessary implication, article 11 assumes that an arbitrator must have legal capacity and be educated. Otherwise, it is inconceivable

that the qualifications envisaged by article 11 could be present. These conditions apply independently from the agreement of the parties.

B.2. Good reputation and morals

The second condition mentioned in article 11 of the Statute concerns the integrity and impartiality of the arbitrator. An arbitrator has to be of “good reputation and morals”. It would be impracticable to require positive evidence of “good reputation” and “morals”. These conditions have to be presumed unless and until proof to the contrary has been established.

However, national arbitration laws may require that the arbitrator must have a plain criminal record and not bankrupt as an objective indication on good reputation.⁽¹⁾ Since serious criminal convictions and bankruptcy can undermine the trustworthiness of a person, they conflict with the conditions of good reputation and morals. As such, the Statute can also be interpreted as implicitly requiring arbitrators to be free from such causes of mistrust.

B.3. Independence of opinion

It is generally required that an arbitrator must be independent from the parties to the dispute. Article 11 of the Statute refers to this condition, requiring the arbitrator to have “independence of opinion.” In other words, an arbitrator must be independent in the sense of the individual

(1) Section 234 of the Bahraini law of civil and commercial procedures number 12 of 1971; section 206(1) of the UAE law of civil procedure; section 16 of the Omani Law number 47/97 relating to arbitration in commercial and civil disputes; section 193 of the Qatari law of civil and commercial procedures; section 174 of the Kuwaiti law of civil and commercial procedures number 38 of 1980.

aspects of judges' independence.⁽¹⁾ As such, the arbitrators are expected to be of a high caliber that enables them to decide in accordance with their own conviction.

The above-mentioned general conditions aim to guarantee the interests of the parties and to impart general confidence in the arbitration regime as a means of the administration of justice. Therefore, the parties cannot waive these general conditions. This is because article 4 of the Procedural Regulation, while empowering the parties to agree on applicable procedural rules, does not allow them to contract out of the powers of the Centre or the arbitral tribunal that are stipulated in the Regulation. And since the general conditions of arbitrators implicate the role of the Secretary General in appointing arbitrators, it is submitted that the parties cannot amend them by agreement.

Needless to say, that the general conditions of the arbitrators must be present at the time of appointment of the arbitrator and must exist throughout the arbitral process. If an arbitrator loses any general condition, *e.g.*, because of a supervening criminal conviction, the arbitrator will have to be replaced.

The parties may require additional conditions of the arbitrator under their agreement. Additional conditions may relate to the nationality of the arbitrator, as when the parties stipulate that the arbitrator shall be of a nationality other than that of each party. For instance, the ICC Rules of Arbitration of 2012 directs the Court of Arbitration of the ICC to take the nationality of the parties into consideration when appointing arbitrators.⁽²⁾

(1) On the individual aspects of judges' independence, as opposed to institutional independence, see the Bangalore Principles of Judicial Conduct adopted by the UN ECOSOC in 2002.

(2) Article 13(1) of the ICC Rules of Arbitration of 2012.

Likewise, the Rules of Arbitration of the London Court of International Arbitration provide explicitly that “a sole arbitrator or the presiding arbitrator shall not have the same nationality as any party unless the parties who are not of the same nationality as the arbitral candidate all agree in writing otherwise.” And “[t]he nationality of a party shall be understood to include those of its controlling shareholders or interests.”⁽¹⁾

This indicates that it would usually be preferable for the appointing authority not to appoint arbitrators of the nationality of either party. There is no reason why the Centre may not take similar considerations into account when exercising its power as the appointing authority.

C. The Procedures for Appointing the Arbitrators

Generally, the mechanism of appointing arbitrators under the Statute and Procedural Regulation is similar to the manner by which arbitral tribunals are composed under contemporary national arbitration laws. The underlying principle in this regard is respect for the autonomy of the parties while an appointing authority (a court under national laws or the Secretary General under the Statute) intervenes to support the process in case of failure of the parties’ own mechanism.

Article 11 of the Statute empowers the parties to appoint arbitrators, whether from the list of arbitrators accredited by the Centre or from outside this list. If the parties agree to refer the dispute to a sole arbitrator, the parties are required to appoint the arbitrator jointly within twenty days from the date of the submission of the answer to the request for arbitration. If the parties fail to appoint the arbitrator, the Secretary General shall make the appointment within two weeks upon

(1) Article 6(1),(2) of the LCIA Rules of Arbitration of 1998.

the lapse of the said twenty-day period, and shall notify the parties of the appointment.

In one arbitration case,⁽¹⁾ a sole arbitrator was to be appointed. The claimant suggested an arbitrator in his request for arbitration. The respondent nominated a different arbitrator. The Secretary General found that the parties have failed to agree on a sole arbitrator and, therefore, he appointed the arbitrator. It should be observed that the Secretary General is required by the Statute to choose arbitrators from the public list of accredited arbitrators at the Centre.

On the other hand, if the arbitral tribunal is to include three members, the claimant is required to nominate an arbitrator in his request for arbitration, and the respondent nominates one in the answer to the request for arbitration. In the cases involving multi-claimants or multi-respondents each side will be treated as one party for the purpose of nominating an arbitrator.⁽²⁾

To avert any delay in the formation of the arbitral tribunal, a time limit is set under the Procedural Regulation for each party to nominate an arbitrator. Thus, the claimant has to nominate an arbitrator in the request for arbitration or supply it within two weeks from the filing of the request. Upon the lapse of the two weeks from the filing, the Secretary General can make the appointment. Likewise, the respondent has to nominate an arbitrator not later than two weeks from the last date for the filing of his answer to the request for arbitration. Otherwise, the Secretary General would appoint the arbitrator.

Upon the appointment of the two arbitrators, the Secretary General requests them to appoint a third arbitrator who will preside over the

(1) The arbitration case number 3/2009 at the Centre, decided on 1 September 2005.

(2) Article 13 of the Procedural Regulation.

tribunal. If the two arbitrators fail to choose a third arbitrator within twenty days from the date of receipt of the request from the Secretary General, the latter will make the appointment.

It should be noted that article 21 of the Statute allows the parties to authorize the Secretary General to form the arbitral tribunal, in which case the Secretary General will, it appears, appoint all the arbitrators. Further, the power of the Secretary General to assist in the formation of the arbitral tribunal falls within the scope of the exclusive jurisdiction of the Centre, which has been discussed in Chapter 2. As such, courts of Member States lack jurisdiction to appoint arbitrators on the basis of their respective national laws upon request from either party. However, the principle of ‘party autonomy’ empowers the parties to agree to designate a national court as an appointing authority so that the court can act, if it accepts the designation, on the basis of the agreement of the parties rather than the national law.

The following observations can be made regarding the mechanism of appointing arbitrators under the Statute and Procedural Regulation.

While the Statute contains general conditions that arbitrators must satisfy, and which the parties may not waive, the Statute does not provide an approval or confirmation by the Centre of appointed arbitrators. Unlike the Statute, the ICC Rules of Arbitration of 2012 empower the Court of Arbitration at ICC to confirm the arbitrators nominated by the parties.⁽¹⁾ Also, the Rules of Arbitration of the LCIA vest the arbitral institution with the authority to approve the party-nominated arbitrators and requires the nominees to supply their curriculum vitas to the institution.⁽²⁾

As the Statute sets out general conditions of arbitrators, it would have been plausible to combine these conditions with a verification procedure

(1) Article 13 of the ICC Rules of Arbitration of 2012.

(2) Article 5 of the LCIA Rules of Arbitration of 1998.

whereby the Secretary General ascertains these conditions and confirms the appointment of arbitrators accordingly, *e.g.*, upon reviewing the curriculum vitas of the nominated arbitrators. However, under the existing provisions of the Statute, the Secretary General may have an opportunity to verify the required conditions if either party files an objection to the appointment of an arbitrator in accordance with article 14 of the Procedural Regulation (which is discussed later).

Article 12(1) of the Procedural Regulation requires the Secretary General to choose arbitrators from the list of accredited arbitrators at the Centre. This requirement is not mentioned in other articles dealing with different instances of the Secretary General's intervention to complete the formation of the tribunal. It seems, however, that the intention of the drafters of the Statute was to have arbitrators selected by the Secretary General from an accredited list.

This intention can be discerned from the fact that the Statute requires the Centre to have and make public a list of accredited arbitrators. In any event, it is submitted that the Secretary General can disregard this requirement with the consent of the parties. For example, the Secretary General may ask each party to nominate a specific number of arbitrators so that the Secretary General will make appointment out of the nominated arbitrators.

Although the Statute and Procedural Regulation contain no explicit mention of a written acceptance by the arbitrators of the arbitral mission, arbitrators are required to express their acceptance in writing as a customary rule of commercial arbitration. The Secretary General requests such written acceptance from the nominated arbitrators. One can infer that the Procedural Regulation requires the arbitrators to express their position regarding their nomination, since article 15 provides that an arbitrator can be replaced if he declines the mission. In any event, the requirement of written acceptance is not generally an

essential formality for the constitution of the tribunal to be valid; it is simply a means of proof.⁽¹⁾

In fact, national arbitration laws tend to require arbitrators to record their acceptance of the arbitral mission in writing.⁽²⁾ The significance of this “written acceptance” is that it establishes the date of the appointment of the arbitrators; they cannot be removed thereafter other than in a prescribed manner. Hence, it is important to ascertain the date at which an arbitrator has been finally appointed.

By the same token, arbitrators appointed at the Centre have to declare that no conflict of interest arises from them acting as arbitrators in the relevant case and to disclose any circumstances that might affect their independence and impartiality.⁽³⁾ This is observed by the Centre as a customary rule and a professional requirement of arbitrators. Indeed, the Centre usually uses a special form for “the declaration of arbitrator’s independence, impartiality, and no conflict of interests.”

The Statute and Procedural Regulation do not provide for the organization and signing of “terms of reference” for the arbitral mission. “Terms of

(1) Abu Al-Wafa, *Arbitration*, p. 173.

(2) e.g., section 234 of the Bahraini law of civil procedure of 1971 relating to domestic arbitration; section 207(1) of the UAE law of civil procedure; section 16(3) of the Omani Law number 47/97 relating to arbitration in civil and commercial matters; section 195 of the Qatari law of civil and commercial procedures; section 178 of the Kuwaiti law of civil and commercial procedures number 38 of 1980.

(3) Cf section 16(3) of the Omani Law number 47/97 which provides that “The acceptance by the arbitrator of his arbitral mission must be in writing and he must disclose, upon accepting the mission, any circumstances that might give rise to doubts regarding his independence or impartiality, and the arbitrator must declare promptly to the parties and the rest of arbitrators any such circumstances that may arise after his appointment or during the arbitration proceedings.” See also section 16 of the Saudi Arbitration Regulation.

reference” is a document normally prepared and signed by the arbitrators and the parties at the outset of the arbitration proceedings to define the nature of the dispute and the questions to be determined by the arbitrators. It can also serve as evidence of the arbitrators’ acceptance of the arbitral mission.

Accepting the arbitral mission in writing and signing terms of reference are, in fact, common practice in commercial arbitration. Arbitrators do follow this practice as being an element of professional conduct without the need for a provision requiring them to do so.⁽¹⁾ However, introducing an explicit provision in the Regulation regarding written acceptance and disclosure would be advisable, at least to ensure that arbitrators file their disclosure timely. Article 11(2) of the ICC Rules of Arbitration of 2012 is a good example. It states that “. . . a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator’s independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator’s impartiality. . . .”

D. Replacement of Arbitrators

Supervening circumstances may occur in the course of the arbitration proceedings that may entail the need for the replacement of an arbitrator. The Procedural Regulation deals with the replacement of arbitrators in certain circumstances. Thus, article 15 of the Regulation provides that “[i]f an arbitrator dies or declines the mission or if a *force majeure* precludes him from fulfilling or continuing his mission, an arbitrator shall be appointed to replace him through the original manner

(1) The arbitration award of 1 September 2005 in the arbitration case number 9/2003 mentioned that the arbitrator has made a statement of disclosure sent to the Secretary General who notified the parties of the same.

of appointment.” However, article 15 does not refer to all possible situations in which an arbitrator will have to be substituted for another. Yet, the situations not referred to could be solved by analogy with the cases mentioned in article 15.

Thus, supervening incapacity of an arbitrator will obviously be a ground for the replacement of the affected arbitrator. Incapacity could be brought within the meaning of *force majeure* under article 15 of the Regulation. Indeed, *force majeure* should be interpreted as including or events and causes that prevent an arbitrator from carrying out his function *de jure* or *de facto*. Alternatively, analogy could be drawn with the death of an arbitrator to hold that incapacity is a ground for replacing him. The same analysis holds in respect of the insolvency of an arbitrator, which could also undermine the general condition of “good reputation” as explained above.

A special case may arise in respect of the president of the arbitral tribunal, if he has been appointed by the other two arbitrators. If the two other arbitrators have been replaced, it would appear that the president of the tribunal can no longer be regarded as appointed by the other (new) members of the tribunal. Therefore, in one case, the Secretary General has declared the post of the president of the tribunal to be vacant upon the removal of one member of the tribunal and the resignation of the other.⁽¹⁾

An arbitrator may also decline the arbitral mission. If this occurs by way of not accepting the nomination from its inception, the nominated person is considered never to have been appointed and the formation of the tribunal will be completed in accordance with the Procedural Regulation. However, if an arbitrator resigns during the arbitration process, a new arbitrator has to be appointed following the original procedure of appointing the outgoing arbitrator.

(1) Decision of the Secretary General Q/2014/266 of 2 June 2014.

The Procedural Regulation does not deal with the procedure of submitting an arbitrator's resignation or any constraints thereupon in terms of choosing an appropriate time to resign. However, practically and professionally, a resigning arbitrator must notify the parties, the other members of the tribunal, and the Secretary General. Article 17 of the Procedural Regulation refers to a particular instance of resignation. That is, upon the filing of a challenge to an arbitrator, the concerned arbitrator may resign as a pre-emptive measure to avoid the examination of the challenge.

Notably, the Procedural Regulation does not prescribe certain procedures and time limits for notifying the Secretary General in the event a replacement of an arbitrator is needed. Particularly, the Secretary General may have to investigate the facts that warrant a replacement of an arbitrator. For instance, if a party requests the replacement of an arbitrator on the ground that the arbitrator has been subject to insolvency proceedings, the Secretary General may reasonably notify the concerned arbitrator of the request and afford him the opportunity of providing a clarification or resigning. If the arbitrator does not resign and the investigation of facts is required, it is submitted that the Secretary General has residual authority to conduct such investigation on the ground of the exclusive jurisdiction of the Centre.

A question arises as to whether the Secretary General has the power to decide on an application submitted by either party for the removal of arbitrators. The Statute is silent regarding grounds and applications for the removal of arbitrators, as opposed to challenging an arbitrator based on doubts about his impartiality. For instance, national laws and the ICC Rules of Arbitration of 2012 provide that the failure of an arbitrator to fulfill his function entitles either party to seek his removal and replacement.⁽¹⁾

(1) Hamza Hadda, *Arbitration*, pp. 277-278; article 15(2) of the ICC Rules of Arbitration of 2012.

Grounds for the removal of arbitrators should be regulated by special provisions under the Procedural Regulation to define these grounds and prescribe the procedural aspects of removal applications. Indeed, grounds for removal of arbitrators differ from the circumstances of replacement mentioned in article 15, such as *force majeure*. Until such provisions are introduced, the provisions relating to the challenge to arbitrators could be utilized as they are not specifically linked to doubts about the arbitrator's impartiality as will be seen later (III.B).

Finally, an arbitrator can be replaced if all the parties agree on his removal. Although such an agreement may rarely occur, article 18(1) of the Procedural Regulation referred to it indirectly. It provides that an arbitrator shall be replaced if, upon a challenge to the arbitrator filed by one party, the other party does not raise objection to the challenge. As such, article 18(1) assumes that an implied agreement between the parties could emerge.

E. Disputing the Validity of the Appointment of Arbitrators

Article 14 of the Procedural Regulation allows the parties to dispute the validity of the appointment of arbitrators. Disputing the appointment of an arbitrator differs from challenging an arbitrator. The former relates to the procedural aspects of the appointment, while the latter implicates the impartiality of the arbitrator. For example, the appointment of an arbitrator may be disputed on the ground that the arbitrator does not satisfy one of the stipulated qualifications or conditions. Thus, a party argued that one arbitrator did not have experience in English law as required by the relevant arbitration agreement. However, the Secretary General found that the arbitration agreement required the arbitrators to have proficiency in English, not experience in English law.⁽¹⁾

(1) Award of 1 September 2005, arbitration case number 9/2003.

Article 14 provides that “[i]f either party disputes the validity of the appointment of any arbitrator, the Secretary General shall decide on the issue within two weeks by a final decision before the first hearing in the case takes place.” As such, the Secretary General has authority to decide on disputes arising over the appointment of an arbitrator. And this authority belongs to the exclusive jurisdiction of the Centre.

Disputing the validity of the appointment of an arbitrator should be distinguished from objecting to the validity the filing of a request for arbitration and the regularity of subsequent submissions and pleadings. The latter matters fall within the competence of the arbitral tribunal. The Secretary General has refused to consider such objections and referred them to the arbitral tribunal.⁽¹⁾

However, the Regulation does not set out in detail the procedural aspects for raising objections to the appointment of an arbitrator. Yet, it can be assumed that the objection may be filed by any means capable of being recorded. Also, the Secretary General would normally notify the parties and the concerned arbitrator with the dispute and seek their comments if appropriate. For instance, if there are more than one respondent, and one arbitrator is appointed from their side, a respondent could argue that he was not consulted about the nomination process. Seeking clarifications and comments from the respondents will be expected.

No specific time limit is fixed for raising an objection under article 14 of the Regulation. However, since the Secretary General is required to decide on the matter within two weeks and before the first hearing set by the tribunal, one can expect that an objection under article 14 may be inadmissible if it is filed shortly before the first hearing. It would be

(1) Article 6(6) of the Rules of Arbitration of Singapore Chamber of Maritime Arbitration of 2013 clarifies that disputing the validity or regularity of the filing of a request for arbitration does not hamper the formation of the arbitral tribunal.

much better if the Procedural Regulation is amended so as to clarify the procedural aspects of article 14 in specific terms.

If no dispute is raised regarding the validity of the appointment of the arbitrators, or if objections in this regard are raised and dismissed, the appointment of the arbitrators will be deemed valid from the procedural perspective. And further objections thereto will not be heard. However, circumstances may arise subsequently which may constitute a ground to challenge an arbitrator. Challenging an arbitrator will be examined in the next subsection.

III. The Guarantees of the Parties against the Arbitrators

The guarantees of the parties against the arbitrators are constraints that ensure trust in the integrity of the arbitral process. Under the Statute and the Procedural Regulation, one can list the following guarantees, which largely constitute duties of the arbitrators: the independence and impartiality of the arbitrators; the right of the parties to challenge the arbitrators; the duty of the arbitrators to treat the parties on an equal basis; the duty of the arbitrators to comply with the agreement of the parties; and the duty of the arbitrators to reason their award. These guarantees will be discussed further in turn.

A. The Independence and Impartiality of the Arbitrators

As explained earlier above, the Statute requires the arbitrators to be independent in their opinions. However, the independence of an arbitrator in terms of expressing honestly his own opinions remains an inward matter. Therefore, there must be some external aspects of the independence that are ascertainable and which can endorse the presumption of independence. These external aspects involve the independence of the arbitrator in relation to the parties, and the impartiality (or neutrality) of the arbitrator in respect of the subject matter of the dispute and its outcome.

A.1. The independence of the arbitrator *vis. the parties*

For an arbitrator to be considered independent from the parties in the dispute, he must not have such a relationship with either party that could raise doubts regarding his capability of ruling on an objective ground. The type (or lack) of a relationship between an arbitrator and either party becomes an indicator of the arbitrator's perceived independence.⁽¹⁾ Like many national laws, the Statute and Procedural Regulation do not define certain types of relationships that might automatically disqualify an arbitrator. This is a reasonable approach, since the autonomy of the parties entitles them to agree to an arbitrator notwithstanding a known relationship with one of the parties. (By contrast, judges may be automatically disqualified to decide a case if either party is, for instance, next-of-kin of the judge.)

To illustrate, if an arbitrator represents a party in a separate action in court, this may give rise to doubts about the arbitrator's independence - his client may revoke the power of attorney issued for him. However, if the arbitrator discloses this fact and the concerned parties to the dispute (supposedly) confirm their confidence in him, it seems that the arbitrator will remain qualified to hear the case.

It is recalled that the immunity afforded to the arbitrators under the Statute against legal actions relating to their function ensures their independence in relation to the governments of the Member States, which may be parties to arbitration at the Centre.

A.2. The impartiality of the arbitrator

An impartial arbitrator has no personal preference as to the result of the arbitration.⁽²⁾ As such, an external indicator of the impartiality of the arbitrator is not as much a matter of his relationship with the parties as

(1) Al-Ghamal and Abdel Aal, Arbitration, p. 608.

(2) Al-Ghamal and Abdel Aal, Arbitration, p. 607.

it is a question of whether the arbitrator benefits or loses depending on the outcome of the case.

Thus, if an arbitrator is a shareholder in a company that is party to the dispute, although as a shareholder the arbitrator is not subordinate to the company, he might indirectly make a loss or gain depending on the company's position in the case.

Since the independence and impartiality of arbitrators are essential, parties should have a remedy in case there are doubts as to these qualities of the arbitrator. This remedy takes the form of challenging the arbitrator with a view to replacing him.

B. Challenging Arbitrators

An arbitrator may be challenged by either party if doubts arise regarding his impartiality or independence. The Secretary General decides on such challenges in accordance with articles 17 and 18 of the Procedural Regulation.

A challenge may be upheld and the arbitrator displaced as a precautionary measure to safeguard the trust in the arbitral process, while the arbitrator may in fact be sincerely capable of deciding the case objectively and in accordance with the applicable law.

In his decision number Q/2014/266, the Secretary General has explained the nature and purpose of a challenge to an arbitrator, saying that:

“Arbitration, like the courts, administers justice and determines disputes; so, the basic guarantees in litigation are equally required for arbitration. Also, it is well settled that an essential aspect of justice is founded upon the parties’

perception of the trustworthiness of those who decide on their disputes, as judges or arbitrators.”

In light of this purpose of the challenge to an arbitrator, the Procedural Regulation does not require a challenged arbitrator to resign. Rather, an arbitrator may supply clarifications that demonstrate that doubts about his impartiality are frivolous or not based on valid grounds. The following paragraphs elucidate the procedural aspects of a challenge to an arbitrator before the Secretary General.

B.1. The grounds for challenging an arbitrator

Article 17 of the Regulation provides that “[e]ach of the parties may file an application to challenge any arbitrator for reasons to be set out in the application. The application shall be filed with the Secretary General.” Unlike many national laws and institutional rules of arbitration, the Procedural Regulation does not link the grounds for challenging an arbitrator with there being doubts regarding his impartiality or independence. Therefore, a party filing a challenge to an arbitrator will have to articulate the alleged grounds for the challenge.

As such, facts that may justify the removal of an arbitrator under national laws, *e.g.*, arbitrator’s failure to act, can be relied on for the purposes of challenging an arbitrator. This is because the Procedural Regulation does not deal with the removal of arbitrators.

In one arbitration case, the arbitrator disclosed some circumstances that might give rise to doubts regarding the existence of conflict of interest. The respondent filed a challenge to the arbitrator on the ground that there was possibly a conflict of interest on the side of the arbitrator. Upon receiving a notification from the Secretary General, the arbitrator did not resign and submitted clarifications to show that the relevant

circumstances did not affect his independence and impartiality. The Secretary General upheld the respondent's application "to guarantee due process."⁽¹⁾

In another case, the claimant filed an application to challenge the president of the arbitral tribunal. The application was based on the allegation that the president violated the rules of arbitration by admitting a counterclaim filed during the proceedings while it should have been submitted with the answer to the request for arbitration according to article 11 of the Regulation. The Secretary General found that the arbitrator acted within the powers of the tribunal in light of article 26 of the Regulation and the provisions of the Bahraini law of civil procedure which supplemented the Regulation.⁽²⁾

By retaining the application and examining it on the merits, the Secretary General has impliedly confirmed that a challenge could be based on grounds like the non-compliance with the rules of arbitration, at least if such non-compliance insinuated a preferential treatment of either party. However, mere disagreement or dissatisfaction with a procedural decision of the arbitral tribunal is not a good ground for challenging an arbitrator.

Thus, a claimant challenged the president of the arbitral tribunal on the ground that he allowed the submission of documents after the closing submissions had been filed with the tribunal. The Secretary General dismissed the challenge since the action taken by the tribunal was within its powers under articles 24 and 26 of the Regulation.

(1) Decision of the Secretary General number Q/2014/266 of 2 June 2014. The archive of the Centre also indicates that the Secretary General accepted a challenge to an arbitrator on the ground that he was a relative of one of the parties.

(2) The decision of the Secretary General number Q/2013/130 of 28/10/2013.

B.2. The procedures for challenging an arbitrator

The Procedural Regulation does not specify time limits for filing an application to challenge an arbitrator. It is recommended, however, to amend the Regulation so as to set time limits to be triggered by the occurrence or knowledge of the ground for the challenge invoked in the application. While the continuous participation by a party in the arbitration process without raising objections to an irregularity is usually interpreted as waiving the relevant irregularity, setting a time limit for challenging an arbitrator helps in determining when a party can be deemed to have waived such a challenge.

Similarly, the Regulation contains no details of the procedural aspects of the Secretary General's examination of the application. However, since article 18(1) of the Regulation refers to the possibility that the other party may agree with the challenge or the arbitrator may resign, it follows by necessary implication that the Secretary General should notify the parties and the arbitrators with the application to challenge an arbitrator. They should be allowed a period of time to supply their views and comments to the Secretary General.

The Secretary General is required to decide on the application within three days from the date of receipt of the same. This period seems unrealistic since it does not allow reasonable time to serve notify the arbitrators and the parties and receive their comments. Yet, the Regulation does not stipulate that the decision of the Secretary General will be rendered null if he does not adhere to the said period. Therefore, the Secretary General may set deadlines for the parties and the concerned arbitrators to submit their observations regarding the application.

Also, the Secretary General should conduct a formal examination of applications filed to challenge arbitrators, albeit without being required to do so under the Regulation. A formal examination would reveal

whether an application is frivolous and worthy of dismissal without examining it on the merits. For instance, if the application states general reasons for the challenge without providing underlying, plausible facts, *e.g.* a general reference to impartiality or preferential treatment without setting out facts casting doubt on the arbitrator, the Secretary General may rule that the application is inadmissible.⁽¹⁾

Likewise, the Secretary General may consider the timing of the application and whether it was filed long after the party had known of the relevant facts and continued to participate in the arbitral process. In such a case, the party may be deemed to have waived the challenge.

The decision of the Secretary General shall be notified to the parties and the concerned arbitrator.⁽²⁾ If the challenged arbitrator is removed, a new arbitrator will be appointed in accordance with the nomination process under the Regulation.

Finally, it should be noted that authorizing the Secretary General, instead of the courts, to receive and decide on applications to challenge arbitrators aims to expedite the arbitral process and to reinforce the autonomy of the Centre. A similar approach is adopted under the Rules of Arbitration of the Singapore Chamber of Maritime Arbitration, where the Chairman of the said Chamber decides on applications to challenge arbitrators by a final, non-appealable decision.

(1) The archive of the Centre shows that the Secretary General has rejected three applications to challenge arbitrators as he found them not to be founded upon “essential reasons.”

(2) Article 18(3) of the Procedural Regulation.

C. Procedural Guarantees Regarding the Conduct of the Proceedings

The arbitral tribunal has a duty, according to article 5 of the Procedural Regulation, to ensure “all the rights of defence for the parties of the dispute and shall treat them on an equal basis and give each of them, throughout the whole process, the full opportunity to present his case.” Article 5 recognizes common procedural guarantees forming rules of public policy as they are essential for due process. These procedural guarantees include the right of defence, equal treatment of the parties, affording each party full opportunity to present its case.

As regards the right of defence, respect for it rests on due notification procedures, and the communication to each party of the pleadings, evidence, and documents submitted by the other. Equal treatment involves prohibiting arbitrators from communicating with the parties separately. Also, each party should be allowed to see the evidence submitted by the other.

