

Recognition and Enforcement of Foreign Commercial Arbitral Awards Relating to
International Commercial Disputes: Comparative Study (English and Jordanian Law)

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Abstract

This thesis examines and critically analyses the extent to which foreign commercial arbitral awards are recognisable and enforceable under the English and Jordanian regimes. The importance of recognition and enforcement comes from the fact that arbitration is considered to be of no value if its award is not enforceable. Bearing this in mind, this thesis argues that when recognition and enforcement are performed with minimal procedural delay, the use of arbitration will be increased and vice-versa.

The performance of recognition and enforcement depends on the effectiveness of the regimes that are provided for this purpose in the forum place. From this perspective, a challenge for the applicable regimes is to provide effective modes of enforcement under which the winning party can recognise and enforce a foreign legal arbitral award. Another challenge is to provide grounds of refusal by which the losing party can resist the enforcement of an illegal arbitral award. But perhaps the greatest challenge for the applicable regimes is to draw a balance between the interest of the winning party on the one hand, and the interest of the losing party on the other.

This thesis concludes that the applicable regimes in both States provide modes by which the winning party can recognise and enforce a foreign commercial arbitral award. They also provide grounds of refusal by which the losing party can resist enforcement. However, they fail to strike a balance between the interest of the winning party and the interest of the losing party. That is to say, there are examples where an arbitral award is enforced even though it has been achieved illegally, and there are examples where an arbitral award is not enforced even though it has been achieved legally.

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Abbreviations

AA 1950: British Arbitration Act 1950.

AA 1996: British Arbitration Act 1996.

AAA: American Arbitration Association.

Act No. 8: Jordanian Enforcement of Foreign Judgements Act, 1952.

AJA: British Administration of Justice Act 1920.

Amman Convention: Amman Arab Convention for Commercial Arbitration, 1987.

Arab League Convention: Arab League Convention on the Enforcement of Foreign Judgements (and Awards), 1952.

CCR: British County Court Rules.

CJJA: British Civil Jurisdiction and Judgements Act 1982, 1991.

CPR: British Civil Procedure Rules.

Dicey & Morris: Dicey & Morris on The Conflict of laws. Edited by General Editor: Collins, Lawrence. Editors: Hill, Jonathan & McClean. J. D. & Morse, C. G. J. Vol.1. Thirteenth Edition. London. Sweet and Maxwell. 2000.

FJA: British Foreign Judgements (Reciprocal Enforcement) Act 1933.

Geneva Convention: Convention on the Execution of Foreign Arbitral Awards Signed at Geneva on the 26/9/ 1927.

Geneva Protocol: Protocol on Arbitration Clauses Signed at A meeting of the Assembly of the League of Nations on 24/9/1923.

Inter-Arab Conventions: The conventions to which Jordan is a party that are made among Arabic countries on recognition and enforcement of arbitral awards.

LCIA: London Court Of International Arbitration.

New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Done at New York on 10 June 1958.

Riyadh Convention: Riyadh Convention for Judicial Co-operation, 1983.

RSC: British Rule of Supreme Court.

UNCITRAL Model Law: UNCITRAL Model Law on International Commercial Arbitration (1985) as Adopted by the United Nations Commission on International Trade Law on 21 June 1985.

UNCITRAL Rules: UNCITRAL Arbitration Rules of 1976.

UNCITRAL: United Nations Commission on International Trade Law.

Washington Convention: Convention on the Settlement of Investment Disputes
between States and Nationals of Other States Done at Washington, 18 March 1965.

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Introduction

The problem stated and the structure of the thesis

This thesis examines the recognition and the enforcement of foreign commercial arbitral awards in the United Kingdom and the Hashemite Kingdom of Jordan. It aims at examining and critically analysing the applicable regimes in both States with a view to determining to what extent foreign commercial arbitral awards are recognizable and enforceable under these regimes. It intends to discover why the current regimes on recognition and enforcement of foreign arbitral awards are created. This thesis also looks at some key factors in order to examine the degree to which foreign awards are recognised and enforced as far as these awards are enforceable, and the degree to which foreign awards are not enforceable if they have been achieved by fraud or bias or other illegal means. Furthermore, this thesis will consider whether the available regimes in England and Jordan are consistent in their approach towards recognition and enforcement and how both States compare to each other.

Accordingly, this thesis examines four main questions as follows:

- 1- What is the legitimacy of the recognition and enforcement of foreign arbitral awards? In other words, under what policy should courts enforce outcomes of private ordering?
- 2- Do the current regimes provide effective modes of enforcement by which the winning party can enforce the arbitral award with minimal procedural delay as far as the arbitral award has been achieved legally?
- 3- Do the current regimes provide grounds of refusal by which the losing party can resist enforcement as far as the arbitral award has been achieved by fraud, corruption, bias, or any other grounds of illegality?
- 4- Do the current regimes strike a balance between the interest of the winning party and the interest of the losing party?

As regards the first question, chapter one presents the theoretical part of the thesis to examine the case law on the regimes' provisions discussed in the succeeding chapters. It will present a substantial account of the evolution of the law of arbitration in both England and Jordan in order to determine the importance and the legitimacy of recognition and enforcement. The importance of recognition and enforcement comes from the fact that arbitration is considered to be of no value if its award is not enforceable. Bearing this in mind, this chapter argues that, when recognition and enforcement are performed with minimal procedural delay, the use of arbitration will be increased and vice-versa.

As regards the second question, this thesis includes four chapters in which it examines the steps that the winning party should follow in order to recognise and enforce the foreign arbitral award. Chapter two examines the field of application of the current regimes in both States. It determines what foreign commercial arbitral awards are concerned in both States on recognition and enforcement. That is to say, are these regimes flexible enough to cover any foreign arbitral award that the winning party may obtain? Chapter three examines the competent authorities in both States to whom the winning party should apply for recognition and enforcement. It also examines the time limit within which the application for enforcement must be submitted to these authorities. Chapter four examines the evidence that the winning party must furnish the competent authority with, in order to recognise and enforce the arbitral award. It also examines the authentication of the evidence and the burden of proof. Chapter five examines the modes of enforcement that are provided by the applicable regimes in both States. It also examines the reasons why the winning party should choose a particular mode of enforcement rather than others.

The thesis includes one chapter devoted to the third question. Chapter six examines in depth the grounds of refusal that are provided by the applicable regimes in both States. It examines how the English and the Jordanian courts practise their discretionary powers to refuse enforcement, and also examines the circumstances under which the losing party can rely on a particular ground of refusal.

The thesis examines an argument relating to the enforcement of a foreign award merged with a foreign judgement. Chapter seven of this thesis, therefore, is devoted to this argument with the aim of discovering how the current regimes in both States recognise and enforce the foreign arbitral award that has been merged with a foreign judgment in the country of origin. Is such an award enforced as a foreign judgement according to the regimes that deal with foreign judgments, or enforced as a foreign arbitral award according to the regimes that deal with foreign arbitral awards.

As regards the fourth question, this thesis considers it in one chapter. Chapter eight examines for the first time the relationships among the current regimes in both States to identify the reasons why they may fail to strike a balance between the interest of the winning party and the interest of the losing party.

At the end of each chapter the proposal for uniform interpretation, elaborated in regard to the issues of recognition and enforcement as examined in that chapter, is summarised under the heading 'summary'. This study ends with chapter nine that summarizes the general findings of the thesis and includes some suggestions as an attempt to outline, hopefully, a policy that the current regimes should pursue in order to strike a balance between the interest of the winning party and the interest of the losing party.

The importance of this thesis is that it represents an attempt to provide an analysis from which a standard for the application of the current regimes in both States may be extracted. In Jordan, the disputants have no means by which they can predict the courts' stand on different issues which may determine the extent to which an arbitral award is enforceable. This is because Jordanian courts have no rules that they can apply consistently to resolve future arguments.

Thus, the aim of this thesis is to provide a critical analysis of the views of the English regimes for the benefit of the Jordanian regimes. This research will enable the disputants to find a detailed and comprehensive work on how recognition and enforcement of foreign arbitral awards are conducted in both States. However, the analysis of domestic regimes in England and Jordan together with other major

arbitration laws and domestic regimes, will lead to a synthesis of two legal systems that have not been put together before.

Finally, the author would like to state that there has been no previous comprehensive study addressing the subject of recognition and enforcement under the current regimes in both States. This is , in addition to the absence of any comprehensive analysis of judicial treatment of foreign arbitral awards sought to be enforced in England and Jordan.

Scope of the thesis

This study deals with recognition and enforcement in the light of the most important arbitral rules at international level that England and Jordan have adhered to. It also focuses on the local regimes that are enacted to deal with recognition and enforcement. This does not mean, however, that this research will not exemplify any other international arbitral rules wherever the necessity of illustration arises. Basically, it will deal with this subject exclusively in England as part of the United Kingdom, and in the Hashemite Kingdom of Jordan and further exemplify other national laws when the necessity of illustration is required to highlight a problem or to point to a solution concerning the subject matter of this study.

It is to be noted that the subject of the recognition and enforcement of foreign arbitral awards under the current regimes in both States is an immense area which allows for an unlimited amount of analysis and discussion. The limited scope of this thesis, however, does not allow an extensive treatment of the provisions of the current regimes. Therefore, the focus, as noted in the above section, will be directed at those key issues in the current regimes which, in the author's estimation, are most likely to represent the hard core of recognition and enforcement before the English and the Jordanian courts

Methodology

This thesis is based upon library-based research as well as case-law. It is based on the fact that every subject discussed, or problem faced is considered from both a theoretical and a practical viewpoint.

The theoretical viewpoint traces the various solutions proposed by the writers of books or articles, projects and draft laws developed by the concerned public and private international organizations. It aims at seeing what, if any, relevant provisions are to be found in the rules of the better known permanent arbitration institutions and in the major international arbitration conventions dealing with recognition and enforcement.

The main sources for these materials are the library of the University of Leeds, the library of Leeds Metropolitan University, the library of Oxford University, the library of the University of Aberdeen, the British Library in London, the library of Yarmouk University, and the library of the University of Jordan. In addition to this, the author has been in contact with a number of publishers to obtain some of these materials, notably Sweet and Maxwell, Butterworths, LexisNexis, and Hart Publishing. Furthermore, some of these materials have been accessed through the Internet. Finally, inter-library loan facilities have been frequently utilized for the sources that were unavailable through the library of the University of Leeds.

The practical viewpoint examines the judicial interpretations of the applicable regimes made by the national courts. This thesis primarily concerns the interpretations given by the courts in England and Jordan. The current regimes cannot function without the assistance of the national courts. These regimes effectively derive their authority from the courts. The manner in which the courts interpret and apply these regimes is the main source of their effectiveness. For each issue considered throughout this thesis a general explanation of the provisions of the applicable regimes concerned is given and the relevant court decisions are analysed and compared, identifying those issues on which a general consensus exists and those on which it does not. In respect of

diverging interpretations, an attempt is then made to arrive at one interpretation.

This thesis also involves certain questions on which a judicial interpretation has not yet been given. Where it is appropriate, these questions are also examined. All decisions of English courts considered in this thesis are reported in different journals. However, the name of the journal or its abbreviation is mentioned next to the case wherever it is reported throughout the thesis. As regards the decisions of Jordanian courts, they are only reported by one journal, the Journal of the Jordanian Bar.

A three-year research has been conducted to draw a clear picture of the current regimes in England and Jordan. During this period, I have written an article relating to the recognition and the enforcement of arbitral awards.¹ I have also been contacted by the editor of the Year Book of Commercial Arbitration to report on the English case law pertaining to this subject for the period 2000-2003.

¹ L Daradkeh 'The Extent to which Foreign Online Arbitration Awards (Electronic Awards) are Recognisable and Enforceable under English Law' [2003] *ICFAI Journal of Alternative Dispute Resolution* 69. It is also published in <www.odrnews.com/lafi.doc> 2003.

Chapter One: Theory and Principles of Recognition and Enforcement of Foreign Commercial Arbitral Awards

This chapter presents the theoretical background to the thesis's examination of the case law on the regimes' provisions which is contained in the following chapters. It aims at discussing the legitimacy of recognition and enforcement. In other words, under what policy should English or Jordanian courts enforce the outcomes of private ordering?

The reason why the English and the Jordanian courts are ready in appropriate cases to recognise and enforce foreign awards is that they wish to protect the legitimate expectations of the parties to the disputes, or to respect the parties' autonomy. The parties would suffer injustice if their reasonable reliance on the applicability of the law which has the closest connection to the matters in issue were to be rejected. If recognition and enforcement were refused by the English and the Jordanian courts, it would undermine the very principle of the parties' autonomy and frustrate their legitimate expectations.

To demonstrate this, the chapter briefly discusses the historical point when the first attempts made by the commercial community to influence national legislatures to introduce arbitration as an independent means of dispute settlement. It also examines the meanings and purposes of recognition and enforcement. What is the aim of recognition and enforcement considered as an inseparable term, and what are the aims of recognition and enforcement considered as two separable terms?

It also shows how important it is to conduct arbitration properly in order to enforce the award easily, especially when its enforcement is in a place different from the place where it was made. It demonstrates the great effect of having proper arbitration on the enforcement process.

The chapter also shows the extent to which an award made by a tribunal should influence a national court of the place where an award is made or a foreign state in which the arbitral award is sought to be recognised and enforced. It also shows that the current regimes in both states have territorial effects. In other words, the

recognition and the enforcement of an arbitral award in England or Jordan will not affect the process of recognition and enforcement in other jurisdictions.

In order to place the recognition and enforcement in their proper contexts in the following chapters, this chapter is divided into the following sections:

- An overview of the legal instruments applicable to the recognition and enforcement of foreign commercial arbitral awards in England and Jordan.
- A definition of recognition and enforcement of foreign arbitral awards.
- The justification or legitimacy of the recognition and enforcement of foreign arbitral awards.
- The current economic importance of the recognition and enforcement of foreign arbitral awards.
- An analysis of where an arbitral award is made and where its recognition and enforcement are sought.
- The territorial effect of the regimes applicable to recognition and enforcement of arbitral awards.

1.1. An overview of the legal instruments applicable to the recognition and the enforcement of foreign commercial arbitral awards in England and Jordan

England and Jordan have different historical backgrounds regarding legal instruments applicable to recognition and enforcement. These backgrounds determine how and why the current legal instruments have been created. In this regard, it is important to start with a brief historical overview of these legal instruments and then deal with the legal instruments of recognition and enforcement in both nations. It is also important for the purposes of this research to unify the terminology used by the legal instruments. This will be done in the following sub-sections.

1.1.1. A brief historical overview of the legal instruments for recognition and enforcement and the regimes that are still in force in England and Jordan

In England, the legal instruments for recognition and enforcement have been

developed over a long period.² This period can be divided into a number of stages. In each stage more than one legal instrument could be used to recognise and enforce an arbitral award. In this regard, the development of legal instruments in England can be classified into the Common Law period and the statutes of arbitration periods. In Jordan, arbitration as a means of dispute resolution has existed since the foundation of the kingdom. However, the development of arbitration law in Jordan can be described as falling into two distinct periods, the Emirate of East Jordan (1923-1946) and the Hashemite Kingdom of Jordan. This section will discuss these developments in both States in turn.

1.1.1.1. Common Law period

Common Law developed clearly in England in the Middle Ages, from the reign of Edward I until 1485.³ In this period, merchants were known as men who carried out international transactions by travelling from fair to fair over all Europe.⁴ The courts of the fairs and markets were recognised as the only courts settling trade disputes in this age;⁵ however, the Royal Courts later came to dominate commercial trade disputes.⁶ Foreign traders who came to England were not protected by these courts, as these courts would not enforce judgement if one of its parties was a foreigner.⁷

Regarding arbitration, its roots can be traced to long before the King's Courts, and Shakespeare later referred to it, writing that 'the end crowns all, and that common arbitrator, time, will one day end it'.⁸

The fifteenth century witnessed developments in dispute resolution methods. At this time, arbitration was known as a means of resolving commercial disputes. As an evidence of this development, an award was found in the Rolls of the Mayor's Court

² Parker *The History and Development of Commercial Arbitration* (5th Series Magnes Press Jerusalem 1959) 5-59. A Tweeddale and K Tweeddale *A Practical Approach to Arbitration Law* (1st edn Blackstone Press Limited Great Britain 1999) 1-13.

³ AKR Kiralfy *Potter's Historical Introduction to English Law and its Institutions* (4th edn Sweet and Maxwell Limited London 1962) 30.

⁴ *ibid* 35.

⁵ *ibid* .

⁶ *ibid* .

⁷ A Tweeddale and K Tweeddale. *Op. Cit.* (footnote 2) 2.

⁸ As cited in J Paris *The Law and Practice of Arbitrations* (1st edn George Grodwin Limited Great Britain 1974) 2.

of the City of London in 1424.⁹

As far as the enforcement of an arbitral award is concerned at Common Law, it can be enforced only by bringing an action on the basis of a breach of agreement.¹⁰ It cannot be enforced as judgement of the court.¹¹ It is only since 1927, so far as one can judge from reported cases, that the English courts have enforced a foreign arbitral award under the Common Law,¹² as illustrated in *Norske Atlas Insurance Co. Ltd v London General Insurance Co. Ltd*.¹³

1.1.1.2. Statutes of arbitration periods

A number of arbitration acts have been enacted in England, the first being in 1698 (statute 9 & 10 Will 3, c 15).¹⁴ In the light of this Act, the court could set aside an award if an error appeared on the face of the award. Consequently, it could not look behind the award. That is to say, the court might or might not enforce an award on the ground that an error had or had not appeared on the face of an award.¹⁵

As a development of the Arbitration Act 1698, the Common Law Procedure Act 1854 was enacted to deal with the development of the commercial sector at that time.¹⁶ It is considered to be the foundation of the modern law of arbitration.¹⁷ It was intended to create new powers for courts regarding arbitration.¹⁸

During the nineteenth century, England became an industrial country at the centre of the commercial world, especially after the invention of the steamship, which led to a great expansion of trade. This new development led to the reconsideration of the

⁹ Parker. Op. Cit. (footnote 2) 8.

¹⁰ A Tweeddale and K Tweeddale. Op. Cit. (footnote 2) 5.

¹¹ *ibid* 5.

¹² L Collins and others (eds) *Dicey & Morris on the Conflict of Laws* (13th edn Sweet and Maxwell London 2000) vol 1, 619. JHC Morris *The Conflict of Laws* (5th edn Sweet and Maxwell London 2000) 170.

¹³ (1927) 28 Li. LR 104.

¹⁴ Parker. Op. Cit. (footnote 2) 14.

¹⁵ *ibid* 15-18.

¹⁶ *ibid* 19.

¹⁷ MJ Mustill and SC Boyd *The Law and Practice of Commercial Arbitration in England* (2nd edn Butterworths United Kingdom 1989) 440.

¹⁸ Parker. Op. Cit. (footnote 2) 19.

Common Law Procedure Act of 1854.¹⁹ The Arbitration Act 1889 (52 & 53 Vict, c. 53) came to replace the previous Act. It increased the control of the courts over commercial arbitration and it is still considered as a yardstick for the development of arbitration rules in England. It also reflected the extent to which commercial trade had developed in England. This Act continued in force until 1934.²⁰

During the period between the Arbitration Act 1889 and the Arbitration Act 1934, there were the Arbitration Clauses (Protocol) Act 1924 (14 & 15 Geo 5, c. 39), and the Arbitration (Foreign Awards) Act 1930 (20 & 21 Geo 5, c. 15).²¹ The former was the first Act dealing with foreign arbitral awards and gave effect to the Geneva Protocol 1923.²² On the other hand, the latter was passed to give effect to the Geneva Convention on the execution of foreign arbitral awards of 1927.²³ As a result, the Arbitration Clauses (Protocol) Act 1924, and the Arbitration (Foreign Awards) Act 1930 are considered to be the first legislations in England dealing with non-domestic arbitration in regard to the recognition and enforcement of foreign awards.

The Mackinnon Committee in 1927 made a recommendation which led to the enactment of the Arbitration Act 1934 (24 & 25 Geo 5, c. 14). Many changes to rules regarding arbitration themes and terminology were made in this Act.²⁴

From 1950 to 1996, England witnessed the enactment of a number of arbitration Acts,²⁵ beginning with a new Arbitration Act introduced in 1950. This Act repealed the previous arbitration Acts which had been made between 1889 and 1934.²⁶ Part III (3) of this Act clearly refers to this effect and it provided that ‘The arbitration Act 1889, the arbitration Clauses (Protocol) Act 1924 and the Arbitration Act 1934 are hereby repealed...and the arbitration (Foreign Award) Act 1930 is hereby repealed...’

Soon after, the Arbitration (International Investment Disputes) Act 1966 was made to give effect to the Washington Convention of 1965. However in 1975, a new

¹⁹ *ibid* 19.

²⁰ *ibid* 19 -24.

²¹ A Tweeddale and K Tweeddale. *Op. Cit.* (footnote 2) 11.

²² *ibid* 12.

²³ J Hill *The Law Relating to International Commercial Disputes* (2nd edn LLP London 1998) 69.

²⁴ A Tweeddale and K Tweeddale. *Op. Cit.* (footnote 2) 12-13.

²⁵ *ibid* 14-15.

Arbitration Act was made. The main aim of this Act was to give effect to the New York Convention 1958 on the recognition and the enforcement of foreign arbitral awards. In 1979, a new arbitration Act was made. This Act introduced a new regime in respect of appeals on points of law. However, these two Acts have since been repealed by the Arbitration Act 1996.²⁷ Actually, this new Act is a combination of different rules provided by the Arbitration Acts 1950, 1975, 1979, the Consumer Arbitration Agreement Act 1988, and the Common Law.²⁸ It is considered something entirely new in English arbitration law.²⁹

1.1.1.3. The Emirate of East Jordan to the Hashemite Kingdom of Jordan

Jordan was part of the Ottoman Empire before World War I. Soon after, the Emirate of East Jordan was placed under the French mandate by the San Remo Conference of 1920. Later on, it came under the British mandate, under which the Emirate of East Jordan was founded in 1921.³⁰ On 25 May 1923, the Emirate of East Jordan was proclaimed an independent State, but it was not until 25 May 1946 that the Hashemite Kingdom of Jordan was founded as an independent State under the reign of prince Abdullah.³¹

As far as arbitration is concerned in this period, the Palestinian Arbitration Act 1933, (modified in 1946), and the Arbitral Proceedings Act 1935 were in force in the Emirate of East Jordan, and the effect of these Acts continued until 1953.³²

1.1.1.4. The Hashemite Kingdom of Jordan

Jordanian law was essentially based on the *Medjella Al- Adlieah*, which is the Ottoman Law,³³ and of which articles 1841-1846 deal with arbitration. In addition to this law, the Palestinian Arbitration Act 1933, and the Arbitral Proceedings Act 1935

²⁶ *ibid* 14.

²⁷ Sch 4 of Arbitration Act 1996.

²⁸ R Merkin *Arbitration Act 1996, an Annotated Guide* (LLP London 1996) 1.

²⁹ MJ Mustill and SC Boyd *Commercial Arbitration: 2001 Companion Volume to the 2nd Edition* (Butterworths London 2001) 3.

³⁰ AH El-Ahdab (tr) *Arbitration with the Arab Countries* (Kluwer Law and Taxation Publishers Deventer 1990) 331.

³¹ *ibid* 331.

³² *ibid* 333.

³³ *ibid* 332.

remained in force until they were repealed by the Arbitration Act 1953.³⁴ As far as recognition and enforcement are concerned, the earliest legislation enacted and still in force is the Enforcement of Foreign Judgements Act 1952. This Act deals with the recognition and enforcement of foreign judgements and arbitral awards as provided by article 2 of the said Act.

Jordan is currently involved in the process of liberalising its economy which is accompanied by a vast programme of privatisation and reform of the legal environment for the purpose of attracting foreign investments. One of the aspects of this wave of new reforms is the adoption of a new Arbitration Act No 31 of 2001.³⁵ This Act can be considered as a step forward in encouraging arbitration, both domestic and international, as a means of dispute resolution in Jordan. The Arbitration Act No 18 of 1953 was totally repealed by the Arbitration Act 2001. Articles 52-54 of the latter Act deal with the matter of recognition and enforcement of arbitral awards made according to this Act.³⁶

In addition, Jordan has acceded to a number of bilateral, regional, and international conventions relating to the recognition and enforcement of foreign arbitral awards. The first group³⁷ comprises conventions between Jordan and Syria,³⁸ Lebanon,³⁹ Tunisia⁴⁰, and Egypt.⁴¹

The second group, known as the Inter-Arab Conventions, comprises conventions which can be classified according to their subject into two kinds:⁴² firstly, conventions relating to arbitration;⁴³ secondly, conventions relating to the recognition and enforcement of arbitral awards, which are:

³⁴ A Al-Moumany *Arbitration under the Jordanian Legislation and Comparative Law* (Amman 1982) 97.

³⁵ Arbitration Act No 31 of 2001. This Act was published in the Official Gazette on 16 July 2001, No 4496. PP 2821-2836.

³⁶ An award made according to this Act is a domestic award by virtue of articles 4 and 5 of this Act.

³⁷ S Saleh *Commercial Arbitration in the Arab Middle East; a Study in Shari'a and Statute Law* (Graham & Trotman Limited London 1984) 173.

³⁸ Official Gazette, annex No (1) to series (1182), 1954, ratified on 2 December 1953.

³⁹ Official Gazette, annex No (3) to series (1202), 1954, ratified on 23 November 1953.

⁴⁰ The judicial Jordanian-Tunisia Treaty ratified on 4 March 1965.

⁴¹ <<http://www.farrajlawyer.com/law/etf002m.htm>> (20 October 2004).

⁴² HA Haddad *Inter-Arab Conventions on Commercial Arbitration* (Amman 1989) 3-12.

- 1- Amman Arab Convention for Commercial Arbitration 1987.⁴⁴
- 2- Arab League Convention on the Enforcement of Foreign Judgements 1952.⁴⁵
- 3- Riyadh Convention for Judicial Co-operation 1983,⁴⁶ which has replaced the above Convention 1952 for the States which ratified it.⁴⁷

The last group comprises the New York Convention 1958,⁴⁸ and The Washington Convention 1965.⁴⁹

However, it is worth noting that in regard to the Inter-Arab Conventions and the bilateral conventions, they have not yet become operative in Jordan, even though they have come into force. In fact, no commercial dispute has been settled or even referred to arbitration under these conventions since they have come into force. It is clear that the practice of enforcement of arbitral awards in Jordan under these conventions is very negligible.

1.1.1.5 A discussion of terminology used by the current legal instruments

The previous sub-sections have introduced the current regimes for recognising and enforcing arbitral awards; this sub-section tries to unify the terminology used by these regimes.

The terminology relating to arbitral awards used in the above named arbitration acts varies significantly for the purpose of recognition and enforcement in England. Subsequently, it is important to clarify this terminology to avoid confusion amongst the regimes regarding recognition and enforcement. Regarding part III of AA 1996, it used the term 'Convention Awards' to give effect to the New York Convention award 1958, whereas part II of AA 1950, used 'certain foreign awards' to give effect to the Geneva Protocol 1923, and the Geneva Convention 1927. In this regard, it is

⁴³ These Conventions are beyond the scope of this study.

⁴⁴ Ratified on 23 September 1988 and entered into force on 27 June 1992 after it was ratified by eight Arab States.

⁴⁵ Ratified on 28 July 1954 and published in the Official Gazette No 1195, 1954.

⁴⁶ Ratified by Jordan in 1985 and published in the Official Gazette No 3329, 1985.

⁴⁷ Art 72 of Riyadh Convention.

⁴⁸ Ratified by Jordan on 8 July 1979 and published in the Official Gazette No 3585, 1988.

⁴⁹ Ratified by Jordan on 16 September 1972.

suggested that ‘convention award’ is a far more simple and wide-ranging term than ‘foreign award’ as provided by part II of AA 1950,⁵⁰ while other regimes have used the term ‘arbitral awards’.

Apart from part II of AA 1950 and part III of AA 1996, the understanding of a foreign convention award and a foreign non-convention award for the purposes of this study will be as follows: a foreign convention award is an award which is sought to be recognised and enforced according to the conventions to which Jordan or England is a party, while a foreign non-convention award is an award which is sought to be recognised and enforced in Jordan or in England according to the local regimes in both States.

1.2. A definition of recognition and enforcement of foreign arbitral awards

The terms ‘recognition’ and ‘enforcement’ are usually used interchangeably. However, they have different meanings and each can be used for different purposes.⁵¹

1.2.1. Inseparable or separable terms of recognition and enforcement

When the winning party applies to have a foreign award enforced, the terms ‘recognition’ and ‘enforcement’ are often used together. These terms are inextricably linked in the New York Convention 1958⁵² and in the Model Law.⁵³ The same can be said of English AA 1996.⁵⁴ Indeed, the reason these terms are normally used inseparably regarding foreign arbitral awards is that a foreign award cannot be enforced without first being recognised.⁵⁵ In this regard, recognition and enforcement

⁵⁰ DR Thomas ‘International Commercial Arbitration Agreement and the Enforcement of Foreign Arbitral Awards - a Commentary on the Arbitration Act 1975’ [1981] *Lloyd’s Maritime and Commercial Law* 17, 30-32.

⁵¹ L Anglade ‘Challenge, Recognition and Enforcement of Irish and Foreign International Arbitral Awards under the Irish 1997 Arbitration (International Commercial) Bill’ (1998) 9(5) *International Company and Commercial Law Review* 128, 132. G Soo ‘International Enforcement of Arbitral Awards’ (2000) 11(7) *International Company and Commercial Law Review* 253, 253.

⁵² Arts IV and V also used the terms as inseparable.

⁵³ C VIII of Model Law.

⁵⁴ Pt III of Arbitration Act 1996.

⁵⁵ A Redfern and others *Law and Practice of International Commercial Arbitration* (4th edn Sweet & Maxwell London 2004) 515-517.

cannot be separated.⁵⁶ Therefore, the precise distinction is between ‘recognition’ on the one hand, and ‘recognition and enforcement’ on the other.⁵⁷

However, these terms can be used separately⁵⁸ because recognition of a foreign award may be sought alone without enforcement.⁵⁹ Thus, the terms ‘recognition’ and ‘enforcement’ may be used separately by providing special conditions for each one. The Geneva Convention of 1927 distinguishes between recognition and enforcement in article (1) which states that ‘to obtain such recognition or enforcement...’ In addition, the New York Convention speaks about recognition or enforcement in regard to the conditions that may apply to each term.⁶⁰ Furthermore, a clear example of this separation can be found in Vietnamese regimes.⁶¹ They distinguish between the two terms by providing a special procedure for recognition and another for enforcement. An application for recognition is submitted to the Ministry of Justice (MOJ),⁶² while an application for enforcement should be submitted according to the Ordinance on the enforcement of civil judgements (Ordinance II).⁶³

Consequently, some arbitration rules in one part speak about recognition and enforcement as one term, while in another part they speak about recognition and enforcement as two terms.⁶⁴

1.2.2. Different meanings and purposes of recognition and enforcement

As has been discussed above, ‘recognition’ and ‘enforcement’ may be used as ‘inseparable’ or ‘separable’ terms. This section focuses on the different meanings of both terms which are easier to exemplify than they are to identify. The basis is that the

⁵⁶ *ibid.*

⁵⁷ *ibid* 515.

⁵⁸ DD Pietro and M Platte *Enforcement of International Arbitration Awards: The New York Convention of 1958* (1st edn Cameron London 2001) 22-23.

⁵⁹ A Redfern and others. *Op. Cit* (footnote 55) 515-517.

⁶⁰ Art III of the New York Convention 1958.

⁶¹ TV Toan and SE Vecchi ‘Enforcing a Foreign Arbitral Award in Vietnam’ [2000] *International Business Lawyer* 317, 319. Nicholson and NT Minh ‘Commercial Disputes and Arbitration in Vietnam’ (2000) 17(5) *Journal of International Arbitration* 1, 4.

⁶² TV Toan and SE Vecchi. *Op. Cit* (footnote 61) 317, 319.

⁶³ *ibid* 320.

⁶⁴ The New York Convention speaks in arts IV and V about recognition and enforcement as one term, while it speaks about them in art III as two terms. English Arbitration Act 1996 also speaks in Pt III about them as one term and it speaks about them as two terms in ss 102, 103, and 104.

winning party may seek recognition as a proof that the dispute has been determined by arbitration and is no longer subject to litigation,⁶⁵ or he may seek enforcement to obtain the amount awarded by the arbitral award.⁶⁶

In England, the use of recognition as a means of proof can be found in *Dallal v Bank Mellat*.⁶⁷ In this case, the English court found that the tribunal was competent and its award was recognised as a valid judgement, but it was not enforceable in England under the New York Convention.

The meaning of recognition comes from the application made by the winning party to the competent court in order to obtain proof to the effect that the dispute has been determined by arbitration. This proof activates as a defence to prevent any allegation that may be made by the losing party relating to the same dispute.⁶⁸ For instance, in *Peoples' Insurance Company of China, Hebei Branch (2) China National Feeding Stuff Import/Export Corporation v Vysanthi Shipping Co Ltd*,⁶⁹ an arbitral award was recognised and enforced where it had been made with jurisdiction and at an earlier time than a judgment on the same issues in the Chinese courts. In this regard, the role of the court is negative in the sense that it does not require any positive action against the losing party.⁷⁰

The purpose of recognition is a defensive process which acts as a shield to prevent the losing party from bringing a second allegation before the local court.⁷¹ If one party were to bring a court action against the other in regard to the subject matter of the arbitration, based on the same cause of action, the court would dismiss the action on the basis that the issues had been disposed of and were *res judicata*.⁷² A clear example of this can be found in section 101(1) of AA 1996 which states that 'A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland'.

⁶⁵ G Soo. Op. Cit (footnote 51) 253, 254

⁶⁶ DD Pietro and M Platte. Op. Cit (footnote 58) 22-23.

⁶⁷ [1986] 2 WLR 745.

⁶⁸ A Redfern and others. Op. Cit (footnote 55) 516. JHC Morris. Op. Cit (footnote 12) 173-174,178.

⁶⁹ [2003] EWHC 1655 (Comm).

⁷⁰ J Hill. Op. Cit (footnote 23) 4.

⁷¹ A Redfern and others. Op. Cit (footnote 55) 516.

The winning party can also seek recognition of an award in order to prevent the losing party obtaining another arbitral award in respect of the same dispute, as happened in the *Hilmarton /OTV* arbitration. In this case, the French court refused to recognise and enforce the second award, which contradicted the first one in respect of the same dispute.⁷³

On the other hand, enforcement entails taking a step further after recognition to force the losing party to carry out the award.⁷⁴ In this regard, the role of the court is positive, in that it is required to take an action against the assets of the losing party by way of seizure, expropriation, or any other means in the place where the enforcement is sought.⁷⁵

The purpose of enforcement, therefore, is to take an attacking action against the assets of the losing party. The winning party uses enforcement as a sword in this case.⁷⁶ Enforcement will be sought after the losing party has refused to enforce the award voluntarily. Thus, to force the losing party to carry out the award, the winning party applies to the competent court to take a positive action against the assets of the losing party. This action normally takes the form of different sanctions, the aim of which is to make the losing party carry out the award. These sanctions differ from one State to another depending on where the enforcement is sought. Such a sanction may take the form of seizure or attachment of the losing party's assets and sometimes includes imprisonment.⁷⁷

1.3. The justification or legitimacy of the recognition and enforcement of foreign arbitral awards

What is the legitimacy of the recognition and enforcement of foreign awards? In other words, under what policy should courts enforce outcomes of private ordering?

⁷² *ibid* 459.

⁷³ C Kessedjian 'Court Decisions on Enforcement of Arbitration Agreement and Awards' (2001) 18(1) *Journal of International Arbitration* 1, 8-9.

⁷⁴ G Soo. Op. Cit (footnote 51) 253, 254

⁷⁵ J Hill. Op. Cit (footnote 23) 4. DD Pietro and M Platte. Op. Cit (footnote 58) 22-23.

⁷⁶ A Redfern and others. Op. Cit (footnote 55) 517.

⁷⁷ *ibid*.

The party in whose favour the award is made in an international commercial dispute expects it to be carried out without delay.⁷⁸ It follows that the losing party will carry out this award voluntarily. In international commerce, the majority of arbitral awards are carried out voluntarily.⁷⁹ Consequently, if the losing party refuses to voluntarily carry out the arbitral award, the winning party will resort to the means of recognition and enforcement. Thus, the creation of recognition and enforcement methods is to enable the winning party to enjoy the fruits granted by the award.⁸⁰

Without effective methods of recognition and enforcement, international arbitration cannot function effectively. In this regard, Berg comments:

The effectiveness of international arbitration depends ultimately on the question whether the awards can be enforced against the losing party. That is not to say that most arbitrations lead to enforcement proceedings before the courts of some State. Quite the contrary, arbitral awards are complied with voluntarily in a large number of cases. But this large degree of voluntary compliance is, for a significant part, probably due to the fact that effective international enforcement measures are generally available to the winning party.⁸¹

It has also been submitted that the recognition and enforcement of awards constitute the key to international arbitration.⁸² The importance of recognition and enforcement of an award to international commercial arbitration was stated by Gaudet, chairman of the ICC Court of Arbitration, to be ‘the last and decisive step of an international commercial arbitration’.⁸³

⁷⁸ *ibid* 510.

⁷⁹ *ibid* 510.

⁸⁰ It has been suggested that ‘The essential function of an international arbitral award is to declare the rights and obligations of the parties in a manner that will do full justice; the award need not concern itself primarily with the procedures for its enforcement’. RBV Mehren and PN Kourides ‘International Arbitrations between States and Foreign Private Parties: The Libyan Nationalisation Cases’ (1981) 75 *American Journal of International Law* 476, 537. However, it can be said in this regard that adopting this view leads in practice to an underestimation of the arbitration process; there is no need to go to arbitration since the award is not enforceable as a judgement. The importance of the recognition and enforcement of arbitral awards is discussed later in this study.

⁸¹ AJVD Berg ‘Recent Enforcement Problems under the New York and ICSID Conventions’ (1989) 5 *Arbitration International Journal* 2, 2.

⁸² M Secomb ‘Shades of Delocalisation Diversity in the Adoption of the UNCITRAL Model Law in Australia, Hong Kong and Singapore’ (2000) 17(5) *Journal of International Arbitration* 123, 145.

⁸³ As cited in M Suffian ‘International Commercial Arbitration in a Changing World.’ [1984] *International Arbitration 60 Years of ICC Arbitration a Look at the Future* 377, 378.

The recognition and the enforcement of arbitral awards is an extremely important issue in arbitration relating to international commercial disputes. If it was not possible to recognise and enforce the arbitral award, arbitration would be pointless,⁸⁴ meaningless,⁸⁵ or valueless.⁸⁶ In other words, the continued use of arbitration as a means of dispute resolution will not be maintained without the availability of a reliable, fair and effective means of carrying out the arbitral award;⁸⁷ as Holtzmann has observed, 'If businessmen are not reasonably sure of enforcement of foreign arbitral awards, there will be little or no arbitration'.⁸⁸

As has been noted historically English courts have jealously guarded their domain and are watchful of encroachments on their jurisdiction. The courts regarded arbitration as a private dispute settlement mechanism created to usurp their jurisdiction,⁸⁹ however, the attitude of the courts has changed under pressure from the commercial community to recognise arbitration. The disputants go to arbitration because they want privacy, confidentiality and finality in the settlement of their disputes, and judicial intervention in the arbitration process or in the review of arbitral awards should occur only in exceptional circumstances.⁹⁰

Consequently, the autonomy of parties going to arbitration is considered to be the legitimacy of an arbitral award as an outcome of private ordering, and hence the award is recognised and enforced by the national courts. This fact is emphasised by AA 1996, in that when the parties agree to go to arbitration, the court should respect their autonomy and ensure the finality of the arbitral award.⁹¹ It is also approved in *Aoot Kalmneft v Glencore International A.G and others*,⁹² as Colman J held that the policy of AA 1996 is to preserve the parties' autonomy and ensure the finality of the

⁸⁴ (--) *Arbitration for Consumers and Small Businesses: Guide to the Arbitration Act 1996* (Department of Trade and Industry London 1997) 34.

⁸⁵ I Carr *International Trade Law* (Cavendish Publishing Limited London 1996) 214.

⁸⁶ A Asouzu 'The Adoption of the UNICITRAL Model Law In Nigeria: Implications on the Recognition and Enforcement of Arbitral awards' [1999] *Journal of Business Law* 185, 185.

⁸⁷ L Hu 'Enforcement of Foreign Arbitral Awards and Court Intervention in the People's Republic of China' (2004) 20(2) *Arbitration International* 167, 167.

⁸⁸ HM Holtzmann 'Commentary' [1984] *International Arbitration 60 Years of ICC Arbitration a Look at the Future* 361, 362.

⁸⁹ R Goode 'The Role of the *Lex Loci Arbitri* in International Commercial Arbitration' (2001) 17 (1) *Arbitration International* 19, 20.

⁹⁰ *ibid.*

⁹¹ Department Advisory Committee on Arbitration Law *Report on the Arbitration Bill* (Report of February 1996) Paras 273-283. L Collins and others (eds). *Op. Cit.* (footnote 12) 595.

award in arbitration.

1.4. The current economic importance of the recognition and enforcement

It has been noted in the chapter's outline of the historical development of arbitration that arbitration was introduced as an essential factor in industrial and economic development. It was established that arbitration is considered meaningless unless its awards are recognisable and enforceable. This section will try to demonstrate the current economic importance of the recognition and enforcement of foreign commercial arbitral awards. It is suggested on the basis of indirect evidence that this importance is enormous.⁹³

It is recognised that international commercial transactions are normally more complex and more expansive than their national counterparts. International transactions take place between trading and investment entities, such as private individuals, multinational corporations and governments.⁹⁴ It has been pointed out that the international sale of goods, carriage of goods, banking and finance, licensing agreement, and construction work and foreign investment are considered areas in which disputes normally arise.⁹⁵

The economic importance of arbitration explains why almost all international commercial transactions require disputes to be resolved by arbitration.⁹⁶ The US Supreme Court in *Scherk v Alberto-Culver Co* declared arbitration to be 'an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction'.⁹⁷

⁹² [2002] 1 Lloyd's Rep 128, 136, 140.

⁹³ R Nazzini 'The Arbitral Award in the Multiple Interaction of State Legal Systems' (2001) 12 *European Business Law Review* 120, 120.

⁹⁴ M Wang 'Are Alternative Dispute Resolution Methods Superior to Litigation in Resolving Disputes in International Commerce?' (2000) 16 (2) *Arbitration International* 189, 189.

⁹⁵ *ibid.*

⁹⁶ BL Benson 'To Arbitrate or to Litigate: That is the Question' [1999] *European Journal of Law and Economics* 91, 93.

⁹⁷ X Xu and GD Wilson 'One Country, Two-International Commercial Arbitration-Systems' (2000) 17(6) *Journal of International Arbitration* 47, 63.

In fact, a study notes that 80% of such contracts contain an arbitration clause.⁹⁸ Another study suggests that 90% of international transactions include an arbitration clause.⁹⁹ The disputes that arise out of these transactions concern a great deal of money; billions of dollars are involved in international commercial disputes solved by arbitration. For instance, Iran is reported as the country most involved in arbitration with more than 3,700 cases valued at billions of dollars. Furthermore, about 100 other cases also involving billions of dollars are still to be settled before the International Court of Arbitration of the International Chamber of Commerce or before *ad hoc* arbitration to be conducted in Paris, Geneva, Zurich, The Hague, and London.¹⁰⁰

One can understand and accept these figures on the basis that most, if not all, international transaction disputes are nowadays solved by arbitration.¹⁰¹ It follows that there will be no incentive to make such huge contracts or investments in different economic aspects if arbitration is not available to solve disputes or where arbitral awards are not enforceable. For example, it is inconceivable that the disputes between Iran and the United States could be solved by the national courts in Iran or in the United States.

International transactions by means of the Internet and the globalisation of electronic communications are not in the same category as the above transactions;¹⁰² they have recently been called electronic international transactions.¹⁰³ These on-line transactions involve the exchange of small amounts between consumers and suppliers of goods and services.¹⁰⁴ The international electronic transactions are increasing as a result of the availability of Internet access 24 hours a day for any person anywhere in the world.¹⁰⁵ Anyone can enter any supplier's website and order goods and services to be

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ M Mashkour 'Building a Friendly Environment for International Arbitration in Iran' (2000) 17(2) *Journal of International Arbitration* 79, 79.

¹⁰¹ SL Sempasa 'Obstacles to International Commercial Arbitration in African Countries' (1992) 41 *International and Comparative Law Quarterly* 387, 388.

¹⁰² F Gelinas 'Arbitration and the Challenge of Globalisation' (2000) 17(4) *Journal of International Arbitration* 117, 118.

¹⁰³ RP Alford 'The Virtual World and the Arbitration World' (2001) 18(4) *Journal of International Arbitration* 449, 449-461.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid* 453.

delivered to his address, wherever that may be.¹⁰⁶ Therefore, one can imagine that arbitration will be important for international electronic commerce.¹⁰⁷ This importance has in fact been increasing with the use of online dispute resolution in which the Internet has replaced the traditional methods of conducting the arbitration process.¹⁰⁸

Is arbitration economically important only in a peaceful situation? In fact, while arbitration plays an important role in improving the economy in prosperity, it also plays the same role in economic crises, as happened in many Asian States, such as Indonesia, Malaysia, and Thailand.¹⁰⁹ As a result of such crises, a number of commercial disputes have been raised.¹¹⁰ Arbitration, therefore, can be used as a means to solve such disputes in a flexible, peaceful, and speedy manner. This means that these transactions may be resumed again between the disputants. Blessing addressed the peaceful role of arbitration on the opening day of the 1996 ASA conference:

I believe that it is the combination of these two elements, the professional element and the human element which have made arbitration....an important, if not the most important, element to enable the development of global business and trade and to *foster mutual understanding, respect and a decent and peaceful resolution of disputes whenever they arise*, (emphasis added).¹¹¹

As a result of the economic importance of international arbitration, efforts have been exerted to promote the use of arbitration and to keep improving the legal and institutional support for international commercial arbitration.¹¹² Many States have been investing much effort in improving their arbitration rules, especially by adopting the UNCITRAL Model Law, for no reason other than to be more competitive and

¹⁰⁶ *ibid* 453. The author refers to the top ten websites which are: eBay.com, or amazon.com, travelocit.com, expedia.com, dell.com, cdnow.com, etoys.com, buy.com. barnesandnoble.com, and jcpenny.com.

¹⁰⁷ A Vahrenwald 'Out-of-Court Dispute Settlement Systems for E-commerce' [2000] <<http://www.vahrenwald.com/doc/part4.pdf>> (20 October 2004).

¹⁰⁸ RP Alford. *Op. Cit* (footnote 103) 457.

¹⁰⁹ AAD Fina 'Recent Developments in Australasia' (2000) 17(2) *Journal of International Arbitration* 73, 73.

¹¹⁰ *ibid*.

¹¹¹ M Blessing 'President's Cocktail Address at the Occasion of the Welcome Cocktail on 1 February 1996' in M Blessing (ed) *The New York Convention of 1958* (ASA Special Series No 9 Swiss Arbitration Association Zurich 1996) 11.

¹¹² VC Cram 'The United Nations Economic Commission for Europe and the 1961 Convention on International Commercial Arbitration' (2000) 17(6) *Journal of International Arbitration* 137, 137-153.

attractive to foreign investors. Foreign investors are looking for a basic standard of protection. They need to ensure that any disputes arising out of their investments will be settled by arbitration, resulting in an enforceable award whether or not such arbitration is conducted inside the State in which they are making their investments.¹¹³ Shouye, Judge of the Supreme People's Court in China, has commented: 'It has always been a concern for foreign investors to know whether China provides adequate legal protection for foreign investment'.¹¹⁴ These reasons also underlie the enactment of the new Malagasy Arbitration Act.¹¹⁵

The economic importance of arbitration is achieved where arbitration is considered in itself as an investment.¹¹⁶ Mustill has emphasised this: 'In the first place, international commercial arbitration has *become a growth industry*, and in particular has come to be seen as an important element in the overseas trade relations of the less developed countries' (emphasis added).¹¹⁷ The economic importance of arbitration lies in the fact that arbitration offers a private method for settling disputes, similar to any other private investment.

It is very evident that institutional arbitration such as arbitration conducted under the auspices of the International Chamber of Commerce (ICC),¹¹⁸ the American Arbitration Association (AAA), or the London Court of International Arbitration (LCIA),¹¹⁹ takes the form of investment which represents a potential source of revenue as well as a source of prestige to their countries.¹²⁰ This explains why every State consistently undertakes serious efforts to create its own arbitral institution. Iran, for

¹¹³ N Blackaby 'Arbitration and Brazil: a Foreign Perspective' (2001) 17(2) *Arbitration International* 129, 129.

¹¹⁴ C Shouye 'Chinese Relevant Legislation and Execution of Recognition and Enforcement of Foreign Arbitral Awards' <<http://www.ita.doc.gov/legal/cao.html>> (12 February 2002).

¹¹⁵ R Jakoba 'Comments on the New Malagasy Arbitration Act' (2000) 17(2) *Journal of International Arbitration* 95, 95.

¹¹⁶ A Redfern 'International Commercial Arbitration, Jurisdiction Denied: The Pyramid Collapses' [1986] *The Journal of Business Law* 15, 15.

¹¹⁷ MJ Mustill 'Transnational Arbitration in English Law' (1984) 37 *Current Legal Problems* 133, 136.

¹¹⁸ Statistics show that there are more than 400 new arbitrations every year alone under the auspices of the ICC. There were also 5,676 parties from 1980 to 1988. Furthermore, in 1995 the ICC International Court of Arbitration received 427 requests for arbitration. JC Najjar 'The Inside View: Companies Needs in Arbitration' (1996) 12(3) *Arbitration International* 359, 359-371. BV Hoffmann 'International Construction Arbitration' in P Sarcevic (ed) *Essays on International Commercial Arbitration* (Graham & Trotman Limited London 1989) 223.

¹¹⁹ Statistics show that the LCIA institution, during 1995-1996, has registered 71 new cases involving parties from 37 different States. JC Najjar. Op. Cit (footnote 118) 359.

¹²⁰ A Redfern and others. Op. Cit (footnote 55) 77-78.

example, has become aware of such kinds of investment and intends to create an arbitral institution in Tehran.¹²¹ The economic importance of arbitration as a service industry is also the main factor that has encouraged China and Hong Kong to improve their arbitration rules.¹²²

In England, the Arbitration Act 1996 is considered to be a comprehensive Act in comparison with the other national arbitration Acts. It values the benefits of hosting international arbitration in England. To achieve this, it modifies the security requirement rules by asking the claimant to provide security for the cost of arbitration. In doing so, it does not base this security requirement upon foreign status, and operates without distinction between individuals and organisations in this status.¹²³ This new Act has also limited the English courts' intervention in arbitration proceedings to ensure the parties' autonomy in going to arbitration and thus to ensure its privacy and finality.¹²⁴ This court's intervention was behind the loss of a substantial amount of arbitration work which had previously come to London from overseas.¹²⁵

Moreover, this Act does not give an extensive discretionary power to the arbitrators in the name of good faith, although sections 1(1) (b), 33(10), and 46(1) (b) recognise the validity of clauses which invest the arbitrators with the power to decide *ex aequo et bono* or to act as an *amiable compositeur*.¹²⁶ This new approach of AA 1996 comes as an attractive step to make commercial parties choose London as the seat of arbitration and English law as the applicable law.¹²⁷

The same thing has occurred in Jordan, where economic importance was the main factor in the enactment of the new Arbitration Act 2001 which was designed to attract foreign and local disputants to choose Jordan as their seat of arbitration. This

¹²¹ M Mashkour. Op. Cit (footnote 100) 79.

¹²² X Xu and GD Wilson. Op. Cit (footnote 97) 61.

¹²³ S 38(3) of Arbitration Act 1996.

¹²⁴ SS 42-45 of AA 1996. Department Advisory Committee on Arbitration Law *Report on the Arbitration Bill* (Report of February 1996) Paras 273-283. It is also confirmed in *Aoot Kalmneft v Glencore International A.G and Another* [2002]1 Lloyd's Rep 128, 136,140.

¹²⁵ RM Goode *Commercial Law* (2nd edn Penguin London 1995) 1196-1197.

¹²⁶ E Mckendrick 'Good Faith: A Matter of Principle?' in ADM Forte (ed) *Good Faith in Contract and Property* (Hart Publishing Oxford 1999) 53.

¹²⁷ S Netherway 'The Arbitration Act 1996 and its Potential Impact on Insurance and Reinsurance Dispute Resolution' (1997) 5(9) *International Insurance Law Review* 276, 282.

approach has been adopted by all States in the world whether they are developing or developed States.¹²⁸

The principle of the 'race to the bottom' is found in every new national arbitral rule that has been adopted in every State.¹²⁹ This is because of the awareness of the economic importance of hosting arbitration. Each State seeks to attract individuals and organisations to choose to use its particular system of arbitration.¹³⁰ Thus, competition¹³¹ has arisen among States to attract disputants by being an efficient and effective seat of arbitration.¹³² States, however, are competing with each other by reducing the standards of arbitration and removing the obstacles and difficulties that could make its arbitration system unattractive to disputants.¹³³ Consequently, many States have provided institutions for conducting arbitration with lower standards and safeguards to win the race.¹³⁴

The situation outlined above is an obvious illustration of the importance of arbitration to the enhancement of international commerce and in serving the needs of international commerce in which arbitration plays the role of a procedural safeguard. Briner has indicated the importance of arbitration in this respect: 'International commercial arbitration is the servant of international business and trade'.¹³⁵ Asouzu concurs with this view: 'International Commercial Arbitration... [is] so important in the ... economic development of African States that [it] should be given more attention than at present'.¹³⁶ He adds: 'Arbitration... may well then serve as a

¹²⁸ For the number of new arbitral rules, institutions, organisations, and websites created at national and international levels see REG Everard 'Directory of Arbitration Websites and Information on Arbitration Available Online' in AJVD Berg (ed) *Yearbook Commercial Arbitration* Vol. XXV (Kluwer Law International Hague 2000) Vol XXV, 1205.

¹²⁹ ER Leahy and CJ Bianchi 'The Changing Face of International Arbitration' (2000) 17(4) *Journal of International Arbitration* 19, 47.

¹³⁰ HL Yu and P Molife 'The Impact of National Law Elements on International Commercial Arbitration (2001) 4(1) *International Arbitration Law Review* 17, 18.

¹³¹ KP Berger *International Economic Arbitration* (Kluwer Law and Taxation Publishers Deventer 1993) 1-23.

¹³² P Zumbansen 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law' (2002) 8 (3) *European Law Journal* 400, 409-410. KP Berger. Op. Cit (footnote 131) 1-23.

¹³³ One way of avoiding the problem is by acceding to the New York Convention 1958.

¹³⁴ There are many arbitral institutions and organisations which are created to conduct arbitration at national and international levels. B Wheeler *International Arbitration Rules a Comparative Guide* (LLP Professional Publishing London 2000) 101.

¹³⁵ R Briner 'Philosophy and Objectives of the Convention' in (--) (ed) *Enforcing Arbitration Awards under the New York Convention* (United Nations New York 1999) 9.

¹³⁶ A Asouzu *International Commercial Arbitration and African States, Practice, Participation and Institutional Development* (Cambridge University Press 2001) 456-457.

facilitator of commercial activities and as an instrument of economic development and prosperity in Africa'.¹³⁷

This effective role of international arbitration in the current economic situation could not occur unless the arbitral award is recognisable and enforceable.¹³⁸ One cannot imagine economic development without such recognition and enforcement of arbitral awards. As Holtzmann has noted, 'Enforcement of foreign arbitral awards thus is not merely a legal exercise; it is a commercial necessity'.¹³⁹ Sanders remarks with respect to the New York Convention 'The business world is grateful to the United Nations for having provided it with this instrument in a world where arbitration is more and more resorted to for the solution of international commercial disputes'.¹⁴⁰ These sentiments are echoed by Cardenas, who adds that the convention 'accordingly offers something more than just an advantage. It represents, rather an essential tool for competing in the increasingly liberalised environment of international trade between private individuals'.¹⁴¹ Westin begins his article by saying that 'Enforcing foreign...arbitral awards [is] of critical importance in international business...greater uniformity and certainty in enforcement would contribute to a more effective international business system'.¹⁴²

1.5. An analysis of where an arbitral award is made and where its recognition and enforcement are sought

1.5.1. Place where the arbitral award is made (rendering place)

Fixing the rendering place is a debatable matter because different criteria have been adopted to be used for determining where an award is made. It has been suggested that the rendering place is normally the place where the arbitral award is deemed to be

¹³⁷ *ibid* 457.

¹³⁸ AJVD Berg 'Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions' (1987) 2 *ICSID Review-Foreign Investment Law Journal* 439,439.

¹³⁹ HM Holtzmann. *Op. Cit* (footnote 88) 361, 362.

¹⁴⁰ P Sanders 'The Making of the Convention' in (--) (ed) *Enforcing Arbitration Awards under the New York Convention* (United Nations New York 1999) 5.

¹⁴¹ E Cardenas 'Benefits of Membership' in (--) (ed) *Enforcing Arbitration Awards under the New York Convention* (United Nations New York 1999) 15.

¹⁴² D Westin 'Enforcing Foreign Commercial Judgements and Arbitral Awards in the United States, West German, and England' (1987) 19 *Law & Policy in International Business Journal* 325, 325.

made.¹⁴³ Article 16 (4) of UNCITRAL 1976 Rules provides that ‘The award shall be made at the place of arbitration’. It is also provided by section 53 of AA 1996 that ‘...where the seat of arbitration is in England and Wales or Northern Ireland, any award in the proceedings shall be treated as made there...’ Before section 53 had been enacted an eminent scholar commented: ‘If a place other than the seat is held to be decisive, unacceptable consequences could ensure’.¹⁴⁴

However, the seat of arbitration is normally decided by either the disputants’ will or the governing arbitral rules.¹⁴⁵ In relation to the parties’ will, they are free to choose directly by themselves the place where the arbitral award will be made or they can entitle an arbitrator or an arbitral tribunal to do so.¹⁴⁶ If the parties choose the place where the arbitral award is deemed to be made, this place should not be affected by the place where the arbitral award is signed, despatched or delivered to any of the parties.¹⁴⁷

In relation to the arbitral rules, fixing the place where the arbitral award is made is a controversial matter.¹⁴⁸ This is because no unified criterion exists upon which arbitral rules have been adopted to fix the place where the arbitral award is deemed to be made.¹⁴⁹ However, there are a number of criteria which can be derived from the arbitral rules. The place where the arbitral award is deemed to be made can be known by either the geographical criterion or the applicable law criterion.¹⁵⁰

¹⁴³ FA Mann ‘Where is an Award ‘Made?’ in FA Mann *Notes and Comments on Cases in International Law, Commercial Law, and Arbitration* (Clarendon Press Oxford 1992) 28. SA Baker and MD Davis *The UNCITRAL Arbitration Rules in Practice, the Experience of the Iran-United States Claims Tribunal* (Kluwer Law and Taxation Publishers Deventer 1992) 77-79. H Verbist ‘Notes the Practice of the ICC International Court of Arbitration with Regard to the Fixing of the Place of Arbitration’ (1996) 12(3) *Arbitration International* 347, 347. O Chukwumerije ‘Is an Arbitration Award “Made” Where it is Signed?’ (1992) 20 *Canadian Business Law Journal* 305, 315.

¹⁴⁴ FA Mann ‘Where is an Award ‘Made?’ in FA Mann *Notes and Comments on Cases in International Law, Commercial Law, and Arbitration* (Clarendon Press Oxford 1992) 29.

¹⁴⁵ A Tweeddale and K Tweeddale. Op. Cit. (footnote 2) 280. SS 53,101(2, b) of English Arbitration Act 1996. S 27 of Jordanian Arbitration Act 2001.

¹⁴⁶ For example, if the parties choose to arbitrate according to the International Centre for Settlement of Investment Disputes, the seat of arbitration will be as fixed by SS 2, 62, and 63 of the Washington Convention 1965. It is also provided by S 3 of English Arbitration Act 1996.

¹⁴⁷ SS 53, 100 (2, b) of Arbitration Act 1996. There are no corresponding Sections in Jordanian legal system.

¹⁴⁸ MR Sammartano *International Arbitration Law* (Kluwer Law & Taxation Publishers Deventer 1990) 15-24. FA Mann ‘Where is an Award ‘Made?’ in FA Mann *Notes and Comments on Cases in International Law, Commercial Law, and Arbitration* (Clarendon Press Oxford 1992) 29.

¹⁴⁹ MR Sammartano. Op. Cit (footnote 148) 17.

¹⁵⁰ MR Sammartano. Op. Cit (footnote 148) 17. M Pryles ‘Foreign Awards and the New York

According to the first criterion, an arbitral award is made, for example, in England since England is the place where an award is made, notwithstanding what the applicable procedural law may be, whether it is English law or foreign law.¹⁵¹ On the other hand, according to the second criterion an award is made, for example, in France since the applicable procedural law is French law, irrespective of whether the geographical place in which the award is made is inside or outside France. This criterion is adopted in Germany and France.¹⁵²

However, as far as recognition and enforcement are concerned, what are the consequences of adopting one of these criteria? And what is the criterion that is adopted in England and Jordan?

Before answering these questions, it is better to bear in mind the following two ideas. First, when recognition and enforcement of an award are sought in any place, the local regimes in this place will deal with the matter. Secondly, the effect of local regimes is territorial and does not affect the recognition and enforcement process in other places. Consequently, refusing recognition and enforcement of an arbitral award in one place does not prevent it from being enforceable in other places.¹⁵³ This means that an arbitral award can be recognised and enforced in more than one place (forum shopping).¹⁵⁴

According to the first idea, one can imagine that if recognition and enforcement are sought in a State, the enforcing court in this State will verify whether this award is a non-convention award or a convention award. If it is a non-convention award, it will

Convention' (1993) 9(3) *Arbitration International* 259, 259.

¹⁵¹ This criterion has been adopted in art (1) of the New York Convention 1958, in which it provides that recognition of an award made in the territory of a State other than that in which recognition and enforcement are sought. The same criterion has also been adopted in art (1) of the Geneva Convention 1927, in that 'award has been made in a territory of one of the High Contracting parties to which the present Convention applies'. The Geneva Protocol 1923 was the first in which this criterion was adopted, providing in art (3) that arbitral awards are made in its own territory. The Riyadh Convention also adopted this criterion in art (37), in that it deals with recognition and enforcement of arbitral awards that are made in contracting States.

¹⁵² P Contini 'International Commercial Arbitration, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' [1959] *The American Journal of Comparative Law* 283, 292.

¹⁵³ J Hill. Op. Cit (footnote 23) 669.

¹⁵⁴ A Redfern and others. Op. Cit (footnote 55) 518.

apply the local law that has been enacted for such an award. In case it is a convention award, it will verify whether the place where the arbitral award is made is a contracting State or not.¹⁵⁵ If it is so, according to the first criterion there is no problem in applying this convention.

However, according to the second criterion applying this convention will be subject to the applicable law. If it is a foreign law belonging to another contracting State, there will be no problem. But if it is a domestic law belonging to the forum place or to a State which is not a member State to the convention, it is not possible to apply this convention as there is no other contracting State, even though according to the geographical criterion the award was made in another contracting State.

On the other hand, according to the second idea, if an award is sought to be recognised and enforced in two places that have adopted the same criterion, the result will be the same. However, in cases where each place adopts a different criterion, the result will be different. An award may be recognised and enforced in one place, but it may not be in the other place.

These side effects of adopting one of these criteria were realised when the New York Convention was enacted. In fact, when the drafters prepared to formulate article (1) of the New York Convention on the basis of the geographical criterion, the delegates of Italy, Western Germany, France, and Turkey objected that this criterion was not sufficient to determine whether the arbitral award was foreign or domestic. According to them, there were other factors which should have been taken into account for this purpose, particularly as the geographical criterion is often chosen merely as a matter of convenience.¹⁵⁶

To avoid the consequences of both criteria on the recognition and the enforcement of foreign awards, the solution to be adopted should not be affected by these criteria. The

¹⁵⁵ This verification will take place if the convention concerned is applicable only among member States. However, if the convention is applicable to member States and to non-member States, such verification will occur in cases where there is reciprocal reservation, such as in the New York Convention 1958.

¹⁵⁶ P Contini. *Op. Cit* (footnote 152) 292.

first attempt to find such a solution was in the New York Convention 1958.¹⁵⁷ This convention added a new criterion in addition to the geographical criterion. It refers to the application of the convention to an arbitral award which is not considered to be a domestic award in the State where recognition and enforcement are sought.¹⁵⁸ A solution was also provided by UNCITRAL Model Law, which provides rules for the recognition and enforcement of an arbitral award, regardless of the country in which it is made.¹⁵⁹ This approach leads to the principle that the forum place should recognise and enforce the arbitral award as far as this award is legal according to the applicable law.

1.5.1.1 Position in England and Jordan

It has been noted earlier that England is a contracting State to the Geneva Protocol 1923, the Geneva Convention 1927, the New York Convention 1958, and the Washington Convention 1965. In addition, a number of regimes have been enacted in England, of which the last is AA 1996. Section 53 of AA 1996 adopts the geographical criterion, and provides that:

Unless otherwise agreed by the parties, where the seat of arbitration is in England Wales or Northern Ireland, any award in the proceedings shall be treated as made there, regardless of where it was signed, despatched or delivered to any of the parties.

Furthermore, the geographical criterion is adopted by section 100 (1) (2, b) of AA 1996 for the purpose of recognition and enforcement of the New York Convention award. The application of the New York Convention is limited by section 100(1) between the UK and other contracting States.¹⁶⁰ This is because the territorial reservation on the application of this Convention is made by the UK.¹⁶¹

¹⁵⁷ *ibid* 292-293.

¹⁵⁸ Art (1) of the New York Convention.

¹⁵⁹ S 35 of UNCITRAL Model Law.

¹⁶⁰ The criterion of the New York Convention is where recognition and enforcement are sought in a State other than the State where the arbitral award is made, or when the award is considered as non-domestic in the forum place, whether or not the rendering place and forum place are parties to this convention. However, art 1(3) of the convention gives the contracting State the right to make reciprocal reservation as well as commercial reservation.

Before AA 1996, the criterion was different, as illustrated in *Hiscox v Outhwaite*.¹⁶² In this case, the House of Lords held that the place where the arbitral award is made is the place where it was signed. The result of this case has been strongly criticised by eminent scholars as it leads to odd consequences.¹⁶³ However, the decision in this case was repealed by sections 53 and 100 (2, b) of AA 1996 in which the place where an award is signed cannot be considered as the place where an award is made.¹⁶⁴ The decisive factor is the agreement of the parties. If they do not agree on the place where an award is made, fixing such a place will not be affected by the place where it was signed, despatched, or delivered to any of the parties.

However, the place where an award was made is different from the place where the hearing or other procedures of arbitration are heard, as arbitration proceedings can be performed on a transitional basis.¹⁶⁵ In this regard, the arbitral tribunal can conduct arbitration proceedings in any convenient place, but the place where an award is made is not fixed by the place where an award is signed, despatched, or delivered to any of the party.¹⁶⁶

¹⁶¹ R Thomas 'Reflection on Recent Judicial Development of the Concept of a Convention Awards' [1992] *Civil Justice Quarterly* 352, 352.

¹⁶² [1991] 3 All ER 641.

