THE IMPEDIMENTS FACED BY YEMEN IN ENFORCING INTERNATIONAL ARBITRAL AWARDS: A LEGAL ANALYSIS

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ABSTRACT

The importance of an award of international arbitral proceedings is considered to be of no value if the award is not enforceable. The enforcement of international arbitral award (IAA) depends on the national court of a nation. In Yemen, however, the enforcement of IAA by the national court is difficult because of the loopholes of the provisions of Yemeni Arbitration Act 1992 (YAA), tribalism and corruption. The objectives of this study are: firstly, to investigate the provisions of the enforcement of arbitration laws in Yemen; secondly, to study international provisions relating to the enforcement of arbitration laws; thirdly, to study the impact of tribalism on the court of appeal in the enforcement of IAA in Yemen; fourthly, to determine the impact of corruption on the court in the enforcement of IAA in Yemen; and finally, to make suggestions for the improvement of the enforcement of international arbitral awards in Yemen. This study employed two methods namely doctrinal legal research and socio-legal research. The data were collected through face-to-face, semi-structured interview. The researcher applied purposive sampling by choosing expert persons from the Central Organization for Control and Auditing, Public Funds Prosecution, the Supreme National Authority for Combating Corruption, academicians, arbitrator, Judicial Inspection Board member and the Court of Appeal judges who conduct arbitral cases. The collected data were analysed using content analysis method. This study found that YAA is unable to cope with issues relating to the enforcement of IAA. It failed to include some legal provisions that are related to the enforcement. The study also confirmed the adverse impact of tribalism and corruption on the court in enforcing the international arbitral awards. This is because the tribes dominate the government institutions. While, the corruption impedes the judicial operations. Therefore, the suggestions to overcome the impediments are: firstly, the amendment of YAA; secondly, ratification of New York Convention 1958; thirdly, development of strategies to civilize the tribes by the government; and finally, the independence of the judiciary must be enforced.

Keywords: Arbitration, International Arbitral Awards, Tribalism, Corruption, Yemen.

ABSTRAK

Kepentingan satu ‘award’ prosiding penimbangtaraan antarabangsa dianggap tidak ada nilai jika ‘award’ itu tidak boleh dikuatkuasakan. Penguatkuasaan ‘award’ penimbangtaraan antarabangsa (IAA) bergantung pada mahkamah sesebuah negara. Akan tetapi, penguatkuasaan ini sukar dilaksanakan oleh mahkamah di Yaman kerana halangan-halangan seperti kelemahan di dalam Akta Timbangtara Yaman 1992 (YAA), tribalisme dan rasuah. Kajian ini mempunyai lima objektif iaitu: pertama, menyiasat peruntukan penguatkuasaan undang-undang penimbangtaraan di Yaman; kedua, mengkaji peruntukan antarabangsa berkaitan penguatkuasaan undang-undang penimbangtaraan; ketiga, mengkaji impak tribalisme ke atas mahkamah rayuan dalam penguatkuasaan IAA di Yaman; keempat, menentukan impak rasuah ke atas mahkamah dalam penguatkuasaan IAA di Yaman; dan terakhir, memberi cadangan ke atas penambahbaikan penguatkuasaan IAA di Yaman. Metodologi kajian yang diguna pakai ialah kaedah penyelidikan undang-undang doktrinal dan kajian sosio-perundangan. Manakala data pula dikumpul melalui kaedah temu bual separa struktur secara bersemuka. Kajian mengguna pakai pensampelan bertujuan dengan memilih pakar dalam bidang tertentu daripada Central Organization for Control and Auditing (COCA), Public Funds Prosecution (PFP), Supreme National Authority for Combating Corruption (SNACC), ahli akademik, ahli penimbang tara, ahli Judicial Inspection Board (JIB) dan hakim mahkamah rayuan yang mengendalikan kes penimbangtaraan. Data yang dikumpul telah dianalisis menggunakan kaedah analisis kandungan. Kajian mendapati YAA tidak berupaya untuk menghadapi isu berkaitan dengan penguatkuasaan IAA. Ia gagal untuk memasukkan beberapa peruntukan undang-undang yang berkaitan dengan penguatkuasan. Kajian juga mengesahkan terdapat impak buruk tribalisme dan rasuah ke atas mahkamah dalam penguatkuasaan IAA. Ini kerana suku kaum mendominasi institusi-institusi kerajaan. Manakala, rasuah pula menjejaskan operasi kehakiman. Oleh sebab itu, cadangan-cadangan bagi mengatasi halangan tersebut ialah: pertama, pemindaan YAA; pengesahan New York Convention 1958; pembangunan pelan strategik untuk mendisiplinkan kabilah oleh pihak kerajaan; dan kebebasan badan kehakiman hendaklah dikuatkuasakan.

Katakunci: Timbang Tara, ‘Award’ Penimbangtaraan Antarabangsa, Tribalisme, Rasuah, Yaman.

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LIST OF ABBREVIATIONS

IAA	International Arbitral Award
ICC	International Chamber of Commerce
ICSID	The International Centre for Settlement of Investment Disputes 1965
NYC	New York Convention 1958
GCC	Gulf Countries Cooperation
COCA	The Central Organization for Control and Auditing
PFP	Public Funds Prosecution
SNACC	The Supreme National Authority for Combating Corruption
JIB	Judicial Inspection Board
FDI	The Foreign Direct Investment
UNCITRAL	UNCITRAL Model Law on International Commercial Arbitration 1985

LIST OF CASES

1. *Abdul Baqi Abdul Qadir* v *Zayn bint Ahmad Hashim*, Commercial Appeal No.2 of 1977.
2. *Bergesen* v *Joseph Muller Corp*, 710 F.2d 928, 932 (2d Cir. 1983).
3. CLOUT Case No. 436, Bayerisches Oberstes Landesgericht, Germany, 24 February 1999.
4. CLOUT Case No. 117, Ontario Court of Justice, 19 December 1994.
5. CLOUT Case No. 88, High Court of Hong Kong, 16 December 1994.
6. CLOUT Case No 67, Saskatchewan Court of Appeal, Canada, 17 September 1991.
7. CLOUT Case No. 37, Ontario Court, Canada, 12 March 1993.
8. CLOUT Case No. 372, Oberlandesgericht Rostock, Germany, 1 Sch 3/99, 28 October 1999.
9. *Coppee Levalin N.* v. *v Kan- Ren Fertilisers & Chemicals* [1994] 2 Lloyd's Rep. 109, 116 (H.L.).
10. *Desert Line Projects L.L.C* v. *Republic of Yemen* (ICSID case No. ARB/05/17).
11. *Feertilizer Corp. of India* v *IDI Mgt. Inc*., 517 F.Supp. 948 (S.D. Ohio 1981).
12. *Fiat S. P. A.* v *Ministry of Finance and Planning of Suriname* 1989 U.S. Dist. LEXIS 11995 at 14.
13. In Re Chromalloy Aeroservices 939 F. Supp. 907 (D.D.C. 1996).
14. *KJ International* v *MV Oscar Jupiter* 131 ILR, P. 529.
15. *Helnan International Hotels A/S* v *Arab Republic of Egypt*, (ICSID Case No. ARB/05/19), FA, 3 July 2008.
16. *Hilmarton Ltd.* v. *Omnium de traitement et de valorization (OTV)* (Cour de cassation Mar. 23, 1994).
17. *Lombard Commodities Limited* v *Alami Vegetable Oil Products* [2010] 2 Mlj 23.
18. *Mondev Int'l Ltd.* v. *United States*, ICSID Case No. ARB (AF)/99/2, NAFTA Ch. 11, 127 (11 Oct. 2002).
19. *Moscow Dynamo* v *Alexander M. Ovechkin* 412 F.Supp.2d 24 (2006)
20. *Northrop Corp* v *Triad International Marketing Northrop*, 811 F.2d at 1269.
21. Reasons & Whittemore Overseas Co., 508 F.2d.
22. *Saipem* v *Bangladesh* ICSID Case No. ARB/05/07

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1. The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (1958).
2. UNCITRAL Model Law on International Commercial Arbitration 1985.
3. The International Centre for Settlement of Investment Disputes 1965.
4. Riyadh Arab Agreement for Judicial Cooperation 1983.
5. International Law Commission's Article on State Responsibility.
6. The Vienna Convention on the Law of Treaties 1969.
7. United Nations Convention on Jurisdictional Immunities of States and Their Property.
8. UK State Immunity Act 1978
9. Yemeni Arbitration (Act No. 22) 1992.
10. Yemeni Central Organization for Control and Auditing (Act No. 39) 1992.
11. Yemeni Civil Procedure and Implementation (Act No. 40) 2002.
12. Yemeni Crimes and Penalties (Act No. 12) 1994.
13. Yemeni Judicial Authority (Act No. 1) 1991.
14. Yemeni Anti-Corruption (Act No. 39) 2006.
15. Yemeni Ministerial Decree No. (158) for the year 1992 on Public Funds.

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CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

The growth of the international trade has caused more disputes and consequently, the General Assembly in 1966 was directed by the resolution 2205 (XXI) to form UNCITRAL to handle the increasing disputes instead of relying on the national legal systems which proved to be unable to cope with developments in global trade.[1] The arbitration system is regarded as an appropriate approach, due to its speed and flexibility in relation to procedures, availability of experienced arbitrators, preservation of friendly relationship between disputed parties and other salient benefits that are not available in the national courts.[2] Hence, arbitration imposes its influence on the international trade arena for its salient advantages, by encouraging any dispute to resort to arbitration as an effective means to settle the disputes that have arisen or may arise from the international trade contracts.[3] Consequently, the resolution of these disputes will positively increase the arbitration credibility compared to the national judiciary, which is proven to be more arduous, complicated, and slow.[4] Thus, the

[1] United Nation Commission on International Trade Law, accessed October 22, 2015, http://www.uncitral.org.

[2] Mohamed Abdel Fattah Twrek, "Maritime Arbitration" (master's thesis, University of Dar Aljameh Aljadidah, 2003), 235.

[3] Shahin Alam, "Commercial Arbitration: Factors making it lose out against other processes," *Middle East Journal of Bussines* (April 2014): 1, accessed September 14, 2015, http://platform.almanhal.com/Reader/Article/43996.

[4] Ibid.

arbitration system is seen as capable of keeping pace with international commercial disputes.[5]

Through arbitration, a neutral third party settles any issue between disputing parties.[6] Therefore, the more arbitration and its mass use are developed, the more laws in several countries and international conventions are created to regulate arbitration in the international level.[7] The simple arbitration process, in which one person or legal office acted as the judge, has evolved over time to make the system less complicated with various advanced rules.[8] Arbitration is an easier legal mechanism than national legal systems, more self-regulated and an effective way of solving disputes working alongside – or in place of –national courts.[9] However, international arbitration has been commonly known and used as a method of settling disputes since the appearance of the modern commercial law.[10]

According to the American lawyer Olson, he confirms that enmity between disputed parties is being made in the national court as a result of win-loss where each party is struggling in order to win and get more than their own legal rights.[11] Thus, arbitration has come into the picture to settle disputes between parties as an alternative way of justice in this modern era. The main purpose of this alternative resolution is to reduce the rigidity of procedures that are often followed by the national courts, unnecessary delay, high costs, and the like.[12]

[5] Ibid.
[6] Twrek, "Maritime Arbitration," 221.
[7] Ibid.
[8] Babak Hendizadeh, "International Commercial Arbitration: The Effect of Culture and Religion on Enforcement of Award" (master's thesis, Canadian Queen's University, 2012) 1.
[9] Ibid.
[10] Ibid.
[11] Alam, "Commercial Arbitration," 51.
[12] Ibid.

As far as the Yemeni context is concerned, Yemen was divided into two independent states, the People's Democratic Republic of Yemen (PDRY) in the south and the Yemen Arab Republic in the north.[13] The two states were then unified and the Republic of Yemen was announced on the 22nd of May 1990.[14] Yemen Arab Republic is regarded as the first Arab country that enacted its national arbitration law in 1981.[15] Later, the law was amended and is currently called Yemeni Arbitration (Act No. 22) 1992 (YAA)[16] which was amended again in 1997, that is twenty year after the last amendment of the Act.

The YAA is mainly based on UNCITRAL Model Law on international commercial arbitration with amendments as adopted in 2006 (UNCITRAL).[17] UNCITRAL has been recognized as an essential legal rule of the United Nations framework for the arrangement purpose of international trade law.[18] UNCITRAL was adopted in June 1985 by the United Nations Commission on International Trade Law.[19] The adoption of UNCITRAL is considered as a tremendous step to harmonize and modernize the international commercial arbitration, and a contribution to facilitate the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention") hereinafter referred to as (NYC).[20] UNCITRAL was drafted by combining both the NYC and the

[13] Advanced Unedited Version, Human Rights Council, the High Commissioner on OHCHR's visit to Yemen, Rep A/HRC/18/21 (2011), accessed October 20, 2015, http://www.ohchr.org/Documents/Countries/YE/YemenAssessmentMissionReport.pdf.
[14] Ibid.
[15] Jens Kambeck, "Arbitration in Yemen," Arab Law Quarterly, Vol. 22, No. 3 (2008): 333, accessed October 21, 2015, https://www.jstor.org/stable/pdf/27650626.pdf?refreqid=excelsior%3A618e47a8ae9de052b9c63fd33d548ebe.
[16] Ibid.
[17] Ibid.
[18] Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 2nd ed. (London: Sweet & Maxwell, 2009), 7.
[19] Henri C. Alvarez et al., *Model Law Decision* (the Huge: Keluwer Law International, 2003), 1.
[20] Ibid.

UNCITRAL Arbitration Rule 1976.[21] One can notice that in chapter 8 of UNCITRAL, which deals with the enforcement of award provisions, an extract of the NYC as well as the other provisions which can be noticed in UNCITRAL are considered as an original copy of the UNCITRAL Arbitration Rules.[22]

The overall situation in Yemen is favorable, as it has an exclusive product in the market like frankincense and coffee.[23] Additionally, Yemen is categorized among the countries that are producing natural resources such as oil and metals which are considered as resources for achieving economic prosperity and can greatly change the poverty and misery of the Yemeni people to a brilliant economic situation.[24] Therefore, arbitration in Yemen may have a positive effect on the national economy if the government is serious to ratify it. According to the Minister of Industry and Commerce, the specialist Saad Eddin bin Talib "it is a right direction to pay attention to the arbitration as one of the means of resolving trade disputes, in particular, where the disputed parties can find a better and suitable environment in which access to the desired result is far more quicker, less costly, simple procedures, and less complexity, and depends on technical expertise to contribute to resolving disputes.[25] Additionally, he points out that, the international commercial arbitration is growing and expanding a lot and gaining more importance. It is outstanding for its role in relieving the burdens on the courts and in the speed of resolving trade disputes".[26]

[21] Loukas A. Mistelis, *Concise International Arbitration* (United Kingdom: Kluwer Law International, 2010), 582.
[22] Ibid.
[23] Kambeck, "Arbitration in Yemen," 331-333.
[24] Ibid.
[25] Adel Thamer, "Second Forum of the Commercial Arbitration of the Ministry of Industry and Trade in Sana'a," *Press Today*, May 6, 2014.
[26] Ibid.

The YAA was amended in 1992 to cope with the global trade growth. In 4th December 2013, Yemen became a member of the Word Trade Organization.[27] Yemen is a non-convention state to NYC, but is intending to ratify it as there is no reasonable excuse for non-ratifying the convention, especially, when ratifying it could bring positive effects to the national economy.[28] It should be noted that YAA allows the disputed parties, whatever one of the parties is non-citizen or both are non-citizens to choose their own law, place and language to settle the existing or future dispute.[29] Also, section 10 (1) of Yemeni Investment Law grants the foreign investor and the government, to settle their dispute through arbitral rules based either on local or international institution (2) and they could also settle the dispute by procedures based on UNCITRAL.[30] This means that Yemen courts are obliged to recognize and enforce the international arbitration award (IAA) as YAA gives full freedom of the parties to settle their dispute through local or foreign laws and confirmed the award as final and binding.[31] Whereas, the court of appeal is the competent court that has jurisdiction to deal with the enforcement of the arbitral awards.[32]

However, the enforcement of international arbitral awards is beset with challenges. According to Jens Kambeck, the enforcement of the legal decision in Yemen faces difficulties,[33] this is perhaps due to the existence of the tribal system. However, the tribes differ in their impact from one state to another.[34] For example, in some countries

[27] "Yemen's accession to the World Trade Organzation," *Almasdar Online*, May 11, 2014, accessed October 25, 2015, http://almasdaronline.com/article/54633.
[28] Shahir Alsalahi, "The Significance of ratifying the New York Convention 1958," *Organization House of Law*, accessed March 22, 2016, http://ohlyemen.org/modules.php?name=News&file=article&sid=96.
[29] Yemeni Arbitration (Act No. 22) 1992, section 7.
[30] Yemeni Investment Law (Act No. 10) 2010.
[31] Yemeni Arbitration (Act No. 22) 1992, section 57.
[32] Ibid, section 58.
[33] Kambeck, "Arbitration in Yemen," 332.
[34] Ted Liu, Ethnicity and Tribalism in Arab Transition (2012), accessed October 28, 2015, http://fride.org/download/PB_137_Ethnicity_and_Tribalism_in_Arab_Transitions.pdf.

the tribes have a major impact on economic and political issues.[35] On the other hand, their impact seems fragile in some other countries.[36] In the Arab world, the Republic of Yemen is regarded as the most populated tribal state.[37] Historically, the tribes in Yemen have a close relationship with the state in protecting the state's lands, promoting security, and cooperating with the army to protect the borders of the country.[38] Currently, it could be noticed that the majority of military individuals and most of the parliament members belong to the tribes.[39] The tribes are characterized as lawless and aggressive to others.[40] The tribal *Sheikhs*[41] do various unlawful activities such as ghost jobs, which is receiving salaries even without really going to the workplace, they are attached to.[42] They do not have loyalty to the country and always having conflict of interest, and consequently, the former president Ali Abdullah Saleh bought the *Sheikhs'* loyalties by providing personal incentives such as money, jobs, and lands.[43]

Undoubtedly, as the tribes are considered an important part of the Yemeni society, it is hard to separate them from the society,[44] since they play a significant role in the

[35] Ibid.
[36] Ibid.
[37] J. E. Peterson, "Tribes and Politics in Yemen," (2008): 1, accessed October 9, 2015, http://www.jepeterson.net/sitebuildercontent/sitebuilderfiles/APBN-007_Tribes_and_Politics_in_Yemen.pdf.
[38] Marc Lynch, "Arab Uprisings: Yemen: the Final Days of Ali Abdullah Saleh?" (March, 2011): 20, accessed October 23, 2015, http://www.pomeps.org/wp-content/uploads/2011/03/POMEPS_BriefBooklet3_Yemen_WEB-Rev.pdf.
[39] Ibid.
[40] Ibid.
[41] Sheikh: is an Arab ruler who is the most eminent rank in the tribe, and is used in the Yemeni tribes. Where this Sheikh is an authorized from his tribe to conclude treaties and agreements and alliances with State and other tribes or resolved, and representation of the tribe to the State and other tribes.
[42] Daniel Egel, "Tribal Diversity, Political Patronage and the Yemeni Decentralization Experiment," (January, 2010): 1, accessed October 29, 2015, http://ecommons.luc.edu/cgi/viewcontent.cgi?article=1147&context=meea.
[43] Sasha Gordon, *Abiani Tribes and Alqaeda in the Arabian Peninsula in Yemen* (2012), accessed October 24, 2015, http://www.criticalthreats.org/yemen/gordon-abyani-tribes-and-al-qaeda-arabian-peninsula-july-25-2012.
[44] James McCune, Tribes and Tribalism in Yemen. A Joint FCO Research Analysts and Stabilisation Unit Workshop (April 26, 2012), accessed November 1, 2015, http://webarchive.nationalarchives.gov.uk/20141014133309/http://www.stabilisationunit.gov.uk/attac

Yemen.[45] The tribes do multiple tasks such as protecting their members, maintaining security and stabilizing the country, negotiating with the state regarding various matters that are important to the tribes,[46] settling most of the society disputes (about 80%), by applying customary laws.[47] Thus, the customary laws have been recognized officially. This could lead to bias and cronyism among the disputed parties. As usually the tribal arbitrator and disputed parties descend from the same tribe. Thus, tribalism may impede arbitration, especially, the principle of independence and impartiality.

Furthermore, Yemen is the poorest country among the Arab countries, and corruption is a common phenomenon in the Republic.[48] Consequently, Gulf States refuse to accommodate Yemen in the Gulf Countries Cooperation (GCC),[49] even international aids for development in Yemen are banned because of the rampant corruption in the state institutions and this has adversely affected public services.[50] Corruption is a hindrance to good performance of the state institutions, especially the judiciary.[51] Despite the state's efforts to reform the judiciary, it is still the weakest institution compared to other government institutions.[52] Reforming the judiciary is strongly

hments/article/523/Tribes%20and%20Tribalism%20in%20Yemen%20%20workshop%20report_FCO%20and%20Stabilisation%20Unit_2012.pdf.

[45] Elham M. Manea, "Yemen, the Tribe and the State,", This paper was presented to the International Colloquium on Islam and Social Change at the University of Lausanne (October 11, 1996), accessed November 6, 2015, http://al-bab.com/albab-orig/albab/yemen/soc/manea1.htm.

[46] Amr Hamzawy, *Between Government and Opposition: the Case of the Yemeni Congregation for Reform* (Carnegie Endowment for International Peace, 2009), 4, accessed November 6, 2015, http://carnegieendowment.org/files/yemeni_congragation_reform.pdf.

[47] Laili al-Zwaini, "State and Non-State Justice in Yemen. Paper for the Conference on the Relationship between the State and Non-State Justice Systems in Afghanistan," (December 10-14, 2006): 2-10, accessed November 11, 2015, http://www.usip.org/sites/default/files/ROL/al_zwaini_paper.pdf.

[48] Sarah Philips, *Evaluating Political Reform in Yemen* (Carnegie Endowment for International Peace, 2007), 17, accessed October 17, 2015, http://carnegieendowment.org/files/cp_80_phillips_yemen_final.pdf.

[49] Edward Burke, "One Blood and One Destiny? Yemen's Relations with the Gulf Cooperation Council. Kuwait Programme on Development, Governance and Globalisation in the Gulf States," (2012), accessed November 25, 2015, http://eprints.lse.ac.uk/55241/1/Burke_2012.pdf.

[50] Christopher Biucek, Yemen: a voiding a downward Spiral (September, 2009), accessed October 18, 2015, http://carnegieendowment.org/files/yemen_downward_spiral.pdf.

[51] Brian Katulis, Countries at Crossroads 2004- Yemen (2004), accessed October 20, 2015, http://www.refworld.org/docid/473868f963.html.

[52] Ibid.

equated with eliminating corruption.[53] Personal properties and contractual rights and obligations are not well protected by the law, and the law can easily be changed on favoritism.[54] Hence, corruption may be an obstacle towards the court competency on enforcement of IAA.

Since it is found that the international arbitration is important to attract investment, it is necessary for Yemen to examine its application and enforcement in the country. Especially, on the impacts of provisions of YAA, tribalism, and corruption which are perhaps very challenging to the enforcement of IAA so this is going to be the main focus of the researcher.

1.2 Problem Statement

International arbitration besets with various challenges in achieving its objectives. One of the challenges is lack of good provisions to deal with arbitration system in the country. According to Michael Kerr, the national arbitration laws in the Middle East countries, including Yemen are not in accordance with international arbitration laws.[55] The laws related to the enforcement and protection of rights in Yemen are considered weak, so Yemeni government needs to modernize the laws.[56] The last amendment of YAA was in 1997[57] which is twenty years old and thus insufficient to cope with the current arbitration system. Thus, this study focuses on the investigation of the

[53] Ibid.
[54] Freedom House, Countries at Crossroads 2012: Yemen (September 20, 2012), accessed November 12, 2015, http://www.refworld.org/docid/505c1726f.html.
[55] Michael Kerr, "Concord and Conflict in International Arbitration," *Arbitration International* 13.2 (1997): 130
[56] DOC (Department of Commerce), *Yemen Business Law Handbook: Strategic Information and Basic Laws*, volume 1. (International Business Publications, USA, 2008), 160, accessed May 5, 2016, https://books.google.com.my/books?id=joqcEuEZ0OcC&pg=PA160&lpg=PA160&dq=inadequacy+of+laws+in+Yemen&source=bl&ots=xQQ3o5xLqu&sig=1RcKHD-QB7xQpx8Hb25YW4Cn-7A&hl=en&sa=X&redir_esc=y#v=onepage&q=inadequacy%20of%20laws%20in%20Yemen&f=false.
[57] Yemeni Arbitration (Act No. 22) 1992.

arbitration laws that are related to the enforcement of IAA based on YAA as well as to examine the international provisions such as NYC, UNCITRAL, Convention on the Settlement of Investment Disputes, Arab Convention on Commercial Arbitration, Riyadh Convention for Judicial Cooperation, international laws, and Bilateral Investment Treaties (BITs) which are relevant to the enforcement of IAA in order to identify the loopholes in YAA.

The judiciary is not capable of handling commercial disputes because of weak enforcement of the law.[58] The studies Al-Zwaini have shown that 60% of judgements are not enforced.[59] Thus, the foreign investors loses their rights because of the loopholes in YAA. Particularly, the provisions relevant to the enforcement of the IAA. It is important to refer to case of *Desert Line Projects L.L.C* v. *Republic of Yemen*,[60] in this case the respondent applied to set aside IAA while the claimant applied to enforce IAA. However, the Yemen court procrastinated the enforcement. Especially, it could not determine any ground in the respondent's defence to set aside the arbitral award based on section 53 or 55 of YAA. This means that YAA has to be modernised by strong relevant provisions of the enforcement of IAA. It is commonly known that the arbitration system recognizes the parties' autonomy relating to the choice of law or the place where the award is given.[61] However, it is not very important for the disputed parties to have assets in the host states.[62] The creditor party has to make reference to the state where the debtor party has assets in order to coerce the debtor

[58] Erwin Van Veen, *From the Struggle for Citizenship to the Fragmentation of Justice: Yemen from 1990 to 2013* (Netherlands Institute of International Relations Clingendael, 2014), 24, accessed December 14, 2015, https://reliefweb.int/sites/reliefweb.int/files/resources/Yemen%20-%20Fragmentation%20of%20Justice%20-%202014%20-%20Erwin%20van%20Veen_0.pdf.
[59] Al-Zwaini, *the Rule of Law in Yemen Prospects and Challenges*, 66.
[60] *Desert Line Projects L.L.C* v. *Republic of Yemen* (ICSID case No. ARB/05/17).
[61] Ahmad Hindi, "Implementation of the provisions of the arbitrator-is the implementation of the provisions of national and foreign arbitrators" (master's thesis, University of Dar Aljameh Aljadidah, 2001), 5.
[62] Ibid.

party to enforce the award. Therefore, the national arbitration laws are perhaps fundamental factor towards the enforcement of IAA.

Tribalism may have an influence on the enforcement of the foreign arbitral award. The tribe in Republic of Yemen plays a significant role in the public sector and also affects the policy of the state.[63] According to Tribalism Index Scores 2009, Republic of Yemen is ranked number 7 out of 160 countries in the world, figure 1 is considered as the highest rate, while figure 160 is considered as the lowest.[64] Number 7 is high rate, so this rate is considered as negative as tribes are one of the factors that adversely affect the growth of the Yemeni national economy as well as the good performance of the government institutions. They perform various illegal acts which are mentioned with supporting evidence in this research. The tribe in Yemen is historically rooted, till now it has a significant impact on social, economic, and political life.[65] It can be observed that the majority of the members of the strongest opposition party (*Islah*) are for the tribes,[66] and the majority of Yemeni army and members of the House of Representatives are chosen by the people who are from the tribes.[67] These tribes possess deadly weapons and are well armed.[68] The United Nation Security Council revealed that the Yemeni judiciary reform is confronted with challenges and the tribes are one of the causes.[69] Unfortunately, the government offers a greater importance to

[63] Egel, "Tribal Political, and Yemen," 7.
[64] David Jacobson and Natalie Deckard, "the Tribalism Index: Ulocking the Relationship between Tribal Patriarchy and Islamists Militants," *New Global Studies* 6.1 (2012): 10-11, accessed December 5, 2015, https://www.degruyter.com/view/j/ngs.2012.6.issue-1/1940-0004.1149/1940-0004.1149.xml.
[65] Hamzawy, *Between Government and Opposition*, 2.
[66] Ibid, 1.
[67] Lynch, "Arab Uprisings," 21
[68] United Nation Security Council, "Letter Dated 20 February 2015 from Panel of Experts on Yemen established Pursuant to Security Council regulation 2140 (2014) addressed to the president of the Security Council, (February 20, 2014), accessed December 7, 2015, http://reliefweb.int/sites/reliefweb.int/files/resources/N1500825.pdf.
[69] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice,* 9.

tribal leaders (Mashaeikh), by paying them monthly salaries, and providing them with cars, houses, and personal security.[70] This support contrasts with the reforms of the judiciary that has been taken by the government. This act of government supports the reforms on one side and ruins such reforms from another side. The tribes commit vandalism like bombing oil pipes and kidnapping foreigners to overcome the government.[71] The tribes refuse to comply with the law and their attitudes are unfriendly.[72] Such non-compliance with the law by the tribes affects judicial performance,[73] which is against the principle that all citizens are equal before the law.[74] The party that gives judgement in favour of him/her may lose rights if he/she does not belong to a tribe that protects his/her rights to execute the judgement against the other tribal party.[75] 60% of the court judgements are not enforced[76] because of tribal resistance and power.[77] As mentioned earlier, the stronger tribes disobey the court orders and interfere with the affairs of the government. All members of the tribes unite to protect each other[78] against those outside their groups.[79] Therefore, the influence of the tribes on the competency of the court in the enforcement of IAA in Yemen is primarily considered in this research.

[70] Egel, "Tribal Political, and Yemen," 8.
[71] Peterson, "Tribes and Politics in Yemen," 18.
[72] Lynch, "Arab Uprisings," 21.
[73] Bertelsmann Stiftung, BTI 2014 — Yemen Country Report (2014), accessed December 14, 2015, http://textlab.io/doc/589835/bti-2014---yemen-country-report.
[74] Hamzawy, Government and Opposition, 2.
[75] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice*, 24.
[76] Ibid, 8.
[77] Peterson, "Tribes and Politics in Yemen," 1.
[78] Manea, "Yemen, the Tribes and State,"
[79] P. Dresch, "The Position of Shaykhs among the Northern Tribes of Yemen," *Man, New Stories*, Vol. 19, No. 1 (March 1984): 35, accessed December 17, 2015, http://www.jstor.org/stable/pdf/2803223.pdf?refreqid=excelsior:924186af05c7dc59430d23fd06140a6b.

Tribalism in Arab culture is meant to protect the tribes' interest as well as the tribal members' interest[80].Tribal nepotism adversely affects the judges' independence.[81] Similarly, the judges could not perform their functions because of the threat of *Sheikhs* against them.[82] They pressure them to abstain from hearing of some cases and request to transfer the cases to tribal tribunals, and/or give a judgement in favour of the *Sheikhs.*[83] For instance, in one case, the *Sheikh* came to public prosecutor's office and threatened him if he released the detainee[84] stating that, such release would lead to murder.[85] The public prosecutor considered the interference as a threat against his life and the detainee's life.[86] In another type of interference, the punishment of transfer of judges to different governorate because he issued a judgement against a prominent *Sheikh.*[87] The same happened to lawyers when they represented their clients before the court in regions that are controlled by tribes which such *Sheikhs* considered that as conflict with local tribal authority.[88] So, IAA will face difficulties as the court control and assistance are major importance to enforce the arbitral awards and to make a success of the arbitration system as a whole.[89] It is necessary to refer to the case of *Desert Line Projects L.L.C* v. *Republic of Yemen (ICSID case No. ARB/05/17), Sheikh* Mouthir El Chazil, " in this case a member of the local council at AlMahweet, and individuals of his tribe "confronted" the Claimant's personnel (the foreign investor) at

[80] Baabbad, "Tribalism and Perceived Auditor Independence," 1306, quoted in Anthony, John Duke, "Saudi Arabia: from tribal society to nation-state," International Research Center for Energy and Economic Development< Boulder, Colo.>: *The International Research Center for Energy and Economic Development* (1982): 93-98.
[81] Baabbad, "Tribalism and Perceived Auditor Independence," 1306, quoted in Roszaini Haniffa, and Mohammad Hudaib, "Locating audit expectations gap within a cultural context: The case of Saudi Arabia," *Journal of International Accounting, Auditing and Taxation* 16.2 (2007): 179-206.
[82] Gaston, Dispute Resolution and Justice Provision in Yemen's Transition, 6
[83] Ibid.
[84] Ibid, 7.
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Ibid.

the AlMahweet – Al Qanawis site, demanding to traverse the working site and opening fire with automatic weapons. The Claimant immediately wrote to the President of Yemen to request protection and security to protect lives". Unfortunately, the President of the Republic did not take any action to secure the claimant. It appears that the government is unable to control the tribal leaders. In other words, the government does not will to cut alliance with the tribes for political reasons. The government supports the tribes' leaders who are in alliance with the government so that most members of the House of Representatives are represented by famous tribal *Sheikhs*.[90] The former president Ali Abdullah Saleh has intentionally strengthened tribal power in order that none could rule except him.[91] As consequences, the legal principle all the citizens are equal before the law is not practiced in Yemen. This is confirmed the theory that says some persons who have a power whatever such power comes from businessmen, tribal confederation, or political persons which they enjoy special privileges and protections other than normal citizens.[92] Therefore, there is a failure of the enforcement of IAA in Yemen if the government does not prevent the tribe's interventions in the affairs of the judiciary.

Another issue that probably affects good governance is corruption. According to the 2015 of Transparency International statistic, Yemen is placed among the first eighteen highest corrupt countries in the world.[93] It is important to understand the rampant corruption of the public funds by referring to the statement of the former head of the Yemeni House of Representative, *Sheikh* Abdullah bin Hussein Alahmer, he was also

[90] Lynch, "Arab Uprisings," 21.
[91] Sami Kronenfeld and Yoel Guzansky, "Yemen: A Mirror to the Future of the Arab Spring," *Milatary and Strategic Affairs* 6.3, (2014):83-84, accessed October 30, 2016, http://www.inss.org.il/he/wp-content/uploads/sites/2/systemfiles/SystemFiles/05_Kronenfeld_Guzansky.pdf.
[92] Life, "Political Party," 20.
[93] Transparency International," Google Corruption Perception Index (CPI)," last modified 2015, accessed December 5, 2015, http://www.transparency.org/cpi2015.

a head of Hashid tribes.[94] He said neither he nor members of the parliament has knowledge of the amount of oil extracted and its income and expenditure.[95] This is very sensitive issue as the legislature plays a prominent role in developing good governance and reducing corruption and weak management in all sectors of society. The importance of Parliament to fight corruption is closer to citizens and the biggest burden is to fight corruption. The executive branch, considering that parliament is the only institution that can monitor the performance of governments. The Yemeni law itself grants the parliament an authority to fight corruption more than the three anti-corruption agencies (COCA, PFP, SNACC). So, the anti-corruption agencies have no power to investigate highly placed officers in corrupt case, particularly Yemeni Occupants of the Senior Posts Act 1995 (OSPA) which limits jurisdiction of the Supreme National Authority for Combating Corruption (SNACC) to investigate politicians unless two-third of the parliament withdrew the immunity of such ministers, deputy ministers, governors and the likes. It has to refer to the internal regulations of the House of Representatives Law No. (1) For the year 2006 to understand the jurisdiction of the House of Representative on the matter fighting corruption. Section 52 (i) provides that the Standing Committees of the House of Representative shall exercise their respective supervisory functions, such as studying the reports of The Central Organization for Control and Auditing (COCA) thereon to the House of Representative. Also, section 131 provides that The House of Representatives shall ratify international economic and political treaties and agreements. Another authority in section 154 provides that each member of the House

[94] Pual Dresch & Bernard Haykel, "Streotypes and Political Styles: Islamists Tribesflok in Yemen," *International Journal of Middle East Studies*, Vol. 27 (Nov 1995): 405, accessed November 22, 2015, http://www.jstor.org/stable/pdf/176363.pdf?refreqid=excelsior:b5a959a6abc0d2ad97245ea6ff60088c.
[95] Abdullah bin Hussein Al-ahmer, "The Head of Yemeni House of Representative. Press interview," *Sana'a Al-Wasat*, November 23, 2005.

of Representatives has the right to direct an inquiry to the Prime Minister or, Deputies or ministers to hold them accountable for matters within their competence. Also, article 62 of the constitution provides that the House of Representative has jurisdiction to observe and inquire about matters related to the work of ministries or governmental institutions. Hence, if the House of Representative has deprived of jurisdiction provided by the constitution and the law, it appears the principle of the separation of power is not practiced in Yemen. The executive party is the most powerful party. The absence of the separation of power leads to interference by the executive in other organs.[96] As consequences, the corruption is widespread in Yemen.