The combined effect of the respect for the right of defence and ensuring equal treatment of the parties should be, in fact, that each party enjoys a full opportunity to present his case. However, for the parties to have a full opportunity to present his case, the arbitral tribunal has an implied duty to choose reasonable procedures to administer the arbitration process. For instance, the arbitrators need to afford the parties reasonable time to submit their pleadings. Also, the tribunal should make reasoned decisions if it decides not to admit new documents, submissions or evidence.

D. Reasoning the Awards

As a general rule, the arbitral tribunal has to make a reasoned award. The reasoning of the award can demonstrate the arbitrators’ respect for the

procedural guarantees mentioned above. Thus, the arbitrators discuss the main arguments of the parties and articulate how they reached to the conclusion embedded in the award. The Procedural Regulation does not state that the parties could dispense with the requirement of reasoning the award. However, if the parties authorize the arbitrators to decide on the dispute *ex aequo et bono*, this authorization could be interpreted as waiver of the reasoning of the award, since the arbitrators will then have the power not to apply *the law*.

Notably, article 36 of the Regulation does not mention the omission of any reasoning from the award can be a ground for the refusal of the enforcement of the same. Yet, making an unreasoned award may be viewed as deviating from the agreement of the parties which require the application of the Procedural Regulation, including the need for making reasoned awards. Indeed, if the absence of the reasoning of the award is not a ground for refusing the enforcement of the award, the requirement of reasoning under the Procedural Regulation would become devoid of any value.

IV. The Applicable Procedural Law

To determine the legal rules governing the procedures of arbitration at the Centre, it is appropriate to recap on the legal nature of the Statute which was articulated in Chapter 1. The Statute is an international convention concluded between the Member States of the Cooperation Council. Each Member State has to put the Statute into force as legally binding rules under its legal system.

Therefore, the courts of some Member States have described the Statute, as incorporated into their respective legal systems, as a special law that binds the general national law relating to arbitration. It follows that the Statute applies to the procedures, while national laws may still be relevant for the arbitral proceedings.

A. The Statute of the Centre as the Procedural Law

The legal rules that constitute the procedural law governing the arbitration process at the Centre are the provisions of the Statute (and the Procedural Regulation issued thereunder) themselves. In other words, unlike arbitration agreements incorporating the ICC Rules of Arbitration for instance, the provisions of the Statute and the Procedural Regulation are not to be viewed as contractually binding terms incorporated into the arbitration agreement; rather, they are the procedural *law* which has been chosen by the parties by agreeing to arbitrate at the Centre.

Article 13 of the Statute provides that arbitration at the Centre “shall be conducted in accordance with the Regulation of Procedures of the Arbitration Centre unless otherwise stated in the contract.” Besides, article 4 of the Procedural Regulation states that:

“Arbitration at the Centre shall be conducted in accordance with this Regulation unless otherwise stated in the arbitration agreement; the parties may choose additional procedures of arbitration before the Centre provided that such shall not affect the powers of the Centre or the arbitral tribunal as stated in this Regulation”

By submitting to the Centre’s jurisdiction, then, the parties choose the Statute and Procedural Regulation to govern the arbitral process. However, it is clear from the above-mentioned provisions that the Statute and Procedural Regulation apply as legal rules rather than contractually incorporated terms. This is evident from the restriction laid down on the parties not to affect (remove) any powers of the Centre and the arbitral tribunal under the Statute.

An example of the powers of the Centre that the parties may not contract out is the power of the Secretary General to appoint arbitrators or extend the period of arbitration. As for the arbitral tribunal, its powers deriving

from the Statute and Regulation include its power to decide on its own jurisdiction and to interpret and correct the award.

Questions arise, however, as to whether the parties may choose a national law to govern their arbitration at the Centre. Also, what powers of the Centre and the arbitral tribunal the parties cannot contract out or choose rules that “affect” them? Further, apart from the powers of the Centre, are there any mandatory rules under the Statute? And what if the Statute and Procedural Regulation are silent as to certain procedural matters? The following paragraphs seek to answer these questions.

B. Whether the Parties Can Choose a National Law as the Procedural Law

The parties may stipulate some procedural rules in the arbitration agreement. As contractual terms, these rules will apply to the extent they do not contravene mandatory provisions of the Statute. However, instead of stipulating specific rules of procedure of their choosing, the parties simply agree to arbitrate before the Centre, while submitting the arbitral process to a national law. In this case, a question arises as to the relationship between the chosen procedural law and the Statute of the Centre.

It is submitted here that the chosen procedural law should be treated as contractual terms incorporated into the arbitration agreement. Again, contractual terms relating to the procedures of arbitration would apply to the extent they are not conflicting with the Statute. This view receives support from the practice under national laws, where the parties may choose a national law other than the law of the seat of arbitration to govern the procedures of arbitration. The law of the seat would,

generally, give way to the chosen law provided it does not contradict mandatory rules of the law of the seat.⁽¹⁾

For example, the chosen national law can apply in respect of the language of arbitration and the notification of the parties, these not being subject to mandatory provisions in the Statute. By contrast, if the chosen national law empowers the courts of the seat to remove arbitrators, this rule could not apply since it contradicts the mandatory exclusive jurisdiction of the Centre which includes the determination on the challenges to the arbitrators.

In fact, the parties may spell out their intention to give priority to the provisions of the Statute and Procedural Regulation. This can occur if the parties refer to a national procedural law to apply in respect of matters not referred to in the Statute or Regulation.⁽²⁾

C. Provisions of the Statute and Regulation that the Agreement of the Parties May not “Affect”

Article 4 of the Procedural Regulation, while empowering the parties to agree to procedural rules of their choosing, prohibits agreements that “affect” the powers of the Centre and the arbitral tribunal. There is a need to clarify what powers may not be affected. Also, it is asked whether the word “affect” includes removing as well as increasing the powers of the Centre. Further, it will be asked whether there are other mandatory provisions not relating to *powers* of the Centre.

C.1. Powers of the Centre and arbitral tribunal

It can be said that the powers of the Centre referred to in article 4 of the Regulation, which may not be removed or restricted by agreement,

(1) Hamza Haddad, *Arbitration*, p. 322.

(2) Arbitration case number 4/2002 at the Centre.

include the powers of the Secretary General provided for in the Statute and Regulation, such as appointing arbitrators, deciding on challenges to arbitrators, and extending the period of arbitration. Further, the procedural rules pertaining to the exercise of the said powers of the Secretary General seem to be mandatory. For example, the time limits for nominating arbitrators by the claimant and the respondent; the power of the Secretary General is linked with these time limits as explained above. The same analysis should apply in respect of removing or restricting powers vested in the arbitral tribunal by virtue of the Statute and the Regulation.

However, the parties may, arguably, confer additional powers on the arbitral tribunal but not the Centre. This is because the Centre is established by virtue of a convention and, as with statutory bodies, the constituent instrument of the relevant body defines its authority and powers. Such instruments are not, generally, capable of being modified by private agreements. Therefore, it seems that the parties cannot grant additional powers to the Centre not envisaged by the Statute.

The question of additional powers takes a different manner regarding the arbitral tribunal. Arbitrators primarily derive their powers from the parties' agreement. As such, the parties may agree to authorize the arbitral tribunal to take some actions not mentioned in the Statute and Regulation. For example, the parties may agree that the president of the tribunal should have the power to make unilateral procedural orders relating to the conduct of the proceedings and that the tribunal may decide to terminate the arbitration procedures without making an award on the merits if it turns out that the process has become futile (*e.g.*, if the claimant abandons the proceedings).

However, additional powers that may be granted to the arbitrators by the agreement of the parties must not conflict with the powers of the

Centre. For instance, the parties cannot authorize the tribunal to decide on any challenge to one of its members.

That the Regulation restricts the freedom of the parties to modify the powers of the Centre and the tribunal is not unjustifiable. It can be argued that these restrictions aim to help the Centre achieve its objectives. Thus, the Centre aims to provide speedy arbitration procedures free from judicial intervention. Towards that end, some powers have been afforded to the Secretary General that would otherwise be exercised by national courts. It is reasonable to ensure that these characteristics of the arbitral mechanism of the Centre are not weakened by various arbitration agreements.⁽¹⁾

C.2. Mandatory provisions other than the powers of the Centre and the arbitral tribunal

While article 4 of the Procedural Regulation restricts the ability of the parties to contract out of the powers of the Centre and the arbitral tribunal, a question arises as to whether the Regulation contains other mandatory provisions not related to the powers of the Centre or the tribunal. The question is evoked because some provisions of the Regulation expressly empower the parties to agree to modify the rules contained therein, *e.g.*, paragraphs (a) and (b) of article 6 and article 7 apply “unless the parties agree otherwise . . .”. However, other provisions put do not contain such explicit permission for the parties to “agree otherwise;” as such, they could be regarded as mandatory provisions.

The provisions which are, apparently, mandatory are limited. They are article 5 (duty of the arbitrators to treat the parties equally and respect

(1) The Washington Convention of 1965, too, contains restrictions on the freedom of the parties to choose procedural rules. Chosen procedural rules may not contradict the Convention. See Moshe Hirsch, *The Arbitration Mechanism*, p. 113.

their right of defence), article 8 (the choice between a sole arbitrator and a three-member tribunal), article 11 (the time limit for filing the answer to the request for arbitration), article 34 (reasoning the award), and the provisions relating to the finality of the award without there being an action to annul it. These provisions will now be examined more closely to discern whether they are really mandatory.

Articles 5, 8, 11

To start with article 5, it contains a principle of procedural public policy. Thus, the equal treatment of the parties and respect for their right of defence constitute a guarantee for due process. This has been explained in subsection III.C above of the present chapter. As such, it is justifiable that the parties cannot waive these guarantees. Indeed, it is difficult to imagine that parties could agree to procedures that jeopardizes either party's right of defence and equal opportunity to present its case.

As regards the rule pertaining to the number of arbitrators according to article 8(subsection II.A of this chapter above), it is clear that parties can choose between a sole arbitrator and a tribunal comprising three arbitrators. However, this restriction on the parties' freedom to determine the number of arbitrators is, generally, of trivial practical significance. This is because arbitral tribunals tend to be formed as a sole arbitrator or three-member tribunals. As such, the limitation to the autonomy of the parties under article 8 is mostly theoretical as it harmonizes with the prevailing preference of the parties in reality.

As far as article 11 relating to the time limits for the filing of the answer to the request for arbitration, which the Regulation seem to treat as 'a statement of defence,' It is recalled that the Secretary General may extend the period according to article 11. The fact that this period can be extended indicates that the time allowed under it is not rigid and is intended to organize the conduct of the proceedings with due regard

to the right of defence. It is submitted, therefore, that the parties may agree to a longer period for the submission of the statement of defence. This is because the extension of this period does not jeopardize the requirements of due process. Rather, it may afford the respondent a better opportunity to present its case.

Making reasoned awards

It seems that the requirement of making reasoned awards may not be waived by the parties. This is because the reasoning of the award can be regarded as a guarantee for the compliance by the arbitrators with their duties relating mainly to applying the law chosen by the parties and the perusal of each party's arguments and evidence. And the court before which the enforcement of the award is sought is required to check the compliance by the arbitrators of the said duties. Since the reasoning of the award mirrors the compliance or non-compliance by arbitrators of these duties, reasons of the award are effectively the basis for the formal review of the award.

The author takes the view that the dispensation with the reasoning of the award detracts from the feasibility of the judicial review of the award. It follows that the parties may not agree to waive the requirement of reasoning the award.

The finality and enforceability of the award

The main characteristic of the arbitration mechanism of the Centre is that the enforceability of the award in the Member States is no dependent on the validity of the award under the legal system of the seat of arbitration. The Statute provides for no action to annul the award in the seat of arbitration. It is inconceivable, therefore, to expect the Statute and Procedural Regulation to empower the parties make agreements to undermine the said characteristic. Further, since the Member States implement the Statute as part of their respective legal systems, thus

requiring their courts not to retain an action to annul the award, the parties may not confer jurisdiction on the courts that their laws have ruled out.

An arbitration tribunal has confirmed that the finality and enforceability of an arbitration award is a matter determined in accordance with the Statute. In the arbitration case number 49/2010 at the Centre, a party argued that the award could conflict with a decision of a court in a pending action involving a third party and facts related to the subject matter of the dispute before the tribunal. That party asked the arbitral tribunal to include in the award, if issued against it, an order that its enforcement may not be sought until that action in court is decided. The arbitral tribunal rejected the request on the ground that it lacked authority to make such a qualification to the award. As such, the finality of the award under the Statute is not a procedural question that can be modified by the tribunal or, it is submitted, by the agreement of the parties.

D. Supplementing the Statute of Procedural Regulation

In the cases where the Statute and Procedural Regulation may be silent as to some procedural matters, the arbitral tribunal must follow the rules agreed upon by the parties. According to the principle of the autonomy of the parties prevailing in commercial arbitration, the agreement of the parties can supplement the Procedural Regulation. However, an arbitral tribunal may face procedural questions that are not provided for in both the Regulation and the agreement of the parties. In such situations, the Procedural Regulation may be supplemented by procedural orders of the tribunal, the law of the seat of arbitration, and the principles of procedural public policy (requirements of due process).

D.1. Procedural orders of the arbitral tribunal

The judicial function of the arbitral tribunal empowers the arbitrators to issue procedural orders to ensure the proper administration of justice.

This power of the arbitrators is necessary since it enables the arbitrators to function despite gaps that may appear in the applicable procedural rules and the agreement of the parties. However, an arbitral tribunal should normally invite the parties to agree to fill in the gaps and, failing such an agreement, the tribunal should lay down appropriate rules of procedure that conform with the duty of the arbitrators to treat the parties equally and ensure them full opportunity to present their cases.⁽¹⁾

For instance, a party may ask the tribunal to allow it to amend its motions previously submitted or to file additional claims or counterclaims. Since the Procedural Regulation does not explicitly afford or deny the parties the opportunity to amend or supplement their claims and counterclaims, the tribunal will have to make its own decision on this procedural issue. In the arbitration case number 49/2010, the arbitral tribunal ruled that:

“The duty of respecting the right of defence does not preclude the tribunal from organizing the use of this right. The tribunal may set deadlines for the parties to submit their memorials and documents; if a memorial or document is filed with the tribunal beyond the deadline, the tribunal may reject it as inadmissible and disregard the submissions contained therein as if they were never presented before the tribunal. This approach is not a breach of the right of defence. The tribunal may even exercise this power without adhering to the deadlines fixed in the agreement of the parties so long as the tribunal affords each party the opportunity to answer the submissions filed by the other party within a reasonable period of time.”⁽²⁾

(1) Hamza Haddad, *Arbitration*, p. 321.

(2) Award of 1 September 2012 in the arbitration case number 49/2010 at the Centre.

The above-quoted decision indicates that the tribunal may make procedural decisions to draw certain rules of procedure subject only to the principles of due process. An arbitral tribunal may, then, decide that the parties have to attend a hearing in person so that the tribunal may examine them on certain points.⁽¹⁾ Also, if the tribunal decides to appoint an expert, the tribunal will determine the procedure and timeframe for his mission and cross-examination, which matters are not detailed in the Procedural Regulation.

D.2. The relevance of the law of the seat of arbitration

In Chapter 1, it has been shown that the Statute is an international convention that is received as binding legal rules into the national legal system of Member States. As such, the Statute has the legal value of domestic law and applies as a special law that binds the general national arbitration law.⁽²⁾

Since the national arbitration law of the Member States is viewed as a general law overridden by the Statute, the procedural rules of the national law can be applied in respect of the matters not regulated by the special law, *i.e.*, the Statute. For instance, in the arbitration case number 30/2008, notifying the respondent in person with procedural notices was not possible. The arbitral tribunal decided to follow the rules of notification under the Bahraini law of civil procedure, the seat of arbitration being in Bahrain.⁽³⁾ Similarly, in examining an application to challenge an arbitrator on the basis of violating the rules of procedures,

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- (1) The Procedural Regulation does not refer explicitly to the power of the tribunal to interrogate the parties. However, article 24 of the Regulation mentions the power of the tribunal to carry out such investigations as it may deem appropriate.
 - (2) Decision of the Supreme Court of Kuwait (commercial) cited in *Majallat Al-Taḥkīm Al'Alamīyah* (2009) issue 2, pp. 303-309.
 - (3) Award of 31/10/2009 in the arbitration case number 30/2008 at the Centre.

the Secretary General has resorted to the Bahraini law to determine whether an arbitral tribunal could admit counterclaims during the arbitral process.⁽¹⁾

However, the rules of the national law of the seat of arbitration are applied as supplementary rules only. As such, they are subject to the rules and purposes of the Statute. As such, even the mandatory rules of the national law of the seat would not be applicable if they are inconsistent with the Statute and Procedural Regulation. For instance, the conditions of the arbitrator under the Saudi Arbitration Regulation requiring an arbitrator, or at least the president of the arbitral tribunal, to be qualified in law and *Shari'ah* are inapplicable in arbitration at the Centre.

In any event, the role of the national law of the seat of arbitration should not be exaggerated. Indeed, the possibility of resorting to the law of the seat is largely theoretical since the procedural questions which the Procedural Regulation and the agreement of the parties may not cover are very limited.

D.3. The impact of procedural public policy

Procedural public policy includes principles relating to due process. These have been considered above as procedural guarantees involving the right of defence and the equal treatment of the parties. These principles provide guidance on possible options to fill in gaps in the Procedural Regulation and the agreement of the parties.

For instance, the Statute and Procedural Regulation make no mention of the possibility of filing challenges to appointed experts. Article 24 of the Procedural Regulation empowers the arbitral tribunal to appoint experts, and article 22(5) of the Regulation authorizes the tribunal to admit or

(1) Decision of the Secretary General number Q/2013/130 of 28/10/2013.

reject evidence. However, the Regulation contains no rules to govern the procedures whereby either party may request the replacement of an expert on grounds similar to those pertaining to challenging an arbitrator. Since affording the parties the opportunity to seek the replacement of an expert ensures due process, the arbitral tribunal can set procedural rules to examine and decide on this matter in conformance with the principles of procedural public policy.

The practice of arbitral tribunals at the Centre confirms the possibility of challenging experts. For instance, the arbitral tribunal in the case number 35/2008 upheld a challenge to an expert and decided to replace him. Even with no explicit provision, the practice of the arbitral tribunals is to be endorsed since it is consistent with the requirements of due process and the autonomy of the arbitrators who have the power to appoint experts in the first place. .

Finally, it should be realized that reference here is made to international principles of procedural public policy. This is in line with the international nature of the mechanism of arbitration of the Centre. Therefore, national rules of procedural public policy are irrelevant for the arbitration proceedings under the Statute. For instance, the mandatory rule of national law that an award must be formally made in the name of a certain authority of the country in which the arbitration is seated, or that the award must be issued in a particular language or deposited with a certain court so as to become legally binding, do not apply to the award issued in accordance with the Statute.⁽¹⁾

(1) Likewise, national procedural public policy does not apply to ICSID arbitration held in accordance with the Washington Convention of 1965. See Moshe Hirsch, *The Arbitration Mechanism*, p. 114.

V. The Seat of Arbitration

The “seat of arbitration” may be understood in two different ways. First, it may refer to the geographical venue of arbitration. Alternatively, it means the legal system to which the parties have agreed to attach their arbitration. The latter sense, which can be called the juridical seat of arbitration, is the object of this subsection.

The English Arbitration Act of 1996, for instance, concentrates on the juridical seat of arbitration, as opposed to the geographical seat. Section 3 of the said Act provides that the seat of arbitration is the juridical seat designated by the parties or the arbitral tribunal or any institution authorized in this regard by the parties.

However, the geographical venue and the juridical seat of arbitration may be confused in cases where the parties fail to designate a juridical seat expressly. At the stage of the enforcement of the award, the court may have to determine the juridical seat of arbitration and may be influenced by the geographical location of the proceedings or the issuance of the award.⁽¹⁾

A cardinal consequence of determining the juridical seat of arbitration is that the procedural law of the seat would be deemed to apply to the arbitral proceedings, including the validity of, and recourse against, the resulting award. By contrast, the geographical venue of arbitral hearings, deliberations, and even the signing of the award, does not necessarily result in attaching the award to the law of that venue.

The juridical seat of arbitration becomes of less significance, however, as far as arbitration under the Statute is concerned. This is because the Statute and Procedural Regulation cover most of the procedural aspects of arbitration and, combined with the agreement of the parties and

(1) Hamza Haddad, *Arbitration*, p. 329.

the procedural orders of the arbitrators to supplement the Regulation, resort to the procedural law of the seat of arbitration is minimal. (This was discussed in A.4. of this subsection IV.) Further, the Statute and Regulation recognize the finality of the award without providing a means of recourse against it. As such, the Centre has a self-contained regime of arbitration that is not dependent on the law of the seat. Hence, the importance of determining the juridical seat of arbitration is lessened to a great degree.

The insignificance of the juridical seat of arbitration at the Centre can be clarified through the model of ICSID arbitration. Under the Washington Convention of 1965, arbitration at ICSID is governed by rules stemming from the Convention apart from any national legal system. The venue of ICSID arbitration is a geographical location with no legal consequences for the procedural rules or the enforceability of the award.⁽¹⁾ The linkage between arbitration under the Statute of the GCC Commercial Arbitration Centre and its seat is virtually of the same nominal importance as in ICSID arbitration.

Nevertheless, article 6 of the Procedural Regulation does refer to the designation of “the seat of arbitration.” According to article 6(1) “The arbitral tribunal shall designate the seat of arbitration unless the parties agree otherwise.” Paragraph (2) of the same article signals the distinction between the juridical seat of arbitration and the geographical venue of the proceedings and hearings as it empowers the tribunal to convene sessions in any place it deems fit. Also, article 6(3) allows the arbitrators to hold their deliberations in any place. Affirming that the venues for hearings and deliberations do not affect the seat of arbitration, paragraph (4) of article 6 provides that “[i]n all circumstances, the award shall be considered to be made in the designated seat of arbitration.” As

(1) Georges R. Delaume, ‘ICSID arbitration proceedings’ *Berkely Journal of International Law* (1986) 4, p. 218, at 221-222.

such, article 6 recognizes the seat of arbitration in the juridical sense regardless of the geographical location of hearings and actual issuance of the award.

But, what consequences may ensue from designating a juridical seat for arbitration under the Statute, given the above clarification of its nominal importance? It seems that seat of arbitration is referred to as a ‘fall-back rule that can be needed in some exceptional cases or for purposes relating to the enforcement of the award in a Non-member State. While the enforcement of the award will be examined in detail in Chapter 4, it is appropriate here to consider two arbitral awards rendered under the auspices of the Centre that may shed light on the circumstances in which attaching the arbitral process to a juridical seat may be inescapable.

In the arbitration case number 30/2008, the arbitral tribunal considered that the seat of arbitration was in Bahrain, although the hearings were held in Cairo, Egypt, and the award was signed therein. This affirms the distinction between the juridical seat (in this case Bahrain) and the geographical venue (Cairo, in the same case). As such, the arbitral tribunal relied on the Bahraini law to supplement rules relating to the notification of the parties. Thus, the seat of arbitration has been referred to so as to determine the supplementary procedural law as explained above.

By contrast, in the arbitration case 67/2013, an arbitral tribunal rejected the idea that arbitration under the Statute was attached to a legal system of the seat of arbitration. According to the tribunal, the arbitral process and the award are subject only to the Statute and Procedural Regulation. Therefore, the tribunal held that, while the arbitration proceedings took place in Qatar, this State:

“While being the venue of the arbitral proceedings, it by no means is a juridical seat of the arbitration. There is a stark

distinction between the juridical seat of arbitration and its venue. A juridical seat is, from the procedural perspective, the geographical location in which, and under whose law, arbitration takes place. On the other hand, the venue of arbitration procedurally with which arbitration has only a geographical link without any connection between that place and the applicable procedural law, like the situation in the present case. This is why the award should not be issued in the name of a certain authority [of Qatar], and a clarification has been warranted as the award is issued in the context of the GCC Commercial Arbitration Centre of the States of the Cooperation Council of the Arab States of the Gulf located in the Kingdom of Bahrain.”⁽¹⁾

The arbitral tribunal in the case number 67/2013 seems to suggest that the seat of arbitration in the juridical sense is inapplicable to the arbitration under the Statute. While the position of the arbitral tribunal is understandable in light of the nature of the Statute as an international convention and is consistent with its objectives, it flies in the face of article 6 of the Statute which explicitly refers to designating the seat of arbitration.

The contradiction between the opinions of the two arbitral tribunals in the cases 30/2008 and 67/2013 may well be ostensible only. In fact, designating the juridical seat in one Member State makes no practical difference, since each Member State should have adopted the Statute as part of its legal system. As such, the Statute will be the special law governing the arbitral proceedings whether the seat is designated in Qatar or Bahrain or any other Member State. And the national law of that State will apply only in respect of (very few) “matters not regulated

(1) Award of 21/8/2013, quoting a legal opinion of Dr. Consultant Magdy Ibrahim Kassim previously provided to the Centre.

specifically under the Statute and Procedural Regulation”⁽¹⁾ or “to the extent permitted by the Statute.”⁽²⁾

In light of the exclusive jurisdiction of the Centre and the precedence of the Statute over national laws of Member States as explained in Chapter 2, linking the arbitral proceedings with the procedural law of a Member State designated as the seat of arbitration is a formality. This may explain, perhaps, why the arbitral tribunal in the case number 30/2008 referred to the law of Bahrain as a source of guidance on the manner of notification of the parties. The tribunal did not say unequivocally that the law of the seat was binding on it. This narrows the gap between this tribunal and the tribunal of the case 67/2013 which effectively said that the law of the seat was irrelevant.

Despite the general view that the arbitration proceedings under the Statute are not governed by the procedural law of the seat, it has been noticed that some arbitral tribunal followed the procedural law of the seat in a particular formality of the award, namely to make it “in the name of the head of State.” This is not a universal practice at the Centre, however. It is better interpreted as a legal precaution least such formalities be deemed supplementary to the Statute, especially that compliance with that formality did not contravene or contradict any provision in the Statute.

However, it is submitted that the formalities of the award under the laws of Member States are inapplicable. This is because the form of the

(1) Decision number 348/D/4 of 1432 H (2011 AD), the Saudi Board of Grievances (4th circuit); appeal number 671/2004, 23/11/2005, Supreme Court of Kuwait (commercial chamber), *Majallat Al-Taḥkīm Al’Alamīyah* (2009) issue 3, pp. 461-464; and Supreme Court of Kuwait (commercial chamber), *Majallat Al-Taḥkīm Al’Alamīyah* (2009) issue 2, pp.303-304.

(2) Appeal number 101/2010, 2 April 2012, Supreme Court of Bahrain, *Majallat Al-Taḥkīm Al’Alamīyah* (2013) issue 18, p. 277.

award is dealt with under articles 32-34 of the Procedural Regulation. As such, the form of the award has not been left for supplementary rules of the law of the seat, and any formalities not mentioned in the Regulation shall be deemed excluded. Indeed, this has been the implicit position of many arbitral tribunals which did not make the award in the name of any particular authority of the State of the seat. And this position has been upheld by the Supreme Court of Kuwait which ruled that the fact that arbitration under the Statute took place in Kuwait did not entail the application of Kuwaiti law of civil procedure in respect of issuing awards in the name of the head of the State.⁽¹⁾

Designating a seat of arbitration in accordance with article 6 of the Statute may, however, be more significant if the seat is designated in a Non-member State. A Non-member State will not be bound with the Statute as an international convention. As such, that State may regard the Statute as contractual terms incorporated in the agreement of the parties *subject to* its procedural law of the seat. (This has been considered in Chapter 1, section VIII.C.)

The foregoing discussion focused on the impact of designating a seat of arbitration on determining the procedural law governing the arbitration. However, designating a seat of arbitration will be relevant at the post-award stage. Thus, while the enforcement of the award in a Member State will always be governed by the Statute on the merits, the procedural aspects of the application for enforcement may vary in the same Member State depending on whether the seat of arbitration was within its territory or not. Also, for the enforcement of the award in a Non-member State, the seat of arbitration will resolve the question as to whether the New York Convention of 1958 applies. (The procedural

(1) Appeal number 668 of the year 2006 , 10 February 2009, Supreme Court of Kuwait (commercial chamber), *Majallat Al-Taḥkīm Al'Alamīyah* (2009) issue 3, pp. 451-454.

aspects of the application for enforcement in Member States and other States will be examined in Chapter 4.)