¹⁶³ The consequences including encouraging the arbitrator to sign the award in the place where the party cannot challenge the award. In cases where there are a number of arbitrators and an award is signed in more than one place, which place should be considered in determining whether the award is made in A or B? The arbitrator may sign an award in a particular place not because the arbitration was conducted in that place but because he is visiting his family at that place. It is certainly not the intention of the parties to assent to an award made in such a place just because it is signed there, or to subsidise an arbitrator who is visiting his family. See the commentators on this case: C Reymond 'Where is an Arbitral Award Made?' (1992) 108 *The Law Quarterly Review* 1, 1-6. FA Mann 'Foreign Awards' (1992) 108 *The Law Quarterly Review* 6, 6-8. R Merkin *Arbitration Law* (LLP Publisher London 1991) 16-3. FP Davidson 'Where is an Arbitral Award Made?-Hiscox v Outhwaite.' [1992] *International and Comparative Law Quarterly* 637, 637-645. R Thomas. Op. Cit (footnote 161) 352-362. MP Broberg 'The Interpretation of Section 5 (2) (b) of the English Arbitration Act 1975' [1994] *Journal of International Arbitration* 119, 119-122. JM Timmons 'Where is an Arbitration Award Made, and What are the Consequences?' [1992] *Arbitration* 124, 124-127. Department Advisory Committee on Arbitration Law *Report on the Arbitration Bill* (Report of February 1996) Paras 349-354. O Chukwumerije. Op. Cit (footnote 143) 305-316.

¹⁶⁴ As a rule in the English legal system the decisions of the House of Lords can be overruled by either statute or by a refusal of the House of Lords to follow them in later cases. T Ingman *The English Legal Process* (10th edn Oxford University Press Oxford 2004) 4.

¹⁶⁵ Kerr LJ stated that in *Naviera Amazonica Peruana SA v Compania Internacional de Sugereros del Peru* [1988] 1 Lloyd's Rep 116, 121.

¹⁶⁶ FA Mann 'Where is an Award 'Made'?' in FA Mann *Notes and Comments on Cases in International Law, Commercial Law, and Arbitration* (Clarendon Press Oxford 1992) 28. MJ Mustill and SC Boyd. Op. Cit (footnote 29) 259.

To turn to Jordan, that State is a party to the New York Convention, the Washington Convention, the Riyadh Convention, the Arab League Convention, and the Amman Convention. The method by which the Jordanian legal system gives effect to these conventions is completely different from its counterpart in England. The above named conventions are applicable in Jordan as soon as they are ratified and published in the Official Gazette.¹⁶⁷ In other words, there is no specific implementing legislation for these conventions, because conventions have the full force of law in Jordan without the need for special legislation. Those seeking to enforce in Jordan an arbitral award made outside Jordan may therefore proceed directly under these conventions.

The criterion adopted in the Jordanian regimes to fix the rendering place differs from one regime to another. Section 27 of the Arbitration Act 2001 adopts the geographical criterion. The same criterion is also adopted by the Enforcement of Foreign Judgements Act 1952. According to article I (1) of the New York Convention, a foreign award in Jordan may be fixed by either the place where it was made, or by considering it as a non-domestic award. It is possible that an arbitral award is considered as a non-domestic award for the purpose of the New York Convention, even though it was made in Jordan.

There is no specific criterion provided by the convention to apply the concept of a non-domestic award; it is left to the local courts' interpretation. Article I (1) of the New York Convention invests the local court with discretionary power to decide the meaning of a non-domestic award.¹⁶⁸ The operation of this approach can be seen, for example, in the USA when the court in *Bergesen v Joseph Muller Corp*,¹⁶⁹ stated that it could apply the New York Convention to an arbitral award made in the USA if the disputants were the involved parties who had their principal place of business outside the United States.

¹⁶⁷ S 93(ii) of 1952 Constitution. This principle was emphasised by the Court of Cassation in Jordan. Court of Cassation's decision No 12/70 (Journal of the Jordanian Bar Issue 3-4 1970) 22.

¹⁶⁸ AJVD Berg *The New York Arbitration Convention of 1958 Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers Deventer 1981) 25-26. AJVD 'The New York Convention: Summary of Court Decisions' in M Blessing (ed) *The New York Convention of 1958* (ASA Special Series No 9 Swiss Arbitration Association Zurich 1996) 53-54. DD Pietro and M Platte. Op. Cit (footnote 58) 23-24, 27-30.

¹⁶⁹ As cited in P Tutun 'Arbitration Procedures in the United States-German Income Tax Treaty: The Need for Procedural Safeguards in International Tax Disputes [FNa]' [1994] *Boston University International Journal* 179, 204. WL Craig WW Park and J Paulsson *International Chamber of*

However, the Jordanian Court of Cassation adopted a different criterion. The court stated that ‘if the arbitral award was signed in America, this means it was issued in America and not in Amman’.¹⁷⁰ This approach is the same as in *Hiscox v Outhwaite*.¹⁷¹ The Jordanian Court of Cassation’s decision can be criticised on the basis that it leads to odd consequences. It is also contrary to section 2 of the Enforcement of Foreign Judgements Act 1952, to which the court’s decisions must adhere. In this regard, section 27 of the 1952 Constitution provides that ‘All judgements shall be given in accordance with law’. Unfortunately, the Court of Cassation’s approach has not been repealed by the Arbitration Act 2001 as happened in the case of English AA 1996.

However, the Jordanian legal system is different from the English legal system in dealing with case law. The Jordanian legal system is a statutory system,¹⁷² whilst English law has adopted a system of judicial precedents (Common Law). This means that Jordanian courts are not obliged to adhere to previous decisions of the Court of Cassation such as the one noted above. They can on other occasions adopt another criterion which adheres to the applicable laws in Jordan. Thus, it would seem that the adopted criterion in Jordan for recognition and enforcement is not unified as it depends on case-by-case circumstances and the regime concerned.

1.5.2. Place of recognition and enforcement of arbitral awards (forum place)

The decision to choose the place of recognition and enforcement is made by the winning party. It has been suggested that there are two main factors that the winning party should take into account when he intends to choose the forum place: firstly where the assets of the losing party are located, and secondly, whether the arbitral award in this place is enforceable according to the applicable regimes.¹⁷³

The assets of the losing party may be located in more than one place. In this instance,

Commerce Arbitration (2nd edn Oceana Publications New York 1990) 660.

¹⁷⁰ Court of Cassation’s decision No 307/66 (Journal of the Jordanian Bar Issue 5 1967) 546.

¹⁷¹ [1991] 3 All ER 641.

¹⁷² S 27 of 1952 Constitution of Jordan

¹⁷³ A Redfern and others. Op. Cit (footnote 55) 517-518.

the winning party can practise forum shopping by choosing the place where the assets of the losing party meet the merits of the award and the award is enforceable according to the applicable regimes therein as well.¹⁷⁴

Regarding the second factor, the foreign award may or may not be recognised and enforced according to the local regimes in the forum place. Each regime provides a number of conditions to be met in order to enforce the arbitral award; it also provides a number of grounds upon which the enforcement of a foreign award may be refused.

1.5.3. The importance of fixing the rendering place and the forum place

There are some considerations that the disputants take into account when they choose the rendering place and the forum place for the purpose of recognition and enforcement.¹⁷⁵ The main consideration is whether the rendering place and the forum place are parties to the New York Convention. The rendering place is considered in cases of international arbitration as always neutral vis-à-vis the parties¹⁷⁶ to avoid political and national bias.¹⁷⁷

It is important for recognition and enforcement to fix the rendering place and the forum place because there is no guarantee of a uniformity of solution in both places.¹⁷⁸ In other words, there should be a comparison between the attitude of the court in the rendering place and the attitude of the court in the forum place.¹⁷⁹ Challenging the award in the rendering place and in the forum place is not the same.¹⁸⁰ In the rendering place, the challenge concerns the validity of the arbitral award and its finality, whereas in the forum place it concerns whether or not the award should be recognised and enforced.¹⁸¹ Furthermore, the applicable rules are different if the

¹⁷⁴ *ibid* 518.

¹⁷⁵ GR Delaume 'Reflections on the Effectiveness of International Arbitral Awards' (1995) 12 *Journal of International Arbitration* 5, 6.

¹⁷⁶ MR Sammartano. *Op. Cit* (footnote 148) 325.

¹⁷⁷ P Tutun. *Op. Cit* (footnote 169) 207.

¹⁷⁸ J Paulsson 'Arbitration Unbound: Award Detached From the Law of its Country of Origin' [1981] *The International and Comparative Law Quarterly* 358, 359. For examples of the importance of fixing the rendering place and the forum place with respect to the application of the New York Convention 1958 see DD Pietro and M Platte. *Op. Cit* (footnote 58) 25-26.

¹⁷⁹ J Paulsson. *Op. Cit* (footnote 178) 359.

¹⁸⁰ GR Delaume. *Op. Cit* (footnote 175) 6.

¹⁸¹ *ibid* 6.

question before the court is in regard to recognition and enforcement or in regard to the review of an award.¹⁸²

It is important to fix the rendering place and the forum place because the law of the forum place may refuse to recognise and enforce an arbitral award made in a particular place.¹⁸³ For example, any award made in Israel was not enforceable in Jordan before the Jordan-Israel peace treaty.¹⁸⁴ This political obstacle to the recognition and enforcement of a certain arbitral award still exists between Israel and some Arab States which have no peace treaty with Israel. Thus, such a reservation cannot be performed without fixing the nationality of the arbitral award.

Furthermore, it is important to fix the rendering place so as to fix the nationality of the arbitral award in international arbitration.¹⁸⁵ By doing so, it is possible to identify the applicable procedure on recognition and enforcement,¹⁸⁶ and to apply the conventions that deal with recognition and enforcement which depend on knowing whether or not the rendering place and the forum place are contracting States to the same convention.¹⁸⁷

In order to apply the New York Convention, the rendering place should be indicated in order to implement article V of the said convention. This article gives a huge consideration to the law of the place where the arbitral award is made.¹⁸⁸ Fixing the rendering place is important for the purposes of article V (1, a) of the New York Convention. The place where the award is made indicates the law governing the validity of the arbitration agreement, if the parties have not agreed on a particular law to govern it. It is also important for the purposes of article V (1, e) to fix the place where the award is made in order to indicate which national court has jurisdiction to

¹⁸² C Reymond. Op. Cit (footnote 163) 2.

¹⁸³ H Verbist. Op. Cit (footnote 143) 350.

¹⁸⁴ This was the Jordanian reservation on the New York Convention as stated by the message of the Jordanian Industry and Trade Minister (No 827/7/2//9532 Dated 20/8/1979) to the Jordanian Delegate in the International Chamber of Commerce.

¹⁸⁵ FA Mann '*Lex Arbitri and Locus Arbitri*' in FA Mann *Notes and Comments on Cases in International Law, Commercial Law, and Arbitration* (Clarendon Press Oxford 1992) 36. MR Sammartano. Op. Cit (footnote 148) 15. JDM Lew *Application Law in International Commercial Arbitration* (Oceana Publications Dobbs Ferry 1978) 13.

¹⁸⁶ A Tweeddale and K Tweeddale. Op. Cit. (footnote 2) 272.

¹⁸⁷ *ibid* 280.

¹⁸⁸ The same can be said of all corresponding regimes dealing with recognition and enforcement.

set aside or suspend such an award.

It is also important for article VII (2) of the New York Convention. It is not possible to apply this article without identifying the nationality of the arbitral award and then whether it is rendered in a State which is a contracting State to the Geneva Protocol 1923 or the Geneva Convention 1927 or which is just a contracting State to the New York Convention. If such an arbitral award is rendered in a contracting State to the Geneva Protocol, or the Geneva Convention and not a contracting State to the New York Convention, the Geneva Protocol, or Geneva Convention will be applied. However, if an award is rendered in a contracting State to the Geneva Protocol or the Geneva Convention and a contracting State to the New York Convention, then the New York Convention will be applied.

It is important to apply article I (3) of the New York Convention. According to this article, England has made a territorial reservation for the application of this convention. This reservation is to the effect that: '[the convention will apply]... in accordance with article 1, paragraph 3 thereof, only to the recognition and enforcement of awards made in the territory of another contracting State'. So, without fixing the rendering place, it is impossible to perform this reservation. This reservation is embodied in section 100 of AA 1996.

Moreover, fixing the rendering place is vital to the application of section 72 of the Riyadh Convention. By fixing the rendering place and the forum place, it is possible to fix which is the applicable convention, whether the Riyadh Convention or the Arab League Convention. In cases where both the rendering place and the forum place are contracting States to the Riyadh Convention and the Arab League Convention, the Riyadh Convention will be applied. But in cases where the rendering place and forum place are contracting States to the Arab League Convention but only one of them is a contracting State to the Riyadh Convention, the Arab League Convention will be applied.

Fixing the rendering place is important to the forum place in applying the reciprocal

provision provided by the local regimes.¹⁸⁹ It is important to fix the rendering place in order to apply the Foreign Judgements (Reciprocal Enforcement) Act 1933. This Act is to be applied in respect of the countries with which England has reciprocal arrangements. So, without fixing the rendering place it is impossible to know where England has reciprocal arrangements. Furthermore, it is important to fix the rendering place in order to apply section 7 (2) of the Enforcement of Foreign Judgements Act 1952. According to this sub-section, an arbitral award is not enforceable in Jordan if the rendering place refuses to enforce an arbitral award that is rendered in Jordan (reciprocal principle).

1.6. The territorial effect of the regimes applicable to recognition and enforcement of arbitral awards

The effect of applicable laws on recognition and enforcement of arbitral awards is territorial.¹⁹⁰ Thus, an arbitral award is enforced according to the applicable regimes in the place where recognition and enforcement are sought.¹⁹¹ In England, the English court ‘exercises control over the enforcement of arbitral awards as part of the *lex fori*, whatever the proper law of the arbitration agreement or the place where the arbitration is conducted’.¹⁹² This approach of the court is compatible with the traditional theory of territoriality which was based on the general principle of international law that a State is exercising sovereignty within its borders and that its laws and courts have the exclusive right to establish the legal effect of laws enacted within its borders.¹⁹³

¹⁸⁹ For example, art I (3) of New York Convention provides that:

When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

However, England has made a territorial reservation and not a commercial reservation. Jordan has not made any reservations.

¹⁹⁰ MH James and N Gould *International Commercial Arbitration a Handbook* (LLP Publisher London 1996) 18.

¹⁹¹ JG Castel ‘The Enforcement of Agreements to Arbitrate and Arbitral Awards in Canada’ [1991] *Canada-United States Law Journal* 491, 497. M Domke *Domke on Commercial Arbitration* (West Group 1999) vol 2, 607.

¹⁹² As provided by *Soleimany v Soleimany* [1999] 3 W.L.R. 811.

¹⁹³ R Goode. *Op. Cit* (footnote 89) 24.

Regarding the conventions dealing with recognition and enforcement, they do not interfere in the local regimes with respect to recognition and enforcement procedures. The New York Convention provided in article III only one condition in respect of fees that the local court should observe while dealing with a New York Convention award and the procedures are left to the national laws for other conditions and processes.¹⁹⁴ The Washington Convention in article 54 (3) also left the enforcement of the arbitral award to be governed by the laws in force in the State in whose territories such an execution is sought.

The effect of the rules that govern recognition and enforcement is limited within the territorial scope of the forum place. They do not affect the application of other rules outside the forum place. At the same time, other rules in other jurisdictions do not affect the application of forum place rules.¹⁹⁵ For example, the experience of France, the USA, Germany, and the Netherlands on recognition and enforcement of annulled arbitral awards in the country of origin emphasises the role of local regimes to assess whether or not an award will be recognised and enforced.¹⁹⁶ If these countries gave effect to the law of the State of origin, they would refuse recognition and enforcement to an annulled award.

On the other hand, the English court has no power to grant a Mareva injunction to be applied to the defendant's assets located outside the jurisdiction of the enforcing court.¹⁹⁷ This principle is confirmed in *Rosseel N.V. v Oriental Commercial & Shipping Co. (U.K) Ltd, and others*,¹⁹⁸ in which the Court of Appeal refused to grant a Mareva injunction with respect to assets of the defendants which were located in a foreign State. Moreover, in *Sokana Industries Inc. and Others v Freyre & Co. Inc and Another*,¹⁹⁹ the court refused to interfere with the conduct of proceedings in foreign

¹⁹⁴ P Sanders 'The Making of the Convention' in (--) (ed) *Enforcing Arbitration Awards under the New York Convention* (United Nations New York 1999) 4. LV Quigley 'Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1961) 70 *Yale Law Journal* 1049, 1064-1065.

¹⁹⁵ J Hill. Op. Cit (footnote 23) 669.

¹⁹⁶ E Gaillard and J Edelstein 'Baker Marine and Spier Strike a Blow to the Enforceability in the United States of Awards Set Aside at the Seat' (2000) 3(2) *International Arbitration Law Review* 37, 41. GR Delaume 'Enforcement Against a Foreign State of an Arbitral Award Annulled in the Foreign State' <http://www.cm-p.com/publications/11_96.htm> (6 February 2001).

¹⁹⁷ D Capper 'The Trans-Jurisdictional Effects of Mareva Injunctions' [1996] *Civil Justice Quarterly* 211, 214.

¹⁹⁸ [1990] 1 W.L.R 1387.

¹⁹⁹ [1994] 2 Lloyd's Rep 57

State.

However, leaving the recognition and the enforcement procedures to the municipal courts and laws has been criticised as it is considered the weakest link in the entire chain of the international dispute resolution. This is because the national and the political bias in the forum place which is especially strong when the party against whom the enforcement is sought is the State itself or one of its nationals.²⁰⁰

1.7. Summary

Originally a hostile relationship existed between arbitration and the courts, because the courts regarded arbitration as a private dispute settlement mechanism created to weaken their jurisdiction. However, this negative attitude of national courts towards arbitration changed gradually over a long period under pressure from the commercial community. The parties' autonomy to go to arbitration was the reason why national courts have come to recognise and enforce arbitral awards.

The effect of recognition is to act as *res judicata* defence under which the losing party cannot raise an issue which has been determined by arbitration before another arbitral tribunal or national court, whereas the effect of enforcement is to make the losing party carry out the award. That is to say, steps will be taken by the court of the recognising State with a view to securing compliance with the obligations imposed by the award by means of public coercive force.

However, there is a strong connection between arbitration and recognition and enforcement. That is to say, arbitration is considered meaningless if the resulting arbitral award is not recognisable and enforceable. Recognition and enforcement thus provide a new measurement by which arbitration can be judged. Arbitration is successful not only by issuing a final and a binding award but also by the enforcement or non-enforcement of such an award. If the award fails to be enforced, this reflects to

²⁰⁰ M Blessing 'The New York Convention: Major Problem Areas' in M Blessing (ed) *The New York Convention of 1958* (ASA Special Series No 9 Swiss Arbitration Association Zurich 1996) 20-22.

some extent the weakness of the arbitration.

To recognise and enforce the arbitral award, it is important to fix the rendering place and the forum place. The convention-regimes cannot be applied without fixing whether or not the rendering place and the forum place are party to the convention concerned. However, the effect of current regimes is territorial. That is to say, if an award is not enforced in one State, it does not mean that this award is also not enforceable in other States.

Chapter Two: The Field of Application of the Current Regimes on Recognition and Enforcement

Arbitration is one of the alternative dispute resolution methods. It deals with disputes arising between the parties to arbitration with respect to different issues. Since the matters which are brought to arbitration are different, the merits of an award will be accordingly different. At the enforcement stage, the winning party brings the arbitral award to the place where the assets of the losing party are located. In this place, an award may be enforced or not, depending on the applicable regimes. This means that not every kind of foreign award is enforceable in foreign jurisdictions, and as such this matter is left to the regimes of the forum place to be judged.

Since the second objective of this thesis is to examine the effectiveness of the current regimes to recognise and enforce foreign awards, it is very important to indicate the scope of the current regimes in both States. In this regard, this chapter raises the question of the extent to which the current regimes in both States are wide enough to absorb any foreign award that the winning party may obtain. The answer to this question depends on whether or not the current regimes define the foreign arbitral awards that are enforceable under them. That is to say, they have a limited scope in cases where they have defined the foreign arbitral awards. In cases where they have not defined the foreign arbitral awards, then the question is, what foreign arbitral awards are concerned on recognition and enforcement under these regimes? In considering this issue, the chapter is divided into the following sections:

- Definition of a foreign arbitral award.
- What foreign arbitral awards are concerned on recognition and enforcement in England and Jordan?

2.1. Definition of a foreign arbitral award

It has been seen in 1.6 that two main criteria are used to identify the place where an award is made. According to the geographical criterion, an award is made, for example, in England if England is the place in which the award is made, irrespective of the applicable law. In contrast, according to the applicable law criterion, an award

is considered to have been made in France if the applicable law is French law, irrespective of the place where it was made. Accordingly, a foreign award in the light of the first criterion can be defined as an award made outside the State that adopts such a criterion, as in England; while according to the second criterion, it can be defined as an award made according to a law other than the law of the State which has adopted such a criterion, as in France.

As far as the English regimes are concerned, a foreign award has been defined differently among these regimes. Section 100 of part III of AA 1996 defines it as ‘...an award made, in pursuance of an arbitration agreement, in the territory of a State (other than the United Kingdom) which is a party to the New York Convention’, whereas section 2 of part I of the same Act defines a foreign award which can be recognised and enforced according to section 66 of the said Act as an award made according to arbitration even if the seat of arbitration is outside England or no seat has been designated or determined. In addition to this, in the light of section 35 of AA 1950, a foreign award is defined as an award made outside of England according to the Geneva Protocol or made in the territory of a State other than the United Kingdom which is a party to the Geneva Convention. So, it can be said that a foreign award according to the English regimes is an award made outside the United Kingdom.

On the other hand, the Jordanian regimes define foreign arbitral awards differently. According to section 2 of Act No 8, a foreign award is an award made by a tribunal outside Jordan. A foreign award in the light of article I of the New York Convention, however, is an award made in the territory of a State other than Jordan where recognition and enforcement of such an award are sought, and arising out of differences between persons, whether physical or legal. It also applies to an arbitral award which is not considered as a domestic award in Jordan, where its recognition and enforcement are sought. It is suggested that the New York Convention adopts a hybrid definition of a foreign award.²⁰¹

Moreover, in the light of the Inter-Arab Conventions, a foreign award is defined as an award made in the territory of an Arabic State other than Jordan which is a party to

²⁰¹ M Pryles. *Op. Cit* (footnote 150) 273.

the Inter-Arab Conventions. Finally, in regard to bilateral conventions, a foreign award is an award made in the territory of Syria, Lebanon, Tunisia, or Egypt which sought to be recognised and enforced in Jordan.

Therefore, a foreign award can be defined in the light of the English regimes as an award made in the territory of another State, whilst in Jordan, it can be defined as an award made in the territory of another State or in Jordan but with a foreign or international element.²⁰²

2.2. What foreign arbitral awards are concerned in England and Jordan on recognition and enforcement?

Having examined the concept of a foreign arbitral award in the light of the applicable regimes in England and Jordan, the next aspect of the field of application of these regimes is, what foreign awards can be recognised and enforced under these regimes? In other words, are all foreign awards as included in the above provisions, subject to recognition and enforcement in England and Jordan? Or are there some kinds of foreign awards which cannot be recognised and enforced?

The remedies which are ordered by the court can be ordered by an arbitrator, with some reservations with respect to a penalty award which cannot be ordered by an arbitrator according to some laws. The majority of arbitral awards order the payment of a certain amount of money, although a specific performance may also be ordered by an award.²⁰³ A question which may arise in this respect is, what does an award

²⁰² There are other criteria in some legal systems according to which an award is a foreign award, such as: the nationality of the parties and the arbitrator, the place of the regular court where the award was filed, the law of the court which is competent to deal with the setting-aside petition or conduct the enforcement proceedings, mixed criterion between the place where the award is made and the law of proceedings, substantive law which has been applied, existence of a special legitimate interests to make legal action not on the fact that the award had been made in State A, and the State where services of process have been made. For more detail see I Szaszy 'Recognition and Enforcement of Foreign Awards' (1966) 14 *The American Journal of Comparative Law* 658, 658-672. P Sarcevic Petar 'The Setting Aside and Enforcement of Arbitral Awards Under the UNCITRAL Model Law' In P Sarcevic (ed) *Essays on International Commercial Arbitration* (Graham & Trotman Limited London 1989) 178-180.

²⁰³ N Horn 'The Development of Arbitration in International Financial Transactions' (2000) 16(3) *Arbitration International* 279, 293. Unless the parties have agreed otherwise, an arbitrator has the power to order a wide range of remedies, such as order payment of money, make a declaration of the rights between the parties, order a party to do or refrain from doing something, order specific performance and/or order the rectification, setting aside or cancellation of a deed or document. N

mean? The term 'award' has not been defined either by national laws or by international conventions.²⁰⁴ However, an attempt was made to define the term 'award' in the Model Law but it did not succeed; it defined 'award' as:

'Award' means a final award which disposes of all issues submitted to the arbitral tribunal and any other decisions of the arbitral tribunal which finally determine any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms it's decision an award.²⁰⁵

However, in the absence of a definition of an award,²⁰⁶ some authors have attempted to characterise the term 'award' by saying that it finally determines the dispute referred to the tribunal by the parties and that this award is binding upon the parties. The arbitrator then has no further jurisdiction on the dispute as it has become *res judicata*.²⁰⁷ Hunter defined it as follows:

A decree arbitral or award is a decision reached by a qualified and properly appointed arbiter or arbiters or oversman, without misconduct, corruption, bribery or falsehood, upon questions properly submitted on the basis of a valid and subsisting arbitration agreement, and issued to the submitters in such form and at such time or place as the law or the contract requires. If only one award is made in a submission of existing disputes, it must exhaust all the questions at issue; if there are more awards than one, all the part awards must together exhaust those questions. An award issued by an oversman must be based on a proper devolution of the matters determined by the decree.²⁰⁸

He also characterised it as follows:

The decree arbitral or award should be the accurate embodiment of the

Gould and others *Dispute Resolution in the Construction Industry* (1st edn Thomas Telford Ltd Publication 1999) 87. A Redfern and others. Op. Cit (footnote 55) 422-433.

²⁰⁴ MJ Mustill and SC Boyd. Op. Cit (footnote 29) 105. A Redfern and others. Op. Cit (footnote 55) 419. DSJ Sutton and J Gill (eds) *Russell on Arbitration* (22nd edn Sweet and Maxwell Publication London 2003) 228-229. F Knoepfler and P Schweizer 'Making of Awards and Termination of Proceedings' In P Sarcevic (ed) *Essays on International Commercial Arbitration* (Graham & Trotman Limited London 1989) 160. DD Pietro and M Platte. Op. Cit (footnote 58) 30.

²⁰⁵ As cited in F Knoepfler and P Schweizer 'Making of Awards and Termination of Proceedings' In P Sarcevic (ed) *Essays on International Commercial Arbitration* (Graham & Trotman Limited London 1989) 160.

²⁰⁶ An award is defined in BA Garner (ed) *Black's Law Dictionary* (7thedn, West Group 1999) as 'A final judgment or decision, esp. one by an arbitrator or by a jury assessing damages'.

²⁰⁷ MJ Mustill and SC Boyd. Op. Cit (footnote 29) 106. DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 228-229. S Rajoo *Law, Practice and Procedure of Arbitration* (LexisNexis Kuala Lumpur 2003) 452-471.

²⁰⁸ RLC Hunter *The Law of Arbitration in Scotland* (2nd edn Butterworths United Kingdom 2002) 277-278.

arbitrator's own clear, precise, internally consistent, self-contained and unconditional judgment (not mere hope or opinion) upon a disputed question or questions which the parties had agreed to submit for determination. It is not competent to submit to arbitration and to make an award upon a matter if the object is simply to attempt to give the force of a decree arbitral to an issue which had already, prior to the submission, been agreed between the parties or their agents.²⁰⁹

The importance of the definition of 'award' is to know whether the award is enforceable by a domestic or a foreign court.²¹⁰ This research supports the proposition that 'award' should not be defined, because making a definition means that any award which does not fall within the definition cannot be recognised and enforced. However, other writers prefer to define the 'award' because 'the definition of what qualifies as an arbitral award is important since only this type of decision can benefit from recognition and enforcement under the convention [New York Convention]'.²¹¹

In response to this statement, it is true that any international convention such as the New York Convention should be sufficiently flexible as to include different views from different States and to encourage many States with different views to become party to the convention. Thus, by defining the term 'award' in order to apply the New York Convention limits the number of States which are now party to the convention because such a definition may not be acceptable to all States.

In the absence of a definition of an award in the English and Jordanian regimes, what foreign arbitral awards are subject to recognition and enforcement in England and Jordan?

To answer this question, an examination on an award-by-award basis should be conducted. In this regard, there are a number of awards, namely an a-national award, an electronic award, an interest award, a punitive (exemplary) award, a liquidated damages award, a penalty award, an interim measures award, a final award, an additional award, an agreed award, and a partial and/or an interim award. Generally, these sorts of award are recognisable and enforceable. However, the laws on recognition and enforcement are the local regimes in the forum place and the foreign

²⁰⁹ *ibid* 278.

²¹⁰ F Knoepfler and P Schweizer 'Making of Awards and Termination of Proceedings' In P Sarcevic (ed) *Essays on International Commercial Arbitration* (Graham & Trotman Limited London 1989) 160.

award may or may not be recognised and enforced according to these regimes. If an arbitral award is not recognisable and enforceable in State A, it does not mean that it is also not recognisable and enforceable in State B.

This study tries to examine whether or not the above named awards are recognisable and enforceable under English and Jordanian regimes.

2.2.1. A-national award

This kind of an award has many names. It is called a-national, supernational, transnational, expatriate, de-nationalised, stateless, and floating.²¹² In this section ‘a-national award’ will be used.

The concept of the a-national award is based on the idea that an award results from arbitration which is detached from the ambit of the national law by the parties’ agreement.²¹³ A-national award theory serves the interests of the parties’ autonomy in international contracts. It enables the parties to stipulate in their contract to arbitration not to subject it to any procedural rules in any country, to the conflict of rules of any particular country, or to the substantive rules of any particular legal system. Instead, arbitration will be conducted under the rules chosen by the parties themselves.²¹⁴

All authors who have discussed such an award agree that it comprises two main pillars; namely, there are no national laws to govern arbitration which such an award results from, and this effect is made by the parties’ agreement.²¹⁵

As far as recognition and enforcement of an a-national award are concerned, the

²¹¹ DD Pietro and M Platte. Op. Cit (footnote 58) 30-31.

²¹² AJVD Berg. Op. Cit (footnote 168) 29. AJVD Berg. Op. Cit (footnote 81) 5. L Collins and others (eds). Op. Cit (footnote 12) 604.

²¹³ AJVD Berg. Op. Cit (footnote 168) 29.

²¹⁴ L Collins and others (eds). Op. Cit (footnote 12) 604-607. MJ Mustill. Op. Cit (footnote 117) 133-152.

²¹⁵ AJVD Berg. Op. Cit (footnote 168) 28-40. J Paulsson. Op. Cit (footnote 178) 358-387. J Paulsson ‘Delocalisation of International Commercial Arbitration: When and Why it Matters’ (1983) 32 *The International and Comparative Law Quarterly* 53, 53-61. G Bamodu ‘Extra-National Legal Principles in the Global Village: a Conceptual Examination of Transnational Law’ (2001) 4(1) *International Arbitration Law Review* 6, 6-16. FA Mann ‘English Rejects ‘Delocalized’ Contracts and Arbitration’ in FA Mann *Notes and Comments on Cases in International Law, Commercial Law, and Arbitration*

question arises, is it enforceable under the English and the Jordanian regimes?²¹⁶

In England, according to part III of AA 1996, the question arises, does this regime require for its application that the award be governed by a municipal arbitration law? In answer to this question, there are no direct guidelines that an award should be subject to a national law. However, there are implied requirements for a national law as in section 103 (2, a, b) of part III, which refers to the applicable law. It provides that the party to the arbitration agreement was (under the law applicable to him) under some incapacity. It also provides that the arbitration agreement was not valid under the governing law. These requirements imply that the arbitration in which an award is made was governed by a national law. Therefore, because an a-national award is detached from any national laws, it cannot be recognised and enforced according to section 103.²¹⁷

According to part II of AA 1950, the same question arises: does this regime require for its application that an award be governed by a municipal arbitration law? Section 37(1,c) of part II expressly requires such a provision which provides that ‘in order that a foreign award may be enforceable under this part of this act it must have been made in conformity with the law governing the arbitration procedure’. Section 37 (1,b) also provides for the same thing: ‘in order that a foreign award may be enforceable under this part of this act it must have been made in pursuance of an agreement for

(Clarendon Press Oxford 1992) 26-27.

²¹⁶ A-national award is believed to be enforced voluntarily only. However, this belief was disproved when such an award was enforced by the court in some jurisdictions in the 1950s such as in *SEEE v. Yugoslavia*. GR Delaume ‘SEEE v Yugoslavia: Epitaph or Interlude?’ (1987) 25 *Journal of International Arbitration* 25, 25-43.

²¹⁷ Pt III of Arbitration Act 1996 gave effect to the New York Convention. In this regard, the highly distinguished British Branch Committee on the enforcement of international arbitral awards rendered a report on ‘Delocalised arbitration and the New York Convention’ to the international law association in 1982. It clearly summarises the problem as follows:

Although there is considerable doubt as to whether ‘delocalised’ arbitration falls within the scope of the [New York] convention, the intention of the United Nations committee, which prepared the convention, is clear. In considering a preliminary draft of the convention the committee expressed reluctance to accept the idea put forward by ICC that international awards should be completely independent of national laws...there must therefore, be a substantial risk that enforcement of ‘delocalised’ awards may be refused; or at least, ‘delocalisation’ may give the Courts of the country of the party against whom an award has been given an excuse to reject enforcement under the convention. The existence of a trend toward ‘delocalised’ arbitration is beyond doubt. However, there may be considerable doubt as to whether such arbitration falls within the scope of the convention. The legislative history and general tenor of the convention would suggest not.

As cited in HM Holtzmann. Op. Cit (footnote 88) 366-367.

arbitration which was valid under the law by which it was governed'. An award according to section 37 must meet such conditions, otherwise it is not recognisable and enforceable. Thus, since an a-national award is not subject to national laws, such an award according to section 37 of part II cannot be recognised and enforced in England.

According to article 42 of the Washington Convention, arbitration must be conducted under the law agreed by the parties. If they do not agree on the applicable law, the law of the contracting State which is a party to the dispute will be the applicable law. Since an a-national award is not governed by the national law, such an award is not covered by the Washington Convention.

At Common Law the idea of floating or delocalization arbitration was refused on a number of occasions in England. In *Bank Mellat v Helliniki Techniki S.A.*,²¹⁸ it was held that 'Despite suggestions to the contrary by some learned writers, our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law'.

In *Amin Rasheed Shipping Corporation v Kuwait Insurance Co.*,²¹⁹ Lord Diplock stated that 'Contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract...'

In *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru*,²²⁰ Lord Justice Kerr confirmed that 'English law does not recognise the concept of a 'delocalised' arbitration or of 'arbitral procedures floating in the transitional firmament, unconnected with any municipal system of law'.²²¹

In *Union of India v Mcdonnell Douglas Corp.*,²²² Saville J referred to the difficulties of applying the idea of delocalisation of arbitration:

²¹⁸ [1984] QB 291, 301.

²¹⁹ [1983] 3 WLR 241, 249.

²²⁰ [1988] 1 Lloyd's Rep 116.

²²¹ *ibid* 119.

²²² [1993] 2 Lloyd's Rep 48, 50-51.

It is clear from the authorities cited above that English law does admit of at least the theoretical possibility that the parties are free to choose to hold their arbitration in one country but subject to the procedural laws of another, but against this is the undoubted fact that such an agreement is calculated to give rise to great difficulties and complexities, as Lord Justice Kerr observed in the *Amazonica* decision. For example (and this is the proviso to which I referred earlier in this judgment) it seems to me that the jurisdiction of the English Court under the Arbitration Acts over an arbitration in this country cannot be excluded by an agreement between the parties to apply the laws of another country, or indeed by any other means unless such is sanctioned by those Acts themselves.

In *SA Coppee-Lavalin NV v Ken-REN Chemicals and Fertilizers Ltd. (In Liquidation In Kenya)*,²²³ Mustill rejected the idea of delocalisation of arbitration:

‘Transnationalism’ is a theoretical ideal which posits that international arbitration, at least as regards certain types of contractual disputes conducted under the auspices of an arbitral institution arbitration, is a self-contained juridical system, by its very nature separate from national systems of law, and indeed antithetical to them. If the ideal is fully realized national Courts will not feature in the law and practice of international arbitration at all and differences between national laws will become irrelevant. By contrast ‘harmonization’ recognizes that participation by the Court, however unwelcome in theory, is in certain situations inevitable, and sets out to minimize the difference between national arbitration laws and with them the practical significance of the choice of *forum*. The UNCITRAL Model Law on International Commercial Arbitration, embodied in the law of Scotland, and an impetus for proposed legislation for the remainder of the United Kingdom, is an important example of harmonization, albeit of only a partial nature. My Lords, I think it unnecessary to enter into the controversy over transnationalism which has been a feature of the past two decades, and would indeed not have mentioned the term if it had not been pressed in argument. I doubt whether in its purest sense the doctrine now commands widespread support: as witness the recognition of Court-imposed interim measures in, among others, art. 9 of the UNCITRAL Model Law, and art. 8(5) of the ICC rules.

Speaking about the transnational arbitration in English law, Mustill concluded in his article that ‘In these circumstances a transnational theory relating to the merits of the disputes seems highly unlikely to gain a toe-hold in English law, or indeed in international commercial practice’.²²⁴

Goode summarised the position of English law with respect to floating arbitration as

²²³ [1994] 2 Lloyd’s Rep 109, 115.

²²⁴ MJ Mustill. Op. Cit (footnote 117) 150.

follows:

English law does not recognise the concept of a-national (or delocalized) arbitration 'floating in the transnational firmament, unconnected with any municipal system of law', in which the procedure is left entirely within the control of the parties and the arbitrators.²²⁵

According to section 66 of part I of AA 1996, an a-national award may be enforced for two main reasons. First, there is no express or implied provision in section 66 which requires for the application of its field that an award is governed by a national arbitration law as provided in section 103 of part III and section 37 of part II of AA 1950. Second, an a-national award results from arbitration which is detached from the national law by means of an agreement of the parties.

The absence of provision in section 66 that an award must be subjected to a national law raises the question as to whether part I of AA 1996 provides a provision by which the parties cannot agree to detach the arbitration from national law. According to section 4 of part I of AA 1996, the parties can agree to the application of institutional rules or provide any other means by which the matter may be decided.

Accordingly, in the light of section 4, the parties can agree upon anything which does not contradict the mandatory provisions provided in schedule 1 of AA 1996. With reference to this schedule, there is no provision regarding the applicable law indicated by section 46 of AA 1996. This means that regarding the non-mandatory provisions, the parties are allowed to make their own arrangements by agreement. Thus, they can agree to detach arbitration from the national law, as it was held in *Deutsche Schachtbau v Shell International Petroleum Co. Ltd.*²²⁶ The Court of Appeal in this case agreed to recognise and enforce the foreign award since the parties had intended to create legally enforceable rights and liabilities, the contract had the requisite degree of certainty, and the enforcement of the arbitral award would not be contrary to public policy.²²⁷ This judgement was in regard to a contract in which there was no express provision about the applicable law, and the tribunal applied internationally accepted

²²⁵ RM Goode. Op. Cit (footnote 125) 1185.

²²⁶ [1987] 3 WLR 1023, rev'd [1988] 3 W.L.R 230.

²²⁷ See the case comment on this case: A Dimity and S Kingsford 'Enforcing of English Judgments Against Foreign Parties'(1988) 3(6) *Journal of International Banking Law* 274, 274-277. (-) 'Case Comment' (1987) 2(2) *Journal of International Banking Law* 66, 66-68.

principles of law governing contractual relations.

However, the conclusion to exclude section 46 of AA 1996 by the parties' agreement, according to Dicey and Morris, 'will often have little or no practicable significance' because the framework of section 46 mirrors the choice of law provisions to be found in many of the leading arbitration rules.²²⁸ However, in a case where the parties did not agree on the applicable law, the tribunal shall apply the law which is determined by the conflict of laws,²²⁹ but it cannot apply the *Lex mercatoria* or general principles of law because they do not form 'law', which can mean only a specific system of law.²³⁰

In Jordan, according to section 2 of Act No 8, section 48 (4) of the Arbitration Act 2001, article V (1, a, d, e) of the New York Convention,²³¹ section 42 of the Washington Convention, section 37 (1,d) of the Riyadh Convention, and the bilateral conventions an award must be issued according to the national law that applies to arbitration. Thus, since an a-national award is not issued according to the national law, it seems that such an award is not enforceable under the Jordanian regimes.

2.2.2. Electronic award

The concept of an electronic award is new. It is rooted in innovation and the use of the Internet. Such an award results from online arbitration, which uses the Internet instead of the traditional process as a means of communication between the parties, the arbitrator, and any other actors concerned. This new mechanism depends on using the Internet to bring parties together in a dialogue which is connected to a third party service provider acting as an arbitrator. As a result, the arbitrator renders the award through the Internet.²³²

²²⁸ L Collins and others (eds). Op. Cit (footnote 12) 607.

²²⁹ S 46 (3) of AA 1996.

²³⁰ L Collins and others (eds). Op. Cit (footnote 12) 607.

²³¹ Berg argued that this convention does not cover a-national awards in its application for two main reasons. First, the historical legislation of the convention, in that he pointed out that some delegates of some States refused the idea of an a-national award. Second, it implies provision to the effect that an award shall be governed by national law as in article V (1, a, d, e). AJVD Berg. Op. Cit (footnote 168) 28-40.

²³² AI Hermosilla 'Online Alternative Dispute Resolution: An Issues Primer' <<http://law.Washington.edu/lct>> 2000

In online arbitration, the parties choose the applicable law or they let the arbitrator to do so. The main problem of this kind of arbitration relates to the seat of arbitration,²³³ it is not possible to fix the seat of arbitration conducted via the Internet, because there is no decisive criterion upon which it is possible to say that the seat of arbitration is fixed.

As far as recognition and enforcement of an electronic award are concerned, is such an award enforceable in England and Jordan?

As far as English regimes dealing with recognition and enforcement are concerned, the theory of online arbitration has not been rejected inasmuch as recognised. The closest theory to online arbitration is that of floating arbitration, which has been discussed with reference to English law. Thus, the argument of this research is whether online arbitration theory can be judged by an analogy with the floating arbitration theory, or whether the current regimes can absorb the online arbitration as an independent theory.

According to part III of AA 1996 which gave effect to the New York Convention, section 100 of this part provides that ‘in this part a “New York Convention award” means an award made, in pursuance of an arbitration agreement in the territory of a State (other than the United Kingdom) which is a party to the New York Convention’. This section clearly applies part III to any award made in the territory of another contracting State to the New York Convention. With reference to an electronic award, it is not possible to fix its nationality; so it is not possible to establish whether or not such an award is made in the territory of another contracting State. Thus, it seems that the application of part III to an electronic award is not possible.

According to part II of AA 1950, section 35 of this part provides with regard to its application that an award is made in the territory of a State which is party to the Geneva Protocol or the Geneva Convention. Thus, the same argument that is made according to part III of AA 1996 can be made for the purpose of part II of AA 1950.

²³³ *ibid.*

According to the Washington Convention, it seems that an electronic award is enforceable. Section 54 of the Washington Convention provides that the contracting States should recognise and enforce arbitral awards made by the International Centre for Settlement of Investment Disputes (ICSID). Because an award is made under the auspices of the ICSID and not in the territory of a contracting State, there is no need to fix the nationality of an award to know whether it was made in a contracting State or not in order to enforce it according to the Washington Convention. So, the point is not where an award was made, but is whether or not the State is a contracting State to the convention in regard to the dispute. If it is a contracting State, it will enforce the award made by the ICSID whether or not it is an electronic award.

To clarify this point, it can be compared with what is provided in section 100 of part III. In order to apply part III of AA 1996, section 100 of this part refers to the place where an award is made, and this place must be other than the United Kingdom and be a State party to the New York Convention. According to the Washington Convention, the place where an award is made is already fixed in advance, i.e., in the ICSID and not in the territory of the contracting State.

Therefore, according to section 100 of part III, fixing the contracting State to apply part III depends on the place where the award was made, whereas fixing the contracting State to apply the Washington Convention is reliant on the disputants' nationality and not on the place where the award was made. Accordingly, it can be said that if it is possible that arbitration can be conducted via the Internet under the auspices of the ICSID, an electronic award which results from such an arbitration will be recognised and enforced by the contracting States to the Washington Convention.

At Common Law it would seem that recognition and enforcement of an electronic award are arguable. In *Bank Mellat v Helliniki Techniki SA*,²³⁴ the court refused the idea of a floating award which results from an arbitration not belonging to a particular legal system. By analogy with this case, an electronic award can involve the idea of a floating award, and thus it cannot be recognised and enforced in England.

²³⁴ [1984] QB 291.

In *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del peru*,²³⁵ *Union of India v McDonnell Douglas Corpn*,²³⁶ and in *ABB Lummus Global Ltd v Keppel Fels Ltd*,²³⁷ the court pointed out that the seat of arbitration was not known from the arbitration agreement. Thus, the choice of the law of State A as the procedural law will be a strong pointer to choose State A as the seat of the arbitration. Accordingly, in an electronic award the parties choose or entitle the arbitrator to choose State A's procedural law. Since it is not possible to fix the seat of electronic arbitration, by analogy with these cases the seat of electronic arbitration is the State under whose law the arbitration is conducted by the parties' agreement. Because the date of these cases is later than the former case, they overrule the first case as far as the seat of arbitration is concerned in all mentioned cases.

According to section 66 of AA 1996, it seems that an electronic award is enforceable by this regime. An electronic award is enforceable according to section 66 by virtue of sections 2 and 52 of the same Act. Section 2 provides that section 66 applies to an award resulting from arbitration even if the seat of the arbitration is outside England or no seat has been designated or determined. In electronic arbitration, the seat of arbitration is not designated or determined. Thus, it seems that an electronic award is enforceable according to section 66 of AA 1996 by virtue of section 2 of the same Act. Furthermore, section 52 of the said Act gives the parties the ability to agree on the form of an award. So, they can agree to an oral award, or a print-out from the computer, or via the Internet. Other regimes require that an award be written and signed by an arbitrator, but this obstacle can be avoided by virtue of section 52 with respect to an electronic award.

It is worth noting that an electronic award may come in the form of an a-national award. This is in cases where the parties may not agree to govern the online arbitration by any national arbitration laws. Therefore, is this award enforceable in England? Before answering this question, a distinction between the two kinds of award should be made. A-national and electronic awards are different, in that the a-national award results from arbitration which is not governed by any national law,

²³⁵ [1988] 1 Lloyd's Rep 116.

²³⁶ [1993] 2 Lloyd's Rep 48.

²³⁷ [1999] 2 Lloyd's Rep 24.

whilst the electronic award may be governed by a national law. On the other hand, both kinds of awards are the same, in that both have no nationality. As a result, it seems that an electronic award is a developed form of the a-national award, and may be called an 'a-national electronic award'.

However, as far as recognition and enforcement of an 'a-national electronic award' are concerned in England, the only way to recognise and enforce such an award is under section 66 of AA 1996 by virtue of sections 4, 2, and 52 of the same Act. Section 4 gives the parties the ability to agree that arbitration will not be governed by any national law, section 2 refers to section 66 which is applied to arbitration conducted abroad where no seat has been designated or determined, and section 52 provides the parties with the ability to agree on the form of an award to be through the Internet without signature of arbitrator(s).

To sum up, it can be said that until a statement to the contrary is received whether in a statutory provision or in a judicial authority, the theory of an online arbitration award is different from the theory of a floating award. It seems from the above discussion that the online arbitration award is enforceable in England under the regimes which do not require an award to be made in the territory of a State.

In Jordan, all applicable regimes refer to the seat of arbitration. Therefore, an electronic award has no chance of being recognised and enforced in Jordan. An exception to this rule is an award made according to the Washington Convention or the Amman Convention. Both Conventions provide a particular place to conduct arbitration, with the ICSID according to the Washington Convention, and the Arab Centre for Commercial Arbitration according to the Amman Convention. The contracting States to both conventions shall recognise and enforce an award made under the auspices of these centres whether an award is electronic or not.²³⁸

²³⁸ The same argument that is provided under the English regimes can be used for the Jordanian regimes.

2.2.3. Penalty award, punitive damages award, liquidated damages award, and interest award

In England, the term ‘penalty’ is distinguished from the term ‘liquidated damages’. The focus is on the meaning and not on the term itself. Thus, the court has jurisdiction to verify whether the term is indeed a penalty or liquidated damages. In *Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd*,²³⁹ Lord Dunedin stated that:

Though the parties to a contract who use the words ‘penalty’ or ‘liquidated damages’ may *prima facie* be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found *passim* in nearly every case.

Distinction can be made between these terms. Penalty is a security for the performance of a contract which is not enforceable in England, whilst liquidated damages are the measure of the damage in the event of a breach and they have a compensation purpose and are enforceable if the amount specified in the clause is a genuine pre-estimate of the anticipated loss that the claimant suffered as a result of that breach.²⁴⁰ In *Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd*,²⁴¹ Lord Dunedin distinguished between the terms: ‘The essence of a penalty is a payment of money stipulated in *terrorem* of the offending party; the essence of the liquidated damages is a genuine covenanted pre-estimated of damage’.

Moreover, there is a difference between a penalty and punitive (exemplary) damages.²⁴² A penalty must be agreed by the parties as a part of the contract, whereas punitive damages are not so agreed; they are wholly punitive and are awarded without the need to mention them in the contract. However, both terms share the meaning of a

²³⁹ [1915] A.C. 79, 86.

²⁴⁰ BM Cremades ‘Liquidated Damages, Penalty Clauses and Punitive Damages within International Contracts’ [2002] *International Business Law Journal* 329, 330.

²⁴¹ [1915] A.C. 79, 87.

²⁴² For more detail about punitive (exemplary) damages, see A Burrows ‘Reforming Exemplary Damages: Expansion or Abolition?’ in P Birks (ed) *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press Oxford 1996) 153-175. NJ McBride ‘Punitive Damages’ in P Birks *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press Oxford 1996) 175-202. S Deakin A Johnston and B Markesinis *Tort Law* (5th edn Clarendon Press Oxford 2003) 786-792.

civil sanction at common law jurisdiction.²⁴³ In civil law jurisdiction such as in Germany and Japan, punitive damages are considered as a criminal sanction, and are considered against public policy. Thus, they are outside the scope of judicial recognition.²⁴⁴

Moreover, punitive (exemplary) damages are recognised by the English courts in limited circumstances, as in *Rookes v Barnard*,²⁴⁵ in which Lord Devlin divided exemplary damages into three categories. First, where there 'is oppressive, arbitrary or unconstitutional action by the servants of the government'. Second, where 'cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff'. Third, where 'exemplary damages are expressly authorised by statute'. In *Cassell & Co. Ltd v Broome*,²⁴⁶ the punitive (exemplary) damages were limited against those who are particularly callous and deliberate in the commission of torts. It was held in this case:

(Unanimously) that, inasmuch as there was evidence on which the jury could find that the case fell within the second of the categories enumerated by Lord Devlin in *Brook v Barnard*, viz, that the defendants had calculated that the money to be made out of their wrongdoing would probably exceed the damages at risk they were under a potential liability to pay exemplary damages: the fact that the tortuous act was committed in the course of carrying on business was not sufficient; it must be done with guilty knowledge for the motive that the chances of economic advantage outweighed the chances of economic or physical penalty.

In *AB v South West Services Ltd*,²⁴⁷ even in tort the scope of recovery of exemplary damages is very limited; the court in this case held that:

Since it had been laid down by the House of Lords in 1964 that awards of exemplary damages should be restricted to torts which were recognised at that time as grounding a claim for exemplary damages and, since public nuisance

²⁴³ BM Cremades. Op. Cit (footnote 240) 334.

²⁴⁴ NT Braslow 'The Recognition and Enforcement of Common Law Punitive Damages in a Civil Law System: Some Reflections on Japanese Experience' (1999) 16(2) *Arizona Journal of International and Comparative Law* 285, 285-360. G Wegen and J Sherer 'Recognition and Enforcement of US Punitive Damages Judgements in Germany - a Recent Decision of the German Federal Court Justice' [1993] *International Business Lawyer* 485, 485-488.

²⁴⁵ [1964] A.C 1129, 1226-1227.

²⁴⁶ [1972] A.C 1027, 1028-1029.

²⁴⁷ [1993] 1 All ER 609.

was not such a tort, exemplary damages could not be recovered by a plaintiff for particular damage resulting from public nuisance.

Interest is also different from damages.²⁴⁸ Damages are defined as compensation to the claimant given by the process of law for the damages, loss, injury, or actionable wrong that the claimant suffered as a result of that breach or actionable wrong.²⁴⁹ In England, the arbitrator by virtue of AA 1996 has the power to impose interest on damages after liquidation or to fix the damages from the date of the award until payment or according to the dates as provided by section 49 of AA 1996.²⁵⁰

As far as recognition and enforcement of a foreign penalty, punitive damages, liquidated damages, and interest awards are concerned in England, the question arises, would the English courts grant an enforcement order on a foreign arbitral award which has imposed a penalty, punitive damages, liquidated damages, or interest?

The English regimes do not provide any provision for not enforcing such awards. The major obstacle to the enforcement of such foreign awards under the English regimes is the public policy exception. With respect to a foreign arbitral award, imposed liquidated damages, or interest, it seems that such awards are enforceable as they are not contrary to English public policy. However, where the petitioner seeks to enforce an award of interest, the whole or any part of which relates to a period after the date of the award, he shall file a certificate giving the following particulars:

1- whether simple or compound interest was awarded; 2- the date from which interest was awarded, 3- whether rests were provided for, specifying them, 4- the rate of interest awarded, and 5- a calculation showing the total amount claimed up to the date of the certificate and any sum which will become due thereafter on per diem basis.²⁵¹

With respect to a penalty award or a punitive (exemplary) award (in cases other than the cases which are recognised by English law) it seems *prima facie* that such awards are not enforceable in England on the basis that such awards are contrary to the rules of English public policy. Therefore, this can be agreed if the award is a national award,

²⁴⁸ I Yoshida 'Comparison of Awarding Interest on Damages in Scotland, England, Japan and Russia' (2000) 17(2) *Journal of International Arbitration* 41, 43.

²⁴⁹ *ibid* 52.

²⁵⁰ I Yoshida. *Op. Cit* (footnote 248) 52-58.

²⁵¹ MJ Mustill and SC Boyd. *Op. Cit* (footnote 29) 578.

but not if it is a foreign award. In case of a national award, the English courts would refuse to enforce such an award as it is contrary to English public policy.

However, in the case of a foreign award, this research refers to the position in which English courts have made it possible to recognise and enforce a foreign award which is based on an illegal contract from the viewpoint of English law. In *Lemenda Trading Co. Ltd v African Middle East Petroleum Co Ltd*,²⁵² the court classified public policy into two main categories in order to be able to or not to enforce a foreign illegal contract on the basis of public policy. Category (a) of the rule is based on universal principles of morality (international public policy), whilst category (b) of the rule is based on considerations which are purely domestic (domestic public policy). If the infringement falls within the first category of public policy, a foreign contract will not be enforced in England. If, however, the infringement falls within the second category, the English court will refuse to recognise and enforce the contract if it is contrary to the public policy according to English law and to the law of the foreign place of performance.

However, in *Westacre Investments Inc v Jugoimport-SpDR Ltd*,²⁵³ and in *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd*,²⁵⁴ the English court seems to reverse its decision compared to the *Lemenda* case with respect to the position of the court in dealing with the enforcement of foreign awards based on an illegal contract. In these cases, the court kept the same categories as in the *Lemenda* case but with some changes. It kept the first category, in that if a foreign award is based on an illegal contract which infringes the rules of international public policy the award will not be recognised and enforced in England. However, the court made changes to the second category: in order to refuse enforcement, the award must be contrary to the public policy of *the proper law or the curial law* of the contract regardless of whether or not it is contrary to the rules of public policy in the place of performance and/or in England.

By analogy with these authorities, it can be submitted that if the situation is to enforce

²⁵² [1988] Q.B 448.

²⁵³ [1999] 3 W.L.R. 811.

²⁵⁴ [1999] 2 Lloyd's 227.

a *foreign contract* which contains a penalty clause or punitive damages, English courts will refuse to enforce such a clause as it is contrary to English public policy.²⁵⁵ However, in case of an enforcement of a foreign award *based* on a contract which contains a penalty clause or punitive damages, an English court by analogy with the *Westacre* case and the *Hilmarton* case may enforce such an award. This is in cases where such an award is legal in the eyes of the proper law or the curial law, even though English law has a different view.

The reason for this adoption as justified in the *Westacre* case and the *Hilmarton* case is that, when an arbitral award is made, the cause of action of arbitration (the underlying contract which contains a penalty clause or punitive damages) is merged in the arbitral award. Subsequently, an English court will not adjudicate ‘on the underlying contract; the decision [will be] whether or not the arbitration award should be enforced in England’.²⁵⁶ Such an approach is consistent with the intention to understand the scope of international public policy as being narrower than the scope of domestic public policy. It is also consistent with the same approach in other States in which such awards are enforced, even though they are contrary to domestic public policy.²⁵⁷

On the other hand, under the Jordanian Civil Law, contracting parties may stipulate in their contract the amount of damages in advance if a breach occurs.²⁵⁸ This contractual term is called ‘penalty clause or liquidated damages’. However, the Civil Law provides the courts with discretionary power under which they may, upon the request of either party, increase or decrease such damages to make them equal to the actual loss suffered by the claimant and any agreement to the contrary shall be annulled.²⁵⁹ The Court of Cassation has confirmed that Jordanian law does not, as a

²⁵⁵ This is the judgment of the *Lemenda* case.

²⁵⁶ *Hilmarton* case [1999] 2 Lloyd’s Rep 222. The same fact is provided in the *Westacre* case, in which the court held that ‘Although the award was not isolated from the underlying contract it was relevant that the English court was considering the enforcement of an award and not the underlying contract’ [1998] 2 Lloyd’s Rep 11, 112.

²⁵⁷ M Bernet and N Culmer ‘Recognition and Enforcement in Switzerland of US Judgements Containing an Award of Punitive Damages’ [1994] *International Business Lawyer* 272, 272-275. PM Patocchi ‘The 1958 New York Convention, The Swiss Practice’ in M Blessing (ed) *The New York Convention of 1958* (ASA Special Series No 9 Swiss Arbitration Association Zurich 1996) 186-189.

²⁵⁸ S 364 (1) of Jordanian Civil Law.

²⁵⁹ S 364 (2) of Jordanian Civil Law. It is also confirmed by the Court of Cassation in its decision No 221/91 (Journal of Jordanian Bar 1993)186.

general rule, differentiate between administrative and civil contracts where the rules of Civil Law apply to both contracts.²⁶⁰ Thus, the penalty clause in Jordan is enforceable (legal),²⁶¹ even in regard to a foreign penalty award. This is because it is not contrary to public policy in Jordan. In addition, the Jordanian legal system recognises interest.²⁶² Therefore, a foreign award is enforceable in Jordan with interest imposed.²⁶³

Furthermore, punitive (exemplary) damages are not recognised as civil sanctions in the Jordanian legal system; instead they are recognised as criminal sanctions.²⁶⁴ In fact, articles 256-272 of Civil Law 1976 deal with tort and damages which must be awarded to a person who has suffered loss or injury as a result of such an action. However, the damages in this case must be equal to the genuine estimated loss or injury suffered by the claimant as a result of that tort. It does not include damages as a sanction against those who committed such a tort. Such a sanction is left, by virtue of article 271 of Civil Law, to the Criminal Law. Thus, a foreign arbitral award which has imposed punitive damages is likely not to be enforced in Jordan as it is contrary to Jordanian public policy.

2.2.4. Foreign arbitral awards on provisional relief, measures, or remedies (pre-award attachment)

The importance of an interim arbitral award is that it directs the interim preservation of property and ensures security for the costs of the arbitration, or that it orders any money in dispute to be secured. This kind of order is made by the national court alone, the arbitral tribunal alone or by concurrent jurisdiction issued either by the court or the arbitral tribunal.²⁶⁵

²⁶⁰ Civil Cassation decision No 391/87 (Journal of Jordanian Bar 1990) 234.

²⁶¹ See generally about the enforcement of penalty clauses in Jordan, FS Daradkeh *Penalty Clause (Agreed Damages) in Jordanian Civil Law: Comparative Study with Civil Laws in Arab States, Some European States, and with Islamic Jurisprudence (Fiqh)* (Amman 1995).

²⁶² Art 167 of Jordanian Civil Procedure Law of 2002.

²⁶³ In some countries which adopt Islamic Law, interest (*riba*) is considered as contrary to public policy in these countries. Thus, they do not recognise and enforce such awards. A Redfern and others. *Op. Cit* (footnote 55) 465.

²⁶⁴ Art 271 of Civil Law 1967 provides that 'in case the conditions of civil responsibility are met, it does not affect the criminal responsibility and the criminal sanction has no effect to fix the extent of civil responsibility and to fix the damages'.

²⁶⁵ DD Pietro and M Platte. *Op. Cit* (footnote 58) 6-44.

However, such an award is not enforceable in foreign jurisdictions as both England and Jordan do not provide any provision to recognise and enforce foreign awards, imposing only provisional relief.²⁶⁶ All regimes in both States are enacted to deal with a foreign arbitral award and not with a foreign order on a provisional basis.²⁶⁷

2.2.5. Other types of arbitral award

The arbitral tribunal has the power to issue many types of arbitral awards. It has the power to issue an interim or a partial arbitral award to resolve certain aspects of its jurisdiction, and to resolve questions of liability or other issues. It has also the power to issue consent or agreed arbitral awards if the parties reach a settlement during the arbitration process. Moreover, it has the power to issue a default arbitral award if one party (usually the respondent) fails or refuses to take part in the proceedings. Furthermore, it has the power to issue an additional arbitral award when one or more issues of the dispute are omitted from the final award.²⁶⁸

All these types of arbitral awards, for the purpose of recognition and enforcement, should be final. In fact, the finality of an arbitral award has two meanings in respect of the role of the arbitral tribunal and the role of the local court. On the one hand, the normal use of a 'final award' refers to cases where a tribunal has disposed all the issues submitted to arbitration, and has not left any matter to be disposed by a third party,²⁶⁹ unless the parties have otherwise agreed,²⁷⁰ and this determination is binding

²⁶⁶ See generally A Bosch and J Frarnsworth (eds) *Provisional Remedies in International Commercial Arbitration: A Practitioner Handbook* (Walter De Gruyter Berlin 1994). T Kojovic 'Court Enforcement of Arbitral Decisions on Provisional Relief: How Final is Provisional?' (2001) 18(5) *Journal of International Arbitration* 511, 511-532. AJVD Berg. Op. Cit (footnote 81) 15. DD Pietro and M Platte. Op. Cit (footnote 58) 44-45. Such kinds of orders are not enforceable even under s 66 of Arbitration Act 1996, which deals with domestic awards. DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 365.

²⁶⁷ Currently, there is a debate about the recognition and the enforcement of provisional relief as a final provision in the issue dealt with during the arbitration process. T Kojovic. Op. Cit (footnote 266) 511-532. DD Pietro and M Platte. Op. Cit (footnote 58) 31-32.

²⁶⁸ A Redfern and others. Op. Cit (footnote 55) 442-448. MJ Mustill and SC Boyd. Op. Cit (footnote 17) 371-381. R Merkin. Op. Cit (footnote 163) 26. KP Berger. Op. Cit (footnote 131) 588-594, 644. J Chuah *Q & A Series International Trade Law* (2nd edn Cavendish Publishing Limited London 1999) 247-254. MR Sammartano. Op. Cit (footnote 148) 405-412. DD Pietro and M Platte. Op. Cit (footnote 58) 30-55. RLC Hunter. Op. Cit (footnote 208) 278-281.

²⁶⁹ DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 230. S Rajoo. Op. Cit (footnote 207) 433. Art 46 of the Washington Convention provided as a duty of the tribunal to dispose all matters referred to arbitration: '...the tribunal shall if requested by the a party, determine any incidental or additional

on the parties.²⁷¹ At this stage, the tribunal ceases to continue its jurisdiction on the disposed dispute; it is *functus officio*,²⁷² or *res judicata*.²⁷³ This means that the arbitral tribunal should exert every effort to make sure that its award is binding and final (enforceable).²⁷⁴ Thus, it becomes the tribunal's duty to render an award enforceable at law.²⁷⁵

On the other hand, finality means that an arbitral award is final and binding since it was rendered by the tribunal and cannot be challenged by any means provided by the local law for local judgements.²⁷⁶ It also means that an award is not subject to any challenge by the local court, if there is an agreement between the parties not to challenge the award.²⁷⁷ In other words, it can be said that an award will not become final until it has resisted an appeal or unless no appeal has been lodged within a certain period.²⁷⁸ In this context article I (d) of the *Geneva Convention provided that* 'The award has become final in the country in which it has been made...' This means that the award is not subject to any kind of review.²⁷⁹ Furthermore, article V(1,e) of the New York Convention provides that 'The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made'.

claims or counterclaims arising directly out of the subject-matter of the dispute...', while the Geneva Convention provided in art 2 that in cases where the tribunal has not decided all submitted matters, the country where recognition and enforcement are sought can postpone such recognition.

²⁷⁰ S 39 of Arbitration Act 1996 provides that 'The parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award...'. Furthermore, in *Chiswell Shipping Ltd v State Bank of India, the World Symphony* (No 2)[1987] 1 Lloyd's Rep 157, the arbitrators had at least tacitly been authorised to deal with issues by separate awards.

²⁷¹ A Redfern and others. Op. Cit (footnote 55) 417.

²⁷² A Redfern and others. Op. Cit (footnote 55) 442. RLC Hunter. Op. Cit (footnote 208) 277-278, 304. In *Chiswell Shipping Ltd v State Bank of India* (No2) [1987] 157, the court held that when the final interim award is made the arbitrator is *Functus officio* with regard to the issues that he dealt with.

²⁷³ R David *Arbitration in International Trade* (Kluwer Law and Taxation Publishers Deventer 1985) 356.

²⁷⁴ S 35 of ICC rules.

²⁷⁵ GJ Horvath 'The Duty of the Tribunal to Render an Enforceable Award' (2001) 18(2) *Journal of International Arbitration* 135, 135-158.

²⁷⁶ S 48 of Jordanian Arbitration Act 2001. Furthermore, art 53 (1) of the Washington Convention provides that '[an] award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this convention'. This means that an award shall not be reviewed by the local court and shall be enforced as a final judgement of a court in the State where enforcement is sought as provided by S 54 (1) of the Convention. T Firth 'The Finality of a Foreign Arbitral Award' (1970) 25 (1) *The Arbitration Journal* 1, 5.

²⁷⁷ S 69 of Arbitration Act 1996.

²⁷⁸ J Paulsson. Op. Cit (footnote 178) 363. T Firth. Op. Cit (footnote 276) 5. In England, SS 67, 68, 69, 70, and 71 of Arbitration Act 1996 provide the means by which an award may be reviewed.

²⁷⁹ T Firth. Op. Cit (footnote 276) 1.

As far as such awards are concerned in England and Jordan, there is no bar to recognition and enforcement. However, the losing party has the right to resist their enforcement by means of defence according to the applicable regimes in both States.

2.6. Summary

The current regimes in England and Jordan do not define the term ‘arbitral award’. In doing so, they open the door to the winning party to enforce any foreign arbitral awards he may obtain.

Not every type of award qualifies for recognition and enforcement under the current regimes in both States. Only arbitral awards made through a process which constitutes a real alternative to the judgments of the courts should be recognised and enforced under the current regimes. Arbitral awards issued through a gap-filling process do not qualify for recognition and enforcement under the current regimes.