As stated above, the main purpose of UNCITRAL is to modernize the international trade, but corruption is one of the problems that opposes the foreign direct investment (FDI) to countries like Yemen, where corruption is a major obstacle.[97] Studies have shown that less corrupt countries are more attractive for FDI.[98] Hence, public prosecutors and the like must abstain from involving in corruption as it adversely affects their independence and effectiveness.[99] On the other hand, higher corruption may be more attractive to FDI as most corrupt countries facilitates illegal transactions instead of following the guided rules.[100] The foreign companies pay bribery to the authorized person to ease the contract in the corrupt host country. For instance, the oil

[96] Johnson, G. "Executive power and judicial deference: judicial decision making on executive power challenges in the American states." Political Research Quarterly. 68(1), (2015): 130.
[97] Basel Sultan & Stephen Kajewski, "Policies for Economic Sustainability for the Construction Industry in Yemen," In Sidwell, Anthony, Eds. Proceedings of The Queensland University of Technology Research Week International Conference Brisbane, Australia. (2005), accessed December 25, 2015, https://eprints.qut.edu.au/3524/1/3524_3.pdf.
[98] Brenck, A et al., "Public-private partnerships in new EU member countries of Central and Eastern Europe: an economic analysis with case studies from the highway sector*," EIB Papers*, Vol. 10 (2005): 84, accessed December 26, 2015, https://www.econstor.eu/bitstream/10419/44852/1/494495715.pdf.
[99] J. Kane-Berman (ed), "South Africa Survey 2002/2003, Johannesburg, South African Institute of Race Relations," (2003): 475–477.
[100] Samuel P. Huntington, *Political Order in Changing Societies* (London: Yale University Press, 1968), 61-62, accessed October 22, 2015, http://projects.iq.harvard.edu/gov2126/files/huntington_political_order_changing_soc.pdf.

companies gain huge money by illegal means because of the corruption in Yemen. Through a television interview with parliamentarian Ali Ashal, winner of prize of GOPAC International Anti-Corruption Award that titled of "Yemen's looted funds".[101] He said that there is an agreement between the Republic of Yemen and the Hunt Oil Company for operating the oil sector No. 18. The agreement stipulates that after a period 20 years is supposed to return the entire sector to the Yemeni state to be operated by national company. But, the extension of this company has been another 5 years without reference to Parliament for ratification. It has covered during the court's hearing of witnesses of the case from both parties the Yemeni government and Hunt Oil Company. The director of Hunt Oil Company said that former President Ali Abdullah Saleh had extended the agreement. Where the investigation team of the documentary film followed the International Chamber Commerce, the clarity of the judgement confirms that the decision to extend the company has violated international norms and a gross violation of the rights of the Yemeni people. What confirms the gain from these engagements is what the Commission of Experts said in 2005, where the report mentioned that former President Ali Abdullah Saleh is asking for funds in exchange for giving companies exclusive rights to explore for oil and gas in Yemen. Moreover, FDI entry strategy in a corrupt host country is to establish joint ventures with a domestic investor to reduce the transaction costs of dealing with local government officials rather than to create a wholly owned subsidiary.[102] It means the domestic partner has a good relationship with the official persons to ease the

[101] Aljazeera Channel, "Yemen's looted funds," YouTube, https://www.youtube.com/watch?v=iaatblXTBZU.
[102] Roland Craigwell and Allan S Wright, "Foreign Direct Investment and Corruption in Developing Economies: Evidence form Linear and Non-Linear Panel Causality Tests," (2011): 5-6, accessed July 10, 2018, https://mpra.ub.uni-muenchen.de/40933/2/MPRA_paper_40933.pdf.

application and escape from tax. However, economic growth does not correlate with the existence of corruption.[103]

Furthermore, the former president of Yemen, Ali Abdullah Saleh confirms the lack of objectivity of the judiciary in his letter, including the hearing pleadings at home, receiving intercession calls with regards to the cases under pleading.[104] Furthermore, the judiciary is dependent as the government officials interfere with the judicial affairs.[105] It is stated by Amundsen that corruption has influenced all the state apparatus[106] which results to injustice. In like manner, the creditor parties of the arbitral awards are coerced to pay bribe to the Court of Appeal to enforce arbitral awards. As stated by Elliot, the foreign investors have to pay bribery to officials to secure contracts in the state that suffers from corruption.[107] The Yemeni government has not taken serious measures against corruption.[108] In Yemen, rights and obligations are not well protected by the law.[109] Bribery can change the verdict in favour of the party who pays the bribery.[110] It is important to refer to section 30 of Yemeni Anti-Corruption which provided that a person who pays bribe to the government to obtain commercial personal interest has committed a crime as well as a government employee

[103] Glenn E. Robinson et al, "Yemen Corruption Assessment," (September 2006): 3, This publication was produced for review by the United States Agency for International Development, accessed November 24, 2015, https://photos.state.gov/libraries/yemen/231771/PDFs/yemen-corruption-assessment.pdf.

[104] Ali Abdullah Saleh, "Punishment Judges who Violate Judicial Ethics," (August 3, 2010), accessed August 3, 2015, E:\judicial corruption\رئيس الجمهورية يؤكد على محاسبة القضاة المخلين بآداب وسلوكيات القضاء_php.mht.

[105] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice*, 31.

[106] Inge Amundsen, *Political Corruption: An Introduction to the Issues* (Chr. Michelsen Institute Development Studies and Human Rights, 1999), 20, accessed 12 August 2015, https://brage.bibsys.no/xmlui/bitstream/handle/11250/2435773/WP1999.7%20Inge-07192007_3.pdf?sequence=2&isAllowed=y.

[107] Kimberly Ann Elliott, "Corruption as an International Policy Problem: Overview and Recommendations," *Institute for International Economics: Washington, DC* (1997): 175-233.

[108] Lwbna Hussein Al-museiblee, "Yemeni Citizen Bribe," *Yemen-Press*, Febrary 20, 2012.

[109] Robinson, "Yemen Corruption Assessment," 10.

[110] Stacey Philbrick Yadav, Countries at Crossroads 2012: Yemen (September 2012), accessed November 27, 2015, http://www.refworld.org/docid/505c1726f.html.

who receives bribes.[111] This section addresses two accused, the first one is any citizen whatever his employment, is committed a crime if he gives the public servant any kind of benefit or gift with intention to ease his transaction or escape from liability, while the second one is public servant committed a crime by receiving any kind of benefit or gift to perform his obligation or misuse his position. The foreign investors are in search of transparency and suitable environment where the laws are effectual. Therefore, the influence of corruption on the competent court in the enforcement of IAA is explored in this research.

The Yemenis prefer to settle their disputes by tribal laws instead of the formal laws because they do not fully trust the state enforcement as long as the corruption is widespread in government institutions.[112] Corruption is notable in Yemen such that 60% of the court judgements are not enforced.[113] To understand the influence of corruption on the enforcement of IAA, it is important to refer to the case of *Desert Line Projects L.L.C* v. *Republic of Yemen* (ICSID case No. ARB/05/17), in this case the place seat of the arbitration is Yemeni. The arbitral tribunal rendered IAA in favour of the Claimant. However, the court could not take any action against the Respondent. Although, the Claimant applied to enforce the arbitral award, and the Respondent has not proven any reasonable ground based on sections 53 or 55 of YAA to set aside the award. Then, the Claimant was forced to enter into the Settlement Agreement which latter the ICSID arbitral tribunal held the Settlement Agreement void and null. This means that the corruption may impede the implementation of IAA as the court procrastinates the enforcement unreasonably.

[111] Yemeni Anti-Corruption, (Act No. 39) 2006.
[112] Morris, "Formal and Informal Justice and Punishment Urban Law and Rural Mediation Rituals in Yemen," 142.
[113] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice*, 8.

1.3 Research Questions

This study seeks to examine the adequacy of YAA, the impacts of tribalism, corruption on the enforcement of IAA. Therefore, the study aims to answer the following Research Questions:

1- Are the provisions relating to the enforcement of arbitration laws in Yemen in accordance with international arbitration laws?
2- What is the impediment of tribalism on the competent courts in the enforcement of international arbitral awards in Yemen?
3- How does corruption impede the competent court in the enforcement of international arbitral awards in Yemen?

1.4 Research Objectives

The major objective of this study is to investigate the adequacy of YAA, the impacts of tribalism, corruption on the enforcement of IAA. Thus, the study attempts to achieve the following objectives:

1- To examine the provisions of the enforcement of international arbitral awards in Yemen.
2- To analyse international provisions of the enforcement of international arbitral awards.
3- To examine the impediment of tribalism on the competency of the competent court in the enforcement of international arbitral awards in Yemen.
4- To examine the impediment of corruption on the competent court in the enforcement of international arbitral awards in Yemen.

5- To make suggestions on the improvement of the enforcement of international arbitral awards in Yemen.

1.5 Significance of the Study

The international commercial arbitration is growing and expanding and gaining a lot of importance in alleviating the burden on the national courts in fast resolution of trade disputes. Globally, majority of countries around the world, including Yemen, are serious about updating their own legal systems to overcome the difficulties faced by arbitration and to cope with global economic growth through the adoption of the arbitration system to resolve commercial disputes by professional institutions or arbitrators whom the disputed parties trust for their fairness, impartiality, and integrity. Hence, this study contributes by coming out with recommendations to the legislators which may be helpful in modernizing or amending the laws of YAA. The study examined the provisions relating to the enforcement of arbitration laws such as Yemeni Arbitration (Act No. 22) 1992, Yemeni Procedure and the Implementation (Act No. 40) 2002, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), UNCITRAL Model Law on International Commercial Arbitration 1985, Convention on the Settlement of Investment Disputes, Arab Convention on Commercial Arbitration, Riyadh Convention for Judicial Cooperation, international laws, and Bilateral Investment Treaties. These convention, UNCITRAL, and international laws would highlight the weakness in YAA. International laws and conventions are considered stronger and more suitable to deal with international disputes. Particularly, this study investigated the impediments to the enforcement of IAA thus study is significant in order to identify the weakness of YAA. It is commonly known that the enforcement of IAA is the most important stage in the arbitration

system. Thus, if the legislators intend to amend YAA, particularly, the relevant provisions of the enforcement of IAA in order to align with international standard of arbitration system, this study will be very useful.

It could help to legislate stricter laws to combat the tribal interference in the affairs of the judiciary and coerce the tribes to comply with court orders. Also, it contributes to the knowledge of the extent of the tribalism impediment on enforcement of IAA as the researcher has not found previous studies focusing on the tribalism impediment. Thus, study provides information to the government about the negative effects of tribalism on the economy, especially since the arbitration system is one of the attractive factors of FDI. A good arbitration system is considered by foreign investors in order to settle future disputes. The government, hence, will plan ways to socialize the tribes. Also, the influence of corruption especially since Yemen is characterized as one of the highest countries in terms of tribalism and corruption. According to the statistics of 2015 of Transparency International, Yemen is classified as one of the eighteen countries with the highest corruption. It is commonly known that corruption may adversely affect any government institutions and the judiciary. The court assumes significant part in in controlling and assisting the arbitral tribunal as the last has less jurisdiction compared to the court. The independence and the integrity of the judiciary are vital to the enforcement of IAA. Hence, this study focused on the influence of corruption in Yemen is justified.

Furthermore, this study contributes to the arbitration field by shedding light on the obstacles facing enforcement of IAA as well as provide elaborate explanation to the foreign investors on the obstacles that may face their investments in Yemen. For example, perhaps the foreign investors are unaware of the social structure of Yemeni

society; especially the hindrance of tribalism and corruption that may lead to losing their rights in case of disputes arising between parties to contracts, the tribes may provide local protection for their own members as well as corruption hence constituting obstacles on the enforcement of IAA.

Moreover, this study investigated the negative impacts on IAA in Yemen, especially as Yemen suffers from tribal system and a high rate of corruption. The study also aims at determining obstacles that might lead to adversely affect the good performance of the judicial supervision towards the enforcement of IAA, and those interested in strengthening the national economy through providing an appropriate mechanism that could attract the FDI. Therefore, this study offered recommendations to the legislators, the judiciary, and the government as a whole to legislate laws that limit the barbaric tribes and their misconducts against the court's ruling as well as suggests strategies that also aims to limit the power of the tribes. To curb corruption, the legislators may rely on this research to enact stricter laws to combat the rampant corruption in the judiciary. Overcoming such impediments could contribute to improving the enforcement of international arbitral awards.

This study provided suggestions to overcome impediments that face the most important stage of the arbitration, that is, the enforcement of international arbitral awards. This study as a guidance to legislators to adopt it, so the current system will be improved and it will positively affect government institutions, particularly, the judiciary.

1.6 Research Methodology

This section highlights the methodology adopted for this study. The section identifies research design, the research scope, and types of data. In addition, there is a section for the data collection methods and data analysis procedure.

1.6.1 Research Design

The methodology of this research is doctrinal legal research and socio-legal research in nature as both of them could be used for a large study.[114] This methodology was chosen since this research is more concerned about social phenomenon and does not involve experimental research or statistical analysis of the data like quantitative research.[115] In comparison, between qualitative and quantitative, qualitative is more flexible in the matter of focusing on discovering novel or unexpected findings and may change research plan in response to discovering occurrences.[116] Qualitative can produce sufficient data more than quantitative. Therefore, this research is in need of deep data to achieve its objectives such as relevant data of adequacy of YAA, the tribalism impediment on the enforcement of IAA, and the corruption as well. The deep data are required to identify the relationship between causes and effects of the impediments on the enforcement of IAA as well as the data collection of interviews that have to be critically analysed. According to Alan Bryman, qualitative researches require to produce data which they often call rich.[117] Thus survey data can provide

[114] Adilah Abd Razak, "Understanding Legal Research," *Integration & Dissemination* 4 (March 2009): 20, accessed December 27, 2015, http://docshare01.docshare.tips/files/16641/166412435.pdf, quoted in McConville, M. and Wing, H. C, *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007).
[115] William A. Firestone, "Meaning in Method: The Rhetoric of Quantitative and Qualitative Research," article *in educational researcher* (1987): 2-3.
[116] W. B. Shaffir, R. A. Stebbins, and A. Turowetz, *Fieldwork Experience* (New York: St. Martin's Press, 1981), 6-24.
[117] Alan Bryman, "The Debate about Quantitative and Qualitative Research: A Question of Method or Epistemology?" *The British Journal of Sociology*, Vol. 35, No. 1 (1984): 79, accessed December 27,

insufficient data and weak evidence to conduct a social study.[118] In addition, the researcher adopted a doctrinal approach to conduct this research as it is generally relying on a library-based study, which means that the research depended on the materials and information that are available at the library, such as books, journals, thesis, and articles.[119] Furthermore, it is a systematic analysis of legal rules, legal principles, and decided cases.[120] Furthermore, socio-legal research explains the legal procedures, alternative dispute resolutions, and effect of particular phenomenon on the institutions.[121]

The doctrinal legal research is composed of; the systematic analysis of the relevant statutory provisions and legal principles, and the ordering of the legal propositions and principles in an orderly and legal approach. [122] Furthermore, this method calls for the determination of facts, principles, themes, concepts, provisions and arbitration laws specifically those pertinent to the international arbitration awards recognition and enforcement.[123] This study used doctrinal legal research due to the nature of this research which concerns mainly the law on the enforcement of international arbitral awards in Yemen. Therefore, the research emphasized on substantive present laws, rules, doctrines, concepts and judicial pronouncements. In other words, the researcher studied arbitral law cases and related statutory provisions of the enforcement of IAA such as the Convention on the Recognition and Enforcement of Foreign Arbitral

2015, http://www.jstor.org/stable/pdf/590553.pdf?refreqid=excelsior%3A0b1d7ffd276b9b0c0e4a5b8fe1b66ea7.

[118] Ibid.

[119] Anwarul Yaqin, *Legal Research and Writing* (Malaysian: Malayan Law Journal, 2007), 3-10.

[120] Ibid.

[121] Abd Razak, "Understanding Legal Research," 21.

[122] Khushal Vibhute and Filipos Aynalem, *Legal Research Methods: teaching materials* (2009), 72, accessed October 1, 2015, https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf.

[123] Yaqin, *Legal Research and Writing*, 10.

Awards, UNCITRAL, Convention on the Settlement of Investment Disputes, Arab Convention on Commercial Arbitration, Riyadh Convention for Judicial Cooperation, international laws, and Bilateral Investment Treaties. The most of these resources are a library-based study. It means, the researcher can find them in the libraries, achieves, and other databases. Such resources will help the researcher to identify, explain, examine, rules, principles, facts, concepts and analysing provisions that are relevant to the enforcement of IAA in order identify the inadequacies in YAA. Thus, doctrinal legal research was an appropriate to do that. Therefore, as an advantage, it supported to answer the problems through the research's analysis of the related statutory provisions, arbitral law cases, judges, and arbitrators' opinions. Thus, lawyers, judges, and others can have required tools to reach the solutions to the problems.[124] Another advantage of doctrinal legal research seen that in a systematic way with a reasonable reason the researcher could investigate the issue and inconsistency to achieve its purpose, as consequences of the improvement and development of the law.[125] Along these lines, the doctrinal legal research is suitable to be applied in this study to achieve the objectives of this study, particularly to the research objectives one and two. Also, socio-legal research helped the researcher to analyse the law by studying the sciences used to formulate a particular law. E.g. studied tribal and corruption influence on the competent court towards the enforcement of IAA.[126] The socio-legal research is more related to behavioral sciences and social facts and it efforts to introduce the relationship between the behavioral sciences and the law through empirical inquiry to examine the effectiveness of behavioral sciences on the law and the effectiveness of

[124] Khushal Vibhute and Filipos Aynalem, *Legal Research Methods: teaching materials* (2009), 23, accessed October 1, 2015, https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf.
[125] Stebbins, *Fieldwork Experience*, 81-82.
[126] Abd Razak, "Understanding Legal Research," 20.

the law on behavioral sciences.[127] The social research is thus as effort to uncover actual realities and truths and to explain whether a particular fact, event or phenomenon was the cause or effect of certain distinctly identifiable forces or not. Law alone may not effective to answer the problem, issue or question.[128] Therefore, where the true factors for the existence of the problem or issue are identified by empirical inquiry, law, where it is applied and enforced with the necessary will, commitment and appropriate strategies, can serve as an effective mechanism of regulation, change and reform.[129] The research objectives three and four achieved, hence, by applying the socio-legal research by referring to relevant resources of tribalism impediment on the enforcement of IAA such as legal factors that may lead to such impediment or to discover other non-legal factors behind that. To identify that, hence, it will refer to the recognition of tribal alternative dispute resolution mechanism by the official law. The interrelationship between the tribes and other essential factors such as politics, army, and economy. Also, tribal activities and interference in the judiciary by citing legal cases and experts' opinions. While, examining the corruption impediment on the enforcement of IAA by the same method, that is, the socio-legal research. The researcher has to examine the cause and effect so it referred to anti-corruption agencies to know Yemen rank in Corruption Perception Index and the working factors behind it. Then, reflected it on the enforcement of IAA and the judiciary as a whole. In addition, it referred to the experts in both fields the judiciary and the anti-corruption agencies as well as the academicians and the arbitrator to discover it. This supported by the legal cases as well.

[127] Vibhute, *Legal Research Methods: teaching materials*, 70.
[128] Yaqin, *Legal Research and Writing*, 13.
[129] Ibid.

Hence, the doctrinal legal research was more suitable to investigate the provisions of YAA that are related to the enforcement of IAA and international laws while socio-legal research was suitable to conduct the tribalism and the corruption influence on the competent court towards on the enforcement of IAA. Therefore, the research focused on the currently applicable law that applies to conduct over arbitral cases like Yemeni Arbitration (Act No. 22) 1992, UNCITRAL, Convention on the Settlement of Investment Disputes, Arab Convention on Commercial Arbitration, Riyadh Convention for Judicial Cooperation, international laws, and Bilateral Investment Treaties. Moreover, it discussed the impediment of the tribalism and corruption in Yemen through describing this phenomenon and analysing the related cases and also explored the corruption influence in Yemen.

Besides, the methods of this study are, analytical and critical, the descriptive and exploratory research which answered the research questions and objectives. Analytical and critical studies found answers to research question one and accomplish research objective one and two through examining the provisions that relates to the enforcement of arbitration laws such as provisions in YAA, NYC, UNCITRAL, Convention on the Settlement of Investment Disputes, Arab Convention on Commercial Arbitration, Riyadh Convention for Judicial Cooperation, international laws, and Bilateral Investment Treaties to understand the inadequacies in YAA. Thus, such method was chosen as it can evaluate the relating rules, cases and principles to give the researcher a clear picture to reach the conclusion.[130] Through it can carefully examined and

[130] Yaqin, *Legal Research and Writing*, 16.

analysed the inadequacy of the existing law in order to amend it to cope with some problems.[131]

Descriptive research is related to exploratory research because it is the foundation for descriptive research.[132] The descriptive can provide analysis of law sets such as the facts and related case laws. No influence or emotional facts could be added to cases which are already decided. The finding can explain the major factor behind the appearance of the issue and interrupt the cause and effect.[133] Furthermore, analysis used to examine and evaluate decided cases lead to understanding, and coming out with a conclusion.[134] Thus, descriptive, analytical and critical methods answered research question one and research objective one and two as well as research question two and research objective three. The descriptive method also achieved the research question three and research objective four. A legal research, therefore, involves the use of various methods combined together such as descriptive, exploratory, analytical and critical. In the context of this study, thus, the descriptive, critical and analytical approaches employed in order to investigate and respond to the research question one and research objectives one and two, study and respond to research question two and research objective three, determine and respond to research question three and research objective four.

The exploratory research aims at gaining general information for the purpose of investigating the research topic, operationalizing or explaining the variables or

[131] Ibid, 17.
[132] Zikmund et al., *Business Research Methods*, 8th edition. (South-Western Publishing Company, 2010), 57.
[133] Abd Razak, "Understanding Legal Research," 21-22, quoted in McConville, M. and Wing, H. C, *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007).
[134] Yaqin, *Legal Research and Writing*, 16.

generating hypotheses.[135] Also, it added an advantage if the researcher needs a primary information in order to introduce the problem and suggest hypotheses.[136] The researcher interviewed the Central Organization for Control and Auditing (COCA), the Interview for Public Funds Prosecution (PFP), the Supreme National Authority for Combating Corruption (SNACC), Academicians, Arbitrator, Judicial Inspection Board (JIB), and the Court of Appeal judges who conduct arbitral cases. These groups have been chosen as purposive sampling as they are professionals who deal with such issues and cases. Hence, interviews contributed to answering the research questions one, two, and three and research objectives one, two, three, and four. Thus, the researcher employed exploratory approach in order to explore and respond to the research questions one, two, and three as well as research objectives number, one, three, and four. This due to the fact that in an exploratory approach the researcher worked on a relatively unstudied topic or area of knowledge with the purpose of finding out unknown or partly known facts.[137] In the context of this study, therefore, the research explored the inadequate provisions that are relevant to the enforcement of IAA (domestic and international), as well as the working factors the tribalism and corruption impediment on the enforcement of IAA.

1.6.2 Research Scope

The scope of this study was bound in examining the provisions relating to the enforcement of arbitration laws such provisions as Yemeni Arbitration (Act No. 22) 1992, Yemeni Procedure and the Implementation (Act No. 40) 2002, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958),

[135] Sarantakos, S. *Social Research*, 2nd ed. (Macmillan: South Melbourne, 1998), 150.
[136] Gary Armstrong, G. *Principles of Marketing*, 6th ed. (Australia: a division of Pearson Australia Group Pty Ltd, 2015), 108.
[137] Yaqin, *Legal Research and Writing*, 33, 15.

UNCITRAL Model Law on International Commercial Arbitration 1985, Convention on the Settlement of Investment Disputes, Arab Convention on Commercial Arbitration, Riyadh Convention for Judicial Cooperation, international laws, and Bilateral Investment Treaties to identify the inadequacies in YAA. Also, to examine the tribalism influence and corruption impediment that affects the competency of the court in enforcement of IAA in Yemen.

This objective was achieved through the investigations involving the perceptions of the Central Organization for Control and Auditing (COCA), the Interview for Public Funds Prosecution (PFP), the Supreme National Authority for Combating Corruption (SNACC), Academicians, Arbitrator, Judicial Inspection Board (JIB), and the Court of Appeal judges who conduct arbitral cases. These groups were chosen as a purposive sampling of professionals dealing with such issues and cases. The methods used in this study extended to analytical and critical, descriptive, and the exploratory research and the research questions and objectives were answered and attained. The researcher chose big commercial cities to collect the data through interviews which include Sana'a, Aden, and Hadhramout as these are the biggest cities in Yemen where there are many investment projects.

1.6.3 Types of Data

Throughout this research, the researcher collected two types of data; primary sources and secondary sources as follows:

Primary sources: these sources included Yemeni Arbitration (Act No. 22) 1992, the UNCITRAL Model Law on International Commercial Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Convention on the

Settlement of Investment Disputes, Arab Convention on Commercial Arbitration, Riyadh Convention for Judicial Cooperation, international laws, Bilateral Investment Treaties, and arbitral case laws. Furthermore, the researcher collected primary data that could be collected through interview with each of the Central Organization for Control and Auditing (COCA), the Interview for Public Funds Prosecution (PFP), the Supreme National Authority for Combating Corruption (SNACC), Academicians, Arbitrator, Judicial Inspection Board (JIB), and the Court of Appeal judges who conduct arbitral cases.

Secondary sources: the secondary sources included textbook, journal articles, Master and Ph.D. thesis, online information, deduction of secondary information from primary sources, commentaries on statutes, and legal dictionaries.

1.6.4 Data Collection Methods

The researcher relied on several methods to collect related data to answer the research questions and achieve the research objectives as follows:

a) As part of the research which is based on library research, the researcher collected data from textbooks, journals, related case laws, Yemeni statutes, international provisions. Moreover, the researcher visited several places to collect data such as Sultanah Bahiyah Library (UUM), International Islamic University Malaysia (IIUM), Aden University, Sana'a University, and Yemeni National Information Center.
b) The second phase of this research collected data through face to face semi-structured interview. The researcher conducted purposive sampling by choosing sixteen expert persons which met interviewees face to face at their offices and some

in their houses. The interviewer did not face any difficulties in getting the respondents' consent to be interviewed. Member of Supreme Judicial Council facilitated communications and meetings with most interviewees by phone call, reassured them that the interviewer is well-known and the data are only for study purpose. Especially, the interviewees from COCA, PFP, SNACC, Arbitrator, JIB, and the Court of Appeal judges. By this mediator, all interviewees welcomed the interviews face to face, except only PFP, particularly Aden branch who refused to meet face to face. But answered in writing. Such interviewees as the Central Organization for Control and Auditing (COCA), the Interview for Public Funds Prosecution (PFP), the Supreme National Authority for Combating Corruption (SNACC), Academicians, Arbitrator, Judicial Inspection Board (JIB), and the Court of Appeal judges who conduct arbitral cases. Reasons of chosen one expert of each agency among each governorate that are COCA, PFP, and NACC whom were chosen to answer the questions that are relevant to anti-corruption agencies, especially, the public funds, whereas, these three anti-corruption agencies are authorized by the law to fight the corruption as well as they are interrelated in the matter of cooperation in the investigative operations. While, JIB was chosen to answer the questions that are relevant to the corruption in the judiciary. JIB is an authority which investigates the judicial system and ensure the implementation of judicial operations. Moreover, one of the Court of Appeal judges from each governorate was chosen to answer the questions that are relevant to arbitration cases as they are experts in arbitration matters because the Court of Appeal has the jurisdiction regarding set aside, refusal and the enforcement of IAA as well as to answer the questions that are relevant to judiciary. In addition, the two academicians and one arbitrator were chosen to answer the questions that are

relevant to arbitration system in Yemen. They are non-partisan and focus on the economy of Yemen, expert in arbitration as their knowledge is updating by researching in the area. Semi-structured interview was chosen so as it combines both unstructured interview and structured interview,[138] and it is relevant to qualitative design.[139] A semi-structured interview is suitable for this study as it is more flexible, and the researcher can prepare predetermined questions. The wording of question could be altered according to the suitability of the interviewees' position[140] as we have various interviewees to respond to the questions. The researcher selected this kind of interview as it is suitable to collect structured information based on interviewees' beliefs. In addition, it has the advantage of encouraging the interviewees to provide accurate information and talk fairly, and this feature is free from complications that could be found in the structured interview.[141] Therefore, the researcher found semi-structured interview is appropriate in this study because the interviewees are not from one field or department. They are from various departments such as the Central Organization for Control and Auditing (COCA), the Interview for Public Funds Prosecution (PFP), the Supreme National Authority for Combating Corruption (SNACC), Academicians, Arbitrator, Judicial Inspection Board (JIB), and the Court of Appeal judges. Further, question wording can be changed and explanations given; particularly questions which seem inappropriate with a particular interviewee can be omitted, or additional ones included.[142] In addition, the interview method was similar to previous studies focusing on dispute resolution and justice provision in

[138] Yaqin, *Legal Research and Writing*, 170.
[139] Vibhute, *Legal Research Methods*, 168.
[140] Ibid.
[141] Smith and Joan Macfarlane, *Interviewing in Market and Social Research* (London: Routledge and Kengan Paul LTD, 1972).
[142] Khushal Vibhute, *Legal Research Methods: teaching materials* (2009), 168.

Yemen's transition by Erica and Nawada[143] as well as another study conducted on the fragmentation of justice in Yemen from 1990 to 2013 by Veen.[144]

1.6.5 Analysis of Data

As far as this study is concerned, the researcher employed an analytical method to analyse the data. Such methods were chosen as they are appropriate.[145] Therefore, out of analysing these facts the legal issues could be formulated to come up with solutions of the investigating problems.[146] The doctrinal legal research is an appropriate to interview purposive samplings such as Judges, lawyers, prosecutors, arbitrators, and the like.[147] In purposive sampling the researcher intentionally select the specific individuals to identify the central phenomenon[148] as the chosen interviewees are expert in the research study. Often, the researcher faces difficulties to consider the whole universe or to investigate all population. Hence, he/she takes sample from the entire population. Such sample is referred as purposive sampling. It is an important device in the domain of social science analyses. This sample is concerned with an examination of this method with the aim of investigating the plausibility of its utilize in ventures concerning law, legal and undiscovered field of legal research.[149] Sampling studies are getting to be increasingly prevalent in all types of mass researches, but they are particularly in case of social studies. When a social researcher is incapable of observing all phenomena, he/she takes portion of that population. The vastness of

[143] Erica Gaston and Nadwa Al-Dawsari, Dispute Resolution and Justice Provision in Yemen's Transition (April, 2014). United States Institute of Peace, accessed December 27, 2015, http://www.usip.org/sites/default/files/SR345_Dispute-Resolution-and-Justice-Provision-in-Yemen%E2%80%99s-Transition.pdf.
[144] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice.*
[145] Vibhute, *Legal Research Methods*, 192.
[146] Ibid, 190.
[147] Ibid, 192.
[148] John W. Creswell, *Educational Research: Planning, Conducting, and Evaluating Qualitative and Qualitative Research*, third edition (New York: Peterson Education Ltd, 2008), 214.
[149] Khushal Vibhute, *Legal Research Methods: teaching materials* (2009), 152.

population and the difficulties of ascertaining the universe make sampling the best alternative in case of social studies. But while selecting a purposive sampling, an appropriate care is required by selecting the sample out of the population through scientifically proven methods, minimizing the chances of bias/errors and ultimately acquiring a representative sample.[150] Thus, they assisted the researcher to collect information that is helpful to carry out the analysis for the collection of such data that would enable the researcher to explain the relevant judicial concepts, analyses the related statutory provisions such YAA, NYC, UNCITRAL, Convention on the Settlement of Investment Disputes, Arab Convention on Commercial Arbitration, Riyadh Convention for Judicial Cooperation, international laws, and Bilateral Investment Treaties to understand the inadequacies in YAA, formulated facts from related cases that led to find out answers to the research questions and accomplish research objectives. The researcher has to refer to a general approach to legal research, which has the capacity to handle a lot of problems, such general approach engages several steps to come up with its function. Firstly, to identify the facts. Secondly, to analyse the facts. Thirdly, to formulate the facts, and finally, to do the actual research and updating.[151]

In this context, the researcher analysed the data and data collected by applying analytical approach because it contributes to evaluation and examination of the provided information to extract final conclusion[152] and using content analysis as the participants are of limited numbers of experts. Therefore, the analytical approach and content analysis responded to research question one and research objectives one and

[150] Ibid, 153.
[151] John W. Creswell, *Educational Research*, 193.
[152] Ibid, 81.

two, research question two and research objective three, and research question three and research objective four. The interview data were used to achieve three research objectives, that are, research objective one, three, and four. Data from the Central Organization for Control and Auditing (COCA), Public Funds Prosecution (PFP), and the Supreme National Authority for Combating Corruption (SNACC) were analysed to achieve research objectives three and four as the data are relevant to tribalism impediment and corruption. Moreover, data from academicians were analysed to achieve research objectives one, three, and four as the data are relevant to the provisions of YAA, tribalism impediment, and corruption. These three anti-corruption agencies (COCA, PFP and SNACC) are authorized to fight corruption, especially, the public funds. As corruption affects all the government institutions including the judiciary, the researcher interviewed these agencies to understand the tribalism impediments on their operations and corruption as well. The analysed data of these agencies strengthen the study to know the factors behind the tribalism impediments and widespread of corruption in Yemen. Furthermore, data from arbitrators were analysed to achieve research objectives one, three, and four as the data are relevant to the provisions of YAA, tribalism impediment, and corruption. The arbitrators are expert in the matter of weaknesses in YAA and the impediments that face the enforcement of IAA such as inadequacy of YAA, tribalism impediment, and corruption. In addition, data from Judicial Inspection Board (JIB) were analysed to achieve research objective four as the data are relevant to the impediment of corruption. JIB is the authority that has jurisdiction to investigate the judge's performance and judicial operation. The analysed data enriched the study to understand the factors behind corruption in the judiciary which adversely affect the enforcement of IAA. Data from the Court of Appeal judges were analysed to achieve

research objectives one, three, and four as the data are relevant to the provisions of YAA, tribalism impediment, and corruption. As analysed data from the Court of Appeal judges contributed to achieve the research objectives one, three, and four as they are well-known of the impediments of the judicial operations as well as experts in the enforcement of IAA because if the debtor party refused to enforce the arbitral award voluntarily, then, if the place of enforcement of the arbitral award in Yemen he/she will refer to the Court of Appeal to set aside it or the creditor party will refer to the same court to enforce it.

1.7 Limitation of the Study

The researcher faced some difficulties in achieving the objectives of this study. One of the major limitations that the researcher faced is the unavailability of the books related to tribalism and corruption in Yemen at the Malaysian universities, specifically, at the targeted universities: Universiti Utara Malaysia (UUM), International Islamic University Malaysia (IIUM). Therefore, the researcher searched of these books at the local universities such as Aden University, Sana'a University, and the Yemeni National Information Center. Furthermore, published information related to IAA in Yemen are scarce, so the researcher spent much time to get accurate information through an interview. Hence, the researcher travelled to Yemen to collect primary data through interviews as well as secondary data from public universities and Yemeni information center.