VI. The Jurisdiction of the Arbitral Tribunal to Decide on Its Jurisdiction

Arbitral tribunals and national legislatures endorse the principle that the arbitral tribunal has the power to decide on its own jurisdiction. This is known as the competence-of-competence principle. Article 20 of the Procedural Regulation affirms this principle, stating that:

“The arbitral tribunal shall have jurisdiction to decide on the allegation that it lacks jurisdiction. This includes the defences based on the non-existence of the arbitration agreement, its invalidity or termination or that it does not include the issue at dispute. These defences shall be raised in the first hearing before discussing the merits of the dispute.

It should be remembered that according to articles 14 of the Statute and article 2 of the Regulation read together with article 20 of the Regulation, the arbitral tribunal, once formed, has a pre-emptive authority to examine its jurisdiction before submitting this question to the courts of Member States. This has been explained in subsection IV.B of Chapter 2. Also, subsection I.B of the present chapter has discussed the role of the Secretary General in conducting *prima facie* examination of the arbitration agreement. The reader is referred to these sections for the avoidance of repetition.

To elaborate on the competence-of-competence principle under the Procedural Regulation, one should examine the authority of the arbitral tribunal to examine its jurisdiction *ex officio* or upon either party’s invocation of its lack of jurisdiction. Besides, the timing of making a decision on the tribunal’s jurisdiction and whether such decision is final should be clarified.

A. The Authority of the Arbitral Tribunal to Examine Its Jurisdiction Ex Officio

The authority of the arbitral tribunal to determine its own jurisdiction springs from the judicial nature of its function.⁽¹⁾ In other words, since the tribunal adjudicates on disputes, it is entitled to ascertain that the dispute referred to it falls within its jurisdiction. Moreover, it is a duty of the tribunal to endeavor to make an award that is capable of being enforced. As such, the tribunal has to satisfy itself that it has jurisdiction to make the award; otherwise it would not be enforceable. Therefore, while the power of the tribunal to determine its jurisdiction may well be justified as a matter of policy to avert tactical and frivolous allegations of lack of arbitral jurisdiction, the present author takes the view that that power, referred to as the competence-of-competence principle, is better founded on the judicial function of the tribunal.

It follows that the arbitral tribunal does not exceed its powers if it examines its jurisdiction on its motion without either party having argued that it lacked jurisdiction. Arbitral tribunals at the Centre have decided on their own jurisdiction *ex officio*.⁽²⁾ Thus, in the case number 28/2008, a claimant has initiated arbitration against a company and its manager. However, the arbitral tribunal decided on its own motion that the manager was not a party to the relevant arbitration agreement as he had signed it on behalf of the company and not in his personal capacity. As such, the arbitral tribunal refused to make an award of joint liability against the company and its manager.⁽³⁾

(1) A Broches: A Commentary on the UNCITRAL Model Law on International Arbitration, Kluwer Law and Taxation, Deventer (1990) p. 74.

(2) Arbitration cases number 11/2003; 49/2011 at the Centre.

(3) A similar approach was followed in the arbitration case number 30/2008 at the Centre.

Also, in the arbitration case number 53/2011, the arbitral tribunal held that it lacked jurisdiction over the representative of the respondent. Likewise, an arbitral tribunal found, in the case number 49/2011, that it had no subject-matter jurisdiction in respect of a motion to make a suspended award pending a relevant action in court.

The circumstances of a case may render it necessary for the arbitral tribunal to examine its jurisdiction on its own motion. For instance, if a respondent ignores the arbitral proceedings, the arbitral tribunal will have to verify the notification procedure as well as its jurisdiction to hear claims against the absent respondent.⁽¹⁾

Further, it is submitted that the arbitral tribunal at the Centre has to examine its subject-matter jurisdiction on its own motion in cases involving the Economic Agreement, since it has jurisdiction only over commercial disputes relating thereto under article 4 of the Statute. By the same token, the arbitral tribunal has to verify its personal jurisdiction, since the Statute stipulates that at least one party must have a connection with a Member State in terms of nationality or seat of juridical persons.⁽²⁾ An award outside the defined jurisdiction of the Centre carries the risk of being unenforceable or, at best, deemed to be a national arbitration of the country of the seat of arbitration.

It is worth noting that the duty of an arbitral tribunal to examine its jurisdiction *ex officio* has been affirmed by the ICC Rules of Arbitration of 2012. Article 6(3) of these Rules provides that the arbitral tribunal shall decide on its jurisdiction if the respondent fails to submit an answer to the request for arbitration or does not raise any defence relating to the lack of jurisdiction of the tribunal.

(1) Arbitration case number 30/2008 and number 55/2011. In the latter case, the tribunal found that it had no jurisdiction over one of the absent respondents.

(2) The jurisdiction of the Centre has been examined in Chapter 2 of this book.

B. Contesting the Jurisdiction of the Tribunal by Either Party

In answering a claim (or a counterclaim), a respondent may invoke a defence that the arbitral tribunal lacks jurisdiction to decide on the dispute or a certain matter or against a particular person not bound with the relevant arbitration agreement. Such defence must be submitted in writing, stating specific grounds for the alleged lack of jurisdiction. Article 20 of the Procedural Regulation mentions a number of possible grounds for the lack of arbitral jurisdiction. These include the non-existence of an arbitration agreement. This may be established if there was no arbitration agreement at all or if the respondent is a non-signatory to an existing arbitration agreement signed by and between other parties to the proceedings.

Also, a party may dispute the jurisdiction of the arbitral tribunal, alleging that the arbitration agreement is void for lack of capacity or authority on the side of a signatory thereto.⁽¹⁾ Or, it could be argued that the relevant arbitration agreement has terminated or that, upon the correct interpretation of it, the agreement does not cover the dispute referred to the tribunal.⁽²⁾

However, it seems that jurisdictional questions are not limited to the cases mentioned in article 20 of the Regulation. This is indicated by the same article which uses the term “include” when listing grounds for jurisdictional objections. One example of a jurisdictional defence not

(1) Arbitration case number 13/2004 at the Centre.

(2) The question of the interpretation of the arbitration agreement was raised in the arbitration case number 13/2004. In that case the respondent argued that the claimant relied on two contracts and that, while the two contracts were inter-related, only one thereof contained an arbitration clause. Also, the respondent argued that the arbitration clause covered only claims on contract not tort.

mentioned in article 20 is the failure of the claimant to exhaust a pre-arbitration stipulated means to resolve the dispute.⁽¹⁾

It should be recalled that allegations relating to the invalidity or termination of the main contract containing an arbitration clause are not jurisdictional matters. Rather, by virtue of the separability principle, such allegations go to the merits of the dispute which falls within the jurisdiction of the arbitral tribunal to make final decisions. (The separability principle has been explained in Chapter 2 of this book.)

According to article 20 of the Regulation, a challenge to the jurisdiction of the arbitral tribunal has to be raised at the first hearing before substantive consideration of the merits. Otherwise, the concerned party will lose the right to object to the arbitral jurisdiction. By referring to the substantive consideration of the merits in general, article 20 seems to assume that the party contesting the jurisdiction of the tribunal is the respondent and that the objection is raised at the outset of the proceedings. However, either party may object to the jurisdiction of the arbitral tribunal in respect of any application, claim or counterclaim submitted by the other. Here, in line with the timing of jurisdictional objections under article 20, the jurisdictional objection must be invoked before taking any further substantive step on the merits of the dispute. Belated jurisdictional objections will not be heard as the party who failed to raise them timely will be deemed to have waived them.

The possibility of waiving jurisdictional challenges evinces the fact that these challenges are not part of procedural rules of public policy. Obviously, since arbitration is consensual in the first place, the parties may agree during the proceedings to vest the arbitral tribunal with additional powers to decide no matters not envisaged initially by the arbitration agreement. It is recalled that an arbitration agreement in writing can emerge through the exchange of letters between the parties

(1) Arbitration case number 49/2011 at the Centre.

and, of course, this can apply in respect of the exchange of submissions before the arbitral tribunal.

A party may not lose the right to object to the jurisdiction of the tribunal, despite failing to contest its jurisdiction timely, if the tribunal decides to hear a late plea if the proper administration of justice so requires. Thus, the tribunal may admit a late challenge to its objection, *i.e.*, a plea raised after consideration of substantive issues on the merits, if the tribunal is satisfied that the concerned party had reasonable justifications for the delay in contesting its jurisdiction.⁽¹⁾

As the Procedural Regulation envisages that a challenge to the arbitral tribunal's jurisdiction may be raised before the tribunal, it must be recognized that the participation by either party in the formation of the tribunal does not deprive him from contesting its jurisdiction. This view is further affirmed by article 36 of the Regulation which allows a party to challenge the enforcement of the award on the ground that the arbitral tribunal lacked jurisdiction. Again, the right to object to the arbitral jurisdiction may be lost, however, if the conduct of the concerned party is interpreted as waiver thereof.

C. The Time of Making the Jurisdictional Decision

Arbitration laws usually entitle the arbitral tribunal to decide on challenges to its jurisdiction by a provisional award or, alternatively, to defer the jurisdictional question and determine it together with the merits.⁽²⁾ The Procedural Regulation does not specify the options open to the arbitral tribunal regarding the determination on its substantive

(1) Al-Gammal and Abdel-Aal, *Arbitration*, p. 649; section 22(2) of the Omani Law number 47/97 relating to arbitration in civil and commercial matters; section 20(2) of the Saudi Arbitration Regulation.

(2) e.g., section 16(3) of the Bahraini law number 9/1994 relating to international commercial arbitration.

jurisdiction. It is submitted that the silence of the Regulation in this regard should be interpreted as entitling the arbitral tribunal to take the approach it finds appropriate: either to decide on its jurisdiction by means of an award or join it to the substance of the merits and determine them in the final award. The parties may, however, agree to a particular approach which the tribunal will, then, have to follow.

The practice of arbitral tribunals at the Centre confirms this interpretation. In the arbitration case number 19/2006 and the case number 35/2008 the arbitral tribunal made an initial award affirming its jurisdiction. In other arbitration cases, arbitral tribunals have declared in the final award - and not by means of an initial award on jurisdiction - that they lacked jurisdiction in respect of one respondent.⁽¹⁾

In fact, since the Statute does not provide for a means of recourse against the award, the timing of the issuance of an award on the arbitral tribunal's jurisdiction becomes of little importance. Challenging the arbitral tribunal's decision on its jurisdiction can only occur in the course of challenging an application for enforcement of the final award.⁽²⁾

D. Review of the Arbitral Tribunal's Decision on Its Jurisdiction

While the arbitral tribunal has, under the Statute and Regulation, a pre-emptive power to examine its jurisdiction prior to courts' determination

(1) e.g., arbitration case number 55/2011.

(2) Even some national arbitration laws do not allow recourse against the award on jurisdiction except with a challenge to the final award on the merits. Other laws may allow challenging the jurisdictional award without waiting for the issuance of the final award on the merits. For example, section 16(3) of the Bahraini law relating to international commercial arbitration allows recourse against the award upholding the arbitral jurisdiction within thirty days from its issuance. By contrast, article 20 of the Saudi Regulation allows recourse against the jurisdictional award jointly with the final award on the merits.

of that matter, the tribunal's jurisdictional award may not necessarily be final. Rather, it can be subject to no judicial review, whether the tribunal declines or upholds jurisdiction.

Thus, if an arbitral tribunal declares that it lacks jurisdiction, the party willing to refer the relevant dispute to arbitration may invoke the arbitration agreement against an action that the other party may bring regarding the dispute. A court may find that a binding arbitration agreement exists and stay the action. In this case, the decision of the court reversing the negative jurisdictional finding of a previous tribunal will prevail, and the arbitral jurisdiction would be restored despite the position of the arbitral tribunal initially seized with the matter; a negative finding by an arbitral tribunal has no binding consequences, much less a *res judicata* effect.⁽¹⁾

Further, a party in respect of whose request for arbitration a tribunal declined jurisdiction may still file a new request for arbitration with the Centre so that the jurisdictional question may be re-examined. This option is explicitly adopted by article 6(7) of the ICC Rules of Arbitration of 2012. And it is submitted that nothing prevents a party from filing a new request for arbitration under the Statute of the Centre.

On the other hand, if an arbitral tribunal assumes jurisdiction, the exclusive jurisdiction of the Centre will be affirmed. As such, courts of the Member States will continue to be precluded from examining any matter relating to the ongoing arbitral process. Consequently, the courts will not have authority to hear any challenge to the tribunal's finding of jurisdiction until a final award is made and only if the award debtor challenges enforcement proceedings - No direct means of recourse against the award is available as will be explained in Chapter 4.

(1) Al-Gammal and Abdel-Aal, Arbitration, p. 652.

VII. The Conduct of the Arbitral Proceedings

The arbitral tribunal has to commence the proceedings within fifteen days from being seized with the file of the case referred to it by the Secretary General (article 16 of the Regulation). The examination of the conduct of the proceedings involves studying the administration of the hearings in terms of determining the venue and language of the hearings.

Other aspects of the conduct of the proceedings include evidence and pleadings, staying and termination of procedures, and the security for arbitration expenses and the fees of the arbitrators. These aspects of the arbitral proceedings will be looked at in more depth.

A. The Hearings

Generally speaking, the organization of the hearings of arbitration under the Procedural Regulation is determined by the arbitral tribunal. Article 22(1) of the Regulation provides that the arbitral tribunal holds hearings at venue and date decided by the tribunal, provided the same shall be notified to the parties at sufficient time ahead of the hearing.⁽¹⁾ However, the power of the tribunal in this regard is subject to certain restrictions under the Regulation.

A.1. The Agreement of the Parties

The first restriction on the power of the tribunal to organize the hearings is the agreement of the parties. The parties may agree whether there

(1) Article 22(1) of the Regulation refers to notifying the parties with the date and venue for the hearing of submissions. However, hearings held for other purposes are assumed to be subject to the same rule by analogy and according to custom in arbitration.

should be oral submissions or not and, possibly, the intervals of time between the hearings.

That the agreement of the parties restricts the power of the tribunal is consistent with the principle of the autonomy of the parties. Yet, article 21 of the Regulation instructs the arbitral tribunal to hold hearings for oral submissions or to examine witnesses or experts *upon request* from either party. However, it will be seen later that the power of the tribunal regarding evidence, *e.g.*, determining the relevance and admissibility of testimony, may enable the tribunal to reject requests made under article 21 if the tribunal decides that the purpose of the requested hearing is futile.⁽¹⁾

A.2. The requirement of holding one hearing at the minimum

In the absence of an agreement by the parties on certain procedural rules relating to the organization of the hearings, the arbitral tribunal has the power to hold hearings as it deems appropriate, taking into account requests that may be made by either party under article 21 of the Regulation. Alternatively, the tribunal may decide the case based on the documentary evidence submitted by the parties. However, in the latter case, the tribunal is required to hold at least one hearing according to article 21 of the Regulation. This echoes national laws of Member States that stipulate that one hearing as a minimum must be held at the outset of the proceedings.⁽²⁾

It is recalled that the arbitral tribunal is required to commence the proceedings within fifteen days from the date it has been seized with the file of the case referred to it by the Secretary General. Commencing the proceedings, however, does not necessarily require holding a hearing.

(1) Under article 22(5) of the Regulation, the tribunal has the power to decide whether to admit evidence for examination in the first place.

(2) Hamza Haddad, *Arbitration*, p. 329.

Proceedings can be commenced before the tribunal if it notifies the parties to submit additional documents.

In any event, the said period of fifteen days is - it is submitted - organizational and aims to urge the tribunal to expedite the process. Failing to actually commence the proceedings within the said period should have no negative impact on the validity of the procedures. However, if the delay in the commencement of the proceedings reveals that the arbitrators inexcusably fail to act, either party may request the removal of the concerned arbitrator.⁽¹⁾ As already explained in subsection II.D of the present chapter, the removal of an arbitrator is dealt with under the Regulation by the same procedure as a challenge to arbitrators.

Practically, one expects that the hearing which shall be held at minimum would take place in the inception of the proceedings. At such hearing, ‘terms of reference’ are usually agreed. The date of holding the first (and possibly the only) hearing has an important procedural consequence; it marks the lapse of the opportunity for either party to dispute the validity of the appointment of any arbitrator or to raise a defence of lack of arbitral jurisdiction over matters stated in the request for arbitration or the answer thereto.

A.3. Organizing the minutes of hearings

It is indisputable from the professional perspective that arbitrators have to procure that minutes of the hearings are properly arranged. The Procedural Regulation, while not mentioning the minutes of hearings as an explicit requirement, presuppose the preparation of the same. This is inferred from article 18 of the Statute which refers to the duty of the secretariat of the arbitral tribunal to organize the minutes of hearings and article 22(3) of the Procedural Regulation relating to making records of the testimonies and pertinent translation. Also, article 25 of

(1) Hamza Haddad, Arbitration, p. 331.

the Regulation requires the preparation of a record of the settlement which the parties may conclude before the tribunal.

Indeed, the organization of minutes of hearings relates to procedural public policy. Such minutes constitute a means to reveal the procedures conducted by the tribunal and to review the legality thereof.

According to article 18 of the Statute, the General Secretariat of the Centre provides secretarial assistance for the arbitral tribunal in respect of the organization of the minutes of hearings. It is appreciated that borrowing the secretariat of the tribunal from the staff of the General Secretariat of the Centre is a logistical issue rather than a procedural requirement. In other words, if the venue of the arbitration is in Bahrain, the Centre can practically provide secretarial staff. However, if the venue of arbitration is outside Bahrain, nothing should preclude the arbitral tribunal to procure secretarial services as it deems appropriate.

A.4. Confidentiality

Unlike judicial hearings, arbitration is confidential. National laws as well as institutional rules of arbitration enshrine the confidentiality of arbitration, which is considered one of its salient advantages for the business community. Article 22(4) of the Procedural Regulation underlines the confidentiality of the hearings relating to submissions and examination of witnesses “unless the parties agree otherwise.” While article 22(4) refers to the confidentiality of specific hearings relating to submissions and examinations of witnesses, it should be understood as applying to all hearings and documents, including expert reports and hearings held to issue preliminary decisions or the final award. The broad scope of confidentiality rests on arbitral custom.⁽¹⁾ Yet, in light of the apparent specific scope of confidentiality under article 22, it would

(1) Al-Haddad, General Theory, pp. 20-22.

be advisable to stress the confidentiality of the arbitral proceedings in general under the agreement of the parties.

In addition, article 13(c) of the Statute assures the confidentiality of the documents and awards kept at the Centre, prohibiting the disclosure of the same except with the explicit consent of the parties or if the arbitral tribunal deems it necessary to authorize third parties, *e.g.*, experts, to inspect such documents. It goes without saying, that the duty to respect the confidentiality of documents relating to arbitration cases extends to the employees and representatives of the Centre as well as subcontractors, consultants and researchers who may have access to the archive in the course of providing services to the Centre.

Further, article 26 of the Statute provides that the papers, documents and, generally, the archive of the Centre enjoy immunity against any action of any kind whatsoever. Since the Statute overrides national laws of the Member States, it is submitted here that subpoena of national courts cannot be made or enforced against the Centre.

It seems, however, that the confidentiality under the Statute and Procedural Regulation does not cover the very existence of the arbitral proceedings. This is inferred from the fact that the General Secretariat of the Centre, and some arbitral tribunals, has notified parties to the proceedings by publishing notices of the existence of a request for arbitration or the date and venue of a forthcoming hearing in daily papers in the country where the latest known address of the concerned party is located. If notification in this way is to be resorted to, it should be approved by a procedural order of the arbitral tribunal, if it has been formed, and notification should, of course, be confined to the basic particulars of the relevant procedure, without disclosing all the parties or the subject matter of the dispute.

Finally, the scope of confidentiality can be modified by the agreement of the parties. As confidentiality is intended to serve their interests, they should be able to waive it to the extent they agree upon. This has been affirmed, for example, by article 22(3) of the ICC Rules of Arbitration of 2012, which empowers the arbitral tribunal to determine the scope of confidentiality upon request from either party. It follows that if the arbitral tribunal may decide the scope of confidentiality, the parties should, *apriori*, be able to determine it by agreement.

A.5. The representation of the parties before the arbitral tribunal

The Statute and Procedural Regulation do not prescribe special conditions for the representation of the parties before the arbitral tribunal. It can be said, therefore, that each party is entitled to appoint representatives by special powers of attorney, whether they are legal experts or not. The freedom of the parties in choosing their representatives in arbitral proceedings is generally an accepted principle in commercial arbitration.⁽¹⁾

B. Notification of the Parties to the Arbitral Proceedings

The Statute and Procedural Regulation do not provide for rules or modes of serving notices on the parties. The arbitral jurisprudence at the Centre indicates that a respondent would be notified at the address mentioned by the claimant in the request for arbitration. In some cases, alternative addresses have been gathered from the documents, the contract, and previous exchange of letters between the parties as filed by the claimant.⁽²⁾ In one case, the arbitral tribunal has considered that the attempted notification at the available address of the respondent was

(1) Hamza Haddad, *Arbitration*, p. 342.

(2) Arbitration cases number 30/2008; 51/2011; 53/2011 at the Centre.

sufficient although it was not certain that the respondent had received the notice in person.⁽¹⁾

A misdirected notification does not necessarily preclude the continuity of the proceedings or the validity thereof provided the party who has not been duly notified attends the relevant hearing. Thus, an arbitral tribunal affirmed the legality of the hearing which was attended by an attorney of the respondent, although the notification for that hearing was addressed to a branch of the respondent company instead of its headquarters located in a different country.⁽²⁾

As for the means of notification, the arbitral tribunal may resort to the procedural law of the seat of arbitration to supplement the Statute in this regard. This approach may be followed if the parties fail to agree on a particular means for notification.⁽³⁾ It should be noted that the national laws of the Member States are flexible in respect of notification procedures in arbitration. For example, section 212(1) of the UAE law of civil procedure provides that an arbitral tribunal shall follow the rules of serving notices according to the law of civil procedure unless the parties have agreed otherwise. Similarly, the Kuwaiti law of civil and commercial procedures provides that the rules of notification in court proceedings do not apply to arbitration; as such, notification procedures are left for the agreement of the parties, or else they may be determined by the arbitral tribunal.⁽⁴⁾

Section 3 of the Bahraini law number 9/1994 relating to international commercial arbitration provides, too, that “without prejudice to the agreement of the parties, any written letter shall be deemed delivered if

(1) Arbitration case number 56/2011 at the Centre.

(2) Arbitration case number 28/2008 at the Centre.

(3) Arbitration cases number 30/2008; 34/2008 at the Centre

(4) Sections 179 and 182 of the Kuwaiti law of civil and commercial procedures number 38 of the year 1980.

handed to the addressee in person or if delivered at his place of business or residence or to his postal address; if these places could not found upon reasonable search, the written letter shall be deemed delivered if sent to the last place of business or ordinary residence known for the addressee through registered mail or by any other means capable of proving the attempt of delivering the letter.”⁽¹⁾

Again, if no valid address of the party to be notified could be found upon reasonable search, notification may be served though publishing a notice in daily papers in the country of the last known address of that party.⁽²⁾

C. The Language of Arbitration

Among the matters left for the agreement of the parties under the Procedural Regulation is the language of arbitration. According to article 7 of the Regulation, in the absence of an agreement of the parties in this regard, the arbitral tribunal decides the language or languages to be used in the arbitral proceedings, taking into consideration the language of the relevant contract and the circumstances of arbitration, which presumably include the place of arbitration, the applicable law and the common language of the parties as the case may be.

Yet, article 22(3) of the Regulation assumes implicitly that Arabic is expected to be used generally, probably since *some* of the parties must be nationals of Member States or juridical persons seated in a Member State. Thus, article 22(3) provides that oral submissions must be translated into Arabic if delivered in another language.

(1) The quoted section 3 of the Bahraini law corresponds to section 7 of the Omani law number 47/97 relating to arbitration in civil and commercial matters and section 6 of the Saudi Arbitration Regulation.

(2) Arbitration cases number 52/2011; 54/2011 at the Centre.

The language of arbitration must be used in all documents and submissions before the tribunal. It also applies to the request for arbitration and any statement or disclosure that may be made by an arbitrator upon his appointment. It has been noted above, however, that the use of a language other than the one stipulated in the arbitration agreement can be rectified in a subsequent re-submission of the relevant documents.⁽¹⁾

D. Attendance of Hearings

The parties to an arbitration agreement have a reciprocal obligation to cooperate in the conduct of the arbitration. An aspect of this cooperation is to appear in the hearings duly notified to the parties. Attending the hearings is, indeed, a duty of a party as much as it is one of his procedural rights. This is because attendance enables each party to exercise its right of defence and ensures equal treatment of the parties, since the arbitrators are prevented from communicating with either party separately. However, a party may disregard some hearings or choose not to participate in the arbitral process entirely. In such a situation, a solution is needed to strike balance between the interest of the participating party in administering justice on the one hand, and the opportunity of the absent party to present its case.

Article 27 of the Procedural Regulation puts forward a solution that the arbitral tribunal should follow. Thus, if either party fails to attend a hearing, the arbitral tribunal will proceed with the examination of the case unless an acceptable excuse is presented by the absent party. As such, parties may be discouraged to absent themselves by the possibility that the proceedings may be continued in their absence. However,

(1) Arbitration case number 9/2003 at the Centre considered above in subsection I.A of Chapter 3.

proceeding with the hearings in the absence of a party is subject to two safeguards.

First, the absent party must have been duly notified of the relevant hearing. If the tribunal is not satisfied with the notification procedure, it would order that the absent party be notified again.

The second safeguard is that the absent party should be afforded an opportunity to present any excuses it may have. By necessary implication, the first instance of absence does not entitle the tribunal to proceed with the hearing. Rather, the application of article 27 of the Regulation requires, practically, notifying the absent party again so that that party may appear in the next hearing and present an excuse of absence. If the same party absents himself from the second hearing, the tribunal may then proceed with the intended procedure, *e.g.*, examining a witness, or decide that the absent party has failed to present the documents or pleadings requested from him for that hearing.

For instance, in the arbitration case number 30/2008 at the Centre, the tribunal verified the notification procedure of the absent respondent, who did not participate in the proceedings. In light of his continuous absence without him filing an application for an excuse of absence, the tribunal decided to proceed with the case based on the documents presented to it in accordance with article 25(c) of the Regulation.

However, while the arbitration agreement of the parties and the procedural orders of the tribunal can supplement and clarify the Regulation on the treatment of absent parties, the ICC Rules of Arbitration of 2012 seem clearer in this regard. According to article 25(3) of the ICC Rules, an arbitral tribunal may hear witnesses in the presence or absence of the parties provided they have been duly notified. Also, article 26(2) of the same Rules provides that the tribunal may hold hearings in the absence of duly notified party that did not file an acceptable excuse of absence.

Article 26(2) of the ICC Rules envisages that a party would file an application for excuse of absence ahead of the hearing notified to him, whereas article 27 of the Regulation indicates that the arbitral tribunal faced with the absence of a party should notify him again to attend or present an acceptable excuse of absence. It appears that the approach under the ICC Rules can ensure the unhindered progress of the arbitral proceedings.

It is submitted that the procedures under article 27 of the Regulation may be modified by the agreement of the parties or a procedural order of the tribunal. This is because the said article aims to ensure procedural guarantees for the absent party who may have an acceptable excuse of absence. This is a collateral requirement for the duty of the tribunal to afford each party full opportunity to present its case. As such, an alternative procedure to deal with the absence of the parties would be valid so long as it ensures these intended guarantees.

E. Evidence

Articles 21, 22, 23, 24 of the Regulation deal with matters of evidence before the arbitral tribunal. Before examining the relevant rules, it should be pointed out that matters relating to evidence may be of a procedural or substantive character. The provisions of the Regulation deal mostly with procedural aspects of evidence, *e.g.*, the submission of evidence, the examination of witnesses. On the other hand, substantive issues of evidence, *e.g.*, whether a particular means of proof, like writing, is required in respect of certain claims, is to be determined by the law governing the merits of the dispute, except for such aspects as may be regulated by the relevant rules of arbitration.⁽¹⁾

(1) Al-Gammal and Abdel-Aal, *Arbitration*, pp. 687-688.

As far as the procedural aspects of evidence are concerned, the following principles can be gathered from the relevant articles of the Procedural Regulation.