A-national arbitral awards and electronic arbitral awards are narrowly enforceable under English regimes. They are only enforceable under section 66 of AA 1996. They are not, however, enforceable under Jordanian regimes. The winning party can recognise and enforce liquidated damages awards and interest awards in both States. However, this chapter has argued that penalty awards and punitive damages awards are, though they are against English public policy, enforceable by analogy with cases in which English courts enforced foreign arbitral awards based on illegal contracts. Jordanian regimes recognise the foreign award-imposed penalty as it is not contrary to Jordanian public policy. At the same time, Jordanian law considers an award of punitive damages as a criminal sanction, which is against Jordanian public policy.

Among the arbitral awards issued in jurisdictional processes, only those which *finally* determine the entire dispute or part of it should qualify for recognition and enforcement under the current regimes in both States.

Chapter Three: Jurisdiction on the Recognition and Enforcement of Foreign Commercial Arbitral Awards

After an award is made, the losing party may refuse to carry out such an award voluntarily. Therefore, the winning party will seek to recognise and enforce the award in the State where the assets of the losing party are located. The local laws in this State will deal with the proceedings of recognition and enforcement. According to these laws, the winning party should petition the competent authority which has jurisdiction to recognise and enforce such an award.

Since this competent authority is different from one State to another, it is very important to determine which is the competent authority to recognise and enforce an arbitral award in England and Jordan? It is also important to determine with what type of power this authority is invested. That is to say, does the competent authority have permissive or mandatory power to enforce the award? In this regard, the question also arises regarding what is the role of the competent authority? Is it to recognise and enforce an arbitral award as a matter of course or has it the right to re-open the merits of the award?

The winning party is not free to apply for enforcement at any time he wishes. He has to apply for enforcement within a limited time. So, the winning party must be aware of the short period of enforcement. Therefore, the question arises regarding what is the limited time available in which to enforce the award? And what is the date on which this period starts to run?

Accordingly, this chapter is divided into the following sections:

- Competent authority on the recognition and enforcement of foreign arbitral awards.
- The time limit for the recognition and enforcement of foreign arbitral awards.

3.1. Competent authority on the recognition and enforcement of foreign arbitral awards

After an award is made, neither the arbitrator nor the arbitral tribunal has the power to

recognise and enforce an arbitral award by making an enforcement order. The winning party has to resort to the local authority where the recognition and enforcement of an award are sought to make such an order.²⁸⁰ This section, therefore, will focus on the following themes:

- The competent authority that has jurisdiction on its recognition and enforcement
- The challenge against the decision of the enforcing authority
- The discretionary power of the enforcing authority
- The role of the competent authority in dealing with the recognition and enforcement of foreign awards

3.1.1 What is the competent authority that has the jurisdiction to recognise and enforce foreign arbitral awards?

The authority that has jurisdiction on the recognition and enforcement is not unified in all legal systems. Each system provides a different competent authority to deal with foreign arbitral awards. It is suggested that the enforcing authority falls within one of the following categories:²⁸¹

- 1-Judicial authority: the winning party should apply to the competent courts which are indicated by the rules about the enforcement of foreign awards
- 2-Public officer: the winning party should apply to a certain public officer
- 3-Arbitrators: in some legal systems arbitrators are empowered to declare any award they have made as enforceable as soon as it is deposited with a court registry if there has been no action to set this award aside within the indicated time limit. In other countries, such a rule is provided for certain awards but not every one.

The majority of the States give the judicial authority the jurisdiction to recognise and enforce a foreign award by issuing an enforcement order on the basis of a request made by the winning party. However, the competent courts differ about which court

²⁸⁰ M Swcomb 'Shades of Delocalisation, Diversity in the Adoption of the UNCITRAL Model Law in Australia, Hong Kong and Singapore' (2000) 17(5) *Journal of International Arbitration* 123, 128.

²⁸¹ R David. *Op. Cit* (footnote 273) 368-369.

has the jurisdiction to give an enforcement order. In France,²⁸² and Belgium²⁸³ the power to issue an enforcement order for a foreign award is invested in the same court which has the jurisdiction to issue an enforcement order for the national arbitral award. In other countries, the power to issue an enforcement order for a foreign award is invested in the Court of Appeal, which is different from the Court of the First Instance, which has the jurisdiction to issue an enforcement order for a national award, as in Egypt.²⁸⁴

As far as the recognition and enforcement of foreign awards are concerned in England and Jordan, what is the competent court that has the jurisdiction to recognise and enforce foreign arbitral awards? In England, there are a number of courts that may have jurisdiction to recognise and enforce the foreign arbitral award according to the applicable regimes.²⁸⁵

According to section 105 of the AA 1996, the competent court which has jurisdiction to recognise and enforce foreign awards is either the High Court or the County Court. This section provides for the allocation of proceedings under the AA 1996 between the High Court and the County Court.²⁸⁶ Moreover, the High Court and County Court (Allocation of Arbitration Proceedings) Order 1996 was made for the purpose of this section, which came into force on 31st January 1997.²⁸⁷

The enforcing court for a foreign award made by the International Centre for Settlement of Investment Disputes (ICSID) is the High Court, as provided by article

²⁸² Arts 1477 and 1500 of the French Civil Procedure Code.

²⁸³ Art 1719 (1) of the Belgium Judicial Code.

²⁸⁴ Arts 9 and 56 of the Egyptian Arbitration Act 1994.

²⁸⁵ The presence of assets in the jurisdiction is not a pre-condition for the court exercising its discretionary power to grant the enforcement permission. DSJ Sutton and J Gill (eds). *Op. Cit* (footnote 204) 370.

²⁸⁶ The County Courts are different from the High Courts in that the High Courts have unlimited jurisdiction compared to the County Courts. They also deal with proceedings that are more important and bigger in value than the County Courts. MJ Mustill and SC Boyd. *Op. Cit* (footnote 29) 385.

²⁸⁷ According to this Order, as a general rule, the proceedings under the AA 1996 must commence and be taken under the High Court with some exceptions where the County Court may have jurisdiction, one of which relates to the enforcement of arbitral awards. According to s 4 of this Order, proceedings under ss 66 and 101(2) (enforcement of awards) of the AA 1996 may be commenced in any County Court. Thus, the winning party can petition before the High Court or any County Court in England to enforce an arbitral award. By virtue of s 5 of the said Order, the enforcement proceedings may open before the Central London County Court Business List. This jurisdiction would be according to the criteria provided by s 5 (2, 3, 4, 5) of the said Order. S 6 of the said Order gives the judge in charge of the Commercial List the ability to transfer the proceedings under the AA 1996 to another list, court, or division of the High Court to which he has the power to transfer proceedings.

1(2) of the Arbitration (International Investment Disputes) Act 1966. According to article 2 of the said Act, an award made by the ICSID must be enforced by the High Court as a judgement of this court.

According to rule (1) of the Rule of the Supreme Court (RSC) Order 71, the court to enforce an arbitral award, under part II of the Administration of Justice Act 1920, or under part I of the Foreign Judgements (Reciprocal Enforcement) Act 1933, is the High Court. It may be exercised by a judge or a Master of the Queen's Bench Division and the procedures for enforcing such an arbitral award is provided by rule 2 of the said Order. Finally, according to rules 37 and 38 of RSC Order 71, the High Court has the jurisdiction to enforce an award made in one part of the United Kingdom to be enforced in other parts of the United Kingdom under part II of the Civil Jurisdiction and Judgements Act 1982.

In Jordan, according to article 3 of Act No 8, the procedures for obtaining an enforcement order for an arbitral award made abroad are quite simple. The winning party files a request with the First Instance Court that has competent jurisdiction for the place where the losing party is resident; if the losing party resides abroad, the request must be filed with the Court of First Instance having jurisdiction for the place where the assets of the losing party are located.²⁸⁸ According to article 2 of AA 2001, the Court of Appeal has the power to issue an enforcement order for a national arbitral award, whereas the First Instance Court has the jurisdiction to issue an enforcement order for a foreign award, according to Act No 8.

However, the winning party can recognise and enforce the New York Convention award, the Washington Convention award, and the Inter-Arab Conventions award before the Court of Appeal, as indicated by AA 2001. This is because these conventions refer to the local laws of the country of enforcement for the purpose of enforcement proceedings. However, there are a number of reservations that can be made concerning AA 2001:

²⁸⁸Art 4 of Act No 8. The presence of assets and/or the residence of the losing party are a pre-condition to the court exercising its power to enforce the award as indicated by art 36 of the Civil Procedure Act 2002.

1- It excludes the First Instance Court from the jurisdiction of enforcement. Thus, it prevents the losing and winning party from having the right to have a judicial review before the Court of Appeal.

2- It prevents the losing party from challenging the decision to enforce the award issued by the Court of Appeal.

3- The only challenge provided by this Act is in cases where the enforcement is refused. The court whose jurisdiction to challenge such a decision is the Court of Cassation. Since the role of this court is scrutiny, the possibility to quash the decision of the Court of Appeal is inconceivable as far as the challenge needs a trial.

4- It does not make reference to the Civil Procedure Law in case the enforcement proceedings need further clarification, as provided in Act No 8.

5- It does not take into account the recognition and enforcement of conventions-awards by providing special provisions to these conventions. Thus, the enforcement of conventions-awards according to this Act is inconceivable in practice.

3.1.2. The challenge against the decision of the enforcing authority

After the winning party has made a petition to the competent court to issue an enforcement order, the court may or may not issue such an order. If it refuses to do so, the winning party may challenge the decision of the competent court. The losing party may also challenge the decision to enforce the foreign award, if the applicable law of the forum place permits that.

Many countries give the parties the right to challenge the decision whether or not to enforce an arbitral award. English law allows the parties to challenge the decision to or not to grant an enforcement order on a foreign award. Article 8 of Act No 8 allows challenge to the decision of the First Instance Court of Jordan whether this decision is to grant an enforcement order or not. On the other hand, many countries give the winning party the right to challenge the decision of the competent court in case it

refuses to grant an enforcement order.²⁸⁹ At the same time, they do not allow the losing party to challenge the decision to grant an enforcement order, as in Egypt (as provided by article 58(3) of the Arbitration Act 1994), and in Jordan (as provided by article 54 (2,a) of the AA 2001).

3.1.3. The discretionary power of the enforcing authority

The term ‘discretion’ is based on the idea that the competent court has the power to grant an enforcement order or not. Its decision depends on case-by-case circumstances relating to whether the competent court feels that it is appropriate to do so. In the light of the English and Jordanian regimes, the competent courts have a discretionary power to enforce a foreign award or not on two main grounds:

- 1- If the word ‘may’ or its synonyms words are used by the applicable regimes
- 2- If the competent court feels that it is appropriate to grant an enforcement order or not on the grounds that there has been no provision in the regimes concerned for dealing with a particular matter that needs to be judged by the competent court.

3.1.3.1. The use of the word ‘may’ or its synonyms

The word ‘may’ gives the competent court the power to enforce the foreign arbitral award or not, and the language is permissive, not mandatory. It may grant an enforcement order for one foreign award and may refuse to do so for another, if they are not the same circumstances, such as in *Soleimany*, *Westacre*, and *Hilmarton* cases.²⁹⁰

As far as the English regimes are concerned, the word ‘may’ is provided in section 66 (1, 2) of AA 1996. According to this section, the High Court or the County Court has the power to enforce a foreign award by leave of the court, in the same manner as the judgement or order of the court to the same effect. It also has the power to refuse the enforcement. Moreover, section 103(2) of part III of AA 1996 provides the grounds upon which the High Court or County Court may refuse to recognise and enforce the

²⁸⁹ Art 54 (B) of the Jordanian Arbitration Act 2001.

²⁹⁰ These cases will be discussed in further detail in chapter 7.

New York Convention award. According to the said section, if the losing party proves one ground of refusal as provided by section 2 (a-f), the competent court may not enforce the award.²⁹¹

Section 103 (3, 4) of AA 1996 also invested the competent court with the power to enforce a foreign arbitral award or not that resulted from an arbitration determined matter which is not capable of being settled by arbitration, or if it is contrary to the public policy of England.²⁹²

²⁹¹ Mustill provides some considerations which are most likely to arise in practice regarding s 103(2). These considerations, which are not intended to be exhaustive, are:

- 1-On which statutory provision the attempt to resist enforcement is founded. Article V (2) and section 103(2) compress into a few lines several disparate complaints about what happened in the foreign country. Thus, it will be relevant whether the matter relied on as a ground for resisting enforcement concerns the validity of the entire arbitral process (ie where the ground falls within the first part of paragraph (c) and paragraph (d); or whether again it concerns a defence in the way an actually valid arbitration has in fact been conducted (ie where the complaint is founded on the second part of paragraph (c) or the second part of paragraph (e).
- 2-Whether the matter relied on concerns the status of the award under the foreign law and if so whether and with what result the award has been challenged in the foreign country under that law.
- 3-Whether the matter relied upon as a ground for denying enforcement was advanced before the arbitrators, and if so (assuming that, ex hypothesi, it was rejected), what grounds in the nature of findings of fact or conclusions of law the arbitrators had given.
- 4-If the matter was not relied upon before the arbitrators, whether it could have been and (if so) what explanation the party now resisting enforcement gives for not having done so.
- 5-Whether the matter was made a ground of complaint before a supervising court and, if so, with what result.
- 6- What grounds in the nature of findings of fact or conclusions of law the supervising court gave for its decision.
- 7-If the matter was not made the subject of an application to the supervising court, and if such an application would have been possible, what reason the party now resisting enforcement gives for not having done so.
- 8-Where the matter relates to a procedural defect, to what extent the actual procedure deviated from the local norms.
- 9-The extent to which, so far as the English court is able to judge, the procedural defect affected the outcome of the dispute.
- 10-The extent to which the matter complained of offends the English concepts of natural justice.

See MJ Mustill and SC Boyd. *Op. Cit* (footnote 29) 90-91.

²⁹² Mustill also provides some considerations regarding s 103(3) which are:

- 1-Although (unlike article V 2 (b) of the convention) it does not actually say so, we feel little doubt that section 103(3) is confined to the public policy of England. Sub-section (2) is concerned with matters going wrong with the arbitral process when and where it is carried out, in country of the forum. Section 103 (3) asserts, as article V 2 (b) acknowledges, that there are local interests at the place of enforcement which are worthy of respect. When enforcing an award the court lends its coercive powers to an otherwise consensual process. The court is an organ of the State, and it cannot be open to a party to that process to insist on the co-operative of the State where that would be contrary to the interests of the State in the proper administration of justice. Foreign public policy may be relevant to the exercise of the discretion in a case falling within section 103(2), but it is not a ground of non-recognition in itself.
- 2-We believe that the court should have constantly in mind that the list of grounds contained

Other commentators suggested in respect of section 103 that the court should not exercise its discretionary power to refuse enforcement in cases where the parties' agreement was not respected by the arbitrator in order to adhere to the mandatory rules of the law of the seat of arbitration. It may not also exercise its discretion to enforce an award which had been set aside in the country of origin.²⁹³ It is suggested with respect to the discretionary power provided by article (V) of the New York Convention that the enforcing court is allowed to conduct a balancing exercise between finality and justice.²⁹⁴ This means an arbitral award must be final and binding on the parties. However, there is an exception to this principle where it is discovered that one of the arbitrators was guilty of corruption in regard to the arbitral process. The court, therefore, would not enforce such an award even though it is final.²⁹⁵ However, these guidelines are not mandatory to the court. This matter is left by the regimes concerned without guidelines to be judged by the enforcing court on a case by case basis.²⁹⁶

Section 103(5) of part III of AA 1996 also invested the competent court with the power to adjourn or not the decision about the recognition and enforcement of an arbitral award. The said section also provides the competent court with discretionary power to ask the other party (defendant) to give suitable security. Moreover,

in section 103(2) is exhaustive, and care should be taken not to expand it under the guise of applying English public policy.

3-It will not of course be a ground for refusal of enforcement that the English court believes the award to be wrong, or even hopelessly wrong, on the law or the facts. If this is a ground for complaint at all, it must be raised before the supervising court in the forum country.

4-Again this scarcely needs saying; the public policy exception is concerned with the interest of England, as the enforcing country, in maintaining the fair and orderly administration of justice, including that system of private justice which consists of arbitration. Other interests of enforcing country are irrelevant.

5-Finally, in the respect as in all others the court should give full weight to the importance of a reliable international system of enforcement (and where the court of the forum has been invoked, of judicial comity as well). The application of section 103(3) involves a balance, but it is one which we suggest should be weighed heavily in favour of enforcement. The court should hesitate long before concluding that in case where section 103(2) does not apply there is nevertheless something so repugnant about the situation that the State should not lend its powers in support.

MJ Mustill and SC Boyd. *Op. Cit* (footnote 29) 91-92.

²⁹³ CM Clarkson and J Hill *Jaffey on the Conflict of Laws* (2nd edn Butterworths Publication London 2002) 305.

²⁹⁴ P Mayer 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) *Arbitration International* 249, 250.

²⁹⁵ S Zaiwalla 'Challenging Arbitral Awards: Finality is Good but Justice is Better' (2003) 20(2) *Journal of International Arbitration* 199, 199-204.

according to section 37 of part II of AA 1950, the competent court has discretionary power to enforce a foreign award deemed to be enforced according to the Geneva Protocol 1923 or the Geneva Convention 1927.

As regards Jordanian regimes, the use of the word 'may' is found in article 7 of the Act No 8, article V of the New York Convention, and article 3 of the Arab League Convention. On this basis, the competent court has the power to grant an enforcement order or not.

3.1.3.2. Where there is no precise provision in respect of the subject matter

The competent court has the discretionary power to enforce a foreign arbitral award since there is no provision provided by the applicable regime to be applied to the subject-matter. For example, the losing party may resist the enforcement on the ground that an award is contrary to public policy. Since there is no provision dealing with the meaning of public policy, it is therefore left to the enforcing court to examine whether or not the matter falls within the scope of public policy.

As far as the recognition and enforcement of a foreign award are concerned in England, the High Court or the County Court has discretionary power in respect of public policy. In fact, the meaning of public policy is developed from domestic public policy to international public policy regarding the enforcement of a foreign arbitral award. In *Soleimany v Soleimany*,²⁹⁷ the Court of Appeal refused to grant an enforcement order because it would have been contrary to public policy in England. Soon after, in *Westacre Investment v Jugoinport-SDPR Holding Co. Ltd*,²⁹⁸ and in *Omnium de Traitement et de Valorisation SA v Himarton Ltd*,²⁹⁹ the court made the concept of public policy narrower than it was in *Soleimany* case.

Jordanian courts also have discretionary power to fix the meaning of public policy. In one case, the Court of Cassation fluctuated in order to fix the meaning of public policy. In this case, the Court of Appeal in Amman held that the order granting the

²⁹⁶ See in respect of the New York Convention DD Pietro and M Platte. Op. Cit (footnote 58) 134.

²⁹⁷ [1998] 3 WLR 811.

²⁹⁸ [1999] 1 All ER 865.

²⁹⁹ [1999] 2 Lloyd's Rep 222.

recognition and enforcement of a foreign judgement issued in the United Arab Emirates should be refused. The court relied on article 7(1, f) of Act No 8, in which the recognition and enforcement of a judgement may be refused if it has been 'unreasoned'.³⁰⁰ This decision was quashed by the Court of Cassation. The judgement of the Court of Cassation was based on the fact that it is not permitted to refuse enforcement on the basis that the judgement is unreasoned.³⁰¹ Following this decision, the case was remanded to the Court of Appeal for re-determination against the decision of the Court of Cassation. However, the Court of Appeal insisted on its previous decision, resulting in the Court of Cassation holding a meeting which included all its members in order to examine the second appeal in regard to the same case. After much scrutiny and deliberation, the Court of Cassation issued a new decision in which it revised its previous decision to the effect that an unreasoned judgement is contrary to Jordanian public policy.³⁰²

It is not only public policy that is not governed by the provision of the law, but there are also a number of issues which are not governed by the provision of law. For instance, which is the applicable law according to which the evidence of enforcement is authenticated? And which is the law according to which the incapacity of a party is determined?

3.1.4. The role of the competent authority in dealing with the enforcement of foreign arbitral awards

After the winning party has petitioned before the competent court to recognise and enforce a foreign arbitral award, the question arises as to whether or not it is the role of the competent court is to review the merits of the award. In other words, does the competent court have to enforce the award as a matter of course, or is it allowed to investigate or review the subject matter which has been determined by an arbitrator?

As far as English regimes are concerned, there are no provisions to the effect that the

³⁰⁰ Jordanian Court of Appeal's decision No 761/88 (Unpublished dated 15/8/1988)

³⁰¹ Court of Cassation decision No 865/88 (Journal of Jordanian Bar 1990 Issue 8-9) 1881.

³⁰² Court of Cassation decision No 852/89 (Journal of Jordanian Bar 1991 Issue 5) 875.

competent court is allowed to reopen the issue settled by an arbitrator.³⁰³ They do not have provisions about mistakes in fact or law by the arbitrator. The role of the enforcing court is to recognise and enforce the foreign award since it is final and fulfils the conditions of enforcement and no grounds of refusal are met.

The doctrine of the non re-examination of the merits of an arbitral award does not mean that the enforcing court will not look into the award when it is necessary to ensure whether or not there are grounds of refusal as provided by the regime concerned. Thus, the court has to investigate the award to evaluate the allegation of this effect.³⁰⁴ It is suggested that any form of examination as to how the arbitrator has arrived at his decision lies beyond the task of the enforcing court.³⁰⁵

The justification behind non-examination of the merits of an award relate to the fact that an arbitration agreement is separable from the substantive agreement (underlying contract).³⁰⁶ Therefore, the enforcing court should honour this arbitral agreement and the resulting award, without any re-examination of its merits. In addition to this, a fundamental policy is provided by AA 1996 to the effect that once the parties have agreed to go to arbitration, the court should not be permitted to intervene and overturn the resulting award, since the judge in the legal proceedings may have taken a different view and drawn a different conclusion.³⁰⁷ This fact was emphasised in *Aoot Kalmneft v Glencore International A G and Another*,³⁰⁸ where the court held that the policy of AA 1996 is to preserve party autonomy and ensure the finality of the arbitral award in arbitration.

The main reason for not re-examining the merits of an arbitral award is the doctrine of *res judicata* (Latin for “the thing decided”). This is a common law doctrine intended

³⁰³ Pt II of AA 1950, s 66 and Pt III of AA 1996.

³⁰⁴ AJVD Berg ‘The New York Convention: Summary of Court Decisions’ in M Blessing (ed) *The New York Convention of 1958* (ASA Special Series No 9 Swiss Arbitration Association Zurich 1996) 81.

³⁰⁵ AJVD Berg. Op. Cit (footnote 168) 272. In Jordan, This principle has been confirmed by the Court of Cassation in its decisions No 2958/2000 (Judicial Journal 2000 Issue 6) 139, and decision No 1693/2000 (Judicial Journal 2000 Issue 10) 141.

³⁰⁶ S 7 of AA 1996.

³⁰⁷ Department Advisory Committee on Arbitration Law *Report on the Arbitration Bill* (Report of February 1996) Paras 273-283. A Johnson ‘Illegal Contracts and Arbitration Clauses’ (1999) 2(1) *International Arbitration Law Review* 35, 35-36. C Mulcahy ‘The Challenge to Enforcement of Awards on Grounds of Underlying Illegality’ [1998] *Arbitration* 210, 210.

³⁰⁸ [2002] 1 Lloyd’s Rep (by Colman J) 128, 136, 140.

to prevent the litigation of cases (except on appeal) between the same parties in court.³⁰⁹ That is to say, a final judgement of a competent court or arbitral tribunal is conclusive upon the parties in any subsequent litigation concerning the same cause of action. Therefore, this doctrine was judicially produced to put an end to litigation and to avoid repetitious lawsuits.³¹⁰

Res judicata includes two related concepts: claim preclusion and issues preclusion. Claim preclusion prevents a suit from being brought again on a legal cause of action that has already been finally decided between the parties. Issue preclusion bars the relitigation of factual issues that have already been necessarily determined by a judge as part of an earlier claim.³¹¹

There are four prerequisites for *res judicata*: 1- a final judgment; 2- the final judgment must be on the merits of the case; 3- the claims must be the same in the first and second suits; and 4- the parties in the second action must be the same as those in the first.³¹²

This doctrine was created in *Henderson v Henderson*.³¹³ Its purpose was to achieve finality of litigation by encouraging the disputants to bring forward their whole case so that all aspects of it may be finally decided, once and for all.³¹⁴

As far as an arbitral award is concerned, there are three different aspects of *res judicata*. Firstly, the effect of an award on existing disputes between the parties. It is clear that the arbitral award disposes disputes between the parties that were submitted to arbitration. If one party were to bring a court action against the other in regard to

³⁰⁹ KR Handley (ed) *The Doctrine of Res judicata* (3rd edn Butterworths London 1996) 1. PR Barnett *Res Judicata, Estoppel, and Foreign Judgments* (Oxford University Press Oxford 2001) 8. RC Casad KM Clermont. *Res Judicata: A Handbook on its Theory, Doctrine, and Practice* (Carolina Academic Press Durham North Carolina 2001) 4.

³¹⁰ KR Handley (ed). Op. Cit (footnote 309) 4-5. PR Barnett. Op. Cit (footnote 309) 8. RC Casad KM Clermont. Op. Cit (footnote 309) 4.

³¹¹ KR Handley (ed). Op. Cit (footnote 309) 2-3. PR Barnett. Op. Cit (footnote 309) 9-11. RC Casad KM Clermont. Op. Cit (footnote 309) 9-12.

³¹² KR Handley (ed). Op. Cit (footnote 309) 10. PR Barnett. Op. Cit (footnote 309) 9-11. RC Casad KM Clermont. Op. Cit (footnote 309) 49-59.

³¹³ (1843) 3 Hare 100.

³¹⁴ I Gordon 'The Rule in Henderson v Henderson' (1999) 149 *New Law Journal* 1557. I Gordon 'Res Judicata and Settlement Agreements' (1999) 149 *New Law Journal* 348. KR Handley 'A Closer Look at Henderson v Henderson' (2002) 118 *Law Quarterly Review* 397, 397-407.

the subject matter of the arbitration, based on the same cause of action, the court would dismiss the action on the basis that the issues had been disposed of and were *res judicata*.³¹⁵

Secondly, the *res judicata* effect on the subsequent disputes between the parties. The previous decision of an arbitral tribunal will not be binding on any subsequent disputes that arise between the same parties. However, this does not mean that a previous decision will necessarily be unrelated to the resolution of a subsequent dispute between the same parties, particularly for the purpose of establishing an issue estoppel.³¹⁶

Thirdly, the *res judicata* effect on the third parties: if a person is not a party to the arbitral agreement, an arbitral tribunal has no power to issue orders or to give directions in respect of this person. It follows that a person who is not a party to the arbitral agreement cannot be affected by the arbitral award.³¹⁷

The effect of an award on existing disputes between the parties is the main reason why the disputants take their dispute to arbitration in international commercial transactions.³¹⁸ The aim of arbitration is to determine the disputes definitively and quickly. Thus, an arbitral award is not open to appeal on merit unless the parties have agreed otherwise. It is submitted as a matter of fact that the arbitration rules state that an arbitral award is definite. However, if the award is capable of challenge, this can be done before the court of origin (seat of arbitration), and not before the enforcing court.³¹⁹

In recent cases, such as *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd and others*,³²⁰ and *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd*,³²¹ the court has narrowed the scope of the intervention by the enforcing judge. This has allowed the foreign award to shelter the illegality of the underlying contract

³¹⁵ A Redfern and others. Op. Cit (footnote 55) 459.

³¹⁶ *ibid* 459-460.

³¹⁷ *ibid* 560-561.

³¹⁸ JS Ziegel *New Developments in International Commercial and Consumer Law* (Hart Publishing Oxford 1998) 9, 32-33.

³¹⁹ HV Houtte *The Law of International Trade* (2nd edn Sweet and Maxwell London 2002) 406-407.

³²⁰ [1999] 3 W.L.R 811.

and place it beyond the reach of the enforcing judge. In both cases, the allegation that the underlying contract was illegal was defeated on the basis that public policy was in favour of upholding the *finality* of the arbitral award, which outweighed the public policy of the illegality of the underlying contract. The court also considered the enforcement of the arbitral award, but not the underlying contract.

However, there are certain exceptional circumstances in which the court may go behind the foreign arbitral award.³²² This fact was justified neither for the sake of the plaintiff, nor for the sake of the defendant, but for the sake of the court's concern to preserve the integrity of its process and to see that its executive power has not been abused. Such a concern cannot be overridden by private agreement.³²³ This approach emerged in *Soleimany v Soleimany*,³²⁴ and in *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd and others*.³²⁵ The question raised in these cases is what is the scope of re-opening an award if public policy is involved?

In *Soleimany v Soleimany*,³²⁶ Waller LJ found that there are circumstances in which an English court will allow a re-opening despite the *prima facie* position of an award preventing a party from reopening matters decided by either the arbitrator or the party which had every opportunity to raise them before the arbitrators. In the *Westacre* case,³²⁷ Waller LJ addressed the question of whether or not the court should be allowed to re-open a case. In answer to this question, he referred to the paragraph of his judgment in the *Soleimany* case which states that a court may re-open a case where there is a non-speaking award. He also considered the precedents where the English court reopened the decisions of the arbitral tribunals and foreign court judgements at the enforcement stage. He concluded that the re-opening of cases is permitted under English law. He added that a consideration of whether or not a court can reopen an award is a balancing exercise between the public policy of the finality of an arbitral award and the public policy of illegality.³²⁸

³²¹ [1999] 2 Lloyd's Rep 222.

³²² C Rose 'The Strange Case of the Persian Carpet-Runner' [1998] *Commercial Lawyer* 32, 34. D Serota 'Soleimany v Soleimany: Acommentary' [1998] *Commercial Lawyer* 35, 35.

³²³ Waller LJ in *Westacre* [1999] 3 W.L.R. 811, 834.

³²⁴ [1998] 3 W.L.R 811.

³²⁵ [1999] 3 W.L.R 811.

³²⁶ [1998] 3 W.L.R.811, 824.

³²⁷ [1999] 3 W.L.R.811, 829.

³²⁸ *ibid* 829-833.

In the *Westacre* case, the court decided, with respect to a fraud that concerned illegality, that:

...normally the issue could not be reopened unless the evidence to establish the fraud was not available to the party alleging fraud at the time of the hearing before the arbitrators; that where the allegation was of perjury the evidence must be so strong that it could reasonably be expected to be decisive at a hearing, and must if unanswered be decisive.³²⁹

However, the arbitrator may sometimes enter upon the point of illegality and find there was none; he may make a non-speaking award. In this case, can the losing party in this situation challenge the award by asking the enforcing court to re-assess the facts of the case? The solution to this question is addressed by Waller LJ in *Soleimany v Soleimany*:³³⁰

The difficulty arises when arbitrators have entered upon the topic of illegality, and have held that there was none. Or perhaps they have made a non-speaking award, and have not been asked to give reasons. In such a case there is a tension between the public interest that the awards of arbitrators should be respected, so that there be an end to lawsuits, and the public interest that illegal contracts should not be enforced. We do not propound a definitive solution to this problem, for it does not arise in the present case. So far from finding that the underlying contract was not illegal, the Dayan in the *Beth Din* found that it was. It may, however, also be in the public interest that this court should express some view on a point which has been fully argued and which is likely to arise again. In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent. Is there evidence on the other side to the contrary? Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith, so as to procure an award despite illegality? Arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered tribunals in international trade but in many other circumstances. We do not for one moment suggest that the judge should conduct a full-scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid. The judge has to decide whether it is proper to give full faith and credit to the arbitrator's award. Only if he decides at the preliminary stage that he should not take that

³²⁹ [1999] 3 W.L.R. 811, 812.

³³⁰ [1998] 3 W.L.R. 811.

course does he need to embark on a more elaborate inquiry into the issue of illegality.³³¹

Thus, the answer to this question is that, if there is evidence of illegality, the enforcing court will carry out a preliminary test to examine whether the award should be given full faith and credit. If the court decides not to give the award full faith and credit, then a full-scale enquiry will ensure.³³²

The criterion upon which an English court may re-open a case as found in the *Westacre* case is a balancing exercise between the competing public policy of finality and illegality. By applying such a criterion, Waller LJ suggested several factors that the court must take into account when it performs a balancing exercise between the public policy of finality and the public policy of illegality and subsequently whether or not it should re-open the case. These factors relate to the nature of the illegality, the strength of the case in which there was illegality, and the extent to which it can be seen that the asserted illegality was addressed by the arbitral tribunal.³³³ This means that if the public policy of finality outweighs the public policy of illegality, the court cannot re-open the case, but if the public policy of illegality outweighs the public policy of finality, the court will re-open the case.

Accordingly, the consideration of public policy must be sufficiently strong to outweigh the presumption in favour of the finality and the enforceability of an award. A stronger case will exist where the illegality is of a kind which is universally condemned, such as terrorism or drug-trafficking, or deserving of strong judicial and governmental approval, as in the case of contracts to bribe officials of a friendly foreign government. Meanwhile, less strong cases will exist where the award is founded on a contract which, although unlawful in England, is lawful in the place of performance.³³⁴

What are the circumstances upon which the enforcing court may re-open an award? According to the *Westacre* and *Hilmarton* cases, there are two kinds of circumstances. Firstly, the position where the arbitral tribunal has made a clear and obvious error

³³¹ [1998] 3 W.L.R. 811, 824.

³³² D Serota. Op. Cit (footnote 322) 35.

³³³ [1999] 3 W.L.R 811, 833.

which is apparent from the award itself and it has been ignored. In this situation, both cases reach the same conclusion. The courts investigate the arbitral award to evaluate such an allegation and may refuse to enforce the award, if the tribunal finds a clear and obvious error which was ignored.

Secondly, when the illegality is not clear from the award itself. The *Westacre* and *Soleimany* cases are not the same in this approach. In the *Westacre* case, the court was able to intervene at the enforcement stage if there were facts not put before the arbitrator that, had they had been presented at the hearings, would have had a substantial effect on the result. The court also intervenes when the public policy of the enforcement of illegal contracts outweighs the public policy of the finality of arbitral awards. Whereas, the Court of Appeal in the *Soleimany* case stated by Waller LJ that:

An enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent. Is there evidence on the other side to the contrary? Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith, so as to procure an award despite illegality?³³⁵

To answer the question as the scope of the re-opening of an award if public policy is involved, a distinction needs to be made between the two kinds of challenge to an arbitral award.

Firstly, the challenge before the arbitral tribunal or before the supervising court in the place of origin.³³⁶ The losing party in this challenge has to base his argument on a question of fact or law. The role of the tribunal or the supervising court in this challenge is to exercise a full scale trial. In the light of the evidence submitted by the losing party, the challenging authority may set aside or vary the arbitral award in whole or in part.

The validity of the arbitral award should be subjected to a single decision in the court of origin, as the validity of arbitral award is governed by the *lex arbitri*. Otherwise, a

³³⁴ MJ Mustill and SC Boyd. Op. Cit (footnote 29) 210.

³³⁵ [1998] 3 W.L.R. 811, 824.

³³⁶ A Redfern and others. Op. Cit (footnote 55) 507-508.

denial of the function of *lex arbitri* may involve litigations in every State where the losing party has assets, and this would lead to instability in the process of recognition and enforcement, and could be described as oppressive.³³⁷ This kind of challenge was exercised by the defendant in the *Westacre* case when he objected before the ICC arbitral tribunal and his allegation of illegality was rejected. Moreover, the defendant challenged the award before the supervising court (Swiss Federal Court) in an attempt to overturn the award but his objection was again rejected.

The grounds upon which this challenge is based cannot be used again at the enforcement stage. This point is addressed by Goode:

A party against whom an award is made decides to challenge it in the courts of the seat of the arbitration. If he is unsuccessful, why should he be allowed a second-or a third or fourth-bite at the cherry in proceedings before a court or courts elsewhere? Why, having embarked on challenge under the *lex loci arbitri*, should he not be required to accept the outcome?³³⁸

The English court also confirmed this point in *Minmetals Germany v Ferco Steel*,³³⁹ in which it was held that, once an arbitral award had been challenged in the rendering place, the court will not normally reinvestigate the same issues of such a challenge at the enforcement stage.³⁴⁰

It should be noted in respect of this point that the committee on international commercial arbitration in its final report on public policy as a bar to the enforcement of international arbitral award recommended that '1-Where a party could have relied on a fundamental principle before the tribunal but failed to do so, it should not be entitled to raise the said fundamental principle as a ground for refusing recognition or enforcement of the award'.³⁴¹

Secondly, the challenge before the enforcing court in the place of enforcement. The

³³⁷ R Goode. Op. Cit (footnote 89) 34.

³³⁸ R Goode. Op. Cit (footnote 89) 35.

³³⁹ [1999] 1 All ER 315.

³⁴⁰ See the commentators on this case: HL Yu 'Minmetals Germany GmbH v Ferco Steel Ltd- a Step Further than Localisation' (1999) 2(3) *International Arbitration Law Review* 83, 83-89. A Sheppard 'Enforcement of CIETAC Award' (1999) 2(2) *International Arbitration Law Review* 17, 17-19. H Nina 'Case Comment Minmetals Germany GmbH v Ferco Steel Ltd [1999] 1 All ER 315' (1999) 2(2) *International Arbitration Law Review* 78, 78-80.

³⁴¹ P Mayer. Op. Cit (footnote 294) 260, recommendation 2 (c).

role of the enforcing court at this stage is to recognise and enforce the foreign arbitral award, since it is final and has fulfilled all the conditions provided by the regime concerned. When there is an allegation that there are grounds of refusal, the enforcing court has to look into the award to ensure whether or not these grounds of refusal as alleged by the defendant are correct. Such a challenge has been raised before the enforcing court in both of the afore mentioned cases on the basis that the enforcement of an arbitral award is contrary to English public policy. The role of the enforcing court in such a challenge is to investigate the award to the extent that it is necessary to ensure whether or not the award is contrary to English public policy.

Since the scope of public policy is not limited, the enforcing courts in both cases diverged in indicating the scope of re-opening an award just as they diverged in indicating the scope of public policy. In the *Soleimany* case, the court investigated the award to evaluate the allegation that such an award is contrary to English public policy. It was founded on the facts as they appeared from the award and its reasons that the underlying contract is illegal according to the law of the place of performance and thus refused to enforce the award. In this case, the court extended the scope of public policy by exercising control over the enforcement of the arbitral award as part of the *lex fori*, whether the proper law of arbitration agreement or the place where the arbitration agreement was conducted, and that an award, whether domestic or foreign, would not be enforced by an English court if enforcement would be contrary to public policy.³⁴² In other words, the court did not distinguish between domestic and international public policy.

In the *Westacre* case, the court investigated the award itself and found that the objections made by the defendant had been made before the arbitral tribunal and before the supervising court and had been rejected. Thus, there was no need to look at them again as the award is an estoppel on the issues which are decided by an arbitrator. In this case, the court also limited the scope of public policy by exercising control over the enforcement of an arbitral award as part of the proper law or the curial law of the contract, even though the English court might have taken a different view.³⁴³ In other words, the court in this case distinguished between domestic and

³⁴² [1998] 3 W.L.R 811.

³⁴³ [1999] 3 W.L.R 811, 812.

international public policy.

Likewise, in *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd*,³⁴⁴ the objection before the enforcing court in this case was an award based on an illegal contract which was contrary to public policy, as in the previous two cases. However, the similarity between this case and *Soleimany* case is that the illegality of the underlying contract according to the law of the place of performance was found by an arbitrator. In the *Soleimany* case, the court held in addition that:

An English court will not enforce a contract governed by English law, or to be performed in England, which is illegal by English domestic law. Nor will it enforce a contract governed by the law of a foreign and friendly State, or which requires performance in such a country, if performance is illegal by the law of that country.³⁴⁵

Accordingly, since the performance of the underlying contract in the *Hilmarton* case was illegal under the law of Algeria, the court should, in the light of the *Soleimany* case, refuse to enforce such an award. However, the court in the *Hilmarton* case found that the reliance on the *Soleimany* decision was ‘misplaced’ because of the element of ‘corruption or illicit practice’ presented in the *Soleimanty* case, but not present in the *Hilmarton* case.³⁴⁶

The court in the *Hilmarton* case followed the *Westacre* case, even though the *Hilmarton* and the *Westacre* cases are distinguishable. For instance, the defendant in the *Westacre* case could not prove that the performance of the underlying contract was illegal according to the law of the place of performance (Kuwaiti law), but the arbitrator explicitly found in the *Hilmarton* case that, by entering the contract, the parties were wittingly envisaging activity which breached the law of the place of performance (Algerian law). However, in the *Westacre* and the *Hilmarton* cases, the allegation of public policy was determined according to the proper law and curial law of the contract (Swiss law), according to which the underlying contract was legal.

³⁴⁴ [1999] 2 Lloyd’s Rep 222.

³⁴⁵ [1998] 3 W.L.R 811, 827.

³⁴⁶ [1999] 2 Lloyd’s Rep 222, 225.

In the *Hilmarton* case, the court held in regard to the issue of re-opening the award when public policy is involved that:

- (1) the Court was not adjudicating on the underlying contract; the decision was whether or not the arbitration award should be enforced in England; and in this context (absent a finding of fact of corrupt practices which would give rise to obvious public policy considerations) the fact that English law would or might have arrived at a different result was nothing to the point; the reason for the different result was that Swiss law was different from English law and the parties chose Swiss law and Swiss arbitration; if anything this consideration dictated (as a matter of policy of upholding of international arbitration awards) that the award should be enforced.
- (2) on the arbitrator's unchallengeable finding of fact the element of corruption or illicit practice was not present; there were no public policy grounds on which the enforcement of this award could be refused and s 103 of the Arbitration Act, 1996 did not apply.³⁴⁷

Consequently, there is a clear-cut answer that the English enforcing court, when called to enforce a foreign award, should not go behind the award and investigate it in the manner of a re-examination of the merits of the dispute as determined by the arbitrator. The role of the enforcing court is, therefore, to decide whether or not the arbitral award is enforceable, but not whether or not the underlying contract is enforceable. This conclusion is in line with the previous authority as held in *Birtley and District Co-operative Society Ltd v Windy Nook and District Industrial Co-operative Society Ltd*,³⁴⁸ that: 'That there was nothing on the face of the award to indicate that it was an unreasonable restraint of trade; and that the court was not entitled to look behind the award and become, in effect, an appellate tribunal from the arbitrators'.

However, in the *Soleimany* and *Westacre* cases there are some judgments which were not applied. In the *Soleimany* case, Waller LJ made suggestions about when the arbitrators have entered upon the topic of illegality and have held that there was none, or they have made a non-speaking award. These suggestions did not apply to the *Soleimany* case, as the arbitrator in this case explicitly indicated in the award that the underlying contract was illegal according to the law of the place of performance (Iranian law) as well as English law. Thus, the award was not 'non-speaking' and Waller LJ's suggestion was not applied. In addition, the court in the *Westacre* case

³⁴⁷ [1999] 2 Lloyd's Rep 222.

held in regard to the fraud which concerns illegality that:

...normally the issue could not be reopened unless the evidence to establish the fraud was not available to the party alleging fraud at the time of the hearing before the arbitrators; that where the allegation was of perjury the evidence must be so strong that it could reasonably be expected to be decisive at a hearing, and must if unanswered be decisive.³⁴⁹

However, this judgment was not applied to the *Westacre* case, since the defendant did not provide strong or decisive evidence. The court also found that the defendant's objections had already been rejected by the tribunal and by the Swiss court (the supervising court). Consequently, the question arises whether Waller LJ's suggestions in the *Soleimany* case and the Judgement in the *Westacre* case will be applied if the circumstances to apply them are found in future?

In regard to the position in Jordan, all Jordanian regimes emphasise the idea that the enforcing court shall recognise and enforce the foreign arbitral award without needing to re-examine the merits of the case. In other words, the enforcing court in Jordan has only the power to enforce the award or not without re-opening the case again. In this regard, article 2 of the Arab League Convention provides that 'The competent judicial authority of the State which is requested to enforce the judgement shall not be allowed to investigate or review the subject matter of the case...' The same is provided by article 37 of the Riyadh Convention, articles 12-14 of the Jordanian-Tunisia Convention, article 22 of the Jordanian-Syria Convention, article 19 of the Jordanian-Lebanon Convention, and article 54 (a) of the Arbitration Act 2001.

Moreover, the Court of Cassation confirmed this fact on a number of occasions. For instance, it held that 'Act No 8 does not give the enforcing court the right to examine the merits of the foreign judgment'.³⁵⁰ It also held that 'it is not within the jurisdiction of the Court of Cassation and the enforcing court to re-evaluate the evidence that are submitted to the arbitrator'.³⁵¹ Many other judgements issued by the Court of Cassation emphasise that the enforcing court must not re-examine the merits of the

³⁴⁸ [1960] 2 Q.B 1, 3.

³⁴⁹ *Westacre* [1999] 3 W.L.R 811, 812.

³⁵⁰ Court of Cassation's decision No 30/71 (Journal of Jordanian Bar 1971) 919.

³⁵¹ Court of Cassation's decision No 3101/2000 (Judicial Journal 2001 Issue 4 2001)136.

case again.³⁵²

It can be said that the role of the enforcing court in both States is to recognise and enforce the foreign arbitral award without a re-examination of the case on its merits. In the view of this research, two main reasons encourage the court at the enforcement stage not to involve itself in the subject-matter of the case when it intends to recognise and enforce a foreign arbitral award.

Firstly, the finality of a foreign award: once an award becomes final, it means that an award is *functus officio*. If there was a possibility of it being reviewed on the basis of a question of law or fact, this would be done according to the *lex arbitri* in the place of origin and not in the place where an award is brought to be enforced.³⁵³ It is worth noting that the challenge of an arbitral award at the enforcement stage aims at resisting enforcement. This is on the basis that there are grounds of refusal as they appear from the facts and the reasons of the award, without needing to re-open the case again. Meanwhile, the aim of the challenge in the place of origin is to set aside or vary the award on the basis of a question of law or fact. When the arbitral award passes the latter stage, the public policy of the finality of an arbitration award will outweigh the public policy of other matters, such as the illegality of the underlying contract, commercial corruption...etc. This fact was confirmed in the *Westacre* case by Waller LJ when he found that the public policy of the finality of an award outweighs the public policy of illegality because:

What of course gives one cause for concern is the way the matter can be put so powerfully in relation to finality. The appellants chose not to run the point they now run before the arbitrators, and on the bribery issue they raised they lost; they took the matter to the Swiss Federal Court and lost; the point, if it is successful, prevents at least in this jurisdiction enforcement so as to require payment of that part of the price paid under the main arms contract which would otherwise have gone to *Westacre*.³⁵⁴

³⁵² Court of Cassation's decision No 159/1988 (Journal of Jordanian Bar 1990) 1113. Court of Cassation's decision No 148/1988 (Journal of Jordanian Bar 1990) 1355. Court of Cassation's decision No 268/1988 (Journal of Jordanian Bar 1990) 1603. Court of Cassation's decision No 755/1988 (Journal of Jordanian Bar 1990) 1864. Court of Cassation's decision No 301/1993 (Journal of Jordanian Bar 1994) 1273. Court of Cassation's decision No 116/1999 (Judicial Journal Issue 5 1999) 278.

³⁵³ MJ Mustill and SC Boyd. Op. Cit (footnote 29) 92.

³⁵⁴ [1999] 3 W.L.R 811, 834.

This approach was adopted by the Jordanian Court of Cassation, when it held that:

Once the arbitral award has been challenged before the arbitral tribunal and before the supervising courts (First Instance Court of Paris, Court of Appeal of Paris, and the Court of Cassation of Paris) and then it has been rejected. Thus, it is not the role of the Jordanian judicial authorities to re-open the merits of the award again as Jordanian courts have no jurisdiction to determine the dispute when it is determined by a final arbitral award which is sought to be enforced in Jordan. Jordanian courts in this case are restricted to investigate whether or not the foreign arbitral award is enforceable according to the Jordanian enforcing regimes.³⁵⁵

Secondly, reopening the case of arbitration by the enforcing court goes against the principle of confidentiality in arbitration.³⁵⁶ Confidentiality in arbitration is the key attractive issue for the successful practice of commercial arbitration.³⁵⁷ Therefore, confidentiality is the main reason why the disputants take their dispute to arbitration and not to litigation.³⁵⁸ In this regard, if the enforcing court is allowed to re-open the case again, there is no need to choose arbitration as a means of dispute resolution, since the main reason to go to arbitration is not respected by the enforcing court.³⁵⁹

³⁵⁵ Court of Cassation's decision No. 2996/1999 (Dated on 30 /5/2000 Adalah Centre Publications)

³⁵⁶ RM Goode. Op. Cit (footnote 125) 1178.

³⁵⁷ VDDS Marc 'Confidentiality of Arbitration and the Obligation to Disclose Information on Listed Companies or During Due Diligence Investigations' (2003) 20(2) *Journal of International Arbitration* 211, 211-216. A Redfern and others. Op. Cit (footnote 55) 32-41.

³⁵⁸ For the importance of confidentiality of arbitration see LE Trakman 'Confidentiality in International Commercial Arbitration' (2002) 18(1) *Arbitration International* 1, 1-18. H Bagner 'Confidentiality-a Fundamental Principle in International Commercial Arbitration?' (2001) 18(2) *Journal of International Arbitration* 243, 243-249. P Neill 'Confidentiality in Arbitration' (1996) 12(3) *Arbitration International* 287, 287-318. A Redfern and others. Op. Cit (footnote 55) 32-41.

³⁵⁹ It should be noted in this respect that the English court in *Ali Shipping Corp v Shipyard Trogir* [1998]1 Lloyd's Rep 643(Clark J) reconfirmed the general obligation of arbitration confidentiality in England. In this case the court held that:

(2) a term should certainly be implied into all the contracts imposing a duty of confidence on the Yard and the respective buyers sufficient to ensure that the documents disclosed in any of the arbitrations would not be disclosed to 'third parties' in the sense of anyone other than the respective buyers or the arbitrators in the arbitration; and to imply or give effect to the obligation of confidence so limited was consistent with commonsense and commercial and business reality.

Also, it held by (C A Potter Deldam and Brooke LJJ) that:

(1) - The implied term ought properly to be regarded as attaching as a matter of law; in holding as a matter of principle that the obligation of confidentiality arose as an essential corollary of the privacy of arbitration proceedings, the court was propounding a term which arose 'as the nature of the contract itself implicitly required'. (2) - The Yard's concession in this appeal to the existence of the implied term of confidentiality in commercial arbitrations was well advised; it did not seem that the judge's approach on the basis of the officious bystander test was correct; his proper starting point would have been to assume an implied obligation of confidence subject to proof of circumstances apt to bring the yard within one of the recognised exceptions or otherwise justifying the withholding of injunctive relief. (3)- The confidentiality rule had been founded fairly and squarely on the ground that the privacy of arbitration proceedings necessarily involved an obligation not to make use of materials

Furthermore, in some jurisdictions, the court considers the challenge to an arbitral award to constitute a breach of arbitration confidentiality and so the party who seeks such a challenge should be penalised. This is illustrated in *Aita v Ojeh*, where the Court of Appeal of Paris considered the party seeking to set aside an award made in London to be merely seeking to provoke ‘a public debate of facts which should remain confidential’,³⁶⁰

However, one may argue that bringing an arbitral award to the enforcing court to enforce it is, in itself, a breach of the principle of confidentiality. Thus, re-opening a case before the enforcing court is not breaching the principle of confidentiality, as it has already been breached. In this regard, it is important to distinguish between two facts. Firstly, the principle of confidentiality in which the disputants want the facts of their case and the documents presented to remain confidential. Secondly, the enforcement of an arbitral award is considered not as a breach of the principle of confidentiality, or this would mean that an award would be unenforceable.

The result of arbitration is embodied in the award of the arbitrator. If the winning party is precluded from referring to the award because of the principle of confidentiality, he cannot enforce it. This would be fundamentally inconsistent with and frustrate the purpose of the arbitration by preventing the winning party from enforcing the rights declared in its favour. It would also constitute a breach of the losing party’s duty to perform the award by recognising and respecting those rights.³⁶¹ The case of re-opening the award means to start from the zero point where a public debate of the facts, which should remain confidential, will occur. Moreover, the enforcement of an arbitral award is about relying upon an award as having given the winning party certain rights against the other. Its enforcement is limited to presenting the facts that appear on the award itself as a plea of issue estoppel.

generated in the course of the arbitration outside the arbitration even when required for use in other proceedings.

³⁶⁰ As cited in A Redfern and others. Op. Cit (footnote 55) 37.

³⁶¹ This fact is illustrated in *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2002]1 WLR 1041, 1048.

3.2. The Time limit on the recognition and enforcement of foreign arbitral awards

It has already been stated that enforcement proceedings are left to the local laws in the place where the enforcement is sought. These laws normally provide a time limit within which the winning party should seek the recognition and enforcement of the foreign arbitral award. Since the matter of time is left to the local laws in the forum place, these laws normally provide different periods within which an award should be enforced and about from which date this period should begin.³⁶² To this effect, the working group of UNCITRAL Model Law points out that:

Many legal systems already had rules on the period for enforcement of arbitral awards, either by assimilating for this purpose arbitral awards to court judgements or by special legislation. Harmonisation of these rules would be difficult to achieve since they were based on the differing national policies closely linked to the procedural law as aspects of State.³⁶³

It was suggested for the Model Law that a ten year period should be fixed within which an award should be enforced. However, this suggestion was refused, as stated by the working group of UNCITRAL Model Law.³⁶⁴ Therefore, there is no agreed period among the enforcing regimes. It is, for example, three years in the USA, and one year or six months in Mainland China.³⁶⁵ Accordingly, the application of the recognition and the enforcement should be submitted before the competent authority in the forum place within the specified period to issue an enforcement order. Careful attention should be paid to this matter by the winning party. It is suggested that the winning party should consult an experienced local practitioner and that no time should be lost.³⁶⁶

As regards the date when the time of enforcement begins, this raises the question

³⁶² An exception to this fact is the Moscow Convention 1973. It provided in art IV (5) that the award should be enforced within two years from the date of serving an award to the party applying for enforcement, and in cases when an award had been sent by post, from the date of the postmark indicating acceptance of a registered letter for delivery. In the case of an agreed award, the period reckoned from the date of agreement on such settlement.

³⁶³ As cited in FP Davidson *International Commercial Arbitration, Scotland and the UNCITRAL Model Law* (Sweet and Maxwell Edinburgh 1991) 257.

³⁶⁴ *ibid* 257.

³⁶⁵ S Gary 'International Enforcement of Arbitral Awards' (2000) 11(7) *International Company and Commercial Law Review* 253, 259.

whether the time should start from the date on which an award is made or from the date on which it becomes final.³⁶⁷ Moreover, according to another perspective, the time is presumed to begin from the date on which an award is served to the losing party.³⁶⁸

As far as recognition and enforcement in England and Jordan are concerned, within which time period should the winning party seek to recognise and enforce an award, and from what date does this time begin?

In England, the winning party, according to section 7 of the Limitation Act 1980, should bring an action on an award not after the expiration of six years from the date on which the cause of action accrued. The question arises, then, as to what the phrase 'cause of action accrued' means?³⁶⁹ Is it from the breach of the arbitral agreement or the original contract? In *Agromet Motorimport Ltd. (Poland) v Maulden Engineering Co. (Beds) Ltd*,³⁷⁰ it was interpreted to mean:

That an action to enforce an arbitrator's award was an independent cause of action arising from the breach of an implied term in the arbitration agreement that the award would be honoured and not from the breach of the contract which had been the subject of the arbitration; that the six-year limitation period imposed by section 7 of the limitation Act 1980 upon the bringing of an action to enforce an award, therefore, began to run from the date of the failure to honour the award.

Furthermore, in *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corporation of India*,³⁷¹ the court held that 'The six year limitation period began whenever the claimants became entitled to enforce the award; in legal terms, when their cause of action arose'.

The time to enforce the award begins to run from an indeterminate later date on which the implied promise to perform the award is broken. This is neither from the date of

³⁶⁶ A Redfern and others. Op. Cit (footnote 55) 519.

³⁶⁷ RDB King and others 'Enforcement of Foreign Arbitral Awards' Houston-117281.V 1. <<http://www.kslaw.com/library/pdf/bishop6.pdf>> (25 October 2004).

³⁶⁸ Art IV (5) of the Moscow Convention 1973.

³⁶⁹ Cause of action is defined in Black's law dictionary as 'A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person'.

³⁷⁰ [1985] 1 W.L.R 762, 763.

the original breach of contract, which gives rise to arbitration (arbitration agreement), nor from the date of the award.³⁷² By identifying the time limit for bringing an action on an award, it will be necessary to show, as has been suggested, that one of the following things has happened:³⁷³

- A-The time (if any) for performing the award as provided in the contract has expired
- B-(Where (a) does not apply) the time (if any) as stipulated in the award for its performance has expired
- C-(where neither (a) nor (b) applies) a reasonable time for performance since the award was made has elapsed
- D-(in any case) a clear and unequivocal intention to the effect that the defendant is not to be bound by the award has been manifested

The time limit of six years can be discontinued as a result of the part-payments and other acknowledgements within the meaning of section 30 of the Limitation Act 1980.³⁷⁴

Where an award determined damages, it should be enforced within two years from the date of the award.³⁷⁵ Accordingly, the winning party should be aware that there is only a short period to enforce such an award; otherwise he will lose his right to enforce the award if the time limit expires. This fact was illustrated in *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corporation of India*,³⁷⁶ when the court, held that:

The six year limitation period began whenever the claimants became entitled to enforce the awards; in legal terms, when their cause of action arose; conceptually the claim arose under a contractual undertaking to honour the award; the relevant cause arose sometime before the end of 1984 and the limitation period had expired before the applications were made; this factor

³⁷¹ [1996] 2 Lloyd's Rep 474, 476-477.

³⁷² A McGee *Limitation Periods* (3rd edn Sweet & Maxwell London 1998) 276. DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 367. MJ Mustill and SC Boyd. Op. Cit (footnote 17) 418. MJ Mustill and SC Boyd. Op. Cit (footnote 29) 211. (--) Current Survey Enforcement of Award-Time Limit '[1996] *Civil Justice Quarterly* 234, 238.

³⁷³ A McGee. Op. Cit (footnote 372) 276.

³⁷⁴ This fact was implemented in *Good Challenger Navegante SA v Metalexportimport SA* [2004] 1 Lloyd's Rep 67.

³⁷⁵ S 10(3) of Limitation Act 1980.

³⁷⁶ [1996] 2 Lloyd's Rep 474, 476-477.

alone meant that the Order of Mr. justice Waller setting aside the leave given ex parte by Mr. justice Saille to issue and serve fresh proceedings in 1993 should be upheld.³⁷⁷

With respect to Jordanian regimes, there are no provisions in respect of the time limit within which the winning party should apply to the First Instance Court to recognise and enforce a foreign award. Therefore, the winning party, who is not familiar with the Jordanian legal system, may think that there is no time limit in which to make his petition. This may make him wait to do so and a part or all of the time limit may have lapsed before he submits the application of the recognition and enforcement. However, after an arbitral award has been made, the winning party, by virtue of article 449 of the Civil Law, cannot petition to recognise and enforce such an award after the expiration of fifteen years without a legal excuse.

3.3. Summary

The winning party can apply to recognise and enforce a foreign arbitral award before the High Court or the County Court in England. Each regime indicates clearly the court that has the competence to enforce the arbitral award which falls within its jurisdiction. The winning party has to apply to the First Instance Court to enforce this award in Jordan. However, according to the Washington Convention and the Amman Convention, the application of enforcement must be submitted to the highest court in Jordan, which is the Court of Appeal.

The competent court in both States has permissive power to enforce the award and it may choose whether to enforce it or not. This matter depends on the circumstances of the case concerned. However, the decision issued by the competent court is subject to challenge by the party concerned. The competent court has to enforce the foreign arbitral award without the need to re-open the merits of the award again at the enforcement stage.

The winning party must be aware of the time limit for the enforcement under the English regimes. He has to apply for enforcement within a six year period starting

³⁷⁷ [1996] 2 Lloyd's Rep 474.

from the date on which the losing party failed to honour the arbitral award. He should also be aware of the short period provided to enforce the arbitral award on damages, which is two years. However, the winning party has fifteen years in which to enforce the arbitral award in Jordan, which begins from the date of the arbitral award.

Chapter Four: Evidence about the Recognition and Enforcement of Foreign Commercial Arbitral Awards

The previous chapters have shown the scope of the English and Jordanian regimes, the competent authority that has jurisdiction to issue an enforcement order, and the time limits within which the enforcement application has to be made by the winning party. This chapter deals with the evidence that the winning party has to furnish the competent authority in order to recognise and enforce the award.

Each regime requests the winning party to furnish the competent court with particular evidence to enforce the award. However, the level of authentication of the requested evidence is different from one regime to another. The burden of proof upon which party it is to be placed differs from one regime to another. Therefore, the questions arise in this chapter as to what is the requested evidence to enforce a foreign convention award? What is the requested evidence to enforce a non-convention award? What type of authentication is requested by the regime concerned in order to accept the evidence?

Accordingly, this chapter is divided into the following sections:

- Evidence of the recognition and enforcement of the foreign convention arbitral awards
- Evidence of the recognition and enforcement of the foreign non-convention arbitral awards

4.1. Evidence of the recognition and enforcement of foreign convention arbitral awards

Convention regimes on recognition and enforcement can be categorised into two groups according to what evidence should be introduced:

- 1-The local courts in the forum place may request the winning party to introduce and fulfil the evidence and conditions imposed by the applicable law in the place where an

award was made. These requirements may jeopardise the integrity of arbitration, in that the parties in international disputes resort to arbitration in order to conduct it in a neutral place to avoid the political and national bias which may be found in a local court.

So, the enforcing court requests the winning party to introduce a proof to the effect that an award is final according to the law of the rendering place. This means taking an arbitral award to a local court in the rendering place to see whether the award is enforceable or not. In this case, the local court may, for any reason, practise bias against the winning party by considering the award null and void, especially when the losing party is one of the nationals of the rendering place.³⁷⁸ Such a requirement causes what is called a *double exequature*. In Jordan, such a requirement is provided by article 2 of Act No 8. In this regard, it was held by the Court of Cassation that:

The arbitral award that is sought to be enforced in Jordan has been attached with the statement that this award is enforceable by the president of the *AlKuliha* Court in Kuwait. Therefore, this award is considered to fulfil the condition provided by article 2 of the said Act.³⁷⁹

It is also provided by article 37 of the Riyadh Convention, articles 14 and 16 of the Jordanian-Tunisia Convention, article 26 of the Jordanian-Syria Convention, and articles 16-19 of the Jordanian Lebanon Convention.³⁸⁰ However, such a requirement has been criticised because it would be impossible to be fulfilled in some circumstances where an award is rendered through institutional arbitration. In such arbitration, the court of the neutral place in the light of its local law may refuse to issue an enforcement order for such an award. Consequently, the award will not be enforced in Jordan, since the conditions of enforcement provided by the rendering

³⁷⁸ An example of national bias may be seen in *Hilmarton* case. In this case, Hilmarton is a British company which had helped a French company OTV in its dealing with Algerian authorities, and subsequently requested payment of its fees. An arbitral award was made against Hilmarton (British company) in favour of OTV (French company). This award was set aside by the Court of Appeal of Geneva, and confirmed by the Swiss Federal Court. A second arbitration was conducted and a new arbitral award was made in favour of Hilmarton (British company) against OTV (French company). At enforcement stage the French court refused to enforce the second award, which is against the French company, on the basis that the first award being in favour of the French company. Meanwhile, the English court enforced the second award which was in favour of the British company and not the first award which was against the British company.

³⁷⁹ Court of Cassation's decision No 3048/2001 dated on 21/1/2002 (Adalah Centre Publications).

³⁸⁰ The requirement provided by all these regimes was that the award should be legislated and coupled with an enforcement order in the rendering place. S Saleh. Op. Cit (footnote 37) 119, 153 and 174.

place law are not met.³⁸¹

On the other hand, such a requirement is provided by part II of AA 1950. Section 37(1, d) of this Act requests the winning party to introduce proof that the award has become final in the country in which it was made. This section represents article 4(1) of the Geneva Convention 1927. It is submitted that this section amounts, in practice, to the necessity of acquiring an enforcement order in the country in which it was made.³⁸²

2-When recognition and enforcement are sought, the local courts in the forum place may not require the arbitral award to meet the conditions imposed by the applicable law in the place where it was made. They only require the winning party to meet the conditions provided by the applicable regimes, as found in all English regimes except part II of AA 1950. In Jordan, such a requirement is provided only by regimes other than those named above that are involved in the *double exequature*.

The evidence required by the applicable regimes, whether in England or in Jordan, are almost the same, in that they all require documentary evidence. Documentary evidence may be introduced by submitting originals, certified copies, ordinary photocopies, or evidence in the form of electronic data, with requirements demanding the indexing or numbering of the required documents.³⁸³ However, there is no precise meaning of the term 'document'; although it implies that it contains and conveys information. Also, in modern times, the storing of information in a diagrammatic form or on computer, or the audio or video recording of information is also probably equally acceptable for most purposes.³⁸⁴

As far as the requested evidence in England and Jordan are concerned, this section will deal with the evidence that is required by the applicable convention regimes in England and then in Jordan.

³⁸¹ AH Haddad 'Enforcement of Judicial Judgements and Arbitral Awards in Jordanian and Iraqi Law' (Paper Presented at International Lawyer Conference March 1989) 6

³⁸² AJVD Berg. Op. Cit (footnote 168) 246.

³⁸³ PV Eijssvoegel *Evidence in International Arbitration Proceedings* (Graham & Trotman Limited London 1994) 60.

4.1.1. In England

Introducing documentary evidence before the competent court is subject to the applicable regimes. Documentary evidence is not defined in the applicable regimes. Wherever there is no definition for the word 'document' or 'copy' in the applicable regimes, these words before English courts bear the meaning as provided by section 13 of the Civil Evidence Act 1995. This Act defines a document as 'anything in which information of any description is recorded' and it defines copy as 'anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly'.

According to sections 100 and 102 of part III of AA 1996, which represent article IV of the New York Convention, the winning party has to submit along with his application, as a cumulative not an alternative, the following evidence:³⁸⁵

1-The award has satisfied the condition provided by section 100. It has to be proved that the award is a New York Convention award (convention award). This can be done by proving that the award was made in pursuance of an arbitration agreement in writing, in the territory of a State (other than the United Kingdom) which is a party to the New York Convention, regardless of where it was signed, despatched, or delivered to any of the parties. In *Hiscox v Outhwaite*,³⁸⁶ the main question was whether an award was a convention award or not in order to determine the allegations.

2- A duly authenticated original award or a duly certified copy of it: it is submitted that the logic behind the requisition of the production of an arbitral award is that an award means evidence of the facts found therein. An award represents an agreement between the parties; thus a valid award is conclusive evidence between the parties to the arbitration of the facts found by it.³⁸⁷ To this effect, Lord Slessor LJ, in his judgement in *Bremer Oil Transport GmbH v Drewry*,³⁸⁸ stated that an award of an arbitrator 'represents an agreement made between the parties, and is no more and no

³⁸⁴ P Murphy *Murphy on Evidence* (7th edn Blackstone Press Limited London 2000) 553.

³⁸⁵ See for the evidence which are requested to enforce the New York Convention award DD Pietro and M Platte. Op. Cit (footnote 58) 123-129.

³⁸⁶ [1991] 3 All ER 641.

³⁸⁷ C Style and Ch Hollander *Documentary Evidence* (4th edn Longman law London 1993) 346-347.

³⁸⁸ [1933] 1 K.B 753.

less enforceable than any agreement made between parties’.