The legal cases can make the research stronger. However, Yemen applies civil law in which judges and arbitrators depend on the law to make judgement or the arbitral award. While in Commonwealth countries that apply common law, which the judge and arbitrator depend on the law and precedent case to render the judgement or the

arbitral award. Hence, in Yemen there is no legal website such as the Malaysian legal journal or LexisNexis to support the arguments by precedent cases. However, the objectives of this study can be achieved even view case are cited. According to Khushal Vibhute, the system of analysis of facts can be usually employed in types of analytic, applied, case oriented and similar legal researches.[153] Even court case is not involved in the legal research, as legal research is systematic investigation of problems or information and attempting to come up with a solutions to overcome problems, the methods of analysing facts are similarly applicable to various kinds of legal researches, though the degree may vary from one to another.[154]

1.8 Definition of Operational Terminologies

Judicial Supervision: judicial supervision is a major importance to make the arbitration mechanism succeed.[155] Thus, UNCITRAL allowed the court intervention to assist the tribunal to achieve the arbitration proceedings as well as the arbitral awards in the matter of taking evidence or the enforcement of the final award, such intervention cannot be determined as contravention of the arbitration agreement.[156] It is necessary to resort to the judicial body to take interim measures of protection to assist the tribunal, especially, some interim measures of protection are out of tribunal's jurisdictions, as because the tribunal has no power as the same as the judiciary.[157] The national court is the core to make the international arbitration sufficient, without

[153] Khushal Vibhute and Filipos Aynalem, *Legal Research Methods: teaching materials* (2009), 190, accessed October 1, 2015, https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf.
[154] Ibid.
[155] UNCITRAL Model Law on International Commercial Arbitration 1985, articles 9, 27, & 35.
[156] Ibid.
[157] The Judiciary, accessed January 1, 2016, http://199.20.64.195/treasury/omb/publications/09budget/pdf/98.pdf.

interference support of national court the international arbitration cannot succeed.[158] The national courts are strong support for the arbitral tribunal as they do two main tasks: assistance and control.[159] In the matter of assistance, the national courts do multiple functions such as grant seeking interim measures of protection, appointment of arbitrators, calling for expert or witnesses, and the like proceedings that may out of the arbitration tribunal capacity, while in the matter of controlling the national courts do refuse the application of any of the disputed parties if the agreement contained arbitral condition and this upon the request of the other party, appointment of the arbitrators and revocation or replacement as well.[160] Moreover, the national courts are only having jurisdiction to recognize and enforce the arbitral award.[161] The court after recognition can decide whether the IAA is valid or void in order to enforce it or reject it.[162]

The enforcement is applied as sword.[163] Thus, if there is no objection to the recognition in the state where the award is seeking to enforce, the creditor party has the right to require the national court to take enforceable actions against the debtor party's assets; such forcible actions come only after the debtor party rejects to implement the arbitral award voluntarily.[164] The type of sanctions can be taken against the debtor party are

[158] Henry P. De vries, "International Commercial Arbitration: A Contractual Substitute for National Courts," *Tul. L. Rev*. 57 (1982): 47.
[159] Ibid.
[160] Ibid.
[161] Hang Song, *Recognition and Enforcement of Arbitration Awards in International Commercial Arbitration* (1st Ed. 2000), 24.
[162] Xiaoyang Zhang, "Settlement of Commercial Disputes with Foreign Elements Involved In Arbitration: Legal Theories and Practice in the United Kingdom," 12 Fla. *International Law Journal* (1998): 167-179.
[163] Alan Redfern, *Law and Practice of International Commercial Arbitration* (4rd Edn Sweet & Maxwell London, 2004): 515-517.
[164] Soo, G, "International Enforcement of Arbitral Awards," *International Company and Commercial Law Review* 11.7 (2000): 253-254.

depended on the court's discretion, often like the seizure of the debtor party's assets, imprisonment, and the like.[165]

Tribalism: is a group of people, mostly belong to one lineage due to the very top or the name of a tribal alliance that considered being a grandfather of the tribe and consists of several clans.[166] Often members of the tribe live in a joint territory upheld as their home, and they speak a distinctive tone, and they have a homogeneous culture or a common solidarity (i.e. Neurological) against external elements at least.[167]

Corruption: is misusing one's position to gain personal interest, whatever gaining such personal interest through breaking the law or misuse of granted powers.[168] Similarly, official persons perform an action to serve their own personal interest. Corruption differs from one country to another. Rampant corruption exists in countries which have weak institutions.[169] Once corruption is widespread in the institutions, it means that anti-corruption laws are inadequate.[170]

Arbitration: is the parties to the contract choose by free consent one person or more to settle their dispute which has arisen or which may arise outside the court[171]. Similarly, it is a traditional alternative to litigation process where a third party is appointed as arbitrator by a mutual consent of both parties to the contract; the arbitrator controls the outcome of the process.[172] The arbitration process is mostly regulated by a legal

[165] Alan Redfern, Martin Hunter and Nigel Blackaby, *Law and Practice of International Commercial Arbitration* (4rd Edn Sweet & Maxwell London 2004), 517.
[166] Seth Godin, The Tribes Casebook, accessed February 14, 2016, http://sethgodin.typepad.com/seths_blog/files/CurrentTribesCasebook.pdf.
[167] Ibid.
[168] Yemeni Anti-Corruption, (Act No. 39) 2006, Section 2.
[169] Huntington, *Political Order in Changing Societies*, 59-62.
[170] Ibid.
[171] Yemeni Arbitration (Act No. 22) 1992, Section 2.
[172] Alam, "Commercial Arbitration," 51.

authority.[173] The final decision is imposed on the contending parties which is called an award, based on the merits of the case, and such award usually is binding on both parties and not appealable except under certain circumstances.[174] Fiadjoe defines arbitration as "a consensual system of judicature directed to the resolution of commercial disputes in private".[175]

Arbitration Agreement: is an agreement by the free consent of the parties to the contract to refer to arbitration for part or all the dispute that arose or may arise in the future, such dispute has to be within the legal relationship, whatever is contractual or non-contractual.[176] It can be formed by the arbitration clause within the contract or in a separate agreement.[177]

Arbitral Award: is an award which is totally different from the domestic awards, so the state where the recognition and enforcement is sought cannot consider it as domestic.[178] It is only the same as national the court's judgement from the perspective of effectiveness.[179] In other words, the arbitration tribunal has jurisdiction to form the award at the same as the national court, such jurisdiction has the authority to order any of the disputed party to pay money as damages, declare the receding that has to be followed, order any party to do or abstain from doing something, order specific

[173] Ibid.
[174] Ibid.
[175] Albert Fiadjoe, *Alternative Dispute Resolution: A Developing World* Perspective (Great Britain: Cavendish Publishing Limited, 2013), 72.
[176] UNCITRAL Model Law on International Commercial Arbitration 1985, article 7(1).
[177] Ibid
[178] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, article 1.
[179] Nicole Conrad et al., *International Commercial Arbitration* (North America: Helbing Lichtenhahn, 2013), 4.

performance, order endorsement, setting aside, cancellation of some documents, and so on.[180]

The Foreign Arbitral Award: it is the award that is made in the territory other than the state where the recognition and enforcement of the same award is sought.[181] The NYC provides that the state where the recognition and enforcement are sought cannot consider the award as domestic, it only could be considered as a domestic award by the enforcing state if the award was regulated by the municipal law.[182] The arbitral award is considered as a foreign award by the state where the award is made based on the nationality of the disputed parties.[183] However, as there is no clear definition of the foreign award provided by the NYC, it can be noticed that there are different definitions from one legal system to another.[184] For instance, the European civil law considers the arbitral award as a foreign award if the disputed parties choose the governing arbitration law of another country.[185] Article V indicates that the award is a foreign arbitral award when another state issues the guideline for the award to enter the local award is called non-domestic award. Therefore, it could introduce the award as non-domestic award or a local one that depends on the applicable arbitration law.[186]

Recognition: the arbitral award shall be recognized as binding by the competent court once the creditor party applied in writing for the enforcement.[187] It is the jurisdiction of the national court to recognize the award made by the arbitral tribunal, so the

[180] Farlex Dictionary, accessed January 13, 2016, http://encyclopedia.thefreedictionary.com/Arbitration+Award.
[181] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, article I (1).
[182] Ungar, Kenneth T, "Enforcement of Arbitral Awards under UNCITRAL's Model Law on International Commercial Arbitration," *Colum. J. Transnat'l L*. 25 (1986): 717.
[183] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, article I (1).
[184] Jian Zhou, "Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts," *Pac. Rim L. & Pol'y J*. 15 (June 2006): 403.
[185] Ibid.
[186] Ibid.
[187] UNCITRAL Model Law on International Commercial Arbitration 1985, article 35.

national court will reject any issue brought by any of the parties which has been already decided by the arbitral tribunal.[188]

Enforcement: the award is binding so the competent court has to enforce, unless the award comes under the grounds which powered the national court to refuse,[189] these grounds discussed in chapter three. An arbitral award is effective at the same as the court judgement.[190] The award is enforceable with the jurisdiction, the enforcement is depend on the signatory states to the convention as the judiciary body has the enforcement jurisdiction through judicial process.[191] In other words, a national court grants order performance against the debtor party to enforce an award recognized by the arbitrator.[192]

The enforcement of IAA is insisted by NYC and legal systems of each signatory state.[193] The application of arbitration system depends on the parties' autonomy to settle their dispute by arbitration, which is not the same as other mechanisms like mediation, conciliation and so on.[194] Mediation: is a process, whereas a neutral third party (mediator) leads the negotiation between the disputed parties to the contract to assist them in reaching a peaceful settlement.[195] The uniqueness of this settlement is that it is quicker, cheaper, and confidential.[196] The disputed parties do not insist on only wining/losing the case, but to continue their future projects, so through this

[188] J. Lew et al., *Comparative International Commercial Arbitration* (Netherland: Kluwar Law International, 2003), 69.
[189] UNCITRAL Model Law on International Commercial Arbitration 1985, articles 35 & 36.
[190] Conrad, *International Commercial Arbitration*.
[191] Ibid.
[192] D. Pietro and M, *Platte, Enforcement of International Arbitration Awards: The New York Convention of 1958* (London: Cameron, 2001), 22.
[193] Born, *International Arbitration*, 3.
[194] Ibid.
[195] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (New York: Oxford University Press, 2007), 6.
[196] Ibid.

settlement, often concession of legal rights occur in order to continue the relationship.[197] However, the mediator has no jurisdiction to come out with his/her own decision to conclude the settlement without the free consent of the disputed parties.[198] In other words, the mediator's decision is not binding, so if the parties inform the mediator there is no chance to settle the issue; the mediator has to stop mediation procedures.[199]

Besides, it is extremely important to refer to arbitration and conciliation through discussing conciliation in order to understand the differences. Conciliation is amicable composition, it uses to stop or prevent disputes between disputing parties.[200] Conciliation achieves by a contract conducted offer and acceptance.[201] Both principles arbitration and conciliation can contribute to settle the disputes between the disputing parties in a peaceful manner.[202] It can mean that the both principles have the same aim which is resolving disputes. However, the distinguishing between those principles is that, in the matter of conciliation the award or a final judgement is not bound on both parties of the dispute unless both the parties agreed to the award, and approved by the court, while arbitration is bound upon the disputing parties without the parties' consent or court approval.[203]

The arbitration agreement has to be in a written form and should mention clearly the disputed parties as well as the existing disputes or perhaps the disputes that may arise

[197] Tweeddale, *Arbitration of Commercial Disputes*, 6.
[198] The LCIA Mediation Rules, article 6.
[199] Ibid.
[200] Phillips Capper, *International Arbitration: A Handbook*, 3rd ed. (London: Bodmin, Cornwall, 2014), 51.
[201] Ibid.
[202] Ibid.
[203] Ibid.

in the future.[204] So, the national courts will refuse to hear the dispute if there is prior arbitration agreement and immediately will refer it to the arbitration jurisdiction when the second party to the dispute opposes the court's interference.[205] To identify whether there is arbitration agreement or not, the NYC and UNCITRAL did not provide any specific requirement to constitute arbitration agreement. Thus, the national courts and arbitral tribunals have jurisdiction to identify the agreement type.[206] Hence, article II of NYC and article 8 of UNCITRAL only applies if there is an agreement made by the parties that they will settle their disputes by arbitration mechanism.

Throughout the definitions of the recognition and enforcement it could be noticed that they are inextricably linked to each other, the recognition of the award is the first proceeding step that has to be started in the national court by the party seeking for the enforcement while the enforcement is the second step to be taken.[207] However, it can be noted that the difference between the recognition and enforcement is that the national court can recognize the IAA without enforcement, but once there is an enforcement by the competent court, it means that it is already recognized.[208] Even they are inextricably linked to each other.[209] The purpose of this study is to focus more on the enforcement of IAA. Moreover, the study focused on obstacles that may challenge the enforcement of IAA and the capability of the competent court to force the debtor party to implement the award that is recognized by the arbitrator or by the competent court. The enforcement of international arbitral award: the arbitral award

[204] Convention on the Recognition and Enforcement of Foreign Arbitral, article II (1) & UNCITRAL Model Law on International Commercial Arbitration 1985, article 7 (1).
[205] Born, *International Arbitration*, 3.
[206] Ibid.
[207] Tecle Hagos Bahta, "Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia," *Mizan Law Review Vol*. 5 no.1, (2011): 107, accessed January 3, 2016, https://www.ajol.info/index.php/mlr/article/view/68771/56836.
[208] Ibid.
[209] Ibid.

is binding, so the national courts have no jurisdiction to ignore the enforcement of the arbitral award without justification.[210] Thus, the creditor party can apply in the official language of the state where the recognition and enforcement is sought through the competent court to enforce the arbitral award.[211] However, the national court has a jurisdiction to refuse the enforcement of arbitral award under specific grounds, such exceptional grounds such as the debtor party can prove that the party to the arbitration agreement referred to in article 7 was under the age of maturity, was an incompetent person, or aggrieved party was not given a sufficient notice in the matter of appointment of the arbitrator as well as a reasonable notice of the arbitral proceedings or was unable to present his/her case. The court could determine the refusal to enforce the arbitral award if the arbitral tribunal fails to comply with the terms agreed by the disputed parties in the arbitration agreement.[212] Also, it is a reasonable ground to refuse the enforcement of the tribunal award if the court found that the subject matter of the dispute is not capable of settlement by arbitration under the law of the state where the enforcement is sought or the award conflicted with the public policy.[213]

The enforcement of IAA is the most important of arbitration mechanism so there are various international conventions and rules which guide the enforcement of IAA such as NYC which is the main convention of arbitration system;[214] UNCITRAL which are rules that are determined as a guideline for national arbitration laws[215] and to harmonize and modernize international commercial arbitration as well as to help the

[210] UNCITRAL Model Law on International Commercial Arbitration 1985, article 35.
[211] Ibid.
[212] Ibid, article 36.
[213] Ibid.
[214] The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, www.newyorkconvention.org (accessed April 9, 2016).
[215] United Nation Commission on International Trade Law, accessed October 22, 2015, http://www.uncitral.org.

implementing of NYC;[216] Convention on the Settlement of Investment Disputes which provide International Center for Settlement of Investment Disputes (ICSID) to monitor and observe disputes that arise between the contracting state and the national of another contracting state; and other international laws and Bilateral Investment Treaties carry the same purpose.[217] At the level of the Arab Region, Yemen is member of various conventions that assist in the enforcement of a foreign award among the signatory states such as Arab Convention on Commercial Arbitration, Riyadh Convention for Judicial Cooperation. All the above mentioned international and regional conventions, rules, treaties and laws are discussed deeply in chapter three.

1.9 Literature Review on the Enforcement of IAA

The arbitration system faces difficulties in enforcing IAA on time because of various obstacles.[218] This means the procrastination of the enforcement of IAA is an impediment. To improve the arbitration system, here is need to investigate such impediments and come out with solutions. The impediments of the arbitration system are different from one system to another. The researcher, thus, has attempted to link these impediments which could be relevant to the arbitration system in Yemen such as inadequacy of YAA, tribalism impediment, and corruption in order to improve the Yemeni arbitration system. There are several literatures which are mostly related to obstacles facing the enforcement of international arbitral awards. There are several literatures conducted in different countries around the world as follows:

[216] Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 10.
[217] Aron Broches, "Observations on the Finality of ICSID Awards," *ICSID Law Review* 6 (September, 1991): 322.
[218] Caroline Simson, "4 International Arbitration Cases to Watch In 2018," accessed May 21, 2018, https://www.jdsupra.com/legalnews/4-international-arbitration-cases-to-17226/.

1.9.1 The Local and International Provisions Relating to the Enforcement of International Arbitral Awards

At the outset, in El-Ahdab's book that is titled "Arbitration with the Arab Countries".[219] The authors stated that there is lack of specials rules for international arbitration. This means that YAA is not align with international arbitration standard. There are important sections that have to be amended, otherwise, may set aside the arbitral award. Such section like the arbitration agreement which YAA has not clarified validity of the agreement, especially, the submission of the arbitration clause by modern means of communication under section 19. This section does not protect the party autonomy to choose to settle their dispute by arbitration mechanism. The court may reject to refer the disputed parties to the arbitral tribunal if the arbitration clause is ineffective, expired, the dispute is not within the arbitration agreement, or the parties proceed before the court without objection of any of the parties. On the other hand, section 28 of YAA provides that the arbitral tribunal has jurisdiction to settle questions pertaining its jurisdiction in the matter of ineffective of the arbitration agreement, expired of the arbitration clause, and the dispute is not within the arbitration agreement. However, such jurisdiction may lead to set aside the arbitral award if any of the disputed parties challenged that before the court. YAA, therefore, has to be amended as avoid jurisdiction conflict between the arbitral tribunal and the court. Also, there is conflict between sections 17 and 22 in the matter of the appointment of the arbitrators. The contradiction is obvious where section 17 provides that the arbitrator/arbitrators must be appointed in the arbitration agreement while in section 22 provides that the parties are free to choose the method of appointing the

[219] Abdel Hamid El-Ahdab and Jalal El-Ahdab, Arbitration with the Arab Countries (London: Kluwer Law International, 2011), 835.

arbitrator/arbitrators. The last section applies the parties' autonomy while the first one limited their freedom. The procedures are important to be followed by the arbitral tribunal based on the principle of the parties' autonomy. The arbitral award perhaps set aside if it was rendered by different procedures, other than, agreed terms by the parties.

In a paper written by Jens Kambeck "Arbitration in Yemen"[220], the author stated that it is the first country that legislated a local arbitration law in 1981 and that before the unification of the Republic of Yemen, the local arbitration law was based on UNCITRAL. It has been replaced by a new law in 1992 after the unification of the Republic of Yemen which is currently Yemeni Arbitration (Act No. 22) 1992. The author emphasizes that Yemen economy is growing due to global trade, domestic arbitration law has brought foreign investors, especially; investors were suffering from slow court proceedings, and sometimes non-implementation of the court's judgements. Currently, the arbitration center has opened in Sana'a.

The author clarifies the convenience of arbitration that investors are looking for in the host country of investment. However, the author did not discuss the international arbitration in Yemen which is governed by YAA, as it applies to domestic arbitration and international as well, even ignored arbitration difficulties faced by the local arbitration. On the other hand, this study addressed the important point that the courts' judgements face difficulties to be enforced, but did not mention the factors behind the non-enforcement. It can mean that the competent courts in Yemen may face the same difficulties to enforce IAA.

[220] Kambeck, "Abitration in Yemen," 331-333.

In another similar literature focusing on arbitration in Yemen written by Isam Muhammad Ghanem "the Enforcement of Arbitral Awards and Foreign Judgements in the Yemen Arab Republic",[221] the author confirms that the Yemeni local arbitration does not provide any provision for enforcement of foreign awards, only when there is an award embodied with foreign judgement could be sought in Yemeni competent court, but nowadays YAA can be applied over both local arbitral disputes and international as well. The national court enforces the foreign judgements if the creditor party fulfills several requirements. These requirements as stated in the case *Abdul Baqi Abdul Qadir* v *Zayn bint Ahmad Hashim*,[222] it was held that the Yemeni law does not provide bilateral international dispute, so to enforce foreign judgement according to the principle of reciprocity, it has to fulfill the following requirements:

1. The judgement has issued by the competent court.
2. The judgement has to be issued according to evidence.
3. The judgement has to be free from any fraud.
4. The judgement has not be contrary to the international law and justice.
5. The judgement has to be finalized.
6. The judgement must not be contrary to public policy.

This study focused on the requirements that the award has to fulfill in order for the creditor party to claim the enforcement of the national court. Such article has conducted in 1988, before the unity of Yemen. This means Yemen is suffering from scarce knowledge of arbitration, as can be seen from the fact that YAA was amended

[221] Isam Muhammad Ghanem, "The Enforcement of Arbitral Awards and Foreign Judgements in the Yemen Arab Republic," *Arab Law Quarterly*, Vol. 3, No. 1 (February 1988): 81-82, accessed October 22, 2015, http://sci-hub.cc/10.1163/157302588x00155.
[222] *Abdul Baqi Abdul Qadir* v *Zayn bint Ahmad Hashim*, Commercial Appeal No.2 of 1977.

in 1997, twenty years old. The researcher referred to the modern international arbitration laws which may assist to modernize YAA and arbitration system as a whole in Yemen to cope with growing international trade.

Another good literature in the context of this study is "obstacles to International Commercial Arbitration in African Countries" written by Samson L. Sempasa.[223] The study concludes that the history of legal development in Africa through the African governments and lawyers how to deal with international commercial arbitration, research for universal modern rules, and challenges beset IAA. The author stated that African countries have a chance to update and modernize their laws to keep pace with the global trade; trade has become a major factor for the advancement and progress. So, it could be seen that the lack of modern and updated law in African countries and different law from country to another is as a result of colonialism as could notice the applicable arbitration laws of those countries as the same as old western-style.

Currently, applicable arbitration laws in Malawi, Kenya, Zambia, Uganda, Tanzania, Zimbabwe, and Mauritius are based on the English Arbitration Acts 1854 or 1889, Thus, African countries face challenges of operating with current international arbitration laws. Moreover, information about arbitral processes is insufficient. African scholars' research formulations are very old, so it adds nothing to modernize African laws to deal with universal arbitration laws. Non-conducting modernized formulations that are mostly found in UNCITRAL and new western studies related to arbitration rules and international institutions. Consequently, it adversely impacted the

[223] Samson L. Sempasa, "Obstacles to International Commercial Arbitration in African Countries," *The International and Comparative Law Quarterly*, Vol. 41, No. 2 (Apr, 1992): 387-413, accessed January 10, 2016, http://www.jstor.org/stable/pdf/760926.pdf?refreqid=excelsior:a18afaee7875da164c41ef2035befb02.

African lawyers' understanding and ability to cope with arbitral processes. Furthermore, the lack of development in arbitration centers in Africa, so Africans resort to western arbitration centers.

A result of the old legal system in African countries, the lawyers are facing difficulties to cope with arbitral cases over there, especially since the African arbitration rules do not apply in Africa in the contemporary international arbitration law. This study in Africa focused on the difficulties facing international arbitral award, it has not referred to the difficulties facing the enforcement of international commercial arbitration.

It can be noticed that there are obstacles facing international commercial arbitration in African countries. The main obstacle is the old laws because of the lack of scholarly sources to assist the legislators in updating and amending the old laws that are no more in line with universal arbitration laws. This obstacle perhaps faces the development and modernization of YAA as well as the lack of scholarly sources as the last amendment of YAA was in 1997 which is twenty old year ago, so the laws that are relevant to the enforcement of an arbitral award may be not be in line with international arbitral issues. Thus, this research found out the weakness in YAA, especially, the laws which are related to the recognition and enforcement of IAA and competency of the YAA to ensure the Act is sufficient to deal with the enforcement of foreign awards. Another reason rises doubt about the lack of arbitration knowledge in Yemen is non-ratifying NYC till now, the researcher has not found any provided reasonable reasons about Yemen unwillingness to ratify the convention. Especially, the convention allowed the national court to reject to recognize and enforce the award based on reciprocity reservation and commerciality in article I (3) as well as article V (2) (b) if

the award is contradicted with the public policy of the country where the recognition and enforcement is sought.

Moreover, a study entitled "A way to increase K-SURE's export insurance recoveries through arbitration by subrogation" written Keon-Hyung Ahn and Pil-Joon Kim,[224] looks for any conceivable arrangement to dispense with lawful deterrents and enhance trade. At that point, are the answers for dispose of lawful deterrents and encourage subrogation arbitration with regards to the Export Insurance Act? To expand Korea Trade Insurance Corporation (K-sure)'s recoveries, the researchers achieved the conclusion that it is important to take out lawful deterrents and build up more dynamic participation between K-SURE and The Korean Commercial Arbitration Board (KCAB) to give double assurance devices – export insurance and arbitration. These are adequate confirmation in various lawful framework asserted that frail and old laws are noteworthy impediment to arbitration system. The current old laws like YAA perhaps impede the enforcement of IAA. As the amendment of the current YAA is perhaps important to deal with international arbitral disputes since the last amendment was performed 20 old years ago.

Furthermore, a study entitled "Party autonomy and justice in international commercial arbitration" written by Moses Oruaze Dickson,[225] this study focused on the party autonomy. The application of arbitration system depends on the parties' autonomy to settle their dispute by arbitration. As it is commonly known that the parties are free to

[224] Keon-Hyung Ahn and Pil-Joon Kim, "A way to increase K-SURE's export insurance recoveries through arbitration by," Journal of Korea Trade, Vol. 20 Issue: 4, (2016): 364-382, accessed May 21, 2018, https://doi.org/10.1108/JKT-12-2016-020.
[225] Moses Oruaze Dickson, "Party autonomy and justice in international commercial arbitration," International Journal of Law and Management, (2016): 1-34, accessed My 21, 2018, https://doi.org/10.1108/IJLMA-12-2016-0184

agree on the terms for their settlement so there is a challenge of the arbitration agreement as the choice of law is a major term of the arbitration agreement. Party autonomy such as choosing the applicable law, language, and place to conduct the arbitration is acceptable standard in arbitration system. However, the principle of parties' autonomy may not applicable if the agreed terms will breach the natural justice and public policy. On the other hand, it is proposed that limitations to party autonomy should be chipped away as much as possible. However, the principle of party autonomy is limited where it impedes on issues relating to justice or public policy. This study clarifies that the national arbitration laws have to be modernized to deal with international disputes. They have to reach international standard. Like the principle of party autonomy, if the arbitral tribunal rendered IAA based on the agreed terms by the disputed parties, then, such terms will impede the enforcement of the IAA if it breaches the justice or the public policy of both the place seat of the arbitration or/and the place of enforcement of the arbitral award. Thus, it has to investigate the provisions of YAA that relevant to the enforcement to prevent the impediments that may face the most important stage in arbitration procedures and processes, that is, the enforcement of IAA.

1.9.2 The Tribalism Influence on the Competent Court towards the Enforcement of International Arbitral Awards

Indeed, the researcher have not found direct literature about the tribalism influence on the competent court towards the enforcement of IAA. However, there are write up about local protectionism which indirect related to the tribal protection for their own members. It could notice a study entitled "Enforcement of foreign arbitral awards concerning commercial disputes in Bangladesh" written by Nour Mohammad &

Rakiba Nabi.[226] This study addresses the litigation of long procedures and expensive charge fees in national courts, arguing that they are more than those for conducting litigation in foreign courts. The parties to the case are often upset with the lengthy proceedings, and every party considers the court's judgement as to win or lost and this leads to breaking trade relations between the parties. The design, methodology, and approach of this study is based on theoretical sources and empirical data collection, and examination of legal provisions under Arbitration Act 2001 plus conducting arbitral case that is more related to the enforcement of international arbitral awards. The authors stated that the arbitration is playing a crucial role to revive trade in Bangladesh, so Bangladesh legislated Arbitration Act 2001 is based on UNCITRAL. However, the study concluded that there are several obstacles facing the enforcement of IAA in Bangladesh as follows:

1. The adverse effect of biasness and corruption on the national courts.
2. The inefficiency of the national courts to deal with alternative dispute resolutions.
3. Shortage of qualified staff that understand international arbitration rules. They lack of knowledge and expertise of international law, international commerce, and practices, so arbitrators and District Court Judges face difficulties in handling arbitration matters.
4. The spread of corruption.
5. Local protectionism, which the nationality can impact on the outcome of the arbitration. However, sometime local protectionism is biased in favour of the foreign party, it is a policy to encourage FDI.

[226] Nour Mohammad & Rakiba Nabi, "Enforcement of Foreign Arbitral Awards Concerning Commercial Disputes in Bangladesh." *Humanomics*, Vol. 24 Iss 4 (2008): 274 – 284, accessed January 14, 2016, http://www.emeraldinsight.com/doi/pdfplus/10.1108/08288660810917150.

6. Varying numbers of international arbitration conventions such as NYC, UNCITRAL, and UNCITRAL Rules, which there is no single agreement that gather all conventions.
7. The arbitration applies judicial techniques to deal with arbitration issues.

It could be noticed that the situation in Bangladesh which is related to the challenges beset the enforcement of IAA may be similar to Yemen in some points. The Yemen court is perhaps not willing to enforce the award in case one of the parties is a tribal member, the military pressure on the competent court is more likely as most of the military members are tribal members. According to Veen, the military plays an important role in determining the path of the judiciary; it is one of the main factors that negatively affect the independence of the judiciary.[227] The military not only controls half to two-third of the seats of the Supreme Judicial Council but also gives recommendation on the judges' appointments and transfer.[228] Moreover, the high military officers do function as judges; they have their own prisons and do imprison their opponents without trial.[229] Hence, through the power of tribal military members may adversely affect the independence of the court, so the competent court may become reluctant to take coercive actions against the tribal debtor party who refuse to implement the IAA. Therefore, local protectionism in Yemen may arise as a result of the tribal patronage and military.

Besides, the tribes consider themselves as sovereign within the state sovereignty which they do not allow the state to enter their territories without prior permission, so many soldiers killed because of entering the tribal territories without giving a reasonable

[227] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice,* 22.
[228] Ibid.
[229] Ibid.

justification as well as prohibiting the officials to perform their duties and impeding the state from extracting the natural sources. Therefore, the tribal resistance against the state operations as a whole, means that the competent court orders would not be implemented. For example, if the competent court orders the police to bring the tribal debtor party before the court or seize his/her properties, it is more likely that the police would hesitate to follow the court orders as far as the resistance of the tribe is expected. Thus, the enforcement of IAA in Yemen may face challenges because of the tribal obstacles.

It is important to refer to African countries to understand the tribalism influence on the judiciary. In Africa, the tribes are powerful and even have their own laws to manage the tribal affairs.[230] In Kenya, some tribes have dominant position so they are involved in political influence.[231] The tribes in Africa are unwilling to socialize even there is industrial revolution.[232] They believe that tradition values will help to strengthen their dominance on the common opportunities and public interest.[233] The government knew tribes' power and illegal activities.[234] For instance, once the Somalian government has a plan to be achieved, it has to prepare the war against evils.[235] Such kinship is a negative factor in the society.[236] The concept of the tribe that the emergence of the modern state means a reduction of their control and the elimination of their interests. This is why when the state creates development projects in rural areas, they are

[230] Robert Hamilton, "Criminal Justice in East Africa," *Journal of the Royal African Society*, Vol. 34, No. 134 (Jan., 1935): 21, accessed March 25, 2018. http://www.jstor.org/stable/716740.
[231] G Wachira Mukundi, Kenya: Constitutional, Legislative and Administrative Provisions Concerning Indigenous Peoples. 20
[232] Peter P. Ekeh, "Social Anthropology and Two Contrasting Uses of Tribalism in Africa," *Comparative Studies in Society and History*, Vol. 32, No. 4 (Oct., 1990): 688, http://www.jstor.org/stable/178957.
[233] Ibid.
[234] Ibid.
[235] Ibid.
[236] Ibid, 692.

opposed by the tribes that live there and ask them for money to use the land. If the state refused the conditions of the tribes, the tribes feel themselves a bit of the ability to confront the government, through the insurgency and the fight against the government, and tribal members had wide confrontations with the government. The tribes consider themselves as sovereign within the state sovereignty which they do not allow the state to enter their territories without prior permission, many soldiers killed because of entering the tribal territories without giving a reasonable justification as well as prohibiting the officials to perform their duties and impeding the state from extracting the natural sources. According to Al-Zwaini, the *Sheikhs* fight the government soldiers with their own bodyguards to prevent the implementation of some government orders that conflict with tribal interest.[237] This means wherever the tribes are, they only look after their own interest. The judiciary as well as the executive authority are not effective in the tribal areas.[238] In case of disputes among the tribal men, it will be settled by the customary law.[239] Hence, the position in Africa is the same as in Yemen which the tribes control some regions and adversely affect the official operations. The judiciary and the government are not effective in tribal areas. Thus, the official law faces difficulties to be applied in tribal countries. Then, the creditor party will fail to enforce IAA against the tribal lost party. As the tribal lost party will refer to his own tribe to protect him/her. Therefore, the place of enforcement of the arbitral award will be powerless to take coercive actions to enforce IAA. In addition, tribalism and nepotism are malpractices in African societies.[240] It can mean that the members of each tribe

[237] Al-Zwaini, "State and Non-State Justice in Yemen," 32.
[238] Charles Dundas, "Native Laws of Some Bantu Tribes of East Africa," the journal of *the Royal Anthropological Institute of Great Britain and Ireland*, Vol. 51 (Jan. - Jun., 1921): 219, http://www.jstor.org/stable/2843522.
[239] Ibid.
[240] Peter Blunt, "Social and Organisational Structures in East Africa: A Case for Participation," *The Journal of Modern African Studies*, Vol. 16, No. 3 (Sep., 1978): 44, http://www.jstor.org/stable/160036.

will come together as one group to protect each other against outside invaders. Thus, the creditor party will face obstacles to enforce IAA as the tribes will protect their own members against court legal actions. As some regions are under the control of the tribes so the enforcement of IAA will be impeded. Such situation is the same as in Yemen; the government authority is not extended in tribal areas. The tribal members bear the responsibility of the security of such areas. As a result, the customary law is prevailing in such areas. The tribal members are traditionally liable to protect their own members against outsiders. Thus, the court operations are not run well. This more likely to impede the enforcement of IAA.

1.9.3 The Corruption Influence on the Competent Court towards the Enforcement of International Arbitral Awards

An article published in 2001, Seek Truth Form Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC of Randall Peerenboom also forms an important form of the literature review.[241] This study confirms that the enforcement of the arbitral award is the most fundamental element to the disputed parties. It is stated that the enforcement of the foreign arbitral award is not guaranteed against PRC companies in China. The researcher, through a survey conducted in the Arbitration Research Institute in China International Economic and Trade Arbitration Commission's (CIETAC) research arm, found that 47% of CIETAC and 52% of foreign awards were enforced. This article has shown the enforcement rates for foreign awards from the period 1991 to 1999, the total application cases reached 25 arbitral cases, whereas 13 cases were enforced and 12 cases were not enforced, which the

[241] Randall Peerenboom, "Seek Truth Form Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC," *The American Journal of Comparative Law*, Vol. 49, No. 2 (Spring 2001): 249-327, accessed January 27, 2016, https://www.jstor.org/stable/pdf/840813.pdf?refreqid=excelsior:4c612f891bd43e86504e9aa8c69df285

enforcement of foreign arbitral awards at a rate of 52% while non-enforcement at a rate of 48%.

The methodology of this study mostly relied on a survey of 89 foreign and CIETAC arbitral awards enforcement cases, questionnaire was distributed to more than 350 PRC firms and over 100 to foreign firms. The largest percentage, at 43%, of unenforceable awards are because of insolvency of the respondents. But, the failure to enforce the awards is not due to insolvency only, it also includes non-possession of the respondents' properties to seize in order to coerce the enforcement arbitration. Moreover, the study found that the size of the awards play a major role in enforcement, if the award is big size, then the enforcement could face difficulties while smaller size award are more acceptable. It could be noticed that another fact in this study is the deficiency in legal framework as well as institutions. Further, the weakness in the judiciary is due to getting financial funding from the government in addition to security protection supervised by the government directly. Such financial dependency on government causes intervention in the affairs of the judiciary. Local protectionism has a negative role regarding the enforcement of the awards, especially if the local party has a relationship with government officials. This lead to intervention and pressure on the court to rule in favour of the local party, so the court tries to impede the enforcement of the arbitral awards by requesting additional documents and the like.

The judges are often frustrated by political interference which hindered the enforcement of the arbitral awards or receiving threats from some parties to the conflict in case of compulsory attendance before the court. Although, the court has a power, but it is reluctant to use it against those violators of the order execution because the violators have a relationship with some government officials and getting support to

disobey the court's orders. As a consequence of government intervention, the courts are not serious to seize or confiscate properties of the respondent, prevent the company from the operation, undertake mandatory sanctions, reluctant to take interim measures of protection to guarantee the enforcement, and afraid to make an issuance order to arrest or to fine the violators. Therefore, it is found out that the court decisions tend to encourage the parties to solve problems quietly, rather than coercion. There are only a few court cases which the respondents are forced to enforce the arbitral award through freezing the bank account, confiscation of property, and other precautions. Also, one of the difficulties facing the enforcement of arbitral awards in China if the local company's shareholders belong to military personnel. Finally, the incompetence of judges to deal with arbitral cases, thus they face problem to apply related rules to the refusal or the enforcement of arbitral awards.

As previously mentioned that the judiciary plays an important role in the control and assistance of the arbitral tribunal as it has less jurisdiction compared with the court. The independence and the integrity of the judiciary are important to the enforcement of IAA. The enforcement of IAA is the highest summit of the arbitration dispute where there is nothing after this stage. In other words, the enforcement of IAA is the most important stage in the arbitration system. To achieve the enforcement stage of IAA, the independence and the integrity of the judiciary have to be practiced by the place of enforcement of the arbitral award. Lack of the integrity and the judicial independence because of military interference and the influence of the local corporate lobby on judges lead to adverse effect in enforcing IAA. A study of People's Republic of China found out some challenges of enforcement of IAA which may be similar to those of Yemen. The similarities in the matter of weakness of the judiciary as well as political intervention. In Yemen, the judiciary is considered as an extension department of the

executive. The appointment of judges is based on political recommendation, this means that the executive interferes with the judicial affairs so the political intervention in the judiciary is the most element challenges the judiciary reforms.[242] Thus, such judges are likely to accept their political party intervention and accept political recommendations.

Moreover, one of the obstacles that faces the enforcement of foreign awards in RPC is the threatening of the judges if issuing any writ to bring the debtor party before the court or seize the property of the local party who has close tie of relationship with officials. The same obstacle could be found in Yemen. The judges are not disposed to orders such as seizure of the property or habeas corpus against the tribal man in order to coerce him/her to enforce the IAA as it is expected that the judges will be threatened to be killed or kidnapping him/her or any of his family members. It is necessary to have case to explain that the tribe is above the law and the law only can be enforced against the weak person but not against the tribes' leaders and their members. The facts of the case are that the defendant is a tribal leader (Yaser Al-Awadhi) and the plaintiffs are the parents of two dead persons at the age of nineteen. In this case during ceremony marriage for Al-Awadhi family on 14/5/2013 and that hold place in Sana'a. The guardians of *Sheikh* Yaser Al-Awadhi intercepted the two dead persons' car and shoot them without apparent reason. The parents filed an action in the court, but the police did not take any investigated action of the crime incident. Till this moment, the case has not been tried yet.[243]

[242] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice*, 8.
[243] Case of Killing Two Persons from Aden, *Aden Alghad*, May 17, 2013, Accessed January 27, 2016, http://adengd.net/news/50459/#.VoDH1_lYrIU.

In addition, International bodies, including, the World Bank, the United Nations and Transparency International, have all identified that corruption is significant impediment to fair and impartial judicial dispute settlement in Indonesia.[244] The enforcement of the arbitral award faces difficulties in Indonesia. It often requires separate judicial order to force the debtor party to honor it.[245] If the judiciary is involved in corruption, then arbitration reform will be difficult.[246] Such procrastination of non-enforcement is to give opportunity to the judges and court officials to receive bribe.[247] Such corruption impediment on enforcement of the arbitration system in Indonesia is the same as in Yemen. The rampant corruption, particularly bribery, might adversely affect the enforcement of IAA in Yemen. The debtor party may pay bribe to the place of enforcement of the arbitral award or judge to escape from implementation of IAA. As corruption in a few countries makes the commercial arbitration unsatisfactory.[248] Hence, the corruption impediment will lead to non-enforcement of IAA.

1.9.4 Effectiveness of Reciprocity Reservation on Yemen

There is a legislative problem in NYC on the matter of enforcement of IAA, this could be seen in the article I (3) that allowed two reservations to the signatory states, and first one is that the convention state can only enforce the award made by another signatory state, not by non-convention state.[249] The second one is that the signatory state can only apply the convention to dispute that comes out of legal relationships,

[244] Anselmo Reyes and Weixia Gu, *The Developing World of Arbitration,* 198.
[245] Ibid.
[246] Ibid, 291.
[247] Ibid.
[248] Gary B. Born, *International Arbitration: Law and Practice* (The Netherlands: Kluwer Law International, 2012), 16-17.
[249] Convention on the Recognition and Enforcement of Foreign Arbitral, article 1 (3).

whether contractual or not, which the municipal law of the state making could consider it as commercial.[250] For instance, the United Kingdom declined to enforce the judgements rendered in Saudi Arabia, so as a reaction, the Saudi Arabia courts refuse to enforce arbitral awards rendered in the UK.[251] The enforcement of IAA in the United States may be rejected if the creditor party from the country is not a signatory state. The citizens of the non-convention state may lose the advantage of the enforcement of the arbitral award if his country does not ratify the NYC, especially some countries like the US ratified the convention subject to the reciprocity reservation.[252] It is necessary to refer to the American case of *Bergesen* v *Joseph Muller Corp*,[253] the Court of Appeal held the that the reciprocity reservation could mean that the United States would only enforce the foreign arbitral award if it was rendered in a contracting state. The US court has full jurisdiction to refuse the enforcement of an award rendered by a non-signatory state.

Thus, non-ratifying NYC by Yemen will harm Yemeni businessmen. Especially, when they come to recognize and enforce arbitral award whether the place seat was in Yemen or in another state may lose the convention privileges as the state where the enforcement is sought has legal permission to refuse the enforcement under the ground that Yemen is a non-signatory state. Such legal permission could be noticed in the article I (3) of NYC that provides reservations to the signatory states which can only enforce the award made by another signatory state, not by the non-signatory state like

[250] Ibid.
[251] Charles N. Brower and Jeremy K, Sharpe. "International Arbitration and the Islamic World: the Third Phase," *The American Journal of International Law*, Vol. 97, No. 3 (Jul., 2003): 643-656, accessed January 20, 2016, http://www.jstor.org/stable/pdf/3109849.pdf?refreqid=excelsior%3Aaf602bae96881e9e7ceffa0b45413d4e.
[252] Gerald Aksen, "American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards," *Sw. UL Rev*. 3 (1971): 1, Quoted in Letter of Accession from President Nixon to United Nations dated September 1, 1970
[253] *Bergesen* v *Joseph Muller Corp,* 710 F.2d 928, 932 (2d Cir. 1983).