E.1. Parties may determine the manner by which evidence is to be submitted

Article 4 of the Regulation entitles the parties to agree generally to design their own rules of procedure. The freedom of the parties in this regard extends to evidence by virtue of article 21, which empowers the parties to use witnesses or expert evidence. The parties may, then, agree that witnesses may submit written statements without being necessarily cross-examined. Also, the parties may agree that photocopies of signed documents are admissible as valid evidence without the need for submitting the relevant original documents.

The freedom of the parties is subject to the principles of due process (procedural public policy). Thus, the chosen procedures relating to evidence must not contravene the principle of equality between the parties or the right of each party to be supplied with copies of the evidence submitted by the other party so as to be able to answer it.

E.2. The arbitral tribunal has authority to decide on the admissibility of, and to ultimately weigh, evidence

Like judges, an arbitral tribunal has the power to assess the admissibility of evidence submitted by the parties. Thus, the tribunal examines the relevance of the evidence for the dispute and whether it is conducive to the determination thereof. If the evidence is irrelevant or is not capable of affecting the outcome of the case, then the tribunal may disregard it.

If evidence filed by a party is admissible, the arbitral tribunal will weigh that evidence against other evidences to establish the facts of the case.

Article 22(5) of the Regulation alludes to the weighing of evidence, stating that the tribunal shall assess the significance of the evidence.

However, the tribunal has to comply with the mandatory substantive rules of the applicable law. It follows that if the applicable law prescribes that a certain claim may not be established other than in writing, the tribunal should require written evidence for that claim.

E.3. The arbitral tribunal may interrogate the parties and order them to submit documents even after the closing submissions

An arbitral tribunal does not have a passive role in administering the procedures relating to evidence. Rather, the arbitral may have an inquisitorial role in this regard. Thus, article 24 of the Regulation empowers the tribunal to order the parties to present documents or other evidence. Also, the tribunal may carry out such investigations as the tribunal deems appropriate. The reference in article 24 to the carrying out of investigations by the arbitral tribunal may be interpreted to authorize the tribunal to interrogate the parties. The generality of article 24 may also empowers the tribunal to request “conclusive oath” in lieu of, or to supplement, other evidence in the case.

The arbitral tribunal may exercise its powers under article 24 at any stage of the proceedings, even after the submission of the closing argument by the parties. The tribunal may re-open the floor for submission after the closing argument if the tribunal finds essential justification for this action.

It is recalled that, since article 24 provides for powers of the tribunal, the parties cannot contract out of according to article 4 of the Regulation. However, if either party fails to cooperate with the orders of the tribunal

made under article 24, the arbitral tribunal may decide the case on the basis of the documents presented before it.⁽¹⁾

E.4. The arbitral tribunal may carry out physical inspections and appoint experts

According to article 24 of the Regulation, the arbitral tribunal may, on its own motion, carry out physical inspections and resort to experts. The tribunal may move to the site of a project involved in a dispute under a construction contract to get first-hand knowledge of certain facts. Likewise, the tribunal may appoint an expert to examine relevant ledgers, financial reports, etc.

The Regulation does not contain details of the procedural aspects of physical inspection and expert evidence. Therefore, unless the agreement of the parties covers these aspects, the arbitral tribunal will determine pertinent procedures. However, guarantees of due process must be observed. For instance, an expert has to fulfill his mission under oath and will be subject to a challenge from either party.

E.5. Procedures relating to the cross-examination of witnesses

A party who intends to enter witnesses into his evidence has to inform the arbitral tribunal and the other party, at least seven days ahead the date of the hearing designated for the cross-examination of witnesses, with the names and addresses of the witnesses and the questions in respect of which they will testify and the language to be used.⁽²⁾ This rule envisages that witnesses are heard automatically upon the request of the party naming them.

(1) Hamza Haddad, *Arbitration*, p. 344.

(2) Article 22(2) of the Procedural Regulation.

However, the aforementioned rule must be understood in the context of the arbitral tribunal's authority to assess the relevance of evidence discussed above. As such, a party has to name witnesses and specify the facts in respect of which they will testify so that the tribunal will determine whether or not to hear this evidence in the first place. This determination will be based on the relevance and conduciveness of the requested witnesses as well as on the agreement of the parties regarding the admissibility of oral testimony (if any). And nothing (other than an agreement of the parties) prevents a tribunal from making a procedural order setting a time limit for naming witnesses and providing particulars about them and the purpose of their testimony. Only if the tribunal decides to hear witnesses can the rule summarized above apply.

E.6. Allegations of forgery

In the context of examining documentary evidence submitted by the parties, either party may raise allegations that a particular document is not genuine and that it is forged. Such allegations implicate criminal issues and are, therefore, considered outside the realm of commercial arbitration at the Centre.

Article 23 of the Procedural Regulation provides that:

“1- If either party alleges that forgery has occurred in documents submitted before the tribunal, the tribunal shall stay the arbitration proceedings provisionally. 2- The tribunal shall refer such allegation to the competent authority to investigate in the allegation and issue a decision in this regard. 3- If forgery is established, the tribunal shall make a decision to strike out the documents that have been proved to be forgeries.”

It is clear from article 23 that allegations of forgery are non-arbitrable and must be relegated to the competent authority. A question arises, then, as to determining the competent authority. It is submitted here that, since the documents alleged to be forged are used before the tribunal, it follows that the courts of the seat of arbitration have jurisdiction over investigating and trying the case of alleged forgery.

A further question arises as to whether an arbitral tribunal has no option but to stay the arbitration proceedings upon receiving allegations of forgery. While article 23 of the Regulation apparently suggests that the tribunal “shall stay the arbitration proceedings” without granting the tribunal a discretionary power in this regard, it is submitted that the tribunal does have a discretionary power to stay or proceed with the arbitral procedures if forgery is alleged. This discretionary power can be discerned from article 22(5) of the Regulation which authorizes the tribunal to assess the importance of evidence.

As such, the tribunal should determine whether the document alleged to be forgery is necessary for the determination of the case and whether it may change the outcome of the case. If the tribunal deems such document to be decisive, a stay of proceedings must be ordered. Conversely, if the document at issue is not conducive for the determination of the case or if it can be ignored because the facts intended to be proven with it are common-ground between the parties, then the tribunal may decide to proceed with the arbitration based on the rest of evidence admitted in the case.

Recognizing a discretionary power of the arbitral tribunal to continue with the proceedings despite allegations of immaterial documents is necessary to avert frivolous allegations of forgery that aim to delay the arbitral process.

F. Presentations

If the parties agree that there shall be held a hearing for oral presentations before the tribunal, the tribunal has to organize the hearing. In the absence of an agreement of the parties in this regard, the tribunal may hold a hearing for presentations upon a request from either party (article 21 of the Regulation) or according to the tribunal's discretion in determining the procedures. Indeed, article 21 contemplates the possibility that the tribunal may determine the dispute based on the evidence submitted before it, i.e., without conducting a hearing for oral presentations. Practically, whether presentations will be made in a special hearing should be determined by the tribunal upon soliciting the comments of the parties.

Article 22 provides for certain procedures in respect of a hearing designated for parties' presentations, should such hearing be organized. However, these procedures apply actually universally to all hearings as they include notification of the hearing, confidentiality, and recording the minutes of the hearing.

It should be noted that while article 23 of the Regulation seems to suggest that presentations would be heard in one session, it would be more consistent with the respect due for the right of defence to hear parties; presentations in turn so that the respondent would have the opportunity to answer the claimant's arguments. Also, presentations should be heard after the completion of examining evidence to be entered into the case.

Following the completion of the presentations, the tribunal declares the proceedings closed so that neither party may file new documents or pleadings. And the tribunal embarks on private deliberations that culminate in the making of the award. Nevertheless, article 26 of the Regulation entitles the tribunal to re-open the case for further proceedings, on its own motion or upon request from either party, so as

to request or admit new documents if essential reasons justify this action. A tribunal should weigh carefully assess such requests from the parties to avoid tactical applications aiming to prolong the proceedings.

The decision of the arbitral tribunal in the case number 49/2011 at the Centre summarizes the rules relating to the closing of trial as follows:

“The duty of respecting the right of defence does not preclude the tribunal from organizing the use of this right. The tribunal may set deadlines for the parties to submit their memorials and documents; if a memorial or document is filed with the tribunal beyond the deadline, the tribunal may reject it as inadmissible and disregard the submissions contained therein as if they were never presented before the tribunal. This approach is not a breach of the right of defence. The tribunal may even exercise this power without adhering to the deadlines fixed in the agreement of the parties so long as the tribunal affords each party the opportunity to answer the submissions filed by the other party within a reasonable period of time. [. . .] by declaring the case set for the final award [by means of an explicit decision or impliedly through the completion of the exchange of submissions, evidence and of the investigation of the case] the proceedings shall be closed; consequently, the parties’ involvement in the arbitral case comes to an end so that they may not participate further in it except to the extent permitted by the tribunal. Therefore, neither party – once the case is set for the issuance of the final award – may submit memoranda or file documents. And if a party submits a memorandum containing arguments or filed a document, the tribunal shall disregard the same and is not required to reply to it. Nor shall the tribunal rely thereupon in its ruling; otherwise the award will be null. The tribunal

may not reopen the case for further proceedings except for serious reasons. [. . .] one serious reason that justified the reopening of the case is the occurrence of a new fact that has an impact on the determination of the case. And the reopening of the case is subject to the discretionary power of the tribunal.”⁽¹⁾

G. The Suspension of the Arbitral Proceedings

As with court proceedings, the arbitral process may be provisionally suspended. Suspension may be obligatory. This occurs when either party alleges that a document is forged if the relevant document is decisive for the determination of the case. As explained in the previous subsection, the tribunal has to refer the allegations of forgery to the competent court according to article 23 of the Regulation.

On the other hand, suspension of the proceedings may be optional, *i.e.*, subject to the discretion of the tribunal. Article 41 of the Regulation provides for one instance of optional suspension of proceedings in case of failure of the parties to deposit the estimated costs of arbitration which the Secretary General has requested them to advance.

Apart from the above-mentioned cases of suspension indicated in articles 23 and 41 of the Regulation, there is no discussion of the suspension of the proceedings under the Regulation. The question of suspending the arbitral process is, therefore, subject to the agreement of the parties and the discretion of the tribunal. The parties may, for instance, agree to suspend the proceedings pending negotiations of a settlement of the

(1) Award in the arbitration case number 49/2011 at the Centre, citing Fathi Wali: *Qanūn Al-Taḥkīm fil Naẓariya wal Taṭbīq* (Arbitration Law in Theory and Practice), pp. 305, 425-426.

dispute. In this case, the parties should file an application to the tribunal for the suspension, and the tribunal will fix the period of suspension.⁽¹⁾

The arbitral tribunal may exercise its discretionary power to decide whether to suspend the proceedings or continue with them in certain circumstances. Thus, if either party challenges an arbitrator before the Secretary General, there is no mandatory rule that the tribunal has to suspend the proceedings. Yet the tribunal may decide to suspend the proceedings pending the decision of the Secretary General on the challenge to the arbitrator.

However, one cannot rule out that certain circumstances may render it necessary to suspend the proceedings even in the absence of a provision in the Statute to that effect. For example, if a preliminary issue that is not arbitrable arises and the tribunal finds that the determination of that issue is necessary for the determination of the case, the tribunal will have to suspend the proceedings pending the determination of the non-arbitrable, preliminary matter by the legal department. For instance, deciding a dispute over a franchise agreement may depend on the validity of the relevant patent being tried before a Jordanian court.

The instances of suspending the arbitral proceedings depend mainly on the agreement of the parties or the decision of the Commission. However, arbitral proceedings at the Centre may not be suspended by virtue of a court order, since the courts of Member States are precluded from hearing application relating to an ongoing arbitration.

It should be clarified that the cases of suspension of the arbitral proceedings discussed above relate to halting the arbitral process where the tribunal is otherwise capable of proceeding with the arbitration. On the other hand, if the tribunal is already truncated and is not

(1) Arbitration case number 25/2007 at the Centre.

capable of proceeding with the action, *e.g.*, if an arbitrator resigns, the proceedings will have to be suspended unless an alternate arbitrator is appointed.⁽¹⁾ Needless to say, that the period of suspension should not be counted as part of the period of arbitration during which the award must be issued.⁽²⁾

VIII. Termination of the Arbitral Process

The procedures of arbitration come normally to an end by the issuance of a final award on the merits of the dispute. Chapter 4 will examine the award in detail. However, this section looks at cases in which the arbitral process terminates without a final award having been made.

One of the main causes to terminate the arbitral process without a substantive determination of the merits of the dispute is the arbitral tribunal's finding that it lack jurisdiction. This possibility has been discussed above.

Also, the arbitral process may lapse prior to the making of a final award if the period of arbitration expires. Article 33 of the Regulation, while allowing the extension of the original period of arbitration of one hundred days, provides that the function of the arbitral tribunal is exhausted upon the expiration of the period of arbitration.

Further, arbitration may be aborted according to article 41 of the Procedural Regulation by a decision of the tribunal to terminate the procedures if the parties fail to make deposits requested by the Secretary General. Such deposits relate to the estimated expenses of arbitration

(1) Also, proceedings shall be suspended in cases of bankruptcy of a company party to the proceedings. Al-Gammal and Abdel-Aal, *Arbitration*, pp. 781 et seq; Hamza Haddad, *Arbitration*, pp. 349-353.

(2) Al-Gammal and Abdel-Aal, *Arbitration*, pp. 779-780.

and fees of the arbitrators. (The tribunal may alternatively suspend the proceedings provisionally as mentioned in the previous subsection.)

The Procedural Regulation does not refer to cases of termination of the arbitral proceedings without an award having been made other than the above mentioned situations. However, according to general principles, arbitration procedures may be abandoned by the agreement of the parties. In addition, the arbitral tribunal may exercise discretion to declare the procedures terminated if the tribunal is convinced that the arbitral process has been rendered futile as a result of the failure of the majority of arbitrators to reach a decision or if the claimant unilaterally abandons the proceedings and the respondent asks the tribunal to end the procedures.⁽¹⁾

It should be realized, however, that the termination of the arbitral procedures prior to the making of an award does not prevent the arbitral tribunal from deciding on the distribution of costs and fees as between the parties. Recognizing this power of the arbitrators is consistent with the principles of equity and the expectations of the parties.⁽²⁾

IX. The Expenses of Arbitration and the Fees of the Arbitrators

Arbitration expenses include the fees due to the Centre for its administrative services. These are set as a percentage of the value of the claim (and counterclaim as the case may be), which may not exceed 2% thereof.⁽³⁾ Making the Centre's fees relative to the disputed amounts

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- (1) Some national laws provide that arbitral proceedings shall terminate in certain circumstances even if no award has been made. However, there is no need to resort to the law of the seat of arbitration to declare the arbitral process at end since such declarations can be regarded as falling under the discretionary power of the arbitral tribunal.
 - (2) Cf. Al-Gammal and Abdel-Aal, *Arbitration*, p. 803.
 - (3) Article 40 of the Procedural Regulation.

encourages the parties not to exaggerate their claims. These fees apply in addition to the registration fee stipulated in accordance with article 39 of the Procedural Regulation.

As regards other expenses of the arbitration, *e.g.*, travel expenses of arbitrators and witnesses and the fees of experts and translators, they are, too, assessed on the basis of the disputed amounts.

The Secretary General estimates the expenses of arbitration and requests the parties to advance a deposit, shared equally by them, before the commencement of arbitration. The Secretary General may request the parties to make an additional deposit during the arbitral proceedings if further expenses are contemplated, as if an expert is appointed. If a party fails to pay its share in the requested deposit within thirty days from the date of request, the Secretary General notifies the rest of the parties so that they may complete the amount of the deposit. If the parties refrain from making depositing the full amount, the Secretary General refers the matter to the arbitral tribunal which may decide to suspend or terminate the proceedings.

As regards the fees of the arbitrators, they are determined in accordance with the Bylaw Regulating Arbitration Expenses of the year 2012 at certain percentages of the disputed amounts. If the case involves an undetermined amount, then the Secretary General has the authority to determine these fees. According to article 2(4) of the Bylaw Regulating Arbitration Expenses, an arbitrator is deemed to have reviewed and accepted the fees stipulated under that Bylaw.

Since the fees of the arbitrators are determined by the Centre, whether by virtue of the relevant Bylaw Regulating Arbitration Expenses or by a decision of the Secretary General, no question of contesting these fees arises. By contrast, where arbitrators may decide on their fees

under some national laws, such laws allow the parties to challenge the determination of fees before the courts.

Following the issuance of the final award, the Secretary General prepares a final statement of the expenses and deposits. Any surplus of the deposits will be refunded to the parties. If, however, the deposited amounts fall short from covering all the actual expenses and fees, the difference will be requested from the parties.⁽¹⁾ The arbitral tribunal has authority to decide on the distribution of fees and expenses between the parties, and requests for the payment of outstanding expenses should be pursued accordingly.⁽²⁾

(1) Article 23(c) of the Statute; article 41(3) of the Procedural Regulation.

(2) Article 34 of the Procedural Regulation.

Chapter 4

The Arbitral Award

The rules relating to the arbitral award under the Statute and Procedural Regulation underscore the objectives of the Centre in ensuring a much greater opportunity for the enforcement of the awards. These rules will be studied in this chapter as follows. Section I will examine the applicable substantive law to the merits according to which an award may be made.

Section II explains the rules relating to the issuance of the award in terms of the period of arbitration during which the award must be made, deliberations, and the form of the award.

In section III, the consequences of the issuance of the award will be explored. This covers the legal value of the award; whether it is subject to depositing requirements under the law of the seat of arbitration; and the consequences relating to the exhaustion of the function of the arbitral tribunal.

Finally, section IV will explicate the rules pertaining to the enforcement of the award, including the grounds for refusal of the enforcement of the award. To explain the characteristics of the enforcement regime under the Statute, comparison will be made between the Statute and the enforcement of awards under other regimes applicable in Member States.

I. The Legal Rules Governing the Merits of the Dispute

Article 12 of the Statute deals with the question of the law applicable to the merits of the dispute, stating that:

“The parties may determine the law to be applied by the arbitrators to the merits of the dispute. If the parties do not determine the applicable law in the contract or the agreement of submission, the arbitrators shall apply the law indicated by the rules of conflict of laws that they deem appropriate, be it the law of the place of conclusion of the contract or the law of the place of its execution or any other law, taking into consideration the conditions of the contract and the rules and customs of international trade.”

On the same subject, article 25 of the Procedural Regulation provides that “[t]he two parties to the dispute may authorize the tribunal to decide *ex aequo et bono*, and they may ask the tribunal to record the settlement or compromise which they have reached, in which case the tribunal shall issue an award accordingly.” Further, article 29 of the Regulation provides that:

“The tribunal shall determine the dispute in accordance with the following: 1. The contract formed between the parties, and any subsequent agreement between them. 2. The law chosen by the two parties. 3. The law that is most connected with the substance of the dispute according to the rules of conflict of laws that the tribunal deems appropriate. 4. Domestic and international commercial customs.”

In addition, article 30 of the Regulation provides that “[t]he regulations of the Cooperation Council, its resolutions, and the provisions of the Unified Economic Agreement and its interpretive decisions shall apply to the disputes arising from its implementation.”

These provisions deal with questions regarding the authority of the arbitral tribunal to decide *ex aequo et bono*, where the question of the applicable law does not arise. In other cases, it should be explained how

the applicable law is determined, and whether the applicable rules have to belong to a national legal system. These questions will be considered in the following paragraphs. A close examination of the aforementioned provisions will reveal that, despite discrepancies in the wording of the Statute and the Regulation, article 29 of the latter can be viewed as a reasonable interpretation of the former.

A. Arbitration *ex aequo et bono*

While arbitrators are usually required to apply a national law to the substantive issues of the merits of the dispute,⁽¹⁾ the parties may authorize the arbitrators to decide the case on the basis of equitable considerations. This is called arbitration *ex aequo et bono*.⁽²⁾ Thus, the arbitrators can be authorized to determine disputes in accordance with their subjective judgment in the circumstances of the case. It follows that the question of determining the applicable law arises in such cases.

Arbitrators may not act *ex aequo et bono* unless the parties have explicitly authorized them to do so.⁽³⁾ The general rule derived from article 25 of the Regulation is, therefore, that arbitrators have to apply a *law*. This is consistent with the position of national arbitration laws and other rules of institutional arbitration.⁽⁴⁾

The requirement of an explicit authorization for the arbitrators to rule *ex aequo et bono* can be justified as follows. When deciding a dispute

(1) Hamza Haddad, Arbitration, pp. 148-149.

(2) Al-Gammal and Abdel-Aal, Arbitration, p. 109.

(3) Award of 2 February 2008 in the arbitration case number 24/2007 at the Centre.

(4) Section 38(2) of the Saudi Arbitration Regulation; section 28(3) of the Bahraini law number 9/1994 relating to international commercial arbitration; article 21(3) of the ICC Rules of Arbitration of 2012; article 22(4) of the LCIA Rules of Arbitration of 1998.

on the basis of equitable considerations, an arbitrator will apply, in lieu of the law, his personal judgment of what is fair and, probably, more consonant with the normal course of business with a view to reaching a middle solution that enables the parties to continue their relationship.⁽¹⁾ The resulting award would put forward a solution that does not adhere to the letter of the law or even to the contract. As such, each party is perceived to have accepted the possibility of ceding part (or all) of its claim that might otherwise be upheld under the strict application of the law and contract. In light of this possibility, which effectively embodies a compromise,⁽²⁾ an express consent to the authority of the arbitrators not to apply the law is essential and justifiable.

Obviously, an arbitrator does not have to refer to rules of conflict of laws nor to the provisions of any national law. Indeed, by authorizing the arbitrator to decide *ex aequo et bono*, the parties dispense with the application of objective criteria deriving from the law in favor of the arbitrator's own conscience and subjective criteria.⁽³⁾

However, an arbitrator deciding the case on 'equitable' considerations may still gather guidance from a national law which he considers to provide a fair solution in a particular case.⁽⁴⁾ In the arbitration case number 67/2011, for example, the arbitrator was authorized to rule *ex aequo et bono*. Yet, he found it appropriate to apply the law of the State

(1) Abdel-Hamid Al-Ahdab, 'Al-Taḥkīm bil-ṣulḥ fil-Ŝar' al-Islāmi' (Arbitration *ex aequo et bono* under Islamic Shari'ah) in Al-Taḥkīm Al-Muṭlaq fil-Ŝari'ah wal Qanūn (Delocalized Arbitration in Shari'ah and Law), (conference proceedings) Tripoli University Institute for Islamic Studies, Tripoli (2000), p. 131, at, 205, 207 (hereinafter: Al-Ahdab.)

(2) Al-Gammal and Abdel-Aal, Arbitration, p. 121; Salameh, Arbitration Centre, p. 36.

(3) Al-Ahdab, pp. 210-211.

(4) Hamza Haddad, Arbitration, p. 150; Al-Ahdab, pp. 214-215.

most closely connected with the dispute.⁽¹⁾ Also, an arbitral tribunal authorized to determine the case *ex aequo et bono* stated that it was not prevented from resorting to a national law if the tribunal found that the law provided a fair solution conforming to the expectations of the parties. Thus, the tribunal relied on the UAE law which recognized the penalty clause inserted in the contract at dispute and was, therefore, deemed to be consistent with the intentions of the parties.⁽²⁾

Since arbitrators may be authorized to decide a case based on subjective criteria, as explained above, a question arises as to whether the award has to be reasoned. It is submitted here that the reasoning of an award normally involves, not only questions of law, but also demonstrating how matters of fact have been established. Consequently, an award based on subjective criteria has to be reasoned in terms of facts. In other words, while founding the arbitrator's conclusions on a law is irrelevant, pertinent facts must be explained and rested on relevant evidence. For instance, if an arbitrator takes into account that a party has always acted in good faith, the arbitrator must specify which established facts demonstrate that party's good faith.

However, since the reasoning of the award in arbitration *ex aequo et bono* is confined to verifying relevant facts, it is submitted that the parties may agree to dispense with this reasoning. This is despite the fact that the Procedural Regulation stipulates that an award must be reasoned. Again, as the parties are deemed to have accepted the possibility of 'compromise,' thus waiving claims otherwise enforceable at law, exonerating the arbitrators from the reasoning of the award crosses with exempting them from the duty of applying a law.

(1) Award of 21/8/2013 in the arbitration case number 67/2013 at the Centre.

(2) Award of 15/4/2012 in the arbitration case number 51/2011 at the Centre.

An arbitrator remains, however, bound with the agreement of the parties to follow certain procedural rules. Likewise, an arbitrator deciding a case *ex aequo et bono* is not exempted from observing the principles of procedural public policy,⁽¹⁾ (e.g., the right of each party to present its case) and the substantive rules of public policy applying to the contract, particularly those of the country where enforcement of the award is likely to be sought.⁽²⁾

Finally, article 25 of the Regulation refers to a ‘settlement-award.’ That is, if the parties reach a settlement during the arbitral proceedings, they may present that settlement to the arbitrators who shall record it by means of a final award enforceable under the Statute.

B. Determining the Applicable Law

The law applicable to the merits of disputes can be primarily determined by the agreement of the parties. Failing an agreement between the parties, the applicable law is determined by the arbitral tribunal. Article 12 of the Statute and article 29 of the Regulation adopt the aforementioned approach, which is explained in the next paragraphs.

B.1. The law chosen by the parties

In line with the autonomy of the parties, the parties to an arbitration agreement may specify a law of their choosing to govern the dispute referred to arbitration. The arbitral tribunal has to apply the chosen law. It is generally accepted that it is the substantive rules of the chosen law, without its rules of conflict of laws, which apply, although the Statute and Regulation do not contain an explicit provision to that effect.⁽³⁾

(1) Al-Ahdab, pp. 209, 228-230.

(2) Ibid, p. 222.

(3) Salameh, Arbitration Centre, pp. 42-43.

Determining the chosen law may become delicate if the parties do not spell it out explicitly. In this case, the arbitral tribunal may investigate the intentions of the parties to discern whether a particular law has been impliedly chosen by them.⁽¹⁾ For instance, if the disputed contract is drafted in English, using legal terms of English law, *e.g.*, estoppel, frustration, etc., the parties may be deemed to have tacitly alluded to English law as the applicable law.

It is submitted that investigating the implied intention of the parties regarding the applicable law is not inconsistent with the Statute and Regulation. Therefore, an arbitral tribunal should discern the applicable law, provided that its finding in this regard is reasoned.⁽²⁾

Practically, however, it seems that the implicit choice of law would often match the law that the tribunal could otherwise apply based on the criterion adopted by the Statute. That is the law which has “closest connection” with the dispute. As will be explained later, the circumstances that may indicate the law closely connected with the dispute are virtually the same elements from which the implicit intention of the parties could be discerned.

However, if the parties make an explicit choice of law, the arbitral tribunal may not deviate from the chosen law on ground of an implicit amendment of the agreement. In the arbitration case number 20/2006, the arbitral tribunal dismissed the argument that the chosen law stated in the contract had been impliedly abandoned by the parties since they have used legal theories of another legal system in their submissions before the tribunal. The tribunal found that it had to adhere to the law

(1) The question whether an arbitral tribunal should search for an implied choice of law has been raised under the Washington Convention of 1965. See Moshe Hirsch, *The Arbitration Mechanism*, pp. 121-122.

(2) Award of 4 June 2009 in the arbitration case number 28/2008 at the Centre.

explicitly chosen by the parties and, therefore, rejected arguments and submissions based on rules of another law.⁽¹⁾

Article 12 of the Statute, like article 29 of the Regulation, seems to suggest that the parties can only choose a national legal system to govern their dispute. By contrast, modern arbitration laws, including the laws of Member States, empower the parties to choose rules that may not necessarily constitute a national law.⁽²⁾ Thus, the parties may agree that their contract is governed by principles of *Shari'ah*, UNIDROIT principles, or international custom and trade usages.

Although the Statute and Regulation use the term “law,” they are better interpreted as permitting the parties to choose a set of rules that do not belong to a national legal system. This interpretation can be supported by the fact that the Statute and Regulation require the arbitral tribunal to take into account, in all circumstances, the conditions of the contract. As such, any set of rules chosen by the parties can be treated as contractual terms of the contract. Indeed, article 29 of the Regulation ranks the conditions of the contract as the first applicable rules in the order of precedence of applicable substantive rules.