According to section 102(1, a) of part III, the award must be provided by the production of a duly authenticated original award. It is not only a requested original award, but it must also be an authenticated one. Authentication means the ‘formality by which the signature thereon is attested to be genuine’.³⁸⁹

The authenticated original award must be a duly authenticated one and not simply any authenticated original award. This means, in the author’s view, that it should fulfil the minimum conditions of an original award, as it is provided in the state of the art. In other words, an authenticated original award should be taken to comprise all matters that have, at any time, been available to show that such an award is authenticated by the competent courts. To examine whether or not an award is a duly authenticated original award is left to the competent courts since there is no precise meaning of the term ‘a duly’.

Moreover, the winning party is permitted to introduce a duly certified copy of an award rather than an authenticated original award. A certified copy means ‘the formality by which the copy is attested to be a true copy of the original’.³⁹⁰ It seems that this way of introducing an arbitral award is for the purpose of convenience and flexibility. It is not possible to bring the original award, as the arbitrator or the institution usually keeps the original award in their files and provides the parties with a certified copy. In this case, the winning party can introduce a duly certified copy instead of the original award.³⁹¹

3-An original arbitration agreement or a duly certified copy of it: in addition to the above evidence, the winning party must, according to section 102 (1, b) of part III of AA 1996, submit the original arbitration agreement or a duly certified copy of it. It is worthy noting that section 102 requires an original arbitration agreement without authentication by signature of the parties and that this agreement must be a ‘duly’ one as it is required for an arbitral award. The reason behind this is that an arbitration

³⁸⁹ AJVD Berg. Op. Cit (footnote 168) 251.

³⁹⁰ *ibid.*

³⁹¹ *ibid* 256.

agreement may be made orally rather than in writing, as indicated in AA 1996,³⁹² or it may be made by the exchange of documents between the parties via fax or the Internet.

This paragraph takes into account the possibility of providing an arbitration agreement which is not authenticated by the parties' signatures. At the same time, in case it is not possible to introduce the original arbitration agreement, this paragraph permits a copy of this agreement to be provided. The copy which is requested is a duly certified one. This requirement is normal because it is not possible to accept any copy of an arbitration agreement without it being certified in a way which is acceptable by the competent court.

With respect to section 102 (1, a, b) of part III, which represents article IV of the New York Convention, there are some questions that had been raised about this theme by Berg.³⁹³ The argument provided by Berg can be summarised as follows: firstly, he asks about the distinction between the authenticated original of an arbitral award and certified copies of the award and the arbitral agreement. Secondly, he mentions the differences between the text which required authenticated original award and the text which required original arbitral agreement. Thirdly, about the law under which an award should be authenticated, a copy of an award or the arbitral agreement should be certified. Fourthly, what is the competent authority for authentication or certification? Fifth and finally, he asks about a certified copy of an award to be a copy of the authenticated award or the non-authenticated award.

According to the first question, the answer is that authentication is related to the formality on which the award is signed by the arbitrator, while the certification is a formality on which the copy is the same as the original. Thus, authentication concerns the signature, while certification concerns the whole document, as being identical to the original. Regarding the second question, an arbitration agreement may not be authenticated since it may be made by an exchange of documents between the parties without bearing their signatures. Thus, it is not requested that the arbitration agreement be an authenticated original.

³⁹² L Collins and others (eds). *Op. Cit* (footnote 12) 610.

³⁹³ AJVD Berg. *Op. Cit* (footnote 168) 251-257.

Regarding the third question, there is no solution provided by the Convention. Berg suggested that an award may be authenticated according to the law of the country in which it was made or the law of the country where recognition and enforcement are sought. However, the enforcing court will decide the law with which the authentication and certification should be consistent. The answer to the fourth question relies on the answer to the previous one; that is to say, it may be by the authority of the rendering place or the authority of the forum place. Finally, there is no particular answer to the fifth question. Therefore, the decision of the enforcing court may or may not require that the copy of an award must be of the authenticated original award.

4-Translation of an arbitral award or arbitral agreement: section 103 (2) provides that 'If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent'. This section represents article IV (b) of the New York Convention. The above two requirements tally with this requirement, as the arbitral award and/or the arbitral agreement is not in the English language. In this case, the winning party must provide a translation into English. This translation, in order to be accepted, must be produced by an official or sworn translator or by a diplomatic or consular agent.

In this regard, Berg raised two further questions.³⁹⁴ His argument can be summarised as follows. He first asked about the request for translation: is it mandatory in all cases where a foreign language is used? The second question is about the authority by which the translation must be certified as correct, and is it mandatory to obtain a certification in all cases?

In relation to the first question, the Convention requests a mandatory translation in cases where the arbitral award or the arbitral agreement has been written in a language that is different from the language of the country where the enforcement is sought. Due to the expense of translation, the use of the English language is common in most international arbitral awards, and the knowledge of this language is understood among

³⁹⁴ AJVD Berg, Op. Cit (footnote 168) 258-262.

the judges in different countries as well. Berg, therefore, argues that a translation is not required unless the court feels it is necessary. He also suggested that a translation is not requested when introducing the original arbitral award, although, it is arguable, according to him, to do so on introducing the arbitral agreement, and the translation may or may not be submitted at the same time as the arbitral agreement.

However, it should be noted that, according to article IV of the New York Convention or section 102 of part III, a translation must be submitted along with an arbitral award or an arbitral agreement whether the local judge is familiar with the award or the agreement languages or not. This approach is expressly requested by article IV or section 102. Article IV uses the word 'shall', whilst section 102 (2) uses the word 'must'. Both words mean that there is a mandatory requirement on the winning party to provide an English translation for the local court if the award or agreement is in a language other than English. As far as the author is aware, no foreign award written in a foreign language has ever been enforced in England, without being translated from the original language into English.³⁹⁵

Regarding the second question about the authority of which country should be deemed competent to certify the translation, since there are no provisions in this respect, it is the authority of the rendering place or the forum place.

On the other hand, if the award is one to which the Geneva Convention applies, the winning party can recognise and enforce it under part II of AA 1950. According to sections 35 and 38 of the said part, the winning party has to submit, as a cumulative not an alternative, the following evidence:

1-An award is 'a foreign award' as indicated in section 35 of part II of AA 1950, in that the award is made according to the Geneva Protocol 1923, or the Geneva Convention 1927. For instance, in *Dalmia Cement Ltd v National Bank of Pakistan*,³⁹⁶ an award was not considered a foreign award, since it did not satisfy the requirements

³⁹⁵ It is worth noting with respect to the argument that it is possible that the local judges are so familiar with the language of the arbitral award or the arbitral agreement is weak enough to justify not requesting a translation, since the majority of the judges around the world do not understand languages other than their own.

³⁹⁶ [1975] QB 9, 10

provided by section 35 of part II of AA 1950.

2- An original award or a copy thereof duly authenticated in a manner required by the law of the country in which it was made. This requirement deals with the original award, or if it is not possible to bring the original, the winning party can introduce a copy of it. The original, or the copy, must be authenticated in the manner requested by the law of the country in which it was made. Section 38(1) of part II identifies the law according to which an award or a copy of it must be authenticated. Although, this point is not settled according to part III of AA 1996, this makes this part more flexible, in that it may use the law of the rendering place or the forum place.

3-The winning party must produce evidence proving that the award has become final. This requirement amounts, in practice, to obtaining leave for enforcement from the country in which an award was made.³⁹⁷ This evidence leads to what is called above '*double exequature*'. However, this depends on the country where an award is made; if the country permits the enforcement of such an award, then it is possible to obtain evidence of finality. Otherwise, it will be impossible to recognise and enforce this award in England, since it is not possible to bring the evidence of finality. However, this requirement is removed by part III of AA 1996 which applies to the contracting States to the New York Convention, the Geneva Protocol, and the Geneva Convention.

4-The winning party is requested to introduce evidence to the effect that the award is a foreign award and that the conditions mentioned in section 37(1, a, b, c) of part II are satisfied. Accordingly, he should provide evidence that an award is made according to section 35 of part II. In this section, a foreign award is an award made according to the Geneva Protocol or the Geneva Convention. Furthermore, he should provide evidence that an award has been made in pursuance of an agreement for arbitration which was valid under the law by which it was made, and that the award has been made by the tribunal provided for in the agreement or constituted in a manner agreed upon by the parties, and it has been made in conformity with the law governing the arbitration procedure.³⁹⁸ However, submission of this evidence is not

³⁹⁷ AJVD Berg. Op. Cit (footnote 168) 246.

³⁹⁸ Those conditions are provided by S 37(1, A, B, C) of Pt II of AA 1996.

mandatory for the winning party and they are requested to produce it as necessary. The necessity of such a requirement is decided by the enforcing court in the light of the circumstances of each case.

5-Translated documents: as for the documents named above, where they are not in English, the winning party must introduce a translation for each one into English. This translation must be certified as correct by the diplomatic or consular agent of the country to which the winning party belongs, or certified in such a manner so that it may be considered sufficient according to English law.

The question of the authority that is responsible for the certification of the documents requested by this section is known, whilst this authority, according to part III of AA 1996, is not known. According to part II of AA 1950, the winning party must certify its document through the diplomatic or consular agent of the State to which he belongs; for example, the country of which the winning party bears its nationality. If this is not possible the winning party can certify it in a manner which is sufficient according to English law; for example, by bringing a certification from the arbitrator or from the institution under whose auspices the award was made or any other manner that fits English Law.

This point requires the winning party to consult an expert in English law who can inform him of the manner that is acceptable by the English law. However, according to part III of AA 1996, the winning party is not requested to certify his document by a particular agent. He may do so by an agent of the state to which he belongs, the English agent, or the agent of the country in which the award was made. This depends on the request of the enforcing court.

Finally, if the winning party seeks to recognise and enforce an award made according to the Washington Convention, he must follow the procedures provided by section (1) of the Arbitration (International Investment Disputes) Act 1966. The evidence that the winning party has to provide is a copy of the award certified by the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID).³⁹⁹ Since

³⁹⁹ This evidence is provided by Art 54 (2) of the Washington Convention.

section 54 (3) of the Washington Convention leaves the enforcement of the Washington Convention award to the laws concerning the execution of judgements in force in the forum place, these laws may require some additional evidence, which the winning party must furnish. According to the Arbitration (International Investment Disputes) Act 1966, the winning party must conform with the evidence and conditions provided by section (1) of the said Act.⁴⁰⁰

4.1.2. In Jordan

As far as foreign convention awards in Jordan are concerned, the evidence that the winning party must introduce according to the applicable convention regimes can be classified into three main kinds:

1-Authenticated and certified documents: the winning party is requested to introduce an original authenticated award or, if this is not possible, a certified copy thereof. He is also requested to provide the arbitral agreement or a copy of it.⁴⁰¹ The authority which is responsible for authenticating or certifying these documents is indicated by the applicable regimes themselves, such as the Secretary-General of ICSID, if the applicable regime is the Washington Convention. However, if such an authority is not indicated by the applicable regimes, this will be decided by the enforcing court. This court, in practice, will usually be satisfied, and accept the authentication or certification made by the arbitrator or institution under whose auspices the award was made.⁴⁰²

⁴⁰⁰ It must also meet the provisions of RSC Order 71, namely the rules 1, 3(1) (except sub-paragraphs c, iv and d thereof), 7 (except paragraph (3) (c) and (d) thereof), and 10(3) which shall apply with the necessary modifications in relation to an award as they apply in relation to a judgement to which Part II of the Foreign Judgements (Reciprocal Enforcement) Act 1933 applies. Application to enforce the Washington Convention award shall be made by claim form under CPR rule 8.6. The evidence provided by rule 3 of Order 71 that must be introduced along with the application are: 1- in lieu of exhibiting the judgement or a copy thereof, exhibit a copy of the award certified pursuant to the convention. 2- in addition to stating the matters mentioned in paragraph 3 (1) (c) (i) and (ii) of the rule 3 state whether at the date of the application the enforcement of the award has been stayed (provisionally or otherwise) pursuant to the convention and whether any, and if so what, application has been made pursuant to the convention, which, if granted, might result in a stay of the enforcement of the award. See MJ Mustill and SC Boyd. *Op. Cit* (footnote 29) 579.

⁴⁰¹ Such evidence is provided by art 5 (A) of the Arab League Convention, Art 54 (2) of the Washington Convention, art IV (1,a) of the New York Convention, and arts 31(b) and 34 of the Riyadh Convention.

⁴⁰² Arts 6-14 of the Jordanian Evidence Law of 2001.

2-Translated documents: the winning party is also requested to provide a certified Arabic translation of any documents which are not in Arabic language. However, the authority by which a translation must be certified as correct is not fixed by the applicable regimes in Jordan. The enforcing court, in practice, is usually satisfied, and accept a translation certified by an official or sworn translator or by the diplomatic or consular agent of the Jordanian government or of the State where an award was made.

3-In addition to the above evidence, some regimes request the winning party to introduce other documents. According to the Arab League Convention, the winning party must introduce the original summons of the text of the arbitration which is to be enforced or an official certificate to the effect that the text of the award has been duly served, a certificate from a responsible authority to the effect that an award is final and enforceable, and a certificate that the parties were duly served with a summons to appear before the proper arbitrators in cases where the award was made by default.

Furthermore, according to the Riyadh Convention, the winning party must introduce, along with an award, a certificate to the effect that an award is final unless this effect is stated in the award itself, a certified copy that an award is served, and certification proving that the defendant had been duly served with a summons to appear before the arbitrators in cases where the award was made by default.

4.2. Evidence about the recognition and enforcement of foreign non-convention awards

In England, the applicable rules dealing with a foreign non-convention award are covered under section 66 of AA 1996, and at Common Law. According to section 66, there is no provision about the evidence which must be introduced before the competent court. However, in practice, the winning party, under section 66 of AA 1996, must furnish the competent court with the arbitral agreement or a copy thereof and the original award or a copy thereof, as well as a translation of the documents.⁴⁰³

⁴⁰³ MJ Mustill and SC Boyd. *Op. Cit* (footnote 29) 577.

However, if the winning party seeks to enforce a foreign award at Common Law,⁴⁰⁴ he must, according to the judicial authorities, introduce and prove that the parties have submitted their dispute to arbitration by an agreement which is valid under its governing law, that the dispute which has arisen falls within the arbitration agreement, that the appointment of the arbitrator or tribunal is according to the arbitral agreement, that the award is valid and final according to the law which governs the arbitration proceedings, and that a translation of the documents has been provided. These were mentioned, for instance, in a case where the award was enforced under part II of AA 1950 in *Union Nationale des Cooperatives Agricoles de Cereales v Robert Catterall & Co. Ltd*,⁴⁰⁵ but it is equally applicable to the recognition and the enforcement of the award at Common Law.⁴⁰⁶

Moreover, with respect to the enforcement of the award under part II of the Administration of Justice Act 1920 or part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933, the RSC Order 71(Schedule 1 of the CPR) shall apply regarding the award as it applies in relation to judgement given by that court.⁴⁰⁷

An award made in one part of the United Kingdom can be enforced in other parts of the United Kingdom under part II of the Civil Jurisdiction and Judgments Act 1982. The evidence and procedures with respect to this kind of award are different should the award include provision of money or provision of non-money. It is by registration under schedule 6 of the Act (if the award orders payment of a sum of money) or under schedule 7 (if the award orders any relief or remedy not requiring the payment of a sum of money).

⁴⁰⁴ DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 366. JHC Morris. Op. Cit (footnote 12) 171. *Norske Atlas Insurance Co. Ltd. v London General Insurance Co. Ltd.* (1927) 28 Li.L.R. 104, 106-107, *Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer etc* [1953] 2 Lloyd's Rep 373, *Kianta Osakeyhto v Britain and Overseas Trading Co* [1954] 1 Lloyd's Rep 247, 250-251.

⁴⁰⁵ [1959] 2 Q.B 44, 54.

⁴⁰⁶ L Collins and others (eds). Op. Cit (footnote 12) 623. JHC Morris. Op. Cit (footnote 12) 169 and 172.

⁴⁰⁷ Subject to the following modification:

For references to the country of the original court, there shall be substituted reference to the place where the award was made; and 2- the affidavit required by rule 3 of the said Order must state (in addition to the other matters by that rule) that to the best of the information or belief of the deponent the award has, in pursuance of the law in force in the place where it was made become enforceable in the same manner as a judgement given by a court in that place.

MJ Mustill and SC Boyd. Op. Cit (footnote 29) 578.

On the other hand, the applicable regime for foreign non-convention awards in Jordan is Act No 8. According to section 6 of this Act, the winning party must introduce a certified copy of the arbitral award, a certified copy of the translation if the award is not in Arabic, and an extra copy of the award or a translation to be served to the losing party.

4.3. Summary

The winning party has to submit several pieces of documentary evidence to enforce an arbitral award. These refer to the original arbitral award or a copy thereof, the original arbitral agreement or a copy thereof, and a translation of the documents if they are written in a language other than English or Arabic, if the enforcement is sought in England or Jordan.

Some regimes request the winning party to prove that the award is final in the State where it was made. This requirement amounts, in practice, to obtaining an enforcement order from the State of origin. The burden of producing the requested evidence for enforcement is placed upon the party who seeks enforcement under the English or Jordanian regimes.

Chapter Five: Modes of Recognition and Enforcement of Foreign Commercial Arbitral Awards

The previous chapters examined the competent court and the procedures before this court, the time limit for submitting a request for an enforcement order, and the evidence for enforcement. Since the winning party is not entitled to recognise and enforce the award directly against the assets of the losing party, then the award should be converted into a judgement or order to enforce it against the assets of the losing party.⁴⁰⁸ To do so, he has to resort to the local regimes enacted for this purpose.

There are many modes of enforcement provided by the regimes concerned. The winning party need not resort to these modes of enforcement unless the losing party refuses to carry out the award voluntarily. Logically, at this stage, it is necessary to determine first the extent to which the losing party is willing to carry out the award voluntarily. What are the motives behind carrying out the award voluntarily? After this stage, displaying the mandatory modes of enforcement will be placed in its proper context in this chapter.

Since the mandatory modes of enforcement are numerous, it then becomes important to show how can the winning party resort to a particular mode of enforcement as the more favourable one? By which means can he do so?

Accordingly, this chapter will focus on the modes of enforcement as provided by the applicable regimes in England and Jordan.⁴⁰⁹ It is divided into the following sections:

- The voluntary mode of enforcement of foreign arbitral awards.
- The mandatory modes of enforcement of foreign arbitral awards.
- The more favourable mode of enforcement.

⁴⁰⁸ MJ Mustill and SC Boyd. *Op. Cit* (footnote 17) 416.

⁴⁰⁹ The execution methods, such as seizure and sale of goods under a writ of fieri facias, garnishment of debts, charging orders, receiverships, sequestration of assets, and any other executing method of the same sort which may be found in Supreme Court practice in England and Executing Law in Jordan, lie beyond the scope of this study.

5.1. The voluntary mode of enforcement of foreign arbitral awards

It is submitted as a matter of fact that the majority of arbitral awards are voluntarily and spontaneously enforced by the losing parties after they have received notice of them.⁴¹⁰ In fact, statistics suggest that about 94% of the awards of the ICC are said to be carried out voluntarily by the losing party.⁴¹¹ Other statistics confirm that approximately nine out of ten are voluntarily enforced.⁴¹² In this respect, two main reasons account for not achieving reliable statistics about the rate of voluntary enforcement of an arbitral award.⁴¹³ Firstly, arbitration is basically a private process, and secondly, there are no reason why an arbitrator or tribunal needs to know whether or not an arbitral award has been enforced.

Voluntary enforcement of an arbitral award is the first method that the losing party may consider. The losing party may carry out the award voluntarily in good faith wishing to continue the relationship with the winning party. He may also do this in order to protect his reputation, particularly when the award is made under the auspices of the rules of trade associations of which the disputants are members.⁴¹⁴ On the other hand, the decision to enforce an arbitral award may be to avoid sanctions that may be cast upon a losing party who refuses to comply with the arbitral award. In this regard, the winning party may exert some kind of commercial pressure on the losing party in order to carry out the award voluntarily. The commercial sanctions which may force the losing party to carry out the award can be summarised as follows:⁴¹⁵

⁴¹⁰ P Lalive 'Enforcing Awards' [1984] *International Arbitration 60 Years of ICC Arbitration a Look at the Future* 318, 347-354. R David. Op. Cit (footnote 273) 357. P Sarcevic 'The Setting Aside and Enforcement of Arbitral Awards Under the UNCITRAL Model Law' in P Sarcevic (ed) *Essays on International Commercial Arbitration* (Graham & Trotman Limited 1989) 191. A Redfern and others. Op. Cit (footnote 55) 510. J Tackaberry and A Marriott (eds) *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (4th edn Sweet and Maxwell London 2003) vol 1, 387. M Domke. Op. Cit (footnote 191) 489.

⁴¹¹ P Sarcevic 'The Setting Aside and Enforcement of Arbitral Awards Under the UNCITRAL Model Law' in P Sarcevic (ed) *Essays on International Commercial Arbitration* (Graham & Trotman Limited 1989) 191.

⁴¹² P Lalive. Op. Cit (footnote 410) 347.

⁴¹³ A Redfern and others. Op. Cit (footnote 55) 510.

⁴¹⁴ R David. Op. Cit (footnote 273) 357. P Sarcevic 'The Setting Aside and Enforcement of Arbitral Awards Under the UNCITRAL Model Law' in P Sarcevic (ed) *Essays on International Commercial Arbitration* (Graham & Trotman Limited 1989) 191-192. P Lalive. Op. Cit (footnote 410) 347-348.

⁴¹⁵ R David. Op. Cit (footnote 273) 357-358. P Sarcevic 'The Setting Aside and Enforcement of Arbitral Awards Under the UNCITRAL Model Law' in P Sarcevic (ed) *Essays on International Commercial Arbitration* (Graham & Trotman Limited 1989) 191-192. P Lalive. Op. Cit (footnote 410) 348-349. H Alvarez 'Arbitration under the North American Free Trade Agreement' (2000) 16(4) *Arbitration International* 393, 407. A Redfern and others. Op. Cit (footnote 55) 512-513. M Domke.

1-Publicity given to such a refusal: such publicity may take the form of posting the name of the losing party on a notice-board at the Chamber of Commerce, or letters circulated to the members of the association. For example, if GAFTA is satisfied there is a default, its members are informed, making the other members refuse to deal with the defaulter until an award is enforced.

2-The prevention of the losing party from resorting to arbitration under the auspices of the Chamber of Commerce or any other arbitral institution

3-the boycotting the losing party by other businesspeople who conduct the same kind of business

4- The exclusion of the losing party from the trade association under whose auspices the arbitration has been conducted

5- A penalty clause can be provided by the arbitration rules or stipulated in the contract by the parties

6-A suspension of the benefits gained by the losing party from trade agreements. For example, such a sanction is provided by Chapter 20 of North America Trade Agreement, (NAFTA).

7-In ICSID Arbitration, the losing party who refuses to carry out an award voluntarily may not be able to obtain any further loans from the World Bank.

It is suggested that there are three reasons why a State party will comply with the arbitral award voluntarily.⁴¹⁶ Firstly, non-compliance with arbitration by the State leads to a denial of justice and engages its responsibility. Secondly, it is a fundamental principle of international law that a State will act in good faith whether it fails to participate in all or part of the arbitration proceedings. Thirdly, if a State against which an award was made fails to carry out the arbitral award, it may be guilty of an

Op. Cit (footnote 191) 489-490.

international tort.⁴¹⁷ Thus, it is confirmed in practice that States act in good faith and carry out arbitral awards voluntarily.⁴¹⁸

Ensuring the voluntary enforcement by the losing party depends, as has been suggested, on the quality of the arbitral award, which in turn depends on the arbitrators, the institutions, and the lawyers. The more these factors are qualified and concerned with achieving the enforceable arbitral award, the more often such an award will be voluntarily carried out by the losing party.⁴¹⁹

5.2. Mandatory Modes of enforcement of foreign arbitral awards

If the losing party refuses to carry out the arbitral award voluntarily, the winning party can exert pressure whether commercial or otherwise to force the losing party to carry out the award. If the losing party insists on not executing the award, the winning party will seek the help of the court against the recalcitrant party. To do so, the winning party needs first to trace the assets of the losing party, such as money in bank accounts, an aircraft on a ship, a cargo of oil in transit, or any other sorts of assets.⁴²⁰ Then, the winning party seeks the local courts' help in the place where these assets are located.

As far as the recognition and enforcement of a foreign arbitral award in England and Jordan are concerned, several modes of enforcement are provided by the applicable regimes in both States. This section will examine these modes in England and then in Jordan.

5.2.1. In England

The modes of enforcement which are provided by the applicable regimes can be summarised as: by action at Common Law, summary procedures, and by registration

⁴¹⁶ RB Von Mehren and PN Kourides. Op. Cit (footnote 80) 476, 537.

⁴¹⁷ A Mann 'State Contracts and International Arbitration' in FA Mann *Studies in International Law* (Clarendon Press Oxford 1973) 291-293.

⁴¹⁸ RB Von Mehren and PN Kourides. Op. Cit (footnote 80) 476, 537.

⁴¹⁹ P Lalive. Op. Cit (footnote 410) 349-354.

⁴²⁰ A Redfern and others. Op. Cit (footnote 55) 514.

before the competent court.⁴²¹

5.2.1.1. Action at Common Law

It is submitted that the consensual character of arbitration means that the parties to an arbitration agreement imply a promise to enforce a valid award.⁴²² This also means that they promise not to take any action inconsistent with their submission to arbitration.⁴²³ The idea of action at Common Law is based on the breach of the implied promise made by the parties.⁴²⁴ The winning party by this mode of enforcement can obtain judgement giving effect to an award. This judgement will be for the amount of the award,⁴²⁵ for damages for failure to carry out the award,⁴²⁶ for specific performance of the award, or for any other form of judgements.⁴²⁷

The argument of an action at Common Law is whether the successful suitor can sue on the award itself, or on the cause of action.⁴²⁸ It held in *Ferrer and Rollason v*

⁴²¹ The bankruptcy of the losing party after the commencement of the arbitration and before the enforcement of the arbitral award does not have any effects on the enforcement process. Moreover, a trustee in bankruptcy with permission of the court may carry out the award. DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 368.

⁴²² DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 366. The editors refer to the following cases: *Purslow v Baily* (1704) 2 Ld Raym 1039, *Bremer OI Transport GmbH v Drewry* [1933] 1 KB 753, *Bloemen v Gold Coast City Council* [1973] AC 115.

⁴²³ L Collins and others (eds). Op. Cit (footnote 12) 621. DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 366. When the award contains an order for payment of costs, but does not fix the amount, the costs need not be assessed before an action is commenced to recover them, the winning party has a choice whether to do so or not. DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 366.

⁴²⁴ MJ Mustill and SC Boyd. Op. Cit (footnote 17) 417. DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 367-368

⁴²⁵ *Beswick v Beswick* [1968] AC 58.

⁴²⁶ *Birtley and District Cooperative Society Ltd v Windy Nook and District Industrial Cooperative Society Ltd (No 2)* [1960] 2 QB 1, *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223, 273-274.

⁴²⁷ The court may order specific performance of an obligation to pay a sum of money as in *Beswick v Beswick* [1968] AC 58. It may also issue judgment for unpaid interest even though the amount of the award has been paid as in *Coastal States Trading (UK) Ltd v Mebro Mineraloel-Handelsgesellschaft GmbH* [1986] 1 Lloyd's Rep 465. The winning party may ask for a declaration that the award is binding, valid, or as to its construction and effect as in *Birtley and District Cooperative Society Ltd v Windy Nook and District Industrial Cooperative Society Ltd (No 2)* [1960] 2 QB 1, *Selby v Whitbread & Co* [1917] KB 736, and *Merrifield, Ziegler & Co v Liverpool Cotton Association Ltd* (1911) 105 LT 97. The court may also give injunction restraining the losing party from failing to comply with the arbitral award as in *Birtley and District Cooperative Society Ltd v Windy Nook and District Industrial Cooperative Society Ltd (No 2)* [1960] 2 QB 1, and in *Blackett v Bates* (1865) 1 Ch App 117. It may also give a *Mareva* injunction to freeze assets of the losing party out of the jurisdiction as a security for the enforcement of the award as in *Rosseel NV v Oriental Commercial & Shipping Co. (O.K.) LTD and others* [1991] 2 Lloyd's Rep 625.

⁴²⁸ Cause of action was defined in *Coburn v Colledge* (1897) 1 Q.B 702, 706 as 'Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court'.

Oven,⁴²⁹ that the cause of action embraced both the arbitral agreement and the arbitral award.

However, the argument at the enforcement stage would be whether or not the cause of action i.e. the arbitral agreement or the underlying contract is merged with the arbitral award. In *East India Trading Co. Inc v Carmel Exporters and Importers Ltd*,⁴³⁰ the court adopted the concept of a merger in the domestic judgement, and rejected it in the foreign judgement. It was held by Cotton L J in *Re Henderson; Nouvion v Freeman* that:

A foreign judgement does not, in the view of an English court, merge the original cause of action, but if the party likes to proceed here on his original cause of action he may do so, notwithstanding the foreign judgement. If he elects to proceed on the foreign judgement, then he must show that the matter has been adjudicated upon by a competent court and that the adjudication is final and conclusive.⁴³¹

The tendency was to adopt the doctrine of non-merger with respect to foreign judgement. The winning party can rely on the original cause of action or on the judgement recovered.⁴³² In *Carl Zeiss Stiftung v Rayner & Keeler Ltd.(no.2)*,⁴³³ Lord Wilberforce criticised the adoption of non-merger doctrine with respect to foreign judgement as 'illogical ...no sound basis for denying a defendant the benefit of a decision on an issue'. However, after the Civil Jurisdiction and Judgements Act 1982, the non-merger doctrine was abolished with respect to foreign judgements. According to section 34 of this Act, the English court would not allow the plaintiff to rely on a cause of action that resulted in judgement, unless the judgement was not enforceable or entitled to recognition in England.

With respect to a foreign award, there is no clear authority on this matter. For instance, in *Norske Atlas Insurance Co. Ltd. v London General Insurance Co. Ltd*, the action was based on the award and not on the arbitral agreement. Mr Justice Mackinnon, in his judgement, addressed this point, saying that:

⁴²⁹ (1827) 7 B & C 427.

⁴³⁰ [1952] 2 Q.B 439

⁴³¹ As stated by Sellers J in *East India Trading Co. Inc v Carmel Exporters and Importers Ltd* [1952] 2 Q.B 439, 442.

⁴³² DT Hascher 'Recognition and Enforcement of Arbitration Awards and the Brussels Convention' (1996) 12(3) *Arbitration International* 233, 250.

⁴³³ [1957] 1 A.C 853, 966.

I quite agree that if the plaintiffs were suing upon this treaty for marine losses sustained by them under insurances they were making, and were claiming as reinsurers, these pleas in defence would be fatal to the plaintiffs. They would be suing upon a contract of marine insurance which, first of all, was not expressly in a policy, and, secondly, was not stamped, and could not be stamped, as a policy needs to be. But in my judgment the question is not that at all. The plaintiffs here are suing on the award. In order to sue on an award, it is, I think, necessary for the plaintiffs to prove, first, that there was a submission; secondly, that the arbitration was conducted in pursuance of the submission; and, thirdly, that the award is a valid award, made pursuant to the provisions of the submission, and valid according to the *Lex fori* of the place where the arbitration was carried out and where the award was made.⁴³⁴

Whereas, in *Bremer Oeltransport v Drewry*, the action was based on arbitration agreement and not on the arbitral award. In this case, Slesser L addressed this point as:

The few cases which appear to support the view that an action may be brought upon the award in my view do not exclude in any event an action brought upon the agreement to refer differences and for this purpose, in my view, the submissions are here sufficiently stated to be in the charterparty of November 19, 1929. Without, therefore, finally determining whether an action may or may not be brought on an implied contract in the award itself, I am clearly of the opinion that it may be brought upon an agreement containing a term to refer disputes, and that the present claim is properly pleaded as arising from such an agreement. It is, therefore, an action for the enforcement of a contract made within the jurisdiction. If it appears that a claim is partly within and partly without the order authorising service out of the jurisdiction, the judge may give leave for service; it is a matter within his discretion.⁴³⁵

Moreover, in *Agromet Motorimport Ltd. (Poland) v Maulden Engineering Co. (Beds) Ltd.*⁴³⁶ the argument was about the expiration of the six years from the *cause of action*. It was argued that such a cause of action occurred since the breach of the underlying contract on which the award was based. This argument was rejected and the court held:

That an action to enforce an arbitrator's award was an independent cause of action, arising from the breach of an implied term in the arbitration agreement that the award would be honoured and not from the breach of the contract which had been the subject of the arbitration; that the six-year limitation

⁴³⁴ (1927) 28 Li.L.R 104, 106-107.

⁴³⁵ [1933] 1 K.B 753, 765.

⁴³⁶ [1985] 1 W.L.R 762.

period imposed by section 7 of the limitation Act 1980 upon the bringing of an action to enforce an award therefore began to run from the date of the failure to honour the award.⁴³⁷

Mustill and Boyd addressed the matter as:

It has been sometimes necessary to decide whether the action is ‘ground upon a contract’ or is brought ‘to enforce contract’, This point would give greater weight to one or other element of the cause of action, depending on the circumstances, but at the end both of them must be presented before the plaintiff can sue.⁴³⁸

It can be seen from the above cases that there is no ground upon which the suitor can sue before the English courts whether on the award itself, on the underlying contract, or on the arbitral agreement. The argument about whether or not the foreign award is merged with the cause of action in England is connected with its counterpart in regard to foreign judgments. The tendency of a foreign judgment was to adopt the doctrine of non-merger. Thus, the winning party can rely on the original cause of action or on the judgement recovered to enforce such a judgment in England.⁴³⁹ However, this doctrine was demolished by section 34 of Civil Jurisdiction and Judgements Act 1982. After that, the question arises as to whether or not the doctrine of non-merger is applicable with respect to foreign arbitral awards? The answer to this question was addressed by Dicey and Morris:

An English award may give rise to a cause of action estoppel or an issue estoppel, and if the award is a final award under the law governing the arbitration proceedings the claimant in the arbitration should not be entitled to sue on the original cause of action. There is no reason of legal policy why the same should not be true in the case of a foreign award. In relation to foreign judgments the non-merger rule has been abolished by statute, and there is no reason of policy or principle why the obsolete and anomalous rule of non-merger in relation to foreign judgments should be extended to foreign awards. Indeed the consensual and contractual character of arbitration means that parties to an arbitration agreement implied promise to perform a valid award, and it should follow that they also promise not to take any action inconsistent with their submission to arbitration. Bringing proceedings on the original cause of action would be wholly inconsistent with the obligation under the submission and the subsequent award. If, therefore, under the law governing the arbitration proceedings the original cause of action is merged in the award,

⁴³⁷ [1985] 1 W.L.R 762, 763.

⁴³⁸ MJ Mustill and SC Boyd. Op. Cit (footnote 17) 417.

⁴³⁹ DT Hascher. Op. Cit (footnote 432) 250.

a claimant should not be entitled to rely on the original contract.⁴⁴⁰

Since there is no judicial authority in this regard at Common Law, the criterion, as has been suggested, is the law that governs arbitration proceedings. If this law considers that the original cause of action is merged into the award, the suitor cannot rely on such a cause of action to enforce a foreign arbitral award.⁴⁴¹

However, the latest tendency of the English court is to enforce the arbitral award and not the underlying contract. In the *Westacre* case,⁴⁴² the Commercial Court held that:

[T]his was not a case of direct enforcement of the underlying contract, but of enforcement of the award which was a valid award in accordance with the law, Swiss law, chosen by the party and made by arbitrators having jurisdiction in respect of a contract governed by Swiss Law.

This decision was confirmed by the Court of Appeal which stated that ‘Although the award was not isolated from the underlying contract it was relevant that the English court was considering the enforcement of an award and not the underlying contract’.⁴⁴³ Moreover, in the *Hilmarton* case,⁴⁴⁴ the court in its judgement followed the *Westacre* case approach; in that it held as ‘1-the court was not adjudicating on the underlying contract, the decision was whether or not the arbitration award should be enforced in England’.

Therefore, in these two cases, the court paid consideration to the arbitral award itself and not to the underlying contract (cause of action) for the purpose of recognition and enforcement. In other words, the cause of action of the arbitration is merged with the award when the interested party seeks to recognise and enforce such an award before the English court and it will not therefore survive to be re-agitated again.⁴⁴⁵

5.2.1.2. Summary procedures

Summary procedures are provided by sections 66 of AA 1996, 101 of AA 1996, and

⁴⁴⁰ L Collins and others (eds). Op. Cit (footnote 12) 621.

⁴⁴¹ *ibid* 621.

⁴⁴² [1998] 2 Lloyd’s Rep 111, 112.

⁴⁴³ [1999] 3 W.L.R 811.

⁴⁴⁴ [1999] 2 Lloyd’s Rep 222.

⁴⁴⁵ P Ramaswamy ‘Enforcement of Annulled Awards an Indian Perspective’ (2002) 19 (5) *Journal of International Arbitration* 461, 464.

36(1) of part II of AA 1950 after amendment. These regimes provide, as a cumulative, not an alternative,⁴⁴⁶ two kinds of remedies.⁴⁴⁷ Firstly, by leave (now known, under the CPR, as ‘permission’) of the court to enforce a foreign award in the same manner as a judgement or order of the court to the same effect as provided in sections 66(1) of AA 1996, 101(2) of AA 1996, and 36(1) after amendment of part II of AA 1950. Secondly, the court may enter a judgement in terms of the award as provided by sections 66(2) of AA 1996, 101(3) of AA 1996, and 36(1) after amendment of part II of AA 1950.⁴⁴⁸

This application for enforcement by this mode is set out in the Civil Procedure Rule (CPR) section 62. However the application must be supported by an affidavit exhibiting the arbitration agreement and the original award or a copy of them and translation if they are not in English.

The winning party must also state the name and the usual or the last known place of abode or business of the winning party and the losing party. This must be combined with a statement that the award has not been complied with or the extent to which the losing party has complied with it at the date of application.

An order giving leave to enforce an award must be drawn up by or on behalf of the winning party and must be served to the losing party by delivering a copy personally or by sending a copy to him at his usual or last known place of residence or business or in any other manner, as the court may direct. Within 14 days, after the service of the order or within any other period as the court may fix, the losing party may apply to set aside the order and the enforcement of the award will be delayed until after the expiration of that period or until after the losing party’s application for setting it aside is finally disposed of.⁴⁴⁹

However, seeking enforcement under section 66 is usually made without notice to the other party by means of an arbitration claim form. This was applied in *Walker v Rowe*

⁴⁴⁶ According to some commentators it is an alternative method of enforcement rather than a cumulative one. See A Tweeddale and K Tweeddale. Op. Cit. (footnote 2) 178.

⁴⁴⁷ MJ Mustill and SC Boyd. Op. Cit (footnote 29) 210. B Harris R Planterose and J Tecks *The Arbitration Act 1996 a Commentary* (3rd edn Blackwell Publishing UK 2003) 308, 418.

⁴⁴⁸ SS 66 (2) and 101(3) of AA 1996.

⁴⁴⁹ MJ Mustill and SC Boyd. Op. Cit (footnote 17) 421. MJ Mustill and SC Boyd. Op. Cit (footnote 29) 577. B Harris R Planterose and J Tecks. Op. Cit (footnote 447) 311, 419. Examples of various forms to be used in proceedings for summary enforcement are available in DM Cato *Arbitration Practice and*

in which the court noticed by Aikens J that ‘an application to enforce an award pursuant to s.66 of arbitration Act, 1996 can be made without notice by using the practice form specified’.⁴⁵⁰

The order which is issued by the competent court must mirror the arbitral award, in that the order must not change the name of the parties,⁴⁵¹ or add interest which has not been granted by the arbitral award.⁴⁵² Otherwise the order will be set aside.⁴⁵³

Where leave is given, the award will be enforced in the same manner as the judgement of the same court. This means that all modes to enforce judgements of the court are then available to enforce the awards,⁴⁵⁴ including an injunction.⁴⁵⁵ Where leave is given, judgement may be entered in terms of the award. The party who has obtained the permission can enforce the award without delay, but he is not obliged to do so.⁴⁵⁶

This way of enforcement is necessary to comply with a contractual requirement to reap the benefit of certain conventions dealing with the enforcement of judgements abroad.⁴⁵⁷ In this case, careful attention must be taken into account by the winning party because an award which is merged with a judgement will not exploit the advantages that are provided by some conventions which deal with the enforcement of an arbitral award if enforcement is sought abroad.⁴⁵⁸ In this regard, if a foreign arbitral award is merged with judgement, it is submitted that such an award will be enforced in England as a judgement and not as an arbitral award.⁴⁵⁹

The conditions for seeking enforcement under section 66 are the same as those at Common Law, but the enforcement under section 66 does not affect any question of

Procedure Interlocutory and Hearing Problems (2nd edn LLP Limited 1997) 278-280.

⁴⁵⁰ [2000] 1 Lloyd’s Rep 116, 119. However, the matter whether or not to notice the other party is left to the enforcing court. DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 363.

⁴⁵¹ *Norsk Hydro ASA v The State Property Fund of Ukraine and ors* [2002] EWHC 2120 (Comm).

⁴⁵² *D. J. Walker v Christopher William Rowe* [2002] 1 Lloyd’s Rep 116.

⁴⁵³ *Norsk Hydro ASA v The State Property Fund of Ukraine and ors* [2002] EWHC 2120 (Comm).

⁴⁵⁴ DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 364.

⁴⁵⁵ *ibid.*

⁴⁵⁶ *ibid.*

⁴⁵⁷ B Harris R Planterose and J Tecks. Op. Cit (footnote 447) 308 and 418.

⁴⁵⁸ *ibid.*

⁴⁵⁹ *East India Trading co. Inc. v Carmel Exporters and Importers Ltd.* [1952] 2 Q.B 439.

substance, as illustrated in *Coastal States Trading (U.K) Ltd. v Mebro Mineraloelhandelsgesellschaft GMBH*,⁴⁶⁰ instead it provides a quicker and cheaper remedy than enforcement by an action on the award at Common Law.⁴⁶¹

Having said that the enforcement under the above sections is a summary form of procedure intended to dispense with the full formalities of a trial, this is not suitable for all cases. For example, this method is not suitable if the objection needs a trial to be dispensed.⁴⁶² In *Union Nationale des Cooperatives Agricoles de Cereales v Robert Catterall & co*,⁴⁶³ the court held that the summary method of enforcing an award is only to be used 'in reasonably clear cases'. In this case, the court can decide the question of law that may arise in summary procedure applications since this question does not involve an issue of fact, and the court will probably now only refuse the application where the objection cannot properly be disposed of without a trial.⁴⁶⁴ This principle is confirmed in *Curacao Trading co. BV v Harkisandas & co*:⁴⁶⁵

In Mustill and Boyd on commercial arbitration, the learned editors state that... I respectfully agree with the statement in the text book, and consider that in a case like the present, where the whole issue turns on the construction of the rules and involves a pure point of law, it would be absurd for the court, having heard all the arguments, to decline to adjudicate and insist upon a full trial, where the same arguments would be duplicated at considerable extra expense.

In case the court refuses to enforce an award under section 66, the application can be made by action at Common Law.⁴⁶⁶ In order to save the time and costs of commencing fresh proceedings, the court may continue as if begun by writ and give direction for further conduct of action.⁴⁶⁷ A foreign award may not be enforced under

⁴⁶⁰ [1986] 1 Lloyd's Rep 465.

⁴⁶¹ MJ Mustill and SC Boyd. Op. Cit (footnote 17) 419. DM Cato. Op. Cit (footnote 449) 272.

⁴⁶² MJ Mustill and SC Boyd. Op. Cit (footnote 17) 419.

⁴⁶³ [1959] 2 QB 44, 52.

⁴⁶⁴ MJ Mustill and SC Boyd. Op. Cit (footnote 17) 419. DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 364. The latter authors cited the case *ABCI v Banque Franco-Tunisienne* [2002] 1 Lloyd's Rep 511. The same authors also mentioned that the enforcement may not be successful in this way if the award purports to decide matters that are not capable of resolution by arbitration or grant relief which would properly affect the rights of person who is not a party to the arbitral agreement even though such reasons are not mentioned by s. 66. They justify that as such reasons are considered in DAC Report. Then, they said that these are exceptional cases.

⁴⁶⁵ [1992] 2 Lloyd's Rep 186, 192.

⁴⁶⁶ DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 366. It is held by Clark LJ in *Goldstein v Conley* [2002] 1 WLR 281, 295 that 'The right of action at common law is independent of any other form of statutory enforcement'.

⁴⁶⁷ MJ Mustill and SC Boyd. Op. Cit (footnote 17) 419.

section 66 if, for example, an award decides the question of quantum but not of liability (declaratory award).⁴⁶⁸ In such a case, the winning party must proceed by action and rely on the award as an estoppel on the issues which are decided therein.⁴⁶⁹ Also, the enforcing court may under some circumstances conclude that the summary method of enforcement is not an appropriate remedy, if it is challenged.⁴⁷⁰

Moreover, a foreign arbitral award cannot be enforced under section 66 if it is in a form in which it cannot be entered as a judgement.⁴⁷¹ For example, if it requires some calculation to be made before the amount payable is known. In *Margulies Brothers v Dafnis Thomaidis*,⁴⁷² for example it was held:

That the award was not capable of enforcement within sect. 26, in that it was not possible to enforce a document which merely said by way of declaration that certain contracts should be set against other contracts and that appellants should pay the differences between them; and that it was outside the statutory jurisdiction of the court to make the order sought.⁴⁷³

If it is not in a form in which it can be entered as a judgment to be enforced by summary procedure, it may be possible for it to be remitted to the arbitrator so that it can be put into a suitable form for entry as a judgment.⁴⁷⁴ Since it is not possible to remit the award to the arbitrator, as it is a foreign award, the winning party can seek to enforce it by action at Common Law by claiming damages for failure to honour the award.⁴⁷⁵ Such as, in *Dalmia Cement Ltd v National Bank of Pakistan*,⁴⁷⁶ in which Kerr J commented that:

By the originating summonses the plaintiff seeks to enforce the awards under section 26 and 36, or under section 26 alone of arbitration act 1950. The bank

⁴⁶⁸ J Tackaberry and A Marriott (eds). Op. Cit (footnote 410) 389.

⁴⁶⁹ MJ Mustill and SC Boyd. Op. Cit (footnote 17) 419.

⁴⁷⁰ *Dalmia Cement Ltd v National Bank of Pakistan* [1975] QB 9, 10.

⁴⁷¹ J Tackaberry and A Marriott (eds). Op. Cit (footnote 410) 389. DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 365-366. B Harris R Planterose and J Tecks. Op. Cit (footnote 447) 308-309 and 418-419.

⁴⁷² [1958] 1 Lloyd's Rep 205.

⁴⁷³ Such defence also used in *Tongyuan International v Uni-Clan Ltd* (January 19, 2001) WL 98036. <<http://www.lawtel2002.com/~282e2b68d85541cfaadd0516354ff422~/content/display.asp?ID=AC0100770CC.pdf>> (20 October 2004)

⁴⁷⁴ MJ Mustill and SC Boyd. Op. Cit (footnote 17) 419.

⁴⁷⁵ In *Tongyuan International v Uni-Clan Lt* The sellers contended that that award should not be the subject of an order for its enforcement as a judgment on the grounds that: (ii) the form in which the award was expressed was not one capable of being enforced as a judgment.

⁴⁷⁶ [1975] QB 9, 13.

denies the plaintiff's entitlement to enforce the awards by means of such summary process but does not challenge its common law right to sue on the awards. In other words, while denying liability, the bank does not challenge the plaintiff's right to bring an action for damages based on the bank's failure to honour the awards by payment in India, and indeed asserts that this is the only remedy open to the plaintiff in the English courts in relation to the awards.

In cases where a foreign arbitral award is not enforceable under summary enforcement, the winning party can enforce it by action at Common Law, as stated by Kerr J in *Dalmia Cement Ltd v National Bank of Pakistan*:

It is common ground that in order to obtain summary enforcement of these awards the plaintiff must succeed on...in my view, the plaintiff's appropriate remedy in the English courts is to bring an action on the awards. In effect, therefore, I must dismiss the plaintiff's applications for summary enforcement.⁴⁷⁷

A foreign award may be expressed in a foreign currency. To enforce it under summary procedure or at Common Law, it must be converted into sterling. The date of the conversion will be the date when leave to enforce the award in sterling under sections 66 of AA 1996, 101 of AA 1996, or 36(1) of part II of AA 1950 is given.⁴⁷⁸

Furthermore, if the arbitral award provides for payment of money out of the jurisdiction, it cannot be enforced by the summary procedures, but it can be enforced at Common Law. This is what was held in *Bank Mellat v GAA Development*:

The submissions by Bank Mellat that the arbitrators had come to the wrong conclusions as a matter of Iranian law would be rejected; the proper interpretation of all clauses in a contract were matters falling within the jurisdiction of the arbitrator and a mistake made by an arbitrator as to the construction of any such clause could not amount to an excess of jurisdiction; the interpretation which the majority adopted was one that was manifestly open on the evidence and arguments before the trial; the award was final binding and enforceable.⁴⁷⁹

⁴⁷⁷ [1975] Q.B 9, 27. Discussion to reach this conclusion at P 23-27.

⁴⁷⁸ By analogy with *Jugoslavenska Oceanska Plovidba v Castle Investment co Inc* [1973] 2 Lloyd's Rep 1, and *Miliangos v George Frank (Textiles)Ltd* [1976] 1 Lloyd's Rep 201. In the former case the date of the award was chosen, but in the latter one the date as Lord Wilberforce said why should not be adjusted so as to allow conversion to be made at the date stated in the text. According to Mustill view, the rule of latter one superseded the rule of former one. MJ Mustill and SC Boyd. Op. Cit (footnote 17) 420. L Collins and others (eds). Op. Cit (footnote 12) 624. JHC Morris. Op. Cit (footnote 12) 173.

⁴⁷⁹ [1988] 2 Lloyd's Rep 44, 45.

A summary procedure method of enforcement is provided, as noted earlier, in section 66 of AA 1996 and part III of AA 1996, and section 36 after amendment of part II of AA 1950. A distinction must be drawn between the involved regimes, in terms of differences regarding evidence and conditions of enforcement.

Accordingly, under part III of AA 1996, an award must be a New York Convention award as indicated by section 100 of the said part. The winning party must also introduce the evidence provided by section 102 of part III. Whereas, section 36 of part II of AA 1950 is designated to recognise and enforce the foreign award made according to the Geneva Protocol 1923 or the Geneva Convention 1927 (certain foreign awards), this is reflected in *Dalmia Cement Ltd v National Bank of Pakistan*,⁴⁸⁰ where the award was not a foreign award, because the requirements of section 35 (1, b) of part II of AA 1950 were not satisfied, resulting in the award not being enforceable under section 36 of part II. The award must also satisfy the conditions of enforcement provided in section 38 of part II.⁴⁸¹

Furthermore, if the award is not enforceable by any of these regimes, enforcement may be achieved by suing the debtor for settlement of a debt. It is not the enforcement of an arbitral award by a fresh application in the English court claiming settlement of a foreign award debt. In this way, the creditor has to prove the debt, and the normal rules that are in use to prove a debt will apply.⁴⁸²

5.2.1.3. Registration before the competent court

According to some regimes, the enforcement of a foreign arbitral award is by way of registration before a competent court. Such registration must be done to enforce the Washington Convention award. The applicant must register such an award before the High Court according to sections 1 and 2 of the Arbitration (International Investment Disputes) Act 1966. Such an award will be enforced as a judgement of the High Court given when the award was rendered pursuant to the Convention and entered on the date of registration. The proceedings may be taken on the award, the sum for which it

⁴⁸⁰ [1975] QB 9, 10.

⁴⁸¹ The evidence and conditions of enforcement are shown in chapter five.

is registered carries interest, and the High Court has the same control over the award as if it had been a judgment of the High Court.⁴⁸³ In any pecuniary obligation imposed by the award and is expressed in a foreign currency, it can or perhaps must be registered for an amount expressed in the foreign currency.⁴⁸⁴

This way of enforcement also applies to enforce an award made pursuant to the Multilateral Investment Guarantee Convention. A foreign arbitral award made in a foreign country registered under part II of the Administration of Justice Act 1920 or part I of the Foreign Judgements (Reciprocal Enforcement) Act 1933 is enforceable in the same manner as a judgement given by a court in that country, provided that the award has, in pursuance of the law in force in the country where it was made, become enforceable in the same manner as a judgement given by a court in that country.⁴⁸⁵

A foreign arbitral award made according to the Geneva Convention on the International Carriage of Goods by Road is enforceable by registration under the Foreign Judgements (Reciprocal Enforcement) Act 1933 if the award has become enforceable in the country where it was made, and if the clause in the contract of carriage conferring competence on the arbitration tribunal provides that the tribunal should apply the Convention.⁴⁸⁶

Finally, an arbitral award made in one part of the United Kingdom becomes enforceable in the same manner as a judgement given by the court of law in that part and is enforceable by registration in other parts of the United Kingdom. This enforcement can be achieved under schedule 6 or 7 of the Civil Jurisdiction and Judgements Act 1982.⁴⁸⁷

⁴⁸² J Chuah. Op. Cit (footnote 268) 267-268. DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 367-368. The court may also enforce the award for specific performance and to declare the award as binding. DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 368.

⁴⁸³ MJ Mustill and SC Boyd. Op. Cit (footnote 29) 578-579. L Collins and others (eds). Op. Cit (footnote 12) 648.

⁴⁸⁴ L Collins and others (eds). Op. Cit (footnote 12) 648.

⁴⁸⁵ L Collins and others (eds). Op. Cit (footnote 12) 644-648. MJ Mustill and SC Boyd. Op. Cit (footnote 29) 578.

⁴⁸⁶ L Collins and others (eds). Op. Cit (footnote 12) 647. J Hill. Op. Cit (footnote 23) 694-696.

⁴⁸⁷ L Collins and others (eds). Op. Cit (footnote 12) 644-645. J Hill. Op. Cit (footnote 23) 693.

5.2.2. In Jordan

Under the Jordanian regimes, it can be said that there are two modes of enforcement. Firstly, an action before the First Instance Court: this mode of enforcement of foreign arbitral awards is provided by section 3 of Act No 8. According to this section, the winning party must sue the losing party before the First Instance Court to enforce foreign arbitral awards.

Suing before the First Instance Court takes the form of an application combined with the evidence that is required by the applicable regimes. The First Instance Court to which the winning party must sue is the court which has jurisdiction for the place where the losing party has his domicile. If he resides abroad, the request will be filed with the court that has jurisdiction in the place where the assets of the losing party are located. Otherwise, it is submitted that a foreign arbitral award cannot be enforced in Jordan.⁴⁸⁸

To enforce the New York Convention award it shall not, by virtue of article III of the New York Convention, impose substantially onerous conditions or higher fees or charges than would be imposed by the recognition and enforcement of a domestic award.

Secondly, registration before the competent court: this way of enforcement concerns the Washington Convention award and the Amman Convention award which are enforceable directly as a judgement issued by the Jordanian courts.⁴⁸⁹ However, the competent court to register the Amman Convention award is different from its counterpart of the Washington Convention award. The Amman Convention award is enforceable by leave of the Supreme Court of the contracting State.⁴⁹⁰

There are no guidelines in the Washington Convention to fix the type of the court that is responsible for enforcing the Washington award. Therefore, it is left to be enforced as a local judgment. Since the local judgment is enforceable by registration at the

⁴⁸⁸ AH Haddad. *Op. Cit* (footnote 381) 23.

⁴⁸⁹ According to s 54 of the Washington Convention.

⁴⁹⁰ According to s 35 of the Amman Convention.

enforcing department of the Magistrate's Court or the First Instance Court,⁴⁹¹ the Washington Convention award will be registered at the enforcing department of the Magistrate's Court or the First Instance Court that has jurisdiction for the place where the losing party has his domicile. If he resides abroad, the request will be filed with the court which has jurisdiction in the place where the assets of the losing party are located.

5.3. The favourable mode of enforcement

As we have seen that there are many modes for enforcement in England as well as in Jordan. The interested party by means of the more favourable-right-provision provided by the applicable regimes can choose the mode which best represents his interests in terms of recognition and enforcement.⁴⁹² In England, the more favourable-right-provision is provided in section 66, part III of AA 1996, and part II of AA 1950. The interested party can rely on section 104 of part III, section 66(4) of AA 1996, and section 40 of part II of AA 1950 as gateways to pass from one regime to another when the other regime is more favourable to the recognition and the enforcement of an arbitral award.

In Jordan, the more favourable-right-provision is only provided by article VII of the New York Convention 1958. According to this article, the interested party can choose any other multilateral or bilateral convention of which Jordan is a member State or any Jordanian law on recognition and enforcement in order to recognise and enforce the arbitral award. However, the scenario of using the more favourable-right-provision is not the same in both States. In England, it is possible that the interested party can find an alternative mode to enforce the arbitral award which fits his situation, whereas it is not possible to find an alternative mode of enforcement to replace the New York Convention, as other regimes are less advanced than the Convention.

The common example of using the more favourable-right-provision is found in the USA, France, Belgium, and Germany. In these countries, it has been shown how, in

⁴⁹¹ Arts (2, 3) of the Enforcing Act No 36 of 2002.

⁴⁹² For more discussed detail about the more favorable-right-provision under the New York Convention see AJVD Berg. Op. Cit (footnote 168) 81-120.

practice, the local law may be more favourable to the recognition and enforcement than the New York Convention. Under the New York Convention, the losing party can resist enforcement if the arbitral award has been set aside or suspended in the country of origin. The courts of these States recognised and enforced the arbitral award according to their local laws on the basis of the more favourable-right-provision as provided by article VII of the New York Convention, even though the award was set aside in the country of origin.⁴⁹³ However, as far as the author is aware, such examples have not been found in England as well as in Jordan.

5.4 Summary

The winning party is able to exert some commercial pressure upon the losing party to carry out the award voluntarily. This happens often when both parties are members of a commercial organisation.

In cases where the losing party refuses to carry out the award voluntarily, the winning party has to resort to mandatory modes of enforcement in order to make the recalcitrant party carry out the award. These mandatory modes of enforcement, under English regimes, are classified into three main modes. In action at Common law, the winning party resorts to this mode of enforcement in cases where the enforcement of an arbitral award needs a trial. In summary procedures, the winning party resorts to this mode of enforcement in clear reasonable cases. In registration before the competent court, this mode of enforcement pertains to the arbitral award, which is to be enforced in the same manner as a judgement given by the court concerned.

However, the modes of enforcement under the Jordanian regimes can be summarised into two main modes. Suing the losing party before the First Instance Court, the winning party can resort to this mode of enforcement to enforce any foreign arbitral awards. By registration before the competent court, this mode of enforcement pertains to the Washington Convention award and the Amman Convention award, as these are enforceable in the same manner as a judgement given by the court concerned.

⁴⁹³ A Redfern and others. Op. Cit (footnote 55) 555-558. GR Delaume. Op. Cit (footnote 216) 34-36.

The winning party can, by virtue of the more favourable-right-provision provided by all regimes in England, choose the mode which best represents his interests. Meanwhile, the more favourable-right-provision is not provided by all Jordanian regimes; it is only provided by the New York Convention. Since other Jordanian regimes are less advanced than the New York Convention, the winning party need not rely on them as a more favourable regime than the said Convention.

Chapter Six: Bars to the Recognition and Enforcement of Foreign Commercial Arbitral Awards

The previous chapters have answered the question as to under what policy should English or Jordanian courts enforce outcomes of arbitration? And they answered the question whether or not the current regimes provide the winning party with an effective means of enforcement. They also discussed the steps that the winning party should follow in order to enforce an arbitral award in England and Jordan.

This chapter will answer the third question; whether or not the current regimes provide grounds upon which the losing party can resist the enforcement of an illegal arbitral award. Therefore, this chapter focuses on a different perception of the enforcement process, suggesting the grounds on which the enforcement of a foreign award may be denied. Owing to the fact that the grounds on which a foreign arbitral award may be denied are numerous, this research limits the discussion to a selected number of grounds which have frequently occurred in both England and Jordan. There are a number of grounds that have been recognised under the applicable regimes in both countries, notwithstanding whether these regimes are convention or non-convention.

The main features of the grounds of refusal relate to the fact that they are all concentrated in one single article in every regime. They are also to be proven by the party against whom the enforcement is sought. Finally, the grounds of refusal, mentioned in the current regimes, are exhaustive. That is to say, the losing party cannot resist the enforcement on grounds other than those mentioned in the regime concerned.

Once an arbitral award is made in the country of origin, the local law provides grounds by which the losing party can challenge the arbitral award. At this stage, the aim of the challenge made by the losing party is to set aside the award in whole or in part. The challenging authority may uphold the award and reject the challenge made by the losing party. In this case, the award becomes final in the eyes of the law of the country of origin. Therefore, the winning party will seek to enforce such an award in

the State where the assets of the losing party are located. At this stage, the regime concerned with enforcing the award provides grounds by which the losing party can resist the enforcement.

According to the applicable regimes in England and Jordan, the grounds on which the losing party can resist enforcement are: state immunity, incapacity of a party, invalidity of an arbitral agreement, violation of due process, excess of arbitrator jurisdiction, composition of tribunal or procedure not in accordance with the arbitral agreement or the relevant law, the arbitral award is not final or not binding or suspended or set aside in the place of origin, non arbitrable of subject matter, public policy, and reciprocity. The aim of resisting enforcement by means of these bars, at this stage, is to resist the recognition and enforcement.

Accordingly, this chapter deals with two major aspects of bars; namely bars in the State where the arbitral award was made, and bars in the State where the recognition and enforcement are sought. Thus, this chapter will be divided into the following sections:

- Bars in the State where foreign arbitral awards are made
- Bars in the State where recognition and enforcement are sought

6.1. Bars in the State where foreign arbitral awards are made

These bars mean the possibility of resisting the enforcement of an arbitral award in the State where it was made before seeking to enforce it in the State where the assets of the losing party are located. Such bars may take the form of an appeal against the arbitral award, or of recourse of the arbitral award. The words ‘appeal’ or ‘recourse’ have the same effect, as both of them provide the opportunity for the losing party to resist enforcement. They are different because of the differences between the legal systems in which they are used. In Common Law countries, the word ‘appeal’ is used while the word ‘recourse’ is used in the Civil Law countries.⁴⁹⁴ It is suggested that the

⁴⁹⁴ A Redfern and others. Op. Cit (footnote 55) 480.

word ‘challenge’ be adopted to cover both terms.⁴⁹⁵ For the purpose of this research, the word ‘challenge’ will be used hereafter.⁴⁹⁶

The applicable rules differ with respect to the extent to which an award is subject to challenge. Some of these rules consider the arbitral award as final and binding, such as the Jordanian Arbitration Act 2001,⁴⁹⁷ the ICC Rules and the LCIA Rules.⁴⁹⁸ Meanwhile, some other rules permit a challenge to the arbitral award, such as the UNCITRAL Model Law,⁴⁹⁹ and the English AA 1996.⁵⁰⁰ The local authorities for challenge also vary. According to the Washington Convention, a challenge to an arbitral award shall, if possible, be submitted to the tribunal which rendered the award; if this is not possible, the challenge will be submitted to a new tribunal.⁵⁰¹ The same authority is also provided by the rules of the Grain and Feed Trade Association (GAFTA).⁵⁰² The majority of arbitral rules give the court of the seat or the place of arbitration the jurisdiction to challenge an arbitral award.⁵⁰³

The methods and the grounds of the challenge also vary from one country to another. The losing party can apply to the English court to challenge an award on the basis of a substantive jurisdiction or serious irregularity, an appeal on a point of law, or public policy.⁵⁰⁴ Furthermore, the time limit within which the challenge shall be submitted is not the same in all arbitration rules. According to article 51 of the Washington Convention, the challenge should be submitted within 90 days after the discovery of the fact, or in any event, within three years after the date on which the award was made. Meanwhile, section 70 (3) of AA 1996 provides that an appeal shall be made within 28 days of the date of the award, or of the date when the applicant or appellant was notified of the result of the arbitral process.

⁴⁹⁵ WL Craige ‘Uses and Abuses of Appeal from Awards’ (1988) 4 *Arbitration International* 174, 177. A Redfern and others. Op. Cit (footnote 55) 480.

⁴⁹⁶ Since this subject is governed by the applicable arbitration rules which vary from country to another, discussed details about this subject are out of the scope of this study.

⁴⁹⁷ S 48 of the Jordanian Arbitration Act 2001

⁴⁹⁸ Art 24 (2) of the ICC Arbitration Rules and art 16(8) of the LCIA Arbitration Rules.

⁴⁹⁹ Art. 34 (1) of the UNCITRAL Model Law

⁵⁰⁰ S 69 of AA 1966.

⁵⁰¹ Arts 50 and 51 of the Washington Convention.

⁵⁰² A Redfern and others. Op. Cit (footnote 55) 482-483.

⁵⁰³ SS 67, 68, 69, and 70 of the AA 1996.

⁵⁰⁴ As it is provided by ss 67-70 of AA 1996.

The outcomes of the challenge are also not the same; they depend on the grounds of challenge and the remedies provided by the applicable laws for every kind of challenge. The court may decide to confirm the arbitral award, to refer it back to the arbitrator for re-consideration, to vary the award, or to set it aside in whole or in part.⁵⁰⁵

The advantages of challenge are that they maintain the integrity of arbitration and avoid the arbitrator's bias and mistakes in rendering the arbitral award. At the same time, the disadvantages of challenge crystallise in political and national bias, especially when the losing party is one of the nationals of the countries of the competent court.⁵⁰⁶

However, challenging the arbitral award constitutes a positive attack by the losing party on the validity of the arbitral award, and its purpose is to disregard the arbitral award as valid and enforceable by setting aside such an arbitral award in whole or in part.⁵⁰⁷ This kind of challenge is an active one which seeks to overturn or set aside an award.

As far as recognition and enforcement are concerned, the enforcing court has the discretionary power to enforce an arbitral award or not, if it is challenged in the place of origin. If the award is set aside, the enforcing court may refuse to recognise and enforce it according to section 103(2, f) of AA 1996 which represents article V (e) of the New York Convention 1958.⁵⁰⁸ If the challenge is still pending, the enforcing court may adjourn enforcement until this challenge is disposed.⁵⁰⁹

6.2. Bars in the State where recognition and enforcement are sought

The above section displayed how the losing party can resist enforcement by means of

⁵⁰⁵ A Redfern and others. Op. Cit (footnote 55) 508-509.

⁵⁰⁶ P Tutun. Op. Cit (footnote 169) 204.

⁵⁰⁷ A Redfern and others. Op. Cit (footnote 55) 479-480.

⁵⁰⁸ There is a room for argument with respect to this result. In this regard, some local regimes recognise and enforce foreign arbitral awards which have been annulled in the State where they were made on the basis of the more-favourable-right-provision. Such examples are found in France and the U.S.A.

a challenge to set aside or suspend an award in whole or in part. However, the challenging authority may uphold the arbitral award. The losing party may or may not carry out such an award even though it was upheld by the supervising court. Therefore, the winning party will seek to enforce such an award in the State where the assets of the losing party are located. At this stage, searching in the local laws for methods to resist or delay enforcement is the job of the losing party.

This kind of challenge is a passive one, in that it does not seek to set aside an award as the above kind of challenge, but it seeks to stop its recognition and enforcement. The grounds of challenge vary from one State to another.

According to the applicable regimes in England and Jordan, the grounds on which the losing party can resist enforcement are: state immunity, incapacity of a party, invalidity of an arbitral agreement, violation of due process, excess of arbitrator jurisdiction, composition of tribunal or procedure not in accordance with the arbitral agreement or the relevant law, arbitral award is not final or not binding or suspended or set aside in the place of origin, non arbitrable of subject matter, public policy, and reciprocity. In the following sub-sections, each ground of refusal will be discussed in depth in turn.