Yemen while Yemen is obligated to enforce the foreign award as stated in sections 7 and 57 of YAA. However, the same effect of reciprocity reservation according to section 494 (3) of the Code of Civil Procedure provides that Yemeni competent court will enforce IAA in Yemen according to reciprocity reservation. Further, by non-ratifying the convention is not an immunity for Yemen and its citizens to escape from an execution of agreements. The foreign award will be enforced against Yemen based on other laws. It is important to refer to the case of *S & Davis* v *Yemen*,[254] in this case, the contract was made and signed in Yemen which contained the arbitration clause. Later, the dispute arose and the place seat was hold in London. The creditor party applied for the enforcement of the award based on NYC at USA competent court. The competent court found that Yemen is a non-signatory convention. Nevertheless, the award was enforced under s 1605 (a) (6) of the Foreign Sovereign Immunity Act 1976 that provides the foreign state cannot claim immunity of any case. Thus, the jurisdiction cannot apply over Yemen even if it is a non-signatory state, so the awards rendered in Yemen may not be enforced in the signatory convention states under the article 1 (3) while the award can be enforced against Yemen in other states through other laws like article 20 that provides a waiver of immunity and cannot be claimed to escape from execution.[255]

On the other hand, the convention allowed the reciprocity reservation and this is more depends on the place where the award is rendered, but not on the nationality of the disputed parties,[256] in addition, the article I (1) of NYC indicates that the arbitral award

[254] *S & Davis* v *Yemen*, US, 218 F.3d 1292, 1301 (11th Cir. 2000).
[255] United Nations Convention on Jurisdictional Immunities of States and Their Property, article 20.
[256] Martin Domke, "The United States Implementation of the United Nations Arbitral Convention," *The American Journal of Comparative Law*, Vol. 19, No. 3 (Summer 1971): 575-586, accessed January 21, 2016,
http://www.jstor.org/stable/pdf/839561.pdf?refreqid=excelsior%3A0cc1f48a1cef672595a7d00255d75

is foreign by the state where the award is rendered not based on the nationality of the disputed parties. Hence, leaving unlimited interpretation to the courts is an obstacle towards achieving the NYC aims, as commonly known that each municipal law is different from state to another, as could be noticed, an American national court may prevent the citizens of non-convention state from enforcement of the award even the award rendered in convention state while the NYC provides the reciprocity reservation provides over the state, it is supposed to clarify how the NYC could deal with non-citizens convention.

The second reservation could be seen in article 1 (3) of NYC that authorizes the signatory state to enforce the award which comes within the commercial terms based on the national legal system, but the interpretation of commercial reservation is different from state to another state, it can be seen that the Chinese Supreme people's Court failed to include the arbitration between the host country and the foreign state as commercial.[257] Giving ambiguous definition of some principles in the convention causes problems in India too. The Indian courts consider the legal relationship as commercial for a long time because there is no provided statutory definition to clarify which led to lower enforcement of IAA.[258] Thus, as discussed above, ambiguity of the reciprocity reservation, the convention terms have to be clarified by uniting definitions in order to avoid misinterpretation and misunderstanding and applying different courts' interpretation of the same definition.

08e, quoted in Robert De la Place de la Loi dans l'Arbitrage, "in International Arbitration. Liber Amicorum for Martin Domke" (1967): 226.

[257] Jian Zou, "Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts," *Pac. Rim L. & Pol'y J*. 15 (June 2006): 403.

[258] Ibid.

It is important to mention the political issue that may be considered as an obstacle to the enforcement of IAA whereas the national court is the main element to make the arbitration system to succeed. According to Calvo doctrine which provides that the foreign nationals are mandatorily subject to the jurisdiction of a national legal system, so the arbitration agreement is impossible to expel the jurisdiction of the national court.[259] Thus, the political issue will be an obstacle towards the enforcement of foreign awards, especially, if there is hostility between the state of the place seat and the state where the enforcement is sought. For more understanding it is pertinent to refer to the case of *Harris Adacon Corporation* v *Perkom Sdn Bhd.*[260] In this case, the debtor's party's argument to set aside the creditor party on the ground of the nationality of the creditor party is Israeli. However, the court found the creditor party's nationality is an American, so the award was not against the public policy to enforce it. This means that the Malaysian competent court will not enforce the award if the creditor party's nationality is Israeli.

Based on all above literatures, it is found that the studies discussed some obstacles facing the enforcement of IAA such as deficient understanding of processes and procedures of international arbitration and lack of knowledge, foreign judges and lawyers face difficulties in dealing with international arbitration cases, so the judges get confused regarding the enforcement or the refusal of IAA. Moreover, Corruption is a factor in the non-enforcement of arbitral awards, and sometimes inability to enforce the arbitral award is a result of the insolvency of the respondent and lacking property to be seized. Another obstacle is the lack of independence of the judiciary because of political interference and military which lead to pressure on the competent

[259] Born, *International Arbitration*, 26.
[260] *Harris Adacon Corporation* v *Perkom Sdn Bhd* [1994] 3 MLJ 504.

courts to provide local protectionism of local businessmen, especially, those local businessmen who have close ties of relationship with the government officials or powerful people owning shares in those companies to the conflict. In addition to these obstacles, the enforcement of IAA may face challenges in the Middle East countries if the awards are inconsistent with *Shari'a*, particularly, if those awards contain any usury or uncertainty terms.

All the studies on the obstacles facing the enforcement of IAA are conducted outside Republic of Yemen. Lack of knowledge of other countries could be noticed in Yemen as the last amendment of YAA was on 1997, this is already twenty years old which may be out of date. This raise doubt that the YAA which is related to the enforcement of arbitral award is perhaps not in accordance with international arbitral law. Even, corruption obstacles are not handled extensively in those studies, especially, corruption in Yemeni government institutions is widespread. To the best knowledge of the researcher, no study has ever been conducted on the obstacles facing the enforcement of IAA in Yemen, especially hindrance or adequacy of YAA and corruption, while hindrance of tribalism facing the enforcement of IAA has not been investigated even outside Yemen. This introduces a problem to investigate YAA, tribalism and corruption influence on the competency of the court in Yemen.

1.9.4.1 *Shari'a* and Public Policy Requirements to Enforce International Arbitral Awards

As long as Yemen is non-signatory state to NYC. It is important to refer to *Shari'a* and public policy as they are interrelated and that to understand if there are reasonable reasons behind non-ratifying NYC. In some of the Middle East countries including Yemen, IAA may be set aside or rejected based on the contravention of *Shari'a* or the

public policy. Will NYC contravene *Shari'a* or the public policy? It has referred to *Shari'a* and the public policy to rebut Yemeni legislator's argument in case arguing that ratification of NYC will contravene *Shari'a* principles. Thus, referring to *Shari'a* and public policy as well, it will clarify how effectiveness of the *Shari'a* and public policy on the enforcement of IAA. In addition, it will rebut any argument behind non-ratifying of NYC. The national arbitration laws will be stronger by ratifying NYC as it is accepted worldwide as the main convention of the arbitration system. In a thesis written by Wasim Yahya Al-Jerafi, "Yemen's ratification of the New York convention: an analysis of compatibility and the uniform interpretation of articles v (1) (a) and v (2) (b)".[261] Al-Jerafi' study stated that Yemen has issued a New Draft of Yemeni Arbitration Act (New Draft), which is still currently being examined prior to being enacted by the Yemeni parliament. New Draft contains sixty-eight articles generally inspired by the Egyptian Arbitration Act. Al-Jerafi' study focused on the public policy under article V (2) (b) of New York and compared with section 66 of the New Draft of Yemeni Arbitration Act. However, to the best knowledge of the researcher, has not found the New Draft. Even, Al-Jerafi' study was completed in 2013 and until now 2018 no New Draft was published or found. There is no relevant informantion regarding New Draft in Google, Yemeni Information Centre, or affirmed by any of the interviewees. It is unreasonable that five years have passed since Al-Jerafi' study, and no draft is found either in the public or to specialist in arbitration field. It means that the researcher may wrongly undermined New Draft. Especially, Al-Jerafi' study stated that New Draft contains sixty-eight articles generally inspired by the Egyptian Arbitration Act. This is rising doubt that Al-Jerafi' study referred to

[261] Wasim Yahya Al-Jerafi, "Yemen's ratification of the New York convention: an analysis of compatibility and the uniform interpretation of articles v (1) (a) and v (2) (b)" (PhD diss, University of Leicester, 2013), 7-8.

the only the Egyptian Arbitration Act. Moreover, Al-Jerafi' study referred to public policy under article V (2) (b) of New York and compared it with section 66 of the New Draft of Yemeni Arbitration Act while the researcher referred to section 53 (g) of YAA that provides the foreign award is binding, unless the award contravenes the *Shari'a*. Also, section 55 (b) that provides the foreign award cannot be enforced if the competent court considers it as against the *Shari'a* and public policy as a whole. In addition, Al-Jerafi' study of the public policy and *Shari'a* on Yemen's ratification of New York as a research question of the study, while the researcher referred to the effect of the public policy and *Shari'a* on the enforcement of IAA as complementary part to improve Yemeni national arbitration laws, that is, YAA. Therefore, Al-Jerafi' study followed different way of the current study. In addition, Al-Jerafi' study is based on El-Ahdab's book that is titled "Arbitration with the Arab Countries". This could be seen as numerous references are found in Al-Jerafi' study which is taken from El-Ahdab's book. Previously, the researcher rebutted El-Ahdab's book regarding New Draft under sub-topic 1.9.1.

Indeed, Yemen practice *Shari'a* law. The constitution recognizes Islam as the religion of the state[262] and the *Shari'a* law as the main source for all laws.[263] Thus, the enforcement of arbitral award is impaired if the arbitration agreement or the arbitral award violates the *Shari'a*. *Shari'a* rules play an important role in commercial transactions which has to be considered in arbitral awards. As noted that there are similar points between *Shari'a* law and western law and different points as well.[264] The differences between the western scholars and Islamic scholars existed in the matter

[262] Yemeni Constitution, Article 2.
[263] Ibid, Article 3.
[264] Herbert Smith Freehills, "Arbitration in DUBAI and the UAE," (October 2013):1.

of arbitration and business as a whole.[265] The Islamic legal system is based on culture which complies with *Shari'a* perspective, so as to avoid non-enforcement of the award the arbitrators have to be familiar with *Shari'a* law and historical arbitration background.[266] Hence, ignoring the culture of each nation will lead to hostility among nations and this will adversely affect the enforcement of IAA. Thus, for the successful arbitration system, the arbitrators have to do more research to have knowledge of other nations' culture.[267] At the beginning, Arab countries welcomed the international arbitration system as they considered the positive effects that could benefit international trade.[268] However, some of these countries became reluctant to continue to recognize foreign arbitration because of a contravention of the public policy, especially, the *Shari'a* rules.[269]

As Yemen is one of the Arab countries and addressed in this study, the problem of contravention of *Shari'a* exists. According to Mayer, the enforcement of IAA in Yemen, perhaps faces challenges if the award contravenes the *Shari'a* law.[270] Therefore, the award could have a better chance to be enforced if the debtor party has assets outside the Middle East to seek the enforcement of the award there.[271] Otherwise, the arbitral tribunal has to avoid terms that may arose suspicion of contravention of *Shari'a*.[272] It is necessary to refer to section 53 (g) of YAA that

[265] Babak Hendizadeh, "International Commercial Arbitration: The Effect of Culture and Religion on Enforcement of Award" (master's thesis, Canadian Queen's University, 2012), 34.
[266] Ibid, 33-34.
[267] Ibid, 58.
[268] Ibid, 56-57.
[269] Ibid.
[270] Mayer Brown, "Arbitration in the Middle East: How Important is International Arbitration in the Middle East?" A Lexis, PSL document produced in partnership with Mayer Brown International LLP https://www.mayerbrown.com/files/News/e8ac863e-39f2-4583-b6fc-41abb24698bd/Presentation /NewsAttachment/a872cb8f-1755-46d1-bb66-41dfd222be9a/LexisNexis_2012_arbitration-in-Middle-East.pdf (accessed March 30, 2016).
[271] Ibid.
[272] Ibid.

provides the foreign award is binding, unless the award contravenes the *Shari'a*. Further, section 55 (b) provides the foreign award cannot be enforced if the competent court considers it as against the *Shari'a* and public policy as a whole. Therefore, the arbitral award would not be implemented in Yemen if it contravened the Islamic law which is the main source of all laws. It prevails on other human laws, and this is clearly stated in article 3 of the Yemeni constitution. It is necessary to refer to the case of *Abdul Baqi Abdul Qadir* v *Zayn bint Ahmad Hashim*,[273] the court held that if the award contravened the *Shari'a*, the award would not be enforced.

In an interesting literature is written by Mark Wakim, entitled "Public Policy Concerns Regarding Enforcement of International Arbitral Award in the Middle East"[274] the author stated that foreign law systems are becoming recognized in Middle East countries, but the knowledge requirement of applying the laws is essential to understand the nature of resolving disputes in the Middle East. Ignoring the norms that religious structure is supportive of Commercial Arbitration to resolve differences in operations is irrational. Religious structure plays an important role in the acceptance and success of the international commercial arbitration. Religion may affect the operation procedures. If the arbitrator violates the Islamic law (*Shari'a*), the public policy will affect the outcome of the arbitration. Hence, those lawyers outside the Middle East region have to be familiar with the laws of these countries, because

[273] *Abdul Baqi Abdul Qadir* v *Zayn bint Ahmad Hashim*, Commercial Appeal No.2 of 1977.
[274] Mark Wakim, "Public Policy Concerns Regarding Enforcement of International Arbitral Award in the Middle East," *New York International Law Review* [Vol. 21 No. 1 (Winter 2008): 1-51. Accessed October 27, 2015, https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=Mark+Wakim%2C+%E2%80%9CPublic+Policy+Concerns+Regarding+Enforcement+of+International+Arbitral+Award+in+the+Middle+East&btnG=.

Islamic law is a very important in directing the legal system of the most Middle East countries.

It is stated that uncertainty (*Gharar*) and usury (*Riba*) to the IAA or the agreement as a whole to be void. It is not in doubt that the all Muslim scholars agree on the prohibition of dealing with any transaction that involves interest whether as a profit, fine, and commission. However, the legal system in the Middle East differs in their application of *Shari'a*. In some Middle East countries, the commercial law derived from *Shari'a* and in other countries not complies with *Shari'a*. For instance, in the Kingdom of Saudi Arabia, the law is completely derived from *Shari'a*, while Lebanese law depends on culture.

Another similarly literature focusing on arbitration in the Middle East context written by J. Cammell "Commercial Arbitration in the Islamic Middle East".[275] This study demonstrated that the *Shari'a* is the law that prevails in global trade in eighteen countries in the Middle East except Israel, Pakistan, and Turkey. So the foreign investors have to be aware of the foundations of Islamic law so as not to put their investment in jeopardy. Arbitration is practicable in those countries and enforceable if the arbitral award does not contradict the rules of Islamic law. Many Arab countries have ratified NYC such as Egypt, Syria, Djibouti, Jordan, Kuwait, Saudi Arabia, Morocco, Tunisia, Bahrain, Brunei, Lebanon, Iran, Qatar, Oman, but these countries are conservative when it comes to enforcement of foreign judgments if they are in conflict with the law. Thus, in order to avoid non-enforcement in those countries as well as leave no argument for the respondent to refuse to enforce the arbitral award

[275] J. Cammell, "Commercial Arbitration in the Islamic Middle East," *5 Santa Claraj. Int'l L* (January 2006): 169, accessed March 28, 2017, http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1025&context=scujil.

base on public policy, the international lawyers have to be cautious when drafting international arbitral awards and avoid terms that are inconsistent with the *Shari'a*, they have to avoid terms that may raise suspicion of violating the *Shari'a*, especially in regard to usury (*Riba*) and uncertainty (*Gharar*).

The two articles discussed have focused on the Middle East which is more concerned about the public policy. The enforcement of foreign awards cannot be implemented in some Middle East countries if the award violated the rules of *Shari'a*, especially, if the award provides interest whether as a profit, fine, or commission. Also, the agreement itself is void if it is dealing with uncertainty (*Gharar*) or usury (*Riba*) terms.

It is important to refer to the above mentioned two articles to understand the effect of the international arbitral awards if they contravened the *Shari'a* principles as well as to refute any argument of non-ratifying the NYC by Yemen. These two articles clarify to the Yemeni legislator that NYC gives the national courts a discretion to refuse to enforce the international arbitral awards if they contravened *Shari'a* principles as *Shari'a* may be part of the public policy of some signatory states, which public policy is referred to see how it is applicable. For example, the Kingdom of Saudi Arabia is signatory state of NYC, and its applicable law is completely derived from *Shari'a.*[276]

Moreover, public policy is determined as an obstacle facing the enforcement of IAA, and *Shari'a* is a part of the public policy. The convention allowed the national court to reject and not to enforce an award based on an article V (2) (b) if the award contradicts the public policy of the country where the recognition and enforcement is sought. The convention specified the permissible grounds to refuse the enforcement of the foreign

[276] Wakim, "Public Policy Concerns Regarding Enforcement of International Arbitral Award in the Middle East," 40-41.

award, it is more likely the courts will refuse to enforce the arbitral award by other exceptions like public policy.[277] Such exception to the enforcement is enough to frustrate the convention's goals.[278] For instance, public mandatory is considered as a part of public policy which the state determines it as sovereign affairs to protect the public interest.[279] Therefore, the arbitration tribunal has to pre-determine in the first instance of the arbitration proceedings whether the arbitration issue violates the public laws of the state where the enforcement is sought? Does the enforcement violate the public law? If the arbitration issue violates the public law, it should not be arbitrated.[280] Thus, the tribunal has to pay more attention to the issues that are inappropriate to be settled by arbitration mechanism.[281] The issues that are considered as being against public laws do not have to be adjudicated by the arbitral tribunal and only the national courts are competent to deal with such issues. Otherwise, the international arbitral award will not be enforced by the competent court if it violates the public policy.[282] It means that when the issue is against public policy, then the arbitral tribunal has to withdraw its authority from ruling on such issue, so the disputing parties have to refer their dispute to the court.[283] This is against the principle of party autonomy and the arbitration principle that give the right of the disputing parties to choose the law which is suitable for them.[284]

[277] Christopher S. Gibson, Arbitration, *Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law* (New York: Boston, 2009), 118.
[278] Ibid.
[279] Christopher S. Gibson, Arbitration, *Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law* (New York: Boston, 2009), 121, quoted in A. Bermann, Introduction: Mandatory Rules of Law in International Arbitration, 18 AM. REV. INT'L ARB. 1 (2007).
[280] Ibid.
[281] Ibid.
[282] Ibid.
[283] New York Convention 1958, article V (1) (a), and UNCITRAL Model Law on International Commercial Arbitration 1985, & article 34 (2) (a) & 36 (1) (a) (i).
[284] Ibid.

Public policy is a major power in the hands of the national courts which they depend on to refuse the arbitral award.[285] The International Law Association Committee on International Commercial Arbitration has stated in the final report 2002 that in fifty years of arbitration, public policy is considered as the most crucial problem encountered in the effort to enforce arbitral awards.[286] The International Law Association Committee on International Commercial Arbitration has spent an effort to constitute guidance on universal public policy but failed to convince all the signatory states.[287] Another author stated that public policy is the key element constituting challenges to IAA.[288] The national courts authorized by article V. 2 (b) to determine whether the arbitrated issue violates public policy or not. Thus, as there is no universal guidance on public policy which only the national courts have jurisdiction to interpret the meaning of the public policy as they think fit. It means that public policy depends on the legal system of each state as each state has different politics, culture, religion, economics, legal system, and the like, so what is considered as public policy in one state may not be the same in another state.[289] Such factors change and develop from time to time, so the standard of public policy is determined by the surrounding circumstances.[290]

[285] Pierre Mayer & Audley Sheppard, "Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards," *Arbitration International* 19.2 (Junuary 2003): 249-253.
[286] Mayer and Sheppard, "Public Policy and Enforcement of Awards," 249-253.
[287] Sameer Sattar, "Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach?" *Transitional Dispute Management Journal* 8.5 (December 2011):4-5, quoted in Obinna Ozumba, Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency? (2009).
[288] Gary B. Born, *International Commercial Arbitration: Commentary and Materials 815*, 2d ed. (2001).
[289] Fifi Junita, "Public Policy Exception in International Commercial Arbitration – Promoting Uniform Model Norms," *Contempt. Asia Arab. J* 5 (May 2012): 45, accessed October 28, 2015, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2115604.
[290] Ibid.

On the other hand, the author argues that public policy is not a major challenges towards that enforcement of a foreign award.[291] However, leaving the public policy without specific guidance may lead to misuse by the national courts. Thus, some national courts, as well as arbitration tribunals, consider that the international law should apply to the international arbitration agreements domestic laws should come into the picture when the matter concerns public policy.[292] The domestic law is not the right law to consider in the arbitration agreement as valid or void.[293] The international laws are suitable for dealing with the recognition and the enforcement of international arbitration agreements.[294] However, the NYC, as well as the Model Law, allow the state to reject the awards that are incapable of being settled by arbitration, such as competition and anti-trust claims, securities claims, bankruptcy, employment contracts, consumer disputes and so on.[295] Thus, the state where the enforcement is sought on a case that is incapable to being settled by arbitration has jurisdiction to refuse the recognition and the enforcement of the award.[296] Hence, most national courts apply their own non-arbitral rules to reject the enforcement of some arbitral disputes.[297]

To understand how each state interprets the scope of public policy, the example of UAE can be used. A United Arab Emirates (UAE) study by Khalil Mechantaf under the title of "Public Policy in the UAE as a ground for Refusing Recognition and

[291] Karl-Heinz Bockstiegel, "Public Policy as a Limit to Arbitration and its Enforcement," *Disp. Resol. Int'l* 2 (2008): 123.
[292] Born, *International Arbitration* (2012), 56-57, quoted in *Municipalte Khoms El Mergeb* v *Societe Dalico*, 1994 Rev. arb. 116, 117 (Frech Cour de Cassation civ. le).
[293] Born, International Arbitration (2012), 56-57.
[294] Ibid.
[295] New York Convention, Article II (1) and UNCITRAL Model Law on International Commercial Arbitration 1985, article 1 (5).
[296] New York Convention, article V (2) (a) and UNCITRAL Model Law on International Commercial Arbitration 1985, article 36 (1) (b) (i).
[297] Gary. Born, *International Commercial Arbitration* 515 et seq (2009).

Enforcement of Awards"[298] stated that the UAE has its own laws which allows it to refuse the recognition and the enforcement of arbitral awards. This could be seen in section 3 of the UAE Civil Code 1985 which provides that personal status like marriage, inheritance, descent is considered as public policy, as well as the rules that relate to sovereign governance, commercial freedom, trading in wealth, rules of personal property, and final decisions that inconsistent with the societal foundation and Islamic *Shari'a* principles. It is important to refer to the case No.180/2011 on February 2012, in this case, the purchaser (respondent) refer to the Dubai Court of the First Instance to recognize and enforce an award made by the Dubai International Arbitration Center (DIAC) against the appellant (real estate developer). The dispute arose in the matter of the sale agreement validity. DIAC held that the sale agreement of the unit is invalid because of failure to register the unit at the Interim Real Estate Register, so the court ordered the real estate developer to return the paid money to the respondent. The Court of the First Instance recognized the arbitral award. The appellant appealed on the ground that the tribunal extended its jurisdiction and did not give him reasonable time to defend his claim, his appeal was rejected. The same claim was transferred to the Dubai Court of Cassation, which annulled the Court of the First Instance' decision. It held that the real estate issue is related to the public policy, so the conciliation is not allowed. Section 203 (4) CCP considers real estate as public policy and prohibits application of conciliation over public policy.

Public policy bears the arbitral tribunal hardship as it has to be familiar with the municipal law of the state where the enforcement is sought in order to know whether

[298] Khalil Mechantaf, "Public Policy in the UAE as a ground for Refusing Recognition and Enforcement of Awards," Wolters Kluwer (July 2012), accessed February 1, 2016 http://kluwerarbitrationblog.com/2012/07/06/public-policy-in-the-uae-as-a-ground-for-refusing-recognition-and-enforcement-of-awards/.

the issue violates the public policy and whether the award can be enforced or not. Also, public policy contravenes the doctrine of the parties' autonomy; this operates against the freedom of choice of law, as it is commonly known that the parties are free to agree on the terms for their settlement so there is a challenge of the arbitration agreement as the choice of law is a major term of the arbitration agreement. Compulsory referring to the national court is against the arbitration principle that provides the parties with the autonomy to agree on the terms they like. So the parties can reach an agreement as they wish. Therefore, public policy is an obstacle towards enforcement of a foreign award.

As far as Yemen is concerned in this research, it refers to *Shari'a* as public policy. In Yemen, the jurisprudence is according to *Shari'a* perspectives.[299] The constitution provides that all laws shall be based on *Shari'a*.[300] Thus, YAA provides *Shari'a* rules as a ground to refuse the enforcement of IAA if the award contravened *Shari'a*, which could be seen in section 53 of YAA which provides that it is not allowed to reject an arbitral award unless it contravenes Islamic law. Also, section 55 provides that the court of appeal has jurisdiction to reject an arbitral award, even without a request of any of the parties, if the award is rendered over a dispute which cannot be settled through arbitration mechanism, it is against the Islamic law, or public policy as well. The Yemen courts do not enforce an international arbitration agreement or IAA if it contains any term stipulating a payment as interest as far as the judges adjudicate the commercial disputes based on *Shari'a*.[301] For more understanding of this principle, refer to the case of *Abdul Baqi Abdul Qadir* v *Zayn bint Ahmad Hashim*,[302] the court

[299] Burke, "One Blood and One Destiny," 2.
[300] Unit, Economist Intelligence. "Yemen Country Profile 2015," accessed October 25, 2015, http://reliefweb.int/sites/reliefweb.int/files/resources/acaps_country_profile_yemen_24july2015.pdf.
[301] DOC (Department of Commerce). *Doing Business in Yemen*, 41.
[302] *Abdul Baqi Abdul Qadir* v *Zayn bint Ahmad Hashim*, Commercial Appeal No.2 of 1977.

held that if the award contravened the *Shari'a*, or the public policy of the country, the award would not be enforced. Hence, YAA leaves full discretion to the competent court to determine the validity of the award, if it is contravened to Islamic principles, if it is, then according to section 53 the competent court is more likely to reject it and will not recognize and enforce the arbitral award. Such rejection can take action upon the request of any of the parties as well as the court could do so if it is contravened section 55, but in section 55 the court has the discretion to reject the award without the request of any of the parties. The arbitral tribunal has to know the law of place seat of the arbitration and the place of enforcement of the arbitral award.

Throughout the related articles to *Shari'a* and public policy, Yemen is protected against any IAA that may contravene *Shari'a* principles and public policy of the country. Yemeni courts have a discretion to set aside or refuse to enforce IAA if contravenes the public policy. *Shari'a* is part of the public policy of Yemen as Yemen applies *Shari'a* law. So, Yemeni courts have a discretion to reject the enforcement of IAA if it contravened public policy. Article V (2) (b) of NYC that provides if the award contradicts public policy of the place of enforcement of the arbitral award, the place of enforcement of the arbitral award has a full discretionary power to refuse the recognition and the enforcement based on such exceptional grounds provided by the convention. Therefore, Yemeni legislators have no reasonable justifications to mind the ratification of NYC. As Yemen is protected under V (2) (b) of NYC to refuse the enforcement of IAA if it is contravened the public policy. As Yemen court is one who reject or enforce IAA, then, public policy of Yemen is protected by the Yemeni national law. Yemen court will not enforce IAA if it is against the public policy. This could be seen in section 53 of YAA that provides upon request of any of the parties the arbitral award will be refused if it is violated the *Shari'a* rules or the public policy. Also section 55

of YAA gives the court a full discretion to determine the validity of the arbitral award in order to enforce it or reject it even without the request from any of the parties, especially, in these paragraphs as (a) that provides if arbitrated dispute is not allowed to be settled by arbitration mechanism (b) if the award contravened principles of the *Shari'a* or public policy.

1.10 Outline of the Chapters

This thesis has been divided into six chapters. The first chapter contains an introduction to the study, problem statement, research questions, research objectives, significance of the study, and followed by methodology conducted in this current study as well as limitation of the study, last part is literature review dealing with IAA outside and inside Yemen.

Chapter two discussed the concept of the international arbitration such as the arbitration clause, composition of the arbitral tribunal, arbitral processes and procedures, the arbitral award, the recognition and enforcement of the arbitral award, the used enforcement tools of the arbitral award, the annulment of international arbitral award, and the court intervention.

The third chapter addressed the adequacy of YAA. Especially, the laws of YAA that deal with the enforcement of IAA. In addition, the judicial supervision to enforce IAA in the matter of practicing interim measures of protection that usually take by the Competent Court as a guarantee to enforce the IAA was discussed. The requirements of the application of the enforcement of arbitral award and also the grounds to refuse the enforcement of arbitral award is addressed in this chapter. Additionally, the international provisions that relates to the enforcement of IAA, such as Convention on

the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), UNCITRAL Model Law on International Commercial Arbitration 1985, Convention on the Settlement of Investment Disputes, Arab Convention on Commercial Arbitration, Riyadh Convention for Judicial Cooperation, international laws, and Bilateral Investment Treaties to identify the inadequacies in YAA were discussed.

The fourth chapter addressed tribalism and its relationship with the state as well as its impact on the judiciary, customary law, and formal law, the independence of the judiciary, tribal illegal activities, and analytical and critical arbitral cases, civil cases, and criminal cases.

The fifth chapter addressed the adverse impact of judicial corruption, particularly, impact of bribe, impact of political and military interference on the judiciary and the adverse effect of such interference on the enforcement of IAA, while the fifth chapter discussed the results of the interview survey. The last chapter addressed the concluding remarks of conclusion, recommendations, and opportunities for future studies.

CHAPTER TWO

CONCEPT OF THE ARBITRATION

2.1 Introduction

The parties to the agreement make an arbitral clause to settle their future dispute or raising dispute by arbitration mechanism. Choosing the arbitration system means to settle the dispute beyond the jurisdiction of the court system. However, the jurisdiction of the court system is impossible to be ignored as the court has jurisdiction to set aside or enforce the award.[1] The arbitration system is ineffective without the court's assistance.[2] The court of place in the suit of the arbitration has a jurisdiction to vacate the award while the court where the enforcement is sought has a jurisdiction to set aside the award or recognize and enforce it.[3] The procedures of the court litigation are different from arbitral proceedings.[4] The procedures of the court litigations are heavily circumscribed while the arbitral procedures are large and more participation of tribunals and counsel.[5] Even though, the litigation and the arbitration are different but they have one aim which is to settle disputes through analyses of the facts and applying

[1] Hang Song, *Recognition and Enforcement of Arbitration Awards in International Commercial Arbitration* (1st Ed. 2000), 24.
[2] Henry P. DE Vries, "International Commercial Arbitration: A Contractual Substitute for National Courts," *57 Tul. L. Rev.* 42 (1982-1983), 47.
[3] Christopher R Drahozal, "Enforcing Vacated International Arbitration Awards: An Economic Approach," *American Review of International Arbitration* 11 (2000): 454, accessed February 13, 2016, https://poseidon01.ssrn.com/delivery.php?ID=293089090070115015025065011020094098004008058002025032090123114097083018086081093112122000022099013026035123091084092080126066059076021059086071089012026084109126077047095009095028029089109111066123030109116003085065065126091010096118112096008084024&EXT=pdf.
[4] Stuart Dutson, Andy Moody, and Neil Newing, *International Arbitration: A Practical* Guide (United Kingdom: Global Law and Business, 2012), 11.
[5] Ibid.

the laws to have a binding decision.[6] The rendered arbitral award is final and binding. There are only limited grounds than to challenge the arbitral award.[7] The settlement of the dispute must have a prior arbitral agreement.[8] And the arbitral proceedings are flexible compared with court litigations that has to strictly follow civil procedure rules.[9]

The litigation and arbitration systems are different. There are two fundamental distinctions between litigations and the arbitration.[10] The first one is the jurisdiction.[11] The second one is the enforcement.[12] The jurisdiction level is based on the parties' agreement.[13] Usually the different national companies form arbitral agreement, clarifies the jurisdiction to handle the arising dispute or the disputes may arise in future.[14] For instance, company X and company Z entered into a contract to formalize company in state L. Thus, they will mention in the arbitration clause the place seat of arbitration and the applicable law is ICSID or can stipulate that the France court is the jurisdictional authority to settle any related dispute to the contract. While the enforcement distinction is a part of the arbitral award. This is subject to the cooperation among the states such as bilateral treaties and conventions.[15] Such as New York Convention 1958 that provides the enforcement of the arbitral award in the signatory state.[16] It is only subject to limited grounds to challenge the award.[17] In contrast, the foreign court judgement made outside the regime of the place of enforcement of the

[6] Ibid.
[7] Dutson, *International Arbitration*, 16-17.
[8] Ibid, 12.
[9] Ibid.
[10] Ibid.
[11] Ibid, 13.
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid.

arbitral award is quite complicated.[18] This is because the judgement is not based on the agreement of the disputed parties.[19] As arbitration is concerned in this study, this chapter discussed the concept, proceedings and procedures of the international arbitration system. Therefore, the researcher referred to YAA to understand the loopholes in the Act. Especially, the proceedings and procedures which will probably influence the result of the requirement of IAA.

2.2 The Definition of Arbitration

Arbitration is a process which is mutually or consensually chosen by the parties that submit their disputes or those that may arise to be settled outside the court system by binding and final award.[20] The award is based on neutrality and equal treatment and equal opportunity to the disputed parties to present their cases.[21] Similarly, it is an alternative approach to specific disputes that disputed parties have knowledge of such disputes.[22] The disputes are clearly known to the disputed parties through and arbitration agreement.[23] As well the agreed procedures and processes to conduct the arbitration. The arbitration can be conducted by one arbitrator or more.[24] Also, the arbitral claim can be filed by one claimant or more against one respondent or more.[25]

[18] Ibid.
[19] Ibid.
[20] Gary B. Born, *International Arbitration: Law and Practice* (The Netherlands: Kluwer Law International, 2012), 4.
[21] Ibid.
[22] World Trade Organization, the WTO Dispute Settlement Procedures, Third Edition (United Kingdom: Cambridge University Press, 2001), 25.
[23] Ibid.
[24] Thomas H. Webster and Michael W. Buhler, *Hand Book of ICC Arbitration*, Third Edition (London: Sweet & Maxwell, 2014), 46.
[25] Ibid.

Then, the appointed arbitrator/arbitrators are authorized to render *inter alia*, an interim, partial or final arbitral award.[26] The arbitral terms are more flexible and modern.[27]

2.3 Advantages and Disadvantages of International Arbitration

One of the main advantages of international arbitration is that the disputed parties could settle their dispute by single law over single issue so such advantage prevents the conflict of laws as the parties from different country.[28] It has to refer to YAA which provides the advantage of choosing the law to avoid conflict of laws. Section 7 provides that the parties to the arbitration, if both or parties or one is a non-Yemeni can agree on the applicable law to settle the dispute that arises or may arise. However, the loophole in this section is limited the choice of the law if both or one of the parties is a non-Yemeni. This is against the principle of autonomy in arbitration system. The local parties may prefer to settle their dispute by any other rules or laws than national laws. Thus, if the dispute between local parties is settled by any other rules or laws than Yemeni laws, the debtor party can set aside the arbitral award base on breach of section 7. Moreover, if the foreign party/parties to the arbitration agreement have not stipulated the applicable rules or laws, then section 45 of YAA will be applicable. It provides that the arbitral tribunal has to settle dispute based on the laws agreed by the disputing parties, if the disputing parties did not mention their preferred law, then, the arbitral tribunal has to settle it base on international law and the principles of justice and has to take into consideration the customary laws. The customary laws are not suitable to settle international commercial disputes or even local complicated

[26] Ibid.
[27] Ibid.
[28] Edward Poulton. *Arbitration of M&A Transactions* (United Kingdom: Global Law and Business, 2014), 299-301

commercial disputes. YAA has to be amended regarding to the applicable laws or rules to settle the disputes.

Further, the commercial issues are sensitive so the arbitration keep such information like documents or evidences confidentially.[29] Such confidentiality could be seen in section 38 of YAA that provides that the arbitral tribunal shall hold arbitral hearings to hear the oral pleadings in order to enable each of the parties to present his/her case through arguments and evidences. The hearings shall be confidential. No one is allowed to attend such hearings and pleadings. YAA is in compliance with international standard in the matter of the confidentiality of the arbitration. Furthermore, many national courts are not specialized to deal with mediation and arbitration or commercial disputes.[30] The commercial courts have no adequate experts to handle complex disputes arising from corporate matter or mediation and arbitration.[31] But, through an arbitration agreement, the parties are free to choose the qualified arbitrators to settle their disputes.[32] While in court system choosing of the judges may randomly which the parties are not free to choose the right judge.[33] Even, the judge is expert in the relating field but may not be expert in mediation and arbitration.[34] Therefore, the arbitration system brings an advantage to the justice system. Moreover, the arbitration system provides neutrality to deal with international business as well as avoid biasness in the litigation court.[35] The national court may give a decision in favour of their own national people or state. Also, through arbitration will

[29] Ibid, 433.
[30] Ibid, 300.
[31] Ibid.
[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Poulton. *Arbitration of M&A Transactions*, 301.

avoid the conflict of laws, especially the parties and location of the business are from different nationalities.[36] Hence, settlement of the disputes by the arbitration will avoid the national courts' bias that may give a decision in favour of their own national people or state as well as evade the jurisdiction conflict of the courts. Another feature of arbitration is that the arbitral award is binding and final so there is no appeal to a higher jurisdiction like that in the court.[37]

On the other hand, the arbitration is not always cheap and speedy.[38] The international arbitration is expensive and may be delayed as the parties have to travel and pay the cost of hotel and daily expenses as well as have to pay experts, especially in complex cases.[39] The tribunal in some certain issues may appoint an expert over specific issues and this will increase the cost.[40] While delay could arise because of the postponed of the submission and procedures.[41] Another disadvantage of the arbitration is the corruption in place seat or the enforcement seat. This adversely affect the arbitration system which enforcement of the arbitral award will face difficulties in the corrupt state. Also, the lack of the competent arbitrators in some states will lead the arbitration system to be ineffective.[42] As a result of corruption and incompetency, the neutrality principle and equal treatment of the parties to present their case would not be achieved. Furthermore, the arbitral tribunal will face difficulties in taking evidence, especially if the court's assistance in different country of the place seat of the arbitration.[43] Thus,

[36] Ibid.
[37] Born, *International Arbitration: Law and Practice*, 36.
[38] Ibid.
[39] Ibid.
[40] Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 162.
[41] Born, *International Arbitration: Law and Practice*, 36.
[42] Ibid, 16-17.
[43] Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 168.

the arbitral proceedings will be delayed as the arbitral tribunal has to look for other international instruments such as bilateral treaties and conventions to take the evidence.[44]

2.4 Types of Arbitration

In the past the commerce was limited to the border of each country. Nowadays, it has become global. The global commercial development creates a need to set up an arbitral institution to cope with such changes. The arbitration rules arranged the framework in which the arbitration proceedings are to take place. It is often at the time when the parties draft the agreement they totally mention what type of arbitration may be used to settle their disputes. Usually, they prefer their agreement conduct under institutional rules or under ad hoc arbitration rules. It could differentiate between the two types as follows:

a) Institution Rules:[45] the arbitration is administered and supervised according to the arbitral institution and its own institutional rules of arbitration. The arbitral institutions have their own rules to conduct the parties' dispute, so through their own provision they set out a basic procedural framework and the time to conduct the arbitration, the choice of the arbitrators, adjudicate the challenge of the arbitrators, choose the suitable place seat, review the arbitrator's award, and the like. It should be noted that institutional arbitration does not mean that the parties have to state specific institutions to settle the dispute, rather it only means that they will choose the institutional rules to deal with the arbitration process, administration, and supervision. Thus, the institutional rules are not displaced by

[44] Ibid.
[45] Dutson, *International Arbitration*, 18-20.

any other rules. For instance, the London Court of International Arbitration (LCIA) rules exclude the right to appeal in the matter of a question of law under the English Arbitration Act 1996 and set out a default timetable for written pleadings.

b) *Ad Hoc* Rules:[46] It is arbitration whereby the parties are free to choose an arbitral process, they would like; it is out of control of institution rules, supervision, and administration. It could mean that ad hoc arbitration is conducted according to the rules that are agreed by the parties, these rules are usually published like UNCITRAL or institutional rules, but it is not necessary to choose published rules in ad hoc arbitration.