Yet, the freedom of the parties to determine the applicable law finds its limits in public policy. Rules of public policy apply regardless of the law chosen by the parties. It is necessary, therefore, to consider which public policy is relevant for the arbitration at the Centre.

(1) Award of 20/5/2008 in the arbitration case number 20/2006 at the Centre.

(2) Section 38 of the Saudi Arbitration Regulation; section 28 of the Bahraini law number 9/1994 relating to international commercial arbitration. Also, article 42(1) of the Washington Convention of 1965 endorses the freedom of the parties to choose “legal rules” to govern their dispute without requiring these rules to constitute a national legal system.

In light of the international nature of the Centre and its procedural rules, it would seem that the arbitral tribunals at the Centre should take international public policy into consideration, rather than the national public policy of a particular State. To elaborate, national public policy of the seat of arbitration is of little relevance and does not constitute a threat to the validity and enforceability of the award. This is because the Statute provides for no means of legal recourse against the award before the courts of the seat of arbitration. Consequently, arbitrators do not necessarily have to apply the public policy of the seat.

As regards the public policy of the State of enforcement of the award, a court of enforcement is expected to apply international public policy from the court's national perspective. An arbitral tribunal may not have to consider the public policy from the perspective of a particular State, since the place of enforcement may not be determinable during the arbitral process. Also, the refusal of the enforcement in one country does not jeopardize the possibility of enforcing the award in another country where the award debtor may have assets.

However, an arbitral tribunal may take into account the public policy of the State or States in which the award is likely to be enforced. Thus, one arbitral tribunal said that, in determining the applicable law, regard should be had to the public policy of the States connected with the substance and procedures of the arbitration.⁽¹⁾

In the arbitration case number 29/2008 at the Centre, for instance, the arbitral tribunal found that the parties had a common domicile in one State and that the dispute was connected therewith. Consequently, the tribunal applied a rule of public policy of that State proscribing the payment of interest, and the tribunal dismissed a claim for interest

(1) Award of 4 June 2009 in the arbitration case number 28/2008 at the Centre.

accordingly.⁽¹⁾ It was clear on the facts that the award was to be enforced in that State.

B.2. Determining the applicable law by the tribunal

If the parties do not specify the applicable law and, at the same time, do not authorize the arbitrators to decide the dispute *ex aequo et bono*, the tribunal will have to determine the law governing the dispute. In this regard, some arbitration laws empower the arbitrators to determine the applicable law on the basis of a set of rules of conflict that the arbitrators deem to be appropriate.⁽²⁾ Alternatively, arbitrators may simply be empowered to apply the law they deem appropriate without the need for justifying their choice on the basis of rules of conflict of laws.⁽³⁾

As far as the Statute of the Centre is concerned, article 12 requires the arbitral tribunal to apply such rules of conflict as it deems appropriate and to determine the applicable law accordingly. As such, the arbitrators may not use a national law simply because they believe that it contains comprehensive provisions for the contract at issue. Rather, there must be a connection between the law determined by the arbitrators and the dispute. This connection can be ensured if a rule of conflict is used to indicate the applicable law, since the rules of conflict of laws attach a given relationship to a particular law based on the link between certain elements of the legal relationship and the indicated law. Article 12 of the Statute mentions, by way of example, a number of possible criteria for the attachment of a contract to a national legal system. These criteria include the place of formation of the contract and the place of its execution.

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- (1) Award of 18/10/2009 in the arbitration case number 29/2008 at the Centre.
 - (2) e.g., section 28(2) of the Bahraini law number 9/1994 relating to international commercial arbitration.
 - (3) e.g., article 21(1) of the ICC Rules of Arbitration of 2012.

It is noted that there is discrepancy between the wording of article 12 of the Statute, on one hand, and article 29 of the Regulation on the other. Article 29 of the Regulation refers to the law that is “most closely connected with the substance of the dispute” as indicated by the rules of conflict of laws that the tribunal deems appropriate. The qualification that the applicable law must be “most closely” connected with the dispute does not appear in article 12 of the Statute. Nevertheless, it is submitted that there is no contradiction here. Rather, article 29 of the Regulation can be reconciled with article 12 of the Statute on the ground that the tribunal should use the rule of conflict which, in a certain set of circumstances, points at the law most closely connected with the dispute.

To illustrate, suppose that a Qatari company enters into a joint venture agreement with a Kuwaiti company to carry out construction projects in Qatar. The contract is signed in Al-Riyad, Saudi Arabia. In these hypothetical circumstances, it would appear that the place of formation of the contract has a remote connection with the substance of the dispute in comparison with the place of execution of the joint venture agreement, Qatar. If the aforementioned example is modified, supposing that the contract was formed in Kuwait, then two factors would point at Kuwait, namely the place of formation of the contract and the nationality of one party thereto. According to both article 12 of the Statute and article 29 of the Regulation, the tribunal should consider which factor is more appropriate as a criterion of attachment of the contract to a national law; and article 29 of the Regulation instructs the tribunal to give preference to the factor which identifies the law most closely connected with the dispute, this factor being deemed the appropriate one.

In short, the arbitral tribunal is required to follow a two-step methodology to determine the applicable law. First, the tribunal should consider the factors present in the case, and which involve criteria for attaching the dispute to a national law. Then, the tribunal should select

the criterion which it deems appropriate and apply the law designated accordingly. By following this methodology, the tribunal's approach will be consistent with the Statute and Procedural Regulation. The tribunal's final conclusion regarding the appropriate rule of conflict of laws and, accordingly, the applicable law will not be subject to review by any authority.⁽¹⁾ For example, in the arbitration case number 32/2008, the arbitral tribunal concluded that the execution of the contract was connected with more than one State and, therefore, it was more appropriate to apply the law of the common domicile of the parties.⁽²⁾

In light of the conditions of personal jurisdiction of the Centre, which require that at least one party must be a subject of a Member State or a juridical entity seated therein, it may be expected that a dispute referred to the Centre will always have some connection with a Member State. However, a law of a Non-member State may be found to be the applicable law.⁽³⁾ It can be said that the methodology of determining the applicable law by the arbitral tribunal ensures a good degree of predictability of the applicable law.

B.3. The conditions of the contract

Article 12 of the Statute provides that the arbitral tribunal shall take into consideration the conditions of the contract. The conditions of contract rank the first in the order of precedence of applicable rules according to article 29 of the Regulation. This accentuates the principle that “the

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- (1) In the arbitration case number 24/2007, the arbitral tribunal found that the law most closely connected with the dispute was the law of the State in which the contract was made and in which the respondent had its place of business.
 - (2) Award of 17/12/2008 in the arbitration case number 32/2008 at the Centre.
 - (3) For example, suppose a dispute arises over a contract between a Bahraini company and an Egyptian company regarding investments of the Bahraini party in Egypt. Egyptian law is likely to be deemed most closely connected with the dispute.

contract is the law of the parties.” It follows that the arbitral tribunal takes a reasonable approach if it determines to apply the law which, among other laws connected with the dispute, gives more efficacy to the contract. The arbitration case number 51/2011 illustrates this.

In that case, a party to the dispute argued that a penalty clause contained in the contract was invalid. While it has interpreted the arbitration agreement as authorizing it to decide the case *ex aequo et bono*, the arbitral tribunal said that it could resort to a national law if it was conducive for achieving an equitable solution. The tribunal found that the law of UAE recognized the penalty clause and was appropriate to be applied so as to give effect to the agreement of the parties.

Indeed, article 29 of the Regulation indicates that the dispute could be resolved on the basis of the terms of the contract without reference to any national law. This is because the order of precedence of the rules applicable to a dispute suggests that if a higher set of rules is sufficient to resolve the dispute, resort is not necessarily made to the lower set of rules. This can be the case at least if the contract is clear enough; contains provisions dealing with the particulars of the dispute; and if the dispute is not over the validity of the contract *per se*. In one arbitration case, the arbitral tribunal found that the contract was connected with a number of States and that it no particular law could be confidently designated as most closely connected with the dispute than the other of laws involved. Therefore, the tribunal decided the case on the basis of the contractual terms without specifying an applicable law.⁽¹⁾

B.4. International and domestic commercial customs

Article 12 of the Statute refers to the customs of international trade as a source of rules that may be taken into consideration to resolve a dispute.

(1) Award of 31/10/2009 in the arbitration case number 30/2008 at the Centre.

However, as explained in Chapter 2, the disputes that can be referred to arbitration under the Statute of the Centre may be international, in the sense that they affect interests of international trade. But the Centre can also assume jurisdiction over domestic disputes. So, a question arises as to whether customs of international trade may be relevant even in respect of purely domestic transactions.

The scope of application of commercial custom may be clarified by article 29 of the Regulation, which refers to both international and domestic commercial custom. Reading article 12 of the Statute together with article 29 of the Regulation suggests that international or domestic commercial custom may be applicable depending on whether the relevant dispute is domestic or international. In other words, article 29 of the Regulation can be understood as interpreting article 12 of the Statute by identifying the scope of application of international commercial custom.

Article 29 of the Regulation, however, evokes a question as to whether it recognizes international commercial custom as a “legal system” of its own. This is because article 29 indicates that a dispute could be resolved “in accordance with” international commercial custom. Be that as it may, a dispute can actually be resolved in accordance with, for example, the principles of UNIDROIT of international contracts in the same way as it could be determined solely on the terms of contract as mentioned above.

The arbitration case number 30/2008 may elucidate the applicability of international commercial custom. In that case, the arbitral tribunal found that the contract at dispute was an international one and did not contain a choice of law clause. The claimant asked the tribunal to apply the law of the place of execution of the contract. However, the tribunal concluded that the contract was connected with more than one State and, consequently, the dispute should be resolved “in accordance

with the terms of the contract at dispute which the tribunal is bound to apply as the law of the parties, taking into consideration the customs of international trade, pursuant to the provisions of article 12 of the Statute of the Centre and article 29 of the Procedural Regulation in force before the Centre.”⁽¹⁾ The tribunal ordered payment of interest at bank short-term interest rates as indicated by a world widely used benchmark. The Tribunal did not rest its order of interest on any national law; instead, it referred to the principles of UNIDROIT for international contracts which the tribunal held applicable to an international contract unless the parties have made an express choice of law.

Further, article 29 of the Regulation may suggest that a non-mandatory rule of the applicable national law could be ignored if it is inconsistent with international commercial custom relating to international contracts. One commentator has even suggested that if the parties to an international contract fail to make an explicit choice of law, they should be deemed to have intended to apply the principles of international trade.⁽²⁾ This view can be supported by the precedent contained in article 42(1) of the Washington Convention of 1965 which provides that the law of the contracting State and the rules of international law apply to the dispute if the parties did not make a specific choice of law. As such, a tribunal at ICSID may apply the national law of the relevant contracting State to the extent it does not contravene international law.⁽³⁾

C. Applying the Provisions of the Economic Agreement

It is recalled that the Centre has jurisdiction over commercial disputes arising from the implementation of the Unified Economic Agreement of the Member States. In respect of such disputes, the provisions of the said Agreement and the resolutions made pursuant to it, and the regulations

(1) Award of 31/10/2009 in the arbitration case number 30/2008 at the Centre.

(2) Salameh, Arbitration Centre, pp. 43 et seq.

(3) Nathan, ICSID, pp. 70-71.

of the Cooperation Council, shall apply to the pertinent dispute referred to arbitration according to article 30 of the Procedural Regulation.

Since the Economic Agreement and the applicable rules referred to in article 30 of the Regulation are international instruments, they override the national laws of the Member States. As such, no question about determining the applicable law arises. Needless to say that it is inconceivable that a law of a Non-member State could be relevant to a dispute arising between Member States or a Member State and a citizen of another.

II. The Issuance of the Arbitral Award

In order to examine the rules relating to the issuance of the award, one should start with a definition of the award. Next, the period within which the award shall be made, its form and substantive elements, pertinent deliberations, and the notification of the award will be considered in turn.

A. The Definition of the Award

An arbitral tribunal may make various decisions throughout the arbitral process,⁽¹⁾ *e.g.*, setting a schedule of hearings, determining the language of arbitration, etc. Besides, the tribunal may issue decisions on preliminary issues, like a plea to contest its substantive jurisdiction or an application to dismiss the case on ground of time limitation. Also, a tribunal may make decisions on interim measures, such as ordering a party to provide security for payment.

The above-mentioned examples of decisions do not determine the case on the merits. A final decision of the arbitral tribunal determines the substance of the dispute and brings the arbitral proceedings to an end at

(1) Al-Haddad, General Theory, pp. 294 et seq.

which the authority of the arbitral tribunal is exhausted. It is this final decision which is enforceable under the Statute as an arbitral award.

B. The Period for Making the Award

In order to expedite the resolution of disputes, the duration of the arbitral process is usually fixed from its inception so that the tribunal will make the award before the expiration of this period.⁽¹⁾ Setting a deadline for the arbitrators to issue the award underlines the professional duty of the arbitrators to accept the arbitral mission only if they can dedicate sufficient time for it.

Article 32 of the Procedural Regulation provides that “. . . the award shall be issued not later than one hundred days from the date of the reference of the file of the case to the arbitral tribunal unless the parties have agreed on another period for the issuance of the award.” The meaning of “the reference of the file of the case” to the tribunal has been explained in Chapter 3. The period of arbitration during which the award must be made starts running from the date of that reference.⁽²⁾

As regards the length of the period of arbitration, which is generally one hundred days, it can be prolonged by the agreement of the parties. Also, the parties may authorize the arbitral tribunal to extend the duration of arbitration. In one case, the authorization of the parties was found to be implicit as they agreed that the tribunal was to function as long as

(1) Al-Haddad, *General Theory*, p. 13.

(2) Some national laws may provide for a longer period of arbitration, which may start to run from the date of request for arbitration, as in Egyptian arbitration law of 1994. As such, the time consumed in the formation of the arbitral tribunal is part of that period. Under the Procedural Regulation of the Centre, while the period of arbitration might be relatively short, it starts to run from the date of referring the case to the formed tribunal. Therefore, the period of arbitration under the Centre is not unreasonable.

necessary to complete its mission.⁽¹⁾ Further, an implied consent to the extension of the period of arbitration may occur if the tribunal continues to function after the lapse of the initial period of one hundred days and neither party objects to the continued procedures.

In the absence of an express or implied consent of the parties to the extension of the period of arbitration, the tribunal has to adhere to the original period of one hundred days. However, article 33 of the Procedural Regulation provides that the Secretary General may extend the duration of the proceedings upon a justified request from the tribunal. The Secretary General decides on such requests after consultations with the parties.

The Procedural Regulation, while empowering the Secretary General to extend the period of arbitration, does not set a maximum limit for such extension. Yet, pursuant to arbitral practice and custom, the Secretary General should fix a new time limit when extending the period of arbitration. Indeed, it has been submitted that exempting the arbitrators from complying with a fixed duration of the arbitral process flies in the face of the nature of arbitration and even contradicts international public policy.⁽²⁾

What is, then, the consequence of the failure of the tribunal to make an award within the period of arbitration (and any extension thereof)? Article 33 of the Regulation answers this question. It states that the function of the arbitral tribunal terminates upon the expiration of the fixed term. Although article 33 refers to the lapse of the extended period, it must be understood as applying upon the expiration of the original period if not extended. Indeed, if the arbitral mission does not

(1) Arbitration case number 9/2003 at the Centre.

(2) Al-Haddad, *General Theory*, p. 17.

end upon the lapse of the original term, there would have been no need for an extension thereof.

Either party may, then, object to the continuation of the proceedings upon the expiration of the period of arbitration. If the tribunal goes on with the arbitration and makes an award, despite the objection, the enforcement of the award may be challenged according to article 36 of the Regulation on the ground that the arbitration agreement has lapsed or that the tribunal has exceeded its jurisdiction. Notably, a late decision of the Secretary General to extend the duration of arbitration would not correct the continued procedures if the objection of either party to the continued process persists.⁽¹⁾

C. The Form of the Award and Its Essential Substantive Elements

Article 34 of the Procedural Regulation provides that:

“The award shall be reasoned and shall include the names and signatures of the arbitrators, the names of the parties, the date of the award, the place of issuance thereof, the facts of the case, the reliefs sought by the parties, and a summary of their arguments and defences and replies thereto, and the party who shall bear the expenses and fees wholly or in part.”

It is clear from the above-quoted provision that the form and content of the award under the Statute does not differ from the common practice in arbitration. Thus, an award must be made in writing. This is required by necessary implication from the elements to be satisfied, like the reasons and signatures.

(1) The Grand Civil Court, Bahrain, case number 2/2009/09679/9, 10 February 2010.

Also, the arbitrators have to sign the award if it is issued unanimously. However, if the award is made by the majority of the tribunal, article 32 provides that the dissenting arbitrator shall record his opinion as an attachment to the award, provided that it shall not be considered part thereof. Apparently, the dissenting arbitrator should also indicate on the signatures page of the award that he is dissenting therefrom.

The substantive elements mentioned in article 34 can demonstrate that the arbitrators have fulfilled their mission in accordance with the procedural rules and requirements of due process. More specifically, the reasoning of the award and the discussion of the parties' arguments and defences reflect the arbitrators' respect for the right of defence and affording each party full opportunity to present his case. As mentioned above, the reasoning of the award may be dispensed with by the agreement of the parties if they authorize the arbitrators to decide *ex aequo et bono*. However, it should suffice if the arbitrators discuss the essential parts of the parties' arguments and defences. Generally, sweeping allegations made by a party with not specific facts or evidence might be ignored.

As regards the date of the award, it is important as it reveals whether the award has been made during the period of arbitration. The date of the award is the date of the signing thereof by the arbitrators (or the majority of them in case of dissent). Obviously, if the arbitrators sign the award in different dates, the date of the last signature should be the date of issuance.

Also, the award must include the place of the issuance thereof. Although the seat of arbitration is of little significance under the Statute as explained in Chapter 3, it may still be relevant for determining procedural issues relating to the application for enforcement as will be discussed later.

Finally, the award must include the distribution of expenses and fees between the parties.⁽¹⁾ As such, the power of the tribunal to decide on the expenses and fees of arbitration does not depend on the agreement of the parties. Rather, this power derives directly from article 34 of the Regulation, which is also supported by implication under article 23 of the Statute and article 41 of the Regulation.

D. Deliberations and the Required Majority to Make the Award

Upon the closing of proceedings, the tribunal starts deliberations that would lead to the making of the award.⁽²⁾ Obviously, deliberations concern tribunals comprising three members according to the Regulation.

Deliberations involve discussions between the arbitrators through which each of them may present his opinion and findings in the case. These deliberations must be held in private so as to avoid any influence on the members of the tribunal. The arbitrators may form a unanimous opinion. If unanimity is not achieved, however, the award may be made by the majority of the arbitrators.

The Regulation is silent as to the situation in which a majority is not achieved; each member of the tribunal may hold a different conclusion. Therefore, the tribunal may exercise its discretion to declare the proceedings at end. To avoid this unfruitful end of the proceedings, the terms of reference of arbitration should provide a solution to which the parties consent. For example, the parties may authorize the president of the tribunal to make the award if majority, much less unanimity, is not achievable to make the award. Although the Statute and Regulation do not refer to the parties' ability to make such an agreement, the validity thereof should be upheld since it conforms with the purpose of arbitration. Indeed, authorizing the president of the tribunal to make the

(1) Article 34 of the Procedural Regulation.

(2) Article 31 of the Procedural Regulation.

award in the aforementioned situation is justifiable on the ground that the parties can refer the dispute to a sole arbitrator in the first place.

E. Notifying the Parties with the Award

If the award is issued at a hearing attended by the parties, they will simply receive copies thereof and no further notification is needed. Article 35(1) of the Regulation, however, refers to the possibility of depositing the award with the General Secretariat of the Centre. As such, the award may be issued without holding a hearing or session to deliver the award in the presence of the parties. And the General Secretariat will carry out the notification of the parties with the award by means of registered mail within three days from the date of the issuance of the award.

The Regulation does not specify the means of communication to be used to deposit the award with the General Secretariat. Therefore, it is open to the tribunal to send the award to the Secretary General by email. Such a speedy method may be recommended since the notification of the award to the parties is to be done within three days from the date of issuance of the award; depositing the award by mail may make strict compliance with the three-day period for notification impracticable since the award may reach the General Secretariat after three or more days from its issuance. Nevertheless, the three-day period is apparently specified for guidance only and non-compliance with it does not - it is submitted - have negative consequences for the validity of the procedure or the award. Also, the fact that the award may reach the General Secretariat after the expiration of the period of arbitration should not affect the validity of the award so long as the date of the issuance of the award, as evidenced by the date of signature of the arbitrators, is within the period of arbitration.

III. The Consequences of the Issuance of the Award

Once an award has been issued, certain consequences will ensue. Some of these consequences concern the award itself, namely, the legal value

and binding effect of the award. Other consequences affect the arbitral tribunal in terms of the exhaustion of its authority except for limited purposes, such as the interpretation or correction of the award. These consequences will be examined more closely.

A. The Legal Value and Binding Effect of the Award upon Its Issuance

Under the Statute, an arbitration award is immediately legally binding upon the parties. As such, it is not required for the award to be deposited with a national court to be regarded as final and binding.

A.1. The immediate legal effect of the award upon issuance

Article 15 of the Statute and article 36(1) state in identical terms that “[t]he award issued by the arbitral tribunal in accordance with these procedures shall be final and binding upon the two parties, and it shall have the executive legal force in the Member States upon an order of execution to be issued by the competent judicial authority.” This means that, wherever the award may be made, it is recognized as binding and final so that enforcement can immediately be sought according to the procedures followed in the place of enforcement.

Thus, voluntary performance of the award by the award debtor discharges a legal obligation. The award debtor may not subsequently argue that it has erroneously paid undue amounts to the award creditor. Also, the award has a *res judicata* effect that precludes new legal proceedings between the same parties on the same cause of action.

A.2. The legal effect of the award does not depend on a depositing procedure

A clarification is needed regarding the reference in the Statute and Procedural Regulation to depositing the award with the Secretary General and thereby with “the competent judicial authority.”

As regards depositing the award with the Secretary General, it is an internal procedure paving the way to notifying the parties with the award.⁽¹⁾ The practical significance of this depositing procedure diminishes where the award is delivered at a hearing in the presence of the parties. Here the award is notified instantaneously. A subsequent deposition of the award with the Secretary General becomes only an administrative procedure for record-keeping purposes. It is obvious, then, that the deposition of the award with the Secretary General is not a pre-requisite to its binding legal effect.

Less obvious, however, is the requirement under article 16 of the Statute (and article 35 of the Regulation) that the Secretary General shall deposit the award with the authority concerned with the registration of awards in the State where enforcement is sought. It is submitted that this procedure has nothing to do with the immediate legally binding effect of the award. Indeed, article 16 of the Statute refers to depositing the award with an authority in the State of enforcement if such procedure is required under the law of that State. As such, it is not intended that depositing an award is a necessary procedure. The Secretary General cannot in fact determine where the award should be enforced so as to deposit it automatically, since this is a decision that the award creditor has to make.

It follows that depositing the award with a competent authority in the place of enforcement cannot occur except upon an application filed by the award creditor with the Secretary General. This is a form of assistance that the Centre offers to the parties. If the Secretary General deposits a copy of the award directly with the relevant authority, the concerned party would save time and cost that would otherwise be consumed in seeking attestation to the authenticity of the award from,

(1) Article 16 of the Statute; article 35 of the Procedural Regulation.

probably, a number of agencies in the country of the seat and the country of enforcement.

Indeed, had the drafters of the Statute intended to defer the legal effect of an award until it is deposited with a certain State authority, deposition would have been required with an authority in the country of the seat of arbitration not in the place of enforcement thereof. The Saudi Board of Grievances has affirmed this, holding that an award issued at the Centre is not required to be deposited with the courts of Bahrain which have no jurisdiction, in the first place, to authenticate or annul the award.⁽¹⁾

Similarly, the Supreme Court of Bahrain has confirmed that the fact that the Centre has its headquarters in Bahrain does not entail the applicability of the Bahraini law of civil procedure to the arbitral awards issued at the Centre. This is because the Centre is an “autonomous judicial authority” having a special regime of arbitration.⁽²⁾ Consequently, the rules relating to depositing the awards under section 241 of the said law with the Civil Court do not apply to the awards of the Centre, and any depositing procedure should be taken before the relevant authority in the State of enforcement of the award.

It should also be realized that, according to article 16 of the Statute, the deposition of the award with an authority in the State of enforcement is only needed if the enforcement procedures require that the award be deposited. As will be seen later, deposition of awards under the national laws of the Member States may be needed in respect of domestic awards *and* if the courts of the relevant State would have jurisdiction over the

(1) Decision number 348/D/4 of 1432 H (2011 AD), Saudi Board of Grievances.

(2) Appeal number 101/2010, 2 April 2012, the Supreme Court of Bahrain, *Majallat Al-Taḥkīm Al’Alamīyah* (2013) issue 18, p. 279; Magdy Ibrahim Kassim, ‘The International Effect of the Arbitration Award Issued at the GCC Commercial Arbitration Centre’ *Journal of Arbitration and Gulf Law*, June 2012, p. 18.

dispute but for the arbitration agreement. This means that the deposition of awards may even not be required in the State of enforcement.

Further, since the deposition of an award, if at all, should be effected before the courts of the State of enforcement that could have jurisdiction over the dispute, it would appear that the courts of the seat of arbitration might not have such jurisdiction and, consequently, they will not be competent for purposes of depositing the awards. This is because arbitration may be seated in a State not connected with the parties or the substance of the dispute and, therefore, does not appear to have a ground for jurisdiction over the dispute.⁽¹⁾

In short, deposition of the award may or may not be required depending on the applicable rules of enforcement (which is discussed later). If the deposition of the award is required at all, it would be carried out in the State of enforcement which is not necessarily the seat of arbitration where the award has been made. It follows that, deposition is not a pre-requisite to the legal effect of the award under the Statute; otherwise, the Statute would have designated courts of the seat as a depository authority so that deposition could be satisfied in all cases.

B. The Exhaustion of the Authority of the Arbitral Tribunal

The issuance of the award marks the normal end of the arbitral proceedings. The arbitrators will have then fulfilled their arbitration

(1) Cf Samia Rashed, Regional Centre, pp. 172-173, where she discusses the inapplicability of the depositing rule under the Egyptian arbitration law (pre-1994 arbitration law contained in the Law of Civil Procedure) to an arbitral award issued at the Cairo Regional Centre for International Commercial Arbitration, highlighting the fact that since disputed referred to the Regional Centre are of international character they may well not be connected with Egypt and Egyptian courts would not have jurisdiction on the dispute and, consequently, will not have authority to accept deposition of the pertinent award.

mission. Accordingly, they will no longer have authority to examine the substance of the dispute. Each party cannot by all means file new arguments, claims, pleadings or objections before the tribunal. Simply the arbitral proceedings terminate and the substantive jurisdiction of the tribunal is henceforth exhausted.⁽¹⁾

Nevertheless, the arbitral tribunal retains for a limited period of time a specific power to interpret or correct the award. Since this power is enshrined in the Regulation, the parties cannot contract out of it according to article 4 of the same Regulation.

Article 37 of the Procedural Regulation empowers the arbitral tribunal to correct the award on its own motion or upon a written request filed by either party with the Secretary General. An application for correction of the award must be submitted not later than fifteen days from the date of notification of the award to the concerned party. The other party shall be notified with the request for correction.

The correction of the award aims to edit or rectify typographical mistakes and mathematical errors that might occur in calculating a sum of the ordered payment, or the like. The tribunal may not modify its findings or the relief ordered under the pretext of correction. For example, the tribunal may correct the name of a party which has been misspelled in the award or the aggregate sum which has been miscalculated, using the correct figures already established in the case. But the tribunal has no authority to consider motions arguing that the tribunal has erred on a point of law. The nature of the correction procedure does not warrant hearings or exchange of submissions. The tribunal examines the award and effects necessary corrections on its own.

Likewise, article 38 of the Regulation allows the tribunal to interpret the award. According to the said article, interpretation aims to remove

(1) As the arbitrators have fulfilled their mission, their right to fees will be finally settled in accordance with Procedural Regulation as explained above.

ambiguities that may appear in the award. For instance, a paragraph in the award may refer to a party in such a way that it is not clear which party is meant. The tribunal may be asked to clarify the paragraph. An application for the interpretation of the award has to be filed with the Secretary General within seven days from the date of notification of the award to the party requesting interpretation thereof. Then, the arbitral tribunal is required to make its interpretive decision within twenty days from receipt of the request.