6.2.1. State Immunity against recognition and enforcement of foreign commercial arbitral awards

This ground of refusal concerns the arbitral award of which the State or its agency is the losing party. The immunity of the State refers to a principle of international law under which a State is exempted to be subject of a foreign State jurisdiction because of equality and independence of the State.⁵¹⁰

⁵⁰⁹ This fact is provided by art VI of the New York Convention 1958 and S 103(5) of the Arbitration Act 1996. However, the effect of such a challenge at this stage on recognition and enforcement will be displayed in the following sub-sections.

⁵¹⁰ O Chukwumerije 'ICSID Arbitration and Sovereign Immunity' (1990) 19 *Anglo-American Law Review* 166, 169. H Lauterpacht 'The Problem of Jurisdictional Immunities of Foreign States' [1951] *The British Year Book of International Law* 220, 228. MV Forrestal 'Examples of and Reasons for Increased Use of International Arbitration' in G Aksen and RBVM Cochairmen (eds) *International Arbitration Between Private Parties and Governments Corporate Law and Practice Course Handbook*

Since the efficiency of arbitration is derived from the ease of recognition and enforcement of the arbitral award by the national courts, the issue of immunity of the States before these courts is of vital importance whenever an award is not complied with voluntarily.⁵¹¹ Because of this, it is said that ‘the availability of a dispute resolution mechanism that has the potential to result in an enforceable award is often a key factor in deciding whether to enter into a transaction with a foreign sovereign or its political subdivision’.⁵¹²

In this regard, the question arises as to whether or not the plea of immunity would be successful according to the applicable law in the forum place? Three theories are suggested as regards this question, namely absolute immunity, limited immunity, and the denied immunity.⁵¹³

6.2.1.1. Absolute immunity theory

According to this theory, the local court is not able to issue an enforcement order to enforce the arbitral award against the foreign government regardless of the nature or the purpose of the underlying transaction.⁵¹⁴ The doctrine of absolute immunity is found on the dignity of a foreign sovereign, or as Lord Macmillan called it as: ‘Dignity, equality and independence’.⁵¹⁵ Thus, seeking enforcement against the State affects this dignity. On this basis, national courts have no jurisdiction or they have to declare themselves incompetent to enforce the arbitral award against the assets of the State.⁵¹⁶

England was one of the States in which this theory was applied, in *the Parlement*

(Series No 399 Practising Law Institute 1982) 44-47.

⁵¹¹ KP Berger ‘State Immunity and International Commercial Arbitration: The Revision of the US Foreign Sovereign Immunity Act’ (1989) 4(5) *Journal of International Banking Law* 241, 241.

⁵¹² DH Freyer ‘Commentary: Drafting Arbitration Clauses in Contracts Involving Sovereigns’ (2002) 18(3) *Arbitration International* 263, 263.

⁵¹³ CM Schmitthoff ‘The Claim of Sovereign Immunity in the Law of International Trade’ (1958) 7 *The International and Comparative Law Quarterly* 452, 453-454. JHC Morris. Op. Cit (footnote 12) 59-60.

⁵¹⁴ TA O’Brien ‘The Validity of the Foreign Sovereign Immunity Defense in Suits under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (1984) 7 *Fordham International Law Journal* 321, 338.

⁵¹⁵ *Compania Naviera vascongado Appellants; v steamship “Cristina”* [1938] A.C 485, 498.

⁵¹⁶ CJ Hamson ‘Immunity of Foreign States: The Practice of the French Courts’ [1951] *The British Year Book of the International Law* 293, 293-331. HV Houtte. Op. Cit (footnote 319) 33.

*Belge*⁵¹⁷ the court granted immunity to a mail pack owned by the Belgian Monarch. The court also in *The Porto Alexandre*,⁵¹⁸ held that:

[A]lthough the ship was engaged in an ordinary commercial undertaking as an ordinary trading Vessel carrying goods for a private trading company, she was the public property of the State of Portugal destined to its public use, and, as such, was entitled to immunity from legal process in English courts... .

After that, in *Compania Naviera Vascongado v S.S Cristina*,⁵¹⁹ their Lordships were different to adopt this theory. Some of them were with absolute theory and others with the limited theory. Lord Atkin was between them, he illustrated State immunity as:

[There are] two propositions of international law engrafted into our domestic law which seems to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to the personal private property. In this country it is my opinion well settled that it applies to both.⁵²⁰

In *Krajina v Tass Agency*,⁵²¹ Cohen LJ and Tucker LJ considered Tass not to have been deprived of the immunity which enjoys as a government department. In *Baccus S.R.L. v Servicio Nacional Del Trigo*,⁵²² the Court of Appeal by a majority also upheld the plea of immunity.

In Jordan, this theory is still applied in respect of the enforcement of the arbitral award according to some applicable regimes. In fact, if enforcement of the arbitral award is sought under the Arab League Convention, article 4 of this convention refers not to apply the said convention to any award issued against the government of requested State or any of its officers in his official capacity and on account of the

⁵¹⁷ (1880) 5 P.D 197.

⁵¹⁸ [1918-19] All. ER Rep 615.

⁵¹⁹ [1938] A.C 485.

⁵²⁰ [1938] A.C 485, 490.

⁵²¹ [1949] 2 ALL ER 274.

performance of his duties.

Moreover, according to the bilateral conventions,⁵²³ if the losing party is the government or a government official acting in the exercise of his office, an arbitral award will not be enforced in Jordan. According to other regimes, they are silent in this regard; the reciprocal principle is applied in this situation as indicated by article 7 of Act No 8.

6.3.1.2. Limited immunity theory

After the Second World War, there had been a gradual alleviation in the application of the absolute immunity doctrine. This is because of the increase in participation of the State in commercial transaction with private trader.⁵²⁴ Distinction had been made between the acts of a sovereign '*Jure imperii*' and the acts of commercial transaction '*Jure gestionis*'.⁵²⁵ Consequently, if the action of the State falls within the '*Jure imperii*' the plea of immunity will be successful, but if it falls within the '*Jure gestionis*' the plea of immunity will not be successful. Thus, the doctrine of limited theory is found in the distinction between the acts of '*Jure Imperii*' and the acts of '*Jure gestionis*'. Once the behaviour of the State descends into the commercial transaction, it cannot claim immunity on the basis of its dignity.⁵²⁶

However, the problem facing this theory is what are the transactions of '*jure imperii*' and '*jure gestionis*'? In other words, how is it possible to distinguish between both kinds of behaviour? In this regard, there are two main criteria. Firstly, the distinction between both transactions is based upon the subject of transaction, namely if its subject is commercial, it falls within the second behaviour. Secondly, it depends on the nature of the transaction; if it is a contract or a tort, it falls within the second behaviour, but if it is, for example, a State or a diplomatic visit, it falls within the first

⁵²² [1956] 3 W.L.R 948.

⁵²³ With exceptional case in respect of the treaty with Egypt, c 5 of this Convention has no such reservation with respect to the official or government's agents.

⁵²⁴ O Chukwumerije. Op. Cit (footnote 510) 170-171. WM Reisman '*International Arbitration and Sovereignty*' (2002) 18(3) *Arbitration International* 231, 231-236.

⁵²⁵ CM Schmitthoff. Op. Cit (footnote 513) 453. TA O'Brien. Op. Cit (footnote 514) 339. HV Houtte. Op. Cit (footnote 319) 34-35. SK Chatterjee '*The Procedural Aspects of Project Finance*' (1993) 8(10) *Journal of International Banking Law* 421, 423. FA Mann '*State Contracts and International Arbitration*' in FA Mann *Studies in International Law* (Clarendon Press Oxford 1973) 274.

⁵²⁶ CM Schmitthoff. Op. Cit (footnote 513) 455.

behaviour.

However, the distinction between the two criteria is important. This is because a transaction according to the first criterion may fall within the first kind of behaviour. Meanwhile, the same transaction according to the second criterion may also fall within the second kind of behaviour.⁵²⁷ The impossibility of making such a distinction between the two kinds of behaviour is used to support the argument in favour of the absolute immunity.⁵²⁸

As far as recognition and enforcement of a foreign arbitral award is concerned, if an award results from commercial disputes, it will be recognised and enforced. Meanwhile, if it results from international diplomatic disputes, it will not be enforced. However, with respect to the enforcement of a foreign arbitral award, distinction should be made between immunity from jurisdiction and immunity from execution. According to immunity from jurisdiction, the State cannot plea against recognition and enforcement of the arbitral award on the basis of sovereign immunity. Meanwhile, according to immunity from execution,⁵²⁹ there is no rule, including ICSID, preventing the State from objection on the basis of sovereign immunity unless the State waived its immunity.⁵³⁰

As far as this theory is concerned in England, in *Rahimtoola v Nizam of Hyderabad*,⁵³¹ Lord Denning expressed his opposition to the absolute immunity in the context of commercial transactions, and he suggested the immunity should depend on the nature of the dispute. The plea of immunity is not available in commercial activities of a foreign State or its officers.

⁵²⁷ CM Schmitthoff. Op. Cit (footnote 513) 455-456. J Crawford 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions' [1983] *British Year Book of International Law* 75, 75.

⁵²⁸ H Lauterpacht. Op. Cit (footnote 510) 222-226.

⁵²⁹ At this stage the execution by way of seizure and attachment or otherwise will be against the assets of State.

⁵³⁰ O Chukwumerije. Op. Cit (footnote 510) 178-182. AJVD Berg. Op. Cit (footnote 81) 11-14. H Lauterpacht. Op. Cit (footnote 510) 222, 241-250. GR Delaume. Op. Cit (footnote 216) 36-40. FA Mann 'State Contracts and International Arbitration' in FA Mann *Studies in International Law* (Clarendon Press Oxford 1973) 277-278.

⁵³¹ [1957] 3 W.L.R 884.

In *Owners of the Philippine Admiral v Wallem Shipping (Hong Kong) Ltd (The Philippine Admiral)*,⁵³² the council also adopted the limited immunity doctrine to ordinary trading transactions. Moreover, in *Trendtex Trading Corporation Ltd v the Central Bank of Nigeria*,⁵³³ the Court of Appeal adopted by a majority the limited immunity to the ordinary trading transaction. In this case, the court held that the Central Bank of Nigeria was not a State agency, and so did not enjoy immunity. The reason for the limited theory doctrine was stated by Goff J in *I Congresso del Partido*⁵³⁴ as:

Certainty in commercial transactions is not in my judgement the true reason why in certain circumstances the doctrine of sovereign immunity is restricted. The true reason is that it is restricted where the foreign sovereign does not act as such, i.e., where he acts as any private citizen may act.

However, after the State Immunity Act 1978 was enacted, section 9(1) of this Act provides that: ‘Where a State has agreed in writing to submit to a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to arbitration’.

The said Act submits in clear terms with respect to arbitration that the immunity plea will not be applicable. According to this Act, it can be said that the English court has jurisdiction to entertain proceedings to recognise and enforce foreign commercial arbitral award.

However, section 1 of the said Act admitted as a general rule that a foreign State is immune from the jurisdiction of the courts in the United Kingdom.⁵³⁵ So, section 9(1) comes as an exception to the general rule that is provided by section 1. According to Dicey and Morris, this exception does not apply to proceedings for the enforcement of arbitral awards; it only applies to arbitration.⁵³⁶ That is because the Bill that has resulted in the 1978 Act expressly stated that this exception does not apply to

⁵³² [1976] 2 W.L.R 214, 232-233.

⁵³³ [1977] Q.B 529.

⁵³⁴ [1978] QB 500, 528.

⁵³⁵ A Mcknight ‘A Review of Developments in English Law during 2003: Part 2’ (2004) 19(5) *Journal of International Banking Law and Regulation* 151, 160.

⁵³⁶ L Collins and others (eds). *Op. Cit* (footnote 12) 251.

proceedings for the enforcement of the award.⁵³⁷

However, it seems that this view is inconsistent with section 9(1) in which arbitration is excluded from State immunity. This section implies that once a foreign State had agreed in writing to arbitration, the resulting arbitral award will be recognised and enforced against this State before English courts. This is because the arbitral agreement includes either expressed or implied promise to enforce a valid arbitral award once it is made. This enforcement is not execution by way of seizure.⁵³⁸ To say otherwise means there is no sense to exclude arbitration from State immunity without the resulting arbitral award. Moreover, it is submitted that once the State agrees to go to arbitration, it waives its immunity defence of jurisdiction against arbitration including the enforcement of the arbitral award.⁵³⁹

It seems that Dicey and Morris have categorised the enforcement of the award within the immunity from execution and not within the immunity from jurisdiction. Thus, the enforcement of the arbitral award, in the light of their view, will not be allowed against the State, unless the State expressly waives its immunity with respect to enforcement of the award.

If their view was so based, this research adopts a new view to the contrary.⁵⁴⁰ This is because arbitration and enforcement of the arbitral award fall within the immunity of jurisdiction. The immunity of execution comes later at the time when actual execution measures by way of seizure or otherwise are sought against the assets of the State as

⁵³⁷ *ibid* 251.

⁵³⁸ L Collins and others (eds). *Op. Cit* (footnote 12) 621. French Court of Cassation in its decision in *Creighton v Qatar* assisted the private parties in the enforcement of arbitral awards against sovereign States by considering the undertaken of the State in the arbitral agreement to enforce the resulting award as a waiver of the State's right to sovereign immunity not only from jurisdiction but also to include the immunity from enforcement of the resulting award. E Gaillard 'Commentary' (2002) 18(3) *Arbitration International* 247, 250.

⁵³⁹ J Sekolec 'International Dispute Resolution: Areas Where Further Research May Be Useful' (2003) 20(1) *Journal of International Arbitration* 35, 43. GR Delaume. *Op. Cit* (footnote 216) 36-37. HV Houtte. *Op. Cit* (footnote 319) 33.

⁵⁴⁰ As an answer to the question whether the judgment, issued by the enforcing court to enforce the arbitral award, constitutes the final point of the arbitration or the beginning of, or at least a preliminary to, execution? The English court held that an application for enforcement serves no useful purpose except as a first step towards execution. This judgment was issued in *Duff development Co. v Government of Kelantan* [1924] AC 797, 820. This approach of English court was adopted to serve the doctrine of absolute immunity. However it was criticised as it is unconvincing and inadequate. FA Mann 'State Contracts and International Arbitration' in FA Mann *Studies in International Law* (Clarendon Press Oxford 1973) 276.

provided by section 13(2,b).⁵⁴¹ Such an execution is allowed, by virtue of sections 13(3) and 4, only by the consent in writing of the State or the property is for the time being in use or intended for use for commercial purposes as provided in section 17(1).

Furthermore, the Bill that has resulted in the 1978 Act speaks about the proceedings of enforcement which may be considered as execution measures and not as recognition and enforcement process. In *Soleh Boneh International Ltd and another v Government of the Republic of Uganda and National Housing Corporation*,⁵⁴² the Court of Appeal considered section 13(2,a) of the State Immunity Act 1978 in its decision as:

Relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property. as “it would not be held that a simple order for the payment of money from no specified source was an injunction; it was no different from a monetary judgement; the order would be varied; unless the employers [Uganda] provided security in the sum of \$ 5m within four weeks there would be leave to enforce the award as a judgement, (emphasis added).⁵⁴³

Accordingly, it can be said that recognition and enforcement procedures against the State by way of obtaining leave for enforcement are possible, while executive measures by way of seizure are not *prima facie* permitted, unless the State waived its immunity.

In this regard, it is also suggested that since the State has accepted to arbitrate, it must be deemed to have waived immunity including from execution; for examples, Switzerland where the court draws a distinction between immunity from jurisdiction and immunity from execution. The court takes the view that once immunity from jurisdiction is resolved against the State; it also ceases to enjoy the immunity from execution.⁵⁴⁴

⁵⁴¹ AJVD Berg. Op. Cit (footnote 81) 13-14. JHC Morris. Op. Cit (footnote 12) 65. L Collins and others (eds). Op. Cit (footnote 12) 240-241.

⁵⁴² [1993] 2 Lloyd’s Rep 208.

⁵⁴³ [1993] 2 Lloyd’s Rep 208, 209.

⁵⁴⁴ AJVD Berg. Op. Cit (footnote 58) 14. For more examples of such distinction see NB Turck ‘French and US Courts Define Limits of Sovereign Immunity in Execution and Enforcement of Arbitral Awards’ (2001) 17(3) *Arbitration International* 327, 327-342.

Moreover, a logical justification can be added, in that if the State accepts to arbitrate, it will not accept to waive its immunity once an award is not made in its favour. Consequently, what is provided by section 9(1) is an exception to section 1 to the effect that if the State agrees in writing to go to arbitration, its immunity that is provided by section 1 will be waived with respect to arbitration and recognition and enforcement of arbitral award. Otherwise, section 9(1) is a dead letter as arbitration is meaningless without its award being recognisable and enforceable.

Moreover, the immunity from execution in England includes foreign diplomats according to Diplomatic Privileges Act 1964. It also includes foreign consuls by virtue of Consular Relations Act 1968. Furthermore, it includes international organisations by virtue of the International Organisations Act 1968.⁵⁴⁵

Subsequently, the principle which had been followed by the English court was the doctrine of absolute immunity, and then this doctrine had been developed to the doctrine of limited theory.⁵⁴⁶

6.3.1.3. Theory of denial of immunity

It has been seen how State immunity doctrine developed from absolute immunity to limited immunity. According to the absolute immunity the local court is not able to issue an enforcement order to enforce the arbitral award against foreign governments regardless of the nature or the purpose of the underlying transaction. Whereas under the limited immunity, the local court is not able to issue an enforcement order to enforce an arbitral award against a foreign government only in case such an award results from an act described as '*Jure imperii*'.

However, State immunity has also developed from limited immunity to denial of immunity. According to the denial theory, State has no immunity to rely on before the court of a foreign State. This theory is developed by Lauterpacht in the 1950s.⁵⁴⁷ It reflects the local development in many Western States where the sovereign has

⁵⁴⁵ JHC Morris. Op. Cit (footnote 12) 66-69.

⁵⁴⁶ R Higgins 'Recent Developments in the Law of Sovereign Immunity in the United Kingdom' (1977) 71 *American Journal of International Law* 423, 423-437. H Lauterpacht. Op. Cit (footnote 510) 270-271.

gradually surrendered considerably parts of his immunity from suit and has become answerable to his subjects in his own courts.⁵⁴⁸

In England, the Crown Proceedings Act 1947 is the most remarkable step in that direction. This theory was also supported by Lord Denning in the *Nizam of Hyderabad v Jung*,⁵⁴⁹ as:

In all civilised countries there has been a progressive tendency towards making the sovereign liable to be sued in his own countries; notably in England by the crown proceedings Act, 1947. Foreign sovereigns should not be in any different position. There is no reason why we should grant to the departments or agencies of foreign governments an immunity which we do not grant to our own, provided always that the matter in dispute arises within the jurisdiction of our courts and is properly cognisable by them.

However, even though the denial theory prohibits the State from raising the plea of sovereign immunity, there are some exceptions in which the plea of immunity has to be recognised, which are:⁵⁵⁰

- 1-Legislation acts relate to foreign countries
- 2-Measures taken in foreign countries according to their own Acts
- 3-Executive and administrative Acts of foreign countries within their territory
- 4-Transactions over which the courts have no jurisdiction according to the rules of private international law of the *lex fori*
- 5-Behaviours contrary to accepted principles of international law in the matter of diplomatic immunities

Accordingly, it is suggested that the difference between the limited theory and the denial theory becomes very slight.⁵⁵¹ That is to say, the limited theory is based upon the distinction between the acts of a sovereign '*Jure imperii*' and the acts of a commercial transaction '*Jure gestionis*'. According to the limited theory if the State's act is described as *Jure gestionis*, it cannot raise the plea of sovereign immunity. However, the State cannot, according to the denial theory, raise the plea of sovereign

⁵⁴⁷ H Lauterpacht. Op. Cit (footnote 510) 220.

⁵⁴⁸ CM Schmitthoff. Op. Cit (footnote 513) 456-457.

⁵⁴⁹ [1957] 3 W.L.R 884, 910

⁵⁵⁰ H Lauterpacht. Op. Cit (footnote 510) 236-239. CM Schmitthoff. Op. Cit (footnote 513) 457.

immunity in case its act is described as *Jure gestionis* unless this act falls in the exceptions mentioned above.

However, this theory exists only in jurist's view as far as arbitration is concerned. It has no application in the municipal laws, and if there is such an application it would be in very few jurisdictions.⁵⁵²

As far as recognition and enforcement are concerned, according to the State Immunity Act 1978, the general rule is to grant absolute immunity. If there is any limitation on this immunity, it is considered as an exception to this general rule as what is provided by section 9(1).

In Jordan, there is no law or case-law in this regard. However, the existence of any of the three theories in Jordan depends on the position of the State concerned. In this regard, if there is any judicial precedent between both States, this precedent will be the criterion upon which one of the three theories may exist. Meanwhile, if there is no judicial precedent between Jordan and other States, Jordanian courts, in the light of the solution provided by the Arab League Convention and the bilateral conventions,⁵⁵³ will refuse to enforce a foreign arbitral award made against the State, unless this State expressly waived its immunity.

6.2.1.4. An award issued by ICSID and State immunity

It has been seen earlier that the State may contract with traders to conduct commercial transactions. As the State raises the plea of immunity against the disputes, the private trader may suffer serious loss.⁵⁵⁴ Therefore, the International Bank for Reconstruction and Development (the World Bank) felt the need for creating a system by which the private investor will not be affected by the State immunity. Its efforts resulted in the creation of the Washington Convention in 1965.

⁵⁵¹ H Lauterpacht. Op. Cit (footnote 510) 239-240. CM Schmitthoff. Op. Cit (footnote 513) 458.

⁵⁵² CM Schmitthoff. Op. Cit (footnote 513) 454.

⁵⁵³ C 5 of the treaty with Egypt has no such provision. Accordingly, it seems an award made against State is enforceable under this Convention.

⁵⁵⁴ CM Schmitthoff. Op. Cit (footnote 513) 453.

The Washington convention was basically created to provide dispute resolution by arbitration and conciliation to solve investment disputes that may arise between the contracting States and the nationals of other contracting States. This convention is considered as the only convention which deals with a private party and a sovereign State.⁵⁵⁵

As far as State immunity in this convention is concerned, distinction should be made between immunity from jurisdiction to arbitration or to recognition and enforcement of ICSID award, and immunity from execution of arbitral award as same as the judgement of the State.

According to immunity from jurisdiction, the State cannot plea jurisdiction immunity not to arbitrate by ICSID as State agrees to arbitrate under the auspices of ICSID.⁵⁵⁶ According to article 54 (1, 2) of the Washington Convention, the State party cannot raise objection based on the sovereign immunity as regards recognition and enforcement.

The immunity from execution of ICSID award had not been solved by the said convention.⁵⁵⁷ According to article 54 (1, 3) of the said convention, distinction should be made between recognition and enforcement of ICSID award as provided by article 54 (1, 2) and execution of ICSID award as provided by article 54(3). Thus, the State party cannot make objections on the basis of sovereign immunity regarding recognition and enforcement as it falls within immunity from jurisdiction which is not permitted by the convention. Meanwhile, the State may raise such an objection on the execution of the award. This depends on the local law as article 54 (3) of the said convention has left this matter to the local law which deals with the execution of local judgement. If this law allows sovereign immunity objection, the State party then can do so.⁵⁵⁸

⁵⁵⁵ O Chukwumerije. Op. Cit (footnote 510) 166-183. AA Asouzu 'The UN, the UNCITRAL Model Arbitration Law and the *Lex Arbitri* of Nigeria' (2000) 17(5) *Journal of International Arbitration* 85, 93-97. CF Amerasinghe 'Jurisdiction Ratione Personae Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' [1977] *The British Year Book of International Law* 227, 225-267.

⁵⁵⁶ O Chukwumerije. Op. Cit (footnote 510) 173-178. DH Freyer. Op. Cit (footnote 512) 266.

⁵⁵⁷ AJVD Berg. Op. Cit (footnote 81) 14.

6.2.2. Incapacity of a party

This ground of refusal is provided by section 103(2, a) of part III of AA 1996, which represents article V (1, A) of the New York Convention 1958. It is also provided by section 37 (2, b) of part II of AA 1950, which represents article 2 (b) of the Geneva Convention 1927. According to section 37(2) of part II and article 2 of the Geneva Convention, a party who is under incapacity is the one against whom enforcement of an arbitral award is sought. Meanwhile, all other regimes refer to the word 'party' without such indication. They also do not fix the nature of the party as a physical party or legal party. So, it seems that a party is the one to the arbitral agreement whether it is a public party or a private party.⁵⁵⁹

The main point with respect to this ground of refusal is under which law a party is under incapacity. The above regimes refer to the applicable law to the parties without indication of how this law would be determined. This law may be the law which has been chosen by the parties, the law of the State where an award is made, the law which governs an arbitral agreement, or any other laws considered as an applicable law. In Jordan, the law which governs the capacity of a person is the law of his nationality,⁵⁶⁰ while in England the law which governs the party incapacity is the law of the country with which the arbitral agreement is most closely connected, or the law of his domicile and residence.⁵⁶¹ Since there is no precise provision in the above regimes in regard to the applicable law, the enforcing court has discretionary power to decide the applicable law.

However, if the party is a legal person (incorporation for example), its capacity is governed primarily by its institution and the law of the place of incorporation or the place of business.⁵⁶² The question whether the party is a State or a State agency to

⁵⁵⁸ O Chukwumerije. Op. Cit (footnote 510) 178-182. AJVD Berg. Op. Cit (footnote 81) 11-14.

⁵⁵⁹ AJVD Berg. Op. Cit (footnote 168) 274- 296. AJVD Berg 'The New York Convention: Summary of Court Decisions' in M Blessing (ed) *The New York Convention of 1958* (ASA Special Series No 9 Swiss Arbitration Association Zurich 1996) 55. A Redfern and others. Op. Cit (footnote 55) 531-532, the authors refer to examples in which the party is a public sector. DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 371.

⁵⁶⁰ Art 12 of the Jordanian Civil Law.

⁵⁶¹ L Collins and others (eds). Op. Cit (footnote 12) 251. JHC Morris. Op. Cit (footnote 12) 342-346.

⁵⁶² A Redfern and others. Op. Cit (footnote 55) 173.

examine if it has capacity or not, depends on the law of the State concerned.⁵⁶³

Jordanian law, for example, does not impose any kind of restriction upon the capacity of the Jordanian government to arbitrate,⁵⁶⁴ whereas in some States like Saudi Arabia arbitration is not allowed.⁵⁶⁵ Other States are restricted conditionally to arbitrate as in France and Belgium.⁵⁶⁶

It also depends on the law of the forum before which the State is sued, or it may depend on an international convention to which the State is a party,⁵⁶⁷ such as the Washington Convention and the New York Convention. In this regard, the capacity of the State to arbitrate is not clear in the New York Convention 1958 as it is indicated in the Washington Convention. However, it is suggested that the text of the New York Convention leads to the conclusion that the State which has agreed to arbitrate having the nature of private law (*Jure gestionis acts*) should comply with the resulting arbitral award when its enforcement is sought under this convention.⁵⁶⁸

The differences among the above regimes are about the burden of proof. According to section 103 and article V of the New York Convention, the party against whom recognition and enforcement are sought must prove this ground in order to refuse enforcement. Meanwhile, the burden of proof according to section 37 of part II and article 2 of Geneva Convention is left to the satisfaction of the enforcing court. It provides that 'If the court dealing with the case is satisfied', this satisfaction of the enforcing court may be reached by proof provided by the losing party, winning party, or by its own motion.

Moreover, according to section 103 of AA 1996 and article V of the New York

⁵⁶³ DD Pietro and M Platte. Op. Cit (footnote 58) 139.

⁵⁶⁴ Art 20 of Jordanian Arbitration Act No 18 of 1953 which has been repealed by Arbitration Act 2001.

⁵⁶⁵ RF Mcquaid 'Saudi Arabia, Foreign Arbitral Awards-Can They Be Enforced?' [1979] *Middle East Executive Reports* 2, 2.

⁵⁶⁶ A Redfern and others. Op. Cit (footnote 55) 174-175. DD Pietro and M Platte. Op. Cit (footnote 58) 138-143. FA Mann 'State Contracts and International Arbitration' in FA Mann *Studies in International Law* (Clarendon Press Oxford 1973) 272-274.

⁵⁶⁷ AJVD Berg. Op. Cit (footnote 168) 278.

⁵⁶⁸ LC Perciballi 'The Application of New York Convention of the 1958 to Disputes Between States and Between State Entities and Private Individuals: The Problem of Sovereign Immunity' (1978) 12 (1) *International Lawyer* 197, 197-207.

Convention, the court has permissive power to refuse the enforcement of the foreign arbitral award even though it has been proved that the party is under incapacity according to the applicable law. Furthermore, according to section 37 (2) of part II and article 2 of the Geneva Convention, the court should be satisfied that the party against whom enforcement is sought was under some legal incapacity. So, if the enforcing court is not satisfied, it may recognise and enforce foreign arbitral award.

6.2.3. Invalidity of an arbitration agreement

This ground of refusal is provided by section 103(2, b) of AA 1996, which represents article V (1, a) of the New York Convention. It states that ‘The arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made’.

Two main issues may arise in regard to this ground.⁵⁶⁹ Firstly, on the meaning of not valid according to the applicable law, it is submitted that it may mean, the lack of consent to arbitrate by means of misrepresentation, duress, fraud, or undue influence.⁵⁷⁰ Secondly, what is the applicable law? According to section 103, there are two ways by which the invalidity of arbitral agreement will be determined. First, as indicated by section 103(2, b), under the law which has been chosen by the parties. Second, if the parties have not agreed on a particular law, it is the law of the place where an award was made.

However, there are some who would argue on this matter by saying that the parties have not agreed to subject an arbitral agreement to a particular law, but they have chosen a law to govern the contract which contains the arbitral agreement. Their argument is whether or not such a law is applicable also to the arbitral agreement on the basis of the separability of the arbitral agreement. In such a situation, the law that governs the arbitral agreement arises in a variety of contexts,⁵⁷¹ as someone who would suggest, as the applicable law, either the proper law of contract or the law of

⁵⁶⁹ The argument about this bar of enforcement under the Jordanian regimes is the same as the English regimes

⁵⁷⁰ AJVD Berg. Op. Cit (footnote 168) 287.

⁵⁷¹ L Collins and others (eds). Op. Cit (footnote 12) 596-600.

the seat of arbitration.⁵⁷² Another says the law which governs the contract also governs the arbitral clause unless the parties agreed otherwise.⁵⁷³

Furthermore, others suggest the law which governs the contract should be different from the law that governs the arbitral agreement as this agreement is separated from the contract according to the doctrine of separability. This argument has also failed according to one who suggests that the doctrine of separability is mainly important in a situation where the underlying contract is invalid. It does not render the arbitral agreement a separate entity from the underlying contract for the purposes of the applicable law.⁵⁷⁴

However, it can be said that since such an argument arises before the enforcing court, it has the power to determine which law governs the invalidity of the arbitral agreement. According to section 103(2, b), if the parties have not chosen the law to govern the arbitral agreement, it will be the law of the place where an award was made. It is a clear-cut indication that, when there is no agreement about the law of arbitral agreement, the award will be examined by the law of the place where it was made.

This approach in case where the parties have not agreed about the governing law can be considered as the most supporting solution whether at national or international level.⁵⁷⁵ In *Channel Tunnel Group v Balfour Beatty Ltd*,⁵⁷⁶ the view held by Mustill that 'the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible'. Moreover, in *XL Insurance Ltd v Owens Corning*,⁵⁷⁷ the court held the view by Mr Justice Toulson that since the parties choose to conduct arbitration in London under AA 1996, the arbitral clause is governed by English law.

From these authorities, it can be said that once the law governing the validity of an

⁵⁷² DD Pietro and M Platte. Op. Cit (footnote 58) 144.

⁵⁷³ L Collins and others (eds). Op. Cit (footnote 12) 597. A Redfern and others. Op. Cit (footnote 55) 154.

⁵⁷⁴ DD Pietro and M Platte. Op. Cit (footnote 58) 144-145.

⁵⁷⁵ A Redfern and others. Op. Cit (footnote 55) 153-154.

⁵⁷⁶ [1993] A.C 334, 357.

⁵⁷⁷ [2000] 2 Lloyd's Rep 500.

arbitral agreement becomes questionable, the English enforcing court will examine the validity of the arbitral award according to the law of the place where the parties agreed to conduct arbitration. Thus, this approach is compatible with section 103(2, b) which speaks to apply the law of the place where an award was made in the absence of the parties' agreement.⁵⁷⁸

It is suggested the invalidity of an arbitral agreement is governed by other rules not only those provided by article V (1, a) of the New York Convention, but also those determined by article II of the same convention that deals with arbitral agreement.⁵⁷⁹ According to Berg, article II (2) of the New York Convention should apply with article V (1, a) of the said convention in regard to the invalidity of arbitral agreement.⁵⁸⁰

However, this research does not agree with this view. In fact, article II of the New York Convention deals with the arbitral agreement in its creation (existence or absence). Article II (1) speaks about recognition of the arbitral agreement in writing, and article II (2) speaks about how this agreement is done. Meanwhile, article V (1, a) speaks about the validity of the arbitral agreement.

There is a difference between both of them, in that if the losing party wants to object on the basis of article II (2), he will object on the existence or on the absence of this agreement in the way as provided by this article (enforcement of arbitral agreement). Meanwhile, if he wants to object on the basis of article V (1, a), he will do so on the basis of the invalidity of the arbitral agreement. This means that the arbitral agreement has existed according to article II (2) as 'The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams'. However, this agreement is invalid, and for to be valid it requires the valid consent of the parties which is governed by the ordinary principle of contract law, which governs the parties'

⁵⁷⁸ PM North and JJ Fawcett *Cheshire and North's Private International Law* (12th edn Butterworths London 1992) 446.

⁵⁷⁹ AJVD Berg. Op. Cit (footnote 168) 287-291.

⁵⁸⁰ *ibid* 296.

expression of consent, its form, and its scope.⁵⁸¹

The most important factor supporting this view is the validity or invalidity of the arbitration agreement which shall be determined under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made. So, where the parties subjected the validity of the arbitration agreement to the New York Convention, then it can be said that article II of the said convention, otherwise the law of the country where an award is made, will determine the validity of arbitration agreement.

Moreover, the grounds provided by article V of the Convention (section 103 of AA 1996) are exhaustive and they are meant to be interpreted narrowly.⁵⁸² This means that the enforcing court will refuse to accept grounds of refusal other than the grounds provided by article V. In other words, as Berg later said: 'it is not allowed to read more than what article V expressly provides'.⁵⁸³ Moreover, section 103(1), which represents article V of the New York Convention, emphasised the fact that the grounds of refusal are exhaustive by saying 'Recognition or enforcement of a New York Convention award *shall not be refused except* in the following cases' (emphasis added).

Furthermore, each article is provided for different purposes. That is to say, the question which is raised with respect to article II (2) is if an arbitration agreement does not meet article II (2) of the Convention should a court refuse to refer to arbitration.⁵⁸⁴ Meanwhile, the question which is raised with respect to article V (1, a) is if an arbitral award does meet article V (1, a) of the convention should a court refuse to enforce such an award?

⁵⁸¹ H Arfazadeh 'Arbitrability under the New York Convention: The Lex Fori Revisited' (2001) 17(1) *Arbitration International* 73, 80. L Daradkeh *Arbitration Agreement in the Jordanian Legislations: A Comparative Study* (LLM thesis University of Jordan 1998) 35-42.

⁵⁸² J Paulsson 'The New York Convention in International Practice-Problems of Assimilation' in M Blessing (ed) *The New York Convention of 1958* (ASA Special Series No 9 Swiss Arbitration Association Zurich 1996) 107-108. AJVD Berg 'The New York Convention: Its Intended Effects, its Interpretation, Salient Problem Areas' in M Blessing (ed) *The New York Convention of 1958* (ASA Special Series No 9 Swiss Arbitration Association Zurich 1996) 32. DD Pietro and M Platte. Op. Cit (footnote 58) 87, 135.

⁵⁸³ AJVD Berg 'The New York Convention: Its Intended Effects, its Interpretation, Salient Problem Areas' in M Blessing (ed) *The New York Convention of 1958* (ASA Special Series No 9 Swiss Arbitration Association Zurich 1996) 32.

⁵⁸⁴ *ibid* 36.

Moreover, the burden of proof that an arbitral agreement has complied with article II (2) is placed upon the party who seeks enforcement, while the burden of proof that an arbitral agreement is invalid according to article V (1, a) is placed upon the party who resists enforcement.⁵⁸⁵

Consequently, this research does distinguish between the existence or the absence of the arbitral agreement as provided by article II (2), and the invalidity of the arbitral agreement as provided by article V(1, a) unless the parties subjected the invalidity of the arbitration agreement to the New York Convention.⁵⁸⁶ In the light of the above discussion, the invalidity of arbitral agreement as provided by section 103 of AA 1996 cannot be determined by part 1 of AA 1996 which governs the arbitral agreement unless the parties have subjected the validity of arbitration agreement to English law or failing any indication thereon, the award was made in England.

This conclusion in England can be supported by the decision of the Court of Appeal in *Excomm Ltd V Ahmed Abdul-Qawi Bamaodah (the St. Raphael)*⁵⁸⁷ in which the court held that:

For an agreement to be a written agreement to arbitrate it was unnecessary for the whole of the contract including the arbitration agreement to be contained in the same document; it was sufficient that the arbitration agreement was itself in writing and it was sufficient if there was a document which recognized the *existence* of an arbitration agreement between the parties.

In this case, the court expressly indicated that the purpose of having an arbitral agreement in writing is to recognise the existence of the arbitral agreement. The same approach is also reached by the Court of Appeal in *Zambia Steel & Building Supplies v James Clark & Eaton Ltd.*⁵⁸⁸ In this case, the court was dealing with article II (2) of the New York Convention as it is enacted by sections 1 and 7 of the Arbitration Act

⁵⁸⁵ AJVD Berg 'The New York Convention: Summary of Court Decisions' in M Blessing (ed) *The New York Convention of 1958* (ASA Special Series No 9 Swiss Arbitration Association Zurich 1996) 79.

⁵⁸⁶ The Italian Supreme Court held that art II (2) of the convention is applied only at the stage of the enforcement of arbitral agreement; it does not apply at the stage of the enforcement of arbitral awards. AJVD Berg 'The New York Convention: Summary of Court Decisions' in M Blessing (ed) *The New York Convention of 1958* (ASA Special Series No 9 Swiss Arbitration Association Zurich 1996) 43. DD Pietro and M Platte. Op. Cit (footnote 58) 87.

⁵⁸⁷ [1985] 1 Lloyd's Rep 403.

⁵⁸⁸ [1986] 2 Lloyd's Rep 225.

1975. The question was whether the terms of sale printed on the reverse of a contract quotation and containing the arbitral clause were properly incorporated into a purchase order, made pursuant to the quotation.

The court held in this case that the requirements of sections 1 and 7 of the arbitration Act 1975 are satisfied if the document containing the arbitration clause to which reference is made in the main contract is written, even though unsigned. That appears to be consistent with article 7(1) of the AA 1975 which defined the arbitral agreement as ‘an agreement in written’ omitting the words ‘signed’ by the parties as contained in article II (2) of the New York Convention.

Thus, in both cases the allegation was about the inexistence of the arbitration agreement as provided by article II (2), and not about the invalidity of the arbitration agreement as provided in article V 1(a).

Furthermore, in *Rosseel NV v Oriental Commercial & Shipping Co. (O.k.) LTD and Others*⁵⁸⁹ Mr. Justice Steyn said that ‘The grounds of refusal set out in s. 5 are exhaustive. If none of the grounds for refusal are present, the award “shall” be enforced’. In *Dardana Ltd v Yukos Oil Company*,⁵⁹⁰ Judge Chambers defined ‘not valid’ as ‘simply means that the agreement is of no legal effect under the relevant law’. In *Dalmia v National Bank*⁵⁹¹ Mr. Justice Kerr, J assumed that the validity of the arbitral agreement ‘can include continuing validity and is not limited to initial validity’.

The approach taken in these cases supports the difference between the meaning provided by article II (2) and article V (1, a). Thus, it seems very clear that the objection under article II (2) concerns the existence of the arbitral agreement as it is illustrated in the former two cases, but the objection under article V(1, a) concerns the invalidity of the arbitral agreement as a ground of refusal as it is illustrated in the latter cases.

⁵⁸⁹ [1991] 2 Lloyd’s Rep 625, 628.

⁵⁹⁰ [2002] 1 Lloyd’s Rep 225, 229.

⁵⁹¹ [1978] 2 Lloyd’s Rep 223, 238.

In this regard, it should be noted that section 103 (2, a, b), which represents article V (1, a) of the New York Convention, differentiates between the invalidity of the arbitral agreement according to the law which governs the incapacity of a party, and the invalidity of the arbitral agreement according to the law which has been chosen by the party or by the rendering place law.⁵⁹²

It can be said that there is no difference between paragraphs (a) and (b) of sub-section 103 (2), which represents article (1, a) of the New York Convention. In that, if the validity of an arbitral agreement as provided by paragraph (a) requires the valid consent by the parties, then being the party to the arbitral agreement under some incapacity, as it is provided by paragraph (b), means that no valid consent has been reached by the parties as it is indicated by paragraph (a). Because both bars have the same effect, it *may* explain why article V (1) of the New York Convention provides them in the same paragraph (a).⁵⁹³ The difference between both paragraphs is that under paragraph (b) the law which governs the invalidity is fixed, but it is not under paragraph (a) and it is left to the conflict laws of the country which are applicable to the parties.

The burden of proof for this ground is cast upon the party against whom enforcement is sought. He should prove the invalidity of the arbitral agreement and not the original contract especially after AA 1996 has adopted the doctrine of separability of the arbitral agreement.⁵⁹⁴

However, the New York Convention does not provide for separability of arbitral agreement. So, the question of invalidity of the original contract as a ground of refusal is still unsolved according to the New York Convention. However, it can be said, as the case may be, that the losing party can resist enforcement on the basis of invalidity of original contract as it will be seen later in *Soleimany* case, *Westacre* case, and *Hilmarton* case. Furthermore, the enforcing court has the permissive power to refuse enforcement even though this ground has been raised by the losing party.

⁵⁹² AJVD Berg. Op. Cit (footnote 168) 275-296.

⁵⁹³ Art V 1(A) provides as 'The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made...'

On other hand, section 37 (1, a) of part II, which represents article 1(a) of the Geneva Convention, stated that '[Foreign award has] been made in pursuant of an agreement for arbitration which was valid under the law by which it was governed'. So, if this law is indicated by the parties to arbitral agreement, it will be easy to know whether or not the arbitral agreement is valid. And if the parties fail to indicate such a law, then the party, who seeks enforcement, has to prove the applicable law under which the arbitral agreement is valid.

According to section 37(1,a) the winning party has also the burden to meet this condition. He has to show that an award is made according to arbitral agreement which is valid according to the applicable law. However, the said section did not indicate how to determine the applicable law. It is left to the conflict rules of the country where the award was invoked.⁵⁹⁵ If the winning party cannot prove the award is made in pursuant to an arbitral agreement, the enforcing court will refuse to enforce the award.

Moreover, the invalidity of the arbitral agreement may be used as a ground of refusal under section 66 or at Common Law. In this regard, the invalidity of the arbitral agreement will be according to the law which has been chosen by the parties. If they do not make an express choice about the governing law, the fact that the parties have agreed to a place for the arbitration is a very strong pointer implying they must have chosen the law of that place.⁵⁹⁶

6.3.4. Violation of due process

Violation of due process as a ground of refusal is provided by section 103 (2, c) of part III, which represents article V (1, b) of the New York Convention, and section 37(2, b) of part II, which represents article (2, b) of the Geneva Convention. It is also provided by section (3, d) of the Arab League Convention, section 37 of the Riyadh Convention, and section 7 (1, c, d) of Act No 8.

⁵⁹⁴ DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 371-373.

⁵⁹⁵ AJVD Berg. Op. Cit (footnote 168) 283.

⁵⁹⁶ *Union of India v Mcdonnell Douglas Corporation* [1993] 2 Lloyd's Rep 48, 50.

Due process, in a general term, as a ground of refusal has a wide scope. Thus, a large number of procedures in defence may arise under this ground. Violation of due process refers to the fact that the parties to arbitration were not given the minimum standard of fairness during the arbitral proceedings.⁵⁹⁷ The above regimes do not use the expression due process, but they mention some aspects of due process violation.

According to section 103(2, c) of part III (article V (1, b) of the New York Convention), the violation of due process is exemplified as the party against whom recognition and enforcement are invoked 'was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case'. It is suggested that the questions of proper notice and other rights of participations will frequently be expressly provided by the parties' agreement or by reference to the rules of an institutional arbitration body. However, in case where there is no such express identification, it is likely to be construed as a notice which is reasonable and adequate.⁵⁹⁸

It is also suggested that such an aspect of violation relates to serious irregularities.⁵⁹⁹ In other words, if the enforcing court reaches satisfaction to the effect that the violation of due process did not affect the arbitral award to be different if the irregularity did not occur, this violation will not be used as a ground of refusal.⁶⁰⁰ Moreover, it is suggested that such a violation of due process includes improper presentation of a party in the arbitral proceedings, and the notice of appointment of an arbitrator should be adequate but need not be in a particular form.⁶⁰¹

However, a limited time of appointment of an arbitrator by a party is not considered as violation of due process, but the party must be informed of the name of the

⁵⁹⁷ DD Pietro and M Platte. Op. Cit (footnote 58) 148.

⁵⁹⁸ DR Thomas. Op. Cit (footnote 50) 17, 35.

⁵⁹⁹ AJVD Berg. Op. Cit (footnote 168) 298. It should be noted in this respect that American courts have generally been reluctant to deny recognition and enforcement of an award on the grounds of procedural irregularity and particularly where the respondent has been given an opportunity to present his case before the tribunal but he did not do so. Ch Style and G Reid 'The Challenge of Unopposed Arbitrations' (2000) 16(2) *Arbitration International* 219, 223-224.

⁶⁰⁰ *ibid.*

⁶⁰¹ DD Pietro and M Platte. Op. Cit (footnote 58) 149-152.

arbitrator(s).⁶⁰² Furthermore, a party who is duly notified but refused to be present at the summons is not considered as a violation of the due process. Moreover, arbitrators should inform the party by the argument and the evidences of the other party.

Furthermore, a short limited time to present a defence by a party is not considered as a violation of due process.⁶⁰³ A number of factors are suggested to be taken into account to consider whether or not the parties were able to present their case, such as the participation in discovery, conflicting orders, time limits, necessity for hearings, standards of adversarial proceedings, adjournment, fraud, and estoppel.⁶⁰⁴

Others suggest that this ground of refusal is a matter of formality based upon the criteria of fair hearing.⁶⁰⁵ The enforcing courts in the forum place have their own concept of a fair hearing as has been said by the United States court as 'Essentially sanctions the application of the forum State's standards of due process'.⁶⁰⁶

A study of over 50 court decisions from States around the world shows the violation of due process basically relating to the right to present the evidence, including the right to have an expert to be appointed by the tribunal and to State one's case on the expert evidence. It also shows that the degree of due process requires that an arbitral tribunal has to pay attention to any mandatory rules at the place of arbitration.⁶⁰⁷

However, it is recommended that in case of consolidation arbitration where there is multi-party arbitration, the procedure to be followed would have to be carefully worked out. This is to ensure that each party is given a proper opportunity to present his case.⁶⁰⁸

⁶⁰² *ibid* 149-152.

⁶⁰³ DD Pietro and M Platte. *Op. Cit* (footnote 58) 296-311. AJVD Berg 'The New York Convention: Summary of Court Decisions' in M Blessing (ed) *The New York Convention of 1958* (ASA Special Series No 9 Swiss Arbitration Association Zurich 1996) 84-85.

⁶⁰⁴ DD Pietro and M Platte. *Op. Cit* (footnote 58) 152-158.

⁶⁰⁵ A Redfern and others. *Op. Cit* (footnote 55) 532.

⁶⁰⁶ As cited in A Redfern and others. *Op. Cit* (footnote 55) 532.

⁶⁰⁷ K Kohler and H Peter 'Formula 1 Racing and Arbitration: The FIA Tailor-Made System for Fast Track Dispute Resolution' (2001) 17(2) *Arbitration International* 173, 187.

⁶⁰⁸ A Redfern and others. *Op. Cit* (footnote 55) 208-209.

An example of violation of the due process can be found In *Dallal v Bank Mellat*.⁶⁰⁹ In this case, the plaintiff alleged that the proceedings in arbitration were contrary to the natural justice, and he is now in a position to present further evidence and arguments which would demonstrate that he ought to succeed on his claims. He was also unable to present his case effectively due to circumstances beyond his control, in that he did not wish to disclose to the tribunal the names of some of the individuals with whom he was dealing in Iran.

The English court in this claim questioned two points to accept or dismiss the plaintiff's claim. Was the arbitral tribunal competent or not and the claim that the plaintiff was unable to present his case effectively before the tribunal due to circumstances beyond his control can be considered as special circumstances to accept his claim or not. The English court found the tribunal was competent and its award should be recognised as valid judgement. On the other hand, it was found that the plaintiff's claim was not considered as special circumstances to accept his claim.⁶¹⁰ Furthermore, the Court of Appeal in *Irvani v Irvani*,⁶¹¹ by Buxton LJ, quashed the declaration that the award was valid and binding on the parties on the basis of violation of due process.

Moreover, it is submitted that violation of due process in domestic cases before the national court is not necessarily to be a violation of due process as regards subjects falling within the scope of the convention (New York Convention). In other words, the standards which the forum place court will apply are not as if the hearing before a national court in the forum place. It is enough that the enforcing courts are satisfied that the hearing is conducted due to an agreement between the parties with the principle of equality of treatment and opportunity to present the argument by both parties.⁶¹²

In *Dallal v Bank Mellat*,⁶¹³ arbitration was conducted under special agreement between the parties (Algeria declaration). The court examined the due process in the

⁶⁰⁹ [1986] 2 WLR 745.

⁶¹⁰ [1986] 2 WLR 745, 764.

⁶¹¹ [2000] 1 Lloyd's Rep 412, 426.

⁶¹² A Redfern and others. Op. Cit (footnote 55) 533.

⁶¹³ [1986] 2 WLR 745.

light of this agreement and the applicable procedure law, and not as due process conducted before the English court and applying English law. The court was satisfied that the hearing was conducted due to an agreement between the parties with the principle of equality of treatment and opportunity to present their case before the tribunal.⁶¹⁴

The aspect of violation of due process provided by section 37 (2, b) of part II (article (2, b) of the Geneva Convention) is about the insufficient time provided for the losing party to present his case. It is suggested that this aspect of violation includes all cases which form the violation of due process.⁶¹⁵

However, under section 103 of AA 1996 the losing party must prove this ground of refusal and the enforcing court will decide whether or not the violation would be considered as violation of due process. In regard to the proper notice, the court needs to be persuaded that the losing party did not really learn of the appointment of the arbitrator or the arbitral proceedings.⁶¹⁶ Meanwhile, in regard to the inability to present his case, the losing party has to state how he was prevented from presenting his case (is there a special circumstance as illustrated in the *Dallal* case).

The law under which the violation of due process to be examined is not determined in the applicable regimes. However, in *Dallal v Bank Mellat* the court stated in regard to the law under which the procedural irregularities should be governed as:

It is a fallacy to suppose that arbitral proceedings must take their authority from the local municipal law of the country within which they take place. It is of course, overwhelmingly the normal position that they do acquire their validity and competence from that source. The curial law is normally, but not necessarily, the law of the place where the arbitration proceedings are held.⁶¹⁷

In dealing with such a bar of enforcement, the court has discretion to or not to refuse enforcement according to section 103 of AA 1996. In this regard, the judge in *Dallal* case stated as ‘I exercise my discretion to strike out the plaintiff’s writ and statement

⁶¹⁴ *ibid* 766.

⁶¹⁵ AJVD Berg. Op. Cit (footnote 168) 297.

⁶¹⁶ DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 373.

⁶¹⁷ [1986] 2 WLR 745, 760.

of claim'.⁶¹⁸ While according to section 37 of part II, the enforcing court will act by its own motion if it is satisfied that the party against whom enforcement is sought was not given sufficient time to present his case.

On the other hand in Jordan, this ground of refusal is used in practice under section 7 (1, c) of Act No 8 which provides as:

The court may refuse the enforcement of foreign judgement in the following cases: (c) if the defendant was not given notice to present before the court which issued the judgement and did not, in deed, present before it, despite the fact that he dwelled or carried out business within the enforcing court jurisdiction, (d) if the award was achieved by fraud.

The resistance of enforcement under sub-section (c) was explained clearly by the Court of Cassation in a number of decisions relating to the enforcement of foreign judgements. All these decisions are based on the lack of notice to the respondent. The court rejected the objection to the enforcement of foreign judgement that was issued by the Iraqi court on the ground that the losing party was not notified of the action and the place of residence was not 'unknown' as mentioned in the Iraqi judgement.⁶¹⁹ In another decision, the court pointed out the purpose of sub-section (c) by saying that:

The purpose of the act's requirement to notify the respondent of the procedures before the court is to safeguard the right of defence for the respondent ..., therefore, a foreign judgement is not enforceable in the Kingdom [of Jordan] if the judgment was made without allowing the respondent to exercise his rights of defence. As such, an order made by the judge of provisional matters in Kuwait according to articles 166-171 of the Kuwaiti Code of Civil and Commercial Procedure, which invest the judge with a power to issue such an order without summoning the respondent or sending him a notice, is a judgment which cannot be enforced in Jordan according to article 7(1, c) of the enforcement of foreign judgments Act.⁶²⁰

Moreover, it is noteworthy to mention that the Court of Cassation in its decision relating to arbitration insisted that the arbitrator should observe the basic requirements of adjudication. These requirements stated by the court to include:

⁶¹⁸ [1986] 2 WLR 745, 766.

⁶¹⁹ Court of Cassation's decision No 67/78 (Journal of the Jordanian Bar 1978) 1118.

⁶²⁰ Court of Cassation's decision No 1258/90 (Journal of the Jordanian Bar 1991) 2329, 2331-2332.

The observation of the defence right by allowing disputants to submit whatever statement they may have, strike a balance of treatment between the disputants, securing the notification of both parties of the proceedings and granting them adequate time limits for the preparation of their defences and responses to settlements and documents submitted in the proceedings.⁶²¹

It is also submitted with respect to the sub-section (c) that if a party had not been notified to present before the competent court legally, the enforcing court is capable of refusing enforcement of foreign judgement.⁶²² Furthermore, it is submitted that the enforcing court is able to refuse enforcement in the above submission even though the applicable law on the dispute permitted not to notify the party.⁶²³

Regarding sub-section (d), the matter of fraud is discussed by articles 143-156 of Civil Law. As there is no case-law about this subject it is premature to predict how the enforcing court in Jordan may understand or deal with such a defence based on sub-section (d).

6.2.5. Excess of tribunal jurisdiction

The enforcing court may refuse the enforcement of a foreign arbitral award if it is furnished with evidence that such an award is made in excess of arbitrator's jurisdiction. Such a ground of refusal is provided by sections 103(2, d) and 103(4) of part III, which represent article V (1, c) of the New York Convention. It is also provided by sections 66 of AA 1996, and 37(2,c) of part II, which represents article 2 (c) of the Geneva Convention. This ground is also provided by article 7 (1,a) of Act No 8, section 37 (c) of the Riyadh Convention, section 3(c) of the Arab league Convention, section 19(1) of the Jordanian-Lebanon Convention, section 26(1) of the Jordan-Syria Convention, and 15(1) of the Jordan-Tunisia Convention.

According to the above regimes, there are two main subjects to be discussed,⁶²⁴

⁶²¹ Court of Cassation's decision No 9/75 (Journal of the Jordanian Bar 1975)1208, 1210.

⁶²² Court of Cassation's decision No 302/90 (Journal of Jordanian Bar Issue 9-11 1991) 1848. Court of Cassation's decision No 1258/90 (Journal of Jordanian Bar Issue 2 1991) 2329.

⁶²³ Court of Cassation's decision No 123/91 (Journal of Jordanian Bar Issue 4-5 1993) 776.

⁶²⁴ AJVD Berg. Op. Cit (footnote 168) 311-322. DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 374. A Redfern and others. Op. Cit (footnote 55) 533-535.

namely the award made in excess of the arbitrator's authority (submission to arbitration), and the partial enforcement of an arbitral award.

6.2.5.1. Award made in excess of an arbitrator's authority (submission to arbitration)

In consensual arbitration, it is submitted that the agreement of the parties to arbitration is the only source from which the jurisdiction of the arbitral tribunal comes from. Thus, such a valid agreement is the only criterion upon which the jurisdiction of arbitral tribunal can be judged.⁶²⁵ According to sections 103 (2, d) and 103 (4) of part III, there are two ways in which the arbitrator may exceed his authority. Firstly, arbitrator deals with matters not contemplated by or not falling within the terms of the submission to arbitration (*Extra Petita*) and secondly, issuing an award on matters beyond the scope of the submission to arbitration(*Ultra Petita*).⁶²⁶

The difference between these two ways is that in the first way the arbitrator does not respect the arbitral agreement and deal with matters which are not provided by the arbitral agreement, the criterion in this regard being the arbitral agreement. In the second way, the arbitrator extends his authority to deal with the subject which is out of the scope of his authority that is mandated by the parties, the criterion in this regard being the parties' mandate. In the second way the arbitrator may also issue an award in excess of his authority but still on matters which are falling within the terms of the submission to arbitration, but he has not been entitled to deal with by the parties.⁶²⁷

Section 66 of AA 1996 provides the situation in which the arbitrator exceeds his authority and the situation in which he deals with matters which are not submitted by the arbitral agreement. This section provides that '...lacked substantive jurisdiction to make the award'. The term 'lack of substantive jurisdiction' covers the excess of submission by the arbitration agreement, and the excess of the parties' mandate.

This point is illustrated in *Lesotho Highlands Development Authority v Impregilo SPA*

⁶²⁵ A Redfern and others. Op. Cit (footnote 55) 295.

⁶²⁶ DD Pietro and M Platte. Op. Cit (footnote 58) 159-162.

⁶²⁷ *ibid.*

&ORS.⁶²⁸ The arbitrators in this case had exceeded their powers under section 68 of the AA 1996 by making an award in a currency different from that provided for in the contract made between the parties. Also, in *Kianta Osakeyhtio v Britain & Overseas Trading Company, Ltd*,⁶²⁹ the court held in regard to the arbitrators' authority that there was no power in arbitrators to determine their own jurisdiction, and that accordingly the arbitrators were without jurisdiction to make the award and the action to enforce the award failed.

Moreover, section 37(2, c) of part II refers to the first way in which the arbitrator exceeds his jurisdiction, in that he deals with matters which are beyond the scope of the arbitral agreement. But it does not refer to the second way in which an arbitrator exceeds his authority by dealing with matters which are submitted to arbitration, but out of the scope of his authority. However, section 37(2, c) of part II also added another way in which the arbitrator may violate his authority. Instead, to exceed his authority and issue an award on matters which are not submitted by arbitral agreement as provided by section 103(2, d) of part III, he issues an award in which he did not dispose all the questions which are submitted to arbitration.

According to the Jordanian regimes, all of them refer to the foreign arbitral award which is made beyond the scope of the arbitrator's jurisdiction. They do not explain the way in which the arbitrator may exceed his authority. Section 7 (1, a) of Act No 8 refers to the foreign arbitral award made by the non competent tribunal.⁶³⁰ It does not refer to the law under which such a tribunal is not competent. However, it is submitted that the losing party has to prove that the tribunal is not competent to issue an award according to the arbitral agreement.⁶³¹

6.2.5.2. Partial enforcement

The enforcing court may recognise and enforce an award on matters which are within the scope of the arbitral agreement, and which can be separated from those on matters

⁶²⁸ [2003] EWCA Civ 1159.

⁶²⁹ [1954] 2 Lloyd's Rep 569.

⁶³⁰ The same is provided by s 37 of the Riyadh Convention, s 3 (c) of the Arab League Convention, and the bilateral conventions.

⁶³¹ Court of Cassation's decision No 874/86 (Journal of Jordanian Bar Issues 11-12 1989) 2550.

not so submitted,⁶³² The criterion in this situation is the possibility of separating the submitted matters to arbitration from those which are not so submitted. Otherwise, enforcement of such an award is not possible. On the other hand, the foreign arbitral award may not deal with all the questions that are provided by the arbitral agreement. The enforcing court has discretion either to postpone recognition and enforcement of such an award or to recognise and enforce it according to section 37(2, c) of part II. In this regard, the enforcing court also may ask the party who seeks enforcement of such an award for security.

The differences among the regimes which deal with this ground of refusal can be summarised as follows:

1-According to section 103(2, d) and section 66 of part III, the burden of proof is cast upon the party against whom the recognition and the enforcement are invoked. Meanwhile, it is left to the satisfaction of the enforcing court according to section 37 (2, c) of part II.

2-According to section 103 (2, d) of part III, the enforcing court has discretionary power to refuse enforcement of a foreign award on this ground. Meanwhile, the enforcing court has no such discretion according to section 66 and it shall not give the leave to enforce such an award. According to section 37(2, c) of part II, this matter is left to the satisfaction of the enforcing court.

3-According to sections 66 and 103(2, d) of part III, the arbitrator exceeds his authority in two ways. First, by dealing with matters which are not submitted in the arbitral agreement. Second, he exceeds his authority to deal with matters which are submitted in the arbitral agreement but he is not entitled by the parties to deal with them. On the other hand, section 37(2, c) of part II deals with the first way, in that the arbitrator deals with matters which are beyond the scope of the arbitral agreement. This section also added the case in which the arbitrator issued an award in which he has not dealt with all the questions referred to in the arbitral agreement.

⁶³² According to s 103 (4) of Pt III of AA 1996.

4-In regard to the partial enforcement, section 103(4) of part III refers to the award on matters beyond the scope of arbitral agreement and which can be separated from matters that are within the scope of arbitral agreement. Section 37 (2, c) of part II refers to an award which does not deal with all the matters that are submitted in the arbitral agreement and the enforcing court may ask the party who seeks enforcement of such an award for security. However, section 66 of AA 1996 does not provide such a way of enforcement.

In regard to partial enforcement in Jordan, two Jordanian regimes provide such a kind of enforcement, namely article V (1, c) of the New York Convention, and article 32 of the Riyadh Convention. However, the doctrine of partial enforcement is known in the Jordanian judicial precedents. In one of its decisions, the Court of Cassation considered part of the award invalid which was made in excess of arbitrator jurisdiction, while the other part which falls within the arbitrator jurisdiction is valid if separation between both parts is possible.⁶³³ The same court also accepted to separate the terms of arbitral agreement where one term is valid while the other is not as long as the separation between the two terms is possible.⁶³⁴ Thus, by analogy with these cases, it can be said that the application to enforce the valid part of the arbitral award is not contrary to the Jordanian law if such a part is separable from the invalid part.

6.2.6. Composition of tribunal or procedure not in accordance with an arbitral agreement or the relevant law

This ground of refusal is provided by section 103 (2, e) of part III, which represents article V (1, d) of the New York Convention. It is also provided by section 37(1, d, c) of part II, which represents article 1(c) of the Geneva Convention.⁶³⁵

According to section 103 (2, e), the enforcing court may refuse enforcement if the

⁶³³ Court of Cassation's decision No 203/66 (Journal of the Jordanian Bar 1966) 947, 949.

⁶³⁴ Court of Cassation's decision No 140/80 (Journal of the Jordanian Bar 1981) 49, 53-54. Court of Cassation's decision No 313/65 (Journal of the Jordanian Bar 1966) 53, 55.

⁶³⁵ There is no corresponding provision to this effect in Jordanian regimes other than the New York Convention.

losing party proves either:⁶³⁶

1-Composition of the arbitral tribunal was not in accordance with the parties' agreement, or with the law of the country where arbitration took place. For example, if the parties had agreed that their dispute should be submitted to three arbitrators, and a sole arbitrator appointed by one party determined the dispute. Another party would have a ground to object to the enforcement of the award that is made by a sole arbitrator.

In this regard, it is suggested that the party who resists enforcement on this ground has not participated in arbitration. If he took part in arbitration without objection on the appointment of a sole arbitrator, the enforcing court would not refuse enforcement on this ground.⁶³⁷ In this regard, the parties' agreement is the first to determine the composition of the tribunal. If there is no such agreement, then it is the law of the country where the arbitration took place.

In case of multi-party arbitrations, great attention should be paid to ensure the composition of the arbitral tribunal according to all parties' agreement. In such a kind of arbitration, one party or more may not be invited to choose the arbitrator because of the nature of the multi-party arbitrations. Thus, it is recommended that in such a kind of arbitration all parties have agreed in one way or another on the form of the arbitral tribunal in order to ensure the enforcement of the outcome of such a tribunal.⁶³⁸

2-The arbitral procedures were not in accordance with the parties' agreement, or with the law of the country in which arbitration took place. It is suggested that the party who resists enforcement should not take part in arbitration; if he did so, the enforcing court needs to be persuaded that he did not waive his right to object to the effect that the procedures were not in accordance with the parties' agreement or with the law of the country where the arbitration took place.⁶³⁹

⁶³⁶AJVD Berg. Op. Cit (footnote 168) 322-331. DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 375. A Redfern and others. Op. Cit (footnote 55) 535-537.

⁶³⁷ DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 375.

⁶³⁸ A Redfern and others. Op. Cit (footnote 55) 200-209.

⁶³⁹ DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 375. In *Minmetals Germany v Ferco Steel* [1999] 1 All ER 315, the court found that the party had waived his right to object to the continuing omission of the arbitrators to disclose an award as required by the rules of arbitration.

According to section 37 (1, b, c) of part II, the party who seeks to enforce an award must prove that this award is made not only by a tribunal constituted on a manner agreed upon by the parties, but also in conformity with the law governing the arbitral procedure.

The differences between both regimes are evident as follows:⁶⁴⁰

1-Section 103 (2, e) of part III requires the party against whom enforcement is sought to prove either the composition of the tribunal or the arbitral procedure not in accordance with either the parties' agreement or with the law of the country in which arbitration took place. Meanwhile, section 37 (1,b,c) of part II requires the party who seeks enforcement to prove that an award is made according to the arbitral tribunal constituted in accordance with the parties' agreement and to the law governing arbitral procedure *together*.

2-The burden of proof according to section 103 (2, e) of part III is cast upon the party against whom recognition and enforcement are sought, whereas according to section 37 (1, b, c) of part II it is cast upon the party who seeks recognition and enforcement of the arbitral award as provided by section 38 of part II.

3-Section 103 (2, e) of part III provides two criteria under which the arbitral tribunal's composition and the arbitral procedure are considered as irregular. First, they are considered as such either according to the parties' agreement, and then if there is no such agreement according to the law of the country where the arbitration took place, while section 37 (b, c) of part II provides only one criterion to each irregularity which

⁶⁴⁰ These differences were addressed by the president of the conference in which the New York Convention was emerged as follows:

...it was already apparent that the document represented an improvement of the Geneva Convention of 1927. it gave a wider definition of the awards to which the convention applied; it reduced and simplified the requirements with which the party seeking recognition or enforcement of an award would have to comply; it placed the burden of proof on the party against whom recognition or enforcement was invoked; it gave the parties greater freedom in the choice of arbitral authority and of the arbitration procedure; it gave the authority before which the award was sought to be relied upon the right to order the party opposing the enforcement to give suitable security.

As cited in LV Quigley. Op. Cit (footnote 194) 1060.

is the parties' agreement for the composition of the tribunal, and the law of procedure for the arbitral procedure.

4-Section 103 (2, e) of part III deals with the irregularity of the arbitral tribunal's composition or arbitral procedure according to the law of the country where the arbitration took place, whereas section 37 (1, c) of part II deals only with the irregularity of the arbitral award which is made according to the law governing the arbitral procedure. This law may or may not be the law of the country where the arbitration took place.