In the matter of the types of the arbitration to settle the dispute, YAA is silent on such point. It means that the institutional rules or Ad Hoc rules are both applicable in Yemeni arbitration system. However, it should be noted that in some countries like China, ad hoc arbitration is not recognized and so it is better to determine the institutional arbitration.[47] Therefore, the institutional rules are more comfortable than *ad hoc* rules because the latter rules do not perform full function as the institutional rules do or do less administrative services. For instance, the institutional arbitration can address the gaps in case the disputed parties did not agree on appointment of the arbitrators or the rules to conduct the arbitration as long as it has its own rules. Also, institutional arbitration has qualified administration to arrange the arbitration from the beginning to the end. In addition, in institutional arbitration review the final award before sign it which will decrease

46 Dutson, *International Arbitration*, 20.
47 Eu Jin Chua, "The Laws of the People's Republic of China: An Introduction for International Investors," *Chi. J. Int'l L. 7* (2006): 133.

the challenges in the court. Hence, YAA has to clarify the position of the applicability of *ad hoc* rules.

2.5 Arbitration Agreement

Arbitration agreement is a written agreement between the parties to settle all disputes or specific disputes that arises or may arise in future whether such disputes are contractual or not.[48] Such arbitration agreement can be written in a separate agreement or included as a clause of the contract.[49] UNCITRAL stipulates that arbitration agreement to be in writing and signed by both parties.[50] The same provides in article II (1) of NYC that stipulates arbitration agreement to be in writing. So, the signatory states to the convention have to recognize the arbitration agreements that are only in the form of writing. However, UNCITRAL failed to clarify the effect of non-compliance with provided requirements in article 7.[51] The opponent party can only oppose the submission of the arbitral dispute to the tribunal prior to the proceeding based on article 16 (2).[52] But, after continued in the arbitral proceedings, the opponent party will be considered as waived of his/her rights according to article 4.[53]

UNCITRAL gives characteristic that the agreement can be in form of telecommunication such as telegram, telex or exchange of letters between the parties.[54] It is common for business negotiations and transactions to be contracted through internet.[55] The parties can communicate in seconds through electronic message.

[48] UNCITRAL Model Law on International Commercial Arbitration 1985, articles 7 (1).
[49] Ibid.
[50] Ibid, paragraph (2).
[51] Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdiction*, 61.
[52] Ibid.
[53] Ibid.
[54] Ibid, 59.
[55] Ibid, 50.

Therefore, after the arbitration agreement is concluded the parties have to refer to the arbitral tribunal to settle their disputes. If one of the parties refers to the court, the opponent party could challenge the application before the court. Then, the court will refer the parties to the tribunal.

As Yemen is addressed in this study, it should understand the arbitration agreement requirements. In section 15 of YAA provides that the arbitration agreement is null and void if it is not written and the scope of the dispute that arise or may arise in future has to be contained in a written agreement. The arbitration agreement can be an arbitration document, telegrams, letters or other modern means of communication of a documentary nature. This means the parties who prefer to settle their dispute should make such arbitration clause in writing. Thus, any oral arbitration agreement will not be authority for the party who is willing to settle the dispute by arbitration mechanism. In addition, The YAA gives the parties a freedom to communicate to conclude such arbitration agreement whatever by electronic message, or any communication of a documentary nature. YAA is flexible in the matter of giving the parties the freedom to communicate and form the arbitration agreement by electronic message as often the parties are located in different states. So, such communication by electronic approach gives YAA a good feature. Moreover, the arbitration agreement can be a part of the contract as included paragraph in the contract or can be in an independent contract which the arbitration clause must be written according to section 16 of the Act.

2.6 The Scope of Arbitration Clauses

The disputed parties to arbitration agreement are the only ones that can choose which dispute to be arbitrated.[56] It is not a matter that dispute to be settled by institutional rules or Ad Hoc rules.[57] They can stipulate exceptions to apply certain procedures to some related disputes to the agreement.[58] The scope of arbitration agreement is depends on the arbitration clauses.[59] Mostly the arbitration clauses are written in broad clauses.[60] For example, all the arising disputes in connection with this contract shall be settled by the arbitration system.[61] This type of broad clause are written in order to avoid the litigation of the court[62] so the tribunal will have jurisdiction over all disputes of the agreement in relating to the existence, validity, breach, or termination.[63] On the other hand, sometimes the disputed parties prefer to exclude some disputes of the arbitration such as the payment obligations or insurance.[64]

YAA, in section 15 provides that the agreement shall be null and void if the dispute is not specified in the arbitration agreement. Also, section 28 provides the arbitral tribunal shall only arbitrate the dispute that is within its jurisdiction. If the arbitral tribunal exceeded its jurisdiction, then any of disputed parties can appeal to the Court of Appeal. Similarity, the Act is very clear to deal with exceeding of jurisdiction which gives the resisting party of the enforcement the right to set aside the arbitral award if the arbitral tribunal arbitrated a disputes that not agreed by the disputed parties.

[56] Edward Poulton, *Arbitration of M&A Transaction*, 289.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Born, *International Arbitration: Law and Practice*, 36.
[61] Ibid.
[62] Poulton, *Arbitration of M&A Transaction,* 290.
[63] Born, *International Arbitration: Law and Practice,* 36.
[64] Ibid.

It means that YAA limited the arbitral tribunal jurisdiction. It has jurisdiction to arbitrate the dispute that is agreed by the parties to settle by arbitration mechanism. Therefore, the resisting party of the enforcement can set aside the arbitral award. However, there is loophole in YAA which is silent if the arbitral tribunal arbitrated a dispute but exceeded its authority by arbitrate non-agreed dispute alongside. What is the authority in such position? Will the court reject to enforce the whole arbitral award? Will the court enforce partly arbitral award which it will enforce the agreed dispute to be settled by arbitration and reject the non-agreed dispute by the parties? Hence, YAA must be amended to add section regarding this gap.

Moreover, there are unilateral clauses which only bind one of the disputed parties to refer to arbitration while another party has the right to choose whether the arbitration system or the court system. This arbitration clause is in favour of the party that gives the choice to have any of the two systems. However, some national courts reject such unilateral clauses because they consider them as unfair contracts. In case of *LLC Sony Ericson Mobile Communications RUS* v *CJSC Russkaya Telefonnaya Kompaniya*,[65] the Russian Supreme Arbitrazh Court held the unilateral clause leads to unfair rights of the parties so it invalidated the clause. While other national laws recognize the unilateral clauses like English law as long as the parties are free to choose the conditions of the agreements.[66] Thus, the parties to the contract have to previously check the law of the place seat as well as the enforcement seat.

[65] *LLC Sony Ericson Mobile Communications RUS* v *CJSC Russkaya Telefonnaya Kompaniya*, Case No BAC 1831/12, June 19 2012.
[66] Poulton, *Arbitration of M&A Transaction*, 291.

2.7 Composition of Arbitral Tribunal and Appointment of the Arbitrators

It is usually preferable that the complex disputes have to be conducted by three arbitrators.[67] Each of the parties appoint one arbitrator and the two nominated arbitrators appoint the third arbitrator.[68] While less important disputes are better conducted by only one arbitrator.[69] However, the sole arbitrator is not a good approach to settle disputes. As multiple arbitrators can reach procedure and award consensually.[70] But, a sole arbitrator' award maybe wrong or right while consensually award is closer to being right.[71] Also, the arbitral processes are subject to the sole arbitrator so in case of resignation of death of that arbitrator, the processes will stop.[72] Article 10 (1) of UNCITRAL provides that the choice of the number of the arbitrators is subject to the freedom of the parties (2) in case the parties failed to mention that, the number of the arbitrators to constitute the tribunal must be three. This means that the parties are free to constitute the number of the tribunal whatever a sole arbitrator or three, but if the parties failed to stipulate that in the arbitration agreement or disagree on the number of the arbitrators, then the court will appoint the arbitrators based on its discretion. It is preferable to have three arbitrators if the difference is complex or the dispute is expensive value. But, if it is minor difference is better to have a sole arbitrator to avoid cost.

It is important to refer to the appointment jurisdiction of the arbitrator or arbitrators under YAA. This could be seen in section 21 provides that the parties to arbitration can agree on the number of arbitrators, and if they do not agree, the number of

[67] Phillips Capper, *International Arbitration: A Handbook*, 3rd ed (London: Bodmin, Cornwall, 2014), 36.
[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Ibid.

arbitrators shall be three. In addition, section 22 subject to the provisions of this law, the parties to arbitration shall have the right to agree on the time of choosing the arbitrator or the arbitral tribunal and how to appoint the arbitrator or arbitrators. In case of disagreement, the following shall be followed:

a. If the arbitral tribunal is to be formed by an individual arbitrator, the competent court shall appoint him at the request of one of the parties after hearing and what may be justified objection by either party of the appointed arbitrator.
b. If the arbitral tribunal has to be composed of two arbitrators, each party shall appoint an arbitrator.
c. If the arbitral tribunal is to be formed by more than two arbitrators, each party shall appoint an arbitrator. Then, the two arbitrators shall agree with the third arbitrator. In case the arbitrators do not agree on the third arbitrator within the period of 30 days following the appointment of the latter, the competent court shall appoint him at the request of one of the parties. The arbitral tribunal shall be presided over by the arbitrator appointed by the two arbitrators or by the competent court.

It should be noted that YAA applies principle of the parties' autonomy in the matter of appointment of the arbitrator/arbitrators. Thus, the parties are free to agree on the number of the arbitral tribunal whatever to be one or three. However, if they disagreed on the composition of the arbitral tribunal, then the court will interfere to constitute the arbitral tribunal based on the parties' agreed terms. If there is no term regarding the number of the arbitral tribunal then shall be three, while if there is prior agreed term but the parties failed to constitute it, then each party has to appoint one and the third who will preside the tribunal can be appointed by the two appointed arbitrators,

otherwise by the court. Hence, in the matter of the composition of the arbitral tribunal, YAA complies with international standards.

2.8 Conduct the Arbitral Proceedings

The efficient conduct of the dispute goes through various processes and procedures from the beginning of the filing the case to the end of the rendered arbitral award as follows:

2.8.1 The Parties' Autonomy

The disputing parties are free to choose the procedures and the rules to settle their own disputes according to article 19 of UNCITRAL, also they are free to choose the place seat of the arbitration according to article 20 as well as the commencement of the arbitration that provides in article 21 and the language to conduct the arbitration based on article 22. However, there are limitations that must be followed by the tribunal such as the principle of the equality in dealing with the all parties to present their cases. Article 18 provides that the tribunal shall deal with all parties equally and give the opportunity to each to present his/her case. Hence, no party shall be given benefits more than the other. They shall all be given enough time to present their cases in equal trial. While the language to conduct the arbitration, according to article 18 (1) provides that the parties are free to agree on that, but if they failed to agree on certain language, then the tribunal has jurisdiction to determine the language or languages. (2) The tribunal has power to order any of the disputed parties to translate the documentary evidences to the agreed language by the parties or the determined language or languages by the tribunal.

As Yemen is addressed in this study, it has to refer to YAA to understand the parties' autonomy. It can be seen in section 7 of the Act which provides that the disputed parties can agree the law, language and place of arbitration. Also, section 32 provides that the parties to the arbitration shall have the right to agree on the procedures to be followed by the arbitral tribunal. If there is no agreement on such procedures, the arbitral tribunal can follow whatever procedures it deems appropriate. Thus, in the matter of parties' autonomy to choose the applicable law, language, and place to conduct the arbitration is similar with standard of international arbitration. YAA gives the parties a freedom to settle the parties in the manner that is suitable. Particularly, the applicable rules, the language, and the place seat of the arbitration. They have such rights, but if there is no such agreement to arrange that procedures, then the arbitral tribunal will decide base on its discretion. However, the parties' autonomy is not that means the disputed parties can agree on the terms even that breach the natural justice and/or the public policy. So, YAA must provide exceptions or limitations to such principle. While the equally treatment of the parties by the arbitral tribunal is fundamental requirement of justice so if the arbitral tribunal did not do so, then resisting party of the enforcement can set aside the arbitral award based on breach of natural justice according to section 33 of the Act.

2.8.2 Commencing the Arbitration

Prior to commencing the arbitration there shall be pre-arbitral moves whereas the parties agreed. Such pre-arbitral moves like arbitration agreement. The processes of the arbitral application as follows:

1. The applicant to the arbitration shall submit the request of the arbitration to the secretariat, and have to post the notice to the respondent of the receipt, request, and the receipt's date.
2. The respondent shall reply to the request within 30 days of the receipt.
3. After the constitution of the tribunal, the chairperson of the arbitral tribunal will call the disputed parties and other arbitrators to start the preliminary hearing. Then, the disputing parties will start to clarify their own defense. This means the arbitration time will start when the claimant serve a notice on the respondent.[73] Such notice has to include the parties' address, the arbitration clause, the contract, the dispute, the number of the arbitrators, the claim, claiming remedy, and so on.[74]

It is necessary to refer to YAA to understand the proceedings for commencing the arbitration, section 34 provides that arbitration proceedings shall commence from the day on which one of the parties receives a request or notice of arbitration from the other party. Also, section 35 provides that the respondent shall send a response of a written statement to the claimant and each member of the arbitration committee, within the agreed period by the parties or time specified by the arbitral tribunal. There is a loophole in section 35 which left the period of the response claim to the parties' agreed term or the arbitral tribunal. Often, such period specifically mention in the national arbitration laws. It can note that in article 4 (1) of UNCITRAL that provides the period that the respondent has to reply on the notice of arbitration is 30 days. Therefore,

[73] Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 135-136.
[74] Ibid.

section 35 has to be amended to specify the response period to the notice of arbitration which is 30 days.

2.8.3 Hearing and Written Proceedings

After the submission of the documentations and attendance, the tribunal will decide whether to conduct the trial by oral hearing or by documentary evidences and other materials.[75] This is subject to any other contrary agreements by the disputed parties.[76] Thus, the tribunal has no discretion if the disputing parties agree to conduct oral trial. The disputing parties are free to choose the procedures to conduct the trial based on the party-autonomy principle according to article 19 (1). The same applies if the disputing parties agree not to have oral trial, then the arbitral tribunal shall not conduct the trial orally. All documentary evidences submitted by any party shall be given to another party.[77] As well, all the evidences supplied to the arbitral tribunal by the experts have to be served on the disputed parties.[78]

It is important to refer to YAA to understand whether the hearing can be agreed by the parties to be conducted orally. Section 32 provides that the parties to the arbitration shall have the right to agree on the procedures to be followed by the arbitral tribunal. It noted that this section is general which gives the disputed parties the right to agree on the terms they prefer. However, the section 35 limited the parties' autonomy to agree on the terms they want. It provides that the claimant shall send a written of the alleging statement claim to the respondent and to each member of the arbitral tribunal. Similarly, section 36 provides that the respondent shall send a written of the response

[75] UNCITRAL Model Law on International Commercial Arbitration 1985, article 24 (1).
[76] Ibid.
[77] Ibid, article 24 (1), Par (3).
[78] Ibid.

claim to the claimant and to each member of the arbitral tribunal. On the other hand, section 38 provides that the arbitral tribunal shall hold hearings to hear the oral arguments in order to enable each of the parties to explain the subject of the case and to submit arguments and evidence. Throughout these sections, it can see that YAA unambiguous in the matter of the parties' autonomy to agree on the term to settle their disputes by oral trial only. For instance, section 32 gives them the right to conduct the arbitration proceedings orally, while section 35 and 36 stipulate documentary submission. Hence, YAA shall specifically state the parties' autonomy to agree on the trial of the parties' arguments to conduct by documentary manner or orally manner as they seem fit.

2.8.4 Default of a Party

According to article 25, the parties are obligated to communicate claiming statement and defence as well, unless agreed on the contrary as follows:

a) The claimant has to conduct his/her statement of claim that provided in article 23 (1), if he/she failed to do then the tribunal can terminate the proceedings.

b) The respondent has to conduct his defence that provided in article 23 (1), if he/she failed to do then the tribunal has to proceed with proceeding and must not consider the non-communication of the defence as agreed on the claimant's allegation.

c) The tribunal has jurisdiction to make award based on the evidences before it so if any of the disputed parties failed to present his/her case or evidence has to bear the consequences of the award.

There is need to distinguish between the statement of claim and request of arbitration. The request of arbitration is only the preliminary step to arbitration based on article 21, while the statement of claim is mentioned in article 23 (1) and has to be submitted on time according to the period agreed by the disputing parties or that determined by the arbitral tribunal.[79] Therefore, UNCITRAL stipulated that the claimant has to communicate his/her statement of claim, if he/she failed to communicate that then the tribunal will terminate the arbitral application immediately. After the claimant submitted his/her statement of claim, the respondent has to submit his/her statement of defence based on the claimant's allegation. Otherwise, if the respondent failed to communicate his/her statement of defence the tribunal will continue the trial and will render the arbitral award based on the evidentiary documents before it. The tribunal will not consider the respondent's failure to submit his/her statement of defence and agreed on the claimant's allegation.

It is necessary to address YAA to understand its compliance with international arbitration system. Section 41 of the Act provides that if the claimant fails to submit his statement of claim, the arbitral tribunal shall terminate all arbitral proceedings and shall have the right to demand payment of all expenses arising from the commencement and termination of the proceedings. If the respondent fails to submit his/her response statement, the arbitral tribunal shall continue the proceedings. But, the failure of the respondent shall not be considered as acceptance of the statement of claim. If a party fails to attend trial/hearing or fails to submit the evidence required of it, the arbitral tribunal may continue the proceedings and issue its award in the dispute on the basis of the evidence before it. It could be seen in the matter of default of the

[79] Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 156.

party, YAA complies with international standard of arbitration system. As section 41 is same as section 25 of UNCITRAL that both systems provide the same position.

2.8.5 The Appointment of Expert

According to article 26 provides that the tribunal has jurisdiction to appoint an expert unless contrary agreed by the disputed parties. (1) An expert can be appointed by the tribunal to give his opinion that will be considered by the tribunal. (2) Any of the disputed parties can request from the tribunal to appoint an expert to have his/her opinion over specific issue. There is need to distinguish between an expert witness that requested by any of the disputed parties and an expert that appointed by the arbitral tribunal.[80] The witness expert is only called by one of the disputed parties to support his/her allegation or argue with the arbitral tribunal or another party.[81] The appointment of the expert is subject to the prior agreement of the disputing parties.[82] The parties' autonomy could prevent the appointment, if the disputing parties do not wish to appoint the expert.[83] However, the parties' autonomy of non-appointment of expert has to be prior to constituting the arbitral tribunal.[84] The tribunal has to resign if has no ability to handle the dispute without an expert.[85] Thus, the tribunal can choose to follow the parties' wish not to appoint an expert or to resign.[86]

The disputing parties have to cooperate with the expert if he/she requests any goods, documents, evidences to investigate.[87] They are not allowed to refuse to submit any

[80] Ibid, 161.
[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Ibid, 161-162.
[85] Ibid, 162.
[86] Ibid.
[87] Ibid, 164.

material for investigation as long as the order is issued by the arbitral tribunal.[88] If any of the parties refused to cooperate with the expert, then the tribunal will continue the trial and will render the arbitral award based on the evidentiary documents before it according to article 25 (c) of UNCITRAL.[89] According of article 26 (2) the expert has to submit his/her report in writing or orally.[90] Then, the disputing parties can testify through asking questions to the expert by their own witness expert.[91] However, article 27 of the UNCITRAL Arbitration Rules which stipulates a written report has to be submitted by the expert.[92] It shall be noted there is loophole in UNCITRAL which failed to provide the right of the disputing parties to challenge the arbitral tribunal' appointment of the expert.[93] So, the disputed parties has no power to challenge the appointment of the expert even if they discovered his/her bias.[94]

There are some loopholes in YAA. Based on section 42 provides that the arbitral tribunal can appoint one or more experts to submit a written or oral report on the issues it considers being relevant to the subject of the dispute. The parties to the dispute shall provide the necessary assistance to enable the expert or experts to complete the task in the best manner. The arbitral tribunal shall send copies of the report to both Parties and the arbitral tribunal. The arbitral tribunal has jurisdiction to decide to hold a hearing to hear the expert's opinion and to allow the parties to hear, discuss and respond to it. Either party may use an expert or experts as witnesses in such a case, unless otherwise agreed.

[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Ibid.

Indeed, there are loopholes in the relevant section of the appointment of expert. Firstly, it gives the parties a jurisdiction to appoint witness expert without the tribunal consent. Secondly, the expert can submit a written or oral report on the issues while it is stronger to submit a written report as UNCITRAL provides a written report only. Thirdly, whether the parties' autonomy can agree on the exclusion of appointment of the expert? Thus, YAA has to be amended on the matter of the appointment of the expert and witness expert.

2.8.6 The Court Assistance in Taking Evidence

Based on article 27 of UNCITRAL provides that if the arbitral tribunal of any of the disputed parties want to take evidence, they can request the court of this state assistance. Then, the request can be executed with the court's competency and based on evidence rules. Based on the suggestion of the Working Group that there are two approaches of the court's assistance.[95] First one is that the court will only assist the arbitral tribunal through compulsion which enable the arbitral tribunal to take the evidence.[96] The second assistance is the court to take the evidence by itself.[97] But, the combination approach of the two is that the court will determine whether to only enable the arbitral tribunal to take the evidence or the court itself will take the evidence.[98] It depends on the surrounding circumstances of each case.[99] While the request of the parties to have the court' assistance is subject to the court' approval.[100] The approval condition in order to prevent the abuse of the court' assistance.[101] The request for court

[95] Ibid, 166.
[96] Ibid.
[97] Ibid.
[98] Ibid.
[99] Ibid.
[100] Ibid.
[101] Ibid.

assistance has to provide the address and name of the parties, witnesses, and so on.[102] However, the court's assistance is difficult if the court in different country of the place seat of the arbitration.[103] Thus, the court' assistance in such situation will depend on the international cooperation among the states such as bilateral treaties and conventions.[104]

The national court is the main factor to make the international arbitration powerful, the international arbitration cannot succeed without the interference support of national court.[105] The arbitral tribunal is stronger by the court's support as they do two main tasks: assistance and control.[106] For assistance, the national courts do multiple functions such as grant seeking interim measures of protection, appointment of arbitrators, calling for expert or witnesses, taking evidence, and the like proceedings that may out of the arbitration tribunal capacity, while in the matter of controlling the national courts do refuse the application of any of the disputed parties if the agreement contained arbitral condition and this upon the request of the other party, appointment of the arbitrators and revocation or replacement as well.[107]

As Yemen is addressed in this study, it must allude to section 31 of YAA that gives the tribunal a jurisdiction to require security of any of the parties to guarantee the compliance with tribunal awards. But, sometimes, the disputed parties resist the tribunal awards so as it does not have power to force any of the parties. It has to request assistance from the court. This could be seen in section 43 provides that the arbitral

[102] Ibid.
[103] Ibid, 168
[104] Ibid.
[105] Henry P. De vries, "International Commercial Arbitration: A Contractual Substitute for National Courts," *Tul. L. Rev*. 57 (1982): 47.
[106] Ibid.
[107] Ibid.

tribunal or any of the parties can request assistance from the competent court to obtain evidence as well as a request to take interim measures of protection as it deems fit and it can request the competent court to adjudicate matters relating to the dispute beyond its powers, Without this being a reason for the discontinuation of arbitral proceedings. But, which of the two authorities has the jurisdiction to allow such awards? In fact, the court could give an interim measures but in case the tribunal allowed an interim measures before the court does so, at that point the court has to perform the arbitral tribunal awards. On the other hand, section 43 gives the court a jurisdiction to grant interim measures during the arbitral proceedings, this implies none of the two authorities has more power over another. In the researcher' supposition, the tribunal is gathered to as it were have the authority to allow interim measures as it is more known of arbitral issues more than the court. Hence, this will lead to conflict of jurisdiction which YAA has to clarify the ambiguity as well as the application for interim measures of protection as the court will makes the arbitral processes longer. It is better to authorize the arbitral tribunal firstly, if the arbitral tribunal refused to grant interim measures of protections then the resist party can refer to the court. However, referring to the court will impede the arbitral processes and procedures. For more questions, the position of interim measures of protection in YAA is deeply discussed in chapter three through an interview.

2.9 The Arbitral Award

After the hearing of disputed parties the tribunal renders the arbitral award which is final and binding.[108] The award is not subject to negotiation by the disputed parties to

[108] Dutson, *International Arbitration,* 201.

accept it or refuse.[109] The award is final and binding, it is only subject to specific grounds which the debtor party can set aside it if proved any of them.[110] After the award is rendered, the creditor party can expect three things from the debtor party.[111] The first thing, the debtor party complies with the award voluntarily. Secondly, the debtor party ignores the award but does not take resisting action. Thirdly, the debtor party resists the award and strives hard to frustrate the recognition and enforcement. Such award cannot appeal to the tribunal. In case the debtor party refuses to enforce it for any reason must challenge that before the court of the host state or the court of the place of enforcement of the arbitral award.[112] The arbitral award maybe set aside if did not comply with specific requirements provided by the law of the host state.[113] Also, the enforcement of the arbitral award must be subject to the laws of the place of enforcement of the arbitral award.[114]

2.10 The Recognition and Enforcement

The main objective of NYC is to recognize and enforce the arbitral award which it requires the signatory-state to deal with the award as binding and enforce based on the law of the territory when the award is relied upon.[115] . Most of the arbitral awards are implemented voluntarily by the debtor party.[116] However, the arbitral award is only a half of the journey in case the debtor party refuses to enforce the award.[117] The enforcement is subject to limited grounds that may lead to set aside the award.[118] For

[109] Born, *International Arbitration: Law and Practice*, 5.
[110] Ibid.
[111] Capper, *International Arbitration*, 121.
[112] Dutson, *International Arbitration*, 201.
[113] Ibid.
[114] Ibid, 204.
[115] New York Convention 1958, article III.
[116] Ibid, 202-203.
[117] Ibid.
[118] New York Convention 1958, article V.

questions, there are bilateral treaties that stipulate on the enforcement of the arbitral awards.[119]

The issuing of the arbitral award is the first step to the enforcement. The creditor party will refer to the the place of enforcement of the arbitral award require it to recognize and enforce the award.[120] The creditor party has to follow the mechanism of enforcement in the court in order to effect the award that has been rendered by the tribunal.[121] The place of enforcement of the arbitral award will firstly determine the recognition of the validity and the binding of the award, then will take the coercive proceedings to the enforcement.[122]

2.11 The Enforcement Tools

The enforcement mechanism is different from one state to another. The common practical mechanism is to seize the debtor party's assets.[123] The place of enforcement of the arbitral award can assist the creditor party if the debtor party has assets within its jurisdiction. Thus, it is preferable that the creditor party investigates the following:[124]

1. In which state the debtor party's assets are located and the easier state to enforce the award as well.
2. Whether the place of enforcement of the arbitral award is signatory-state to NYC, this is a necessary requirement. He/she has to mind any reciprocity reservation or public policy.In case the place of enforcement of the arbitral award is not

[119] Paolo Contini, "International Commercial Arbitration: the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards," *The American Journal of Comparative Law, Vol. 8, No. 3* (1959): 286.
[120] Capper, *International Arbitration*, 121.
[121] Dutson, *International Arbitration*, 206.
[122] Capper, *International Arbitration*, 122.
[123] Ibid.
[124] Ibid, 123.

signatory-state to NYC, whether there are other conventions or bilateral treaties that may assist the enforcement.

3. If there are no conventions or bilateral treaties, it has to see the laws of the place of enforcement of the arbitral award in the matter of enforcement of the foreign award.

After investigation of easier state to enforce the arbitral award, the creditor party shall apply an application for recognition and enforcement based the procedures of the state where the enforcement is sought. Then, such application will be served on the debtor party in case he/she has a defence to set aside the award. The recognition and enforcement may made based on the following:[125]

1- The provisions of New York Convention, he/she must follow the requirements in paragraph (1) and (2) of article IV as following:

a) The original award must be authenticated or certified copy

b) In case the award is written in a language other than the official language of the place of enforcement of the arbitral award, the applicant must translate such documents.

2- The provisions of bilateral treaties or other conventions other than New York

3- File an action claiming the obligation of rendered arbitral award

4- Any mechanism of the recognition and enforcement that are effective at the place of enforcement of the arbitral award.

It has to be noted that usually the interim measures of protection are taken in advance to guarantee the enforcement of the arbitral award where the applicant of such interim

[125] Ibid, 130.

measures proves the merit of the case in his/her favour.[126] Such power to grant the interim measures of protection through the jurisdiction of the tribunal or the arbitration agreement.[127] Thus, the applicant of interim measures of protection has to prove that the arbitral award is less likely to be enforced in the place of enforcement of the arbitral award if the debtor party does not comply with the award.[128] It has to refer to ICC case 10021, the claimant applied to the tribunal to attach the respondents' assets. The tribunal indirectly accepted the application by preventing the respondents from disposing the disputed assets.[129]

2.12 Annulment of the international arbitral award

Most arbitration statutes deal with IAA as presumptively valid as far as the requirements for recognition are existed.[130] IAA shall be recognized by the court unless the court finds any of the provide exception in NYC.[131] The arbitral award may not set aside by the court on the ground only a mistake of law or mistake of fact.[132] After establishing the requirements by the creditor under article IV of NYC, then the creditor party has established prima facie to recognize the award.[133] Therefore, the debtor party bears the burden to fail the recognition and enforcement by proving any of the grounds under article V of the convention (as discussed in chapter three).[134] However, if the debtor party fails to raise jurisdictional challenge during the arbitral process, generally cannot later challenge the opposition in order to set aside the

[126] Ali Yesilirmak, *Provisional Measures in International Commercial* Arbitration (Kluwer Law International, 2005), 277.
[127] Ibid.
[128] Ali Yesilirmak, "Interim and Conservatory Measures in ICC Arbitral Practice," *ICC International Court of Arbitration Bulletin 3*. 11 no. 1 (2000): 33.
[129] ICC Interim Conservatory Award 10021 of 1999 (unpublished).
[130] Born, *International Arbitration*, 379.
[131] Ibid.
[132] Ibid, 383.
[133] Ibid, 376-377.
[134] Ibid, 377.

recognition and enforcement.[135] On the other hand, any practice of misconduct or fraud by the arbitrator will lead to refusal of the recognition and enforcement of the award.[136] Hence, as far as arbitrator's misconduct or fraud will adversely affect the enforcement of IAA, it is more likely lack of impartiality and independence in the judiciary will adversely affect the enforcement of the award.

The NYC does have grounds to annul the IAA, such grounds are limited to the court' discretion.[137] Most national arbitration laws provide such grounds for annulment.[138] The court of seat of the arbitration is generally deal with challenging the award.[139] Even though, the arbitral award is binding, the debtor party still have chance to set aside it if could prove any of the grounds that mentioned in article V of NYC as follows:

1. Incapacity or invalidity
2. Improper notice or inability to present case
3. Award goes beyond the scope of the submission to arbitration
4. Improper procedure or tribunal composition
5. Award is not yet binding or has been set aside or suspended
6. Matter that cannot be settled by arbitration
7. Award is contrary public policy.

However, debtor party does not have to prove some grounds to set aside the award whereas the court has the authority to raise its discretion, such grounds like that the

[135] Ibid, 37, 86.
[136] Ibid, 397.
[137] Ibid, 311.
[138] Ibid.
[139] Capper, *International Arbitration*, 210.

dispute is not suitable to be settled under arbitration, the arbitral award is in conflict with public policy, commercial, or reciprocity reservation.[140] There is no express grounds provided by the NYC to annul IAA in the place of suit. The provided grounds in article V of the convention is only to deal with annulment of the IAA in the state where the enforcement is sought. The provided grounds in article V do not apply to IAA in the place of suit or local arbitral award. However, article V (1) (e) of the convention provides that the court of the place seat has jurisdiction to vacate the award based on the national law, so the convention did not deprive the national court of the place seat of its supervisory authority over IAA.[141]

2.13 The Court Intervention

As far as our study is more concerned about the enforcement of the IAA, the researcher has to highlights the court intervention that usually come into the picture when the creditor party looking for the recognition and the enforcement while the debtor party makes effort to set aside the arbitral award.[142] The domestic law of the place seat has jurisdiction to set aside the arbitral award and the intervention authorities as well while the domestic law of the place of enforcement of the arbitral award has jurisdiction to refuse to enforce the award.[143] Especially, after the award is rendered by the tribunal that passes it through two stages as follows:

[140] Ibid, 132-133.
[141] Born, *International Arbitration*, 312.
[142] William W, Park, "National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration," *Tulane Law Review 63* (1989): 655.
[143] Ibid.

2.13.1 The Supervision by the Court of the Place Seat of the Arbitration

The court of the place seat of the arbitration has jurisdiction to supervise the arbitration award which could even have the right to vacate the arbitral award.[144] The competent court of the place seat is only has such jurisdiction to supervise the proceedings and procedures while the place of enforcement of the arbitral award could only refuse the recognition and the enforcement.[145] as commonly known that the most important of the arbitration mechanism is that the enforcement of the arbitral award so that any of the disputing parties or the tribunal may require some securities as a guarantee to enforce the arbitral award, but has no authority to compel any of the parties to implement its awards so that it has to ask the control and assistance of the competent court of the place of enforcement of the arbitral award. Furthermore, the competent court of the place seat also could provide control and assistance within its sovereignty, such as securities, seizure of assets to implement the arbitration agreement and the arbitral process.[146] Such jurisdiction to take interim measures of protection is not provided by NYC which only provided in article 17[147] of UNCITRAL which provides that the arbitral tribunal has a jurisdiction to order any of the disputed parties to provide securities to ensure the compliance with the subject matter of the arbitration, such request of securities may be required upon the request of any of the disputed parties. However, UNCITRAL is not compulsory rules, it is only used as a guideline to improve the national arbitration laws.

[144] Julian DM Lew QC, "Does National Court Involvement Undermine the International Arbitration Process?" *Am. U. Int'l L. Rev*. 24 (January 2009): 510, accessed February 2, 2016, https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&srctype=smi&srcid=3B15&doctype=cite&docid=24+Am.+U.+Int%27l+L.+Rev.+489&key=7455bbae2c5c2844aa13d9846ab13111.
[145] Ibid.
[146] Park, National Law and Commercial Justice, 657.
[147] UNCITRAL Model Law on International Commercial Arbitration 1985, article 17.

Generally, the competent court of the place seat would consider the debtor party's application of challenging the arbitral award if the arbitral tribunal exceeded its authority or improperly applied the procedures and processes.[148] Whereas, the national arbitration law of each state which most national arbitration laws based on UNCITRAL clarifies the grounds that the court could set aside the arbitral award and the national arbitration law may has more grounds than that stated under UNCITRAL, but UNCITRAL does not encourage the interference with tribunal processes unless provided by this law.[149] For example, article 53 (g) of YAA contains the ground of principles of the *Shari'a* which the arbitral award is more likely to be vacated if it contravened the principles of the *Shari'a*. Such vacation is clearly provided in article V (1) (e)[150] which gives the court of the place seat a jurisdiction to vacate or pending the arbitral award.

However, the NYC stated the grounds to refuse the recognition and the enforcement of the foreign award, but failed to mention the grounds which the national court of the place seat could vacate the award based on. Hence, it leaves a full jurisdiction to the court to consider the award whether it is valid or void, this is a lacuna which the court is perhaps bias to its nationals and might accept the interference of external influences such as political interference, corruption, tribalism, local protectionism, and so on. But, if there are specific exceptions of setting aside the award provided by NYC or other conventions, then the court of the place seat will be restricted from getting out of the course of justice.

[148] William W. Park, "Duty and Discretion in International Arbitration," *The American Journal of International Law*, Vol. 93, No. 4 (October 1999): 816-817.
[149] UNCITRAL Model Law on International Commercial Arbitration 1985, article 5.
[150] New York Convention 1958, article V (1) (e).