The decision of the tribunal regarding the correction or interpretation of the award must be recorded in writing and notified to the parties. It is considered an integral part of the final award for all purposes.

Notably, the Procedural Regulation does not provide for the possibility of requesting a supplementary award on the merits if the award has overlooked parts of the claims.⁽¹⁾

IV. The Enforcement of the Award

If an award is not discharged voluntarily, the award creditor may seek an order from the competent court to enforce it. This section explores the manner by which the award issued under the Statute of the Centre may be enforced. This involves determining whether or not the enforcement requires obtaining a judgment on the award.

Then, the grounds for refusal of enforcement will be examined. Finally, the main procedural aspects of an application to enforce the award in Member States will be highlighted.⁽²⁾

(1) Cf: section 51 of the Omani law for arbitration in civil and commercial matters; section 33(3) of the Bahraini law number 9/1994 relating to international commercial arbitration.

(2) The enforcement of the awards of the Centre in Non-member States has been examined in Chapter 1 where the effect of the Statute before the courts of Non-member States is explained.

A. The Statute's Approach to the Enforcement of the Award in Member States

According to article 15 of the Statute, an award *shall have* the executive legal force in Member States following an order to enforce it. At first hunch, this indicates that an award can be directly presented to the competent authority in a Member State to take execution procedures. However, the practice of the courts of Member States has been that an application to enforce the award should be first filed with the competent court, which would verify its enforceability. The Supreme Court of Bahrain described this procedure as “vesting the award with the leave for execution.”⁽¹⁾

Awards not made under the Statute of the Centre can be enforced in Member States by an order of the competent court giving leave for enforcement. The enforcement of these awards is subject to the conditions for the recognition of foreign awards and judgments in the relevant State. As such, the court will have to decide whether it should recognize the award and grant an order of enforcement. However, an award rendered in accordance with the Statute has to be recognized by Member States, while enforcement may be refused on specific grounds as will be examined later.

A different approach to the enforcement of awards has been adopted by the Washington Convention of 1965. Article 54 of the aforementioned Convention provides that an ICSID award shall be enforced in a contracting State as if it were a decision of a national court of that State. As such, an ICSID award can, presumably, be executed in accordance with the procedures of execution of national judgments. An application to a court for an order to enforce an ICSID award is effectively a formality to ascertain the existence of the award, the recognition and enforcement

(1) Appeal number 746/2010, 12 March 2012, the Supreme Court of Bahrain.

of which is an international obligation under the Washington Convention – no review of the award should be carried out by the court, and no challenge to the enforcement is contemplated.

It seems that the approach of the Statute towards the enforcement of the award lies between the regime of enforcement of the Washington Convention and the route of enforcement of foreign awards under national laws. To explain, like the Washington Convention, the Statute binds the Member States which have to recognize the award issued under the arbitration regime of the Centre. However, the Statute does not go as far as ruling out any challenge to the enforcement of the award.

The possibility of challenging enforcement brings the Statute closer to the common national law approach toward the enforcement of foreign awards, while still facilitating the enforcement: the validity of the award *per se* is not subject to challenge in the seat of arbitration and the enforcement of the award in another Member State is subject to fewer grounds for refusal of enforcement, excluding the nullity of the award in the seat of arbitration.

B. No Direct Means of Recourse against the Award Is Allowed in the Member States

The Statute provides for no direct means of recourse against the award. That is, the courts of the Member State in which arbitration takes place have no jurisdiction to hear an action to review or annul the award. Thus, article 14 of the Statute, which is the basis for the Centre's exclusive jurisdiction, precludes challenging an award before the courts of the Member States. Nor does the Statute set up a mechanism of reviewing the award by the Centre or an appellate committee, like in ICSID.⁽¹⁾

(1) The Procedural Regulation contained a provision to the effect that an application to annul the award could be filed with, and decided by, the Secretary General. This provision has been repealed by the amendment to the Procedural Regulation in 1999.

The Supreme Court of Bahrain has affirmed the dispensation with the nullification procedure in respect of the awards rendered in accordance with the Statute. Thus, the said Court has reversed a judgment annulling an award as the lower court lacked jurisdiction to hear an action brought to set aside an award.⁽¹⁾ The Court rested its decision on the exclusive jurisdiction of the Centre under article 14 of the Statute and the underpinning policy of ensuring a quick and final resolution of the disputes.

While there is no direct means of recourse against the award, *i.e.*, neither party can institute legal proceedings to annul the award, the Procedural Regulation provides for the possibility of challenging an application filed for the enforcement of the award. As such, an award debtor can raise a plea under article 36 of the Regulation against the enforcement before the relevant court.

It is worth noting that article 36 of the Regulation states that an award debtor may “file an application to annul the award” with the court before which the enforcement of the award is being sought. Yet, the same article provides that, if the court upholds such an application, it shall *refuse to enforce* the award. This means that the court will not decide to annul the award; it can only refuse to enforce it within its jurisdiction. As such, despite the unfortunate use of the expression “an application to annul the award” in article 36 of the Regulation, what is meant is clearly a plea against enforcement. In other words, an award may be challenged indirectly by asking a court not to grant a leave of enforcement.

This is evident from the fact that a court of a Member State can be seized with such a plea only after it retains an application for the

(1) Appeal number 746/2010, 12 March 2012. The Administrative Appeal Court of Al-Riyad has, too, upheld the finality of awards of the Centre with no means of recourse against them. Decision number 95/1 of 1434 H (2013 AD), noted in the Journal of Gulf Law and Arbitration (2013) issue 18, p. 26.

enforcement of the award; article 36 concerns the court of the State in which enforcement is wanted which is not necessarily the court of the seat of arbitration. Further, the Regulation provides for no specific time limit for challenging the enforcement of the award; had it meant to allow a principal action to be brought to annul the award, article 36 would have set a time limit for bringing the action in order not keep the fate of the award undetermined for unlimited time.

Having said that an award issued under the Statute is not subject to a direct means of recourse, does this mean that the award is delocalized? An award resulting from an international commercial arbitration is described as delocalized, floating or *anational* if its validity is not attached to the legal system of the country in which it has been made.⁽¹⁾ The major characteristic of a delocalized award is that its validity or enforceability is assessed by the court of enforcement. And the ruling by the courts of the seat of arbitration that the award is null is irrelevant for the enforcement of the same award in other jurisdiction.

In other words, a delocalized award is not regarded by the court of enforcement as being subject to the law of the seat of arbitration. And if the law of the seat of arbitration recognizes the concept of delocalized awards, it will dispense with a nullification action against the award, which could otherwise be brought by the award debtor. The courts may review the award only if seized with the matter through an application for enforcement filed by the award creditor.

Accordingly, the nullity of the award in its country of origin as a ground for refusal of enforcement is neutralized in respect of a delocalized award, even under article 5 of the New York Convention of 1958 which refers to that ground for refusal. Further, the rules applicable

(1) For a detailed examination of delocalized awards see: Mohammad Bashayreh, 'The Delocalized Arbitration Award: Its Concept and Enforcement,' Law Journal (Majallat al-Ḥuqūq) (2007) 31(3), p. 241.

to determine the validity of the award will vary depending on where its enforcement is sought. As such, the award debtor may have to fight enforcement proceedings in different jurisdictions, since the decision of any national court to refuse the enforcement of the award is far from producing an *erga omnes* effect.⁽¹⁾

An award issued under the Statute shares a salient principle with delocalized awards: it is not subject to a nullification procedure in its country of origin. However, two aspects of the award under the Statute differ from the theory of delocalization. First, the Statute contains certain rules concerning the validity of the award. This is because the Statute is the procedural *law* for arbitration and it is not mere contractual terms incorporated by the agreement of the parties (as explained in chapter 3). It follows that, unlike delocalized awards whose validity may depend on different laws of courts examining its enforceability, an award of the Centre will be assessed largely based on the same provisions of the Statute in force in the Member States.⁽²⁾

The second difference between the awards of the Centre and delocalized awards is the scope of dispensing with the recourse against the award in the country of origin or curtailing its consequences at the

(1) While the New York Convention of 1958 could benefit the award debtor in that a judgment to nullify it in its country of origin may be respected by a court of enforcement, the Convention did not rule out the possibility of enforcing the award in one jurisdiction, despite its nullity in its country of origin. This is because the nullity of the award is an optional, not compulsory, ground for refusing to enforce the award according to article 5 of the Convention. See Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed., Sweet & Maxwell, London (2004) pp. 445 et seq.

(2) While public policy may, generally, be a ground for refusal of enforcement, it can be assumed that public policy of Member States involves common principles. Mandatory rules of law, which may differ from a Member State to another, are not necessarily treated as part of public policy.

enforcement stage. The theory of delocalization applies in the realm of international commercial arbitration, *i.e.*, arbitration implicating the interests of international trade.⁽¹⁾ By contrast, the Statute denies direct recourse against all awards issued at the Centre, whether concerning the interests of international trade or purely domestic relationships pursuant to the jurisdiction *ratione materiae* of the Centre as explained in Chapter 2.

In short, the Statute confines the judicial review of the award to examining challenges to enforcement applications. Hence, it is necessary to consider the relevant grounds for refusal of enforcement of an award.

C. Grounds for Refusal of Enforcement of the Award

Article 36(2) of the Procedural Regulation lists certain grounds for refusal of enforcement of an award issued in the context of the mechanism of arbitration of the Centre. Yet, the said article asserts that the general rule is the enforceability of the award unless the party dissatisfied with the award challenges the enforcement on one or more of these grounds. Thus, article 36(2) provides that:

“The competent judicial authority shall grant an order of enforcement of the arbitral award unless either party files an application to annul⁽²⁾ the award based on the following exclusive list of grounds:

- a. If the award has been issued though no arbitration agreement existed or based on an arbitration agreement that is void or has lapsed due to the expiration of the

(1) Sté PT Putrabali Adyamulia, French Court of Cassation, civ. 1, 29 June 2007. Cited and annotated by Philippe Pinsolie, ‘The Status of Vacated in France: the Cour de Cassation Decision in Putrabali’ *Arbitration International* 24(2) (2008) 277.

(2) The improper use of the word “annul” has been clarified in the previous subsection.

period of arbitration or if the arbitrator has exceeded the scope of the agreement;

- b. If the award has been made by arbitrators not appointed in accordance with the law or by some of the arbitrators who are not authorized to make it in the absence of the rest of arbitrators or if it has been issued based on an arbitration agreement that has failed to specify the subject matter of the dispute or that has been made by a person lacking capacity to enter into arbitration agreements.

If any of the cases mentioned in the two paragraphs above, the competent judicial authority must investigate the validity of the application for nullification and decide not to enforce the arbitral award.”

Before embarking on an explanation of the grounds for refusal of enforcement, three general comments should be made regarding article 36(2) of the Regulation. First, these grounds may be invoked by means of a pleading submitted in reply to an application for enforcement of the award, not a principal action that can be initiated by either party. Therefore, as explained in the previous subsection, if any of these grounds is established the court will *refuse* to enforce the award; article 36(2) does not empower the court to *annul* the award despite the use of this term at the beginning of article 36(2).

The second general comment is that a court examining a challenge to the enforcement of the award may not review the merits of the dispute. The court will only ascertain whether the ground for refusal invoked by a party is established or not. Therefore, the Saudi Board of Grievances has refused to examine the alleged invalidity of the main contract containing the arbitration clause, saying that the question of the validity of the underlying contract related to the substance of the dispute and the court was precluded from examining it at the enforcement stage.⁽¹⁾

(1) Decision number 348/D/4 of 1432 H (2011 AD).

Finally, the grounds mentioned in article 36(2) are exclusive. However, they can be supplemented by principles of procedural and substantive public policy which may apply even if they are not spelled out in the text of the said article. Therefore, after discussing the grounds for refusal of enforcement, the impact of procedural and substantive public policy on the enforcement of awards will be examined.

C.1. Non-existence, invalidity, lapse of the arbitration agreement, or the incapacity of either party thereto

While an arbitral tribunal may make decisions regarding its substantive jurisdiction by virtue of the competence-of-competence principle, its jurisdictional decision is not final. A court can, at the stage of the enforcement of the award, review the arbitrators' jurisdiction afresh if the party challenging the enforcement of the award submits a plea disputing the validity of the arbitration agreement, its effectiveness, or scope. The burden of proof in respect of these grounds lies with the party contesting the enforcement of the award.

According to article 36(2) of the Regulation, enforcement will be refused if the court is satisfied that a purported arbitration agreement upon which the award was made never existed as between the concerned parties. For instance, a claimant may commence arbitration against a director of a company, although the relevant arbitration agreement was signed on behalf of the company and no legal relationship existed between the claimant and the director in his personal capacity.

Similarly, an arbitration agreement will be deemed to have ceased to exist if arbitration was commenced after the agreement had terminated. This may occur if the parties have waived the arbitration agreement and accepted to submit the dispute to the courts instead of arbitration.⁽¹⁾

(1) Supreme Court of Bahrain, appeal number 658/2010, 20/2/2012.

It is recalled that, by virtue of the separability doctrine, the invalidity of the contract containing an arbitration clause is not a ground for refusal of the award. An arbitration agreement *per se* must be proven to be invalid. For instance, an arbitration agreement may be made orally and, therefore, not valid since the Statute requires the arbitration agreement to be made in writing. Also, a contract containing an arbitration clause may be signed by an agent who does not have a specific authorization to enter into arbitration agreements. In the aforementioned examples, an arbitration agreement would be void while the underlying contract may still be valid.

The enforcement of an award may also be challenged on the ground that the arbitration agreement has lapsed. This may be the case where the period of arbitration has expired, and the arbitral tribunal has nevertheless continued the proceedings and issued an award. The enforcement of the award can, in this case, be contested as it was made late. An untimely decision of the Secretary General to extend the period of arbitration issued after the original (or duly extended) period of arbitration had expired is incapable of validating the award.⁽¹⁾

Likewise, if an arbitral tribunal decides on new matters, while exercising its power to correct or interpret an award, it will be making an award

(1) The Grand Civil Court of Bahrain, appeal number 2/2009/09679/9, 10 February 2010. In this case, the Grand Civil Court of Bahrain was seized with the challenge to the award by means of a principal action to annul the award. While the decision of the Civil Court gives guidance on the consequence of the expiration of the period of arbitration for the validity of the award, the decision has been reversed by the Third Higher Civil Court of Appeal on the ground that the courts had not jurisdiction to hear a principal action to annul an award made according to the Statute of the Centre (appeal number 3/2010/540/9, 24/11/2010). The Supreme Court of Bahrain has affirmed the decision of the Court of Appeal (appeal number 746/2010, 12 March 2012).

after the arbitration agreement has lapsed upon the issuance of the award being corrected or interpreted.

Article 36(2) mentions a special cause for the invalidity of an award, namely the incapacity of a party at the time of the making of the relevant arbitration agreement. As mentioned in Chapter 2 above, the capacity of the parties to enter into arbitration agreements is governed by the law applicable according to the rules of conflict of laws of the State in which the enforcement of the award is being sought.

C.2. Excess by the arbitrators of their jurisdiction

The arbitration agreement is the basis for the jurisdiction of the arbitrators. As such, the arbitrators will have jurisdiction over the matters referred to arbitration in accordance with the agreement. Matters not included in the agreement fall outside of the ambit of arbitral jurisdiction. And an award deciding such matters can be refused enforcement.

A court will interpret the relevant arbitration agreement to ascertain whether the arbitral tribunal has ruled on matters outside of its jurisdiction. If the court finds that the tribunal has ruled upon matters exceeding its jurisdiction, the court would uphold a challenge to the enforcement of the award, provided that the party contesting the enforcement has raised an objection to the jurisdiction of the tribunal before participating in the examination of the substance of the dispute (as explained above).

It is clear that if an arbitral tribunal makes an award despite the invalidity or lapse of the arbitration agreement, it will be ruling without jurisdiction at all. In these cases the award will be wholly unenforceable. If, on the other hand, the arbitrators exceed their jurisdiction as a result of a wrong interpretation of the arbitration agreement, the award may be wholly or in part made outside the jurisdiction of the tribunal depending on whether the whole dispute fell beyond the arbitral jurisdiction or not.

National laws provide usually for the possibility of partial enforcement of the award if it is severable. In other words, under many national laws, an award can be set aside in part, *i.e.*, just in respect of the issues falling outside the arbitrators' jurisdiction. Although the Statute and Procedural Regulation make no reference to the enforcement of the award in part, it is submitted that the court from which a leave for enforcement is requested may enforce the award in part, if need be. This view is based on the fact that partial enforcement is more consonant with the expectations of the parties and the principle of efficacy of the arbitration agreement which entails giving effect to the agreement of the parties to the extent possible.

Excess of arbitral jurisdiction may also occur if the arbitral tribunal wrongly disregards a condition precedent to the commencement of arbitration, *e.g.*, a condition of having resort first to a pre-arbitration mediator. Provided that the concerned party has invoked the condition precedent in the inception of the arbitral proceedings, it can be used to challenge the enforcement of the award.

The Supreme Court of Bahrain has ruled that arbitrators have to observe conditions precedent to their jurisdiction. Thus, in one case, the parties stipulated that the dispute was to be referred to an adjudication board. The Claimant commenced arbitration, ignoring the phase of the adjudication board. The Supreme Court found that, by assuming jurisdiction to decide on the dispute, the arbitral tribunal had exceeded its jurisdiction.⁽¹⁾

C.3. Uncertainty of the subject matter of the dispute referred to arbitration

Article 36(2) of the Regulation provides that if the arbitration agreement does not specify the subject matter of the dispute, then

(1) Supreme Court of Bahrain, appeal number 127/2007, 25/2/2008, *Majallat Al-Taḥkīm Al'Alamiyah* (2012) issue 16, pp. 363-369.

the resulting award would be unenforceable if a party contests the enforcement thereof. It is worth noting that article 36(2) does not appear to distinguish in this regard between an arbitration clause and a submission agreement. It has been explained in Chapter 2 above that the Statute recognizes the two common forms of arbitration agreements: an arbitration clause inserted into a contract, and a submission agreement made after a dispute had arisen. A question arises, therefore, whether the subject matter of a dispute has to be specified with certainty under both forms of arbitration agreements.

It is submitted here that article 36(2) should be interpreted as referring only to submission agreements. This is because the recognition of arbitration clauses, which are necessarily inserted in contracts before the emergence of any dispute, demonstrates that the Statute envisages that arbitration can be commenced without the need for a new submission agreement defining the dispute. Indeed, the suggested wording of an arbitration agreement indicated by article 2 of the Regulation clearly refers to future disputes that are not capable of specific description.⁽¹⁾

It would be appreciated, however, that if terms of reference for the arbitral process are organized clearly, defining the dispute referred to arbitration and the questions upon which the tribunal is asked to decide, the issue of uncertain arbitration agreements can be obviated. The terms of reference and the subsequent exchange of pleadings can crystalize a vague arbitration agreement, at least if neither party takes issue with the validity or clarity of the relevant agreement.

(1) It seems difficult to interpret article 36(2) as referring to a vague request for arbitration, since such a request might be incapable of registration in the first place – article 9 of the Regulation requires that the dispute be clarified in the request for arbitration. In any event, if the respondent does not object to the jurisdiction of the tribunal based on a vague request for arbitration, the scope of the matters referred to arbitration can be articulated, and the validity of the arbitration agreement substantiated, through the terms of reference or the exchange of pleadings and submissions by the parties.

C.4. The making of an award by unduly appointed arbitrators

According to article 36(2)(b) of the Regulation, the enforcement of an award may be refused if the award has been made by arbitrators who were not appointed in accordance with the law. As such, if an irregularity tainted the constitution of the arbitral tribunal, the resulting award would be unenforceable.

For instance, the Secretary General may appoint arbitrators without affording the parties the opportunity to appoint them. Also, if an arbitral tribunal is composed of two or four arbitrators, while the Regulation stipulates that the tribunal shall have a single arbitrator or comprise three arbitrators. Besides, if the general conditions of arbitrators under the Regulation are not satisfied by the appointed arbitrators, the tribunal will be unduly formed. The same applies regarding any special conditions of arbitrators that the parties may have required under the agreement.

However, irregularities tainting the formation of the arbitral tribunal may be waived by the parties, unless they implicate mandatory rules under the Procedural Regulation (*e.g.*, the number of arbitrators to be either one or three). For instance, as has been explained in Chapter 3, a party loses his right to contest the validity of the appointment of an arbitrator if he fails to raise the issue before the first hearing.

Finally, while article 36(2) (b) refers to the appointment of arbitrators in accordance with the *law*, it should be interpreted as referring to the Statute and Regulation as the procedural law of arbitration. This is because the Regulation itself prevents the parties from choosing procedural rules that detract from the powers of the Centre. Since the supervision of the formation of the tribunal and the appointment thereof fall within the powers of the Centre, these matters cannot be submitted to a procedural law other than the Regulation.

C.5. The making of the award by unauthorized members of the tribunal in the absence of the rest of arbitrators

Article 36(2)(b) poses a situation where only some of the arbitrators have issued the award in the absence of the rest of the arbitrators, assuming at the same time that the arbitrators who made the award were not authorized to make it. Obviously, this situation relates to tribunals comprising three arbitrators under the Regulation; it cannot apply where the dispute is referred to a sole arbitrator. The situation envisaged by article 36(2)(b) seems, however, difficult to occur in reality.

This is because an award cannot be valid unless issued unanimously or by majority according to article 32 of the Regulation. Since a multi-arbitrator tribunal can only consist of three arbitrators under the Regulation, a valid award must then be made by the three arbitrators or a majority of two thereof. On the other hand, if article 36(2) (b) implicitly indicates that two arbitrators may be authorized by the parties or the tribunal to make the award in the absence of the third arbitrator, this would defy the provision of article 31 of the Regulation, which requires all arbitrators to partake in the deliberations culminating in the award. Article 31 is deemed to be mandatory, thus precluding the possibility of an arbitrator lawfully absenting himself therefrom.

However, article 36(2)(b) could be given effect to if it is reconciled with articles 31 and 32(1) of the Regulation. Reconciliation is possible on the basis that article 36(2)(b) contemplates that all arbitrators may participate in the deliberations, and upon a unanimous conclusion, one arbitrator may authorize the others to sign and issue the award even if, for some reason, he would not be able to sign it. Or, he may dissent or refuse to cooperate, following the deliberations, in signing the award or in presenting his written opinion in dissent.

In these situations, it would be reasonable to accept the validity of the award which, on the face of it, is made by the majority of the arbitrators, provided that all the arbitrators have participated in the deliberations and the majority explains the absence of the signature of the third arbitrator. In other words, the absence of the other “arbitrators” (though it would be practically one arbitrator vis. two signatory arbitrators) should be understood as referring to the absence of their signatures from the award and not the absence of an arbitrator from the deliberations.

This understanding helps give effect to the wording of article 36(2)(b) relating to the absence of some arbitrators. It also prevents a member of the arbitral tribunal from aborting the issuance of the award by failing to cooperate in the signing thereof.

It could also be that this ground for refusal contemplates the situation where, upon deliberations, no majority could be achieved and that the parties have authorized the president of the tribunal to make the award. If so, article 36(2)(b) implicitly endorses the view expressed above regarding the majority required to issue an award. Yet, deliberations are indispensable here either.

If, however, an arbitrator fails to participate in the deliberations, and the other arbitrators issue the award nevertheless, it is submitted that the award could be rendered void since it is made in violation of article 31 of the Regulation. The solution to the problem of an arbitrator ceasing to participate in the proceedings is to replace him.

C.6. Violating procedural public policy

Although article 36(2) does not refer to procedural public policy as a ground for refusal of enforcement of the award, it remains relevant for the enforcement proceedings. Principles of public policy impose themselves without their application being dependent on a written

provision. As such, principles relating to the requirements of due process are deemed to be applicable to the arbitral proceedings and violating them could result in the refusal of enforcement of the award.

In fact, until 1999, the Regulation contained a provision in article 38 empowering the Secretary General to annul an award, upon an application filed by either party, on grounds including the case where “an illegitimate influence was exerted on any arbitrator and affected the outcome of the case.” “Illegitimate influence”⁽¹⁾ would mean collusion, bribes, or fraud. However, in 1999, article 38 has been abolished, and the wording relating to illegitimate influence upon arbitrators was not reproduced in any other provision of the Regulation.

However, the omission of the reference to influencing arbitrators unlawfully cannot be interpreted as making such influence acceptable. Rather, the provision dealing with illegitimate influence on arbitrators has been deleted because, it is submitted, it could be regarded as redundant. Again, principles of due process apply even if they are not provided for explicitly.

Also, the explanatory note to the draft amendments to the Regulation⁽²⁾ clarified that article 38 was abolished in order to remove the means of direct recourse against the award before the Centre, leaving the review of the award to be carried out by judicial authorities seized with an application for the enforcement of the award.

Thus, the removal of article 38 of the Regulation aimed to speed up the finality of the award and to avoid reviewing it by the Secretary General.

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- (1) The expression illegitimate influence indicates that some influence can be legitimate. “Legitimate influence” obviously refers to the effect of legal arguments aiming to persuade the arbitrators.
 - (2) Explanatory note to the 1998 draft of amendments, subsequently approved in 1999. The document is kept in the Centre’s archive.

A court before which the enforcement of the award is sought will examine any allegations of violating the requirements of due process that the party contesting the enforcement may raise. Indeed, it would be singular if a party cannot challenge an application for enforcement if, for instance, he was not duly notified of the arbitral proceedings, simply because this is not mentioned explicitly as a ground for refusal of enforcement under article 36(2) of the Regulation.⁽¹⁾

The Saudi Board of Grievances has accepted the possibility that the enforcement of an award may be refused on grounds of principles of due process not mentioned in article 36(2) of the Regulation. Thus, a party resisting enforcement proceedings of an award argued that arbitration was allowed to continue although he could not procure decisive documents he needed in the case. The Board of Grievances referred to provisions of the Saudi law of civil procedure and concluded that for that argument to be upheld the documents must be decisive and unknown to the concerned party during the proceedings. Since the Board of Grievances was not convinced that that was the case during the arbitral proceedings, the argument has been rejected.⁽²⁾ It can be inferred from this decision that if a party was not afforded a full opportunity to present its case, this could be a ground to challenge enforcement proceedings even though this ground for refusal of enforcement is not mentioned in article 36(2) of the Regulation.

(1) It has been suggested that the Statute and Regulation should allow an action to annul the award in order to cover grounds of public policy that may strike at the award (an interview with Dr Azmy Abdel-Fattah Atiyah, *Journal of Gulf Law and Arbitration* (2014) issue 23, p. 32 at 34. However, according to the analysis set out in the text, principles of public policy can in fact be taken into account as a ground to contest the enforcement of the award.

(2) Saudi Board of Grievances, the Appellate Administrative Court of al-Riyad, decision number 95/1 of 1434 H (2013 AD).

C.7. Substantive public policy

Substantive public policy refers, very broadly, to basic principles prevailing in a society the violation of which may be outrageous or dangerous for the well-being of the society in social or economic terms. The Statute and Regulation do not refer to substantive public policy. Nor does the Regulation provide that enforcement of an award may be refused if it offends against substantive public policy.

It could be that commercial disputes falling within the jurisdiction of the Centre would rarely involve principles of public policy. Yet, in ratifying the Statute of the Centre, Saudi Arabia declared that awards will be enforced upon verifying that they do not contravene *Shari'ah*. The Saudi Board of Grievances accepted in principles that an award would not be enforced if it violated *Shari'ah*; however, the Board did not admit new evidence to demonstrate an alleged violation as the evidence should have been presented to the arbitral tribunal.⁽¹⁾

In few cases, arbitral tribunals took into consideration the principles of public policy of the place where the award would most likely be enforced. Thus, in one case, the arbitral tribunal applied the substantive rules of evidence under Saudi law relating to the conditions required in a witness for his testimony to be admitted.⁽²⁾ Similarly, an arbitral tribunal rejected a claim for interest since it was against the public policy in Saudi Arabia, where the award was to be enforced as the dispute was most closely connected with that country.⁽³⁾

Generally, it appears that, in international commercial arbitration, the role of the public policy of the enforcement forum may not be ruled

(1) Saudi Board of Grievances, the Appellate Administrative Court of al-Riyad, decision number 95/1 of 1434 H (2013 AD).