6.2.7. Arbitral award is not final, not binding, suspended, or set aside

The general rule which governs this ground of refusal is about to what extent the judgment of the court of the rendering place that is setting aside or suspending an award is welcome in the forum place.⁶⁴¹ This rule is an exception to the territoriality doctrine which is based on the idea that the law and the court of the State have the exclusive power to determine the legal effects of acts done within its borders. In some jurisdictions, the local court does not welcome the judgment of the rendering place which is setting aside or suspending the arbitral award, such as in the USA and France where the enforcing courts enforced the foreign award which was annulled in the country of origin.⁶⁴² In the following sub-sections, each part of this ground of refusal will be discussed in turn.

6.2.7.1. The arbitral award is not final in the country in which it was made

This ground of refusal is provided by section 37(1,d) of part II, which represents article 1(d) of the Geneva Convention. It is also provided by section 7(1, e) of Act No 8, article 3(f) of the Arab League Convention, article 37(c) of the Riyadh Convention, article 15(b) of the Jordan-Tunisia Convention, article 26(c) of the Jordan-Syria Convention, and article 19(3) of the Jordan-Lebanon Convention.

According to section 37(1,d) of part II, which represents article 1(d) of the Geneva

⁶⁴¹ R Goode. Op. Cit (footnote 89) 28.

⁶⁴² *ibid* 19, 24-28.

Convention, the final award is final in the country in which it was made. Section 39 of part II provides the meaning of 'final award' as 'For the purpose of this part of this Act, an award shall not be deemed final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made'.

The expression 'contesting the validity of the award is pending' has a wide meaning. It includes any kind of challenge against the validity of the arbitral award in the country where an award was made. As provided by article 1(d) of the Geneva Convention, it is open to opposition, appeal or *pourvo en Cassation* (in the countries where such forms of procedure exist), or for example, challenging an arbitral award on the ground that the award was made according to an invalid arbitral agreement, in excess of the arbitrator's authority, or not in accordance with arbitral procedures... etc.

However, the requirement of finality in the context of foreign enforcement of an award was addressed as:

The requirement of finality under treaty or domestic procedural rules refers, rather, to the extent that the award may be judicially challenged in the jurisdiction where the award was rendered, or under whose law the award was rendered. The requirement thus expresses a principle that the award not be enforced in a second jurisdiction while the party against whom it is to be enforced in the second jurisdiction may yet raise issues as to its validity in the first jurisdiction. Judicial attitudes concerning the requirement may vary. An enforcing court might consider an award final as soon as it is delivered, especially if issues as to its validity can be raised in the enforcing court. A middle ground is the granting of finality to a foreign award when the time within which it can be challenged in the rendering jurisdiction has run. At the other ex-treme, a court might not consider an award final until it has been confirmed in the jurisdiction where rendered.⁶⁴³

It is suggested that this request means in practice that such a proof (the award is final) cannot be brought unless the winning party submitted a leave of enforcement from the competent authority in the country in which an award was made. Such a kind of enforcement is called '*double exequature*'.⁶⁴⁴ This means that 'a party, who sought to enforce an award, had to prove an *exequatur* (leave to enforce) issued in the country in which the award was made as well as leave to enforce in the country in which he

⁶⁴³ T Firth. *Op. Cit* (footnote 276) 5.

sought enforcement'⁶⁴⁵ In *Union Nationale des Cooperatives Agricoles de Cereales v Robert Catterall & Co. Ltd.*⁶⁴⁶ The appellant claimed that the award was a foreign award and had not become final in the country in which it was made. The court held that:

[The award] was a final award in Denmark, the country where it was made, and satisfied the conditions of section 73 (1) (c) of the arbitration Act, 1950. The fact that the award was not directly enforceable in Denmark until a judgement of the Danish courts had been obtained did not prevent the award being a final award within section 37(1) (d) and accordingly, section 36(1) applied to it and it was enforceable in the same way as an English award.

In this case Lord Evershed M R stated the reason for not obtaining foreign judgement in the country where an award is made to ensure that an award is become final as:

It would mean that you could never in fact enforce an award, as such, in such cases as this; you would have to wait until you got the judgement of the court of the country where the award was made, and then you would not be enforcing the award but the judgement.⁶⁴⁷

According to this case, the criterion provided to interpret the word 'final' is that since the conditions for enforcement are satisfied as provided by part II of AA 1950, the question with respect to the finality of the arbitral award is whether the award has become final as it is understood in the sense of English law and not as phrase 'final' means in the State where an award was made.⁶⁴⁸

Therefore, to enforce the foreign arbitral award under part II, it is required to prove that an award is final in the country where it was made. The meaning of final award, in the light of this case, does not need to bring enforcement leave (or judgement) from the country where it was made. Thus, the *double exequature* problem had been avoided in this case. By analogy with this case, it can be said that an award was not enforceable in the country where it was made until a judgement or a leave of the local court of that country had been obtained does not prevent the award being final within section 37(1,d) of part II.

⁶⁴⁴ AJVD Berg. Op. Cit (footnote 168) 333.

⁶⁴⁵ Mr Justice Steyn in *Rosseel NV v Oriental*. [1991] 2 Lloyd's Rep 625, 628.

⁶⁴⁶ [1959] 2 Q.B 45, 54.

⁶⁴⁷ [1959] 2 Q.B 45, 54.

⁶⁴⁸ *ibid* 53.

According to Jordanian regimes, so far Jordanian courts have not had an opportunity to deal with the interpretation of phrase ‘final award’. However, if a foreign award has been challenged before a foreign competent court, the enforcing court has to adjourn enforcement until this challenge is dispensed.⁶⁴⁹

The burden of proof that an award is become final according to Jordanian regimes is not clear upon which party it is placed. The Court of Cassation in one of its decisions placed it upon the losing party,⁶⁵⁰ while in another decision it placed it upon the winning party.⁶⁵¹

From a comparison between the English AA 1950 and the Jordanian regimes, this research comes to the conclusion that under the English regimes the burden of proof is cast upon the party who seeks enforcement. Thus, the enforcement of an award will be delayed until the party who seeks enforcement proves that the award is final. Meanwhile under Jordanian regimes, the burden of proof is placed upon both parties. Thus, the enforcement of an award will be delayed until it is provided by the interested party that such an award is not final in the country where it was made.

6.2.7.2. An arbitral award is not binding on the parties

This ground of refusal is provided in the first paragraph of section 103(2, f) of part III, which represents article V (1, e) of the New York Convention. The word ‘binding’ is a replacement of the word ‘final’ provided by section 37 (1, d) of part II. The aim of this replacement is to eliminate the problem of *double exequature* which may happen in some States that are party to the Geneva Convention.⁶⁵² There is no definition of the word ‘binding’ in part III. An attempt to identify the word ‘binding’ was made in

⁶⁴⁹ Court of Cassation’s decision No 89/65 (Journal of Jordanian Bar 1965) 1013.

⁶⁵⁰ Court of Cassation’s decision No 294/74 (Journal of Jordanian Bar 1976) 475.

⁶⁵¹ Court of Cassation’s decision No 3048/2001 dated on 21/1/2002 (Adalah Centre Publications).

⁶⁵² Mr Justice Steyn in *Rosseel NV v Oriental*. [1991] 2 Lloyd’s Rep 625. B Leurent ‘Reflections on the International Effectiveness Arbitration Awards’ (1996) 12(3) *Arbitration International* 269, 278. DD Pietro and M Platte. Op. Cit (footnote 58) 165-166. WM Tupman ‘Staying Enforcement of Arbitral Awards Under the New York Convention’ (1987) 3 *Arbitration International* 209, 211. PR West ‘The Express Defenses of the N.Y. Convention on Foreign Arbitral Awards’ (1983) 5 *New York Law School Journal* 103, 118. MHS Jr ‘Resisting Enforcement of Foreign Arbitral Awards Under Article V(1) (e) and Article VI of the New York Convention: A Proposal for Effective Guidelines’ [1990] *Texas Law Review* 1031, 1047.

comparison with the word 'final'. In that, the word 'binding' means that a leave in the country where an award was made is not required for the award to be binding as it was required for an award to be final under article 1(d) of the Geneva Convention.⁶⁵³

It is suggested that the arbitral award will not become binding on the parties because the parties have the right to appeal to a second arbitral tribunal.⁶⁵⁴ It is also suggested in the view of the private international law committee that an award is 'binding' 'if no further recourse can be had to another arbitral tribunal, such as an arbitral appeal tribunal; and the fact that recourse might be available to a court of law does not preclude an award from being binding'.⁶⁵⁵

Moreover, it submitted that 'the award has not yet become binding on the parties' does not mean that leave must first be achieved to enforce the award by way of exequatur or other similar means in the country of origin'.⁶⁵⁶ Furthermore, it is suggested that an award will not become binding on the parties until another step, that is required, for example, by an arbitral agreement, has been taken. Unless and until that event is achieved, the enforcing court will not enforce the arbitral award.⁶⁵⁷ An example of such a step is illustrated in *Rosseel NV v Oriental Commercial & Shipping Co. (U.K) Ltd. and others*,⁶⁵⁸ in which the defendant argued that the arbitral award is not become binding on the parties on the basis that there is an oral agreement to the effect that the plaintiffs would not seek enforcement abroad until after confirmation of the award by the court of the United States.

The main question which arises with respect to an award binding on the parties, is when it will become binding and if so, according to what law? Section 103 (2, f) of part III provides 'the award has not yet become binding on the parties ...by a competent authority of the country in which, or under law of which it was made'. In regard to the time on which an award becomes binding on the parties, it is suggested that it becomes binding at the moment when an award is no longer open to a genuine appeal on the merits to a local authority where such means of recourse are

⁶⁵³ AJVD Berg. Op. Cit (footnote 168) 333-346.

⁶⁵⁴ CM Clarkson and J Hill. Op. Cit (footnote 293) 305.

⁶⁵⁵ As cited in DR Thomas. Op. Cit (footnote 50) 17, 36.

⁶⁵⁶ MJ Mustill and SC Boyd. Op. Cit (footnote 29) 213.

⁶⁵⁷ DSJ Sutton and J Gill (eds). Op. Cit (footnote 204) 375-376

available.⁶⁵⁹ According to *Rosseel NV v Oriental Commercial & Shipping Co. (U.K) Ltd. and others*,⁶⁶⁰ an award is become binding on the parties at the time when the award is fulfilled according to the conditions provided by the arbitral agreement.

6.2.7.3. Arbitral award is set aside or suspended

This ground of refusal is provided in the second paragraph of section 103 (2, f) of part III, which represents the second paragraph of article V (1,e) of the New York Convention. It is also provided by section 37(2, a) of part II, which represents article 2(a) of the Geneva Convention.

As has been seen earlier, the aim of challenge in the country of origin is to set aside the arbitral award. Accordingly, if the winning party continues to enforce such an award after it has been set aside, the party against whom recognition and enforcement are sought can resist enforcement on the ground that such an award has been set aside or suspended by the competent authority of the country of origin.⁶⁶¹

The grounds on which an award may be set aside or suspended by the local competent court are not restricted by section 103 of part II, which represents article V 1(e) of the New York Convention.⁶⁶² It seems that these grounds are left to the local law of the place of origin. In this regard, Redfern and Hunter said that:

The problem arises because the New York convention does not in any way restrict the grounds on which an award may be set aside or suspended by the court of the country in which, or under the law of which, that award was made. This is a matter that is left to the domestic law of the country concerned; and this domestic law may impose local requirements (such as the need to initial each page of the award) that judges and lawyers elsewhere would not regard as sufficient to impeach the validity of an *international* arbitration award.⁶⁶³

These local requirements mentioned in the above quotation are referred to by Paulsson as 'Local standard annulment (LSA)'. He contrasted LSAs with 'International standard annulment (ISA)'. In this regard, he argued that if an award

⁶⁵⁸ [1991] 2 Lloyd's Rep 625.

⁶⁵⁹ AJVD Berg. Op. Cit (footnote 168) 338-346.

⁶⁶⁰ [1991] 2 Lloyd's Rep 625.

⁶⁶¹ AJVD Berg. Op. Cit (footnote 168) 349-357.

⁶⁶² Such grounds are limited by s 34 of Model Law.

was set aside or suspended according to LSA, the enforcing court should enforce the award even though such an award was set aside or suspended in the place of origin, but if the award was set aside or suspended according to ISA, the court should not enforce such an award.⁶⁶⁴

It is argued that the court of the country where arbitration took place should have control over arbitral procedures as a safeguard against lack of due process, fraud, corruption...etc. In this regard, the questions which may arise as to how far this control will go? Is it limited to a number of grounds or not? If so, to what extent national courts consider their control over arbitration process? It is suggested to strike a balance between the control of the national court and not to interfere to re-examine the merit of the award.⁶⁶⁵

The court that has exclusive jurisdiction to set aside an award is the national court of the country in which an award was made or the national court of the country under the law of which an award was made (the court of the place of origin).⁶⁶⁶

If the court of the place of origin has annulled an arbitral award, it is not mandatory upon the enforcing court to refuse enforcement as such a court has a discretionary power. In practice, such an approach has been achieved in France in *Hilmarton* case, and in the United States in *Chromalloy* case.⁶⁶⁷ However, the English court in *Minmetals Germany v Ferco Steel*,⁶⁶⁸ emphasised the role of the supervising court in the country of origin. That is to say, the interested party should call upon the courts of the country concerned to exercise their supervisory role. By analogy with this case, it can be said that the English courts welcome the outcomes of the supervising court of the country of origin. Therefore, it can be said that the award which has been set aside or suspended in the country of origin will not be recognised and enforced in England.

However, it is submitted that the enforcement of an award annulled by the court in the

⁶⁶³ A Redfern and others. Op. Cit (footnote 55) 538.

⁶⁶⁴ J Paulsson 'The Case for Disregarding LSAs (Local Standard Annulment) Under New York Convention' (1996) 7 *American Review of International Arbitration* 99, 114.

⁶⁶⁵ A Redfern and others. Op. Cit (footnote 55) 538-539.

⁶⁶⁶ AJVD Berg. Op. Cit (footnote 168) 349-350.

⁶⁶⁷ A Redfern and others. Op. Cit (footnote 55) 540.

⁶⁶⁸ [1999] 1 All ER 315.

country of origin relates to two main reasons.⁶⁶⁹ Firstly, the grounds of refusal which are provided by section 103 (2) of part III are permissive. Secondly, the winning party can avail himself to recognise and enforce the New York Convention award by relying on any other regimes provided by the English legal system to enforce an award. This gateway is called as the more favourable-right-provision.⁶⁷⁰

6.2.7.4. Staying recognition and enforcement proceedings

After an award has been made, it is predicted that the losing party may seek to challenge such an award in the place of origin. So, what shall the English or the Jordanian court do in case that, after the enforcement proceedings have been open, the losing party objects to the effect that there are setting aside proceedings pending in the country of origin. In this regard, section 103 (5) of AA 1996,⁶⁷¹ which represents article VI of the New York Convention 1958, provides that:

Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in sub-section (2) (f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award. It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.⁶⁷²

According to this section, the enforcing court is invested with discretionary power to adjourn the decision on recognition or enforcement of the award; it also has the power to order the losing party to give suitable security if the party who seeks enforcement applies for such an order.⁶⁷³

The question which may arise in this respect as to whether the enforcing court shall adjourn enforcement or order security as a matter of course, or it has to verify to what extent the losing party is serious in his application. An answer to this question can be

⁶⁶⁹ A Redfern and others. Op. Cit (footnote 55) 539.

⁶⁷⁰ AJVD Berg. Op. Cit (footnote 168) 81.

⁶⁷¹ Staying enforcement proceedings until the determination of challenge to the award can be applied under s 66. This is applied in *Apis As v Fantazia Kereskedelmi KFT* [2001]1 All ER 348. Once the application to stay enforcement is made the court may ask the applicant to make a payment into court as security. This is applied in *Apis As v Fantazia Kereskedelmi* [2001]1 All ER 348 and in *Air India v Caribjet* [2002] 1 Lloyd's Rep. 314.

⁶⁷² Also s 37(3) of pt II of AA 1950 provides the same effect.

⁶⁷³ *Dardana Ltd v Yukos Oil Co* [2002] 1 Lloyd's Rep 225, 229.

found in the following cases:

1-In *Agromet v Maulden Engineering Ltd. (Q.B.D)*,⁶⁷⁴ it was held that:

I have come to the conclusion that in principle I see no reason why I should grant a stay of execution. There has been arbitration and an award has been made which has become final. The defendants did not take any procedural step to prevent the award becoming final, nor has any attempt been made to set it aside. In my judgment, the defendants are not entitled to a stay in the action to enforce the arbitration award because they have a counterclaim in the civil proceedings.

2-In *Soleh Boneh International Ltd and Another v Government of the Republic of Uganda and National Housing Corporation*,⁶⁷⁵ Lord Staughton held that:

In my Judgement two important factors must be considered on such an application, although I do not mean to say that there may not be others. The first is the strength of the argument that the award is invalid as perceived on a brief consideration by the court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the judge must be guided by his preliminary conclusion on the point. The second point is that the court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult, for example, by movement of assets or by improvident trading, if enforcement is delayed. If that is likely to occur, the case for security is stronger; if, on the other hand, there are and always will be insufficient assets within the jurisdiction, the case for security must necessarily be weakened.

3- *Apis As v Fantazia Kereskedelmi KFT*,⁶⁷⁶ applied the principle that was provided in *Soleh Boneh International Ltd and Another v Government of the Republic of Uganda and National Housing Corporation*. Moreover, the same principle was considered in *Dardana Ltd v Yukos Oil*.⁶⁷⁷ In this case, the award was under appeal in the Swedish courts on the ground of lack of jurisdiction, the winning party sought enforcement before the English court, and then the losing party resisted enforcement by asking the enforcing court to set aside the enforcement order, alternatively, to have the order

⁶⁷⁴ [1985] 1 W.L.R. 762, 77.

⁶⁷⁵ [1993] 2 Lloyd's Rep. 208, 212.

⁶⁷⁶ [2001] 1 All E.R.(Comm) 348.

suspended pending the outcome of his challenge to the award in Sweden. The enforcing court adjourned the enforcement proceedings before it on the basis that the losing party would provide security.⁶⁷⁸ The same principle is also applied by *Socadec Sa v pan Afric Impex Company Ltd.*⁶⁷⁹

In the light of these cases, the court should not adjourn enforcement for reasons other than those mentioned in section 103(5). For example, it cannot adjourn enforcement if the party who resists enforcement has a counterclaim in the civil proceedings.⁶⁸⁰ The court should not also adjourn enforcement if in doing so it will be rendered more difficult in that the party who resists enforcement, for example, would take this opportunity to hide his assets.

In other jurisdictions such as in *Hallen v Angledal*,⁶⁸¹ Justice Rolfe refused the application under article VI of the New York Convention and enforced the award for two main reasons.⁶⁸² 1-The defendants had not satisfied the court that the application for suspension had been submitted before a competent authority and they had not also furnished the court with the evidence about the nature of the body before which the suspension application had been made, nor its competence to set aside such an award. 2-He (Rolfe J) was not satisfied that the application of suspension had a genuine chance of success and he referred to the judgment in the Hong Kong case of *Hebei Import & Export Corp v Polytek Engineering Co. Limited*,⁶⁸³ in which Leonard J said that:

The burden must be on the defendant in this case to show that the application

⁶⁷⁷ [2002] 1 Lloyd's Rep 225, 230. And in the Court of Appeal [2001] EWCA Civ 1077, (Transcript: Smith Bernal), 6 JULY 2001. See the comment on this case in D Altaras 'Enforcement of Foreign Award: Dardana v Yukos Oil Co' (2002) 68 (3) *Arbitration* 315, 315-317.

⁶⁷⁸ See the commentators on this case (--) 'Enforcement of Arbitration Awards Methods of Contesting Enforcement' [2002] *Arbitration Law Monthly* 3, 3-7. M Endicott 'Adjournment of Enforcement Proceedings Pending Decision on Setting Aside Be Foreign Court-Arbitration Act, S 103(5)' (2003) 6(1) *International Arbitration Law Review* 4, 4-5. However, the Court of Appeal reversed the decision which ordered security of US \$2.5 million. Published in [2002] 2 Lloyd's Rep 326.

⁶⁷⁹ [2003] EWHC 2086 (QB).

⁶⁸⁰ *Agromet v Maulden Engineering Ltd* (Q.B.D) [1985] 1. W.L.R 762, 777.

⁶⁸¹ Unreported, supreme Court of New South Wales, June 10, 1999 (50055/1999). As Cited in M Secomb 'Suspension of the Enforcement of Awards Under Article VI of the New York Convention-Proof and LSAS' (2002) 5(1) *International Arbitration Law Review* 1, 1-8.

⁶⁸² *ibid.*

⁶⁸³ Unreported High Court of Hong Kong, November 1, 1996. As cited in M Secomb. Op. Cit (footnote 681) 1-8.

has been made to the Chinese court and that it is a bona fide application, not made only with a view to delaying payment. If it appears that the application is hopeless and bound to fail, this court will not grant an adjournment.

It is submitted that the reason why the discretionary power was invested in the enforcing court by article VI is to avoid abuse by the party who seeks to delay the enforcement of an award.⁶⁸⁴ It is also suggested that after an application to stay enforcement proceedings has been made, the enforcing court should in order to examine the seriousness of such an application verify the following guidelines to secure using its discretion power.⁶⁸⁵

1-The suspension application submitted before a competent authority in the country of origin.

2-The possibility of a genuine chance of success to set aside an award.

3-Being any other elements that are relevant to the exercise of the courts discretion, in that if either party wants to prove that other elements are relevant, the party has the burden to prove that elements, such as the availability of resources to satisfy the award, financial situation of the party concerned, and if the party who resists the suspension application alleges that the application for setting aside an award is based upon the LSA, he has to prove such allegation.

To avoid confusion between section 103(2, f) (article V (1, e) of the New York Convention) and section 103(5) (article VI of the New York Convention) it is worthy to distinguish between them. Section 103 (2, f) deals with an award which has been already set aside or suspended in the country of origin, and the enforcing court has a discretionary power to refuse enforcement of such an award.

Meanwhile, section 103 (5) deals with an award which is not yet set aside or suspended but the application is made to reach such an effect in the country of origin. In this case, the enforcing court has the discretionary power to adjourn enforcement or order the losing party to give suitable security. According to this distinction, the court that has jurisdiction to stay enforcement proceedings of a foreign award under section

⁶⁸⁴ AJVD Berg. Op. Cit (footnote 168) 353

⁶⁸⁵ M Secomb. Op. Cit (footnote 681) 1-8.

103(5) does not amount in practice not to enforce it.⁶⁸⁶

However, once the judgement has been entered in terms of the award to be enforced, the enforcing court at this stage become more cautious to stay the enforcement proceedings. In *Far Eastern Shipping Co. v Akp Sovcomflot*,⁶⁸⁷ the court held by Potter J that:

However, it *would rarely if ever be appropriate to order a stay* in respect of a convention award when, by definition under the convention the time for enforcement had arrived; on the fact and evidence there were no special circumstances which rendered it inexpedient to enforce the plaintiffs' judgment: the stay of execution imposed by the order of Mr. Justice Cresswell would be removed.

Moreover, in *Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne*,⁶⁸⁸ Waller J has been doubted whether the stay is ever appropriate except in the circumstances provided by section 103 (5, f).

On the other hand, the Jordanian court has a discretionary power to adjourn enforcement or to order the losing party to give suitable security in case an application is made to set aside or suspend an award in the country of origin.⁶⁸⁹ Article VI of the New York Convention had been applied in a case before the Amman First Instance Court; in this case the court adjourned the enforcement of the arbitral award as a matter of course upon the application made by the respondent to the effect that he files an action to set aside the award before the Court of Appeal of Paris. In this case, the court stated that:

Since the respondent had petitioned for the setting aside of the award before the Court of Appeal of Paris, the request for enforcement of such an award is considered premature. Therefore, by virtue of article VI of the New York Convention we order the adjournment of the enforcement proceedings and at the same time order the respondent to pay a security in the amount of \$1,817,000.⁶⁹⁰

In this case, the court ordered the adjournment of enforcement as a matter of course.

⁶⁸⁶ MJ Mustill and SC Boyd. Op. Cit (footnote 29) 213.

⁶⁸⁷ [1995] 1 Lloyd's Rep 520, 521.

⁶⁸⁸ [1996] 1 Lloyd's Rep 485.

⁶⁸⁹ Art VI of the New York Convention 1958.

Since article VI of the New York Convention invested the court with a discretionary power, the court should verify, as the English court has done, that the award is invalid as perceived on a brief consideration by the court itself while proceedings to set it aside are pending in Paris. It should also verify whether the award is manifestly invalid, then to order an adjournment and no order for security, or if it is manifestly valid, there should be either an order for immediate enforcement, or an order for substantial security.

On the other hand, the court should consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult, for example, by movement of assets, if enforcement is delayed. The court should also ask the party who applied for suspension to bring the evidence of the body which has jurisdiction to set aside an award and its competence, and to prove that there is a genuine chance of success to set aside the award.

Furthermore, if the enforcement of a foreign award is sought under Act No 8 the enforcing courts by, virtue of article 122 of Civil Procedure Law 2002, has the power to adjourn the enforcement proceedings by its own motion and if there are matters upon their settlement an enforcement order of an award will be issued.

6.3.8. Non arbitrable of subject matter

This ground of refusal is provided in the first paragraph of section 103(3) of part III, which represents article V (2, a) of the New York Convention, section 37 (1, e) of part II, which represents article 1(b) of the Geneva Convention. On the other hand, it is provided by article 2 of Act No 8, article 3(a) of the Arab League Convention, and article 37 (1) of the Riyadh Convention.

This ground of refusal relates to the subject-matter of the dispute. In this regard, the question arises as to whether the differences referred to arbitration are capable of being settled by arbitration.⁶⁹¹ In this regard, two main points are to be examined.

⁶⁹⁰ Decision of Amman Court of the First Instance No 81/1992 (Unpublished Issued on 8 July 1993).

⁶⁹¹ V Reddy and V Nagaraj 'Arbitrability: The Indian Perspective' (2002) 19(2) *Journal of International Arbitration* 117, 121-123. A Redfern and others. Op. Cit (footnote 55) 163.

Firstly, what are the common factors which determine inarbitrability? The attempt to draw a list of the factors which determine inarbitrability has failed and there is no body of authority which suggests how and where the line should be drawn.⁶⁹²

Secondly, by what law the question of arbitrability is to be examined? A number of laws are suggested in academic writing with respect to this point.⁶⁹³ In this regard, national courts have been considering arbitrability alternatively or cumulatively by the forum law, the law that has been chosen by the parties' agreement, and the law of the rendering place.⁶⁹⁴ However, the law mentioned in article V (2, a) of the New York Convention is the law of the country where recognition and enforcement are sought.⁶⁹⁵

As far as the English regimes are concerned, no principle has been adopted upon which the distinction between disputes which are capable of being settled by arbitration and those which are not, can be drawn.⁶⁹⁶ The general principle in English law with respect to arbitrability as Mustill & Boyd submitted is 'any dispute, or claim concerning legal rights which can be the subject of an enforcement award, is capable of being settled by arbitration. This principle must be understood, however, subject to certain reservation'.⁶⁹⁷

However, the enforcing court will decide whether or not the dispute is capable of settlement by arbitration and under which law by virtue of its discretionary power provided by section 103(3), which represents article V(2, a) of the New York Convention.

In Jordan, according to article 2 of Act No 8, a foreign arbitral award must be made to dispose civil cases. It is suggested for the purpose of this article that civil cases must be construed to cover commercial cases in respect of the country which distinguishes

⁶⁹² MJ Mustill and SC Boyd. *Op. Cit* (footnote 29) 70-76. See for controversial issues of arbitrability, such as patents and trademarks, antitrust and competition laws, securities transactions, bribery and corruption, and fraud. A Redfern and others. *Op. Cit* (footnote 55) 165-172.

⁶⁹³ DD Pietro and M Platte. *Op. Cit* (footnote 58) 176-179.

⁶⁹⁴ H Arfazadeh. *Op. Cit* (footnote 581) 73. MJ Mustill and SC Boyd. *Op. Cit* (footnote 29) 75-76. DD Pietro and M Platte. *Op. Cit* (footnote 58) 176-179.

⁶⁹⁵ AJVD Berg. *Op. Cit* (footnote 168) 368. DD Pietro and M Platte. *Op. Cit* (footnote 58) 176.

⁶⁹⁶ MJ Mustill and SC Boyd. *Op. Cit* (footnote 17) 149.

⁶⁹⁷ *ibid* 149.

between the commercial and the civil matter.⁶⁹⁸ According to this article, not any civil arbitral award is enforced in Jordan. Article 2 of the said Act limited the scope of a foreign award which is capable of being enforced in Jordan, to include:

1-Payment of a certain sum of money. In this regard, it is suggested that payment of certain money, regardless of the source of obligation, which may be a contract, unilateral will, tort, unjust enrichment, or the law.⁶⁹⁹

2-Movable property.

3-Winding up account.

Meanwhile, other regimes refer to the Jordanian laws as a criterion upon which disputes are not capable of settlement by arbitration. Not all matters are capable of settlement by arbitration according to Jordanian laws. For example, the following disputes are not capable of settlement by arbitration according to the Jordanian laws:⁷⁰⁰

1-Criminal matters, nationality, inheritance, or entail matters. Such disputes are reserved only to Jordanian courts.

2-Public properties which are related to the government; drugs, and unlicensed weapons.

3-Article 20 of the Commercial Agents and Intermediaries Law No 44 of 1985 reserved to the Jordanian courts any disputes which may arise from any commercial agency contract, regardless of any agreement to the contrary. The courts justified the purpose of non-arbitrability in respect of commercial agencies as to protect the Jordanian citizens and to affirm national sovereignty.⁷⁰¹ Article 215 (b) of Maritime Commercial Law reserved any disputes which may arise from a maritime bill of lading or maritime transport to Jordanian courts.

⁶⁹⁸ AH Haddad. Op. Cit (footnote 381) 7.

⁶⁹⁹ *ibid* 8.

⁷⁰⁰ L Daradkeh. Op. Cit (footnote 581) 39-42.

⁷⁰¹ Court of Cassation's decision No 47/91 (Journal of Jordanian Bar 1993) 193. Court of Cassation's decision No 411/84 (Journal of Jordanian Bar 1985) 152.

This ground of refusal as provided by article V 2 (a) of the New York Convention is different from other grounds provided by the said convention with respect to the burden of proof. This ground can be relied upon to refuse enforcement by the own motion of the enforcing court. It does not need a request to be made by the party against whom recognition and enforcement are sought. However, section 103 (3) of part III, which represents article V 2 (a) of the New York Convention, does not refer to the own motion of the enforcing court. It states that 'Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration'. Meanwhile, article V 2 (a) of the New York Convention states that:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement are sought find that: A- the subject matter of the difference is not capable of settlement by arbitration under the law of that country.

Accordingly, it seems that the English court has no power to refuse enforcement on this ground by its own motion. To do so, the party against whom recognition and enforcement are sought should raise this ground of refusal before the enforcing court.

6.2.9. Public policy

This ground of refusal is provided in the second paragraph of section 103 (3) of part III of AA1996, which represents article V (2, b) of the New York Convention. It is also provided by section 37(1, e) of part II of AA 1950, which represents article 1(e) of the Geneva Convention. On the other hand, it is provided by article 7(1, f) of Act No 8, article 37(e) of the Riyadh Convention, and article 3(e) of the Arab League Convention. However, it can be said that public policy as a ground of refusal is provided, in practice, in all regimes in both States.

Generally speaking, the enforcing courts of England and Jordan will refuse to enforce a foreign arbitral award which is contrary to English or Jordanian public policy. However, the scope of public policy in England is not the same as its counterpart in Jordan.

The issue of public policy is controversial, as no unified concept has been reached to determine its scope. Different States have different meanings for public policy. Therefore, if the enforcement of an arbitral award is refused because of public policy considerations, it is still possible to find another State in which the same considerations do not apply for the purpose of public policy.⁷⁰²

The scope of public policy is not determined even within the territory of one State. The court may refuse to enforce an arbitral award because of public policy considerations. Later, the same court or another court in the same State may enforce the arbitral award which involves the same circumstances as the previous one, as the same considerations no longer apply for the purpose of public policy. This controversial approach was adopted in England in a number of cases in which the same court gave different judgments about different arbitral awards, even though the circumstances were the same.

In the light of the cases decided by the English and the Jordanian courts, this section will attempt to answer the following questions in respect of public policy in both States:

- 1-What is the doctrine of public policy?
- 2-When do the English and the Jordanian courts regard an award as being against the English and the Jordanian public policy?
- 3-Do the English and the Jordanian courts apply a concept of international public policy in the recognition and enforcement process?
- 4-Do the English courts refuse enforcement when an award is contrary to European Community Law? And do the Jordanian courts refuse enforcement when an award is contrary to Islamic principles?

6.2.9.1. What is the doctrine of public policy?

The doctrine of public policy has not been defined or categorised within a particular

⁷⁰² A Redfern and others. Op. Cit (footnote 55) 520.

definition or a particular act.⁷⁰³ It can be raised on different grounds which may include any of the above named grounds of refusal ('catch all' provisions).⁷⁰⁴ The term public policy is known in the Common Law system. Its meaning differs from one country to another and from time to time (relativity of public policy scope). There is an alternative term which is sometimes used instead of public policy known as *order public*. This term is usually used in the Civil Law legal system. So, Jordanian regimes use the term *order public* while 'public policy' is the term used by the English regimes. However, both terms are considered to have the same meaning for the purpose of this research.⁷⁰⁵

It is suggested, however, that the term public policy concerns the fundamental moral and convictional policies of the forum place.⁷⁰⁶ Another writer described it as 'open-textured and encompasses a broad spectrum of different acts'.⁷⁰⁷ Another defined it as 'public policy like national interest to which it is inseparably related is a nebulous concept hardly capable of precise definition or explanation at any one point in time. It is a fluid concept and the contents of which are determined by the changing mod of society'.⁷⁰⁸ In *Richardson v Mellish*,⁷⁰⁹ it was defined as 'it is a very unruly horse, and when you get astride it you never know where it will carry you'.

⁷⁰³ JGD Enterria 'The Role of Public Policy in International Commercial Arbitration' (1990) 21 *Law & Policy in International Business* 389, 401-402. V Shaleva 'The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of Central and East European States and Russia' (2003) 19(1) *Arbitration International* 67, 68-69. KH Bockstiegel 'Public Policy and Arbitrability' in (--) *Comparative Arbitration Practice and Public Policy in Arbitration* (International Council for Commercial Arbitration Congress Series No 3 New York 1986) 178-181. JR Junker 'The Public Policy Defence to Recognition and Enforcement of Foreign Arbitral Awards' (1977) 7 *California Western International Law Journal* 228, 228-231. However, the term public policy is defined in Black's Law dictionary as 'Broadly, principles and standards regarded by the legislature or by the courts as being of fundamental concern to the State and the whole of society'.

⁷⁰⁴ See the matters which may be covered under the public policy scope with respect to the New York Convention, art V (2, b). DD Pietro and M Platte. Op. Cit (footnote 58) 179-190. P Mayer. Op. Cit (footnote 294) 249-264. JGD Enterria. Op. Cit (footnote 703) 410-417. JR Junker. Op. Cit (footnote 703) 230.

⁷⁰⁵ Some who would differentiate between the two terms whether in their scope or meaning, in that the scope of public order is wider than the public policy as it refers to the domestic rules which are mandatory in nature and which cannot be contradicted by the parties. It also includes all rules of due process. JGD Enterria. Op. Cit (footnote 703) 395.

⁷⁰⁶ AJVD Berg. Op. Cit (footnote 168) 376. JGD Enterria. Op. Cit (footnote 703) 390-396. JR Junker. Op. Cit (footnote 703) 228-231.

⁷⁰⁷ AG Tweeddale 'Enforcing Arbitration Awards Contrary to Public Policy in England' [2000] *The International Construction Law Review* 159, 159.

⁷⁰⁸ AI Okekeifere 'The Enforcement and Challenge of Foreign Arbitral Awards in Nigeria' (1997) 14 *Journal of International Arbitration* 228, 236.

⁷⁰⁹ (1824) 2 Bing 229, 252.

Consequently, the doctrine of public policy is easier to exemplify than it is to identify. The basis is that each State has its own fundamental interests within which it has to weigh a foreign arbitral award. If an award, for example, involves bribery or corruption, such an award is not enforceable because it is against the interests of State which prohibits such acts. On the other hand, other laws may consider an action as against the interests of State under some circumstances or at particular time, such as trading with an enemy in wartime.

Two main types of public policy have been identified.⁷¹⁰ Firstly, domestic public policy which involves any act that contradicts the mandatory rules of local laws or infringes the high and invaluable morality of the local society. Secondly, international public policy which involves the interests or principles which are applied in international relationships, any infringement of which is considered as international public policy, such as bribery, corruption, drug trafficking, and terrorism.⁷¹¹

6.2.9.2. When do the English and the Jordanian courts regard an award as being against English and the Jordanian public policy?

It was seen in Chapter 1 that the enforcing court in the forum place exercises control over the enforcement of a foreign award. As part of its control, it may refuse to enforce the foreign award on the grounds that it is contrary to its public policy. On

⁷¹⁰ AI Okekeifere. Op. Cit (footnote 708) 236. DD Pietro and M Platte. Op. Cit (footnote 58) 181-182. JGD Enterria. Op. Cit (footnote 703) 396-398.

⁷¹¹ It should be noted with respect to this matter that the Committee on International Commercial Arbitration in its final report on public policy as a bar to enforcement of international arbitral awards recommended that:

1-The expression 'international public policy' is used in these recommendations to designate the body of principles and rules recognized by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy).

2- The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned, (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as 'lois de police' or 'public policy rules'; and (iii) the duty of the State to respect its obligations towards other States or international organizations.

3- An example of a substantive fundamental principle is prohibition of abuse of rights. An example of a procedural fundamental principle is the requirement that tribunals be impartial. An example of a public policy rule is anti-trust law. An example of an international obligation is a United Nations resolution imposing sanctions. Some rules, such as those prohibiting corruption, fall into more than one category.

P Mayer. Op. Cit (footnote 294) 253.

this basis, the English or Jordanian court may refuse to enforce the foreign award and to do so would be contrary to English or Jordanian public policy. This is regardless of whether the award is a domestic award,⁷¹² a convention foreign award,⁷¹³ a non-convention foreign award,⁷¹⁴ or a foreign award which might otherwise be entitled to enforcement at Common Law.⁷¹⁵

It is expressly stated by the applicable regimes that it is the public policy of the forum place according to which it must be decided whether a foreign award should be enforced or not. In England, a foreign arbitral award will not be enforced by the local courts if it is contrary to English public policy. In *Soleimany v Soleimany*,⁷¹⁶ the Court of Appeal held that:

[An] English court exercised control over the enforcement of arbitral awards as part of the *Lex fori* whatever the proper law of the arbitration agreement or the place where the arbitration agreement was conducted, and if a claimant wished to enforce the award in his favour, he could only do so subject to English law; that an award, whether domestic or foreign, would not be enforced by an English court if enforcement would be contrary to public policy.

In this regard, the question arises that if the underlying contract is against the English public policy, does this mean that the arbitral agreement and the award are contrary to English public policy? It is a matter of fact that an arbitral agreement is separable from the underlying contract which is provided by section 7 of AA 1996. However, it is not always the case that if an underlying contract is annulled, the arbitral agreement is not annulled on the basis of the separability of the arbitral agreement. In this regard, Waller LJ in *Soleimany v Soleimany*,⁷¹⁷ states that:

But, the fact that a contract alleged to be illegal the arbitration clause may not itself be infected by the illegality, does not mean that it is always so, and does not mean that an arbitration agreement that is separate may not be void for illegality. There may be illegal or immoral dealings which are, from an English law perspective. Incapable of being arbitrated because an agreement to arbitrate them would itself be illegal or contrary to public policy under

⁷¹² S 68 (2) of AA 1996.

⁷¹³ S 103 (3) of AA 1996 and s 37(1) of AA 1950.

⁷¹⁴ S 7 of Jordanian Act No 8.

⁷¹⁵ *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223.

⁷¹⁶ [1998] 3 W.L.R 811.

⁷¹⁷ [1998] 3 W.L.R 811.

English law. The English court would not recognise an agreement between the highwaymen to arbitrate their differences any more than it would recognise the original agreement to split the proceeds.⁷¹⁸

The English court also does not distinguish between a domestic award and a foreign award. As far as the domestic and foreign awards are concerned, the enforcing court in England would refuse to enforce such an award if its enforcement would be against English public policy, as stated by Waller LJ in *Soleimany v Soleimany*:⁷¹⁹ 'It follows that an award, whether domestic or foreign, will not be enforced by an English court if enforcement would be contrary to the public policy of this country'.

However, the English courts have recently faced a number of cases in which foreign arbitral awards were based upon illegal contracts and the courts were requested to refuse enforcement on the basis that such awards were contrary to English public policy. They did not adopt a coherent position in these cases. Their positions were based on a case-by-case policy. These cases are:

1-*Soleimany v Soleimany*⁷²⁰

This case is based upon an illegal contract between a father and son. Both of them were Jewish and Iranian by origin. They used to smuggle Persian carpets from Iran to England and other places. The son lived in England while his father lived in Iran. A dispute between them arose with respect to the division of the proceeds of the sales. After failing to resolve this dispute by mediation, both parties agreed to refer it to arbitration by Beth Din under Jewish law.⁷²¹

The award was made in favour of the son and it *referred to the illegality* and assessed his share of the profits at £576,574. Under section 26 of AA 1950, the son applied to the High Court to register the award as a judgement, and accordingly leave to enforce an award was issued by the master. Then, his father resisted the enforcement of this leave by applying to set aside the order on the grounds that the illegality rendered the

⁷¹⁸ [1998] 3 W.L.R 811, 821.

⁷¹⁹ [1998] 3 W.L.R 811, 822-823.

⁷²⁰ [1998] 3 W.L.R 811.

⁷²¹ 'Beth Din means house of judgment in Hebrew, there are a number of Batei Din administered by different sections of the Jewish community. But the best known is the London Beth Din'. C Rose. Op. Cit (footnote 322) 34.

son's claim void or unenforceable in the English court, and contrary to English public policy. The judge refused the father's application on the basis that a contract which is unenforceable for illegality becomes enforceable if the procedural law of the arbitration attaches no significance to the illegality.

Then, the father appealed this decision before the Court of Appeal which held that an English court will not enforce an arbitral award which is contrary to English public policy because of the illegality of the underlying contract according to English law as well as to the law of performance. This is so, even though the arbitrator considered the illegality to be of no relevance, since he was applying Jewish law under which any purported illegality would have no effect on the rights of the parties.

*2-Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd*⁷²²

This case is based on a consultant contract governed by Swiss law in which the first defendant appointed the plaintiffs as consultants for the procurement of contracts for the sale of military equipment to Kuwait. In return for its services, the plaintiff (*Westacre*) was to receive a substantial percentage of the value of the contracts. The plaintiff claimed the money due under this contract. The defendant repudiated the agreement and so arbitration was commenced in Geneva by the plaintiff.

The defendants argued that the agreement was contrary to the public policy because it had been for procuring sales by fraud through bribery or alternatively by illicit personal influence of other kinds. The arbitrator favoured the plaintiff. Then, the defendants appealed against this award before the Swiss Federal Court which upheld the award. Subsequently, the claimant obtained leave to enforce this award in England. Then, the defendants applied to set aside the leave of enforcement on the basis that this award is based on an illegal contract which is contrary to the public policy of England.

During the course of the hearing, the defendants sought leave to amend their defence to allege that the plaintiff, through its witness, gave perjured evidence at arbitration, and that, since the award was obtained by fraud, it is contrary to public policy. The

Court of Appeal unanimously held that such an award is enforceable, since the underlying contract is legal under the proper law and the proceedings law, even though it is illegal in the country of enforcement.

*3-Omnium de Traitement et de Valorisation SA v Hilmarton Ltd*⁷²³

This case is based on an agreement by which OTV appointed Hilmarton as its consultant in respect of a drainage project for the town of Algeria. OTV was to pay Hilmarton fees when it obtained a public works contract. This condition was met and OTV only paid Hilmarton half the agreed fees. Consequently, arbitration proceedings were commenced in Geneva, and the tribunal denied Hilmarton's request. This award was set aside by the Court of Appeal of Geneva and the setting aside was affirmed by the Swiss Federal Court.

A second arbitration was commenced which resulted in the award being in favour of Hilmarton. Hilmarton obtained leave to enforce this award in England. Then, OTV sought to resist the enforcement on the basis that this award is contrary to English public policy in that it is based on an illegal contract. The court held that the court was not adjudicating on the underlying contract. The decision was whether or not the arbitral award should be enforced in England. It was decided to enforce such an award.

6.2.9.2.1. How the above cases interact with each other (an analytic approach)

In the *Soleimany* case, the claimant sought to enforce an English arbitration award. In the *Westacre* and *Hilmarton* cases, the claimant sought to enforce foreign arbitration awards (Swiss arbitration awards) in England. In all cases, the defendants argued that the enforcement of the arbitral award by the court would be contrary to English public policy, as it was based on an illegal underlying contract. In the *Soleimany* case, the defendant's challenge to the award succeeded, and the enforcement was refused. In the *Westacre* and *Hilmarton* cases, the defendant's challenge to the award failed and enforcement was allowed.⁷²⁴

⁷²² [1999] 3 W.L.R 811.

⁷²³ [1999] 2 Lloyd's Rep. 222.

⁷²⁴ This approach is affected by the observations which have been made by commentators on these cases, such as: E Brown 'Illegality and Public Policy-Enforcement of Arbitrage Awards in England: *Hilmarton Limited v Omniun De Traitement Et De Valorisation S.A*' (2000) 3(1) *International*

Illegality in the underlying contract, according to these cases, is a ground on which the English court may refuse the enforcement of a foreign arbitral award. However, the difference between these cases is that, in every case where there was illegality, the enforcement of a foreign arbitral award was not refused. Determining when illegality will defeat enforcement and when it will not, depends on the circumstances of each case.

The difference between the *Soleimany* case on the one hand, and the *Westacre* and *Hilmarton* cases on the other, is that in the former, the arbitrator found the contract illegal under the law of the place of performance (Iranian law). Since it was apparent on the face of the award that the contract was illegal under Iranian law, the Court of Appeal had no hesitation in refusing to enforce the award on the basis that enforcement of such an award was contrary to English public policy. In the *Westacre* and *Hilmarton* cases, the court decided to enforce the arbitral award and not the underlying contract. The court enforced the arbitral award based on a contract which was considered legal according to the law of the place where the arbitration took place even though English law takes a different view.

Furthermore, the *Hilmarton* case was similar to the *Soleimany* case, in that, in the latter, the arbitrator found the contact illegal according to the law of the place of performance (Iranian law) but legal under the curial law (Jewish law). In the *Hilmarton* case, the arbitrator explicitly found also that, by entering the contract, the parties were *wittingly* envisaging activity which breaches Algerian law (law of the

Arbitration Law Review 31, 31-35. F Davidson 'English Arbitration Law 1999' [2000] *Lloyd's Maritime and Commercial Law Quarterly* 230, 230-253. N Enonchong 'The Enforcement of Foreign Arbitrage Awards Based on Illegal Contracts' [2000] *Lloyd's Maritime and Commercial Law Quarterly* 495, 495-521. J Hill 'Illegality Under Law of the Place of Performance and the Enforcement of Arbitration Awards' [2000] *Lloyd's Maritime and Commercial Law Quarterly* 311, 311-315. J Harris F Meisel 'Public Policy and the Enforcement of International Arbitration Awards: Controlling the Unruly Horse' [1998] *Lloyd's Maritime and Commercial Law Quarterly* 568, 568-578. A Rogers and M Kaley 'The Impact of Public Policy in International Commercial Arbitration' [1999] *Arbitration* 326, 326-334. C Rose. Op. Cit (footnote 322) 34. A Sheppard 'Whether Enforcement of a Foreign Award Should Be Refused as Being Contrary to English Public Policy, on the Ground that the Underlying Agreement Concerned the Procurement of Personal Influence' (1999) 2(4) *International Arbitration Law Review* 47, 47. A Sheppard 'Whether Enforcement of a Foreign Award Should Be Refused as Contrary to English Public Policy, on the Ground that the Underlying Agreement was Illegal Under the Law of the Place of Performance' (1999) 2(4) *International Arbitration Law Review* 46, 46. S Wade 'Westacre v Soleimany: What Policy? Which Public' (1999) 2(3) *International Arbitration Law Review* 97, 97-107.

place of performance), but that under the proper law of contract and the curial law (Swiss law) it was legal.

The similarity between the *Hilmarton* and *Westacre* cases relates to the fact that the defendant challenged the illegality of the underlying contract before the arbitral tribunal and it was rejected on the basis there was nothing to render the agreement illegal under Swiss law governing the contract or contrary to Swiss public policy. However, the majority of arbitrators in the *Westacre* case decided that the defendant had not established that there had been bribery or that the performance of the contract was illegal under the Kuwaiti law. Meanwhile, the arbitrator in the *Hilmarton* case explicitly found that, by entering the contract, the parties were *wittingly* envisaging activity which breaches Algerian law. In other words, the *Hilmarton* and *Westacre* cases are distinguishable in that the performance of the contract in the *Westacre* case was not contrary to Kuwaiti law (the place of performance), whereas the performance of the contract in the *Hilmarton* case was contrary to Algerian law (the place of performance).

In the light of these cases, it was not determined clearly when illegality will defeat enforcement and when it will not. In other words, each case had its own circumstances according to which the court reached a different conclusion. In the *Soleimany* case, the principle was that the English court will refuse enforcement of an award if the illegality is palpable and indisputable.

In the *Westacre* case, the court classified the illegality into two classes. 1-Illegality which violates rules of public policy based on considerations which are universally condemned. 2-Illegality which violates rules of public policy based on considerations which are purely domestic. The degree of offensiveness of illegality is the criterion upon which a particular illegality falls into one class rather than another. If the underlying contract involves illegality falling into the first class, the English court will refuse enforcement in all circumstances, regardless of whether or not the contract is enforceable under the proper law, the curial law, or the law of the place of performance. But if it falls into the second class, the English court will enforce the award unless the illegality under the law of the place of performance renders the

contract unenforceable under the proper law of the contract or the curial law, regardless of the fact that English law takes a different view.

Subsequently, what was provided in the *Soleimany* case was repealed by the *Westacre* case, in that, if it is apparent from the face of the award that it is based on an illegal contract and such illegality is universally condemned (falls into the first class), the English court will refuse to enforce such an award. On the other hand, if it is apparent from the face of the award that it is based on an illegal contract and so falls within class two, the English court will enforce such an award unless the underlying contract is unenforceable under the proper law of the contract or the curial law. Thus, what is provided by the *Soleimany* case is applicable in the light of the *Westacre* case to the extent that the illegality is universally condemned but not domestically.

Shortly afterwards, the defendant in the *Hilmarton* case based his allegation upon the *Soleimany* case. This is because the arbitrator explicitly found an illegality in the underlying contract under the law of the place of performance in both cases, and in *Soleimany* case it was held that:

[An] English court will not enforce a contract governed by English law, or to be performed in England, which is illegal by English domestic law. Nor will it enforce a contract governed by the law of a foreign and friendly State, or which requires performance in such a country, if performance is illegal by the law of that country.⁷²⁵

The question in the *Hilmarton* case was whether the enforcement of the award should be granted, as in the *Westacre* case, or refused, as in *Soleimany* case. The court took the view that the *Hilmarton* case's reliance on the *Soleimany* case was 'misplaced'. The reason for this conclusion was that in *Soleimany* case the element of 'corruption or illicit practice' was present, but this element of corruption or illicit practice was not present in the *Hilmarton* case.⁷²⁶

However, since the ground of refusal in the *Hilmarton* case is based on section 103(3) of AA 1996, it seems, in our view, that the English court in *Soleimany v Soleimany*

⁷²⁵ [1998] 3 W.L.R. 811, 827.

⁷²⁶ [1999] 2 Lloyd's Rep 222, 225 (Timothy Walker J).

was consistent with section 103(3) of AA 1996, which represents article V (2) of the New York Convention, which provides that:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

This article invested the enforcing court with the discretionary power to refuse the enforcement of the foreign award which is contrary to the public policy of the country of the enforcing court. This effect is manifestly invoked by the English court in *Soleimany v Soleimany*, in that it refused to enforce the award which is contrary to English public policy.

Meanwhile, the English court in the *Westacre* and *Hilmarton* cases was inconsistent with this article with respect to the matter of domestic public policy. In these cases, the court agreed to enforce the foreign award on the basis that it is not contrary to the proper law of the contract or the curial law (Swiss law), even though such an award is contrary to the English public policy. Instead of examining public policy under English law as provided by the said article, the court examined it under the law of the place where the arbitration was conducted.

It seems that the English court in these cases addressed the issue of public policy according to the law of the rendering place. Meanwhile, according to this article, the English court had to address the issue of public policy according to English law rather than the law of the rendering place. In these cases, the English court replaced the tribunal which issued the award in dealing with a matter of public policy. Such an approach by the English court to these cases is also inconsistent with the recommendation 2(a) of the Committee on International Commercial Arbitration in its final report on public policy as a bar to the enforcement of international arbitral awards; it recommended that:

A court verifying an arbitral award's conformity with fundamental principles, whether procedural or substantive should do so by reference to those principles considered fundamental within its *own legal system rather than in*

the context of the law governing the contract, the law of the place of performance of the contract or the law of the seat of the arbitration.⁷²⁷

The reason why the results were different in these cases may relate to the relativity scope of public policy which depends on the circumstances of each case. Public policy was described as 'a very unruly horse, and when you get astride it you never know where it will carry you'.⁷²⁸ The English court in *Soleimany v Soleimany* refused to enforce an arbitral award which is contrary to English public policy. The court also did not make distinction between a domestic award and a foreign award or between domestic public policy and international public policy. On the other hand, the English court in the *Westacre* and *Hilmarton* cases enforced the foreign award which is not contrary to the law of the place where the arbitration was conducted, regardless of its contradiction with English law and/or the law of the place of performance. The court also distinguished between domestic public policy and international public policy.

Consequently, in answer to the main question, the recent tendency of the English courts is to consider an award contrary to English public policy either in case where an award is contrary to international public policy or where an award is contrary to domestic public policy of the proper law of contract or the curial law.

In Jordan, there are two cases in which the courts have dealt with public policy. The first concerned a non-speaking foreign judgement. In this case, the Court of Cassation decided that such a judgement is contrary to Jordanian public policy, since it is contrary to section 7(1, f) of Act No 8.⁷²⁹ In the other case, the Court of Cassation considered a dispute of the commercial agency which was settled by arbitration, to be contrary to Jordanian public policy, since it is contrary to article 20 of the Commercial Agents and Mediators Law.⁷³⁰ It seems that the tendency of the Jordanian courts is to refuse enforcement as far as the arbitral award is contrary to the mandatory rules of Jordanian law.

⁷²⁷ P Mayer. Op. Cit (footnote 294) 258.

⁷²⁸ *Richardson v Mellish* (1824) 2 Bing 229, 252.

⁷²⁹ Court of Cassation's decision No 852/89 (Journal of Jordanian Bar Issue 5 1991) 875.

⁷³⁰ Court of Cassation's decision No 411/84 (Journal of Jordanian Bar Issue 1-2 1985) 102. Court of Cassation's decision No 47/91 (Journal of Jordanian Bar Issue 1-3 1993) 193.

6.3.9.3. Do the English and the Jordanian courts apply a concept of international public policy?

In the *Westacre* case, there is a general agreement over what has been referred to as the *Lemenda* case, under which a foreign arbitral award can be enforced even if the underlying contract offends English public policy. In the *Westacre* case, public policy was classified into two main categories according to what was determined in the *Lemenda* case. Firstly, international public policy leads to the non-enforcement of a foreign award by the English court in all circumstances.⁷³¹ Secondly, domestic public policy under which the enforcement will be refused only if the underlying contract is illegal under the proper law or curial law of the contract regardless of whether this contract is illegal under English law or under the law of the place of performance.⁷³² In this regard, Waller LJ commented:

It is legitimate to conclude that there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, *even if English domestic public policy might have taken a different view* (emphasis added).⁷³³

The criterion that was suggested in the *Westacre* case to distinguish between the international public policy and the domestic public policy is the degree of offensiveness. In that, international public policy relates to a situation in which the illegality is offensive at the highest level and universally condemned, such as terrorism, drug trafficking, prostitution, paedophilia, and fraud.⁷³⁴ Accordingly, it can be submitted that the English legal system applies international public policy with respect to the recognition and enforcement of foreign arbitral awards.⁷³⁵

In Jordan, all of the cases are concerned with domestic public policy. It is not possible for the Jordanian judges to refuse the enforcement of a foreign arbitral award because it is contrary to international public policy. In this regard, two reasons can be cited for

⁷³¹ (*Westacre* case) [1999] 3 W.L.R 811, 824.

⁷³² The enforcement of the contract is refused in the *Lemenda* case only where the contract is contrary to the domestic public policy of English law and the foreign place of performance

⁷³³ [1999] 3 W.L.R. 811, 825.

⁷³⁴ *Westacre* [1999] 3 W.L.R 811, 822-823.

⁷³⁵ A Sheppard. Op. Cit (footnote 724) 47. A Sheppard. Op. Cit (footnote 724) 46. S Wade. Op. Cit (footnote 724) 97-107.

this conclusion. Firstly, the paucity of cases that are filed before the Jordanian courts about arbitration in general and about the enforcement of foreign arbitral awards in particular. This means that the Jordanian judges have no experience of dealing with international public policy. Secondly, the Jordanian judges are obliged to adhere to the Jordanian laws when issuing their decisions, and they are not permitted to stray far from the applicable rules, especially those which are considered as mandatory rules.

So, since no provision in Jordanian law allows the judges to consider international public policy, they are not encouraged to rely on this kind of public policy in order to refuse enforcement. Thus, it is possible to enforce the foreign arbitral award in Jordan which is contrary to international public policy, but not contrary to Jordanian public policy.

6.2.9.4. Do the English courts refuse enforcement when an award is contrary to European Community Law? And do the Jordanian courts refuse enforcement when an award is contrary to Islamic principles?

In *Eco Swiss China Time Ltd v Benetton International NV (EC Swiss)*,⁷³⁶ the European Court of Justice (ECJ) held that:

Where domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in article 85 of the Treaty (now article 81 EC). That provision constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. Also, Community law requires that questions concerning the interpretation of the prohibition laid down in article 85 should be open to examination by national courts when they are asked to determine the validity of an arbitration award and that it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling

Accordingly, when one of the parties to an international agreement chooses to invoke the EU member States' jurisdiction to enforce an arbitral award, the enforcing court of this State has to ensure that the arbitral award conforms to the national law and public

policy as well as the mandatory rules of European Community Law that are directly applicable under the national legal system. Since the enforcing court enforces a Community Law, it is legibly requested to review the arbitral award as far as the mandatory provisions of the Community Law are concerned, despite the fact that national rules require that they refrain from reviewing the arbitral award.⁷³⁷

Therefore, the English enforcing court is obliged to examine whether or not an award is contrary to the mandatory provisions of Community Law. In *Philip Alexander Securities and Futures Ltd v Bamberger and others: same v Gilhaus*,⁷³⁸ the Court of Appeal found that distinction between domestic and international arbitration agreements is contrary to articles 6 and 59 of the Treaty of Rome (discrimination issue). Thus, the above distinction ceased to have effect. By analogy with this case, an English judge can examine whether or not the foreign arbitral award is contrary to public policy in English law as well as European Community Law.

In relation to the second question, the Islamic principle is considered as one of the highest domestic principles in Jordan. This fact is emphasised by the fact that Islam is the main religion in Jordan, as stated in the Jordanian Constitution.⁷³⁹ Therefore, any arbitral award which is contrary to this principle will be refused unless the matter which is ordered by the arbitral award has been legalised by a particular law, such as the interest. As far as the Jordanian regimes on recognition and enforcement are concerned, they do not provide the Islamic principle as a bar to enforcement except in article 30 (a) of the Riyadh Convention. According to this article, an award which is issued in a country which is party to this convention would not be enforced in any other contracting States if it is contrary to the Islamic principle.

⁷³⁶ [1999] ECR I-3055 <http://web.lexis-nexis.com/professional/document?_m=f413185b5> (20 October 2002)

⁷³⁷ Y Brulard and Y Quintin 'European Community Law and Arbitration National Versus Community Public Policy' (2001) 18(5) *Journal of International Arbitration* 533, 533-547. Ch Liebscher 'European Public Policy and the Austrian Supreme Court' (2000) 16(3) *Arbitration International* 357, 357-366. AG Tweeddale. Op. Cit (footnote 707) 167.

⁷³⁸ [1996] CLC 1757, or See <http://www.lawtel3.co.uk/clft/0/0/0/4/T_C0004178CA.pdf> (20 October 2002)

⁷³⁹ Art 2 of the Constitution Law.

6.3.10. Reciprocity

This ground of refusal is provided by the Foreign Judgements (Reciprocal Enforcement) Act 1933, and by article 7(2) of Act No 8 in Jordan. It is also provided by article I (3) of the New York Convention.

The reciprocity doctrine has generally been defined as ‘the relationship between two States when one State offers the subjects of the other certain privileges on the condition that its subjects enjoy similar privileges in the other State’.⁷⁴⁰ Consequently, applying this doctrine on recognition and enforcement means that if a foreign country in which an award was made does not permit the enforcement of an English or Jordanian award, in return, then these countries will refuse to enforce the award that was made in that foreign country.

This doctrine does not mean that conditions of enforcement as required in a foreign State to enforce an arbitral award must be the same as the conditions of enforcement provided to enforce an award in England or in Jordan.⁷⁴¹ This is because every State has its own regimes for enforcing the foreign arbitral awards. The conditions of enforcement provided by these regimes vary from one State to another. It is suggested that it is enough that a Jordanian or an English award, for example, is enforceable in the foreign States, regardless of the conditions of enforcement.⁷⁴²

This ground of refusal mainly concerns convention-regimes. The New York Convention allows reservations to be made by a State that intends to be a member State. Article I (3) of the said convention states that:

When signing, ratifying or acceding to this convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the convention to the recognition and enforcement of awards made only in the territory of another contracting State. It may also declare that it will apply the convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

⁷⁴⁰ YJ Mok ‘The Principle of Reciprocity in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958’ (1989) 21 *Case Western Reserve Journal* 123, 124-125.

⁷⁴¹ See with respect to Jordanian law AH Haddad. Op. Cit (footnote 381) 21-22.

⁷⁴² *ibid.*

Such a ground of refusal limits the scope of the convention with respect to the State that makes such reciprocal reservations. It would not recognise and enforce the New York Convention award unless it was made in a State which is a member State of the New York Convention. It would also not recognise and enforce such an award unless the award was given on a matter which is considered as commercial under its national law (commercial award).⁷⁴³

Article 1(3) of the New York Convention refers to article (X) 'the colonial clause' which implies the principle of reciprocity. Article (X) applies the convention to colonial territories which do not have the power to engage in international relations with other States. The effect of this article is to apply the doctrine of reciprocity in colonial territories, but only if the principal State party to the convention declares its extension to those territories. Furthermore, article XI; 'the federal clause' applies to federal or non-unitary States which are composed of constituent States or provinces. This article provides that the federal government shall undertake the same obligations as a non-federal or unitary contracting State, to the extent that those articles of the convention are within the scope of the legislative jurisdiction of the federal authority.⁷⁴⁴

Finally, article XIV of the New York Convention states that: 'A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention'. The enforcement of the New York Convention award in England, according to this article, will be to the extent that the foreign State, where an award is made, is bound itself by the New York Convention.

It is worth noting that article XIV is likely to be applicable to contracting States which have made reciprocal reservations. It does not apply to another State, for example, Jordan which has not made such a reservation, as Jordan enforces the New York Convention award whether it was made in a contracting State or not. Otherwise, it seems that there is a contradiction between article I (1) of the New York Convention

⁷⁴³ J El-Hakim 'Should the Key Terms Award, Commercial and Binding be Defined in the New York Convention?' (1989) 16 *Journal of International Arbitration* 161, 165-166.

which speaks about the scope of its application to include a contracting State and a non-contracting State, and article XIV which speaks about the scope of its application to include only States which are bound to apply the convention.⁷⁴⁵

As far as England and Jordan are concerned, England has made a territorial reservation not to enforce the New York Convention award unless the award was made in another contracting State, as provided by section 100 of part III of AA1996. However, England does not make a reservation with respect to the subject matter. Meanwhile, Jordan did not make any reservation to the New York Convention which was confirmed by the Court of Cassation in one of its decisions.⁷⁴⁶

The problem which emerges in the application of reciprocal reservation is how to prove reciprocity?⁷⁴⁷ In other words, if a Jordanian company, for example, intends to enforce an award in England, how can it prove, in a way satisfactory to the English court, that an English award in return would be enforced in Jordan? This problem is illustrated in a decision of the Court of Cassation of Jordan when it held that ‘it should be noted that the respondent has not furnished the court with any proof that French courts refuse to enforce judgements that are made by the Jordanian courts’.⁷⁴⁸ Furthermore, this doctrine addresses two questions: namely, can an award that has been nullified elsewhere be enforced in England or in Jordan; and can a nullified English or Jordanian award be enforced in other jurisdictions?

6.4. Summary

The losing party is provided with a number of grounds of refusal according to the current regimes in England and Jordan. If the losing party resists enforcement on one of the abovementioned grounds, a number of consequences, as a result of this resistance, may occur as follows:

⁷⁴⁴ YJ Mok. Op. Cit (footnote 740) 125-126.

⁷⁴⁵ YJ Mok. Op. Cit (footnote 740) 141-146.

⁷⁴⁶ Court of Cassation’s decision No 768/91 (Journal of Jordanian Bar 1992)1236, 1241.

⁷⁴⁷ M Blessing ‘The New York Convention: Major Problem Areas’ in M Blessing (ed) *The New York Convention of 1958* (ASA Special Series No 9 Swiss Arbitration Association Zurich 1996) 22.

⁷⁴⁸ Court of Cassation’s decision No 768/91 (Journal of Jordanian Bar 1992)1236. At 1241.

1-According to section 66 of AA 1996, the enforcing court shall refuse enforcement if the party against whom enforcement is sought proves the lack of tribunal jurisdiction. Meanwhile, according to section 103 of part III, section 37 of part II, and all Jordanian regimes, the enforcing court has the discretion to refuse enforcement.

If the court refuses to enforce an arbitral award, this does not mean that the winning party cannot seek enforcement in another country in which the losing party has assets. Much depends upon the reason why the court refused to enforce the award. For example, if the enforcement was refused because of public policy considerations, it is still possible to find another country in which the same considerations do not apply for the purposes of public policy. However, if it is not possible to enforce the arbitral award elsewhere because the reason for refusing enforcement is recognised in another country, the winning party in such a case will probably have no option but to recommence arbitral proceedings, assuming that the right to do so has not been lost through the lapse of time.⁷⁴⁹

2-The enforcing court may adjourn enforcement in cases where the party against whom enforcement is sought provides an application to set aside an award before the rendering place court.

3-An award may be partially enforced if it contains matters which submitted to arbitration that can be separated from those not so submitted.

4-Double exequatur occurs in cases where the party who seeks enforcement is requested to prove that an award has become final in the country in which it was made. Thus, in most cases, such kind evidence is not produced and the enforcement is not achieved. English courts have circumvented this situation and made their own definition of the word 'final' to mean final as it is understood by the English court. However, the finality requirement still causes problems under the Jordanian regimes. No attempt had been made by the Jordanian courts to circumvent it. On the contrary, the Court of Cassation insisted in a number of its decisions on fulfilling this condition, or the enforcement will be refused.