Most of the national arbitration laws consider the court supervision as mandatory which the disputed parties has no authority to exclude or limit the jurisdiction of the court to supervise the arbitration and might vacate the award which argues that without review, the award will adversely affect the place of enforcement of the arbitral award in case of implementation of the arbitral award.[151] However, some states like Switzerland allows the disputing parties to limit or exclude the court supervision of setting aside the award while the United States allows the parties to agree on the limitation of the court supervision as well as could agree on stricter court supervision.[152] Moreover, in case the debtor party applied to vacate the award at the competent court of the place seat and the request is rejected, such rejection does not mean that the award shall be enforced by the state where the enforcement is sought, the place of enforcement of the arbitral award has a jurisdiction to determine the validity of the arbitral award.[153] In addition, the most disputed parties disagree on that the place seat must has jurisdiction to review the arbitration award while the most agree on that the place of enforcement of the arbitral award shall have jurisdiction to review the award.[154] To be more understanding must refer the case of *Northrop Corp* v *Triad International Marketing*.[155] The judicial review of the award led to reject the enforcement because bargain of selling army weapons to Saudi Arabia infringed the public policy of California Law and America as a whole.

[151] William, "Duty and Discretion in International Arbitration," 818.
[152] Drahozal, "Enforcing Vacated International Arbitration Awards," 451.
[153] William, "Duty and Discretion in International Arbitration," 816.
[154] William, "National Law and Commercial Justice," 655.
[155] *Northrop Corp* v *Triad International Marketing Northrop*, 811 F.2d at 1269.

2.13.2 The Supervision of the the Place of Enforcement of the Arbitral Award

Based on thumb' rule, the place of enforcement of the arbitral award has to respect the rendered decision by the court of the place seat.[156] However, in some circumstances the place of enforcement of the arbitral award shall not follow the decision of the court of the place seat.[157] As commonly known that each state has its own culture, legal system, religion and the like, so that what could be seen as lawful in one state may be seen as unlawful in another state.[158] This is the same that the grounds to vacate the arbitral award are not the same grounds to reject the arbitral awards. Thus, the court of the place seat may vacate the arbitral award based on its discretion and the domestic law, nonetheless, the same arbitral award is perhaps enforced in the place of enforcement of the arbitral award. Such authority of the place of enforcement of the arbitral award is based on article V (1) (e)[159] that provides the arbitral award may be rejected if the court of the place seat set aside the award, whereas the word may that mentioned in the article does not mean the award shall or must be refused. It leaves the court of the place of enforcement of the arbitral award to decide whether the recognition and the enforcement comply with NYC and the domestic law of the place of enforcement of the arbitral award. The convention did not provide obligations to implement the vacated award.[160] By anyway, there are five approaches to deal with the vacated award as follows:

[156] Herbert Kronke, et al., *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (United States of America: Kluwer Law International, 2010), 10.
[157] Ibid.
[158] Fifi Junita, "Public Policy Exception in International Commercial Arbitration – Promoting Uniform Model Norms," *Contempt. Asia Arab. J* 5 (May 2012): 45, accessed February 4, 2016, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2115604.
[159] New York Convention 1958, article V (1) (e).
[160] William, "National Law and Commercial Justice," 683.

1- The Traditional Approach: this approach is the most strict which deal with the vacated award as null and void, so that the place of enforcement of the arbitral award has no jurisdiction to enforce the arbitral award which is already vacated by the competent court of the place seat.[161] The rationale behind this approach is that the competent court of the place seat is more familiar with the proceedings and the award as a whole than the competent court of the place of enforcement of the arbitral award which such approach comply with article V (1) (e) of NYC that gives the place of enforcement of the arbitral award a jurisdiction to refuse the recognition. According to Albert Jan, applying this approach will cut off the creditor party of the arbitral award from marketing the award among the states in order to find the appropriate state that could recognize and enforce the vacated award.[162]

2- French Approach: this approach enforces the vacated award if fulfills all the requirements for the recognition and the enforcement.[163] To understand more, refer to the case of *In Re Chromalloy Aeroservices*.[164] In this case, the arbitral award was vacated by the Egyptian Court of Appeal which is the place seat. Nonetheless, the creditor party succeeded in claiming the recognition and the enforcement of the same award under both France and the United States' jurisdictions.

3- Chromalloy Aero services Approach: such approach applies in the United States which recognizes and enforces the vacated arbitral award by the court of the place seat if the arbitral award fulfills all requirements for the enforcement.

[161] Drahozal, "Enforcing Vacated International Arbitration Awards," 462, quoted in W. Laurence Craig, "Uses and Abuses of Appeals from Awards," 4 *ARB. INT'L* 174, 177 n.6 (1988).
[162] Drahozal, "Enforcing Vacated International Arbitration Awards," 462.
[163] *Hilmarton Ltd.* v. *Omnium de traitement et de valorization* (OTV) (Cour de cassation Mar. 23, 1994).
[164] In Re Chromalloy Aeroservices 939 F. Supp. 907 (D.D.C. 1996).

Also, the parties had a prior conditional term in the arbitration agreement that stipulates the exclusion of appeal against the award. It could refer to the case of *In Re Chromalloy Aero services*.[165] In this case, there was a prior agreement between the disputed parties which provides the exclusion of the right to appeal against the arbitral award. So, the US competent court enforced the award after fulfilling the required demands for the enforcement.

4- Local Standard Annulment Approach (LSA): this approach allowed the enforcement of the vacated award even such award was vacated in the place seat. The argument of this approach is based on Jan Paulsson who says that the competent court of the place seat vacates the arbitral award based on its national arbitration law, not according to article 36 (1) (a) of UNCITRAL or article V (1) of the NYC, so that there is no legitimate reason to challenge the place of enforcement of the arbitral award to implement the arbitral award. Based on Paulsson, LSA will lead the competent court of the place seat to deal with the arbitral award based on international standard process.[166]

5- Comity Approach: this approach is an idea of William Park, which encourages the enforcement of the vacated award after the creditor party proved that the vacated award was improper or biased or could find the competent court of the place seat violated the justice.[167]

It should be alluded to YAA to comprehend the position of vacated award, there is an escape clause in YAA in the matter of the vacated award. In case the court of the place seat vacated the award, YAA is considered to silent. Thus, YAA has to be amended by adding authority that clarifies the position of the vacated award, regardless of

[165] Ibid.
[166] Drahozal, "Enforcing Vacated International Arbitration Awards," 463.
[167] Ibid, 464.

whether the Yemen court will enforce the vacated arbitral award if fulfills all requirements under YAA or it will reject it as long as it is vacated in the place seat of the arbitration.

By anyway, the disputed parties usually prefer the court supervision because such supervision will protect the disputed parties from arbitrator's perversion. According to F A Mann, the domestic law of the place seat is the most important element to operate the arbitration, so that no other factor could replace the function of the domestic law which is the main element to give rights and power to the private persons.[168] Such importance of the court supervision could see in Lord Mustill's opinion in the case of *Cape Levalin N. V.* v *Kan- Ren Fertilisers & Chemicals*.[169] He opined that it is undoubtedly the court only has power which could rescue the arbitration mechanism in case of danger. Thus, choosing such state by the disputing parties, means the arbitration proceedings are subject to the national arbitration law of the place seat unless it is agreed that another arbitration law should apply to the dispute.

On the other hand, some parties dislike the court supervision. However, the disputing parties often prefer more supervision on the arbitral award by the competent court.[170] The intervention of the court supervision is very important whether by the court of the place seat of the arbitration or the place of enforcement of the arbitral award. Especially, when the debtor party resists the enforcement of the arbitral award, so that without minimum intervention the arbitration system will not succeed[171] whereas the

[168] Sameer Sattar, "Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach?" *Transitional Dispute Management Journal* 8.5 (2011): 2-3.
[169] *Coppee Levalin N. V.* v *Kan- Ren Fertilisers & Chemicals* [1994] 2 Lloyd's Rep. 109, 116 (H.L.).
[170] Drahozal, "Enforcing Vacated International Arbitration Awards," 468.
[171] United Nations Conference on Trade and Development, "Dispute Settlement: International Commercial Arbitration," (New York and Geneva, 2005), 3, accessed April 25, 2016, http://unctad.org/en/docs/edmmisc232add42_en.pdf.

intervention by the competent court of the signatory states is authorized by article 8 (1) and 5 of UNCITRAL and II (3) of NYC. The place of enforcement of the arbitral award will play the role of supervision of the recognition and enforcement.[172] Such supervision will hold on the arbitral award, which the competent court of the place seat will contribute to correct the wrong decision or vacate the arbitral award.[173] Hence, if the place of enforcement of the arbitral award enforced the vacated arbitral award, this means it enforced the rendered arbitral award by the arbitral tribunal, it does not mean that degrade the competent court of the place seat.[174] The court supervision often focuses on the tribunal equal treatment of the disputed parties and delivered justice, it is not a matter that the one of the disputed parties not satisfied with the rendered award but must be treated equally.[175] For example, if it is found the evidence with that rendered award based on was forged, this would raise doubt that the arbitration violated justice.

It has to refer to YAA to understand the position of the parties' autonomy to exclude the court supervision or interference. YAA is silent in this feature which has to clarify that the parties can agree on terms to exclude the court interference such as review the award or challenge it. As the main feature of the arbitration is to settle the dispute outside the court so YAA has be flexible to provide such position of parties' rights to agree on what terms they want. The right of the disputed parties to exclude or limit the right to set aside or challenge the arbitral award as long as UNCITRAL did not oppose the disputed parties' rights to agree on such terms. As commonly known that the

[172] Drahozal, "Enforcing Vacated International Arbitration Awards," 468-469.
[173] Ibid.
[174] Ibid.
[175] GU Weixia, "Recourse against Arbitral Awards: How Far Can a Court Go? Supportive and Supervisory Role of Hong Kong Courts as Lessons to Mainland China Arbitration," *Oxford University Press* (August 2005): 495, accessed April 25, 2016, https://sci-hub.cc/https://doi.org/10.1093/chinesejil/jmi026.

disputed parties prefer to settle their dispute by arbitration mechanism rather than court system because of faster procedures and processes. However, challenging the arbitral award in the court will adversely affect such feature. Thus, the parties' autonomy may agree to limit the court jurisdiction to set aside or reject the arbitral award. YAA has to be amended by adding such authority.

2.14 Conclusion

This chapter has discussed the fundamental elements that are more related to the enforcement of international arbitral awards. Such discussion gives more understanding of arbitration procedures and processes towards the enforcement of the arbitral award. It facilitates the way to discuss deeply how the enforcement of international arbitral awards is going to be. Throughout the discussion, some loopholes in YAA has been discovered as follows:

1. Section 7 is limited the choice of the law. This is against the principle of autonomy in arbitration system. But, this does not affect the enforcement of IAA if both parties or one is a non-Yemeni;
2. YAA is silent if the arbitral tribunal arbitrated a dispute but exceeded its authority by arbitrating non-agreed dispute alongside. What is the authority in such position? Will the place of enforcement of the arbitral award reject to enforce the whole arbitral award? Will the court enforce part of arbitral award which it will enforce the agreed dispute to be settled by arbitration and reject the non-agreed dispute by the parties? Hence, YAA must be amended to add section regarding such gap;

3. Section 35 has to be amended to specify the response period to the notice of arbitration which shall be 30 days;
4. YAA is unambiguous in the matter of the parties' autonomy to agree on the hearing term to settle their disputes. For instance, section 32 gives them the right to conduct the arbitration proceedings orally, while sections 35 and 36 stipulate documentary submission. Hence, YAA shall specifically state the parties' autonomy to agree on the type of trial of the parties' arguments to conduct by documentary manner and/or orally manner as they seem fit;
5. There are loopholes in section 42 of the appointment of expert. Firstly, it gives the parties a jurisdiction to appoint an expert witness without the tribunal consent. Secondly, the expert can submit a written or oral report on the issues while it is better to submit a written report as UNCITRAL provides a written report only. Thirdly, whether the parties' autonomy can agree on the exclusion of appointment of the expert? Even exclusion of expert may cost them more as the arbitral tribunal will face difficulties to understand the issue so this will lead to long procedures and processes. Thus, YAA has to be amended on the matter of the appointment of the expert and witness expert;
6. Whether arbitral tribunal or the court has the jurisdiction to allow interim measures of protection? In fact, the court could give an interim measures but in case the tribunal allowed an interim measures before the court does so, at that point the court has to perform the arbitral tribunal awards. On the other hand, section 43 gives the court a jurisdiction to grant interim measures during the arbitral proceedings, this implies none of the two authorities has more power over another. In the researcher' position, the tribunal is gathered to as it were have the authority to allow interim measures as it is more known of

arbitral issues more than the court. Hence, this will lead to conflict of jurisdiction which YAA has to clarify the ambiguity as well as the application for interim measures of protection in the court will makes the arbitral processes longer;

7. YAA is silent in the matter of the vacated award as to how the deal would be in case the court of the place seat vacated the award. Thus, YAA has to be amended by adding authority that clarifies the position of the vacated award. Whether the Yemen court will enforce the vacated arbitral award if fulfills all requirements under YAA or it will reject it as long as vacated in the place seat of the arbitration;
8. YYA is silent in the parties' autonomy to exclude the court supervision which has to clarify that the parties can agree on terms to exclude the court interference such as review the award or challenge it. As the main feature of the arbitration is to settle the dispute outside the court is faster procedures and processes so YAA has be flexible to provide such position of parties' rights to agree on. The right of the disputed parties to exclude or limit the right to set aside or challenge the arbitral award as long as UNCITRAL did not oppose the disputed parties' rights to agree on such terms;
9. What the effectiveness is of the vacated award by the state of the place seat, whether Yemen court will reject it base on the decision of the place seat of the arbitration or will enforce it if fulfills all the requirements under YAA;
10. YAA has to clarify the position of the disputed parties' autonomy to exclude or limit the right to set aside or challenge the arbitral award as long as UNCITRAL did not oppose the disputed parties' rights to agree on such terms.

CHAPTER THREE

YEMENI LEGISLATIONS ON THE ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

3.1 Introduction

The enforcement of IAA is the main purpose of the arbitration system which only could be enforced through the national arbitration laws which local laws have to be sufficient enough to conduct arbitral processes.[1] The implementation stage of the arbitral award can be considered the highest summit of the arbitration dispute. Where there is nothing after. On the other words, the enforcement of the arbitral award is the most important stage in arbitration. Nevertheless, the arbitral award was rendered in different legal system of the place seat of the arbitration. But still the legal system of the place of enforcement of the arbitral award is applicable at the enforcement stage. as the place of enforcement of the arbitral award control and assist to enforce the arbitral award is major importance. As far as the enforcement of the arbitral award is concerned, the researcher will examine the provisions relating to the enforcement of arbitration laws such as Yemeni Arbitration (Act No. 22) 1992, Yemeni Procedure and the Implementation (Act No. 40) 2002 and international conventions such as Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), UNCITRAL Model Law on International Commercial Arbitration 1985, Convention on the Settlement of Investment Disputes, Arab Convention on

[1] Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 2nd ed. (London: Sweet & Maxwell, 2009), 280.

Commercial Arbitration, Riyadh Convention for Judicial Cooperation, international laws and Bilateral Investment Treaties to identify the loopholes in YAA. This chapter will discuss YAA in terms of matters that relates to the recognition and enforcement of a foreign arbitral award to investigate its effectiveness and capability to cope with international arbitration. It is stated that one of the states with ineffective arbitration in the Middle East is Yemen as the country lacks of national arbitration laws.[2]

Yemen is the first Arab country that enacted the arbitration law in 1981. For instance, Saudi Arabia issued the first arbitration system in 1983[3] and a royal decree was issued in Sultanate of Oman in 1997 for issuing arbitration law for civil and commercial disputes. This means Republic of Yemen is very serious to cope with international trade through providing the needed factors to attract the FDI. Thus, Yemeni Arbitration (Act No. 22) 1992 which was amended in 1997, established commercial courts in some provinces, and paved the way for the enforcement of the Yemeni Investment (Act No. 10) 2010.

3.2 Dispute Resolution Mechanisms in Yemen

The judicial formal system has two courts to settle the legal disputes as follows:

3.2.1 The Court System

The court system applies two main Acts to settle the disputes. The application of each Act depends on the type of the issue as follows:

[2] Michael Kerr, "Concord and Conflict in International Arbitration," *Arbitration International* 13.2 (1997):130.
[3] Saudi Arabia Center for Commercial Arbitration, "the History of Arbitration in Saudi Arabia," accessed June 1, 2017, https://www.sadr.org/detailes.php?module=about_center&id=52.

3.2.1.1 The Civil Courts

Such courts usually adjudicate over the civil disputes. Section (1) of Yemeni Civil Procedure and Implementation (Act No. 40) 2002 provides that this law derived from Islamic *Shari'a* and applies to all transactions and issues, if there is no provision in this law, the principles of Islamic law that this law derived from shall applies. If not found under the Islamic law, it has to refer to custom that are in accordance with Islamic law, if there is nothing has to refer to the principles of Justice that are in accordance with the Islamic law, and takes the opinion of scientists in terms of Fiqh, Islamic law and customs which must not be contrary to the principles of Islamic law and public policy. Yemeni Civil Procedure and Implementation (Act No. 40) 2002 (YCPIL) is the general law of the other branches of private law, including commercial law.[4] This is confirmed by the Yemeni legislation in section 34 of YCPIL which provides that if there is no provision of specialized laws that can be applied to the issue, it has to refer to YCPIL. This law emerged from the book and the Sunna and the consensus and measurement and take the strongest evidence from the total doctrines of *Ijtihad*[5].[6] Based on article 3 of the Yemeni constitution which provides that the Islamic law is the main source of all laws.

Therefore, the enforcement of any contract, transaction, or arbitral award cannot be implemented in some Yemen if that violated the rules of *Shari'a*, especially, if the contract or the judgement provides interest whatever as a profit, fine, or commission. Also, the contract itself is void if it is dealing with uncertainty (Gharar) or usury (Riba)

[4] Saeed Mohammed Haitham, *Yemeni Commercial Law*, 2nd ed (Yemen: Aden University, 2013), 26.
[5] Ijtihad: is made or directing efforts to perform scientific work and diligence requirements must have a hard worker then that he can search and inference, and thus develop Sharia provisions.
[6] Mohammed Hussein Al Shami, *General Theory of Obligations in Yemeni Civil Law* (Sharia Transactions), (Yemen: Aljeel Aljadeed, 2014), 10.

terms. This is very important to refer to as Yemen is considered as an Islamic country, so the contract or the judgement that violated the Islamic law will not be valid or enforced under the ground of violation of Islamic law and public policy of the country as a whole. For example, section 53 of YAA that provides the arbitral award will be refused if it is violated the *Shari'a* rules or the public policy.[7] Therefore, the arbitral tribunal and the parties have to be aware of *Shari'a* rules regarding to the agreements, procedures, and the awards which contravene the *Shari'a* and whether such contravention would prevent the enforcement of the arbitral award.

As mentioned before referring to *Shari'a* with a specific end goal to rebut the Yemeni legislator reservation of non-ratifying NYC. This clarifies that *Shari'a* is requirement to enforce IAA. Yemen court has a discretion to set aside or refuse to enforce IAA if contravenes *Shari'a* principles. It cannot consider *Shari'a* as an impediment to enforce IAA but IAA itself is an impediment to the recognition and enforcement if contravenes *Shari'a* principles. *Shari'a* does not come from the Codes, Acts and the like, but from the divine law which was revealed by God. Hence, if human law is contrary to the law of God, it should be disregarded. *Shari'a* is true law and it is in agreement with nature; it is of universal application, unchanging and everlasting.

3.2.1.2 The Commercial Courts

The court litigation takes dual jurisdiction, so there is a commercial jurisdiction dealing with the consideration of commercial disputes, and civil judiciary has jurisdiction in the consideration of all private non-commercial disputes.[8] According to section 3 of The Yemeni Commercial (Act No. 32) 1991 which provides that this law

[7] Yemeni Arbitration (Act No. 22) 1992, section 53.
[8] Ibid, sections 38-39.

applies to merchants and commercial activities carried out by any person whether dealer or non-merchant. It was the first of Yemen's reign in this system after the adoption of Law No. 20 of 1976 establishing the primary commercial courts in Sana'a, Taiz and Hodeidah in northern part of Yemen that called the Arab Republic of Yemen.[9] In the so-called Yemen People's Democratic Republic, there were no existing commercial courts. It was taken by the system of the judiciary unit so that the court is competent to adjudicate in all commercial or civil disputes.[10] After the unification of Yemen in 1990, the state worked to implement the dual justice system in the southern part of Yemen. A commercial courts were established in Aden and Mukalla.[11] The provinces that did not have commercial courts were granted jurisdiction to deal with commercial cases so that their judgement would be final if the claim's amount were not increased over 70 thousand Yemeni riyals.[12]

The Yemeni Commercial (Act No. 32) 1991 is narrower than Yemeni Civil Procedure and Implementation (Act No. 40) 2002.[13] The commercial law deals with a certain class of merchants, whether individuals or companies, while civil law includes general provisions and rules among individuals regardless of their characteristics or the nature of their business.[14] According to section 6 of Yemeni Commercial (Act No. 32) 1991, it provides that if there is no legal provision applicable, then the judge has to refer to Islamic law, if there is no provision under Islamic law, then he has to refer to the custom, and if there is no custom, he has to apply the principles and rules of Justice. The Yemeni Commercial (Act No. 32) 1991 is different of Yemeni Civil Procedure

[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Ibid.
[13] Alhaji Abdulkadir Mohamed, *Explaining the Yemeni Commercial Law: Business and Traders* (Yemen: University of Sana'a, 1993), 6.
[14] Ibid.

and Implementation (Act No. 40) 2002 in the matter of application of Islamic law. It can notice that in section 1 of Yemeni Civil Procedure and Implementation (Act No. 40) 2002 that the Islamic law shall prevail over all laws so if any law contravened the Islamic law is void. While in section 6 of Yemeni Commercial (Act No. 32) 1991 the applicable priority of this law if no provision in this Yemeni Commercial Act then can refer to Islamic law. Section 6 of Yemeni Commercial (Act No. 32) is contravened article 3 of the Yemeni constitution that provides the Islamic law is the main sources of the all laws.

3.3 The Historical Development Legislations Governing Arbitration System in Yemen

The Yemeni arbitration system has passed through many stages as follows:

3.3.1 Yemeni Law for Enforcement or Judgements Law No. (10), 1978

During the effectiveness of this law in the People's Democratic Republic of Yemen there is no special arbitration law to deal arbitral dispute, it is only deals with foreign judgements.[15] Furthermore, such law does not apply ex parte principles, so grant of interim measures will not be enforced in Yemen courts.[16] Also, this law did not define when the court judgement is final so the debtor party and the creditor party will fail to prove that the judgement is final and effective.[17] Such lacuna will adversely affect the

[15] Isam Muhammad Ghanem, "The Enforcement of Arbitral Awards and Foreign Judgements in the Yemen Arab Republic," *Arab Law Quarterly*, Vol. 3, No. 1 (February 1988): 81, accessed October 22, 2015, http://sci-hub.cc/10.1163/157302588x00155.
[16] Ibid, 82.
[17] Ibid, 81.

refusal on grounds that give the right to the debtor party to resist or set aside the enforcement of the arbitral award based on that grounds.

3.3.2 Yemeni Arbitration Law 1981

Yemen is regarded as the first Arab country that enacted its national arbitration law in 1981.[18] Later, the law was amended and is currently called YAA.[19] The researcher has not find any resources that can prove any loophole and the purpose of amendment Yemeni Arbitration Law 1981 to the current YAA. The main purpose of the amendment is political issue. As commonly known that Yemen was divided into two independent states, the People's Democratic Republic of Yemen (PDRY) in the south and the Yemen Arab Republic in the north.[20] The two states were then unified and the Republic of Yemen was announced on the 22nd of May 1990.[21] Thus, the Yemeni legislation merged Yemeni Law for Enforcement or Judgements Law No. (10), 1978 and Yemeni Arbitration Law 1981 to have YAA.

3.3.3 Yemeni Arbitration Act No. (22) 1992

Before the unification of Yemen there were two separated Acts dealing with foreign judgements. Yemeni Law for Enforcement or Judgements Law No. (10) 1978 in the southern part has three loopholes: one is no special provisions to deal with arbitration issues, the second one is that the Act did apply ex parte principle in case one of the

[18] Jens Kambeck, "Arbitration in Yemen," Arab Law Quarterly, Vol. 22, No. 3 (2008): 333, accessed October 21, 2015, https://www.jstor.org/stable/pdf/27650626.pdf?refreqid=excelsior%3A618e47a8ae9de052b9c63fd33d548ebe.
[19] Ibid.
[20] Advanced Unedited Version, Human Rights Council, the High Commissioner on OHCHR's visit to Yemen, Rep A/HRC/18/21 (2011), accessed October 20, 2015, http://www.ohchr.org/Documents/Countries/YE/YemenAssessmentMissionReport.pdf.
[21] Ibid.

disputing parties requested interim measures, and the last one is that the legislation did not define when the judgement is final. The northern part of Yemen was applying Yemeni Arbitration Law 1981, the Yemeni legislators found it necessary to amend it because of the two legal systems merged together after the unification 1990.

The current YAA has to be examined on whether it is in accordance with the provisions relating to the enforcement of arbitration laws in Yemen are dealing with international arbitral issues as the Yemeni legislator miss very important sections to deal with the enforcement of the arbitral award. Therefore, leaving YAA without trying to develop it will make it to be incapable of coping with international arbitration system.

3.4 The Present Structure of Arbitration System in Yemen

Arbitration system in Yemen is a mechanism of settlement of disputes outside the court.[22] The parties agree prior to or after the rise of the dispute to be settled by arbitration mechanism.[23] The Yemen International Center for Mediation and Arbitration is the only an independent private institute to initiate commercial arbitration and maritime, civil and administrative arbitration (local, regional and international).[24] Hence, the procedures and processes that are relating to the enforcement of international arbitral awards based on YAA are as follows:

[22] Yemeni Arbitration (Act No. 22) 1992, section 2.
[23] Ibid.
[24] Abdulla Luqman and Osama Rasaa, "Arbitration Proceedings in Yemen- Part I," accessed June 1, 2017, http://www.lexology.com/library/detail.aspx?g=56c9cb1b-97ba-47e8-b3f1-68df8c09f456.

3.4.1 Arbitration Provisions Related to the Foreign Party to the arbitration in Yemen

YAA combines both local and international arbitration. As could be found in section 2, it provides that parties to the arbitration must be a natural or legal person who makes a practice of commercial, economic, or investment business, regardless of the nationalities. However, the YAA clearly distinguishes between the local and international arbitration. According to the Act, the local arbitration means that the disputing parties are local citizens whereas in international arbitration, the arbitrators are non-citizens while the place seat of the arbitration is outside the country or the arbitration conducted by an international institution.[25] Thus, YAA allows the disputed parties, whether one or both of them are not Yemeni citizen to choose the law, language and the place to conduct the arbitration.[26] Therefore, such sections prove that YAA could be applied over local or international arbitration as it accepts the non-citizen parties to sit for arbitration inside or outside the country, the place seat of the arbitration could be held in local arbitration centers, international institutions or in any language as well. Further, the YAA applies to local and international arbitration, this means the court will not distinguish between international and local award in the matter of procedures and requirements to enforce the arbitral award. However, the researcher could observe a lacuna in section 2 that distinguishes among commercial, economic, or investment activities and all these terms can be combined under the term of commercial. Additionally, it stated the Arab nationality and international nationality, are considered as international as well.

[25] Yemeni Arbitration (Act No. 22) 1992, section 2.
[26] Ibid.

3.4.2 The Role of the Competent Court in Arbitration Mechanism

The function of the court in the matter of control and the assistance to carry out the arbitration the procedures and supervision of the enforcement of the arbitral award as follows:

3.4.2.1 The Jurisdiction towards Arbitration Agreement

The competent court practices its jurisdiction before and within the arbitration proceedings to supervise the proceedings. Section 19[27] provides that the court may reject any filing case brought before the court and it may refer such case to the arbitration unless the court finds the arbitration to be void, revoked, or the arbitration clause does not contain such arbitrated dispute, as well as if the disputing parties have already commenced with judicial proceedings. This means the court applies its jurisdiction to refuse arbitration mechanism if it finds that it is inappropriate. Without giving any reason. Such jurisdiction which has been given by YAA to the competent court is great. This saves the time, not to do so after the whole processes are completed then the award cannot be enforced because of the same reasons found in section 19.

The competent court has jurisdiction to constitute the arbitral tribunal. So, it is necessary to refer to the section 22[28] that provides the parties' autonomy to appoint the arbitrator or arbitrators as follows:

i) If the arbitration agreement states the tribunal has to constitute a sole arbitrator and the disputed parties fail to agree on such appointment, then the competent court will appoint arbitrator as it thinks fit.

[27] Ibid, section 19.
[28] Ibid, section 22.

ii) If the arbitration agreement states the tribunal has to constitute of two arbitrators and every party has to choose one arbitrator, then every party could choose his own arbitrator.

iii) If the arbitration agreement states that the arbitral tribunal has to constitute of three arbitrators, every party has to choose his own arbitrators after that the two arbitrators must agree on the third arbitrator, in the case of failing to choose the third one by the two arbitrators, then the court will appoint the third one.

iv) This means that the parties are free to constitute the number of the arbitral tribunal whatever a sole arbitrator appointed by the disputed parties or two are appointed by the parties, each arbitrator represents a party and the two representative of the arbitrators are consensually appoint the third arbitrator, otherwise the court will do. But, if the parties failed to stipulate that in the arbitration agreement or disagree on the number of the arbitrators, then the court will appoint the arbitrators based on its discretion.

The court has jurisdiction to reject the appointed judge as well as the arbitrator if it found that the arbitrator had bad reputation, has been sentenced to prosecution for a crime relating to honor or honesty, if practiced the trade or has another job than the judicial job or any job that affects the independence of the judiciary and dignity, or is not qualified[29] but such reasons must appear after the appointment. So, the YAA requires from the arbitrator to reveal all factors that are likely to adversely affect his/her integrity and independence. Thus, if the appointed arbitrator could not perform his/her job which leads to impeding the arbitration processes, then he/she could be removed by mutual consent of the disputed parties or by request of any of the disputed

[29] Yemeni Judicial Authority (Act No. 1) 1991, sections 57, 81, 93.

parties to the arbitral tribunal or the competent court.[30] The section supposed to mention the referring to the competent court in the matter of disability of the arbitral tribunal to carry out its job, not only in case of disability of one of the arbitrators. After successful application of rejecting or removing the arbitrator, the court will fill the vacancy with another one[31].

The arbitral tribunal has jurisdiction to investigate the arbitration agreement to check its validity and legality. So, if it finds the arbitration agreement is revoked, void, or not contained the referring arbitrated dispute, then any of the parties can appeal against that.[32] The researcher sees allowing appeal to the court against the tribunal decision over the agreement validity as inappropriate as the arbitral tribunal understands its jurisdiction and has capability to deal with such dispute more than the court may do.

3.4.2.2 The Arbitral Awards

Sometimes, prior to the final award any of the disputed parties may request interim measures of protection to ensure the enforcement of the arbitral award. So the arbitral tribunal has jurisdiction to render partial award toward such request as it thinks fit. YAA which could be seen in section 31 that provides the tribunal has a jurisdiction to require security of any of the parties to ensure the compliance with arbitration proceedings and the award as well. Regarding the interim measures of protection the Court of Appeal judge (Respondents 1) through an interview stated that:

> *In international arbitration, the procedures can be taken through the judiciary in the host state of the arbitration. Then, the host state requires from the Yemen court to implement the award or the order that are taken by the host state. However, the host state must be BITs*

[30] Yemeni Arbitration (Act No. 22) 1992, section 25.
[31] Ibid, section 26.
[32] Ibid, section 28.

or signatory-state to the convention that Yemen is, like Arab convention, Riyadh convention or has BIT with Yemen.[33]

Court of Appeal judge (Respondent 2) through an interview stated that:

The procedures can be taken in international arbitration through the international judicial mandate, if there is BIT between Yemen and the host state of the arbitration, the foreign judges can delegate us to carry out specific operations, such as seizure of the lost party's property, but all the procedures must be through the diplomatic route (Ministry of Foreign Affairs). For example, Yemen is member of the Riyadh Arab Convention for Judicial Cooperation. If there are some trialing issues before the courts of Saudi Arabia and the accused ran away to Yemen or has property in Yemen, the judge in the Saudi courts' can request from the Yemeni judiciary to apprehend the suspect or forcibly seize his property and so on, and we in Yemen are cooperating with such foreign judicial orders.[34]

Court of Appeal judge (Respondent 3) mentioned that:

Due to the expansion of trade with several countries, especially the Gulf countries, it has been found that international judicial mandate is necessary to ease commercial activities between these multiple territories. Yemen is a member of a number of international conventions regarding judicial cooperation such as the Riyadh Arab Convention for Judicial Cooperation, Arab Convention on Commercial Arbitration, The Convention of the Settlement of Investment Dispute between States and Nationals of Other States, and the like. This cooperation was established in order to overcome the difficulty of collecting evidence, enforce judgements, and enforce awards. Global commercial activities need a mechanism to achieve the desire of States for judicial co-operation through an international judicial mandate that enables national jurisdictions to complete necessary processes and investigative procedures within the territory of a foreign State, and using the powers of another State whenever necessary. However, the international judicial mandate is not an alternative to national jurisdictions, the two are independent from each other, as the implementation of the judicial authorities of the requesting State legislation is subject of to the national laws of the requested State to perform that operation, and cannot perform operations other than those contained in the request, and yet both states are complementary to each other in ensuring the proper administration of Justice. Thus, the international judicial mandate

[33] Interview with Court of Appeal judge No. (1), December 11, 2016.
[34] Interview with Court of Appeal judge No. (2), December 20, 2016.

is practiced as long as the needed operations are not contrary to public policy of the requested state.[35]

Academician (Respondent 4) said that:

The reciprocity reservation applies to have exchange judicial cooperation. If the foreign state cooperates with Yemen then Yemen will cooperate with the host state of the arbitration. Such judicial cooperation is carried out through diplomatic corps.[36]

Academician (Respondent 5) stated that:

Unfortunately, there is inefficient supervision, especially, when the procedures are related to international arbitral awards. This is because the assistance of international judicial mandate should go through diplomatic procedures. The Ministry of Foreign Affairs delays the procedures which lead to loss of rights. Diplomatic authorities sometimes ignore court orders. The international judicial mandate needs cooperation between the judiciary and the Ministry of Foreign Affairs to facilitate communication with the outside authorities, and this is not always effective. As a result of this delay the creditor party restores to other means such as conciliation based on mutual agreement.[37]

Arbitrator (Respondent 14) stated that:

The international judicial mandate is a means by which requests can be made by a Member State to the Convention, for example, the Riyadh convention. A member state can request from Yemen to do some investigations, processes or procedures that it can't do by itself as it is not within its territorial jurisdiction, whether it is by prosecutors, the judges, or police. Such legal actions may be in form of providing evidence or investigation, including taking testimonies from persons or performing inspections or providing documents and records, including bank records, financial records, corporate or business records or seizure of funds, and so on. For example, article 4 of the Riyadh Arab Convention for Judicial Cooperation stipulates that a judicial assistance is required where citizens of the contracting Sates within their respective limits the right to get legal assistance in accordance with the legislation of the requested state. Article 14 stipulates the international judicial mandate to each contracting state to request any other contracting state, shall in its

[35] Interview with Court of Appeal judge No. (3), December 27, 2016.
[36] Interview with Academician No. (4), December 26, 2016.
[37] Interview with academician No. (5), December 25, 2016.

> *territory on his behalf to perform operation such as the testimony of witnesses, expert reports and discuss them, and swear an oath. Article 18 stipulates that the implementation method of the international judicial mandate should be in accordance with the legislated legal procedures in the laws of the requested contracting state. In the case of a requesting state's desire to implement the international judicial mandate, it has to express a request to the requested state, and the requested state is required to respond unless it is contrary to its domestic laws or regulations. The requesting state must expressly notify the other state of the time, date and place of execution of the international judicial mandate and the requested state is expected to execute subject to its national laws.*[38]

Through the above interviews, respondents clarified that the Yemeni Arbitration Act permits the arbitral tribunal or the judiciary in the host State of the arbitration to request from the Yemeni judiciary to carry out legal proceedings, investigations and other operations. But, this must be done through diplomatic corps. Some interviewees said that delays occur from Ministry of Foreign affairs in the execution of court orders and causes difficulties in communicating with foreign authorities. Thus, they recommended better cooperation between the judiciary and the diplomatic corps.

This supervision of the final award consists of two stages which are as follows:

3.4.2.2.1 The supervision on the refusal of the arbitral award

As commonly known that the arbitral award made by the arbitral tribunal is final and binding.[39] This means that the debtor party cannot appeal against the award. On the other hand, the debtor party could only make an application to the competent court to refuse the enforcement of the arbitral award. The Yemeni legislator has restricted the authority of the arbitral tribunal by subjecting it to the supervision of the court. Consequently, the rendering an arbitral award must be based on the provisions

[38] Interview with arbitrator, December 27, 2016.
[39] Ibid, sections 56 & 57.

provided by YAA. Otherwise, YAA provides the court discretion to set aside or refuse the enforcement of IAA. As the arbitral awards are considered not executive by the tribunal exclusive authority in case of the debtor party refuses to enforce it voluntarily. They have to obtain judicial assistance through forced execution, and that by issuing a special order from the competent court. It has to distinguish the arbitral awards from the court judgements which the court judgements are final without the need to issue an order to implement them. The arbitral awards do not derive any power from the public authority, they require the issuance of such order from the court to reach the standard of the court judgements, then can be forcibly implemented.

There are grounds for the debtor party to reject the enforcement of the arbitral award if the award contravenes those grounds. However, such refusal is not considered an appeal or a part of the arbitration dispute. Thus, the rendering arbitral awards must comply with the requirements of what provided in YAA, so that non-fulfilment of requirements will lead to set aside or refusal of the enforcement of the arbitral awards, and return dispute to be decided before the court. The public policy is essential issue will be addressed before the court is the public policy and this at the stage of the application for the recognition and enforcement. The court will make sure the arbitral award is not contrary to the public policy. The court exercises jurisdiction here and considers the request for the recognition and enforcement through verify that the documents submitted have an arbitral award in the proper sense, as well as the arbitration agreement to ensure that the parties have authorized the jurisdiction of the dispute to be settled by the arbitral tribunal. Such grounds could be noticed in section

53[40] that provides the arbitral awards are binding and cannot be refused unless on the following grounds:

a- If there is no arbitration agreement, revoked, or void according to the law.

b- If one of the parties is not competent.

c- If the arbitral tribunal exceeded its authority.

d- If the procedures are unlawful.

e- If the constituted arbitral tribunal is not according to the arbitration agreement.

f- If the arbitrator or the arbitral tribunal did not state the reason of the award making. Also, in section 48 of YAA provides the award must be signed by all arbitrators unless if the award is rendered by the majority so the resisting minority could refuse to sign but must state the reason for the refusal. Such rule is confirmed by the Supreme Court that holds the award is void because the two out of three arbitrators did not sign the final award.[41]

g- If the award infringed the principles of the *Shari'a* or the public policy, these grounds in YAA only could allow the debtor party to refuse the enforcement of the award, even those grounds to appeal stated in civil procedures and commercial laws will not be taken to apply in arbitral cases.