(2) Arbitration case number 20/2007 at the Centre.

(3) Arbitration case number 29/2008 at the Centre.

out. It has been suggested that this may be the case even in respect of ICSID awards which are recognized and enforced under the Washington Convention as if they were national judgments of the concerned contracting State.⁽¹⁾

D. The Procedural Aspects of the Enforcement of Awards in Member States

The Statute and Procedural Regulation submit the procedural aspects of the enforcement of an award issued thereunder to the procedural law of the Member State in which enforcement is sought. This is clear from articles 15 of the Statute and article 35(1) of the Regulation which provide that an award shall be registered in accordance with the law of the concerned State.

The law of the State in which enforcement is requested governs the filing of the application for enforcement, designating the competent court to decide thereupon, and the post-award provisional measures. Yet, the law of that State cannot contradict the Statute. For instance, a court may not assume jurisdiction to hear an action to annul the award since this means of recourse against the award is ruled out by article 14 of the Statute.

The following subsections will explore the essential relevant procedural rules in each Member State.

D.1. The enforcement of the award in the United Arab Emirates

If the seat of arbitration is in UAE, an application to enforce the award has to be filed with the court of first instance in accordance with sections 213 and 215 of the Law of Civil Procedure. Registration or deposition

(1) Edward Baldwin et al, 'Limits to Enforcement of ICSID Awards,' *Journal of International Arbitration* (2006) 23(1), p.1, at pp. 5-9.

of the award does not apply unless arbitration has been conducted under the supervision of the court. Since arbitration at the Centre is not under the supervision of the court, registration of the award is inapplicable. Thus, the party seeking enforcement is required to file an application with a certified copy of the award. Once a leave for enforcement is granted, the judge of execution will pursue the execution procedures.⁽¹⁾

On the other hand, if the seat of arbitration was outside UAE, the procedures to be followed are those applying to applications for the enforcement of foreign judgments. The application is to be filed with the court of first instance. However, the conditions of the enforcement of foreign judgments do not apply to the extent they contradict the Statute. This is affirmed by section 218 of the law of civil procedure which provides that the provisions of this law apply without prejudice to the international conventions to which UAE is a party. As such, the ground for refusal of a foreign judgment that contradicts a national judgment does not apply to arbitral awards issued under the Statute.⁽²⁾

If the seat of arbitration is a Member State, the Convention on the Enforcement of Judgments would apply. However, since no additional grounds for refusal of enforcement will apply, as will be explained later, the procedures for the enforcement of an award in the UAE are practically the same, whether the seat of arbitration was in or outside of UAE.

(1) Section 215 of the UAE law of civil procedure number 11/1992.

(2) Section 125 of the Constitution of UAE provides that the conventions concluded by the federation of UAE are binding on the governments of the states. Each state within the federation has to issue such laws and ordinances to implement such binding conventions. As such, it is presumed that each state within the federation of UAE has taken necessary steps to implement the Statute.

D.2. The enforcement of the award in the Kingdom of Bahrain

It has been suggested by the Court of First Instance that the Bahraini law number 12/1971 of civil and commercial procedures apply to the applications filed for the enforcement of an award rendered at the Centre.⁽¹⁾ However, the provisions of this law concern domestic arbitration. Therefore, they may apply if the seat of arbitration is in Bahrain. According to the aforementioned law, an application for enforcement of the award has to be filed with the court originally having jurisdiction to determine the dispute referred to arbitration. Deposition of the award with that court is needed.⁽²⁾

However, despite the position of the court of first instance mentioned above, the Bahraini law number 9/1994 relating to international commercial arbitration may apply to the enforcement of an award issued under the Statute. This may be the case if the arbitration case satisfied any criterion of international arbitration under Bahraini law, which are generally the criteria adopted under the UNCITRAL Model Law of International Commercial Arbitration.⁽³⁾ If the Bahraini law relating to international commercial arbitration is applicable, the application for enforcement is to be filed with the Grand Civil Court,⁽⁴⁾ and no prior deposition of the award would be required.⁽⁵⁾

Alternatively, if the seat of arbitration is outside of Bahrain and the relevant case does not satisfy any criterion of the internationality of arbitration, the application for enforcement will most likely be subject to the law relating to the enforcement of foreign judgments and awards.

(1) The Bahraini Court of First Instance, case number 8/46/2006/2, 3 June 2008, *Majallat Al-Taḥkīm Al'Alamīyah* (2011) issue 11, pp. 267-273.

(2) Sections 240 and 241 of the Bahraini law number 12/1971.

(3) For more details, see Al-Haddad, *General Theory*, pp. 97-112.

(4) Section 35(1) of the Bahraini Law number 9/1994.

(5) Section 2 of the Bahraini Law number 9/1994.

An application has to be brought before the Grand Civil Court pursuant to the procedures of instituting a civil action according to section 252 of the law relating to the enforcement of foreign judgments and awards. Section 255 of the same law provides that the provisions of this law may not affect the application of relevant international conventions. As such, the grounds for refusal of enforcement are subject exclusively to the Procedural Regulation. The same outcome would be reached if the Convention on the Enforcement of Judgments applies where the seat of arbitration is in a Member State. (This Convention will be considered later.)

D.3. The enforcement of the award in the Kingdom of Saudi Arabia

The Saudi Arbitration Regulation applies, in principle, to arbitration awards if the seat of arbitration is in Saudi Arabia. Also, it applies where the seat of arbitration is outside Saudi Arabia if the parties have agreed to apply the Saudi Regulation to their arbitral procedures. It follows, that the enforcement of the award issued under the Statute may be subject to the Saudi Arbitration Regulation if the seat of arbitration is in Saudi Arabia or if the parties agreed to apply that Arbitration Regulation to the procedures, subject of course to the Procedural Regulation of the Centre as explained in Chapter 3.

If the enforcement of the award is governed by the Saudi Arbitration Regulation, a copy of the award has to be deposited with the competent court, *i.e.*, the court that would have jurisdiction over the dispute but for the arbitration agreement.⁽¹⁾

However, if the relevant arbitration process is outside the scope of application of the Saudi Arbitration Regulation summarized above, the enforcement of the award would be subject to the procedures relating to

(1) Sections 44 and 53 of the Saudi Arbitration Regulation.

the enforcement of foreign judgments. In this regard, the Saudi Board of Grievances has ruled that an award issued in accordance with the Statute can be enforced pursuant to the Convention for the Enforcement of Judgments concluded in the context of the Cooperation Council, provided that the Statute overrides any provisions of the convention that may be inconsistent therewith.⁽¹⁾

The Convention for the Enforcement of Judgments signed among the Member States,⁽²⁾ in turn, refers to the domestic law of execution of judgments. As far as Saudi Arabia is concerned, this means that the Regulation of Execution number 53 of 13/8/1433 H (2012 AD) shall apply. According to section 8 of the said Regulation of Execution, an application for the enforcement of a foreign judgment, and similarly an award, has to be submitted to the judge of execution at ordinary courts. Section 11 of the same Saudi Regulation confirms the supremacy of international conventions, like the Statute, in respect of the conditions of enforcement of foreign judgments (and awards).

D.4. The Enforcement of the award in the Sultanate of Oman

According to section 3 of the Omani law number 47/97 relating to arbitration in civil and commercial matters, arbitration is considered to be “international” if it is submitted to an arbitration Centre located outside Oman. Therefore, arbitration under the auspices of the Centre

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- (1) Saudi Board of Grievances, decision number 348/D/4 of 1432 H (2011 AD).
- (2) It should be noted that, if the seat of arbitration is in a Member State, the Convention for the Enforcement of Judgments may well be applicable in the rest of Member States. However, the Statute overrides this Convention and provides more favorable a regime of enforcement more. This will be explained in section V of this chapter. Specific reference to the Convention regarding the enforcement of awards in Saudi Arabia is warranted as the Saudi court (Board of Grievances) referred to the Convention specifically, while concluding that the Statute took precedence over it.

can be characterized as international for the purposes of the enforcement of the resulting award.

Thus, section 47 of the aforementioned Omani law provides that an award creditor has to deposit a copy of the award with the appellate circuit of the commercial court, which is the competent court in this regard by virtue of section 9 of the same law. Following the deposition of the award, an application for enforcement can be filed with the court accompanied with the original award or a certified copy thereof, a copy of the arbitration agreement, a translation of the award if it was not issued in Arabic, and a formal proof of the deposition of the award.

Since the award issued under the Statute is not subject to a principal action to annul it, it is submitted that an application for enforcement of the award can be filed at any time; the application does not have to be deferred until after the lapse of the time limit set under the Omani law for an action of nullification of other awards. This is because the Statute overrides domestic law as already explained. Likewise, special grounds for the refusal of enforcement under Omani law which are not accepted under the Statute, *e.g.*, inconsistency between the award and a domestic judgment, cannot apply to awards rendered pursuant to the Statute.

If the Omani law relating to international arbitration is not applicable,⁽¹⁾ resort should be made to the rules of enforcement of judgments set out

(1) Although the Omani law for international commercial arbitration regards an arbitration submitted to an arbitration Centre outside Oman as being international, the said law could be interpreted narrowly as requiring the arbitration so referred to be also concerning interest of international trade or connected with more than one State. This is because the said law contains several criteria for an international arbitration. Since the Statute covers disputes that may be purely domestic, a narrow interpretation of the Omani law would not treat an award on a domestic relationship as international. However, the present author takes the view that the Omani law recognizes=

in the law of civil and commercial procedures (sections 352 *et seq* of the Law number 29/2002). According to the said law, an application for enforcement has to be filed with the court of first instance in the manner followed in bringing a civil action. Section 355 of the same law saves the overriding effect of relevant international conventions, like the Statute.

D.5. The Enforcement of the award in the State of Qatar

Section 203 of the Qatari law of civil procedure provides that an award has to be deposited with the court that has jurisdiction over the underlying dispute. The same court has the authority to grant a leave of enforcement. However, it is submitted that the aforementioned rule of deposition applies if the seat of arbitration is in Qatar. An award resulting from an arbitration seated outside Qatar should be enforced in accordance with the procedures relating to the enforcement of foreign judgments.

The enforcement of foreign judgments is governed by the ‘Third Part’ of the law of civil procedure. Section 379 thereof provides that an application for the enforcement of a foreign judgment must be filed with the ‘Central Court’ (*al mahkama al kulliyya*) in the form of a civil action.

Section 383 of the Qatari law of civil procedure ensures the application of relevant international conventions despite any provisions to the contrary in the said law. As such, the conditions of the validity of the award and the grounds for refusal of enforcement will be governed by the Statute of the Centre.

= the international character of arbitration broadly based on either criterion of the criteria mentioned therein. It is worth noting that the same analysis applies regarding the definition of “international arbitration” under the Saudi Regulation of Arbitration.

D.6. The enforcement of the award in the State of Kuwait

The Supreme Court of Kuwait has held that the Kuwaiti law of civil procedure applies in respect of the matters not provided for under the Statute, where the seat of arbitration is in Kuwait.⁽¹⁾ It follows, that if the seat of arbitration is in Kuwait, the award will have to be deposited with the court that has jurisdiction over the underlying dispute according to section 184 of the law of civil procedure (Law number 38/1980). And an application for enforcement is to be filed with the president of the same court.

On the other hand, if the seat of arbitration is outside Kuwait, it is those provisions of the law of civil procedure pertaining to the enforcement of foreign judgments and awards that will apply. By virtue of sections 200 and 202 of the aforementioned law, an application for the enforcement of a foreign arbitration award has to be submitted to the director of the execution department. As with the situation in the rest of the Member States, section 203 of the Kuwaiti law of civil procedure provides that international conventions prevail in case of contradiction with the domestic law regarding the enforcement of foreign awards.

A final note must be made regarding the enforcement of an award issued in a Non-member State under the Statute, *i.e.*, if the seat of arbitration was designated in a Non-member State. It is submitted here that the award so issued will still be enforced in Member States in accordance with the Statute. Other relevant international conventions, like the New York Convention of 1958 and the Al-Riyad Convention on Judicial Cooperation between the members of the Arab League will not apply. Indeed, no practical problems could arise in this regard since the Statute,

(1) Majallat Al-Taḥkīm Al'Alamīyah (2009) issue 2, pp. 303-304. Also: the Supreme Court of Kuwait, appeal number 671/2004, 23/11/2005 Majallat Al-Taḥkīm Al'Alamīyah (2009) issue 3, pp. 461-464; appeal number 101/2010, 2 April 2012 Majallat Al-Taḥkīm Al'Alamīyah (2013) issue 18, pp. 277-279.

as will be explained in the next section, provides a regime that is more favorable for the enforcement of award.⁽¹⁾

V. The Advantages of Arbitration under the Statute of the Centre Compared to other Enforcement Regimes

It has been demonstrated above that the awards rendered in accordance with the Statute of the Centre are recognized and enforced in the Member States in furtherance of an international obligation deriving from the Statute itself. Enforcement of the award is subject to limited grounds for refusal that do not include the nullity of the award in the country of origin. In light of these features of the award issued under the Statute, some advantages of arbitration at the Centre can be highlighted in comparison to other regimes of enforcement of awards not governed by the Statute.

To explicate these advantages, comparison will be made between the regime of enforcement under the Statute and the Convention on the Enforcement of Judgments signed by the same Member States, the New York Convention of 1958, and the Washington Convention of 1965.

A. The Convention on the Enforcement of Judgments

The Member States have signed the Convention on the Enforcement of Judgments and Judicial Notices and Delegations in Oman on 6 December 1995. This Convention applies to the enforcement of judgments but also awards by virtue of article 12 thereof. A close look at the conditions of enforcement of awards under this Convention will reveal how its regime of enforcement is stricter than that available under the Statute.

(1) It is noteworthy that the New York Convention of 1958 explicitly permits resorting to another regime of enforcement of award if it is more favorable for enforcement than the Convention. See Berg, *The New York Convention of 1958*, pp. 90 et seq.

Article 2 of the Convention on the Enforcement of Judgments lists several grounds for refusal of enforcement of judgments and awards. It provides that:

“The enforcement of a judgment, wholly or in part, shall be refused in the following cases:

- a. If it contravenes the provisions of Islamic *Shari'ah*, the provisions of the Constitution, or the public policy in the State in which enforcement is requested.
- b. If the judgment is issued in absentia and the judgment debtor is not duly notified of the action or the judgment.
- c. If the dispute in respect of which the judgment is issued was the subject matter of a former judgment issued on the merit of the dispute as between the same litigants and related to the same substance of right and the pertinent cause of action, provided the judgment has a *res judicata* effect in the State where the enforcement is sought or in any other Member State which is a party to this Convention.
- d. If the dispute in respect of which the judgment whose enforcement is sought was issued is the subject matter of a pending action before one of the courts of the State where the enforcement is requested, provided the action is between the same litigants and related to the same substance of right and the pertinent cause of action, and provided also that such action has been filed at a date preceding the submission of the dispute to the court of the State in which the judgment is issued.
- e. If the judgment is issued against the Government of the State where the enforcement is sought or against one of its officials for acts done thereby in the course of their function or only due to the performance of their function.

- f. If the enforcement of the judgment contravenes the international conventions and treaties applicable in the State where the enforcement is requested.”

While article 2 of the Convention on the Enforcement of Judgments applies to arbitral awards not made under the Statute by virtue of article 12 of the same Convention, not all the grounds for refusal contained in article 2 could be relevant for an award. Grounds mentioned in paragraphs (c) and (d) of article 2, which aim to preserve the jurisdiction of the national courts, could not arise in respect of an award governed by the Statute. This is because the Statute ensures the exclusive jurisdiction of the Centre; it follows that no conflict with the jurisdiction of the national courts of the Member States would arise.

Also, grounds of refusal mentioned in paragraphs (e) and (f) raise no threat for an award issues in accordance with the Statute, since the Statute itself is an international convention. Thus, the Statute binds the Member States with the jurisdiction of the Centre *ratione personae* as well as *ratione materiae* even it involves a governmental authority of a Member State. Indeed, since the jurisdiction of the Centre is based on an arbitration agreement, the consent of a Member State to the submission of a commercial dispute to the Centre virtually removes ground (e) in article 2.

However, these grounds under paragraphs (c, d, e, f) of article 2 can hold in respect of an award not made under the Statute. Mandatory rules of the law of a Member State may ban arbitration in respect of matters reserved for exclusive judicial jurisdiction. Such mandatory rules, if any, could defy the enforcement of an award not issued pursuant to the Statute.

It remains that the grounds for refusal mentioned in paragraphs (a) and (b) of article 2 of the Convention on the Enforcement of Judgments may apply to the awards rendered under the auspices of the Centre. Even these two grounds, however, would be limited to the cases involving a violation of procedural public policy and principles of due process.

Further, a party seeking to enforce an award not issued under the Statute will have to furnish the court of enforcement with proof of the enforceability of the award in the Member State in which the award has been made as required by article 3(a) of the Convention on the Enforcement of Judgments. Moreover, article 9(b) of the same Convention provides that proof has to be submitted to the effect that the award has acquired *res judicata* effect in the country of origin. If the award is subject to a nullification procedure in the country of origin, it is likely that the enforcement of such an award (made outside of the rules of the Centre) will be delayed until the outcome of a challenge to the award in the country of origin is known; enforcement may even be ruled out if the award has been annulled in the country of origin. By contrast, as explained above, an award made in accordance with the Statute is not exposed to this possibility since it is not subject to a means of recourse against it in the Member State in which it is made.

To conclude, the grounds for refusal of the enforcement of an award governed by the Statute and Procedural Regulation are far less than the grounds listed in the Convention on the Enforcement of Judgments. Besides, an award of the Centre is free from the risks associated with a means of recourse against an award in its country of origin.⁽¹⁾

(1) Since the Convention on the Enforcement of Judgments could supplement the procedural aspects of the enforcement proceedings according to the Saudi Board of Grievances, as discussed above, the Convention may help in cases where partial enforcement of an award is possible to avoid refusing the enforcement wholly. Thus, article 7 of the Convention provides that “[t]he duty of the judicial authority of the State where the enforcement is sought shall be limited to verifying whether the judgment satisfies the conditions provided for in this Convention, without examining the merits. That authority shall order the measures required to render the judgment as executable as any judgment of that State itself. The application for a leave of enforcement may relate to the relief granted by the judgment wholly or in part, if it is severable.”

B. The New York Convention of 1958

The Member States of the Cooperation Council are contracting parties to the New York Convention of 1958. Like the Statute, the New York Convention obligates the contracting States to enforce arbitration agreements and to recognize and enforce foreign arbitration awards.

However, unlike the Statute, the New York Convention does not remove the legal connection between an award and the legal system of its country of origin, the State in which the award is made. This is clear from the fact that article V of the New York Convention provides that the enforcement of an award may be refused if it has been annulled in its country of origin.

It follows that, since the Statute does not allow a direct means of recourse against the award in the Member State in which it has been made, the ground for refusal relating to the award being declared null in that State is simply not contemplated by the Statute.

In short, the regime for enforcement of awards under the Statute is more favorable for enforcement, since the Statute curtails the legal connection between the award and the seat of arbitration as already explained in Chapter 3.

C. The Washington Convention of 1965

An award rendered by ICSDI in accordance with the Washington Convention of 1965 is very similar to an award of the GCC Commercial Arbitration Centre. However, the jurisdiction of ICSID is narrower than the Centre's in terms of both the jurisdiction *ratione materiae* and *ratione personae*. Hence, arbitration at the GCC Commercial Arbitration Centre would be useful in respect of the disputes falling outside the ambit of ICSID arbitration.

As far as the enforcement of the award is concerned, the Washington Convention makes it incumbent upon the contracting States to recognize and enforce an ICSID award as if it were a judgment of their respective national courts. Under the Statute of the Centre, however, while the Member States are bound to recognize and enforce the awards of the Centre, a leave of enforcement of the competent court is needed. An application for enforcement can be contested under article 36 of the Regulation as shown above.

Yet, the finality of an award of the Centre could be attained more quickly than is the case under the Washington Convention. This is because an ICSID award could be challenged before an appellate committee formed by the chairman of the World Bank according to article 51 and 52 of the Washington Convention.⁽¹⁾ By contrast, an award of the Centre is not subject to any means of direct recourse against it, be it before the Centre or national courts.

Further, if an ICSID award is cancelled by the appellate committee at the World Bank, new arbitration can be commenced. On the other hand, if the enforcement of an award of the GCC Commercial Arbitration Centre is refused in one Member State, it can still be enforced in another; no new arbitral proceedings will have to be launched.

To sum up, while arbitration at the Centre and ICSID share some characteristics as the source of the rules of arbitration is an international instrument, each regime of arbitration may have some distinct features regarding the enforcement of, and challenges to, awards. These features should be assessed by the concerned parties when choosing their arbitral forum.

(1) The mechanism of challenging an ICSID award before an appellate committee has been criticized by some commentators on the basis that it may encourage parties to raise frivolous appeals since the procedure remains confidential. Moshe Hirsch, *The Arbitration Mechanism*, p.36; Nathan, *ICSID*, p. 69.

Conclusion

The arbitration mechanism of the GCC Commercial Arbitration Centre enriches the theory and practice of commercial arbitration. The rules of arbitration under the Statute of the Centre and its Procedural Regulation give insights into the concept of a 'truly international' arbitration that is governed by rules deriving from an international convention overriding relevant domestic laws. Further, the Centre reinforces the notion of a delocalized arbitration award as the Statute largely lessens the legal connection between arbitration and its seat, thus dispensing with any direct means of recourse against the award before the courts of the seat.

The Statute also facilitates the enforcement of the awards of the Centre in the Member States of the Cooperation Council for the Arab States of the Gulf. This is achieved by two main principles enshrined in the Statute and Procedural Regulation: the exclusion of the jurisdiction of these courts regarding the dispute submitted to arbitration; and the removal of an action to annul the award in its country of origin, leaving the assessment of the validity of the award for each court at the stage of the enforcement of the award. And the validity of the award is largely subject to the same rules in accordance with the Procedural Regulation. The Statute, therefore, harmonizes the positions of the courts of the Member States, which could otherwise differ even though these States are parties to the New York Convention of 1958. It follows that the outcome of enforcement proceedings can be reliably predictable.

In practice, the mechanism of arbitration of the Centre can be relevant to interested parties within and outside of the Gulf region. As a matter

of fact, the Member States host significant investments and, at the same time, have governmental and private investments in Non-member States. As such, parties who may have interest in enforcing arbitral awards in Member States could find that the Statute of the Centre affords them a better opportunity of enforcement, while allowing the seat of arbitration to be designated in a Non-member State.

Although the jurisdiction of the Centre requires there to be a personal connection between a party to the arbitration and one Member State of the Cooperation Council, its arbitration services can be of interest for investors hosted in Member States. Conversely, disputes relating to investments and transactions taking place in a Non-member State may also be submitted to the Centre if one party thereto is affiliated with a Member State.

To explicate the salient aspects of the mechanism of arbitration of the Centre, the following paragraphs present the advantages of this mechanism as well as a look forward regarding possible improvements thereof.

- The Advantages of the Mechanism of Arbitration of the Centre

1. The Statute of the Centre sets up a largely self-contained mechanism of arbitration

As explained in chapters 2 through 4 of this book, the arbitration process is governed by the Statute and the Procedural Regulation issued thereunder. The intervention by the national courts of the Member States in the arbitral proceedings is virtually ruled out by article 4 of the Statute. Even the procedures relating to the appointment of arbitrators and challenging them are regulated under the Procedural Regulation. It has been submitted that provisional measures, too, fall within the power of the arbitral tribunal constituted in accordance with the same Regulation.

It is also worth noting that, since challenging an arbitrator is examined and determined at the Centre, the confidentiality of arbitration extends to these procedures, while it could otherwise become public in court proceedings.

2. The Statute and the Regulation ensure speedy proceedings

The Statute and Regulation contain certain provisions to avert tactical defences that aim to delay the arbitral process. For instance, article 3 of the Procedural Regulation lays down a presumption of the validity of the relevant arbitration agreement. This presumption applies whether the underlying dispute is purely domestic and localized in one Member State or concerns interests of international trade.

Based on the presumption of the validity of the arbitration agreement, the Secretary General conducts only a *prima facie* examination of the arbitration agreement to register a request for arbitration. Further, the power of arbitrators to decide on their own jurisdiction (the competence-of-competence principle) is well recognized under the Regulation; once an arbitral tribunal is formed, its power to examine its jurisdiction pre-empts the judicial examination of this matter. Courts can, however, review jurisdictional questions at the award enforcement stage.

The importance of the presumption of validity under the Procedural Regulation may be better appreciated if one recalls that the domestic laws of Member States would otherwise require proof of the existence of a binding arbitration agreement before an action in court is stayed.⁽¹⁾

(1) e.g., section 8(1) of the Bahraini law number 9/1994 relating to international commercial arbitration. The need for establishing the validity of an arbitration agreement before a dispute is referred to arbitration appears to be the general rule under article 2 of the New York Convention of 1958, although a better interpretation of this Convention may be that a court should stay an action unless the relevant arbitration agreement is manifestly void. Berg, *The New York Convention of 1958*, p. 168.

3. The Statute does not overlook the relevance of the principles of international trade for the merits of disputes

Arbitrators are generally required to apply a national law to the merits of the dispute referred to them, unless the parties have authorized them to decide the case *ex aequo et bono*. The Statute takes this approach, but it also instructs the arbitrators to take into account the ‘rules of international trade.’

It has been shown that, in the absence of a choice of law by the parties, some arbitral tribunal decided international commercial disputes on the basis of the terms of the relevant contract or principles relating to international trade, such as the UNDRIT principles of international contracts.

The legal value of the awards of the Centre; their finality and enforceability

The Statute confers onto the awards rendered in accordance therewith the legal value of a final judgment. This legal value ensues immediately upon the issuance of the award, without being dependent on a deposition procedure before the courts of the seat of arbitration. Further, the finality of the award is augmented by the fact that no means of recourse against the award exists before the courts of the seat.

By contrast, national laws tend to provide for an action to challenge the award before the courts of the seat. Even the New York Convention supposes that an award could be challenged in its country of origin; hence the enforcement of the award may be refused if the award has been declared null in that country. The Statute, then, ensures speedier finality of awards than many national laws do.

However, a court of a Member State in which the enforcement of an award is requested can examine pleas against enforcement. Yet, the grounds for refusal of enforcement are spelled out exclusively in article 36 of the Procedural Regulation. It follows that the enforcement of an award can generally be predicted. Since there is no recourse against the award in its country of origin, the refusal of the enforcement of the award in one Member State does not preclude enforcement in another. Also, the award can be enforced in a Non-member State without it being threatened with annulment in the seat of arbitration if the seat is in a Member State. As such, the opportunity for enforcing an award of the Centre is greater than it is in respect of awards not issued under the Statute.

- Possible Reform

The practice of arbitration under the auspices of the Centre, which has been gathered through the archive of the Centre, reveals that some aspects of the arbitral proceedings should be dealt with in more detail and with greater clarity under the rules of the Centre. Since the provisions of the Statute and Regulation have not apparently been thus far tested or interpreted in the courts of some Member States, these instruments would benefit from a revision with a view to clarifying some rules.

One aspect that should - it is suggested - be clarified is the formality of an arbitration agreement. While the Procedural Regulation requires an arbitration agreement to be in writing, it does not elaborate on the meaning of “writing.” Also, the reference in article 36(2)(a) to the need for the dispute to be specified in the arbitration agreement should be rephrased so as to confirm the interpretation of the said article asserting that “an arbitration agreement” here means “a submission agreements” as opposed to an arbitration clause inserted in a contract.

Besides, the jurisdiction of the Centre *ratione materiae* should be defined as including *civil* and commercial disputes. This will avoid the possibility of disagreement between national courts as to whether “commercial disputes” referred to in the Statute cover only transactions that are commercial in the strict sense under the national laws of Member States.