⁷⁴⁹ A Redfern and others. Op. Cit (footnote 55) 520.

5-A foreign court upheld an award: if a foreign court upholds an award after it has been challenged, the enforcing court in England and Jordan will enforce such an award.

6-A foreign court annulled an award: in this case, if the foreign court sets aside an award, the English court will refuse to enforce such an award. In *Soleh Boneh International Ltd and Another v Government of the Republic of Uganda and National Housing Corporation*, the Court of Appeal held that 'If the award was manifestly invalid there should be an adjournment and no order for security; if it was manifestly valid there should be either an order for immediate enforcement or else an order for substantial security'.⁷⁵⁰ Thus, it can be said that, if the award was manifestly annulled, the enforcing court may refuse enforcement.

The English court in *Minmetals Germany v Ferco Steel*⁷⁵¹ also emphasised the role of the supervising court in the country of origin, in that, the interested party should call upon the courts of the country concerned to exercise their supervisory role. By analogy with this case, the English courts will respect the outcome of the supervising court of the country of origin. Therefore, it can be said that an arbitral award which has been set aside or suspended in the country of origin will not be recognised and enforced in England.

In some jurisdictions, such as in France and the USA, the enforcing courts in both States have enforced a foreign award which was annulled in the States in which it was made.⁷⁵² Two main reasons lie behind the enforcement of an annulled award. Firstly, the enforcing court has a permissive power rather than a mandatory one to refuse enforcement if an award was annulled by the court in the country of origin. Secondly, according to the more favourable-right-provision, the party who seeks enforcement has the right to choose the regime which represents his interest. For example, the

⁷⁵⁰ [1993] 2 Lloyd's Rep 208.

⁷⁵¹ [1999] 1 All ER 315.

⁷⁵² R Nazzini. Op. Cit (footnote 93) 123-124. DH Freyer 'United States Recognition and Enforcement of Annulled Foreign Arbitral awards *The Aftermath of the Chromalloy Case*' (2000) 17(2) *Journal of International Arbitration* 1, 1-9. G Delaume 'Recognition and Enforcement of State Contract Awards in the United States: A Restatement' (1997) 91(3) *American Journal of International Law* 476, 481-482.

party who seeks enforcement can rely on section 104 of part III of AA 1996 to enforce the arbitral award under Common Law or section 66 of AA 1996 instead of part III of AA 1996.

On the other hand, the Jordanian court can refuse to enforce an award which was annulled in the court of origin.⁷⁵³ It is also inconceivable, in practice, that the party who seeks enforcement can avail himself of the more favourable-right-provision provided by the New York Convention. This is because other regimes in Jordan are more complex in comparison to the New York Convention. For example, Act No 8 and the Riyadh Convention request the party who seeks enforcement to provide certification to the effect that an award is enforceable in the country in which it was made.

⁷⁵³ S 2 of the Jordanian Act No 8 and art 37 of the Riyadh Convention.

Chapter Seven: The Recognition and Enforcement of Foreign Commercial Arbitral Awards Merged with Foreign Judgements

The previous chapters dealt with the recognition and enforcement of foreign arbitral awards. This chapter will focus on the enforcement of foreign awards merged with foreign judgements. It is generally recognised that the enforcement of foreign arbitral awards is more easy, straightforward, uncomplicated and inexpensive process than the enforcement of foreign judgements.⁷⁵⁴ This is because:

The network of international and regional treaties providing for the recognition and enforcement of international awards is more widespread and better developed than corresponding provisions for the recognition and enforcement of foreign judgements.⁷⁵⁵

It was seen in the previous chapters that once an arbitral award is made, the winning party will seek to enforce such an award in the State where the assets of the losing party are located. This enforcement will be under either the international conventions, such as the New York Convention and the Geneva Convention, or the local regimes, which are provided for this purpose in the country where the enforcement is sought, such as section 66 of AA 1996, or the Common Law in England. However, a foreign arbitral award may merge with a foreign judgement.

The argument of this chapter is based on the fact that since the methods of enforcement of foreign arbitral awards are different from their counterparts which are provided for foreign judgements.⁷⁵⁶ The question arises as to whether foreign arbitral awards merged into judgements will be enforced by methods of enforcement pertaining to foreign awards or those pertaining to foreign judgements? To answer this question, this chapter is divided into the following sections:

- How does the merger of an arbitral award operate?
- Why does an arbitral award merge into a judgement?

⁷⁵⁴ L Shore 'The Advantages of Arbitration for Banking Institutions' (1999) 14(11) *Journal of International Banking Law* 347, 349.

⁷⁵⁵ A Redfern and others. Op. Cit (footnote 55) 519.

⁷⁵⁶ RM Mosk and R Nelson 'The Effects of Confirming and Vacating an International Arbitration Award on Enforcement in Foreign Jurisdictions' (2001) 18(4) *Journal of International Arbitration* 463, 465-466.

-When does an arbitral award merge into a judgement?

-How will a foreign arbitral award merged into a foreign judgement be recognised and enforced abroad?

7.1. How does the merger of an arbitral award operate?

The doctrine of merger operates to absorb an arbitral award within the judgement.⁷⁵⁷ Thus, the winning party, in some jurisdictions, cannot rely on an arbitral award for enforcement but on the judgement. As far as the *recognition and enforcement of a foreign judgement based on a foreign award* are concerned, the scenario in which an award merges into a judgement is a matter for the *Lex fori* of the court asked to enforce.⁷⁵⁸

In England for example, a local award may be enforced under section 66 of AA 1996, under which an award, made by the tribunal pursuant to an arbitral agreement, may, by leave of the court, be enforced in the same manner as a judgement or order of the court to the same effect. Where leave is so given, judgement may be entered in terms of the award. In most countries, a local award may be enforced by similar or analogous procedures, varying from a mere deposit of the award with the court which gives it executory effect, to a formal order giving the award executory effect or entering a judgement in terms of the award.⁷⁵⁹ If enforcement measures of this kind are taken in a foreign country, it is the award or the foreign judgement which is to be enforced in England or in Jordan.⁷⁶⁰

7.2. Why does an arbitral award merge into a judgement?

The winning party may seek to confirm an arbitral award by a local judgement for the following reasons:⁷⁶¹

1-To obtain enforcement in the place where the arbitral award is made. The winning

⁷⁵⁷ M Domke. Op. Cit (footnote 191) 506.

⁷⁵⁸ L Collins and others (eds). Op. Cit (footnote 12) 621-622. J El-Hakim. Op. Cit (footnote 743) 165.

⁷⁵⁹ L Collins and others (eds). Op. Cit (footnote 12) 621-622.

⁷⁶⁰ *ibid.*

party in some jurisdictions, such as in England, is requested to bring an action on the award. In other jurisdictions, the winning party needs to confirm the award into a judgement in order to obtain enforcement.

2-A winning party may seek to confirm an award for more finality, since the losing party is capable of challenging an award in the rendering place. As such, in some jurisdictions, judicial confirmation is almost immune from an action to set aside. Also, in some jurisdictions, the time for setting aside starts running once the motion to execute or enter an execution order has been filed. So, by merging an award into a judgement, an award becomes immune from challenge.

3-To enforce the arbitral award abroad. According to some convention-regimes, such as the New York Convention, an award will not be enforced if it is not binding on the parties. The Geneva Convention also requires that an award is final in the country where an award is made. Thus, in order to comply with such conditions, the winning party seeks, in advance, to confirm an award in the country where it was made before seeking to enforce it abroad.

4-To avoid delay in enforcement: the need to confirm an award in the rendering place makes the losing party interpose its motion to set aside the award. By doing so, the winning party avoids inconvenient litigation in the country of the arbitral award and so avoids delay in enforcement in the forum place. According to article VI of the New York Convention, for instance, an enforcing court may adjourn enforcement if the party against whom enforcement is sought furnishes the court with evidence that an application to set aside an award has been made in the rendering place.

5-To avoid misapplication of the foreign law by the enforcing court. An award can be set aside according to the applicable law. The enforcing court will examine this matter according to this law. Since the parties agree to apply the law of the country where the arbitration took place, confirming an award by the court of this law is evidence of how the rendering place law can be applied by the rendering place court to the given

⁷⁶¹ (--) 'Enforcing Judgements Based on Foreign Arbitral Awards: The Applicability of Res Judicata.' (1975) 124 *University of Pennsylvania Law Review* 223, 226-228. RM Mosk and R Nelson. Op. Cit (footnote 756) 466-467. A Redfern and others. Op. Cit (footnote 55) 458.

facts.

7.3. When does an arbitral award merge into a judgement?

There are many actions that the winning party may take to enforce the arbitral award. He may seek to apply for summary procedures by leave of enforcement, by registration, by deposit to an award, or by obtaining judgements from the court of rendering place. The question arises as to whether any of these actions merge an award to be absorbed within the action concerned. It is submitted that there is a difference in character between an execution order and judgement on award.⁷⁶² An execution order on an award has a territorial effect within the State in which it was issued, and it does not absorb the arbitral award, whereas a judgement on an award absorbs it within the judgement. In *Northern Sales co. v Reliable Extraction Indus. Pvt.*,⁷⁶³ the High Court of Bombay declared:

The wording of the order leaves no manner of doubt that it was merely an enforcement order and not a judgement in terms of the award. The leave was granted by the Master in chambers merely for enforcement of the award in the same manner as the judgement and cannot be considered as a judgement in terms of the award.

Moreover, in *Stolp & Co v Browne & co*,⁷⁶⁴ the defendants contended that:

The document produced as a judgement is not in reality a judgement of the court at all, but that the effect of the certificate attached to the award is merely an order upon which execution could issue in Holland, and is not such a judgement as could be sued on in Canada.

Thus, an execution order on the arbitral award is not considered for the purpose of a merger, while judgement on an award is considered for this purpose. For the purpose of recognition and enforcement, the judgement and not the execution order is considered.

⁷⁶² J El-Hakim. Op. Cit (footnote 743) 164-165. DT Hascher. Op. Cit (footnote 432) 237-241, and 246-247.

⁷⁶³ As cited in DT Hascher. Op. Cit (footnote 432) 246.

⁷⁶⁴ [1930] 4 D.L.R. 703, 705.

7.4. How will a foreign arbitral award merged into a foreign judgement be recognised and enforced abroad?

The enforcement of a foreign arbitral award merged into foreign judgement abroad is described by Berg as:

If in the country of origin a leave for enforcement is issued by the court of the award, the leave may constitute a court judgement in that country. Such judgement may furthermore have the effect of absorbing the award into the judgement in that country. If in this case the enforcement is sought in another contracting State, the question arises whether the award is to be enforced as a foreign award under the convention or as a foreign judgement on another basis. In other words, does the merger of the award into the judgement in the country of origin have an extraterritorial effect?⁷⁶⁵

It is also addressed in Dicey and Morris as:

In England a local award may be enforced under section 66 of the arbitration act 1996, under which leave of the court may be obtained to enforce the award in the same manner as a judgment, and also, if the claimant applies, to enter judgment in terms of the award. In most countries a local award may be enforced by a similar or analogous procedure, varying from mere deposit of the award with the court which gives it executory effect, to a formal order giving the award executory effect or entering judgment in terms of the award. If enforcement measures of this kind are taken in the foreign country is it the award or the foreign judgement which is to be enforced in England or does the claimant have an option?⁷⁶⁶

It can be submitted that there are three possible answers to the above question, namely merger, non merger, and the option between merger and non-merger.

7.4.1. An award merged into a judgement in the country of origin has an extraterritorial effect (merger doctrine)

In this regard, a foreign arbitral award after its merger into a foreign judgement will not be enforced as an award but as a foreign judgement.⁷⁶⁷ In England, the question arises as to whether or not the winning party can rely on the award after it has merged

⁷⁶⁵ AJVD Berg. Op. Cit (footnote 168) 346.

⁷⁶⁶ L Collins and others (eds). Op. Cit (footnote 12) 621.

⁷⁶⁷ C Kessedjian. Op. Cit (footnote 73) 1, 11.

into a judgement. Dicey and Morris address this matter saying:

A doubt, however, arises whether an award can be enforced as such after entry of judgement on it in the foreign country. The mere fact that the claimant has taken enforcement proceedings involving entry of judgement abroad should as a matter of policy be no bar to enforcement of the award, but it is possible that the abolition of the doctrine of non-merger relation to foreign judgements may have had the unintended result that, provided the judgement is enforceable in England, then it will be the foreign judgement, and not the award, which will be enforceable in England.⁷⁶⁸

In cases where an award is merged into a judgement in the country of origin, the judgement rather than the award will be enforced in England. This effect was illustrated in *East India Trading co. v Carmel Exporters and Importers LD.*⁷⁶⁹ In this case, an award was made in arbitration between the parties in New York on 2nd August 1949, and a judgement was given on the arbitration award in the plaintiffs' favour in the Supreme Court of New York on 11th May, 1950. The question was whether the conversion of the amount in dollars of the foreign judgement and costs into pound sterling, in which alone the English judgement can be given, is to be made at the rate of exchange ruling at the time of the foreign judgement or at the time of the award.? The court held that: 'Where an action is brought in England to enforce a foreign judgement awarding damages for breach of contract, the relevant date for the award to be converted into sterling is the date of the foreign judgment'.

In *Union National des Cooperatives Agricoles de Cereales v Robert Catterall & co. Ltd.*⁷⁷⁰ Lord Evershed M R stated that:

It would mean that you could never in fact enforce an award, as such, in such cases as this; you would have to wait until you got the judgement of the court of the country where the award was made, and then you would not be enforcing the award but the judgement.

Moreover, in *Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne*,⁷⁷¹ the plaintiff sought to enforce in England a foreign judgement given by the French court on an ICC arbitral award.

⁷⁶⁸ L Collins and others (eds). Op. Cit (footnote 12) 622.

⁷⁶⁹ [1952] 2 Q.B 439.

⁷⁷⁰ [1959] 2 Q.B 44, 54.

⁷⁷¹ [1996] 1 Lloyd's Rep 485.

This adoption addresses again the two questions which were raised in the previous chapter; namely, can an award that has been nullified elsewhere be enforced in England or in Jordan; and can a nullified English or Jordanian award be enforced in another jurisdiction? The English courts have not had an opportunity to decide whether to enforce a foreign arbitral award on English territory, notwithstanding that the award has been annulled abroad. In deciding whether to do so in the light of this adoption, an English court cannot enforce an award that has been annulled abroad. This is because the foreign award, according to the merger doctrine, is merged into the judgment.

However, according to part III of AA 1996, the adoption of article V of the New York Convention gives the English court the option to enforce an award even when the grounds of refusal are met.⁷⁷² Thus, the English court has the discretionary power to enforce an award that has been annulled elsewhere or not. However, the English court is unlikely to enforce an award annulled in the country where it was made because of the ‘international public policy’ view that the English court has adopted.⁷⁷³

Regarding the second question, this is an issue primarily for the law and the court of the country enforcing the award (forum place). English law does not place any limitations on such enforcement (except reciprocal arrangements). Therefore, the merger of an award into the judgment under English law will leave a nullified award invalid for enforcement abroad.

According to the Jordanian regimes, there is no statutory provision or case law in the light of which to adopt a merger or non-merger doctrine. However, almost all of the Jordanian regimes do not distinguish between a foreign award and a foreign judgement for the purpose of enforcement. Thus, whether the winning party relies on

⁷⁷² However, the English court in *Minmetals Germany v Ferco Steel* [1999] 1 All ER 315 emphasised the role of the supervising court in the country of origin, in that the interested party should call upon the courts of the country concerned to exercise their supervisory role. By an analogy with this case, English courts will respect the outcomes of the supervising court of the country of origin. Therefore, it can be said that the award which has been set aside or suspended in the country of origin, will not be recognised and enforced in England.

⁷⁷³ Such an approach has been approved by some commentators such as CM Clarkson and J Hill. Op. Cit (footnote 293) 305.

a foreign judgement or on a foreign award, it makes no difference among the Jordanian regimes.

A problem may arise with respect to applying the New York Convention. This is because this convention is devoted to enforcing foreign awards rather than foreign judgements. The Jordanian courts, therefore, would refuse to enforce foreign judgements based on the foreign awards under this Convention.⁷⁷⁴ In the light of articles V and VII of the said Convention, the Jordanian court may enforce a foreign arbitral award which has been annulled elsewhere since such an award is not contrary to Jordanian public policy. However, enforcing a Jordanian award nullified abroad is a matter for the foreign jurisdiction law.

Some writers justify the idea of the enforcement of foreign judgements instead of foreign awards in the case of merger. Their justification is based on the fact that the winning party can avail himself of enforcing foreign judgements by regimes provided to enforce foreign judgements, such as the Brussels Convention, which has more uniformity within the contracting States than does the New York Convention.⁷⁷⁵

However, even though the English court adopted the merger doctrine with respect to a foreign arbitral award merging into a foreign judgement, it refused to enforce the foreign judgement based on a foreign arbitral award under the Civil Jurisdiction and Judgements Act 1982, which enacted the Brussels Convention. In *Arab Business Consortium International Finance and Investment CO v Banque Franco-Tunisienne*,⁷⁷⁶ a foreign judgement entered on an award was excluded from the Civil Jurisdiction and Judgements Act 1982 which enacted the Brussels Convention by article 1(4) of the convention.⁷⁷⁷ The decision of the Court of Appeal in this case was based on a previous decision of the Court of Appeal made in *Marc Rich & Co. A. G. Societa Italiana Impianti p. A (The 'Atlantic Emperor')*.⁷⁷⁸

⁷⁷⁴ This conclusion can be derived from the Amman First Instance Court's decision No 81/1992 (Unpublished 8th July 1993). In this decision, the winning party had obtained an enforcement order in the country of origin but the Jordanian court enforced the award according to the New York Convention without paying attention to the merger or non-merger argument.

⁷⁷⁵ DT Hascher. Op. Cit (footnote 432) 248-249.

⁷⁷⁶ [1996] 1 Lloyd's Rep 485.

⁷⁷⁷ MJ Mustill and SC Boyd. Op. Cit (footnote 29) 212.

However, since the English court adopted the merger doctrine in regard to a foreign arbitral award merged into foreign judgement, then which conditions and methods of enforcement can be used to enforce such a judgement in England if the Brussels Convention is excluded? In this regard, Dicey and Morris suggest that 'There is no doubt that, provided it fulfils the requirements for enforcement, a foreign judgement on a foreign award is regarded as a judgement for the purposes of the rules relating to enforcement of foreign judgements'.⁷⁷⁹

It seems that a foreign judgement based on a foreign award, for the purpose of enforcement, will be treated as a foreign judgement and its enforcement will be according to the methods of enforcement that are provided for foreign judgements, including the Brussels Convention. Moreover, article 25 of the Brussels Convention defined a 'Judgement' as: 'Any judgement given by a court or tribunal of a contracting State, whether the judgement may be called, including a decree, order decision or writ of execution, as well as the determination of costs or expenses by an officer of the court'.

It seems that a judgement given on an award by a court in a contracting State falls within the meaning of this article. Consequently, it can be said that there is no reason why a judgement given on an award by the court of a contracting State is not enforceable under the Brussels Convention in England.⁷⁸⁰

7.4.2. An award merged into a judgement in the country of origin has no extraterritorial effect (non-merger)

This opinion is based on the fact that the purposes of any action made by the court of

⁷⁷⁸ [1992] 1 Lloyd's Rep 342.

⁷⁷⁹ L Collins and others (eds). Op. Cit (footnote 12) 622.

⁷⁸⁰ A lot of discussions have been done about the scope of the Brussels Convention, and whether arbitration falls within its scope. It has been suggested that arbitration and recognition and enforcement of foreign award does not fall within the scope of the Brussels Convention on the basis that there are many conventions dealing with arbitration. Thus, the drafter of the Brussels Convention did not want to add a new instrument to the existing instruments that deal with arbitration. JP Beraudo 'The Arbitration Exception of the Brussels and Lugano Conventions: Jurisdiction, Recognition and Enforcement of Judgements' (2001) 18(1) *Journal of International Arbitration* 13, 13-26. JJVHV Hof 'The Arbitration Exception in the Brussels Convention: Further Comment' (2001) 18(1) *Journal of International Arbitration* 27, 27-39. DT Hascher. Op. Cit (footnote 432) 233-237. A Vahrenwald. Op. Cit (footnote 107)

the place of origin about an arbitral award are to enforce such an award in its territory. It does not extend to have any effect on the territory of another State as a judgement. Thus, seeking the enforcement of an arbitral award abroad will not be affected by the judgement of the court. Its enforcement abroad will be as a foreign arbitral award and not as a foreign judgement. This doctrine is adopted in some jurisdictions with respect to foreign arbitral award including Germany, France, Netherlands, Canada, and India.⁷⁸¹

This doctrine is supported by many commentators, such as Berg, who notes that:

[T]he merger of the award into the judgement in the country of origin does not have extra-territorial effect. The leave for enforcement means that a court authorises the enforcement of the arbitral award within its jurisdiction. The fact that the country of origin is a technical aspect for the purpose of enforcement within that country. The award can therefore be deemed to remain a cause of action for enforcement in other countries⁷⁸²

Dicey and Morris criticised the position of the English court in adopting the merger doctrine, by saying that:

This anomalous result could only apply to enforcement at common law, since (it is suggested) the provisions in section 101 of the Arbitration Act 1996 that convention awards 'shall' be recognised as binding on the parties would apply even if judgement on the award had been entered abroad.⁷⁸³

Mustill and Boyd also criticised the English court position, arguing that:

This rule is, however, anomalous and it leads to the rather odd result that two regimes of enforcement with somewhat different requirements may be in existence simultaneously when judgement has been entered abroad on a 'convention award' or a 'foreign award'-one to enforce the judgement and the other to enforce the award.⁷⁸⁴

Furthermore, Davidson concluded his comments on *Atlantic Emperor* case by saying:

Thus the situation might easily arise where a UK court is obliged by the 1968

⁷⁸¹ RM Mosk and R Nelson. Op. Cit (footnote 756) 470-471.

⁷⁸² AJVD Berg. Op. Cit (footnote 168) 347.

⁷⁸³ L Collins and others (eds). Op. Cit (footnote 12) 622.

⁷⁸⁴ MJ Mustill and SC Boyd. Op. Cit (footnote 29) 423.

Brussels convention (and the 1982 act) to recognise or enforce a judgement of a court of a member State, and obliged at the same time to enforce an entirely inconsistent arbitral award by the 1958 New York convention (and the 1975 act). How might this situation be solved? ⁷⁸⁵

In the *Atlantic Emperor* case, the advocate general suggested that:

The merger of the awards must be regarded as limited to the territory of the court which delivered the judgement and only the award must be taken into account for the purpose of recognition and enforcement in other States. In any event, it is clear that the solution of limiting recognition only to the judgement in which the award is merged must be rejected ⁷⁸⁶

There are some other reasons for not adopting the merger doctrine with respect to foreign arbitral awards. On the one hand, in the case of the merger doctrine, the enforcing court may face different situations, such as whether or not to enforce the enforceable arbitral award accompanied by an unenforceable judgement, an unenforceable award accompanied by an enforceable judgement, an unenforceable award accompanied by an unenforceable judgement, or an enforceable award accompanied by an enforceable judgement. How can the enforcing court deal with all these situations?⁷⁸⁷ On the other hand, the enforcement of a foreign award merged into a foreign judgement makes the conventions provided to deal with the recognition and enforcement of foreign arbitral awards meaningless. ⁷⁸⁸

7.4.3. The option between merger and non-merger of a foreign arbitral award

This solution is based on the fact that the winning party has the choice to rely on a foreign judgement or on a foreign arbitral award. The choice will be based on which one is in the best interests of the winning party.

This solution was suggested by the Advocate General in the *Atlantic Emperor* case, when he commented:

⁷⁸⁵ FP Davidson 'Civil Jurisdiction and Arbitration' [1992] *Scots Law Times* 267, 270.

⁷⁸⁶ As cited in DT Hascher. Op. Cit (footnote 432) 246.

⁷⁸⁷ (--) 'Enforcing Judgements Based on Foreign Arbitral Awards: The Applicability of Res Judicata' (1975) 124 *University of Pennsylvania Law Review* 223, 239-248.

⁷⁸⁸ DT Hascher. Op. Cit (footnote 432) 251.

[T]he prevailing trend in legal literature and case law is to grant the beneficiary of a merged arbitral award an option between the possibility of enforcing the award itself under the New York convention or of enforcing the judgement under bilateral convention or domestic law.⁷⁸⁹

Furthermore, this solution complies with the doctrine of the more favourable-right-provision provided by article VII of the New York Convention and section 66(4) of AA 1996. In this regard, the enforcement of a foreign judgement will prevail if it is the more favourable method than the enforcement of a foreign award.⁷⁹⁰

This kind of solution is likely to be applied under the Jordanian regimes. In fact, there is no statutory provision or case-law in the light of which a solution can be made. However, almost all of the Jordanian regimes do not distinguish between foreign awards and foreign judgements for the purpose of enforcement. Thus, whether a winning party relies on a foreign judgement or a foreign award for enforcement, the conclusion remains the same.

7.5. Summary

The previous chapters have answered the questions relating to the enforcement or refusal of an arbitral award. This chapter dealt with an arbitral award merged into a judgment in the State of origin. The argument in this chapter is based on the fact whether or not the enforcement of such an award will be as a foreign award or as a foreign Judgment. In cases where it is considered as a foreign award, the enforcement of such an award will be according to the arguments discussed in the previous chapters. However, in cases where such an award is considered as a foreign judgment, its enforcement will be according to the regimes enacted to deal with foreign judgements which lie beyond the scope of this thesis.

As far as the arbitral award merged into a foreign judgment in England is concerned, its enforcement will be according to the regimes enacted to deal with foreign judgments. However, even though the English courts adopted the merger doctrine with respect to a foreign award merged into a foreign judgment, they refused to

⁷⁸⁹ As cited in DT Hascher. Op. Cit (footnote 432) 246.

⁷⁹⁰ AJVD Berg. Op. Cit (footnote 168) 349. DT Hascher. Op. Cit (footnote 432) 248.

enforce such an award according to the regimes enacted to deal with foreign judgements, such as the Brussels Convention.

Jordanian regimes do not distinguish between foreign arbitral awards and foreign judgements in regard to the mode of enforcement. Therefore, the winning party can exercise the option to enforce the foreign award merged into a foreign judgement either as a foreign award or as a foreign Judgment.

Chapter Eight: The Relationships between the Applicable Regimes and their Consequences on the Recognition and Enforcement of arbitral awards

The previous chapters answered the question of how a winning party can recognise and enforce a foreign arbitral award under the English and Jordanian regimes. They also answered the question of how the losing party can resist the recognition and enforcement of an arbitral award. This chapter deals with the relationships between the regimes and the consequences of these relationships on the recognition and enforcement of arbitral awards.

It is crucial to understand why and how the relationships between the applicable regimes have been established, and how such relationships affect the role of the winning party in terms of recognition and enforcement and the role of the losing party in terms of resistance. In other words, do the current regimes strike a balance between the interests of both the winning and losing parties?

The winning party can apply to recognise and enforce a foreign arbitral award via several methods in England and Jordan. The scenario for choosing the best regime by the winning party is not the same in both States.

Frequently, the winning party can choose any regime to enforce the arbitral award by virtue of the more favourable-right-provision. In cases where the award is one to which the Geneva Convention applies, he can choose to enforce the award according to section 36 (1) of part II of AA 1950, section 66 of AA 1996, or by an action at Common Law. When the award is one to which the New York Convention applies, he can choose to enforce it according to section 101 of part III of AA 1996, section 66 of AA 1996, or at Common Law. If the award is made in a country to which the Administration of Justice Act 1920 or the Foreign Judgement (Reciprocal Enforcement) Act 1933 applies, then the award will be enforced by registration under those Acts.

Furthermore, if the award is registrable as a judgement under the Administration of Justice Act 1920, the Foreign Judgements (Reciprocal Enforcement) Act 1933, or part II of the Civil Jurisdiction and Judgements Act 1982, the winning party is not

prevented from enforcing the award at Common Law or by means of section 66 of AA 1996.⁷⁹¹

In Jordan in contrast, there are also a number of regimes that recognise and enforce foreign awards. They can be classified into four groups: bilateral Conventions, Inter-Arab Conventions, International Conventions, and local regimes. However, the interested party can only choose one regime to enforce the arbitral award. An exceptional case is the New York Convention, where the interested party can, by virtue of the more favourable-right-provision as provided by article VII (1) of the said Convention, enforce the award according to any other regime which is considered to be more favourable than the Convention.

As noted above, there are a number of modes of enforcement in England and Jordan. The winning party, by means of the more favourable-right-provisions, can choose the mode which best represents his interests. In England, the more favourable-right-provision is provided in almost all regimes. The winning party, accordingly, can practise forum shopping among these regimes. The winning party, for example, can rely on sections 104 of AA 1996, 66(4) of AA 1996, 36(1) of AA 1950, and 40 of part II of AA 1950 as gateways to pass from one regime to another when the other regime is more favourable to the recognition and enforcement of the arbitral award. Meanwhile, in Jordan, it is only provided by article VII (1) of the New York Convention 1958. According to this article, the winning party can choose any other multilateral or bilateral convention to which Jordan is a party or any Jordanian law concerning the recognition and the enforcement.

However, the scenario of using the more favourable-right-provision is not the same in both States. In England, it is possible for the winning party to find an alternative mode to enforce the arbitral award which fits his situation. Meanwhile, it is not possible to find an alternative mode of enforcement to replace the New York Convention in Jordan. This is because other regimes are less advanced than the convention.

As a result of these relationships, an overlapping situation has emerged whereby the

⁷⁹¹ L Collins and others (eds). *Op. Cit* (footnote 12) 618.

winning party by means of the more favourable-right-provision can pass from one regime to another. By doing so, he bypasses the provisions under which the losing party can resist enforcement. However, such a situation does not exist in Jordanian regimes. This is because Jordanian regimes do not provide a more favourable-right-provision. This is only provided by the New York Convention. Since other Jordanian regimes are less advanced than the New York Convention, the winning party may not rely on them instead of the New York Convention.

The relationships among the applicable regimes also resulted in a contradictory situation whereby two or more regimes contradict each other. This is the main problem among the Jordanian regimes. There is no implementing legislation for the conventions to which Jordan is a party. These conventions have full force in Jordan as soon as they are ratified and published in the Official Gazette. According to these conventions, they shall be applied according to the local Jordanian laws. Act No 8 is enacted to enforce any foreign arbitral award. So, these conventions will be applied via this Act. Since both the convention concerned and Act No 8 provide different conditions for enforcement and different grounds of refusal, a contradiction may arise between both regimes.

There are a number of cases where such a problem has occurred in practice. The Court of Cassation of Jordan followed a policy of superseding the convention-regimes over local-regimes as a solution to this problem, whereas Act No 8, though superseded by the convention concerned by virtue of an established judicial principle, continues to apply both, as the general law which governs the enforcement where the convention concerned is silent.

However, such a contradiction in terms of jurisdiction conflict does not exist among English regimes by virtue of the more-favourable-right provision provided by all English regimes. By comparing the English and Jordanian regimes, a policy may be introduced to be adopted by the Jordanian regimes to solve the contradiction problem.

Moreover, the relationship among the current regimes in both States raises the question of retroactivity. Do the current regimes apply retroactively? There is no solution provided by the current regimes to this situation. Therefore, the possibility of

having an arbitral award without the means of enforcement may arise. The House of Lords in England reached a solution for solving such a problem. According to this solution, the recognition and enforcement of an arbitral award depends on the time when the recognition and enforcement proceedings commenced regardless of when the arbitral award was made. Such an approach reached by the House of Lords is important to be adopted in Jordan, as there is no solution so far on the matter whether or not the current regimes apply retroactivity.

All of these issues will be discussed in detail in this chapter and, to this end, it will be divided into the following sections:

- The relationship between the current regimes on recognition and enforcement in England and Jordan
- The territorial scope of the current regimes on recognition and enforcement in England and Jordan
- The consequences of the relationship between the current regimes on recognition and enforcement in England and Jordan

8.1. The relationships between the current regimes in England and Jordan

8.1.1. The relationships between the English regimes

The relationship between the English regimes has been described as complex.⁷⁹² They can be divided into two categories. Firstly, the relationship between the sections/provisions of one regime and, secondly, the relationship between two or more regimes.

⁷⁹² J Hill. Op. Cit (footnote 23) 671.

8.1.1.1. The relationship between sections/provisions of one regime

1- The relationships between the sections/ provisions of the Arbitration Act 1996.

These relationships are governed by section 104 of part III and section 66 of part I of AA 1996. Section 104 provides that ‘Nothing in the preceding provisions of this part affects any right to rely upon or enforce a New York Convention award at common law or under section 66’, while section 66 (4) provides that:

Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under part II of the Arbitration Act 1950 (enforcement of awards under Geneva Convention) or the provisions of part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award.

The relationship between section 104 and section 66 is a complex one. One can imagine section 66 (1, 2, 3) to be considered as the more favourable regime to an interested party by virtue of section 104 than section 101 of part III. On the other hand, such a relationship continues, as section 101 of part III is considered as the more favourable regime, by virtue of section 66(4), than section 66(1, 2, 3) and so on. This kind of relationship creates what may be called an unsystematic enforcement cycle. Such a relationship has been justified by saying that:

In practice, there will not usually be any advantage in choosing this route[s.66], for whereas, sections 103(2) and (3) contain exhaustive lists of the circumstances in which an English Court ‘may’ refuse enforcement of a foreign award, the discretion to refuse under section 66 is much wider.⁷⁹³

However, according to this enforcement cycle, it is also possible to choose section 66 as a more favourable regime than part III, even though the court’s discretion is much wider.

Furthermore, there are relationships between sections 2, 66 of part I, and part III of AA 1996. Section 2 refers to section 66 in spite of the seat of arbitration being outside England and Wales or Northern Ireland, or if no seat has been designated or determined. Thus, section 66, by virtue of section 2, shall apply even though the seat

⁷⁹³ MJ Mustill and SC Boyd. Op. Cit (footnote 29) 212.

of arbitration is outside England and Wales or Northern Ireland, or no seat has been designated or determined. At the same time, section 66(4) refers to part III of AA 1996. In other words, section 2 refers to section 66 to enforce the foreign arbitral award which is a non-convention award in the first place and the winning party, by virtue of section 66(4), can rely on part III of AA 1996, which is a convention regime.

It seems that these relationships among sections 2, 66, and part III of AA 1996 abolish the distinction between a foreign convention award and a foreign non-convention award with respect to the mode of enforcement.

2- The relationship between sections/provisions of Arbitration Act 1950

These relationships are provided by section 40 and section 36(1) after its amendment by section 107 of AA 1996. Section 36(1) refers to section 66 of AA 1996 instead of section 26 of AA 1950.⁷⁹⁴ In other words, section 36(1) after amendment states that: 'A foreign award shall, subject to the provisions of this part of this act, be enforceable in England either by action or in the same manner as the award of an arbitrator is enforceable [by virtue of section 66 of arbitration act 1966]'.

This amendment places section 66 of AA 1996 instead of section 26 of AA 1950 and it does not change the rest of section 36(1). According to section 36(1), the winning party can rely on it to recognise and enforce a foreign arbitral award made within section 35 of part II. The winning party can also, according to section 36(1) after amendment, rely on section 66 of AA 1996. Moreover, section 66(4) of AA 1996, which became part of section 36(1), refers to part II of AA 1950, part III of AA 1996, and the Common Law. In addition, section 40 refers to section 36(1) which, by virtue of section 66(4), refers again to section 36(1). From these relationships, it can be said that an unsystematic enforcement cycle has emerged as well.

8.1.1.2. The relationship between two or more regimes

1- The relationship between the Arbitration Act 1996 and the New York Convention 1958

⁷⁹⁴ App 1, sch 3 (Consequential Amendments) of AA 1996.

It is not possible to rely upon the New York Convention itself to recognise and enforce the New York Convention award in England. The recognition and enforcement of this award needs to be done according to AA 1996 (the implementing Act). Part III of this Act has given effect to the New York Convention. Section 100 (1) of AA 1996 defines the New York Convention award as ‘an award made, in pursuance of an arbitration agreement, in the territory of a State (other than the United Kingdom) which is a party to the New York Convention’. While, article I (1) of the said Convention provides that ‘This convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought...’ As a result, section 101(1) of part III explains how article (I) of the said Convention should be applied in England.

Moreover, section 100 (1) of AA 1996 refers only to the first meaning of the arbitral award which is provided by article (1) of the Convention. This article refers also to the arbitral award which is considered as non-domestic in the State where recognition and enforcement are sought. It provides that: ‘it shall apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought’. Section 100(1) of AA 1996 has limited the scope of article (1) of the convention in two ways: firstly, by the adoption of the first meaning of the New York Convention award, and secondly, because no New York Convention award is enforceable in England as it relates only to the one which is made in other contracting States. This is because when the UK acceded to the New York Convention, it acceded with the territorial reservation not to apply this Convention unless the arbitral award is made in another contracting State.⁷⁹⁵

⁷⁹⁵ The reason behind Art (I) of the Convention is that when the Geneva Convention was enacted in 1927, it adopted the geographical criterion to govern foreign arbitral awards. This adoption was criticised when the drafter prepared to formulate art (1) of New York Convention on the same criterion. The delegates of Italy, Western Germany, France, and Turkey said that this criterion was not enough to know whether arbitral award is foreign or domestic. According to them, there are other factors which should be taken into account for this purpose, and the geographical criterion is often chosen merely as a matter of convenience. The other meaning of arbitral award was added later to the Convention to cover the other criteria existing in other legal systems which govern foreign arbitral award. P Contini. *Op. Cit* (footnote 152) 292.

The seat of arbitration where an award is made is provided in section 100 (2, b). Article (1) of the convention speaks about the arbitral award made in the territory of a State without indicating what the word 'made' means. So, section 100(2, b) provides a guideline for the word 'made' to be at the seat of arbitration regardless of where an award is signed, despatched, or delivered to any of the party.

Actually, section 100(2,b) came by this clarification to avoid the 'strange consequences'⁷⁹⁶ of *Hiscox v Outhwaite*⁷⁹⁷ in which the House of Lords considered an award to be made in the place where it was signed. It would seem that section 100 (2, b) provides an explanation for the application of article (1) of the convention. In addition, section 100 (2, b) refers to part I of the AA 1996 to indicate the meaning of the terms 'agreement in writing'⁷⁹⁸ and 'seat of arbitration'.⁷⁹⁹

Moreover, section 101 (1) of AA 1996 refers to the recognition of the New York Convention award as binding between the persons between whom it was made, whilst article III of the New York Convention refers to the recognition and enforcement of the New York Convention award as binding by each contracting State. However, section 101(1) added the way by which recognition can be done by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland. In addition, section 101(2) provides the method by which the New York Convention award may be enforced, in the same manner of judgement or order of court to the same effect by leave of the court. This section refers to the High Court and the County Court, as provided by section 105.

⁷⁹⁶ As considered by the Department Advisory Committee on Arbitration Law *Report on the Arbitration Bill* (Report of February 1996). MJ Mustill and SC Boyd. Op. Cit (footnote 29) 212, 384.

⁷⁹⁷ [1991] 3 W.L.R. 297

⁷⁹⁸ Pt (I) AA 1996 provides an expansive definition of what is an agreement in writing to cover most methods of concluding arbitration agreement, and which were not covered by art II(2) of the New York Convention. This approach may affect recognition and enforcement according to the New York Convention when the award has been made in England which provided an expansive definition and is sought to be recognised and enforced in a country which does not has such an approach. N Kalan 'New Developments on Written Form' in (--) (ed) *Enforcing Arbitration Awards Under the New York Convention* (United Nations New York 1999) 18.

⁷⁹⁹ S 53 of AA 1996 fixed the seat of arbitration as: 'Unless otherwise agreed by the parties, where the seat of the arbitration is in England and Wales or Northern Ireland, any award in the proceedings shall be treated as made there, regardless of where it was signed, despatched or delivered to any of the parties'.

Furthermore, section 102 of AA 1996 includes the contents of article IV of the New York Convention about the evidence on recognition and enforcement. Section 103 of AA 1996 merges the contents of articles V and VI of the convention and paragraph (1) of this section has removed the discretionary power of the local court provided by article V of the convention.⁸⁰⁰

Section 104 of AA 1996 embodies part of paragraph (1) of article VII of the convention. Article VII of the convention provides that:

The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

While, section 104 of AA 1996 provides that: ‘Nothing in the preceding provisions of this part affects any right to rely upon or enforce a New York Convention award at common law or under section 66.’. It seems that section 104 of AA 1996 limits what is provided by article VII (1) of the convention to the Common Law or section 66 of AA 1996, whereas what is provided by article VII (1) is much wider and includes any other regimes enacted for the purpose of recognition and enforcement. Section 104 does not indicate which party can rely on this section. It comes in the same meaning as article VII (1) of the convention which refers to the interested party without indicating which party; it may mean either the winning or the losing party.

Mustill and Boyd comment on the effect of article VII (1) of the New York Convention, when they speak about the role of this article to enforce an annulled award in regard to what happened in the USA and France,⁸⁰¹ by saying ‘[It] is not a gateway to the local law: it is part of the local law’.⁸⁰² However, in this research view, the effect of article VII (1) is merged into section 104 of AA 1996, which plays the

⁸⁰⁰ According to art V of New York Convention ‘recognition and enforcement of the award *may* be refused...’ (emphasis added). So, the local court *may* or may not refuse recognition and enforcement. While, s 103 of AA 1996 provides that ‘Recognition or enforcement of a New York Convention award *shall* not be refused except in the following cases’ (emphasis added). So, the English courts which are indicated in s 105 of AA 1996 shall refuse recognition and enforcement.

⁸⁰¹ MJ Mustill and SC Boyd. Op. Cit (footnote 29) 83-84.

⁸⁰² *ibid* 87.

role of gateway to the other local regimes in England. It seems there is no difference between relying on article VII (1) of the convention or on section 104 of AA 1996 except that section 104 refers to the Common Law and section 66 only. Within this limitation, both of them have the same scenario.

Finally, article III of the convention which refers to the conditions of enforcement not to impose substantially more onerous conditions or higher fees or charges that would be imposed on the recognition and the enforcement of a domestic award, was not embodied in AA 1996.

The above relationships show that the English legislature did not adopt the New York Convention as it was adopted by the United Nation conference. It was modified by adding some provisions as well as subtracting some other provisions. Also, the provisions of the convention were re-phrased and re-paragraphed.

2- The relationship between Arbitration Act 1996, the Arbitration Act 1950, the Geneva Protocol 1923, the Geneva Convention 1927, and the New York Convention 1958.

Section 99 of AA 1996 gives effect to part II of AA 1950, in that certain foreign awards continue to be recognised and enforced in the same way as in part II of AA 1950. Section 99 of AA 1996 limits the application of part II of AA 1950 to include an arbitral award which is not the New York Convention award. Section 107 also changes the effect of section 36(1) of AA 1950 to refer to section 66 of AA 1996 instead of section 26 of AA 1950.⁸⁰³

On the other hand, section 35 (1, a) of part II of AA 1950 gives effect to the Geneva Protocol 1923. At the same time, section 35 (1, b) of part II gives effect to the Geneva Convention 1927 with some explanations in sub-section 35 (1, b, c, 2, 3) regarding the field of application of the Geneva Convention 1927.

⁸⁰³ S 107 of AA 1996 refers to sch 3 of app 1 of the same Act. S 36 (1) to be read after the amendment in the light of sch 3 of app 1 of Arbitration Act 1996 and s 36 (1) as 'A foreign award shall, subject to the provisions of this part of this Act, be enforceable in England either by action or in the same manner

Section 36 of AA 1950 provides methods to enforce the Geneva Protocol award and Geneva Convention award. Accordingly, an arbitral award may be enforced according to section 36 (1) of AA 1950 by either action or in the same manner as the award of an arbitrator is enforceable, not by virtue of section 26 of AA 1950, but by virtue of section 66 of AA 1996. In addition, section 36 (2) provides that not only may a successful claimant seek to enforce the Geneva Protocol award or the Geneva Convention award in England under part II of AA 1950, but also a successful defendant may rely on the Geneva Protocol or the Geneva Convention as a defence to subsequent legal proceedings in England on the same cause of action.

Section 37 of AA 1950 gives effect to articles 1, 2, and 3 of the Geneva Convention in England and section 38 of AA 1950 gives effect to article 4 of the Geneva Convention. Section 39 of AA 1950 provides the meaning of the term 'final award' as provided by article I (d) of the Geneva Convention. Section 40 of AA 1950 gives effect to article 5 of the Geneva Convention with respect to the more favourable-right-provision.

As was seen above, sections 36, 37, 38, 39, and 40 of AA 1950 give effect to articles 1, 2, 3, 4, and 5 of the Geneva Convention 1927 and they govern an award made according to the Geneva Protocol 1923 by virtue of section 35 (a) of the same Act, while the articles named above of the Geneva Convention 1927 govern an award made according to the Geneva Protocol 1923 by virtue of article (1) of the Geneva Convention 1927.

It is important to note that there is a limitation in the field of application of part II of AA 1950. This limitation is provided by article VII (2) of the New York Convention which provides that:

The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

as the award of an arbitrator is enforceable by virtue of s 66 of Arbitration Act 1996'.

It should be also noted that the field of application of part II of AA 1950 is extended, by virtue of section 36(1) and section 40 of AA 1950, to cover AA 1996 and Common Law as the more favourable regimes. The relationship between the Geneva Protocol or the Geneva Convention (part II of AA 1950) and the New York Convention (part III of AA 1996) is limited by article VII (2) of the New York Convention.

Moreover, there is a connection between part III of AA 1996 and part II of AA 1950, by virtue of section 36 (1) of AA 1950. In that, section 36(1) was amended by AA 1996 to refer to section 66 of AA 1996 instead of section 26 of AA 1950. This connection between part III of AA 1996 and part II of AA 1950 should be applied in the light of article VII (2) of the New York Convention. Thus, part III of AA 1996 can be applied to recognise and enforce the arbitral award made according to AA 1950 and within the limitation provided by article VII (2) of the New York Convention. Therefore, part II of AA 1950 cannot be applied instead of part III of AA 1996 to recognise and enforce the New York Convention award. This is despite section 66(4) of AA 1996, which becomes part of section 36(1) of part II of AA 1950, refers to part III of the AA 1996 and part II of AA 1950 as the more favourable regimes.

3- The relationship between Civil Jurisdiction and Judgements Act 1982 and other regimes

Because of the UK's accession to both the Brussels and Lugano Conventions, there are currently two sets of rules in relation to the recognition and enforcement of foreign judgments, depending on where the judgment in question was made. If it was made within EC/EFTA States and is related to civil and commercial matters, then the issue would be exclusively governed by the CJJA 1982 and 1991, which embodied the said conventions. However if the judgment is made outside those States, then the recognition and enforcement will be according to other traditional law rules.⁸⁰⁴ However, with respect to an arbitral award, it is excluded from the scope of these

⁸⁰⁴ AJ Mayss *Principles of Conflict of Laws* (2nd edn Cavendish Publishing Limited London 1996) 87.

conventions.⁸⁰⁵ An award has to be converted into a judgment to be enforced under the said conventions.⁸⁰⁶

However, section 13(7) of part II of CJJA 1982 deals with the recognition and enforcement of a judgement given by a court of one part of the UK in other parts of the country. Section 18(2) of the same Act defines 'judgement' as:

[A]ny of the following (reference to the giving of a judgement being construed accordingly)-(e) an arbitration award which has become enforceable in the part of the United Kingdom in which it was given in the same manner as a judgement given by a court of law in that part.

The relationship between this and other regimes is provided by section 18(8), to the effect that the winning party can enforce such an award by virtue of this Act, by a summary procedure of section 66 of AA 1996, or by action at Common Law.⁸⁰⁷

4-The relationship between the Administration of Justice Act 1920 and other regimes

A party who has obtained a judgment in a superior court in any part of the Commonwealth applies to the High Court in England or Northern Ireland, or the Court of Session in Scotland for its registration, provided that it is for a fixed sum of money.⁸⁰⁸ The registration of a judgment is not a right, but is discretionary.⁸⁰⁹ A judgment registered under this Act has the same force and effect as if it had been rendered by the registering court.⁸¹⁰ However, a judgment may not be registered if an appeal is pending, or if the defendant intends to appeal.⁸¹¹

This Act is based on reciprocity, which means that a foreign judgment is not rendered registrable within the UK unless the provisions of the Act have been extended by the Order in Council to the country in which the judgment has been obtained. The Order

⁸⁰⁵ PM North and JJ *Fawcett*. Op. Cit (footnote 578) 447-448. JG Collier *Conflict of law* (2nd edn Cambridge University Press Cambridge 1994) 171.

⁸⁰⁶ JG Collier. Op. Cit (footnote 805) 171.

⁸⁰⁷ JHC Morris. Op. Cit (footnote 12) 179-180. L Collins and others (eds). Op. Cit (footnote 12) 644.

⁸⁰⁸ SS 12 and 13 of AJA 1920.

⁸⁰⁹ SS 9 (1) and (2) of AJA 1920.

⁸¹⁰ S 9 (3) of AJA 1920.

⁸¹¹ S 9 (2, e) of AJA 1920.

in Council has been made by the country in question for the enforcement there of the UK judgment.⁸¹² This approach applies equally to an arbitral award.

The Act defines a judgment to include an arbitral award if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by the court in that place.⁸¹³ By virtue of section 9(5), the winning party can enforce the award either by registration under this Act, under the summary procedure of section 66 of AA 1996, or by action at Common law. However, if he or she chooses to do so, then he or she will not usually be able to recover the costs.⁸¹⁴

5- The relationship between Foreign Judgements (Reciprocal Enforcement) Act 1933 and other regimes

Section 7 of the FJA 1933 provides the Crown with the power to make an Order in Council to extend the application of the Act to any Commonwealth country. In this way, the future extension of the AJA 1920 is prevented. Therefore, it is suggested that the FJA 1933 was intended to gradually replace the AJA 1920. The difference between both Acts is that the FJA 1933 does not substitute the AJA 1920. The FJA 1933 does not automatically apply to any Commonwealth country party to the AJA 1920. For this to be done, a further specific Order in Council is required. The FJA 1933 also applies the principle of registration, not only to the Commonwealth, but also to foreign countries.⁸¹⁵

The FJA 1933 is the same as the AJA 1920, in that it operates on reciprocity. A creditor of a judgment, rendered in a foreign country to which the Act has been extended, may apply to the High Court in England or Northern Ireland, or to the Court of Session in Scotland to have it registered. Unlike the AJA 1920, by virtue of section (2) of the FJA 1933, the court has no discretion and must order the judgment to be

⁸¹² S 14 of AJA 1920 as amended by s 35 of the CJJA 1982.

⁸¹³ S 12 (1) of AJA 1920.

⁸¹⁴ AJ Mayss. Op. Cit (footnote 804) 97. PM North and JJ Fawcett. Op. Cit (footnote 578) 452-453. R Merkin. Op. Cit (footnote 163) 14. L Collins and others (eds). Op. Cit (footnote 12) 645-646. JHC Morris. Op. Cit (footnote 12) 179.

⁸¹⁵ AJ Mayss. Op. Cit (footnote 804) 97.

registered, provided that it satisfies the requirements of the Act. The FJA 1933 applies to any judgment of a court and, unlike the AJA 1920, the judgment does not have to be delivered by a superior court, provided that it is for a sum of money, final and conclusive, and not rendered in respect of taxes or penalties as indicated by section 1 (2, a) which was added by section 35 (1) and schedule 10, paragraph 1 of the CJJA 1982. A judgment is considered final and conclusive, although an appeal against it is pending, provided by section 1(3).

However, by virtue of section (5) the court has the discretionary power to set aside the registration or adjourn the application, if it is satisfied that an appeal is pending or the defendant is entitled and intends to appeal. Unlike the AJA 1920, section (6) of the FJA 1933 prevents the party seeking enforcement from bringing an action in England on the foreign judgment.⁸¹⁶ However, the FJA 1933, like the AJA 1920, provides the same provisions, apart from sections 5, and 6, which apply to an arbitral award which has become enforceable in the same manner as a judgment in the place where it was made. The effect of the exception for section 6 indicates the relationship between this regime and other regimes to the effect that the winning party can enforce the award either by registration under this act, under the summary procedure of section 66 of AA 1996, or by action at Common Law.⁸¹⁷

8.1.3. The relationship between the Jordanian regimes

There are a number of regimes for recognition and enforcement in Jordan. The relationship between these is simple, as it is only between two or more regimes.

1-The relationship between the Arab League Convention 1952 and The Riyadh Convention 1983

The relationship between these two regimes is governed by section 72 of the Riyadh Convention. This is to the effect that the Arab League Convention shall cease to have an effect between contracting States on their becoming bound and to the extent that they become bound by the Riyadh Convention. This relationship is the same as the

⁸¹⁶ AJ Mayss. Op. Cit (footnote 804) 97-98.

relationship between the New York Convention on the one hand, and the Geneva Protocol 1923 and the Geneva Convention 1927 on the other.⁸¹⁸

2- The relationship between the New York Convention and other regimes

Such a relationship is governed by article VII (1) of the New York Convention, which provides that:

The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon

Thus, the winning party can rely on any other regimes in Jordan to recognise and enforce the New York Convention award.

8.2. The territorial scope of the regimes on recognition and enforcement in England and Jordan

The UK is a political term rather than a geographical one. It comprises four countries: England, Scotland, Wales, and Northern Ireland. The UK is not, strictly speaking, the same thing as Britain. Britain consists of England, Scotland and Wales, while the UK also includes Northern Ireland. The UK is also not the same as the British Isles. The British Isles is a geographical term rather than a political one, and refers to all of the islands in this region, including the whole of Ireland, not just the northern part.⁸¹⁹

In this regard, the question which arises as to what extent the current regimes are applicable in the four said countries.

AA 1996 extends to include England, Wales, and Northern Ireland.⁸²⁰ Part II of AA 1950 extends to be enforced in all four countries, with the conditions and limitations

⁸¹⁷ S 10(a) which was added by CJA 1982 Sch 10 Para 4. JHC Morris. *Op. Cit* (footnote 12) 179. L Collins and others (eds). *Op. Cit* (footnote 12) 645-646.

⁸¹⁸ Art VII (2) of the New York Convention 1958.

⁸¹⁹ TR Entwistle and C Oliver *Children's Atlas of the British Isles* (Miles Kelly Publishing 2000) 5-7.

provided for this purpose.⁸²¹ The Arbitration (International Investment Disputes) Act 1966 extends to include the four countries but within the limitation provided for this purpose. This Act extends, with some limitations, to be applied in former colonies which are now Commonwealth Countries.⁸²²

The Civil Jurisdiction and Judgements Act 1982 also extends to include the four countries.⁸²³ The Foreign Judgements (Reciprocal Enforcement) Act 1933 is enforceable within the United Kingdom dominions and any other dominions outside the UK indicated by her Majesty's Order.⁸²⁴ The Administration of Justice Act 1920 is also applicable in the UK and in other parts of her majesty's dominions.⁸²⁵ The Carriage of Goods by Road Act 1965 is applicable in the UK so far as it relates to the rights and liabilities of persons concerned in the carriage of goods by road under a contract to which the convention applies.⁸²⁶ The Multilateral Investment Guarantee Agency Act 1988 is also applicable in the UK.⁸²⁷

It seems that there are two kinds of regimes with respect to the territorial scope of their application within the UK. The first kind extends to include the UK, and the second kind extends to include part of the UK. Thus, careful attention should be paid when dealing with the relationships between these two kinds of regimes. If the first kind of regime refers to the second kind as the more favourable-right-regime, the effect of the regime concerned will be only within its territorial scope. It does not extend to the territorial scope of the first kind of regime.

For example, the relationship between section 18(8) of the Civil Jurisdiction and Judgements Act 1982 and section 108 of AA 1996 can illustrate this point. According to section 18(8), the winning party can rely on any other regimes dealing with recognition and enforcement in the UK to recognise and enforce an award made in any part of the UK. While section 108 of AA 1996 has limited the scope of AA 1996 not to cover all of the UK, it just covers England, Wales, and Northern Ireland and it

⁸²⁰ S 108 of AA 1996. This Act extends to Northern Ireland with the limitation provided by this section.

⁸²¹ SS 41 and 42 of Pt II of AA 1950.

⁸²² SS 6, 7, and 8 of AA 1966.

⁸²³ Pt II of Civil Jurisdiction and Judgements Act 1982.

⁸²⁴ Pt I of Foreign Judgements (Reciprocal Enforcement) Act 1933.

⁸²⁵ Pt II of Administration of Justice Act 1920.

⁸²⁶ Enactment Clause 1 of the Convention to have force of law of Carriage of Goods by Road Act 1965.

does not include Scotland. So, according to section 18 (8), the winning party can recognise and enforce the arbitral award by virtue of section 66 or part III of AA 1996, if the recognition and enforcement are sought within the territorial scope of AA 1996, but he cannot rely on AA 1996 to enforce such an award in Scotland.

On the other hand, all of the Jordanian regimes are applicable within the territorial scope of the Hashemite Kingdom of Jordan, as indicated in Chapter One of the 1952 Constitution of Jordan. It can be said that Jordan has a unified legal system that contains only one country or law district and legal relations operate exclusively within one region.

8.3. The consequences of the relationships between the current regimes in England and Jordan

Consequent to the relationship between the applicable regimes in both States, a number of consequences emerges, namely: overlapping, contradiction, jurisdiction conflict, and retroactivity.

8.3.1. Overlapping

The regimes involved in this situation are section 66 of AA 1996, part III of AA 1996, and part II of AA 1950. The interested party can thus rely on section 104 of part III, section 66(4) of AA 1996, or sections 36(1) and 40 of part II of AA 1950 as a gateway for passing from one regime to another. As a result, the winning party can start from one regime and return to the same regime through other regimes. For example, the winning party can rely on section 104 of part III of AA 1996 as a gateway to section 66 and then rely on section 66(4) return to part III again. Also, the winning party can rely on section 36(1) of part II of AA 1950 as a gateway to section 66 of AA 1996, and he can still rely on section 66(4) as a gateway to return once again to part II of AA 1950.

According to the more favourable-right-provision, a number of questions can be

⁸²⁷ S 1 of the Multilateral Investment Guarantee Agency Act 1988.

asked:

1-At what time can the winning party rely on one regime as the more favourable one to recognise and enforce the arbitral award? Is it before or after the resistance of the losing party?

2-If the answer to the above question is 'after the resistance of the losing party', then how many times can the winning party use the more favourable-right-provision under the English regimes?

3-If the answer to the above question is that the winning party can choose as many as he can within the time limit for the enforcement (within six years), then is it acceptable to recognise and enforce the foreign award on the basis of the more favourable-right-provision? If the answer to this question is positive, this means that, if the winning party seeks to enforce an award according to part III, he can pass to section 66 or to Common Law by virtue of section 104 in cases where the losing party resists enforcement, on the grounds provided by section 103.

So, what is the position of the enforcing court with respect to the winning party application to move to section 66 or to Common Law and to the losing party objection? If it rejects the losing party's objection on the basis that the winning party is using the more favourable-right-provision, then what justifications are left in section 103 of part III? It is, indeed, a dead letter.⁸²⁸ However, the English courts, as far as the author is aware, have not had the opportunity to answer the above questions

4-Can the winning party alone choose the applicable regime on the basis of the more favourable-right-provision? Or can the losing party also choose the applicable regime on the basis of the more favourable-right-provision? In this regard, section 104 of AA 1996 provides that: 'Nothing in the preceding provisions of this part affects any right to rely upon or enforce a New York Convention award at common law or under section 66'.⁸²⁹ This section does not indicate which party can avail himself of this section. The same thing is provided by article VII (1) of the New York Convention

⁸²⁸ R Goode. *Op. Cit* (footnote 89) 28, 37.

⁸²⁹ The same is provided by ss 36 (1) after amendment and 40 of pt II of AA 1950.

which speaks about the interested party without fixing whether it is the losing or winning party.

There is nothing in the above section to prevent the party who resists enforcement from exercising his right on the basis of the more favourable-right-provision. As such, the scenario of enforcement on the basis of the more favourable-right-provision becomes more complex. For instance, a choice by the winning party will be based on what is likely to lead to the enforcement of an award. At the same time, a choice by the party who resists enforcement means that he will choose the basis that is likely to refuse enforcement.

This scenario leads to the fact that an award is enforceable at the choice of the winning party, but not from that of the losing party. However, this scenario was intended neither by the New York Convention nor by the English legislature. It is, however, assumed in the doctrine that the losing party does not have such a right, and that it is only provided to the winning party.⁸³⁰

In this situation, the question may arise as to whether the enforcing court may apply, on its own motion, the more favourable-right-provision to enforce the arbitral award or not? In some jurisdictions, this is evident. The French Supreme Court answered this question in the affirmative in *Norsolor v Pabalko*,⁸³¹ while the English courts have not had an opportunity to answer such a question as far as the author is aware.

The mechanism provided by the alternative regimes to recognise and enforce the foreign award on the basis of the more favourable-right-provision can be classified into two main correlations:

1-The many-to-one correlation, whereby there are many regimes for one operation: in this operation the winning party can use either section 66 of AA 1996, part III of AA 1996, or part II of AA 1950 to enforce the award by leave of the court in the manner of judgement or by action at Common Law. This category is based upon all the

⁸³⁰ AJVD Berg 'The New York Convention: Summary of Court Decisions' in M Blessing (ed) *The New York Convention of 1958* (ASA Special Series No 9 Swiss Arbitration Association Zurich 1996) 51.

⁸³¹ As cited in *ibid* 96.

alternative regimes together.

2-The one-to-many correlation whereby there is one regime for many operations: in this correlation the winning party can rely on one regime to recognise and enforce his award by either action at Common Law or by leave of the court. For example, the winning party can recognise and enforce an award by leave of the court as provided by section 101 of part III of AA 1996 or by action at Common Law as provided by section 104 of the said part. The winning party can also do so by section 66(1, 2, 3), section 66(4), and section 36(1) of part II. This category is based upon a regime-by-regime system.

This overlapping situation makes the existing statutory provisions unnecessary and redundant, which is unacceptable. It should be emphasised that the legislature never intended to have so many regimes to conduct one operation. The historical developments of these regimes indicates that such a situation is no more than an accumulation of statutory provisions caused by unsuccessful attempts to find efficient statutory provisions that could govern the recognition and enforcement of the foreign award. However, the approach was to leave them in place and add inefficient new statutory provisions.

All involved regimes were created to achieve one, and only one, objective, namely the recognition and enforcement of an award. This being so, the above regimes seem to differ little in themselves, if at all, insofar as the objective is concerned. This gives support to the fact that the differences between these regimes, to a considerable extent, lie in the states related to the recognition and enforcement of foreign award. Differences of this sort might be considered both advantageous and disadvantageous at the same time. Thus, the advantageous aspect cannot justify the existence of all regimes for conducting one operation because the regime with more advantages would render all others redundant.

Each regime has advantages that cannot be found in other regimes. These advantages have been scattered amongst all of the regimes. This situation has led to the fact that

the existing situation is less efficient than one which would consolidate all of the advantages found in the others. However, it is too difficult to specify one of them as the more favourable-right-regime, and it is impossible to say that one of them is redundant. It is too difficult to specify one of the existing regimes as the more favourable-right-regime because each one enjoys some advantages but lacks other advantages which may be found in other regimes. Scattering the advantages over all regimes makes all of the existing regimes less efficient rather than the consolidation by one of these regimes of all of the advantages found in other regimes.

The advantages and disadvantages of the involved regimes are the conditions of enforcement and the grounds of refusal provided by each regime. Thus, the advantages of each regime do not have the same disadvantages of another regime. For example, not having a list upon which to refuse enforcement in section 66 as in section 103 of part III of AA 1996 is itself an advantage for the winning party, in some cases, to rely on section 66 instead of part III. Furthermore, having the court's discretionary power much wider in section 66 than in part III of AA 1996 is itself an advantage for the winning party, because he can in some cases, use part III instead of section 66, as outlined by Mustill & Boyd:

In practice, there will not usually be any advantage in choosing this route[s.66], for whereas, sections 103(2) and (3) contain exhaustive lists of the circumstances in which an English Court 'may' refuse enforcement of a foreign award, the discretion to refuse under section 66 is much wider.⁸³²

In relation to the Jordanian regimes, such complexity is not available. The only regime providing the more favourable-right-provision is the New York Convention, whilst in contrast, it is provided in all regimes in England. Being with one regime which provides the more favourable-right-provision makes the overlapping less complex or it may not happen as can be seen by comparison between the English and the Jordanian regimes.

⁸³² MJ Mustill and SC Boyd. Op. Cit (footnote 29) 212.

8.3.2. The contradiction between the current regimes

It seems there is an inconsistent approach between section 103(1) and section 103(2) of AA 1996. Having understood that section 103(1) is aiming at the effect that the grounds of refusal are exhaustive; the same effect is found in section 103(2). Section 103(1) states that ‘Recognition or enforcement of a New York Convention award *shall not be refused except* in the following cases’ (emphasis added), while section 103(2) states that ‘Recognition or enforcement of the award *may be refused* if the person against whom it is invoked proves’ (emphasis added).

Consequently, section 103 (1) provides that the competent court *must not* enforce foreign arbitral awards in cases where grounds provided by section 103(2, 3, 4, 5) are available, while section 103(2, 3, 4, 5) provides that the competent court *may not* enforce foreign awards if one of the grounds provided by section 103 (2, 3, 4, 5) is available. The inconsistent approach in this respect is that section 103(1) does not invest the court with the discretionary power to act or not to act, while section 103(2, 3, 4, 5) does. This being so, section 103(1), which speaks about section 103(2, 3, 4, 5), is meaningless or redundant.

It also seems there is an inconsistent approach between part III of AA 1996 and part II of 1950. Section 99 of AA 1996 gives effect to part II of AA 1950, in that certain foreign awards continue to be recognised and enforced in the same way as in part II of AA 1950. Section 99 of AA 1996 limits the application of part II of AA 1950 to include an arbitral award which is not a New York Convention award. However, section 104 of AA 1996 refers to section 66 of AA 1996, which refers in its turn to apply part II of AA 1950 to New York Convention awards.

Moreover, there is an inconsistent approach between section 36(1) of AA 1950 and section 66 of AA 1996. Section 36(1) of AA 1950 was amended by section 107 of AA 1996 to refer to section 66 of AA 1996 instead of section 26 of AA 1950. Even though section 66 of AA 1996 becomes part of AA 1950 after the amendment, paragraph four of section 66 refers again to apply part II of AA 1950.

In Jordan, there is no implementing legislation for the conventions to which Jordan is a party. This means that there is no particular method to enforce the convention-award. However, there is one way by which all foreign awards can be enforced according to the convention concerned. This method is provided by Act No 8. This Act not only provides the method of enforcement, but also provides the conditions for enforcement and the grounds of refusal. Thus, when the winning party relies on any convention to enforce an award, he is required to fulfil the conditions provided by the convention and those provided by Act No 8. Since the conditions in both regimes are not the same, then they may contradict one another.

For example, Act No 8 requires an award to be final, whilst such a condition is not provided for by the New York Convention. On the other hand, Act No 8 provides grounds of refusal which is not provided by other regimes. In these instances, how do the Jordanian courts solve such a situation? As there is no statutory solution, this matter is left to the competent court. In this regard, the court supersedes the provisions of the convention over the provisions of the local law. In this regard, the Court of Cassation held that:

It has been established by the Court of Cassation as a principle that domestic laws which are in force are applicable as far as there is no provision in an international convention or treaty repugnant to the provisions of those laws. This rule should not be affected by the precedence of the domestic law to the international convention or vice versa.⁸³³

In another decision, the court confirmed the fact that conventions are superior in application to the Act No 8, and it held that: 'Since international conventions are superior to the domestic laws and have priority over them in application, the Enforcement of the Foreign Judgements Act is, therefore, not applicable'.⁸³⁴

⁸³³ Court of Cassation's decision No 38/91 (Journal of Jordanian Bar 1992) 1737, 1739. To the same effect other decisions had been issued by the Court of Cassation. Such as decision No 310/66 (Journal of Jordanian Bar 1966) 1153. Decision No 768/91 (Journal of Jordanian Bar 1992) 1236.