Section 53 is the same as international arbitration laws that considers the award as binding on the disputed parties and provides the grounds to refuse the enforcement of the award which could be seen in article v (1) of NYC and article 36 (1) of UNCITRAL. However, section 53 of YAA still needs to amend, especially, paragraph (b) which provides that the award cannot be enforced if any of the parties is incompetent, such paragraph is repeating the same thing as paragraph (a) which

[40] Ibid, section 53.
[41] Supreme Court, commercial division, Recourse No. 32884, Dec. 24, 2008.

provides that the resisting party who was incompetent person at the time of signing the arbitral agreement can challenge the arbitral award as it is commonly known in all laws the parties to the contract have to be competent persons, otherwise, the agreement is voidable at the choice of the victim party. Further, the same paragraph stated the grounds of civil procedures and commercial laws will not be taken to apply in arbitral cases, and this is a lacuna as such laws provides that the judgement will be void if it relies on the misrepresentation, fraud, or false testimony.[42]

In addition, the same section is still weak, which supposed to include other important grounds to refuse the enforcement, such as not given proper notice of the appointment of the arbitrator or the arbitral proceedings to the disputed parties as well as in the case of the award not binding yet. Such grounds are important to achieve justice. Such grounds supposed to be included in YAA. The grounds to refuse the enforcement of the award have to be apply by request from a disputing party, if none of the parties opposed such procedures, the court will not have to investigate in materials that the parties go through by free consent. For more understanding it is important to refer to the case of *Abdul Baqi Abdul Qadir* v *Zayn bint Ahmad Hashim*,[43] the Yemen court could enforce the foreign judgement if it fulfills some requirements as follows:

a. The judgement has to be issued according to evidence;

b. The judgement has to be free from any fraud;

c. The judgement has not been contrary to the international law and justice;

d. The judgement has to be finalized;

e. The judgement has not been contrary to public policy;

[42] Yemeni Civil Procedure and Implementation (Act No. 40) 2002, section 304 (1) (2) (3).
[43] *Abdul Baqi Abdul Qadir* v *Zayn bint Ahmad Hashim*, Commercial Appeal No.2 of 1977.

f. The judgement has issued by the competent court.

If the resisting party of the enforcement fails to recourse against the arbitral award during the limited period that allows the debtor party to set aside/refusal, then the arbitral award becomes binding, but the YAA fails to specify the period to set aside/refusal.

Also section 55 of YAA gives the court a full discretion to determine the validity of the arbitral award in order to enforce it or reject it even without the request from any of the parties, especially, in these paragraphs as (a) that provides if an award regarding an issue that not allowed to be settled by arbitration mechanism (b) if the award contravened principles of the *Shari'a* or public policy. However, such jurisdiction has given under the section 55 cannot be considered as reviewing the arbitral award. The Yemeni arbitration system does not provide the reviewing the award by the court. The Yemeni Supreme Court held that the grounds of setting aside the arbitral award do not mean to review the merit of the award.[44] The court only examines the proceedings and the procedures of the arbitration.[45]

Shari'a does not come from the Codes, Acts and the like, but from the divine law which was revealed by God (Allah) to his messenger Mohammad (pbuh), including the Quran and Sunna. A believer should never violate what God and the prophet (pbuh) ordered him/her to do. Provisions of humanitarian laws should be ignored if it is in conflict with internal or natural laws. In other words, if human law is contrary to the law of God, it should be disregarded. *Shari'a* is true law and it is in agreement with nature; it is of universal application, unchanging and everlasting. It is a sin to try to

[44] Yemen Supreme Court, commercial, Ruling No. 1425/21636, Feb. 22, 2005.
[45] Yemen Supreme Court, commercial division, Ruling No. 29/1424, Jul. 30, 2003.

alter this law, nor is it allowable to attempt to repeal any part of it, and it is totally unacceptable to abolish it entirely... [God] is the author of this law, its promulgator, and its enforcing judge", as God is the author of Islamic law, it certainly is all-encompassing and, in fact, is equivalent to the rule of law in the modern state. Every aspect of life is regulated by *Shari'a* law.

This is very important to refer to as Yemen is an Islamic country, so the award that violated the Islamic law will not be enforced under the ground of violation of Islamic law and public policy of the country as a whole. Section 53 provides that the arbitral award will be refused if it is in violation of the *Shari'a* rules or public policy.[46] Therefore, the arbitral tribunal has to be familiar with the *Shari'a* rules to understand the agreements, procedures, and the awards which contravene the *Shari'a* and whether such contravention would prevent the enforcement of the arbitral award.[47]

3.4.2.2.2 The supervision of the enforcement of the arbitral award

This stage is the most important that the creditor party is looking to the enforcement of the award made by the arbitral tribunal. As commonly known that even the international arbitration is applied and recognized by the court of the place seat or the arbitral tribunal, but it does not mean that is excluded the jurisdiction of the national court in the place of enforcement of the arbitral award. The arbitration system cannot succeed without the assistance and control of the court.[48] Hence, the court is the cornerstone in coercing the debtor party to implement the award that is made by the

[46] Yemeni Arbitration (Act No. 22) 1992, section 53.
[47] Omar Saleh Abdullah Bawazir, Hairuddin Megat Latif, Mohammad Azam Hussain, "Sharia Requirement to Enforce International Arbitral Awards in Yemen: A Legal Analysis," *International Research Journal of Commerce and Law*, Vol.04 Issue-9 (September, 2017): 36, accessed October 3, 2017, http://ijmr.net.in/currentijod.php?p=VOLUME%204,Issue%209,September,2017.
[48] Henry P. De vries, "International Commercial Arbitration: A Contractual Substitute for National Courts," *Tul. L. Rev*. 57 (1982), 47.

tribunal.[49] For the judiciary exercises effective monitoring on the enforcement of the international arbitral awards.

Respondent 1 mentioned that:

> *Disagreed with that the judiciary exercises effective monitoring on the enforcement of the international arbitral awards.*

Respondent 2 mentioned that:

> *if the arbitral awards are rendered outside Yemen then, the creditor party must make an application to the Court of Appeal in Yemen which holds all documents relating to the implementation of international arbitral award such as the origin of the arbitral award or a copy signed by the arbitral tribunal members, a copy of the arbitration agreement, translating all documents to the Arabic language if they are written in a foreign language. Also, the enforcement can be carried out when the creditor party applies to a competent court for the implementation of the International Arbitral award, if the court considers that the arbitral award is valid, then the execution will be through police action or imprisonment till the enforcement or seizure of the debtor assets.*

Respondent 3 stated that:

> *When the creditor party applies for enforcement of the international arbitral award, the competent court makes sure that the arbitral award is rendered based on justice such that both parties are given the same opportunity to present their cases. The courts also ensure that the arbitral award does not contravene the Shari'a and not contrary to public policy. Additionally, the courts make sure that the host State implements the arbitral awards that are rendered in Yemen since the arbitral awards are enforced based on the concept of reciprocity. Often, the Court does not consider the application to set aside the international arbitral award that are rendered outside Yemen because the jurisdiction of the court of the host State. For example: If the arbitration place in Paris then, the appellant must submit the application to set aside the arbitral award in a France court, and if the host States rule that the arbitration should be set aside in Yemen, then, the application to set aside the international arbitral award can apply in Yemen. Hence, the application to challenge the enforcement of the arbitral award must be applied in*

[49] Ibid.

> *the host State where the arbitral award was rendered initially, Yemen has nothing to do with the application of an arbitral award not issued in its territory unless, if there is no an arbitration agreement between the parties, if one of the parties to the arbitration was incompetent, if the arbitral tribunal exceeded its jurisdiction, the arbitral award violates public policy, or contravenes the principles of Shari'a such as stipulates interest or uncertainty. Also, he stated that international arbitral award is compulsory enforced if it fulfils all requirements. If the debtor party refuse to implement it. The court can take coercive actions such as imprisonment, seizure property, and so on.*

Respondent 14 stated that:

> *The arbitral award is forcibly effected if the lost party refused to comply voluntarily. The court may seize his/her property, freeze his/her bank account, or hold his/her passport to prevent him from traveling outside the country till implementation of the arbitral award.*

Thus, the court applies effective monitoring to enforce based on the majority interviewees. However, the researcher is not satisfied of such result as respondents (4) and (5) stated their own experience of the enforcement of arbitral cases. They stated their own experience in enforcing the arbitral awards by exercise effective monitoring as mentioned two arbitral cases which one creditor party forcibly referred to reconciliation after procrastination of the place of enforcement of the arbitral award to enforce the arbitral award while the second creditor party enforced it after long time of fighting after his rights of enforcement of the arbitral award. Respondent 4 stated that:

> *The implementation of the arbitral award is one of the difficulties facing the arbitration system in Yemen. From previous experience in arbitration, I was a representative of one of the disputed parties to the dispute. The Arbitral award issued in favour of my client. But the losing party refused voluntary implementation. We have gone to court to enforce the rendered arbitral award, but did not enforce. Thus, we were forced to enter into a reconciliation and waive certain rights. Sometimes, lost party and refusal of the enforcement of the*

> *arbitral award pays bribery to release him/her from prison, then force the creditor party to enter into a reconciliation.*

Respondent 5 narrated his previous experience as a judge. He stated that:

> *Usually, no execution of arbitral award is carried out when it is against the Government or a party who has a personal relationship with politicians. I have already confirmed the implementation of an arbitral award against the Government. As a result, I exposed to pressure from Ministers, they insult me with words that shameful to be said to the judge. But unfortunately because of lack of independence of the judiciary find such negative interference in judicial affairs.*

However, the national court may have specific requirements to enforce such foreign award. Thus, it is important to refer to section 60 of YAA that provides that the arbitral award will only be enforced after investigating of the following requirements:

a- The arbitral award is final;

b- The arbitral award does not contravene any prior judgement issued by the court;

c- The arbitral award has to be issued in accordance to YAA;

However, the YAA did not mention the period of time for the executive judge to grant a leave of enforcement of the award, the leave of enforcement could only be granted after examination of the award by the judge as far as there is no application by the debtor party on the enforcement of the award.[50] In another case, the Yemeni Supreme Court held that the debtor party could apply for setting aside the award even after all-out of limited timed and the application to set aside the arbitral award will be more considerable if there is a reasonable ground.[51] This is a kind of loophole to leave the enforcement subject to the judge's time schedule which makes the judge to examine

[50] Yemen Supreme Court, Commercial, Ruling No. 136/1424, Apr. 17, 2004.
[51] Yemeni Supreme Court, commercial division, Recourse No. 33036, Feb. 22, 2009.

the award when he is free. Indeed, there must be effective rules to fix the suitable period of time to enforce the arbitral award in case the debtor party did not raise any resistance for the rendered arbitral award. With regards to judges ensure the timely enforcement of international arbitral awards. Respondents 1 mentioned that "Yes, the enforcement of the award on time, unless there are obstacles raised is same as the in the local judgements".

Respondent 2 stated that:

> *International arbitration provisions are implemented by the same mechanism that apply over local provisions. But there is no legal provision which determines the enforcement period of the arbitral award and how it should be carried out. The enforcement period is left to the judge estimates to ensure fairness.*

In the opinion of Respondent 3,

> *No delay happens in implementing the arbitral award as long as the creditor party fulfils all documentations relating to arbitral award. If there is a delay to implement the arbitral award is due to legal proceedings, such as the lost party's application to set aside the arbitral award.*
>
> On the other hand, Respondents 4*"disagreed that the enforcement of the award implemented on time"*.[52] Respondent 5 mentioned that *"the arbitral award is not executed in time because of rampant corruption. Thus, the lost party bribes the judge to avoid the implementation or get the chance to force the creditor party to compromise on reducing the award"*.

In his own contribution, Respondent 14 stated as follows,

> *Delay usually happens because of the length of the proceedings and the implementation processes. Therefore, implementation must be faster because the speed of the resolution and enforcement of the arbitral award is an arbitration advantageous.*

[52] Interview with Court of Appeal judges, December 11-20-25-26-27, 2016.

Thus, as half of the respondents agreed that the arbitral award is enforced on time while the other half disagree, the researcher do agree that the enforcement of the award is not on time because YAA left full discretion to the executive on when the award can be enforced. Also, Respondent 2 is hesitant in his answer as he didn't react to my question specifically, whether the enforcement is carry out on time or not, so it means the enforcement can be on time or may delay as long as the enforcement period is left to the judge estimates. Here, the researcher can confirm that the majority of the respondents do agree that the enforcement of the arbitral award is not on time.

The researcher could see the court supervision of the enforcement of the arbitral award and the requirements are reasonable and there are no complex requirements which may impede or allow the enforcement of IAA. The competent court could confirm the arbitral award if it does not contravene section 55 that insists on the award to comply with principles of the *Shari'a* and must not contravene the public policy, and the issue could be settled by arbitration mechanism. The Act specifies some issues in section 5 that cannot be arbitrated on such as (a) *Hudud* (mandated punishment under Islamic law), *lian* (make a divorce judgement between the husband and the wife base on oath), matrimonial matters like (inheritance and divorce) (b) suing the judges (c) disputes that need coercive performance (d) issues that are incapable to be arbitrated (e) whatever related issues to the public policy.

Another type of court supervision, which if the arbitral award is rendered outside Yemen the enforcement of the award will be based on some requirements under Yemeni Civil Procedure and the Implementation (Act No. 40) 2002 that requires some requirements to enforce the foreign judgements and awards. Especially, section 491

and 494[53] that provide requirements to enforce foreign decisions such as the court judgement or arbitral award must be issued from a recognized authority, not against principles of the *Shari'a* and public policy, the reciprocity reservation, and not against prior judgement issued by the Yemen court. Hence, the issue of reciprocity reservation will challenge the enforcement of the arbitral award rendered in Yemen as long as Yemen is non-signatory state of NYC,[54] so the same issue of the reciprocity reservation provides in Yemeni Civil Procedure and the Implementation (Act No. 40) 2002, it means Yemen will recognize and enforce the judgements and awards that are rendered in the countries that recognize and enforce awards and judgements rendered in Yemen as well as will not recognize and enforce court judgements and arbitral awards rendered in the countries that do not recognize and enforce judgements and awards rendered in Yemen.

3.4.2.3 Sanction for Failure to Comply with Tribunal's Orders

Sometimes the disputed parties refuse to comply with the tribunal's legal rulings whether such order were made during the proceedings of the arbitration or after the issued the arbitral award. For such failure there must be a penalty to make the arbitration system stronger. Otherwise, the arbitral orders will be vain and the disputed parties are more likely to delay the procedures by procrastinations as well as procrastination in the enforcement of the arbitral award which will lead to losses on the creditor party and may lose other transaction because of the lack of financial liquidity. In fact, UNCITRAL did not empower the tribunal or the arbitrator to fine the

[53] Yemeni Civil Procedure and the Implementation (Act No. 40) 2002, section 491 and 494.
[54] The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, accessed April 4, 2018, http://www.newyorkconvention.org/list+of+contracting+states.

debtor party in case of non-compliance with the tribunal's orders.[55] Even though some courts enforce the penalty against the debtor party for failure to implement the tribunal's orders.[56] The YAA is silent about the power of the tribunal to impose sanction on the debtor party in case of failure to disclose the documents or refusal to enforce the arbitral award. The researcher suggests to include a section in YAA to empower the tribunal as well as the court to impose sanction on debtor parties. Especially, if there is no reasonable justification for such non-implementation. Such sanction could add a positive effect to the arbitration system in Yemen as it will deter the debtor party who intend to disobey the tribunal's orders or the arbitral award.

3.5 The Interview in the Matter of Adequacy of Yemeni Arbitration Act and the Difficulties Facing the Arbitral Award

Through an interview with Court of Appeal judges, academicians, and arbitrators, it was confirmed that YAA is not adequate to deal with global arbitration system and to settle disputes. Also, there are some difficulties facing the enforcement of the arbitral award.

3.5.1 The Interview to the Court of Appeal Judges

To be understandable the sufficiency of the provisions relating to the enforcement of arbitration laws in Yemen. Respondent 1 said that "the Yemeni arbitration law is not capable of to dealing with international arbitration system, YAA has to be amended".

[55] Gary B. Born, *International Arbitration: Law and Practice* (The Netherlands: Kluwer Law International, 2012), 188.
[56] Ibid.

Respondent 2 said that:

> *The amendment of the currently arbitration Act is necessary to cope with international arbitration laws, especially repeal sections that recognize customary arbitration. Because such recognition of the customary arbitration leads the disputed parties to appoint tribal arbitrators as many tribal people are unaware of the legal requirements and procedures. As a consequence, the disputing parties may refer to formal court to solve the same dispute which leads to delay the disposition of the commercial cases.*

Respondent 3 stated that:

> *There are loopholes in the current Yemeni Arbitration Act when compared to international arbitration laws. Hence, in order for Yemen to be an effective State in the arbitration system, it has to modernize the local laws to be consistent with international arbitration practices.*

This implies YAA is not align with international arbitral laws, thus YAA is not sufficient adequate to settle arbitral disputes. All the Court of Appeal judges confirmed that YAA is outdated. The current YAA has to be amended. As it is not suitable to deal with the current international arbitration system. YAA provides in section 7, that is, applies to both local and international disputes. Thus, national arbitration laws have to cope with international arbitration standard to settle international commercial disputes, as usually international disputes are complex. Hence, only modern law is suitable to do so. The interviewees confirmed that YAA is not only unsuitable to conduct international commercial disputes, but, it burdens the formal court system as it is recognized the application of the customary law to settle disputes. This leads to set aside the arbitral awards because of unqualified arbitrators who are ignorant of natural of justice. As a result, the cases piled up which delay the judicial operations.

In the matter of the difficulties in enforcing international arbitral awards. Respondent 1 stated that:

> *I suffer from a lack of cooperation from the security authorities to implement judicial orders, particularly when the lost party of the arbitral award is someone who has good relationships with decision makers and this is due to the lack of independence of the judiciary. This is the biggest problem facing the judiciary. In addition, there are increasing numbers of cases in the courts and the courts cannot resolve them quickly and effectively. Currently, business transactions are increasing so trade disputes are increasing as well. So, commercial disputes have to be resolved speedily as well as the enforcement of the arbitral awards. Another problem that the judiciary faces is lack of financial means to perform its role effectively.*

Respondent 2 said that:

> *The difficulties we face in the arbitration system is that the arbitrators are not qualified, especially difficulties in implementing the arbitral award in those cases where the arbitrator is tribal or military because they do not understand anything in the law of litigation and the law of pleadings.*

While Respondent 3 said that:

> *The difficulties that I face in enforcing the arbitral award is failure to comply with the arbitral award voluntary. The debtor party hides his funds in case of the absence of a previous precautionary measures. Thus, I have to imprison him/her in order to enforce the award.*

Hence, the YAA has to be amended, especially the sections that recognize the rendered arbitral award by tribal or military arbitrator as this leads to pile up the cases at the courts. Also, the Court of Appeal judges confirmed that most impediment faces the enforcement of IAA in Yemen is non-independence of the judiciary. The politicians interfere in the judicial operations. This interference is adverse effect on the enforcement of IAA. Especially, if the debtor party has good relationship with

politicians. Often, businessmen have good relationship with politicians, so in case the arbitral award is not in his/her favour will request interference from political person to impede the enforcement of the arbitral award. Hence, The judiciary has not only be independent body, but must be seen to practice that so it has to be financially independent in order to prevent the politicians of misuse such authority on the judiciary. In addition, interim measures of protection must be rendered in advance so the debtor party will not impede the enforcement of the arbitral award.

3.5.2 The Interview of the Academicians

According to academician interviewees of Yemeni universities that the researcher contacted to provide information of the sufficiency of the provisions relating to the enforcement of arbitration laws in Yemen.

> Respondent 4 said that *"YAA has loopholes so the legislators must amend it to cope with international arbitration"*. Respondent 5 said that *"the YAA is an old law so arbitration system in Yemen is facing difficulties in handling some arbitration cases, especially complex cases"*.

Therefore, the amendment of the current YAA is very important since the last amendment was performed 20 old years ago. The modern arbitration laws are very important in dealing with international arbitration system. The interviewees confirmed that YAA is outdated which has to be modernized as it is non-compliant with standard of international arbitration laws. Respondent 5 confirmed that YAA is not suitable law to apply over the complex disputes. As commonly known that the most international disputes are complex so YAA has to be amended to cope with international arbitration system. This means that the current YAA will impede the arbitration processes and

procedures, especially, the last stage of the arbitration, that is, the enforcement of international arbitral awards.

Moreover, the same academician interviewees did mentioned the difficulties in enforcing international arbitral awards. Respondent 4 stated that:

> *There are difficulties such as the lack of implementation of the arbitral award by the parties, I was a representative of one of the parties of the arbitration, and the debtor party rejected enforcement of the arbitral award. Although the Court of Appeals held that the award is binding, no coercive action was taken. This forces us to enter into a reconciliation to reduce the amount held in the arbitral award. This indicates that the enforcement of IAA faces difficulties*.

Thus, the effective monitoring applied by the court is insufficient. As the enforcement of the arbitral award is not effective, it means that the judiciary is weak and the outside interference and influence likely existed. Indeed, the enforcement of the arbitral award is the most important stage in arbitration system, otherwise, the arbitration is meaningless. This raises issues such as link interrelated impediments among tribalism, corruption, and non-enforcement of the arbitral awards. Especially, once there is no application of the debtor party to set aside/refusal of the arbitral award base on the provided grounds in sections 53 and 55 of Yemeni Arbitration (Act No. 22)1992. Non-enforcement without any justified reasons leaving no room for doubt that the enforcement provisions of YAA are weak, the tribalism impediment and corruption in the judiciary are the main reasons behind the failing of the court to enforce a rendered arbitral award by the tribunal.

While, Respondent 5, said that:

> *Yes, especially the difficulties like political interventions, for me intervention of the Minister of Justice based on a complaint from the Minister of Finance, and because of my judgement to implement the*

> *arbitral award. I ordered the state to implement the arbitral award in the amount of $7 million. This arbitral award has been rendered by the legal Affairs, then the Ministry of Trade and Fund appeal against the arbitral award applied by the trader. As a result of my confirmation of the validity of the award, so the Minister of Finance complained to the Minister of Justice against me. Then, the Minister of Justice insulted me by improper words.*

Therefore, the enforcement of IAA in Yemen is more likely to fail because of the political interference in the judiciary, the politicians interfere to protect their partners' business or those who have close tie of relationships with them. The court coercive enforcement is rarely taken. The creditor party will face difficulties in enforcing the international arbitral award in case the debtor party is a political party or has any kind of political relations. This means that the independence of the judiciary is only ink on papers in the Yemeni constitution. As minister interferes in the judge's decisions, this explains beyond any doubt that the politicians misuse of power and deal with the judiciary as a part of the executive body. As consequences, the arbitration system will not succeed in Yemen, unless it overcomes such interferences from the politicians. This is because the court plays important role in control and assistance of the arbitration processes and procedures so without integrity and independence of the court, the enforcement of the arbitral award will be impeded.

3.5.3 The Interview of the Arbitrator

Respondent 14 clarified the sufficiency of the provisions relating to the enforcement of arbitration laws in Yemen. He stated that "YAA is still not adequate to settle international issues by arbitration".

In addition, the same arbitrator provided information relating to the difficulties in enforcing international arbitral awards in Yemen. He said that:

> *There are difficulties facing the enforcement of the arbitral award such as long procedures and proceedings and the competent court are late in making a decision in case the debtor party applies a defence to set aside the award.*

This means that YAA has no adequate provisions of the recognition and enforcement. As long as it is not suitable to settle international disputes, it confirms that YAA is not in standard with international arbitration laws. The interviewee recommended to amend YAA to cope with international arbitration system. Also, the arbitral award is not enforced on time. The delay of the enforcement leads to corruption and add more cost and loss on the creditor party. YAA has to be amended with modern arbitration laws to prevent such procrastination in the implementation of the arbitral awards. The provisions shall not give the place of enforcement of the arbitral award a full discretion of time to enforce the arbitral award, especially, if there is no application to set aside/refusal the arbitral award by the debtor party. As speed of settlement of disputes is one of the most features of arbitration system. This feature will be lost if the arbitration laws did not limit the court jurisdiction of the enforcement period such as 30 days from the date of the rendered arbitral award.

3.6 Related International Provisions to the Enforcement of International Arbitral Awards

Throughout this section the discussion will focus on some international conventions, agreements, and laws in order to understand the loopholes of YAA. For questions, the 1927 Geneva Convention for the Execution of Foreign Arbitral Awards is the first convention that deals with commercial disputes to be settled by the arbitration

system.[57] Such convention recognizes the arbitration agreement and insists on referring the disputing parties to the arbitration system if they entered into a valid prior arbitration agreement.[58] Further, the same convention provides for the recognition and the enforcement of the arbitral awards rendered in other signatory states.[59] However, the NYC is the contemporary instrument to deal with the international arbitration system as far as the NYC has updated to the Geneva Convention.[60] The researcher refers to some international conventions such as New York convention 1958, UNCITRAL rules, BITs, and laws as follows:

3.6.1 The New York Convention 1958

The Convention on the recognition and enforcement of foreign arbitral awards is called New York Convention 1958.[61] NYC is accepted worldwide as the main convention of the arbitration system.[62] Most countries of the world reached a consensus to ratify the NYC.[63] NYC stipulates the recognition and the enforcement of arbitration agreement and IAA.[64] Whereas, such recognition and the enforcement may be challenged upon some limitations in the convention.[65] It is a great effort to gather several states which have a different legal system, religion, culture, geography to agree on one convention

[57] Ibid, 18-19.
[58] Ibid.
[59] Ibid.
[60] Ibid, 19-20.
[61] The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, accessed April 9, 2016, www.newyorkconvention.org.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.

whose purpose is to develop international trade.[66] Till now 156 states have ratified the convention, while Yemen is non-signatory yet.[67]

3.6.2 The Enforcement of International Arbitral Award under New York Convention

The recognition and the enforcement of IAA are the most important in the arbitration system.[68] However, sometimes the debtor party resists enforcement of the arbitral award, so that the creditor party has to refer to the national court to seek a coercive enforcement.[69] Even though, the arbitral award is rendered outside the judicial system but the competent court still has jurisdiction and power over the arbitral award.[70] The success of the arbitration system depends on the competent court.[71] This is true since the competent court has jurisdiction in the matter of assistance and control.[72] For example, In the matter of the enforcement, article III that provides the signatory states are obliged to deal with arbitral award as a binding and enforceable through the same procedures that followed by the competent court in the process of the recognition and the enforcement of the local judgements.[73] Therefore, there must not be more charge fees, different procedures, complex conditions, and so on.[74] Thus, the court has no jurisdiction to refuse to enforce the arbitral award if the award does not contravene the domestic law.[75]

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[66] Ibid.
[67] New York Arbitration Convention, accessed April 9, 2016, http://www.newyorkconvention.org/countries.
[68] Born, *International Arbitration: Law and Practice*, 26.
[69] Ibid.
[70] Ibid.
[71] Vries, "International Commercial Arbitration," 47.
[72] Ibid.
[73] New York Convention 1958, article III.
[74] Ibid.
[75] Hamid G. Gharavi, "Enforcing Set Aside Arbitral Awards: France's Controversial Steps beyond the New York Convention," *J. Transnat'l L. & Pol'y* 6 (1996): 98.

However, the recognition and the enforcement of IAA perhaps face challenges as there are available defences could raise upon the application of the recognition and the enforcement of the arbitral award. An article V[76] that provides the arbitral award can set aside if the resisting party of the enforcement satisfies the competent court by any of the following grounds:

a) The arbitration agreement ground. The resisting party of the enforcement bears the burden of proof that one of the parties was incompetent at the time of entering into the agreement or the agreement is void under the applicable law of the place seat of the arbitration.[77] Thus, there must be free consent of both parties to settle their dispute by arbitration, without such mutual consent the arbitrator has no authority to settle the dispute so that the resisting party of the enforcement could have a defence against the recognition and the enforcement of the award as far as the arbitration agreement is not valid. To be more understanding of the defence of void agreement, it has to refer to the case of *Moscow Dynamo* v *Alexander M. Ovechkin*,[78] the court dismissed the appellant's petition for the enforcement as there is no written arbitration agreement, and so the tribunal has no subject jurisdictional as there no valid arbitration agreement yet.
b) Due process ground. The losing party has three reasons to resist the recognition and the enforcement. Firstly, if he/she was not given a proper notice of the appointment of the arbitrator. Secondly, arbitration process. Thirdly, he/she was incapable of presenting his/her case.[79] Thus, the award may not recognize or enforce if the tribunal is not fair to all parties or breaches the justice proceedings

[76] New York Convention 1958, article V.
[77] Ibid, article 1 (a).
[78] *Moscow Dynamo* v *Alexander M. Ovechkin* 412 F.Supp.2d 24 (2006)
[79] The New York Convention 1958, article 1 (b).

recognized in the most laws. In the case of *Reasons & Whittemore Overseas Co.,*[80] It was stated that the enforcement of arbitral award could face challenges if the debtor party was not given proper notice regarding the appointment of arbitrator, the arbitral process, or was unable to present his case.

c) Jurisdiction: the most national arbitration laws give the debtor party the right to challenge the award in case the tribunal exceeds its authority.[81] The arbitral award may face challenges if the tribunal conducted a dispute that is not within the terms of arbitration agreement. For example, the parties submitted a specific dispute to the tribunal but the tribunal arbitrates another type of dispute or added another unrelated dispute. In the above example the dispute that within the tribunal's authority is enforceable.[82] The decisions that beyond the authority cannot be enforced.[83] This showed that the court may separate the authorized and unauthorized award when it comes to the enforcement of the arbitral award even though the award was made at the same time and the same tribunal. For more understanding of the exceeding authority by the tribunal, refer to the case of *Fiat S. P. A.* v *Ministry of Finance and Planning of Suriname*.[84] In this case the tribunal made a binding award against a third party who was not a party to the arbitration agreement. The competent court held the tribunal exceeded its authority.

d) Procedural ground: the recognition and enforcement of arbitral award could be challenged by request from the resisting party of the enforcement if he/she proves that the composition of the tribunal or the procedures contravened the agreed terms

[80] Reasons & Whittemore Overseas Co., 508 F.2d.
[81] William w. Park, "National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration," *Tul. L. Rev*. 63 (1988): 654.
[82] The New York Convention 1958, article 1 (c).
[83] Ibid.
[84] *Fiat S. P. A.* v *Ministry of Finance and Planning of Suriname* 1989 U.S. Dist. LEXIS 11995 at *14 (S.D.N.Y. Oct. 12, 1989.

in the arbitration agreement, or such agreement is against the laws of the place seat of arbitration place.[85] For example, the laws of the place seat of the arbitration provides that the arbitration must be conducted with present of neutral party co-arbitrator.[86] So, if the arbitration is conducted without a neutral co-arbitrator then it is against the law of the place seat of the arbitration.[87] Therefore, signatory state is not obligated to accept the disputed parties' terms of procedures.[88]

e) The award: the arbitral award will not be effective unless it is the final award. Article 1 (e) of NYC provides that if the arbitral award is not completed or suspended by the court of the place seat of the arbitration, the award would not enforce. According to Garry, the creditor party seeks the recognition and the enforcement is not obligated to have a prior confirmation of the arbitral award from a recognized authority in the place seat of the arbitration.[89] For more understanding, refer to the case of *Fertilizer Corp. of India* v *IDI Mgt. Inc.*[90] This case sought the enforcement of the award while the judicial actions are perhaps taken in future in the place seat where the debtor party sought to set aside the arbitral award. Nevertheless, the court enforced the award since the award did not contravene the public policy.

The same applicable result of the non-enforcement could come into the picture if a dispute is inappropriate to be settled through arbitration mechanism or the recognition and the enforcement of such award contravened the public policy of the place of enforcement of the arbitral award.[91] Therefore, the disputing parties have to be careful

[85] The New York Convention 1958, article 1 (d).
[86] Born, *International Arbitration: Law and Practice*, 398.
[87] Ibid.
[88] Ibid.
[89] Ibid, 400.
[90] *Feertilizer Corp. of India* v *IDI Mgt. Inc*., 517 F.Supp. 948 (S.D. Ohio 1981).
[91] The New York Convention 1958, article 2 (a) (b).

in choosing the place seat of the arbitration because the choice of law may lead to a negative effect on the enforcement if will infringe the public policy of the place of enforcement of the arbitral award. Even, the tribunal tries to ignore the choice of law in order to avoid the refusal of the enforcement in the state where the enforcement is sought, the ignorance of the choice of law will lead to the arbitral award to being challenged in the place seat.[92] It should be noted here that, public policy does not mean political affairs of the states or international policies.[93] Public policy which is relevant to procedural justice are misrepresentation, fraud, bribery and the like which may affect the award decision.[94]

However, the jurisdictional challenge has to make by the resisting party within the arbitration process, not after the issuing the award.[95] The continuation with the process without raising the objection, then may after the rendering of the arbitral award cannot refuse the recognition and the enforcement of the award.[96] On the other hand, some jurisdictional objections may not be waived even there is no opposition during the proceedings and processes of the resisting party of the recognition and the enforcement.[97] Also, in case the resisting party raise jurisdictional challenge before the tribunal but it did not recognize such challenge, such decision by the tribunal does not

[92] Park, National Law and Commercial Justice, 668.
[93] Peter, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 275.
[94] Ibid.
[95] Born, *International Arbitration: Law and Practice*, 386, quoted in China Minmetals, 334 F.3d at 286 (court should "refuse to enforce an arbitration award under the Convention where the parties did not reach a valid agreement to arbitrate, at least in the absence of a waiver of the objection to arbitration").
[96] Ibid.
[97] Gary B. Born, *International Arbitration: Law and Practice*, 386, quoted in Judgement of 26 June 2006, XXXII Y.B. Comm. Arb. 351 (Oberlandesgericht Frankfurt) (2007)
(Holding, wrongly, that claim under Article V (1) (a) that arbitration agreement did not satisfy Article II's written form requirement cannot be waived).

consider as a waiver of jurisdictional objection because the tribunal exceeded the authority.[98]

Another defence could be seen in the article I (3)[99] which provides that the signatory states have authority to enforce the foreign awards that are only rendered in a signatory state as well as the convention only apply to disputes that arise from legal relationships which are considered as commercial under the place of enforcement of the arbitral award. For more understanding, refer to the case of *Lombard Commodities Limited* v *Alami Vegetable Oil Products*.[100] The Court of Appeal set aside the award rendered in London under the argument that the Yang Di Pertuan Agong did not declare in the Gazette that the United Kingdom is a signatory convention to the list, so according to the local law of Malaysia the award is not considered as commercial.

Another defence, which is the state immunity, such defence may consider as an obstacle towards the enforcement of IAA but not strongly.[101] For instance, the rendered award is against the trade assets of the state or its agencies.[102] The state immunity depends on each state, some legal systems provide the state immunity and others do not.[103] Thus, non-enforcement of a foreign award does not mean that the award is void so that the same award may be effective in another state, what is void in one state is perhaps valid under another legal system. So, the creditor party could apply for the enforcement in another state if the debtor party has assets there.[104] For example, the

[98] Born, *International Arbitration: Law and Practice*, 386, quoted in Oltchim, SA v Velco Chem., Inc., 348 F. Supp. 2d 97 (S.D.N.Y. 1990) ("in the light of the fact that Velco appeared in the Romanian arbitration and field counterclaims within that forum" its jurisdictional objections "are all deemed waived." (Despite award debtor's express reservation of jurisdictional objections).
[99] New York Convention 1958, article 1 (3).
[100] *Lombard Commodities Limited* v *Alami Vegetable Oil Products* [2010] 2 Mlj 23.
[101] Phillips Capper, *International Arbitration: A Handbook*, 3rd ed. (London: Bodmin, Cornwall, 2014), 133-134.
[102] Ibid.
[103] Ibid.
[104] Ibid.

award will not be enforced in some Arab states if contains interest, but it could be enforced in another states.[105]

3.6.3 The Court Requirements of the Enforcement of International Arbitral Award

The competent court where the enforcement of IAA is sought demands some requirements prior to the recognition and the enforcement. Such requirements are same as the requirements of arbitration agreement as follows:[106]

a- Arbitral Award Requirements

The award has to be international and not a domestic as the convention and the other arbitration laws apply to IAA only. Such award has rendered based on written arbitration agreement whatever is concluded in the paragraph of the contract itself or in a separate agreement which to conduct a substantive issue, not a procedural one.

b- The Award Applied to Commercial Relationship

The award has to apply to settle commercial issue only, other than commercial issue the court may not recognize and enforce the award under the provided reservation in article 1 (3), so that the local law is the one that considers whether the issue is within the commercial term or not.[107]

c- The Award Arises from Legal Relationship

[105] Ibid.
[106] Born, *International Arbitration: Law and Practice*, 369-370.
[107] New York Convention 1958, article 1 (3).

According to the article II (2) of NYC and the article 7 of UNCITRAL, the arbitrated dispute must be a commercial one that arises out of legal relationships**.**

d- The Award is International

The convention and other arbitration laws apply only to international awards so domestic award are different from a foreign award.[108] The foreign awards are usually rendered in a state, other than the state where the enforcement is sought.[109] It is only considered as the domestic awards when procedures and proceedings are based on the municipal law,[110] so that the awards are considered as a foreign when the guideline of the arbitration processes is a foreign law.[111] The U.S. courts do not consider the awards rendered in the United States as domestic awards as far as they are related to international characteristics.[112]

3.6.4 Proof of International Arbitral Awards

The IAA must be introduced by the creditor party who intends to enforce the arbitral award through showing some requirements to prove the validity of the award, such requirements are as follows:

[108] UNCITRAL Model Law on International Commercial Arbitration 1985, article I (1) and New York Convention 1958, articles 1 (1).
[109] New York Convention 1958, article I (1).
[110] Kenneth T Ungar, "Enforcement of Arbitral Awards under UNCITRAL's Model Law on International Commercial Arbitration," *Colum. J. Transnat'l L*. 25 (1986): 717.
[111] Jian Zhou, "JUDICIAL INTERVENTION IN INTERNATIONAL ARBITRATION: A COMPARATIVE STUDY OF THE SCOPE OF THE NEW YORK CONVENTION IN US AND CHINESE COURTS," Pac. Rim L. & Pol'y J. 15 (2006): 403, accessed April 16, http://digital.law.washington.edu/dspacelaw/bitstream/handle/1773.1/626/15PacRimLPolyJ403.pdf?sequence=1&isAllowed=y.
[112] Gary Born, *International Commercial Arbitration* 2384-87 (2009).