Likewise, the jurisdiction of the Centre *ratione personae* could be developed. Thus, the required personal connection between the parties and a Member State is currently satisfied if a party is a citizen of a Member State or a juridical entity seated therein. It is suggested, however, that the domicile or place of business should be a sufficient connection so that the Centre can extend its services to foreign individuals carrying on business in Member States. This will deal with a question that occurred in a number of cases where claims or counterclaims have emerged during the arbitral proceedings between persons not satisfying the “nationality” criterion for the jurisdiction of the Centre although such claims were intertwined with the principal dispute falling under the jurisdiction of the dispute (*e.g.*, claims filed against a company seated in a Member State jointly with its foreign manager as a co-respondent). This would also help the Centre consider problems that may arise in relation to joining concerned parties to arbitral proceedings even if they are not directly connected with a Member State (*e.g.*, members a group of companies which are not seated in a Member State).

Also, it has been noted that the Procedural Regulation does not set a time limit for filing a challenge to an arbitrator. It also does not deal directly with the removal and resignation of arbitrators. Supplementary provisions in this regard would be helpful.

Moreover, the Procedural Regulation does not mention the power of arbitrators to issue additional or supplementary awards on matters overlooked in an award. Nor does it refer explicitly to the possibility of

enforcing an award in part if it is established that parts of the award are unenforceable, *e.g.*, if they fall outside of the arbitrators' jurisdiction. While these aspects could be supplemented by the procedural law of the seat of arbitration, as explained in chapter 3, dealing with them in the Procedural Regulation will enhance the status of the mechanism of arbitration of the Centre as a self-contained and truly international regime of arbitration.

The mechanism of arbitration of the Centre is, after all, a milestone in the development of arbitration in the Arab and Gulf region. Should the Member States take a step further to make the awards of the Centre enforceable without the possibility of contesting the enforcement by an award debtor, the Centre would virtually become a regional version of ICSID, yet with a broader substantive jurisdiction.

APPENDIXS

Appendix 1: The Charter of the Centre.

Appendix 2: Arbitral Rules of Procedure.

THE CHARTER & ARBITRAL RULES OF PROCEDURE

Supreme Council:

Upon the:

- Commercial Cooperation Committee's recommendation, at its nineteenth meeting, held in Abu-Dhabi, United Arab Emirates in September 1993.
- Ministers of Justice blessing in establishment of the centre during its fifth meeting, held in September 1993.
- Financial and Economic Cooperation, Ministerial Council's resolution at their forty-ninth session (preparatory) on the subject.

We, therefore:

«Approved the establishment of the GCC Commercial Arbitration Centre and the following Centre's Rules annexed».

Issued in Riyadh

Summit 14

Rajab 1414 H / December 1993

The procedures taken by Member States to apply the decision of the supreme council at its fourteenth meeting on the adoption of the GCC Commercial Arbitration Centre.

United Arab Emirates

Council of Ministers resolution No. (5) for the year 2001 dated 4 February 2001.

Kingdom of Bahrain

Decree-law No. (6) for the year dated 25 April 2000.

Kingdom of Saudi Arabia

Council of Ministers resolution No. (102) dated 20/ 4/ 1423 H.

Sultanate Oman

Council of Ministers resolution No. 10/ 2000 dated 4 April 2000 .

Qatar

Council of Ministers resolution No. (29) for the year 2001 dated 19 September 2001 .

Kuwait

Law No. (14) for the year dated 3 February 2002 .

THE CHARTER & ARBITRAL RULES OF PROCEDURE

CHAPTER ONE

Establishment Of The Centre, Its Powers And Headquarters

Article 1

A GCC Commercial Arbitration Centre shall be established under the name of the “GCC Commercial Arbitration Centre for the States of the Co-operation Council for the Arab States of the Gulf ” (The Centre) which shall be independent and shall be a separate juristic entity .

Article 2

Powers:

The Centre shall have the power to examine commercial disputes between GCC nationals, or between them and others, Whether they are natural or juristic persons, and commercial disputes arising from implementing the provisions of the GCC Unified Economic Agreement and the Resolutions issued for implementation thereof, if the two parties agree in a written contract or in a subsequent agreement on arbitration within the framework of this Centre.

Article 3

Centre’s Headquarters:

The Centre’s headquarters shall be situated in the Kingdom of Bahrain.

CHAPTER TWO

Centre's Bodies

Article 4

The Centre shall consist of the following :

- (a) Board of Directors.
- (b) Secretary General.
- (c) Arbitral Tribunal.
- (d) Arbitral Tribunal Secretariat.

Board of Directors

Article 5

The Centre shall have a Board of Directors which shall consist of six members. The Chamber of Commerce and Industry in each of the GCC States shall nominate one member. The Board shall convene a meeting at least once every six months or whenever such meeting is deemed necessary. Chairmanship of the Board of Directors shall be in rotation in keeping with the practice followed in the GCC meetings. The Board of Directors shall appoint from its members a deputy Chairman.

Article 6

Membership of the Board Director shall be for a three year term of office which is renewable once only. Meetings of the Board of Directors shall be held in the host country or in any of the GCC member states, if necessary, upon the summons of the Chairman or Deputy Chairman in the case of the foregoing absence. A Board meeting shall not be validly convened except in the presence of at least four of its Members including the Chairman or his Deputy. Resolutions of the Board of Directors shall

be adopted by a majority vote of the Members present .In case of an equality of votes, the Chairman shall have the deciding vote.

Article 7

Powers of the Centre's Board of Directors:

The Board of Directors shall seek to realize the Centre's objectives and carry out its duties. In particular, the Board shall do the following:

- (a) Approve the Centre's financial and administrative regulations.
- (b) Appoint the Centre's Secretary General.
- (c) Approve the Centre's annual budget.
- (d) Approve the annual report on the Centre's activities.

Centre's Secretary General

Article 8

The Centre shall have a Secretary General who shall be a GCC national and shall be appointed by the Board of Directors. The Board of Directors shall determine his service conditions, duties and entitlements provided that he shall enjoy the required expertise and have specialized knowledge in this field. The Secretary General shall be the Centre's legal representative in all relations before the law courts, public agencies and private entities.

Article 9

The Secretary General shall be assisted by a sufficient number of employees who shall be appointed in accordance with employment provisions stipulated in the organizational rules to be issued by the Board of Directors.

Arbitral Tribunal

Article 10

An Arbitral Tribunal shall be formed by appointing a single arbitrator or three arbitrators as may be mutually agreed upon by the parties under an Arbitration Agreement or Contract. In case there is no agreement, the Rules of Procedure issued by the Board of Directors shall be applicable.

Article 11

The Centre shall maintain a panel of arbitrators to be prepared by Chambers of Commerce and Industry in the GCC member States and the concerned parties may have access to such Panel to select arbitrators therefrom or from elsewhere. An arbitrator shall be a legal practitioner, judge or a person enjoying wide experience and knowledge in commerce, industry or finance. He must be reputed for his good conduct, high integrity and dependent views.

Applicable Law

Article 12

The parties shall have the liberty of deciding the law, which the arbitrators shall apply to the issue in dispute. In case the parties do not stipulate the applicable law in the Contract or Arbitration Agreement, the arbitrators shall apply the law determined by the rules of the conflict of laws which they deem appropriate whether it is the law of the place where the contract was made, the law of the place where it is to be performed, the law of the place where it must be implemented or any other law subject always to complying with the terms of the contract and rules and practices of international law.

Article 13

Centre's Arbitration Rules:

- (a) Arbitration shall take place in accordance with the rules of Procedure (the Rules) of the Arbitration Centre unless there is a contrary provision in the contract.
- (b) The Rules applicable to arbitration shall be the prevailing rules at the time of the commencement of Arbitration unless the parties agree the contrary.
- (c) save for the arbitrators panel, the centre's papers and documents shall be confidential and no one, other than the parties to the arbitration case and the arbitrators, may have access thereto or obtain copies thereof except by the express approval of the parties to the dispute or if the Arbitral Tribunal feels such action necessary for passing a ruling in respect of the dispute.

Article 14

The two parties' agreement to refer the dispute to the Centre's Arbitral Tribunal and the ruling of this tribunal in respect of its competence shall preclude the reference of the dispute or any action pursued upon hearing it before any other judicial authority in any state. It shall also preclude any challenge against the arbitration award or any of the actions required for hearing it before any other judicial authority in any state.

Article 15

The award passed by the Arbitral Tribunal pursuant to these proceedings shall be binding and final upon the two parties after the issuance of an order for enforcement by the competent judicial authority in the states that are parties to this Charter.

Article 16

The Arbitral Tribunal shall refer to the centre's Secretary General a copy of the award passed and he shall provide the possible assistance in depositing or registering the award whenever necessary in accordance with law of the country where the award is to be enforced.

Arbitral Tribunal Secretariat

Article 17

The Arbitral Tribunal Secretariat shall be part of the centre's General Secretariat and work under the supervision of the Secretary General and shall be administratively affiliated thereto.

Article 18

The Secretariat shall have the duty of receiving all the arbitration applications referred thereto by the Secretary General and receiving all papers, correspondence and documents submitted by the parties to the dispute in accordance with the Arbitral Rules of Procedure and as provided for in this Charter. It shall be responsible for recording minutes of the Arbitration Tribunal hearings and implementing its resolutions adopted in the course of hearing the case prior the final judgment thereon.

CHAPTER THREE

Centre's Budget

Article 19

The Centre shall have a temporary budget to be drawn up from the date of its establishment until the beginning of the following first financial year. The Bahrain Chamber of Commerce and Industry shall finance the Centre's budget until the end of the third financial year. The Chambers of Commerce and Industry in the GCC member States shall equally finance the Centre's budgets in the following years.

Article 20

The Centre shall have an annual budget, the revenues of which shall consist of the following:

- (a) Fees received by the Centre in consideration of its services and the expenses incurred for this purpose.
- (b) Grants and donations received by the centre and accepted by its Board of Directors.
- (c) Proceeds from the sale of the Centre's publications and periodicals.
- (d) Payments equally made by the Chambers of Commerce and Industry of States, which are members of this Centre.

CHAPTER FOUR

Additional Assistance Provided By The Centre

Article 21

- (a) In case of authorizing the Centre to select arbitrators in accordance with Rules of Procedure, the centre's Secretary General shall undertake such task in accordance with the provisions of the said rules.
- (b) The Centre shall charge fees to be determined by the Rules of Procedure, in determining the amounts of such fees, the Centre's administrative expenses, volume of work and actual costs incurred shall be taken into account.

Article 22

If the two parties mutually agree on settling their dispute by arbitration but not through the Centre, the Centre's Secretary General may, upon a written application from the parties, provide or arrange the necessary

facilities and assistance for the arbitration proceeding requested by the two parties. The necessary facilities and assistance may include providing an appropriate place for holding the Arbitral Tribunal sittings and assisting with secretarial duties, translations and filing documents and papers.

CHAPTER FIVE

Arbitration Costs

Article 23

- (a) the Centre's Secretary General shall prepare a list containing a provisional estimate of arbitration costs and shall instruct each of the parties to the dispute to equally deposit a certain sum as an advance on account for such costs. He may instruct the parties to make supplementary deposits during the course of the arbitration proceedings.
- (b) If the required deposits are not made within thirty days from the date of receiving the instruction, the Secretary General shall notify the remaining parties of this failure pursuant to the provisions of the Rules of Procedure.
- (c) Following the issuance of an award by the Arbitral Tribunal in respect of the dispute, the Secretary General shall deliver to the parties to the dispute a statement of the deposits made and expenses incurred with a view to making a final settlement by refunding the surplus amount of the deposited sums or collecting the balance remaining for the costs pursuant to the provisions of the Rules of Procedure.

CHAPTER SIX

Immunities And Privileges

Article 24

The Chairman and Board Members, centre's Secretary General, members of the Arbitral Tribunal and members of the Tribunal Secretariat shall

enjoy the following immunities:

- (a) Immunity against any legal action upon their exercise of their job duties unless the Centre decides to relinquish such immunity by a resolution of the Board of Directors.
- (b) Prescribed immunities and prerogatives for members of the diplomatic corps whilst travelling. Further, they shall be exempted from currency restrictions, if any.

The provisions of paragraph (b) shall not be applicable to the citizens of the host country.

Article 25

The Centre and all its properties and funds shall enjoy immunity against any legal or administrative action upon carrying out its duties in accordance with this Charter.

Article 26

The Centre's papers, documents and archives shall enjoy immunity against any action of any kind whatsoever.

CHAPTER SEVEN

Tax Exemptions

Article 27

The Centre, its properties, funds, resources and financial transactions which take place in accordance with the provisions of this Charter shall be exempt from all kinds of taxes, if any, and custom duties.

Further, the Centre may not be subject to any claims in this respect.

Any payment made by the Centre to the Secretary General shall not be subject to any tax that may be imposed.

Such tax shall not be imposed upon salaries, expenses or any other payments made to the Arbitral Tribunal's Secretariat staff. This exemption shall not be applicable to the citizens of the host country.

The preceding provisions shall be applicable to the arbitrators' fees and expenses upon the performance of their duties in accordance with the provisions of this charter.

CHAPTER EIGHT

General Provisions

Article 28

The Arbitral Rules of Procedure shall be prepared by legal experts from the member states within three months from the date of approving this Charter. The Rule shall become effective and enforceable upon their ratification by the GCC Commercial Co-operation Committee.

Article 29

Any GCC member State may seek the amendment of this Charter. An amendment shall be effective three months after its ratification by the Supreme Council.

Article 30

The Charter shall come into effect three months after the date of its ratification by the Supreme Council of the Cooperation Council of Arab States of the Gulf.

ARBITRAL RULES OF PROCEDURE AND AMENDMENTS

Ratified by the Commercial Cooperation Committee

Riyadh - Kingdom of Saudi Arabia

16 November 1994

Amendments Ratified by the Commercial Cooperation Committee

Al-Ain (Abu-Dhabi) - United Arab Emirates

5 October 1999

Preliminary Provisions

Article (1)

In the application of the provisions of these Rules, the following terms and expressions shall have the meanings assigned to them herein unless the context otherwise requires:

Centre: The GCC Commercial Arbitration Centre for the States of the Co-operation Council for the Arab States of the Gulf.

Rules: Arbitral Rules of Procedure for the Centre.

Secretary General: Centre's Secretary General.

Tribunal: Arbitral Tribunal formed in accordance with the Rules.

Arbitration Agreement: Arbitration Agreement made by the parties in writing for reference to arbitration whether prior to the dispute (arbitration clause) or thereafter (arbitration stipulation).

Panel: List of the names of arbitrators at the Centre.

Article (2)

1. An Arbitration Agreement made in accordance with the provisions of these Rules before the Centre shall preclude the reference of the dispute before any other authority or it shall also preclude any challenge to arbitration award passed by the Arbitral Tribunal.
2. In case of reference to arbitration, it is proposed that the following text be included in the Arbitration Agreement:

"All disputes arising from or related to this contract shall be finally settled in accordance with the Charter of the GCC Commercial Arbitration Centre for the States of the Cooperation Council for the Arab States of the Gulf".

Article (3)

All agreements and stipulations referred to arbitration before the Centre shall be presumed valid unless evidence is provided establishing the invalidity thereof.

Article (4)

Arbitration before the Centre shall take place pursuant to these Rules unless there is a provision to the contrary in the Arbitration Agreement. The parties may select further procedural rules for arbitration before the Centre, provided that such rules shall not affect the powers of the Centre or Arbitral Tribunal provided for in these Rules.

Article (5)

The Centre's Tribunal shall ensure all rights of defense for all parties to the dispute and shall treat them on an equal basis. The Tribunal shall ensure each party in the proceedings has the full opportunity to present his case.

Article (6)

1. The Arbitral Tribunal shall determine the place of the Arbitration unless agreed upon by the parties.
2. The Arbitral Tribunal may, after consultation with the parties, conduct hearings and meetings at any place it considers appropriate unless otherwise agreed by the parties.
3. The Arbitral Tribunal may hold the deliberations in any place it deems appropriate.
4. In all cases, the award is considered passed in the place determined for arbitration and on the date mentioned therein.

Article (7)

In the absence of an agreement by the parties, the Arbitral Tribunal shall determine the language or languages to be used in the proceedings of arbitration taking into account the conditions of arbitration including the language of the contract.

Arbitral Tribunal

Article (8)

The Arbitral Tribunal shall be composed of a single arbitrator or three arbitrators as mutually agreed upon between the parties. In case there is no agreement, the Secretary General shall form the Tribunal with one

arbitrator, unless he finds that the nature of the dispute requires to be formed by three arbitrators.

Submission of Applications and Reference to Arbitration

Article (9)

The Claimant shall submit a written application to the Secretary General containing the following:

1. His name, surname, capacity, nationality and address.
2. Name of the respondent , his surname, capacity, nationality and address.
3. Statement of the dispute, its facts, evidence thereof and specified claims.
4. Name of the elected arbitrator, if any.
5. A copy of the Arbitration Agreement and the documents relating to the dispute.

The Secretary General shall ensure that all the necessary documents are available for pursuing the arbitration proceedings. In case the required documents are not complete, the concerned party shall be given notice to produce them.

Article (10)

Upon receipt of the arbitration application and payment of fees, the Secretary General shall notify the Claimant , acknowledging receipt of his application, and shall notify the respondent by registered letter, with a copy thereof within seven days from the date of receiving such application.

Article (11)

The respondent shall submit within twenty days from the date of being notified of the application, a reply memorandum containing his defense pleas, counter claims, if any, and the name of his elected arbitrator supported by the documents available to him. The Secretary General may give him, upon his request, a grace of period not exceeding twenty days for this purpose.

Article (12)

1. If the Arbitral Tribunal consists of a single arbitrator, the parties shall agree on his appointment within the period fixed in the preceding Article, otherwise the Secretary General shall appoint an arbitrator from among the Centre's Arbitrator's Panel within two weeks from the expiry of such period. The Secretary General shall notify all parties of such appointment.
2. If the claimant fails to nominate the arbitrator he wishes to elect in his application, the Secretary General shall appoint the arbitrator within two weeks from the date of receiving the application.
3. If the respondent fails to nominate the arbitrator of his election during the period stipulated in the preceding Article, the Secretary General shall appoint an arbitrator within two weeks.
4. The Secretary General shall invite the arbitrators nominated by the two parties to elect a third arbitrator who shall be chairman of the Tribunal. However, in case of failure to reach agreement within twenty days from the date of the invitation, the Secretary General shall appoint, within two weeks, the third arbitrator.

Article (13)

Where there are multiple parties, whether as claimant or as respondent and where the dispute is to be referred to three arbitrators, the multiple claimants jointly, and the multiple respondents jointly shall nominate an arbitrator.

If the parties fail to appoint arbitrators as mentioned hereinabove, the Secretary General shall appoint all the arbitrators including the Chairman of the Tribunal.

Article (14)

If either party disputes the validity of appointing one of the arbitrators, the Secretary General shall settle such dispute within two weeks by a final decision provided that this dispute on the validity shall be presented before holding the hearing fixed for considering the dispute.

Article (15)

If an arbitrator dies, declines appointment, or force majeure prevents him from carrying out his duties or the continuation thereof, a substitute shall be nominated in his stead in the same manner in which the original arbitrator was appointed.

Article (16)

The Secretary General shall refer the dispute file to the Tribunal within seven days from the date of forming it in the abovesaid manner. The Tribunal shall proceed with carrying out its mandate within fifteen days from the date of notification thereof.

Challenge of Arbitrators

Article (17)

Either party may challenge the appointment of an arbitrator for reasons to be set out in his petition. The challenge shall be submitted to the Secretary General.

Article (18)

1. In case one of the parties seeks to challenge an arbitrator, the other party may agree to such challenge. Further, the arbitrator sought to be challenged may relinquish the hearing of the dispute and a new arbitrator shall be appointed in the same manner in which the said arbitrator was nominated.
2. If the other party does not agree to the plea for challenging the arbitrator and if the said arbitrator sought to be challenged does not relinquish the hearing of the dispute, the Secretary General shall settle the issue of the challenge within three days from receiving an application in this respect.
3. If the Secretary General decides to challenge the arbitrator, a new arbitrator shall be appointed in accordance with the Rule. The challenged arbitrator as well as the parties shall be notified of such decision.

Plea for Jurisdiction of the Arbitral Tribunal

Article (19)

Unless there is an express agreement to the contrary, an Arbitration Agreement shall be deemed as independent from the contract subject to

the dispute. If the contract is invalidated or terminated for any reason, the Arbitration Agreement shall remain valid and effective.

Article (20)

The Arbitral Tribunal shall have the power to rule on the issue relating to its non-jurisdiction. This shall include the pleas based upon the lack of an Arbitration Agreement, nullity of such Agreement, lapse thereof or its non-applicability to the issue in dispute. The said pleas shall be presented at the first hearing prior to examining the merits.

Hearings

Article (21)

The Tribunal shall hold, at the request of either party, at any stage of the proceedings, hearings for verbal pleadings or for hearing testimony from witnesses or experts. If neither party makes such a request, the Tribunal shall have the option either to hold such hearings or to go ahead with the proceedings on the basis of the papers and documents, provided that at least one hearing has already been held.

Article (22)

1. In case of verbal pleadings, the Tribunal shall notify the parties, within a sufficient period of time before the pleading's hearing, of the date, time and place of hearing.
2. In case of providing proof by testimony of witnesses, the party upon whom the onus of proof rests shall notify the Tribunal and the other party, at least seven days before the testimony hearing, of the names of witnesses whom he plans to call to the witness stand, their addresses, the

matters in respect of which the said witnesses shall testify and the language to be used for such testimony.

3. The Tribunal shall make the necessary arrangements for translation of verbal statements made at the hearing if such statements are in a language other than Arabic and the Tribunal shall prepare minutes of the hearing.
4. Pleading and testimony hearings shall be held behind closed doors unless the two parties agree to the contrary and the Tribunal shall be at liberty to decide the method of questioning the witnesses.
5. The Tribunal shall decide whether to accept or reject evidence and the existence of a link between the evidence and the issue of the case or lack of such linkage and the significance of the evidence provided.

Article (23)

1. If either party alleged that the documents submitted to the Tribunal have been forged, the Tribunal shall temporarily suspend the Arbitral proceedings.
2. The Tribunal shall refer the alleged forgery to the competent committee for investigating it and taking a decision in respect thereof.
3. If the forgery incident is proved to be true, the Tribunal shall pass a ruling for cancellation of documents proved to have been forged.

Article (24)

The Tribunal may, at any stage of the arbitration, request the parties to produce other documents or evidence, conduct an inspection of the premises subject to the dispute and make investigations it deems fit, including assistance by experts.

Article (25)

The parties to the dispute may authorize the Tribunal to settle the dispute between them by means of reconciliation. They may also request the Tribunal at any stage to confirm what has been agreed upon between them by way of a reconciliation or settlement, and it shall pass a ruling to that effect.

Article (26)

The Tribunal may, ex-officio or at the request of one of the parties to the dispute, decide at any time, after closing of the pleadings and prior to rendering the award, to open pleadings anew on the merits for material reasons.

Failure to Appear

Article (27)

If either party fails to appear at the hearings after receiving notification to appear from the Tribunal, and does not provide, during a period of time being fixed by the Tribunal, an acceptable excuse for his absence, such absence shall not bar proceeding with the arbitration.

Interim Measures

Article (28)

The Tribunal may take, at the request of either party, interim measures in respect of the subject matter of the dispute, including the measures for preservation of the contentious goods, such as ordering the deposit of the goods with third parties or sale of the perishable items thereof in compliance with the procedural rules in the country where the interim measure is adopted.

Applicable Law

Article (29)

The Tribunal shall settle disputes in accordance with the following:

1. The contract concluded between the two parties as well as any subsequent agreement between them.
2. The law chosen by the parties.
3. The law having most relevance to the issue of the dispute in accordance with the rules of the conflict of laws deemed fit by the Tribunal.
4. Local and international business practices.

Article (30)

The GCC regulations and resolutions as well as provisions of the Unified Economic Agreement and their interpretations shall be applicable to the disputes arising from the enforcement thereof.

Deliberations and Award

Article (31)

If there are several arbitrators and the pleadings have ceased, the Tribunal shall meet for deliberations and passing an award. The deliberations shall be held behind closed doors. However, if there is a single arbitrator on the Tribunal, he shall pass the award after ceasing the pleading.

Article (32)

If there are several arbitrators, the award shall be passed by a unanimous or a majority vote. In all cases, an award shall be passed within a maximum period of one hundred days from the date of referring the case file to the Tribunal unless the parties agree on another period for passing the award. The parties covenant with each other to enforce the award with immediate effect. In case an award is passed by a majority vote, the dissenting arbitrator shall note down his opinion in a separate paper to be attached to the award but the dissent shall not be deemed as an integral part thereof.

Article (33)

The period referred to in the preceding Article may be extended by a decision made by the Secretary General upon a grounded request from the Tribunal. If the Secretary General is not convinced of the reasons given by the Tribunal for the extension request, the Secretary General shall fix a deadline in consultation with the parties to the dispute and the Tribunal shall pass its ruling within such deadline and its mandate shall be ended upon the expiry of the said deadline.

Article (34)

The award shall be grounded and must contain the arbitrators' names, their signatures, names of the parties, date of the award, place of issue, facts of the case, litigants' claims, a summary of their defense pleadings, their defenses, replies thereto and the party who shall incur the costs and legal fees either in full or partially.

Article (35)

1. The Tribunal shall send a copy of the award to the Secretary General for the purpose of deposit and registration, if required, under the law of the State in which the award shall be enforced.
2. The Tribunal Secretariat shall send a copy of the award to each of the parties by registered letter with a note of receipt within three days from the date the award is passed.

Article (36)

1. An award passed by the Tribunal pursuant to these Rules shall be binding and final. It shall be enforceable in the GCC member States once an order is issued for the enforcement thereof by the relevant judicial authority.
2. The relevant judicial authority shall order the enforcement of the arbitration award unless one of the litigants files an application for the annulment of the award in the following specific events:
 - (a) If it is passed in the absence of an Arbitration Agreement or in pursuance of a null Agreement, or if it is prescribed by the passage of time or if the arbitrator goes beyond the scope of the Agreement.

- (b) If the award is passed by arbitrators who have not been appointed in accordance with the law, or if it is passed by some of them without being authorized to hand down a ruling in the absence of others, or if it is passed pursuant to an Arbitration Agreement in which the issue of the dispute is not specified, or if it is passed by a person who is not legally qualified to issue such award.

Upon the occurrence of any of the events indicated in the above two paragraphs, the relevant judicial authority shall verify the validity of the annulment petition and shall pass a ruling for non-enforcement of the arbitration award.

Article (37)

The Tribunal may, ex-officio or at a written request from either party to be submitted through the Secretary General, correct any material and similar errors in the award after giving notice to the other party with respect to such request, provided that the correction request shall be submitted within fifteen days from the date of receiving the award. The correction shall be done and considered as an integral part of the award and notice thereof shall be given to the parties.

Article (38)

Either party may request the Tribunal, within seven days from the date of receiving the award, to interpret any ambiguity which may arise therein, provided that the other party shall be given notice of such request. The Tribunal shall provide the interpretation in writing within twenty days from the date of receiving such application. The interpretation shall be deemed as an integral part of the award in all aspects.

Fees and Costs

Article (39)

The Centre shall charge a fee of (BD 50) or the equivalent thereof for every reference to arbitration.

Article (40)

1. The Centre shall charge fees for the services provided to the parties but such fees shall not, under any circumstances, be more than 2% of the amount in dispute.
2. The Secretary General shall propose a scale of fees for its services pursuant to the preceding Paragraph (1) and such scale of fees shall be effective upon approval by the Board of Directors of the Centre.

Article (41)

1. The Secretary General shall prepare a statement of temporary estimate of the arbitrators' fees and other arbitration costs such as the travel expenses of the arbitrators and witnesses, fees of experts and translators and fees for the Centre's services. Each of the parties to a dispute shall be instructed to deposit a certain equal amount as an advance on account of such costs. The parties may be instructed to make supplementary deposits in the course of arbitration proceedings.
2. If the required deposits are not made within thirty days from the date of receiving the instructions, the Secretary General shall notify the parties in this respect so that one of them shall pay the required amounts. In case the amount is not

paid, the Tribunal may order the suspension or termination of the arbitration proceedings.

3. Once the Tribunal's award is passed, the Secretary General shall submit a statement of the deposits and expenses and make a final settlement by refunding any surplus amount or collecting the amounts outstanding.

Final Provisions

Article (42)

The GCC Commercial Co-operation Committee shall have the right to amend these Rules and the Board of Directors of the Centre shall have the right to interpret them.

Article (43)

These Rules shall come into effect immediately upon their ratification by the GCC Commercial Co-operation Committee.

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