⁸³⁴ Court of Cassation's decision No 768/91 (Journal of Jordanian Bar 1992) 1236, 1241.

Moreover, the court held that ‘The Enforcement of Foreign Judgments Act is the general law as to the enforcement of all foreign judgments and awards insofar as there is no a special provision in international conventions’.⁸³⁵

However, this solution may be changed since the Jordanian legal system is statutory and not based upon judicial precedent as in England. This happened when the Court of Cassation in the above named decision whereby the New York Convention was to be applied, and the court intended to apply the provisions of the Act No 8 with those of the convention together, it held that:

The award for which enforcement is sought does not contradict the provisions of the Enforcement of Foreign Judgments Act which are in conformity with the New York Convention, and the objections of the respondent do not fall under any of the grounds for non-enforcement mentioned in either the convention or the act....the judgement for which enforcement is sought was issued by the tribunal in Paris pursuant to articles 1476-1477 of the French Code of Civil Procedures and complies with all the conditions required by the Act on the Enforcement of Foreign Judgments Act no 8/1952. It does not contain any of the grounds which would prevent its enforcement and which appear in article 7 of the said Act.⁸³⁶

Furthermore, the Court of Cassation considered Act No 8 as a ‘general law’ of international conventions where they are silent.⁸³⁷ This means that the winning party has to meet the conditions of enforcement provided by the convention concerned and Act No 8. The losing party can also resist enforcement according to the grounds of refusal provided by the convention concerned and Act No 8. The same application was reached by the Court of Cassation with respect to the application of the Jordanian Lebanese Convention. In its decision, it held that:

The respondent’s claim was neither provided for among the grounds of refusal listed in article 7 of the Act on the Enforcement of Foreign Judgements, nor those listed in article 19 of the Jordanian-Lebanese Convention. These grounds were exclusively listed in the mentioned articles.⁸³⁸

⁸³⁵ Court of Cassation’s decision No 874/86 (Journal of Jordanian Bar 1989) 2550, 2553.

⁸³⁶ Court of Cassation’s decision No 768/91 (Journal of Jordanian Bar 1992) 241.

⁸³⁷ Court of Cassation’s decision No 74/86 (Journal of Jordanian Bar 1989) 2550, 2555.

⁸³⁸ Court of Cassation’s decision No 51/76 (Journal of Jordanian Bar 1976) 1597, 1600. Court of Cassation’s decision No 294/74 (Journal of Jordanian Bar 1976) 475, 481.

The court followed the same approach in cases where it applied the Riyadh Convention.⁸³⁹ However, the Court of Cassation changed its policy and started to apply the convention to supersede the domestic law and enforced the foreign arbitral award according to the New York Convention without reference to Act No 8.⁸⁴⁰

Subsequently, the current solution might be changed in the future as the court may adopt another solution as it thinks fit to its satisfaction. Therefore, it can be said that the problem still exists and the provided solution is temporary.

8.3.3. Jurisdiction conflict

This section aims to display the jurisdiction conflict among the applicable regimes. This conflict comes from the idea that an award comes within the jurisdiction of two regimes or more. The question arises as to which regime's jurisdiction should prevail? Generally, this conflict happens amongst international, regional, and bilateral conventions within the same legal system in a State that is a party to all of these conventions. It may also happen between these conventions and the local laws of the State which is a contracting State to these conventions.⁸⁴¹

As far as recognition and enforcement are concerned in England, it is a party to the New York Convention, the Washington Convention, the Geneva Protocol 1923, and the Geneva Convention 1927. Each one of these conventions has been given effect by local law. These local laws transferred these conventions into the English legal system. Thus, the problem of the jurisdiction conflict between one convention and another or a local law in England is inconceivable since all regimes are at the same level. Therefore, the doctrine of whether or not the convention regimes supersede local laws is not applicable because all regimes have the same level in England.

However, a jurisdiction conflict may arise among local regimes in England. Sections

⁸³⁹ Court of Cassation's decision No 865/88 (Journal of Jordanian Bar 1990) 1881.

⁸⁴⁰ Court of Cassation's decision No 47/91 (Journal of Jordanian Bar 1993) 193.

⁸⁴¹ AJVD Berg. Op. Cit (footnote 168) 81.

104 of AA 1996, 66(4) of AA 1996, 36 of AA 1950, and 40 of AA 1950 provide the more favourable-right-provision. This provision is a gateway to jurisdictions of the English regimes. The interested party, by virtue of this provision, can recognise and enforce an award by any of these regimes without facing a jurisdiction conflict.

Regarding the Jordanian regimes, there are a number of regimes dealing with recognition and enforcement. Some of these regimes take the form of local laws, which are AA 2001 and Act No 8, whereas other regimes take the form of convention-regimes. The convention-regimes can be classified into two kinds. Firstly, bilateral conventions which are the conventions that Jordan made with Syria, Lebanon, Tunisia, and Egypt. Secondly, Multilateral Conventions which are the Arab League Convention 1952, the Riyadh Convention 1983, the Amman Convention 1987, the New York Convention 1958, and the Washington Convention 1965.

The way in which the Jordanian legal system gives effect to these conventions is different from its counterpart in England. In Jordan, conventions become applicable as soon as they are ratified and published in the Official Gazette without need to implement them by local laws, as in England. Because of this, the problem of jurisdiction conflict between these conventions and local laws is possible in cases where an award has fallen within the jurisdiction of one of these conventions and local law concurrently. In addition, jurisdiction conflicts may arise among these conventions themselves.

In regard to the first type of jurisdiction conflict, the question arises as to which regime shall supersede another, convention-regime or local regime? There is no provision in the 1952 Constitution or in any other Jordanian legislation to solve this problem. This problem has been left to the enforcing court to be solved. There are actually a number of judgements in Jordan which emphasise the fact that the convention supersedes the local law in the case of jurisdiction conflicts and their applications. For instance, the Court of Cassation has upheld the decision made by the Court of Appeal regarding the damages to be paid to the inheritance (defendants) of a person killed in a plane accident. It held that:

Section 22 of Warsaw Convention has fixed the amount of damages that the passenger should be paid in case of tort. Since the company is one of the

companies which are working in Jordan, the claimant's company is committed to this section of the convention. However, the allegation of the Claimant's company that the damages which shall be paid should be fixed by the local law on the basis of blood money (Wergild) is not legal as far as there is a particular section fixing the amount of damages in case of tort which may result from international aircraft accidents. This section is 22 of the Warsaw Convention which supersedes the local laws.⁸⁴²

In another decision, the Court of Cassation held that it was not permitted to apply any provisions that contradict the provisions of the convention.⁸⁴³ Furthermore, it clearly emphasises the superior role of the convention to local law. It agreed that local laws are applicable as long as they are not contrary to any convention.⁸⁴⁴

The above decisions were issued in regard to the recognition and enforcement of a foreign judgment. However, by analogy with the principles that are reached by the above decisions, they can be applied to the jurisdiction conflict between a convention and the local law as regards the recognition and enforcement of a foreign award. This approach was emphasised after the decision of the Court of Cassation regarding the application of the New York Convention. It held that:

Since the Hashemite Kingdom of Jordan has acceded to the New York Convention 1958 without making a reciprocal reservation regarding international arbitral awards, there is no way on saying to apply the Act No 8 and return to interpret section 7 of this act. This is because the international convention is superior to local law and to be enforced first.⁸⁴⁵

On the other hand, as regards the second jurisdiction conflict (with respect to the jurisdiction conflict among convention-regimes), this problem happens when an award falls under the scope of the application of two or more conventions concurrently. Three main methods may be used to sort out this problem. Firstly, the provisions of the conventions themselves. Secondly, the rules of conflict of treaties. Thirdly, solutions provided by the Vienna Convention on the Law of Treaties 1969.

As regards the first solution, the New York Convention in article VII (1) provides that:

⁸⁴² Court of Cassation's decision No 100/62 (Journal of the Jordanian Bar Issue 6 1962) 526.

⁸⁴³ Court of Cassation's decision No 12/70 (Journal of the Jordanian Bar Issue 3-4 1970) 22.

⁸⁴⁴ Court of Cassation's decision No 38/91 (Journal of the Jordanian Bar Issue 10-11 1991) 1737.

⁸⁴⁵ Court of Cassation's decision No 768/91 (Journal of the Jordanian Bar Issue 7-9 1991) 1231.

The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

According to this article, two solutions have been provided. Firstly a compatibility-provision, in that this convention will not affect any other Multilateral Conventions that the contracting State has committed in the subject-matter that is dealt with by the New York Convention.⁸⁴⁶ Secondly, the more favourable-right-provision, in that the interested party can rely on another convention that may be more favourable than the New York Convention. Thus, any conflict between the New York Convention and any other Conventions to which Jordan is a party can be sorted out by using article VII (1) of the New York Convention.

The Riyadh Convention provides a solution for a jurisdiction conflict between it and the Arab League Convention to the effect that the application of the Arab League Convention shall cease to apply between the States that become member States to the Riyadh Convention.⁸⁴⁷ This section has the same effect of article VII (2) of the New York Convention, which addresses the relationship between this convention on the one hand, and the Geneva Protocol 1923 and the Geneva Convention 1927 on the other.⁸⁴⁸

As regards the second solution, it deals with three main traditional principles; namely, the *Lex posterior derogat priori* (later convention supersedes the earlier one), the *lex specialis derogat generali* (more specific convention supersedes more general convention), and *La regle d efficacite Maximale* (the principle of maximum efficacy).⁸⁴⁹

According to the first principle, if there is a convention dealing with recognition and enforcement and a contracting State with this convention becomes a contracting State to a new convention and deals with the same subject-matter of the earlier convention,

⁸⁴⁶ AJVD Berg. Op. Cit (footnote 168) 90.

⁸⁴⁷ S 72 of the Riyadh Convention.

⁸⁴⁸ Jordan is not a contracting State to the Geneva Protocol 1923 and the Geneva Convention 1927.

⁸⁴⁹ AJVD Berg. Op. Cit (footnote 168) 90.

the later convention will be applied to the subject-matter.⁸⁵⁰

According to the second principle,⁸⁵¹ if a jurisdiction conflict happens between two conventions, one being more specifically about the recognition and enforcement of an award, such as the New York Convention, and the other is more generally concerning with the recognition and enforcement of a foreign award, such as the Riyadh Convention or the Arab League Convention, (both are created basically to deal with recognition and enforcement of foreign judgements not awards), the New York Convention, according to this principle, shall prevail.⁸⁵²

In relation to the third principle of maximum efficacy, this means that, if an award is unenforceable under one convention which could be applied but enforceable under another which could also be applied, the other convention will be applicable, irrespective of whether it is an earlier or later convention, and irrespective of whether it is more general or specific.⁸⁵³

⁸⁵⁰ Applying this solution to the jurisdiction conflict among the multilateral conventions of which Jordan is a party would depend on the date on which these conventions came into force in Jordan. In relation to the Arab League Convention is on 28th July 1958, the Riyadh Convention on 17th January 1986, the Amman Convention on 23rd September 1988, the Washington Convention on 16th September 1972, and the New York Convention on 8th July 1979. According to this principle, Amman Convention should apply first to the extent that the Amman Convention and another Convention are both apply concurrently dealing with the same subject-matter. However, the Amman Convention does not provide any mechanism for recognition and enforcement of foreign awards. Thus, the applicable Convention regarding recognition and enforcement of foreign award would be according to the New York Convention.

⁸⁵¹ This solution can be used to solve the jurisdiction conflict between AA 1996, the Carriage of Goods by Road Act 1965, and Multilateral Investment Guarantee Agency Act 1988 as all these conventions are created to deal with particular arbitral award.

⁸⁵² Applying this principle on the jurisdiction conflict amongst the Conventions that Jordan acceded to will be as follows: Regarding the Washington Convention, it deals with international arbitration in the field of investment disputes by the International Centre for Settlement of Investment Disputes (ICSID). According to the art 25(1) of this Convention, arbitration will be under this Convention if the dispute arising is directly out of an investment between a contracting State and a national of another contracting State. According to art 53 of this Convention an award made by ICSID is binding and is not subject to any appeal or any other remedy except those provided by this Convention. Accordingly, an award made under this Convention will be enforced in Jordan as Jordanian local judgements. This Convention is specialised on one kind of dispute as provided by art 25 (1). According to the principle of *Lex specialis derogat generali*, an award made by ICSID will be recognised and enforced according to art (6) of this Convention. This is even though there is another Convention which would apply at the same time. What has been said about the Washington Convention can be said about the Amman Convention which adopts the same mechanism but only among the Arab countries. However, if an award is not recognised and enforced according to the Washington Convention or the Amman Convention, this award may be recognised and enforced according to the New York Convention or to any other local regimes in Jordan.

⁸⁵³ AJVD Berg. Op. Cit (footnote 168) 90-91.

As regards the solution provided by the Vienna Convention 1969, it is provided by article (30) of the said convention. It deals with the application of successive treaties relating to the same subject-matter. Sub-section one of article (30) refers to section (103) of the Charter of the United Nations which, according to this section, supersedes any other conventions. Sub-section one of article (30) also provides the rights and obligations of the States parties to successive treaties relating to the same subject-matter to be determined according to the following situations:

1-In cases where treaties indicate that they are subject to an earlier or later treaty, the provisions of the other treaty will prevail⁸⁵⁴

2-In cases where the treaties indicate that they are not to be considered as incompatible with an earlier or later treaty, the provisions of the other treaties will prevail⁸⁵⁵

3-In cases where all of the parties to the earlier treaty are also parties to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies to the extent that its provisions are not contradictory with those provided by the later treaty⁸⁵⁶

4-In cases where the parties to the later treaty do not include all of the parties to the earlier one, the rule provided in situation 3 will apply between the States party to both treaties. Meanwhile, between a State party to both treaties and a State party to only one of the treaties, the treaty to which both party States are parties governs their mutual rights and obligations.⁸⁵⁷ This solution applies without prejudice to article (41) of this convention or to any question of the termination or suspension of the operation of a treaty under article (60) or to any question of responsibility which may arise or a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty.⁸⁵⁸

⁸⁵⁴ Art 30 (2) of the Vienna Convention 1969.

⁸⁵⁵ *ibid.*

⁸⁵⁶ *ibid* art 30 (3).

⁸⁵⁷ *ibid* art 30 (4).

⁸⁵⁸ *ibid* art 30 (5).

8.3.4. Retroactivity

This situation relates to the element of time; do the applicable regimes apply retroactively? To answer this question, reference should be given to the regime itself, and if there is no answer, then reference should be given to the judicial interpretation. To discuss this point, a distinction between local regimes and convention regimes will arise.

With regard to local regimes, the way in which these regimes come into force is indicated in the regimes themselves, such as in section 44 of AA 1950, and in all of the Jordanian regimes. It may also be indicated by referring to a separate Order or other means, such as in section 9 of arbitration (International Investment Dispute) Act 1966, and section 109(1) of AA 1996.

In this regard, the question arises as to the situation where an award was made before the local regime came into force, but where the recognition and the enforcement proceedings commenced after the local regimes came into force. Does this local regime apply to this case retroactively? For example, if an award made in State A in 1996 before AA 1996 came into force, then this award is recognised and enforced in England in 1998 after AA 1996 has come into force. In this case, the question that arises before the court is: does this award fall within AA 1996 jurisdiction or not? If so, then on what basis? If not on the basis that this award is made before AA 1996 came into force, how does such an award get recognised and enforced? Before these questions can be answered, it is necessary to describe the situation of convention regimes.

It has been seen that England is a contracting State with many conventions dealing with recognition and enforcement. When England became a contraction State, it implemented each convention by a local regime. Regarding these conventions, there are a number of dates on which they may come into force. It may be the date indicated by the conventions themselves, the date on which England became a member State to these conventions, or the date indicated by the implementing law for each convention. In this regard, the question arises as to which date shall be considered as a date on which these conventions came into force in England?

The date on which the convention regimes came into force as indicated in the convention itself is not the same for all of the conventions to which England is a party. The New York Convention came into force by itself on 7th June 1959 in accordance with article XII, the Washington Convention on 14th October 1966, the Geneva Protocol on 28th July 1924 in accordance with article 6, and the Geneva Convention on 25th July 1929 in accordance with article 8. The dates on which these conventions came into force in England are also different. For example, the New York Convention on 24th September 1975, the Washington Convention on 18th January 1967, the Geneva Protocol on 27th September 1924, and the Geneva Convention on 2nd July 1930.⁸⁵⁹ Accordingly, it is possible that the date on which the above conventions came into force by themselves is different from the date on which they came into force in England.

For the purpose of whether convention regimes have any provision on the question of retroactivity, the adopted date is the date on which these conventions came into force in England. In this regard, the question arises as to whether or not the English regimes are applied even though an award was made before they came into force (retroactivity of these regimes)?

As far as recognition and enforcement in these regimes are concerned, they do not have provisions on this question except the Geneva Convention 1927. Article 6 of the Geneva Convention 1927 provides that ‘the present convention applies only to arbitral awards made after the coming-into-force of the protocol on arbitration clauses, opened at Geneva on September 24, 1923’. This article indicates retroactivity in its provisions to include only an award made according to the Geneva Protocol 1923 and not to include an award made according to conventions other than the Geneva protocol. It can be said that this Convention adopts a precise retroactive provision and not a general one to be applied to all other arbitral awards. It is also provided by section 35(1) of AA 1950 which states that ‘this part of this Act applies to any award made after the twenty-eighth day of July, nineteen hundred and twenty four’.

⁸⁵⁹ The implementing Acts of these Conventions in England refer to these dates.

In cases where these regimes are silent on this question, judicial interpretation will play a role. The courts in England have played such a role with respect to the New York Convention award. In *Minister of Public Works of the Government of the State of Kuwait v Sir Frederick Snow and Partners*,⁸⁶⁰ the question raised before the House of Lords was whether an award made in Kuwait, at a time when neither the State of Kuwait nor the United Kingdom were a party to the New York Convention, and later sought to be enforced in England, at a time when the State of Kuwait and the UK had become a party to the New York Convention, was enforceable in England as a convention award? The main point in this case was whether the definition of the convention award provided by the Arbitration Act 1975, which gave effect to the New York Convention, is to apply at the time at which an award was made or at the time when recognition and enforcement proceedings had commenced.

The House of Lords determined the time when recognition and enforcement proceedings had commenced as the crucial point, and thus the Kuwait award was enforceable as a convention award, even though it was made before Kuwait became a contracting State to the New York Convention. The basis for the House of Lords' decision was to avoid the possibility of it being an award without a mechanism of recognition and enforcement. The example provided in this case was that:

Suppose that before 1975 States A and B were both Parties to the Geneva treaty of 1927: in that case awards made in state A could be enforced pursuant to that treaty in State B and vice versa. Suppose next that in 1975 both States A and B became Parties to the New York convention. Then, on the appellants' construction of the expression 'convention award' an award in State A in, say, 1970 could not be enforced as a convention award in State B because, at the time when such award was made, State A was not yet a party to the New York Convention. At the same time, by reason of article VII, paragraph 2, of the New York convention, the award made in State A could not be enforced in State B under the Geneva treaty 1927 because that treaty would, on States A and B becoming Parties to the New York convention in 1975, have ceased to have effect as between them.⁸⁶¹

This approach leads us to say that part III of AA 1996 applies to the recognition and enforcement of an arbitral award made in a foreign contracting State, even though this State was not a contracting State to the New York Convention at the time when the

⁸⁶⁰ [1984] 2 W.L.R 340.

⁸⁶¹ [1984] 2 W.L.R 340, 347-348.

award was made, but it became a contracting State at the time when recognition and enforcement proceedings had commenced. By analogy with this case, it can be said that recognition and enforcement of a non-convention foreign award in England, according to the applicable regimes, depends on the time when the recognition and enforcement proceedings commenced, regardless of when this award was made.

It should be noted here that AA 1996 did not refer to the date on which the New York Convention came into force in England as the AA 1950 did when it repealed the Arbitration Clause (Protocol) 1924, which gave effect to the Geneva Protocol and the arbitration (Foreign Awards) Act 1930, which gave effect to the Geneva Convention. The AA 1996 did not refer, for this purpose, to the AA 1975 by which the New York Convention came into force in England. It just referred in appendix 1 to repealing the whole of AA 1975. Section 44 of AA 1950, despite this section having repealed the Arbitration Clauses (Protocol) Act 1924 and the Arbitration (Foreign Awards) Act 1930, refers to ‘...any reference in any act or other document to any enactment hereby repealed shall be construed as including a reference to the corresponding provision of this Act’.

Furthermore, section 35(1) of AA 1950 states that ‘this part of this Act applies to any award made after the twenty-eighth day of July, nineteen hundred and twenty four’. Such a provision is not provided by AA 1996 with respect to AA 1975. In this regard, the question arises as to whether the New York Convention came into force in England in 1975 as indicated in AA 1975 or it came into force after 31st January 1997 as indicated in AA 1996. The AA 1996 repealed AA 1975 without making any reference to AA 1975, as AA 1950 had done. However, the AA 1996 is considered as an implementing Act to the New York Convention, and it did not change the nature of this convention into being a local law. Also, England is committed to the convention on the date on which it signed the convention in 1975 and not on the date on which AA 1996 came into force.

In relation to the Jordanian regimes, the idea of retroactivity regarding the recognition and enforcement of a foreign award is the same as the idea under the English regimes. The same argument for the English regimes can be made about the Jordanian regimes. This section focuses on the points pertaining to the Jordanian regimes. Jordan did not

implement the Conventions by local laws as it had done in England. All of the Conventions came into force in Jordan as soon as they were ratified and published in the Official Gazette.

The date on which the conventions concerned came into force in Jordan is as follows: the New York Convention, the Washington Convention, and the bilateral conventions came into force on the date on which Jordan ratified these conventions. Regarding Inter-Arab Conventions, there is a difference because Jordan ratified some of these conventions before they came into force themselves.⁸⁶² However, there are no provisions in these conventions, or in the local regimes, regarding the question of whether these regimes are applied to an award made before the conventions came into force. At the same time, there is no case-law in this regard.

As was noted earlier, convention provisions supersede the local laws according to Jordanian judicial precedents. In this regard, the Vienna Convention on the Law of Treaties 1969 provides in article 28 the principle of the non-retroactivity of treaties. This article provides that:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

However, the adoption of such a solution in Jordan in cases where the convention is silent means that some arbitral awards in some circumstances may not be recognised and enforced. It is better, as a suggestion, that the Jordanian court follows in the footsteps of the English court in separating the recognition and enforcement proceedings from the date on which an award was made. As a result, it would ensure that an award would be recognised and enforced in Jordan, regardless of the date on which it was made.

⁸⁶² Jordan ratified the Amman Convention on 8th June 1981 and this convention came into force on 27th June 1992 according to article 29. Jordan ratified the Arab League Convention on 28th July 1954 and the convention came into force on 28th June 1954 according to article 11, and Jordan ratified the Riyadh Convention on 17th January 1986 and the convention came into force on 30th October 1985 according to article 67. Thus, as regards the Inter-Arab Conventions, they came into force in Jordan as

In relation to the retroactivity with respect to the local regimes in Jordan, the date on which these regimes came into force is indicated by the regime itself. However, the only local regime dealing with recognition and enforcement in Jordan is Act No 8. There is no provision in this Act to the effect that it is applied retroactively.

8.4 Summary

There are a number of regimes for recognition and enforcement in England. They are connected with one another by means of the more favourable-right-provisions. According to this connection, the winning party can bypass the provisions under which the losing party can resist enforcement. That is to say, the grounds of refusal provided by the applicable regimes become a dead letter. However, this means of connection is only provided by the New York Convention in Jordan. Therefore, the overlapping situation does not arise in Jordan, as the other Jordanian regimes are less advanced than the said Convention. According to this situation, it can be said that English regimes are in favour of the winning party.

The main problem created by the relationships among the Jordanian regimes is the contradiction situation. This may arise because the enforcement procedures are provided only by the Enforcement of Foreign Judgements Act 1952. This Act provides a number of conditions for enforcement and a number of grounds of refusal. At the same time, other regimes provide different conditions for enforcement and different grounds of refusal. Since the enforcement procedures are only provided by the Enforcement of Foreign Judgements Act 1952, a contradiction may occur between this Act and any other regime, as other regimes are applicable through this Act. According to this situation, the Jordanian regimes are in favour of the losing party.

The relationship between the applicable regimes in both States raises the issue of jurisdiction conflict. In this situation, two or more regimes may claim jurisdiction to enforce the same foreign arbitral award. Moreover, because of these relationships, a question of retroactivity was raised, whether or not the regime concerned is applied retroactively.

of the date on which these conventions came into force after being ratified by a number of Arab

It can be said that the current regimes in both States do not draw a balanced policy between the interest of the winning party and the interest of the losing party. That is to say, the winning party may manage to enforce a foreign award based on an illegal contract under the English regimes, whereas the winning party may not enforce a foreign legal award under the Jordanian regimes. This is because it is very difficult for the winning party to obtain evidence from the State of origin to the effect that the award is enforceable.

Chapter Nine: General Findings and Suggestions

This thesis has been concerned with the recognition and enforcement of foreign commercial arbitral awards under the English and Jordanian regimes. In essence, it examined the extent to which a foreign commercial arbitral award is recognisable and enforceable in both States. To achieve this, the main objectives have been to examine the legitimacy of the recognition and enforcement of the foreign award; whether or not these regimes provide effective modes of enforcement under which the winning party can recognise and enforce the foreign legal arbitral award; whether or not these regimes provide grounds of refusal by which the losing party can resist the enforcement of a foreign illegal arbitral award; and whether or not these regimes draw a balance between the interest of the winning party and the interest of the losing party.

As regards the first question, it is found that the issue of recognition and enforcement is highly important because the effectiveness of international arbitration depends ultimately on the question whether an arbitral award can be enforced against the losing party. It is found that if businessmen are not completely sure of the enforcement of foreign arbitral awards, there will be little or no arbitration. Because of the importance of this subject, efforts have been made to improve the mechanism of recognition and enforcement. The New York Convention to which England and Jordan are party is considered as the most successful instrument in the history of international conventions. It has been widely adopted throughout the world, and ratified by more than 120 States.

The reason why the English and Jordanian courts are ready in appropriate cases to recognise and enforce a foreign award is the principle of the parties' autonomy and the desire not to frustrate their legitimate expectations. However, it has become a globally shared view that businessmen should be given the freedom of natural autonomous business relationships outside the borders of their own countries. Amongst the most urgent needs felt by the members of this community was the need to have an independent mechanism to recognise and enforce foreign arbitral awards.

As regards the second question, the winning party is provided with a number of

regimes to recognise and enforce the arbitral award under English regimes. First, a foreign arbitral award can be enforced by action at Common Law. Second, a foreign arbitral award can be enforced under part II of AA 1950 if it comes within the Geneva Protocol or Geneva Convention. Third, a foreign arbitral award can be enforced according to part III of AA 1996 if it comes within the New York Convention. Fourth, a foreign arbitral award can be enforced under section 66 of AA 1996 by summary procedures. Fifth, an award made in one part of the United Kingdom can be enforced in other parts of the United Kingdom under part II of the Civil Jurisdiction and Judgements Act 1982.

Sixth, an arbitral award made, in countries to which part II of the Administration of Justice Act 1920 or part one of the Foreign Judgements (Reciprocal Enforcement) Act 1933 have been extended, can be enforced in England as if it was a judgement by registration under those Acts. Seventh, an arbitral award made in pursuance of a contract for the international carriage of goods by road can sometimes be enforced by registration under the Foreign Judgements (Reciprocal Enforcement) Act 1933.

Eighth, an arbitral award made in pursuance of the Washington Convention can be enforced by registration under the Arbitration (International Investment Disputes) Act 1966 as if it was a judgement. Ninth, the provisions for registration and enforcement of the Washington Convention also apply to an award made in pursuance of the Multilateral Investment Guarantee Convention as was enacted by the Multilateral Investment Guarantee Agency Act 1988. And tenth, if an arbitral award has been made enforceable by judgement in a foreign country, the winning party can enforce the judgement in England in the same way as any other foreign judgement can be enforced.⁸⁶³

It is very often the case that the winning party can choose alternatively any regime from the above regimes which represents his interest to enforce the arbitral award by virtue of the more favourable-right-provision. In case the award is one to which the Geneva Convention applies, he can choose to enforce the award according to section 36 (1) of part II of AA 1950, section 66 of AA 1996, or by action at Common Law.

⁸⁶³ L Collins and others (eds). *Op. Cit* (footnote 12) 617-618. MJ Mustill and SC Boyd. *Op. Cit* (footnote 17) 416-427. J Hill. *Op. Cit* (footnote 23) 671. JHC Morris. *Op. Cit* (footnote 12) 169-180.

When the award is one to which the New York Convention applies, he can choose to enforce it according to section 101 of part III of AA 1996, by section 66 of AA 1996, or at Common Law. If the award is made in a country to which the Administration of Justice Act 1920 or the Foreign Judgement (Reciprocal Enforcement) Act 1933 applies, the award will be enforced by registration under those Acts.

Furthermore, if the award is registrable as a judgement under the Administration of Justice Act 1920, the Foreign Judgements (Reciprocal Enforcement) Act 1933, or part II of the Civil Jurisdiction and Judgements Act 1982, the winning party is not prevented from enforcing the award at Common Law or by means of section 66 of AA 1996.⁸⁶⁴

As regards Jordanian regimes, there are also a number of regimes available to recognise and enforce a foreign award. They can be classified into four groups, namely bilateral conventions,⁸⁶⁵ Inter-Arab Conventions,⁸⁶⁶ International Conventions,⁸⁶⁷ and local regimes.⁸⁶⁸ However, the winning party can only choose one regime to enforce the arbitral award. An exceptional case is the New York Convention, where the winning party can, by virtue of the more favourable-right-provision provided by article VII (1) of the said convention, enforce the arbitral award according to any regime which is considered to be the more favourable regime than the convention.

There are a number of modes of enforcement in England and Jordan. Under English regimes, the winning party can enforce the arbitral award either by action at Common Law, summary procedures, or by registration before the competent court. Under Jordanian regimes, the winning party can enforce the arbitral award either by suing

⁸⁶⁴ L Collins and others (eds). *Op. Cit* (footnote 12) 618.

⁸⁶⁵ Comprises conventions between Jordan and Syria, Lebanon, Tunisia, and Egypt.

⁸⁶⁶ The Amman Arab Convention for Commercial Arbitration 1987, the Arab League Convention on the Enforcement of Foreign Judgements 1952, and the Riyadh Convention for Judicial Co-operation 1983.

⁸⁶⁷ Comprises the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958 and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

⁸⁶⁸ Comprises the Enforcement of Foreign Judgements Act 1952 and Arbitration Act 2001.

the losing party before the First Instance Court, or by registration of the award before a competent court.

Accordingly, the winning party should choose one of these modes to enforce an award. The mode which represents his interest depends on the arbitral award. He can choose the summary procedure if the enforcement of the award does not need a trial. It is suggested that such a mode is recommended 'in reasonably clear cases'.⁸⁶⁹

Moreover, he can choose action at Common Law if the enforcement needs a trial. Enforcement by registration before a competent court pertains to a particular arbitral award, such as an award made according to the Washington Convention, part II of the Administration of Justice Act 1920, part I of the Foreign Judgements (Reciprocal Enforcement) Act 1933, or according to the Geneva Convention on the International Carriage of Goods by Road.

The winning party should choose the regime under which the conditions for enforcement are met by the arbitral award. At the same time, the grounds of refusal are not met by the arbitral award. If, for any reason, the winning party cannot enforce the award by summary procedures under any of these regimes, he can by virtue of the more favourable-right-provision enforce the award by action at Common Law.

As regards Jordanian regimes, the winning party is not free to rely on any regime to enforce the arbitral award as in England for two reasons:

1-Each regime deals with a particular kind of arbitral award. Accordingly, the winning party has to choose the regime which is enacted to enforce such an award. If it is a foreign non-convention award, he has to enforce it under the Act No 8. Meanwhile, if it is a foreign convention award, he has to enforce it under the convention according to which an award is deemed to be enforceable.

2-The more favourable-right-provision is provided only by the New York Convention. The winning party has the option of relying on any other regimes that are

⁸⁶⁹ *Union National des Cooperatives Agricoles de Cereales v Robert Catterall & Co* [1959] 2 Q.B 44, 52.

available to enforce the award in Jordan. In this case, the winning party should be careful as each regime has its own conditions for enforcement and its own grounds of refusal. Thus, he should choose the regime under which the conditions for enforcement are met by the arbitral award, while at the same time, the grounds of refusal are not met by the award.

As regards the third question, according to the applicable regimes in England and Jordan, the grounds on which the losing party can resist enforcement are: State immunity, incapacity of a party, invalidity of an arbitral agreement, violation of due process, excess of arbitrator jurisdiction, composition of tribunal or procedure not in accordance with the arbitral agreement or the relevant law, an arbitral award not final or not binding or suspended or set aside in the place of origin, non arbitrable of the subject matter, public policy, and reciprocity.

This thesis finds that the grounds of refusal provided by the current regimes in both States are the same. The main features of the grounds of refusal as provided by the current regimes relate to the fact that they are concentrated in one single article in every regime in both States, that they have to be proven by the party against whom recognition and enforcement are sought, that the grounds of refusal mentioned in the current regimes are exhaustive, and that the courts have to construe them narrowly.

This thesis also finds that the courts in both States have interpreted these grounds of refusal differently. The English courts have practised their discretionary power very widely to or not to refuse enforcement as a matter of course. They have conducted a deep investigation to determine whether or not the losing party was serious in his allegation. On the other hand, the Jordanian courts have practised their discretionary power very narrowly to or not to refuse the enforcement as a matter of course and they have refused the enforcement as soon as the losing party furnished the court with evidence relating to the ground of refusal. They did not investigate to what extent the losing party was serious in his allegation.

The last question considered by this thesis is whether or not the current regimes in both States draw a balance between the interest of the winning party and the interest of the losing party.

As far as the winning party is concerned, the current regimes provide him with alternative modes of recognition and enforcement of foreign arbitral award. On the other hand, as far as the losing party is concerned, he is not obliged to enforce an award achieved by fraud or bias, or pursuant to a miscarriage of procedural justice. Accepting such an award is evidently breaking the principle of justice.⁸⁷⁰ According to AA 1996, there are a number of grounds that enable the losing party to resist the recognition and enforcement of arbitral awards. However, the basis upon which he can protest is limited to a number of grounds as provided by section 103 of AA 1996. Moreover, section 66(3) provides a ground by which the losing party can resist recognition and enforcement in the case of a lack of jurisdiction of the arbitral tribunal. The losing party can also rely on Common Law to protest recognition and enforcement in case of a lack of jurisdiction to make an award,⁸⁷¹ or when an award is obtained by fraud,⁸⁷² or it is contrary to English public policy.

However, using the more favourable-right-provision by the winning party as a gateway to pass from one regime to another breaks the balance between the interest of the winning party and the interest of the losing party. This is because sections 103 and 66(3) of AA 1996, which provide means of protection for the losing party, become a dead letter when the more favourable-right-provision is used. This can be illustrated by the case where the winning party can pass from what is provided by sections 103 and 66(3) using sections 104 and 66(4) as a gateway. According to these sections (more favourable- right-provision) the winning party is permitted to avoid refusing recognition and enforcement under sections 103 and 66(3) even though the award is not capable of recognition and enforcement by AA 1996. So, sections 104 and 66(4) are in favour of the winning party.

The unjust treatment of the losing party by the use of the more favourable-right-provision is plainly illustrated in the example of the USA and France in which the local courts relied on their local law to enforce the annulled award by virtue of article VII (1) of the New York Convention. The same can occur in England if the winning

⁸⁷⁰ J Paulsson 'Means of Recourse Against Arbitral Awards Under U.S Law' (1989) 2 *Journal of International Arbitration* 101, 102.

⁸⁷¹ As in *Kianta Osakeyhtio v Britain and Overseas Trading Co. Ltd* [1953] 2 Lloyd's Rep. 569.

⁸⁷² As in *Oppenheim & Co. v Mahomed Haneef* [1922] 1 A.C 482, 487.

party avoids the main regime and seeks enforcement through the alternative by using the more favourable-right-provision.

Moreover, it became possible recently to recognise and enforce an award based on contracts involving bribery and corruption in the foreign State of performance.⁸⁷³ This approach has been adopted in England as in *Westacre Investment Inc v Jugoimport-SPDR Ltd*,⁸⁷⁴ and in *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd*.⁸⁷⁵ Thus, it can be said that if the winning party finds in France and in the USA a haven for enforcement of an arbitral award that had been annulled in the State where the arbitration was conducted,⁸⁷⁶ he can also find England a haven⁸⁷⁷ to recognise and enforce an award based on contracts involving bribery and corruption in a foreign State of performance.⁸⁷⁸

On the other hand, the current regimes do not provide the means by which the winning party can recognise and enforce foreign provisional relief. Such arbitral awards are important to secure the enforcement of the award against the assets of the losing party who tries to hide his assets.⁸⁷⁹ Furthermore, the current regimes give very limited opportunity to enforce an electronic award and a-national award. Since the legitimacy of recognition and enforcement is based upon the parties' autonomy, it is important to reconsider the field of application of the current regimes to cover such arbitral awards.

Consequently, it can be said that the winning party can be more optimistic than the losing party about the outcomes of the English courts for the following reasons:

1-There are many regimes according to which he can recognise and enforce an arbitral award.

2-The enforcing court has discretionary power to refuse enforcement. The English

⁸⁷³ N Enonchong. Op. Cit (footnote 724) 520.

⁸⁷⁴ [1999] 3 W.L.R. 811.

⁸⁷⁵ [1999] 2 Lloyd's Rep. 222.

⁸⁷⁶ H Freyer. Op. Cit (footnote 752) 1.

⁸⁷⁷ N Enonchong. Op. Cit (footnote 724) 520.

⁸⁷⁸ *Westacre Investment Inc v Jugoimport- SPDR Ltd* [1999] 3 W.L.R 811.

⁸⁷⁹ VV Veeder 'Provisional and Conservatory Measures' in (--) (ed) *Enforcing Arbitration Awards Under the New York Convention* (United Nations New York 1999) 21.

courts have used this power in favour of the winning party so far.

3-If the arbitral award is not enforced according to one regime, the winning party by virtue of the more favourable-right-provision can enforce the award according to the other regimes.

As regards Jordan, the current regimes have failed to draw a balance between the interest of the winning party and the interest of the losing party for a number of reasons. There is a distinction between a foreign convention award and a foreign non-convention award. There is also a distinction between a foreign award and a domestic award. There is also no distinction between a foreign arbitral award and a foreign judgement.

According to the Act No 8, which was created basically to deal with foreign judgements, the winning party cannot rely on any regimes other than this Act to recognise and enforce a foreign non-convention award. Moreover, according to sections (2) and 7(e) of this Act, an award should be enforceable in the State where it was made. In case the winning party cannot fulfil the conditions provided by section 7(e), the arbitral award is not enforceable in Jordan.⁸⁸⁰

Furthermore, Jordanian regimes distinguish between the foreign award and the domestic award with respect to recognition and enforcement. A foreign award shall be enforced through the Act No 8, while a domestic award shall be enforced according to AA 2001. Moreover, a foreign convention award shall be recognised and enforced according to the convention that deals with such an award. For example, if the award to which the Arab League Convention, the Riyadh Convention, or the Amman Convention applies, it is only enforceable under the Convention with which the award is concerned.

The only regime which refers to other regimes as the more favourable-right-provision, is the New York Convention 1958. According to article VII (1) of this Convention, any award falling within its scope is enforceable according to any other regimes that

⁸⁸⁰ S 2 of Enforcement of Foreign Judgement 1952.

are available in Jordan. Because the other regimes are less advanced than the New York Convention, the winning party is unlikely to rely on them.

Furthermore, there is no implementing mechanism for convention-regimes. Conventions have the full force of law in Jordan as soon as they are ratified and published in the Official Gazette. Those seeking to enforce an arbitral award made outside Jordan may therefore proceed directly under the Convention concerned. To do so, the only way which is available is via the Act No 8. Thus, applying two regimes together may lead to a conflict.

Consequently, it can be said that the losing party can be more optimistic than the winning party about the outcomes of Jordanian courts for the following reasons:

1-Jordanian regimes, in most cases, do not distinguish between a foreign award and a foreign judgment in regard to the mode of enforcement.

2-The more favourable-right -provision is not provided in all Jordanian regimes. If the enforcement of an award is refused according to one regime, the award will not be enforced according to the other regimes.

3-All Jordanian regimes request the winning party to prove that the arbitral award is enforceable in the place where it was made.⁸⁸¹ This requirement is very difficult to achieve as it amounts in practice to the necessity of acquiring an enforcement order in the country in which it was made.

4-The paucity of judicial precedents in Jordan makes the winning party less enthusiastic to enforce the arbitral award before the Jordanian courts if enforcement by settlement is possible.

Suggestions

⁸⁸¹ Exceptions are the New York Convention and the Washington Convention.

After this summary of the general findings, this thesis attempts to provide some suggestions to outline a policy that the current regimes should pursue in order to strike a balance between the interest of the winning party and the interest of the losing party.

It has been noted that the current regimes in both States are of two kinds. Firstly, convention-regimes whereby the enforcement is under the conventions to which England and Jordan are party. Secondly, the local regimes which are enacted in both States by their legislatures for the purpose of recognition and enforcement. Accordingly, the suggestions which this thesis attempts to provide are of two kinds: firstly, suggestions relating to convention-regimes and secondly, suggestions relating to local regimes.

As regards the first kind of suggestions, they concern any national or international efforts that may be exerted to make convention-regimes. There are a number of aspects that should be taken into account by every legislature or international body that is responsible for making international conventions or rules that deal with this subject; these aspects are as follows:

1-The problem of implementing the legislation of international conventions. There are probably three ways in which the problem can be seen.

A-Some States require an implementing law to apply these conventions in their territory, and the absence of such an implementing law in such legal systems means these conventions remain inapplicable. For example, Indonesia, which acceded to the New York Convention in 1980, did not take action to enact this convention by an implementing law until 1990. So, parties seeking enforcement of an arbitral award in Indonesia were told that this convention, in the view of the local Indonesian court, had not yet become part of Indonesian law as no implementing Act had been enacted for this purpose. The same is also found, for example, in Sri Lanka and Bangladesh.⁸⁸²

⁸⁸² AJVD Berg 'Decisions on the New York Convention' in M Blessing (ed) *The New York Convention of 1958* (ASA Special Series No 9 Swiss Arbitration Association Zurich 1996) 58-59.

B-Some States which have enacted an implementing law, add or omit some provisions which are or are not provided by these conventions. In other words, the text of the conventions has been reproduced and reparagraphed by the implementing law. This may imply adding new restrictions to the application of these conventions. For example, English AA 1996, which implemented the New York Convention 1958, reproduced the text of the convention.⁸⁸³

C-Some States do not require an implementing law to enforce such conventions in their territory. At the same time, they do not provide methods by which such conventions can be enforced as part of the local law. For example, Jordan, which has acceded to the New York Convention, has not provided a method by which it is possible to enforce this convention independently. Enforcement of this convention is left to the local Jordanian laws, which may contradict the convention in some of their provisions.

2-The problem of interpretation: international conventions will be enforced by local courts and laws. Since these laws have different social and economic backgrounds, conventions have been interpreted differently amongst these laws. So, the non-harmonization amongst these legal systems that might be resolved by these conventions is re-established by the ways these conventions are interpreted.

3-The main subjects of recognition and enforcement of a foreign award are the conditions of enforcement, and the grounds of refusal. Any regime, in practice, is measured according to these aspects. The conditions of enforcement or the grounds of refusal may be in favour of the party who seeks enforcement or the party against whom enforcement is sought. Conditions of enforcement are in favour of the party who seeks enforcement if they only relate to the *evidence* of enforcement. In contrast, some conditions will be in favour of the party against whom enforcement is sought if the burden of proof is placed upon the party who seeks enforcement, such as that the arbitral award is final. On the other hand, the grounds of refusal are in favour of the party against whom enforcement is sought; however, the grounds of refusal are in

⁸⁸³ See ch 8.

favour of the party who seeks enforcement if it is possible to avoid them by using the more-favourable-right-provision.

4-The legislator should consider the fact that an arbitral award is capable of being challenged in the State where it was made. Thus, he should focus on providing ways of enforcement by which the losing party cannot challenge the award at the enforcement stage by using the same reasons that he used to challenge the award in the rendering place.

5-This thesis supports the call for an international court of arbitral awards.⁸⁸⁴ Due to the non-harmonization amongst the local laws that implement the arbitral conventions dealing with recognition and enforcement, due to the different standards of enforcement amongst these laws, and due to the new movement for the internationalization of international commercial arbitration, which has attracted the attention of both practitioners and academics, it has been suggested that a new international court of arbitral awards, should replace the national court in recognizing and enforcing arbitral awards. Such a court, Judge Holtzmann has suggested, would:

Promote uniform standards and predictability. In addition, it would be better positioned to avoid the delays that are often experienced in crowded municipal courts where it can take years to reach a final judgment. Also, it would facilitate international trade and investment by reducing the risks and uncertainties that business people fear when they must submit their affairs to the court of a foreign country.⁸⁸⁵

Judge Holtzmann also suggested that by means of an international convention 'applications to set aside or enforce awards would be within the sole jurisdiction of the new international court'⁸⁸⁶ and therefore, 'execution of judgments of the new international court will not be subject to interference or delay by municipal courts'.⁸⁸⁷ Accordingly, each State adhering to the new convention will have 'their appropriate ministerial officials promptly execute judgments, or orders, of the new international

⁸⁸⁴ HL Yu 'Five Years On: A Review of the English Arbitration Act 1996' (2002) 19(3) *Journal of International Arbitration* 209, 223-224.

⁸⁸⁵ As cited in *ibid* 224.

⁸⁸⁶ *ibid* 209, 224.

⁸⁸⁷ *ibid* 209, 224.

court, just as those officials now execute decisions of the State's municipal courts'.⁸⁸⁸ If States fail to comply with their convention obligations, penalties will be imposed upon them by the international court.⁸⁸⁹

Moreover, the reason why this research has recommended that an international court should replace the national courts is to avoid the bias which may be exercised by a national court with respect to its nationals. In fact, the main reason why disputants resort to arbitration instead of litigation is to avoid the bias of the national court of one of the parties: when the enforcement of the arbitral award is sought in the country of one of the parties, the national court in this country may be biased in favour of its nationals. An example of such an argument can be found in the USA. In this case, the losing party (the Egyptian government) resisted before the enforcing American court, citing that an award has been set aside in the country of origin (Egypt) according to article V of the New York Convention. However, the enforcing court let its nationals avoid such resistance by using the more favourable-right-provision.

However, the harmonization solution, as suggested by Goode must be rigorously tested by two criteria: the existence of a serious problem and the feasibility of a proposed solution.⁸⁹⁰ Thus, is there a problem that needs to be solved? For the reasons mentioned above, it can be said that there is a problem.

Is the international court feasible as a proposed solution? It seems that to have an international court to enforce arbitral awards is attractive rather than feasible. The justifications behind this call are legitimate but it is inconceivable that such a court will be in practice in the foreseeable future.

Here I should like to offer a few practical considerations. States are still very concerned about their sovereignty under which the national courts exercise control over the enforcement of the arbitral award as part of the *lex fori*. The second argument against this call is that once such a court has issued its judgment to enforce the award

⁸⁸⁸ As cited in *ibid* 224.

⁸⁸⁹ *ibid* 224.

⁸⁹⁰ R Goode 'Contract and Commercial Law: The Logic and Limits of Harmonisation' (2003) 7(4) *Electronic Journal of Comparative Law* <<http://www.ejcl.org/ejcl/74/art74-1.html>> (28 October 2004).

against the losing party, the winning party needs to bring that judgment again to the national court concerned to recognize and enforce it. This will make the situation more complex, and double the time of enforcement.

The third argument against the international court is that the judgment which will be issued by this court will absorb the arbitral award. In this case, the enforcement will be for this judgment and not for the award and according to the regimes that deal with the enforcement of foreign judgments and not the regimes that deal with arbitral awards.

6-As an alternative to the previous suggestion in case it is not feasible, this thesis calls for the adoption of a protocol to the conventions that deal with recognition and enforcement or a set of guidelines for their interpretation. This approach will work as a common forum that can give a consistent interpretation of the conventions' provisions.

7-There is tension between the competence of international arbitration centres and the local courts when the two parties to a dispute refer the dispute to two different entities.

An agreement by the disputants to submit to arbitration any disputes or differences between them is the foundation stone of international commercial arbitration. It is considered as the basic source of the powers of the arbitral tribunal.⁸⁹¹ An agreement to arbitrate, like any other agreement, must be capable of being enforced at law. When parties agree that a dispute shall be determined by arbitration they cannot resort to the courts to determine the dispute.⁸⁹²

In order not to allow the disputants to resort their disputes to different arbitral institutions or different national courts, a number of international conventions have been adopted to recognize and enforce the arbitral agreement as binding between the parties.⁸⁹³

⁸⁹¹ A Redfern and others. *Op. Cit* (footnote 55) 10.

⁸⁹² *ibid* 25.

However, a party cannot be compelled to arbitrate if he does not wish to do so. As the saying goes, 'You can lead a horse to water, but you cannot make it drink'.⁸⁹⁴ He may also refuse to adhere to the arbitral agreement as it is found defective.⁸⁹⁵ In both situations, the parties to the disputes may resort to different arbitral institutions, or one party may have recourse to an arbitral institution, and the other party may take action in a national court. As a result, two types of conflicts may happen, namely the conflict between two arbitral awards issued by two different arbitral institutions, and the conflict between the arbitral award and the judgment.

What is the solution to this dilemma?

The solution can be sought by international and national means. At international level, it needs to link up national systems of law, and to do by means of convention, which will provide the solution to the tension between the competence of international institutions and the local courts. However, such a type of solution has not yet been achieved.

At national level, different solutions from different States can be provided. As far as England and Jordan are concerned, English law distinguishes between the conflict *between the foreign arbitral award and the foreign judgment* on the same issues on the one hand, and the conflict between two arbitral awards issued by two different arbitral institutions on the other.

A-It is possible under some circumstances that a foreign judgement and a foreign arbitral award are made between the same parties and determine the same dispute. In this situation a conflict between a foreign judgement and a foreign award is possible if both of them are brought for enforcement in one place. Since the methods of enforcement for a foreign judgement are not the same as their counterparts for a foreign award, the question arises, which of these methods will be applied?

As regards English law, it has been suggested that it is important to distinguish a

⁸⁹³ This was the aim of The Geneva Protocol of 1923, the Geneva Convention of 1927, and the New York Convention of 1958.

⁸⁹⁴ A Redfern and others. Op. Cit (footnote 55) 9.

foreign judgement that is made in a country which is a contracting State to the Brussels or Lugano Conventions from a foreign judgement made in a non-contracting State.⁸⁹⁶

With respect to the conflict between a foreign award and a foreign judgement made in a non-contracting State to the above-named conventions, it has been submitted that the enforcing court of England will enforce a foreign arbitral award by virtue of section 32 of the Civil Jurisdiction and Judgements Act 1982 which provides to the effect that a foreign judgement shall be refused recognition and enforcement if the bringing of the foreign proceedings was 'contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country.' So, a foreign judgement is not entitled to recognition and enforcement in England since such a judgement is made in defiance of the arbitral agreement.⁸⁹⁷

With respect to the conflict between a foreign award and a foreign judgement made in a contracting State to the Brussels or Lugano Conventions, it has been doubted that the result of the above situation can also be reached in this situation.⁸⁹⁸ On the one hand, in case the judgment falls outside the scope of the Brussels Convention and the English court recognises the arbitral agreement as valid, it has been suggested that a foreign award will be enforced in England rather than the foreign judgment by virtue of section 32 of the Civil Jurisdiction and Judgements Act 1982 Act.⁸⁹⁹

In *Philip Alexander Securities and Futures Ltd. v Bamburgh* and others,⁹⁰⁰ the German courts did not stay the proceedings to allow the matter to go to arbitration and went on to give a judgment on the merits against PASF and in relation to the same customer. PASF referred the matter to an arbitrator and obtained an award in its favour.

In this case, Waller J said: "I do not think it right to grant declarations at this stage in

⁸⁹⁵ *ibid* 196.

⁸⁹⁶ J Hill. Op. Cit (footnote 23) 696.

⁸⁹⁷ *ibid* 696-697.

⁸⁹⁸ *ibid* 697.

⁸⁹⁹ *ibid* 697.

⁹⁰⁰ <http://web.lexis-nexis.com/professional/form?_index=pro_en.html&_lang=en&ut=3217422758 > 2002. The case was before the Commercial court.

relation to the enforceability of judgments...The appropriate time to consider the question is when, and if, the German customers seek to enforce their judgments in this country.”⁹⁰¹ He also said with respect to the enforcement of a foreign judgment given in defiance of the arbitral agreement:

Accordingly, my suggestion would be that, albeit a judgment on the substance of the dispute is a Convention judgment it may well not be recognisable under art 27 of the Convention [Brussels] if it has been obtained in breach of an arbitration provision. The advantage of this view furthermore seems to me to be that there could be retained some flexibility. There are cases where it is in blatant disregard of an arbitration provision that a party has commenced proceedings abroad and where the party is acting vexatiously and oppressively. In such cases, judgments obtained on the substance of the dispute (it can be argued) should not be recognised. On the other hand a different view might be taken where the question was one of construction and there was a bona fide argument that the clause did not form part of the contract or did not cover the dispute as a matter of construction.⁹⁰²

He concluded his argument in this regard by saying ‘It would seem to me prima facie that if someone proceeds in breach of, and with notice of, an injunction granted by the English court to obtain judgments abroad, those judgments should not, as a matter of public policy, be recognised in the United Kingdom.’⁹⁰³ This conclusion was approved by the Court of Appeal:

About the issue relating to interlocutory injunctions we say no more than that we agree with the judge and both counsel that in the cases of Bamberger, Franz and Gilhaus, who had notice of the interlocutory injunctions before obtaining judgment in their German actions, the German judgments should by force of Article 27(1) of the Brussels Convention not be recognized.⁹⁰⁴

With respect to the position in Jordan, there is no case-law or statutory provision to solve such a problem. The Jordanian court may consider the solution provided by the English court.

⁹⁰¹ *ibid.*

⁹⁰² *ibid.*

⁹⁰³ *ibid.*

⁹⁰⁴ *Philip Alexander Securities and Futures Ltd v Bamberger: Same v Gilhaus* [1996] CLC 1757. Or see < http://www.lawtel3.co.uk/clfi/0/0/0/4/T_C0004178CA.pdf > 2002. P 16.

B-Conflicting awards issued by two different arbitral institutions: it has been suggested that there is no system of precedents in arbitration, which means that an award on a particular issue, or a particular set of facts, is binding on an arbitrator faced with similar issues or similar facts. Each award stands on its own.⁹⁰⁵

This problem was raised in regard to *CME v Czech Republic* in which a single investment dispute involving undisputed facts produced conflicting awards from arbitral tribunals in London and Stockholm as well as giving rise to litigation in the Czech Republic, the US and Sweden.⁹⁰⁶

The proposed solution was to create a new international court for resolving disputes over the enforcement of conflicting arbitral awards, but this solution was described as 'the impossible dream'.⁹⁰⁷

As far as the English and the Jordanian courts are concerned, they have not had an opportunity to address this issue.

8-The realm of the more favourable-right-provision might be restricted. Its application should be only in case where the enforcement of an arbitral award is not possible according to the regime concerned. The winning party, only in this case, can use this right to use another regime by which the enforcement of the arbitral award is possible. With this restriction, the winning party is not allowed to use the more favourable-right-provision as a means by which he can bypass the provisions under which the losing party can resist enforcement.

As regards the second type of suggestions, they relate to the current local regimes in England and Jordan. In regard to the English regimes, there are a number of suggestions that the current regimes should pursue, which are:

1- The Arbitration Act 1996 gives effect to the New York Convention, but it does not refer to the date on which the New York Convention came into force in England, as

⁹⁰⁵ A Redfern and others. Op. Cit (footnote 55) 30.

⁹⁰⁶ *ibid.*

⁹⁰⁷ *ibid.*

provided by section 35 of AA 1950, which gave effect to the Geneva Protocol and the Geneva Convention. So, it seems it would be much better if there were an indication of the date on which the New York Convention came into force in England in order to remove the confusion.

2-Restrict the realm of the more favourable-right-provision as provided by sections 66 (4) of AA 1996, 104 of AA 1996, and 36 after an amendment of part II of AA 1950. Its application should be only in cases where the enforcement of the arbitral award is not possible according to the regime concerned. The winning party can use this right to use another regime by which the enforcement of the arbitral award is possible. With this restriction, the winning party is not allowed to use the more favourable-right-provision as a means by which he can bypass the provisions under which the losing party can resist enforcement. For example, the winning party should be allowed to use this right where the enforcement of the arbitral award is not possible by summary procedures under section 66 of AA 1996, section 102 of AA 1996, or section 36 of AA 1950 as enforcement under these sections is 'in reasonably clear cases'.⁹⁰⁸

Also, if the enforcement of the arbitral award needs a trial, the winning party should be allowed to use the more favourable-right-provision to enforce the award by action at Common Law. With this restriction, the winning party should not be allowed to use this right to bypass sections 103 and 66 of AA 1996 under which the losing party can resist enforcement.

3-Address the relationship between part III of AA 1996 and part II of AA 1950 according to article VII (2) of the New York Convention.

4-The English court in the latest cases (the *Westacre* and *Hilmarton* cases) has considered the arbitral award as not contrary to English public policy as far as it is not contrary to the public policy of the place where the award was made. Meanwhile, the regime which has been used is section 103 of AA 1996 which represents article V of

⁹⁰⁸ *Union National des Cooperatives Agricoles de Cereales v Robert Catterall & Co* [1959] 2 Q.B 44, 52.

the New York Convention. According to this section, the enforcing court should consider the public policy according to the law of the forum place rather than the rendering place.

As regards Jordanian regimes, there are a number of suggestions that should be observed, which are:

1-There is a need to fill the gap between the Jordanian judges, jurists and lawyers and their counterparts in other jurisdictions of the developed States in the field of international arbitration which reflects on the recognition and enforcement of foreign arbitral awards. It can be noted with respect to Jordanian practitioners that there is a lack of adequate information about the arbitral process including the subject of recognition and enforcement, and a lack of discussion and study by Jordanian scholars of the major multilateral formulations of the past years and of the ongoing studies that are taking place, particularly those undertaken under the auspices of formulating agencies such as UNCITRAL.

Without adequate information in the areas of progressive development of applicable arbitration rules, and without proper access to the extensive work coming mostly from UNCITRAL and from conferences organised by Western arbitration institutions, Jordanian practitioners can hardly understand, or cope with the conceptual complexities of the emerging arbitral process.

Moreover, institutional structures such as the ICC, AAA, LCA, etc, which lead the arbitration movement in the West, have largely been unavailable to Jordanian practitioners. Thus, there is a general lack of up-to-date information about the progressive development of the arbitration process. The shortage of literature for use by Jordanian practitioners also complicates matters. As a result, Jordanian practitioners find that they often have to proceed to arbitration with little understanding of important aspects. They in fact approach the process with certain conceptions and assumptions which have either already been changed or are no longer applicable in the current context of international arbitration. Therefore, without first

addressing those obstacles, most Jordanian jurists will continue to be burdened in their ability to cope with the very fast pace of developments in this area.

It is time for the Jordanian legislature to take the necessary steps to provide the Jordanian courts with the relevant legislation needed to meet the requirements of the international business community. The Arbitration Act 2001 can be considered as one of these steps, but it will not be a successful step unless the Jordanian practitioners address the issues of the said Act through the eyes of a global trading environment.

It is also the responsibility of the Jordanian jurists to participate in the ongoing scholarly debate about the elaboration of acceptable regulatory norms in the field of international arbitration. Such an effort must be accompanied by a continuing process of modifying old rules and principles to cope with the rapidly changing situation in the light of current developments in the field of arbitration. To ensure that Jordanian practitioners are supplied with up-to-date information in the field of international arbitration, it is crucial for them to participate meaningfully in international arbitration through involvement in international conferences and multilateral initiatives on the subject of international arbitration. Therefore, the more Jordanian practitioners are aware of the ongoing developments in the field of arbitration, the more their judgements will be close to those of their counterparts in other jurisdictions.⁹⁰⁹

This research represents an attempt to provide a comparative view from which a standard for the application of the English regimes for the benefit of Jordanian regimes can be found. It sheds light upon a number of situations where weaknesses can be noticed and considers how it might be possible to improve such weaknesses.

2-There is a need to revise the Enforcement of Foreign Judgements Act 1952. There are many issues within this Act which would need to be re-examined again, e.g. the

⁹⁰⁹ This argument is based on an argument made about African States. SL Sempasa. Op. Cit (footnote 101) 395-396.

double *exequatur* provided in article 2, and to indicate upon whom the burden of proof, with respect to article 7, should be cast.

3-There is a need to review all regimes providing the condition of enforcement, namely that the arbitral award is final. This condition of enforcement is not achievable as it amounts in practice to the necessity of acquiring an enforcement order in the Country in which it was made (*double exequatur*).

4-The Court of Cassation should not adopt the same decision in which it considered that an award is made in the place where it was signed. It should also clarify its position toward the relationship between the convention-regimes and the local regimes.

5-There should be implementing acts for the conventions to which Jordan is a party in order to indicate the ways in which these conventions can be applied.

6-The more favourable-right-provision should be introduced into all regimes on recognition and enforcement to allow the winning party to enforce the arbitral award in case the enforcement is not possible under the regime concerned. The role of the more favourable-right-provision must be restricted to this aim. The winning party should not be allowed to use this right to bypass other provisions under which the losing party can resist enforcement.

Conclusion

Throughout this thesis, four areas have been discussed. The first area concerned the legitimacy of the recognition and enforcement of foreign arbitral awards. This thesis discussed the historical development of the legal instruments that are applicable to recognising and enforcing foreign arbitral awards. The historical development of arbitration shows that it developed into an essential factor in industrial and economic development. It also shows that the effectiveness of international arbitration depends ultimately on the question whether or not arbitral awards can be enforced against the losing party.

The answer to the question whether arbitral awards can be enforced against the losing party or not leads us to the second area that was examined in this thesis. Therefore, the question was considered whether or not the English and Jordanian regimes provide effective modes for enforcing arbitral awards. In this regard, it should be emphasized that there are uncertainties concerning the field of application in the current regimes. For instance, as shown in Chapter 2, it remains unclear whether or not a national award, an electronic award, a punitive damages award, and a liquidated damages award are enforceable under the current regimes, and the same applies to the applicability of the current regimes in the enforcement of the provisional relief that is issued during the arbitration process. It is needless to remind the reader that similar observations have been made with respect to a final award, an interim or a partial arbitral award, a consent or agreed arbitral award, a default arbitral award, and an additional arbitral award.

Nevertheless, what the present research has shown is that the current regimes have gradually developed a method of dealing with these types of arbitral awards. Although the field of application of current regimes to cover these awards are not crystal clear, one may derive the basic principles applicable on the subject from case-law. Similarly, despite the fact that there is still a significant trend towards refusing the application of the current regimes regarding such awards, international practice in favour of the application is increasing. As a result, there is no doubt that the

individual nature of these awards should be established for their recognition and enforcement under the current regimes.

The motive that gives rise to this trend is the absence of a definition of an arbitral award. The developments as regards the field of application of the current regimes have resulted from the willingness of both international organisation and some States to deal with these kinds of arbitral award. Since the basic aims have always been the principle of the parties' autonomy and the desire not to frustrate their legitimate expectations, there appears to be no reason why such arbitral awards that have been achieved legally should not be recognised and enforced.

This study shows that the winning party will seek to recognise and enforce the award in the State where the assets of the losing party are located. The local laws in this State will deal with the proceedings of recognition and enforcement. The proceedings of recognition and enforcement under current regimes are well established, since the competent authorities to which the winning party should submit the application of recognition and enforcement are clearly fixed. The same cannot be said for the rules regulating the discretionary power of the enforcing authority and the time limits for enforcement.

Two important points should be reiterated here. Firstly, the difference over the role of the competent authority regarding recognition and enforcement remains. That is to say, the competent authority may recognise and enforce arbitral awards as a matter of course or it has the power to reopen the merits of the award at the enforcement stage. Secondly, as noted in Chapter 3, there is debate about the meaning of the phrase 'cause of action accrued' in order to determine the date from which the limited time for the enforcement commences. It has been argued, therefore, that the date from which the time of enforcement begins may be from the breach of the arbitral agreement or the original contract.

This study also shows that the winning party has to submit evidence along with the application of enforcement. This evidence relates to the authenticated original arbitral award or a certified copy of it, an authenticated arbitral agreement or a certified copy of it, and a translation of the submitted documents, in cases where they are not written

in English or Arabic. However, the type of authentication, the law according to which the evidence must be authenticated, and the question of the authority that is responsible for certification of the documents requested by the regimes concerned remain controversial matters.

Moreover, this study has shown that the conditions of enforcement depend on the modes of enforcement. There are three main modes of enforcement, as noted in Chapter 5. Action at Common Law to enforce arbitral awards that need a trial. Summary procedures can be used to enforce arbitral awards that do not need a trial. Registration arbitral awards before the competent court can be enforced as judgments of this court.

The third matter tested is whether or not the English and Jordanian regimes provide grounds of refusal to enforce foreign arbitral awards that have been achieved illegally. The thesis suggests, as noted in Chapter 6, that there are a number of grounds upon which the losing party can resist enforcement. The aim of these grounds is to prevent arbitral awards that are illegal from being enforced against the assets of the losing party. The enforcing courts have affirmed that the grounds of refusal provided by the current regimes in both States have to be proven by the losing party, that they are limitative and excluding, and that they should be construed narrowly.

Finally, the question whether or not the current regimes in both states strike a balanced policy between the interests of both the winning and losing parties was explored in Chapter 8. Dealing with the relationships between the current regimes has led to certain inconsistencies in some of their provisions. Moreover, the compatibility provisions and the more favourable right provisions have created an overlapping situation between the English regimes. However, the convention-regimes are implemented by local legislation in England. This makes the method of applying the convention-regimes clear, while the convention-regimes are enforceable in Jordan as soon as they are ratified and published in the Official Gazette. However, there is no implementing law for the convention-regimes; they are implemented by Act No 8. This has led to a contradictory situation whereby the convention-regimes contradict Act No 8 in their concurrent application.

As an overall analysis, the law, both English and Jordanian, has provided means by which the winning party can enforce arbitral awards. It also provides grounds by which arbitral awards may be refused. However, English law provides the winning party with alternative means of enforcement, while Jordanian law provides these means of enforcement to be used, not merely as an alternative. Therefore, the winning party can choose any regimes to recognise and enforce an arbitral award, while he cannot do so under the Jordanian regimes. This fact also allows the winning party under the English regimes to bypass the provisions under which the losing party can resist the enforcement.

The study of Jordanian law suggests its compatibility with English law. The similarities and the differences of both systems have been highlighted and, in any case, it is impossible to create a uniform law for the whole world (like the principles of natural science). Nevertheless, one legal system can benefit from the experience of the other. In this regard, it can be suggested that the Jordanian legal system should try its utmost to control the process of the recognition and enforcement of arbitral awards, and may be well advised to adopt the strategy of the English system in order to tackle this problem.

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