3.6.5 The Requirements under New York Convention

The New York Convention demands some requirements of the creditor party in order to recognize and enforce the foreign award. It is necessary to refer to article IV:[113] (1) the creditor party bears the obligation to prove the validity of the award, such as:

a- The award has to be original and authorized or certified;

b- The arbitration agreement must be certified.

(2) If the rendered award made in a different language other than the official language of the place of enforcement of the arbitral award, it has to translate it to the official language of the place of enforcement of the arbitral award and the documents has to be officially translated by recognized authority.

Thus, once the creditor party proves the above requirements the national courts do not have to add other requirements that may lead to pending or difficulties towards the recognition and the enforcement of the award. After proving such requirements, the proof will shift to the debtor party to prove any of the exceptions under article V in order to avoid the recognition and enforcement made by the creditor party. The convention and the signatory states made effort to support the creditor party by reducing required obligations.[114] Hence, article III of the convention made such requirements for the recognition and the enforcement in the matter of the procedures scope only, no other hard materials are required as evidence more than that requirements applicable to the domestic judgements. According to Gary, article III has to be read together with article V that give the debtor party a chance to prove any of

[113] New York Convention 1958, article IV (1) (2).
[114] Born, *International Arbitration: Law and Practice*, 374.

the exceptions in order to refuse the recognition and the enforcement of the award.[115] Thus, if debtor party proves any of the exceptions it would be a defence to reject the enforcement of the award as the application of such grounds is compulsory, and not discretionary.[116] This means that the court is bound to recognize and enforce the arbitral award subject to article V of NYC and other resisting exceptions to the recognition and the enforcement such as reciprocity reservation and commerciality in article 1 (3) where such exceptions have to be proven by the resisting party of the award as well as article V (2) (b) that provides if the award contradicts public policy of the place of enforcement of the arbitral award, the court has a full discretionary power to refuse the recognition and the enforcement based on such exceptional grounds provided by the convention. Thus, after the creditor party proves the validity of the arbitral award the competent court is more likely to enforce the award unless the debtor party resists the enforcement, then the burden of proof will shift to him/her to prove the argument of resisting the award to satisfy the court to reject the award.[117]

With regards to international arbitration system, the court has no jurisdiction to review the essence of the arbitrator's decision that includes the award in order to recognize the award. Indeed, the court makes the review, but under the matter of the public policy or the grounds stated in article V of NYC. Actually, there is no provided exception by the convention in case the decision was wrongly reached by the tribunal/arbitrator. Even, the award contained a mistake of law or fact is not acceptable grounds to reject

[115] Ibid, 378.
[116] Ibid.
[117] Alexander S. Vesselinovitch, *Enforcement of SCC and Russian Arbitration Awards in the United States Courts: an Overview* (Juris Publishing, Inc., 2013), 44, accessed 13 April, 2016, http://www.kattenlaw.com/files/19801_Enforcement_of_SCC_and_Russian_Arbitration_Awards--Web_Version.pdf.

the recognition and the enforcement of the award.[118] This means that the court has no jurisdiction to review the credibility of the award or the award has to be officially confirmed pro-enforcement. However, some legal systems practice very limited judicial review of IAA, especially, in the matters of the authority of the arbitrator, the validity of the arbitration agreement, the procedural regularity of the arbitration, and the public policy while other states like United Kingdom provide application of judicial review to the foreign awards that are usually determined by the merit of the tribunal's decision, such limited judicial review could be noticed in the most institutional arbitration rules.[119]

Furthermore, there is another serious ground than the public policy which is public interest. Such grounds apply in national arbitration laws that aims to protect public interest.[120] This contains the grounds of environmental financial effect on the public and culture so that if the award contravened the public interest or public group is perhaps to face a challenge.[121] The arbitral award will not be enforced on the ground of the public interest.[122] Thus, the public interest influences on the arbitration system and it creates negative effect than public policy.

3.6.6 The Consequences of Yemen as Non-Convention State

Currently, there are 156 states that ratified the New York Convention 1958, however, Yemen is not a signatory state.[123] Such large number of the signatory states could mean

[118] Born, *International Arbitration: Law and Practice*, 382, quoted in Judgement of 24 November 1993, XXIY.B Comm. Arb. 617, 623 (Lux. Superior Court of Justice) (1996).
[119] Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 3rd ed. (The Netherlands: Kluwer Law International, 2010), 100-101.
[120] Zhou, "Judicial Intervention in International Arbitration": 448-449.
[121] Ibid.
[122] Ibid.
[123] New York Arbitration Convention, accessed April 14, 2016, http://www.newyorkconvention.org/countries.

that the NYC brings positive effects to their national economies more than negative effects. Thus, the researcher is surprised about the rationale behind non-ratifying the convention by Yemen. On the other hand, most countries have ratified it and some of such signatory states apply principle of the *Shari'a* like Saudi Arabia. According to Alsalahi, there are no reasonable grounds for Yemeni government to justify the rationale behind non-ratifying the convention, especially, joining the convention will lead to positive effects on Yemen such as discharge of compulsory jurisdiction due to the agreement on the promotion and protection of investments 1985, contribute to attracting FDI.[124] As Yemen is a part of the global trade joining the convention will assist the enforcement of IAA.[125]

Therefore, non-ratifying the convention by Yemen will lead to putting the country under the exceptional grounds for the refusal of the recognition and the enforcement of arbitral award as provided in NYC. Article I (3) allows reservation to the signatory states which the signatory state can only enforce the award made by another signatory state, not by non-signatory state.[126] The same effect will be treated by the competent court in Yemen which the IAA could only be enforced in Yemen according to reciprocity reservation.[127] For instance, the United Kingdom refused to enforce the judgements rendered in Saudi Arabia, in reaction, the Saudi Arabia courts refused to enforce arbitral awards rendered in the UK.[128] In another example, the enforcement of

[124] Shahir Alsalahi, "The Significance of ratifying the New York Convention 1958," *Organization House of Law*, Accessed April 14, 2016, http://ohlyemen.org/modules.php?name=News&file=article&sid=96.
[125] Ibid.
[126] New York Convention 1958, article 1 (3).
[127] The Code of Civil Procedure, section 494 (3).
[128] Charles N. Brower and Jeremy K, Sharpe, "International Arbitration and the Islamic World: the Third Phase," *The American Journal of International Law*, Vol. 97, No. 3 (July, 2003): 649, accessed April 20, 2016, http://www.jstor.org/stable/pdf/3109849.pdf?refreqid=excelsior%3A796355557412808b72679029356 58154.

foreign awards in the United States may be rejected if the creditor party from the country that is not signatory state, the citizens of the non-signatory state may lose the advantage of the enforcement of the arbitral award if his/her country is non-signatory state, especially some countries like the US ratified the convention subject to the reciprocity reservation.[129] It is necessary to refer to the American case of *Bergesen* v. *Joseph Muller Corp.*[130] The Court of Appeal held the that the reciprocity reservation means that the United States would only enforce IAA if it was rendered in a signatory state. The US court has full jurisdiction to refuse the enforcement of an award rendered by a non-signatory state.

Through an interview, all interviewees of Court of Appeal judge, academicians, and arbitrator suggested that in order to improve the arbitration system in Yemen, they all recommended ratifying New York Convention 1958. Respondent 1 stated that:

> *Of course, if Yemen wants to deal with international arbitration dispute, it has to ratify the relevant international conventions. But, before that, it must have effective national arbitration laws.*

Respondent 2 stated that:

> *NYC is the most effective convention in the arbitration system, especially in the matter of the enforcement of IAAs. Its main objective is recognize and enforce IAA. Thus, Yemen will be secede from global trade if not ratified New York Convention 1958.*

In his contribution, Respondent 3 stated as follows:

> *Yemen continually a non-signatory state to NYC will adversely affect the recognition and the enforcement of IAA. So, it has to ratify the*

[129] Gerald Aksen, "American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards," *Sw. UL Rev*. 3 (1971): 1, Quoted in Letter of Accession from President Nixon to United Nations dated September 1, 1970.
[130] *Bergesen* v. *Joseph Muller Corp*, 710 F.2d 928, 932 (2d Cir. 1983).

convention if it is interesting to cope with international arbitration system.

Respondent 4 mentioned that:

Non-ratifying NYC by Yemen is an obstacle towards the enforcement of IAA whatever it was rendered in Yemen or by any foreign state as the reciprocity reservation will impede the enforcement because NYC stipulates the enforcement of the IAA if it is rendered in signatory state.

Respondent 5 stated that:

It is commonly known that NYC is the most important convention that most of countries have ratified it, including Arab countries. Hence, Yemen supposedly to ratify it to enhance the national economy.

While Respondent 14, said that:

Actually, there is no reasonable reasons to satisfy us that NYC is may harm the economy or Yemen as a whole. Especially, the NYC empowers the national court to reject to enforce IAA in case contravenes the public policy such as Shari'a principles. Ratifying NYC will join Yemen with global trade. I strongly advise the legislators to ratify it. Indeed, we do not have qualified person who understand the international laws so Yemen is confuse of ratifying the international convention as does not understand which will bring positive effects to the country. NYC is important to improve the arbitration system in Yemen.

Thus, the victims of non-ratifying NYC are Yemeni businessmen and Yemen as a whole because if they seek to recognize and enforce arbitral award whether the place seat is held in Yemen or in another state may fail to enforce the award as the place of enforcement of the arbitral award has legal authority to reject the recognition of the arbitral award on the ground of reciprocity reservation. Also, Yemen is obligated to enforce foreign awards as stated in section 7 of YAA that allows the parties to agree upon the law they wish, the place seat of the arbitration, and the institution. Moreover,

section 57 that provides the arbitral award is binding. However, Yemeni competent court will apply the reciprocity reservation as well. According to section 494 (3) of the Code of Civil Procedure, the competent court will enforce IAA in Yemen based on the reciprocity reservation. Furthermore, non-ratification of the convention is not an immunity for Yemen as well as Yemeni businessmen to escape from execution of agreements. The foreign award will be enforced against Yemen based on other laws. It is necessary to refer to the case of *S & Davis* **v** *Yemen*.[131] In this case, the contract was made and signed by an embassy of Yemen which contained the arbitration clause. Later, the dispute arose and the place seat of the arbitration held in London (UK). The creditor party applied for the enforcement in US competent court based on NYC. The competent court found that Yemen is a non-signatory state. Nevertheless, the award enforced against embassy of Yemen under s 1605 (a) (6) of the Foreign Sovereign Immunity Act 1976 that provides the foreign state cannot claim immunity to escape of the obligations. This case provides that the arbitral award made outside Yemen can still be enforced against Yemen even though Yemen is non-signatory state to NYC. So, based on the previous discussion Yemen will be the losing party in the following ways. Firstly, Yemen is the losing party of non-ratifying the convention because the arbitral award can be enforced against the debtor party outside Yemen. Another situation base on Article I (3) that arbitral award made in Yemen cannot be enforced in the contracting states of NYC.

3.7 UNCITRAL Model Law on International Commercial Arbitration 1985

The UNCITRAL Model Law on international commercial arbitration was recognized in December 1985 by United Nations General Assembly then the United Nations

[131] *S & Davis* v *Yemen*, US, 218 F.3d 1292, 1301 (11th Cir. 2000).

Commission on International Trade Law adopted such rules and that was on 21 June 1985 and later amended in 2006.[132] Such rules have been adopted by many members' states during the period of 40 years,[133] so far over 60 countries have adopted it.[134] UNCITRAL was adopted in June 1985 by the United Nations Commission on International Trade Law, it was a tremendous step to harmonize and modernize international commercial arbitration, and it helped the implementation of New York convention 1958.[135] UNCITRAL drafted by combining both the 1958 New York Convention and the 1976 UNCITRAL Arbitration Rules.[136] Chapter 8 of UNCITRAL deals with the enforcement of award provisions which is an extract of the 1958 New York Convention as well as other provisions could be seen in UNCITRAL which is an original copy of the UNCITRAL Arbitration Rules.[137]

3.7.1 The Intervention of the Competent Court

The competent court could interfere in some proceedings, but such intervention is limited whereas the court has no right to interfere unless that is provided by UNCITRAL.[138] However, article 6 gives the competent court larger authority to interfere in some exceptions. There is a conflict between article 5 and 6 in the matter of jurisdiction. In anyway, the most important is the intervention of the court in the interim measures of protection, whereas various articles provide the jurisdiction of the competent court upon the request of any of the disputed parties to order the other party

[132] United Nations Commission on International Trade Law, accessed April 25, 2016, http://www.uncitral.org/uncitral/en/index.html.
[133] Ibid.
[134] Peter, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 8.
[135] Henri C. Alvarez et al., *Model Law Decision* (the Huge: Keluwer Law International, 2003), 1.
[135] Ibid.
[136] Loukas A. Mistelis, *Concise International Arbitration* (United Kingdom: Kluwer Law International, 2010), 582.
[137] Ibid.
[138] UNCITRAL Model Law on International Commercial Arbitration 1985, article 5.

to provide an interim measures of protection whether before the proceedings or after.[139] Even though, such interim measures of protection were ordered by the tribunal that has jurisdiction to request prior to the deciding of the award[140] while the role of the competent court comes to the picture upon the request of the tribunal asking the court assistance for coercive actions relating to the award of the interim measures which the place of enforcement of the arbitral award shall consider the arbitral award of such interim measures of protection as binding irrespective of where they were rendered.[141] The article 9 and 17 give separated jurisdiction, whereas article 9 gives power to the court to order an interim measures of protection while article 17 gives power to the tribunal for the same purpose.[142] However, which of the two authorities has the priority to grant such orders? Indeed, the court could grant an interim measures of protection but if the tribunal granted an interim measures of protection before the court, then the court has to perform the arbitral tribunal orders.[143] On the other hand, article 9 gives the court a jurisdiction to grant interim measures of protection before or within the proceedings, this means none of the two authorities has more priority over another.[144] In the researcher' opinion, the tribunal is supposed to only have the authority to grant interim measures of protection as it is more known of arbitral award before it than the court. Also, the application for interim measures of protection in the court will makes the arbitral processes longer and conflict of jurisdiction will arise.

Such important point to grand interim measure could be seen in sections 30 and 31 of YAA which that provides the tribunal has jurisdiction to order any of the parties to

[139] Ibid, article 9.
[140] Ibid, article 17 (1) (2).
[141] Ibid, article 17 (H) (1).
[142] Mistelis, *Concise International Arbitration*, 606.
[143] Ibid.
[144] Ibid.

provide interim measure award to ensure the implement of the award. This strengthens the arbitration system in Yemen if practiced as interim measures of protection may help to enforce IAA. However, the same jurisdiction is given to the court to grant interim measures of protection upon the applicant's request based on section 43 of the same Act.

In terms of jurisdiction, the competent court has the power to issue interim measures of protection in arbitration taking place outside Yemen to ensure the enforcement of the international awards if requested by the applicant of the tribunal. Respondent 1 stated that:

> *The enforcement of international interim measures of protection and awards through judiciary channels of the host and the place of enforcement of the arbitral award to implement the arbitral award or an order if that host state is a member to the convention, such as Arab Convention.*

Respondent 2 said that:

> *By international judicial mandate through the diplomatic corps, the arbitral tribunal requests from Yemeni judiciary an interim measures of protection in some arbitration cases. The arbitral tribunal has a discretion whether specific goods are going to expire or they are perishable, or the need to set a guard on a factory to keep it running or supervising its maintenance to continue in production to avoid losses from stoppage of production, or quick action to keep goods in dispute safely and to avoid damage by providing refrigerators or reservation depots during high temperature weather. This is especially if the goods are perishable such as fruit, medicines, and so on. The arbitral tribunal needs a faster procedure to prevent damage. Some goods could get damaged by delay, hence need temporary procedures and speed so as not to hurt the disputing parties' interests if the arbitral tribunal waited until the litigation ends. Thus, we consider such request of interim measures of protection rendered by the arbitral tribunal or the court.*

Respondent 3 said that:

Sometimes, the lost party against whom the temporary award of interim measures of protection is rendered may fail to implement it voluntarily. The arbitral tribunal or the judiciary in the host State contact us to in order to take coercive actions to enforce the temporary arbitral award. It commonly known that the arbitral tribunal has no authority to force the lost party to forcibly implement what it decided. But, such procedures may be a bit complex procedures because the communication between two different systems is through the diplomatic corps.

Respondent 4 stated as follows:

The arbitrator has no authority to compel the lost party to enforce the interim measures of protection, which refers to the court to forcibly enforce interim measures of protection as like freeze the bank account, seize property, and so on. There is a judicial cooperation between Yemen and several States to implement judicial decisions and arbitral awards, so we cooperate with those States that have international conventions with Yemen providing for judicial cooperation. We received several requests which require us to enforce interim measures of protection, and already accomplished these requests as long as not contrary to the public policy or the grounds to set aside the arbitral award as provided in sections 53 and 55 of Yemeni Arbitration (Act No. 22)1992.

Respondent 5 said that:

The Yemeni Arbitration Act does not prevent the foreign arbitral tribunal to request from a Yemen court any assistance and control whether before or during arbitral proceedings but the enforcement of such request is subject to the national laws. There is no section in the Yemen Arbitration Act which provides for rejecting the right of the foreign arbitral tribunal to request from the Yemen court to assist it in taking an interim measures of protection. Also, you should not interpret such request rendered by the arbitral tribunal as a mandate the conflict with the Yemen court. Such request is only to have the court' assistance and control as the court is the only authority has jurisdiction to take coercive actions.

Respondent 14 stated that:

I have seen a foreign arbitral tribunal's request to the Yemen court. Section 43 of the Yemeni Arbitration Act provides that of the arbitral tribunal has a jurisdiction to request from either party or request

> *assistance from a competent court to take interim measures of protection without stopping the arbitration proceedings.*

As it stated above, it is confirmed that the interim measures of protection are provided by YAA and practiced. As the host state of the arbitration and the place of enforcement of the arbitral award are different legal system, so the procedures and processes of interim measures have to be implemented through diplomatic corps. However, it confirmed that to implement interim measures will face communication difficulties which have to go through complicated procedures and processes by two different systems. In addition, the communication will be worse in Yemen, as Respondent 2 answered in different question that "the judiciary faces issues with diplomatic corps because Yemeni diplomatic corps fail to cooperate with the judiciary in case the court requested it to communicate with foreign diplomatic agencies to implement judicial operations. This means that interim measures will face difficulties to be implemented as Yemeni diplomatic corps do not cooperate with court. Hence, it has to improve the internal cooperation between Yemeni judiciary and the diplomatic corps.

Also, regarding to the competent court giving assistance to the tribunal in case of the applicant or the tribunal requested interim measures of protection before issuing the final awards. Respondent 1 said that "the arbitral tribunal requires the Court's assistance, but to accept the request is depend on court's discretion".

Respondent 2 stated that:

> *The court plays a major role in assistance and control the arbitral tribunal to implement the interim measures of protection such as provide guards after seizing the property. The arbitral tribunal has no jurisdiction to appoint guards to take after specific possession or freeze the bank account. Thus, through a request from the arbitral tribunal then, the court may approve or reject it. The court has discretion whether such an arbitral award is reasonable or not.*

Hence, the matter of interim measures of protection are not enforceable if the lost party refused to enforce unless the court approved such arbitral award. The formal court has more power than the arbitral tribunal in the matter of enforcement of the interim measures of protection, the arbitral award of interim measures of protection is only implemented voluntarily by the lost party while, the court could enforce it by coercive actions.

Respondent 3 said that:

The court provides assistance and control to arbitral tribunal, but subject to requirements that must be fulfilled before the acceptance by the court, they are substantive requirements and formal requirements. Substantive requirements such as the arbitral award is issued by the arbitral tribunal according to the arbitration agreement whatever the arbitration agreement in a part of the contract or in a separate contract. The Court will not accept any interim measures of protection in a matter family disputes or criminal disputes as the Yemeni Arbitration Act prevent settlement of family disputes or criminal disputes by arbitration system according to section 5 of the Yemeni Arbitration Act. The interim measures of protection must be relevant to the dispute. The interim measures of protection must be a jurisdiction of the arbitral tribunal so if there is an agreement between the disputed parties which prevents the arbitral tribunal from taking any interim measures, then the court will not assist the implementation of the arbitral award of interim measures of protection. While such formalities like that the arbitral award of interim measures of protection are issued in a written document, must translate any relating documents to Arabic language.

Respondent 4 said that:

The court collaborates with arbitral tribunal to implement interim measures of protection measures which aims to preserve evidence or maintain the goods from damage, and sometimes to create realistic or legal status needed to ensure the implementation of the final award, such interim measures come to the end at the time of issuing the final arbitral award. As temporary in nature, and they are not decisive or conclusive, so their survival depends on the survival of the original dispute, such interim measures are not guaranteeing that the final arbitral award will be in favour of the party whom the interim measures are rendered in favour. Despite its association with the original dispute, they are not intended to resolve the conflict, but aims to facilitate the implementation of the purpose of the original litigation, adjudication, and ensure its future implementation of the final arbitral award.

Respondent 5 said that:

> *The relationship between the court and the arbitral tribunal is not that of competition, but this relationship is meant to facilitate cooperation between the formal judiciary and the arbitration system. That's why the court intervenes in case of refusal of one of the parties to the dispute to enforce the interim measures of protection or the final arbitral award.*

Respondent 14 mentioned that:

> *The arbitral tribunal refers the procedures to the competent court to carry out the subsequent procedures when the lost party rejected implementation of the arbitral tribunal. An arbitrator has no authority to compel some actions so requires judicial intervention to protect the right or liabilities, here could be an arbitrator and judge's role represents a sort of job sharing for the benefit of existing proceedings. Here it clearly highlights the role of the judge as a facilitator and to supplement inadequate authority of the arbitrator.*

Therefore, the tribunal award can issue an interim measures of protection in case of goods that are perishable in order to avoid damage and cost. Also, the interim measures of protection can be taken by the arbitral tribunal to ensure the enforcement of international arbitral award by the lost party. The arbitral tribunal can request the court's assistance and control if the lost party refuse to enforce the arbitral award of an interim measures of protection voluntarily. However, the court can accept the arbitral tribunal' request after fulfilling specific requirements. But, it does not mean reviewing the arbitral award. Such requirements are only stipulated in the Yemeni Arbitration Act. Regarding the discretion of court to accept or reject the award of interim measures of protection. Arguably the court has jurisdiction to reject the award of interim measures that rendered by the tribunal. This is on the grounds that the court is considered be the higher authority. It is irrational to equate the tribunal's jurisdiction with the court's jurisdiction. The court is the authority that all authorities have to be under its jurisdiction. The court is the authority that has to be referred to in case of

breach of the natural justice. Thus, the arbitration laws allow the disputed parties to refer to the court if the tribunal breach the natural of justice or refuse to accept reasonable request such as interim measures. On the other hand, the researcher prefer the tribunal to have sufficient jurisdiction to deal with interim measures as it is the authority which is more understandable of the dispute before it. However, the tribunal jurisdiction cannot be higher than the court jurisdiction. YAA which could be seen in section 31 that provides the tribunal has a jurisdiction to require security of any of the parties to ensure the compliance with arbitration proceedings and the award as well. However, YAA is silent regarding the review of the arbitral award of the interim measures by the court. As the arbitral award of the interim measures is not final as the same as the final arbitral award. YAA, thus, has to clarify the court position. It has to refer to the international cases to understand the award of interim measures. The tribunal indirectly accepted the application by preventing the respondents from disposing the disputed assets.[145] Other measures such as inspection of property to have evidence,[146] sell perishable goods,[147] arrest of a ship,[148] and prevent the respondent from disposing of assets.[149] It is not incompatible with the arbitration agreement to seek the court's assistance to have an order such as interim measures of protection or a subpoena, the applicant has to choice to seek such assistance that with the arbitral tribunal's authorization based on article 27 of the Model Law or without the arbitral

[145] ICC Interim Conservatory Award 10021 of 1999 (unpublished).
[146] CLOUT case No. 692 [*Transorient Shipping Limited v. The Owners of the Ship or vessel "Lady Muriel" v. Transorient Shipping Limited*, Court of Appeal, Hong Kong, 3 May 1995], [1995] HKCA 615, also available on the Internet at http://www.hklii.hk/eng/hk/cases/hkca/1995/615.html.
[147] *Taxfield Shipping Ltd. v. Asiana Marine Inc. and others*, High Court—Court of First Instance (Construction and Arbitration Proceedings), Hong Kong Special Administrative Region of China, 7 March 2006, [2006] HKCFI 271, available on the Internet at http://www.hklii.hk/eng/hk/cases/hkcfi/2006/271.html.
[148] CLOUT case No. 354 [*Silver Standard Resources Inc. v. Joint Stock Company Geolog, Cominco Ltd. and Open Type Stock Company Dukat GOK*, Court of Appeal for British Columbia, Canada, 11 December 1998], [1998] CanLII 6468 (BC CA), also available on the Internet at http://canlii.ca/t/1f0vk;
[149] Ibid.

tribunal's authorization base on article 9. The cases have clarified that the courts are mostly enforce the arbitral award of the interim measures.

3.7.2 Recourse against the Arbitral Award

The arbitral award maybe recourse, so that any of the disputed parties may refer to the court to recourse against the arbitral award if resisting party satisfies the court through proving any of the exceptions stated in article 34 (2) (a) as follows:

(i) One of the parties to the arbitration agreement has less capacity when the arbitration agreement took place, or the agreement is void based on the applicable law to the dispute or the law of the place seat of arbitration and the disputed parties miss to mention that.

(ii) The resisting party challenged the appointment arbitrator and arbitral process under the ground of not given proper notice of the mentioned actions.

(iii) The rendered award conducted a dispute that not contained in the agreement or the arbitrator/arbitrators acted beyond their authority, otherwise, the part that not within the submitted dispute may set aside and that within the submission is more likely to enforce.

(iv) The constituted tribunal or the procedures are against the agreed terms of the disputed parties to the arbitration agreement or such agreement against the laws of the place seat.

The arbitration tribunal shall follow the arbitration rules, proceedings, and procedures agreed upon by the disputed parties in the arbitration agreement.[150]

[150] Mistelis, *Concise International Arbitration*, 647.

In one case the German court refused to recognize the arbitral award based on the argument that the disputing parties agreed upon choosing of arbitrators a pre-set list of arbitrators while the tribunal recognized other arbitrators out of the agreed list. Additionally, the tribunal refused a request to listen to oral hearing which the parties previously agreed in the arbitration agreement as well. So, the tribunal exceeded its authority by such appointment of arbitrators and proceeding that is against the agreed terms in the arbitration agreement.[151]

(b) The competent court has a discretion to set aside the award upon the following grounds:

(v) The subject matter of the dispute is inappropriate to be settled under arbitration system.

UNCITRAL allowed to set aside the arbitral awards that are not appropriated to be settled by arbitration mechanism.[152] However, it did not provide the scope of the disputes that are not arbitral, so it leaves the discretion to the court to determine that based on the national legal system.[153]

(vi) The court classified the award as a contravention of public policy.

According to Sanders, UNCITRAL is lack of essential provisions in the matter of the arbitral agreement or the award that affected corruption, fraud, or bribery.[154] Such matters contravene public policy which gives the right to the debtor party to set aside the award or judgement through limited period of three months from the knowledge of

[151] CLOUT Case No. 436, Bayerisches Oberstes Landesgericht, Germany, 24 February 1999.
[152] Mistelis, *Concise International Arbitration,* 647-648.
[153] Ibid.
[154] Ibid, 648

such matters.[155] The public policy is a contentious issue which the signatory states failed to have to a consensus on one guideline.[156] Thus, leaving the court to consider what constituted the public policy.[157]

3.7.3 Recognition and Enforcement of Awards

It is commonly known the arbitral award is binding on all the disputing parties. Article 35 provides that the arbitral award is binding, so that the court has no jurisdiction to refuse the enforcement of the arbitral award without any of the reasons stated in articles 34 or 36.[158] On the other hand, the place of enforcement of the arbitral award is compelled to enforce the arbitral award that complied with the requirements.[159] Thus, the creditor party can apply for the recognition and the enforcement by providing an official award or authorized copy in an official language of the place of enforcement of the arbitral award.[160] However, the certified copy in case the arbitration agreement or the arbitral award is rendered in different language of the place of enforcement of the arbitral award.

The arbitral award is automatically recognized and enforced if the creditor party fulfills all requirements stated in the article 31. The creditor party is not obligated to confirm the award in the place seat of the arbitration. In one case the resisting party of the enforcement argues that the award has to be confirmed in Canada before applying the enforcement of the award in U. S. courts. The competent court dismissed such argument.[161] Hence, the effectiveness of the arbitrated case will be considered by the

[155] Ibid.
[156] Ibid.
[157] Ibid.
[158] UNCITRAL Model Law on International Commercial Arbitration 1985, article 35 (1) (2).
[159] Ibid.
[160] Ibid.
[161] CLOUT Case No. 117, Ontario Court of Justice, 19 December 1994.

place of enforcement of the arbitral award, rather than the state of the place seat of the arbitration.

The fundamental issue of UNCITRAL is revising what is as of now covered by NYC.[162] It means that UNCITRAL is repeating the same provisions of NYC. Thus the non-signatory states of NYC are perhaps not adopt UNCITRAL as it has not brought new provisions on the matter of the recognition and enforcement, other than repeating NYC provisions.[163] On the other hand there is conflict between article 35 (1) of UNCITRAL and article 1 (3) of the convention.[164] The convention allowed the national court to refuse to recognize and enforce the arbitral award based on reciprocity reservation and commerciality in article I (3). While, UNCITRAL is silent on this authority. However, this researcher disagree with the author because that UNCITRAL is only guideline for the states to adopt it to the national arbitration laws. It does not mean that has to adopt it entirely. The states can merge, change, amend based on what they could be seen is suitable for their reciprocity law. For instance, The YAA is mainly based on UNCITRAL Model Law on international commercial arbitration with amendments as adopted in 2006 (UNCITRAL).[165] But, YAA is only partially adopted it as can notice provisions are relevant to the customary law. Another difference could be seen in article 35 (1) of UNCITRAL and article III of NYC which UNCITRAL is intentionally distinguished between the recognition and the enforcement.[166] It considered them as separated from each other.[167] Even though, at the application of the enforcement of IAA does not require applying for recognition. The same

[162] Peter Binder, *International Commercial Arbitration in UNCITRAL Law Jurisdictions,* first edition (London: Sweet & Maxwell, 2000), 216
[163] Ibid.
[164] Ibid.
[165] Jens Kambeck, "Arbitration in Yemen," 21.
166 Peter Binder, *International Commercial Arbitration in UNCITRAL Law Jurisdictions*, 217.
[167] Ibid.

application is applicable for both the recognition and enforcement.[168] By anyway, YAA adopted article 35 and 36 of UNCTRAL but added a paragraph, that is, the arbitral award will not be implemented if it contravened *Shari'a.* It means that YAA compels Yemen court not only to deal with international awards and domestic awards equally but bears it the obligation to enforce the awards as long as they comply with the requirements provided in YAA. In addition, article 36 of UNCITRAL and V and VI of NYC are similar in the matter of the recognition and enforcement.[169] However, the article 36 of UNCITRAL applies to all awards whatever they are international or domestic awards while articles V and VI stipulated to deal only with foreign awards.[170] Indeed, the rationale of UNCITRAL to be applied to both awards is to prevent the distinction between the international and domestic award.[171] Therefore, the same provisions that apply over domestic awards will be applied to international awards as well. It has to refer to YAA to understand the position of the distinction between the international and domestic award. Section 7 provides that the disputed parties, whatever one of the parties is non-citizen or both are non-citizens to choose their own law, place and language to settle the existing or future dispute. This is good feature of YAA which deals and applies the same procedures over both parties. It does not distinguish among the parties' nationality. It means that the Yemen court will apply the same relevant provisions of the enforcement over the both local and international awards.

[168] Ibid.
[169] Ibid, 221.
[170] Ibid.
[171] Ibid.

3.7.4 The Grounds for Refusing Recognition and Enforcement

Upon the application of the recognition and the enforcement of the competent court, the debtor party could raise objections to set aside the arbitral award.[172] UNCITRAL requires the place of enforcement of the arbitral award to treat the international award and local awards equally.[173] Article 36 (1) (2) provides that the court has a jurisdiction in some exceptional rules to refuse the recognition and enforcement of the arbitral award, such exceptions can come into the picture if the resisting party of the enforcement could prove that one of the parties to the arbitration agreement referred in article 7 was under the age of majority or was an incompetent person or the agreement is void so that the resisting party of the enforcement bears the burden to prove that the agreement is void based on an article 36 (1) (a) (i). Article 18 provides that the disputed parties have to be treated equally and each party must be given sufficient time to present his case, otherwise, if the debtor party was not given a sufficient notice in the matter of appointment of the arbitrator as well as a reasonable notice of the arbitral proceedings or was unable to present his case, he could challenge the enforcement of the award. In one case, it was held that the court requires the tribunal only to give sufficient time to each party, whether the parties exploit such time or not, getting no advantages of the given time will not affect the enforcement of the award.[174]

Another exception, the court can determine the refusal to implement the arbitral award if the arbitral tribunal fails to comply with the agreed terms of the disputed parties that stated in the arbitration agreement. Thus, the tribunal must not adjudicate issues that excluded by disputing parties, otherwise, the award will not be enforced. In one case,

172 Ibid, 287.
173 Ibid.
174 CLOUT Case No. 88, High Court of Hong Kong, 16 December 1994.

the tribunal issued an award that terminates the franchise agreement while the arbitration agreement excluded any matter leading to termination. The competent court held the tribunal exceeded its authority so the award is unenforceable.[175] However, it is not a breach of the arbitration agreement if the arbitral tribunal made a decision on the subject matters that submitted to arbitration which is separated from those subject matters are not submitted, the award on the subject matters that submitted to the arbitration can be recognized and enforced. Furthermore, it doesn't breach of UNCITRAL if the composition of the arbitrators or the arbitral procedures does not comply with the law of the country of the place seat of the arbitration.

Also, it is a reasonable ground to refuse the enforcement of the arbitral award if the court find that the subject matter of the dispute is not capable of being settled by arbitration mechanism under the enforcement law, or the award is contravened public policy.[176] Such violation of public policy like infringement of the principles of morality and justice in the place of enforcement of the arbitral award.[177] For example, *Riba* is strictly prohibited under principles of the *Shari'a* so that imposition of *Riba* in commercial transactions or as penalty is unacceptable.[178] Thus, the arbitral award will be considered as against the public policy of the state that apply *Shari'a*.

Moreover, UNCITRAL considered the award as binding on the disputed parties, regardless of where the award was rendered[179] in order to avoid the distinction between the international awards and domestic awards, especially, to avoid a demand of

[175] CLOUT Case No 67, Saskatchewan Court of Appeal, Canada, 17 September 1991.
[176] CLOUT Case No. 37, Ontario Court, Canada, 12 March 1993.
[177] Ibid.
[178] Abdulrahman Yahya Baamir, *Shari'a Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Ashgate Publishing, 2010), 4.
[179] UNCITRAL Model Law on International Commercial Arbitration 1985, article 36 (1).

onerous evidences to enforce IAA.[180] However, the award will be rejected in the place of enforcement of the arbitral award if the state where the award is rendered had set it aside. However, in a German case, the court enforced the award that was set aside in Russia which it is the original state of the rendered award.[181] This means a lack of uniform guideline in international arbitration systems.

3.8 The Convention of the Settlement of Investment Dispute between States and Nationals of Other States

Convention of the Settlement of Investment Dispute between States and Nationals of Other States (Washington/ICSID Convention), 1965. Such convention established the International Center for Settlement of Investment Disputes (ICSID) to monitor and observe disputes that arise between the contracting state and the nationals of other contracting states.[182] Till now, 152 countries have ratified the ICSID Convention whereas the Republic of Yemen signed the convention on October 1997 and ratified it in October 2004 while the force of the convention entered on November 2004.[183] ICSID has to be the tribunal that shall conduct the disputes whereas the place seat of arbitration is the principal office of the International Bank for Reconstruction and Development (the Bank)[184] which is the main location in Washington, but the disputed parties could agree upon other branch locations of the Bank.[185] This means that the

[180] Mistelis, *Concise International Arbitration*, 652.
[181] CLOUT Case No. 372, Oberlandesgericht Rostock, Germany, 1 Sch 3/99, 28 October 1999.
[182] Aron Broches, "Observations on the Finality of ICSID Awards," *ICSID Law Review 6* (September, 1991): 322.
[183] ICSID, List of Contracting States and Other Signatories of the Convention, 2015, accessed April 16, 2016, https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf.
[184] Convention of the Settlement of Investment Dispute between States and Nationals of other States (Washington/ICSID Convention), 1965, Article 2.
[185] *Helnan International Hotels A/S* v *Arab Republic of Egypt*, (ICSID Case No. ARB/05/19), FA, 3 July 2008.

contracting states to the convention have no jurisdiction to conduct the dispute through their own centers of arbitration. Such jurisdiction is different from that provided in NYC and UNCITRAL which allow the arbitration proceedings to be held in any contracting state to NYC and conduct the arbitration by the rules of the contracting states or the international institutions.

3.8.1 The Jurisdiction of ICSID

ICSID has jurisdiction to conduct disputes that are relating to the investment disputes between the signatory state and the national of the signatory state upon free consent in writing of the mentioned parties to settle their difference through ICSID.[186]The definition of the investment did not leave to the court to determine after the issuing of the award whether the dispute is within the scope of investment or not, this convention stipules on the signatory state that upon ratification of the convention must inform ICSID the disputes which are considered as investment disputes as well as the disputes that are not within the scope of investment.[187] Such limitation is great as did not leave the court to use the definition as a sword against the non-willing to enforce the arbitral award in case the award might not in favour of the signatory state economy, citizen, and the like. Also, this limitation is a guideline for a foreign investor to understand the disputes that inappropriate to be settled by arbitration mechanism. Such limitation provided by ICSID is different from article I (3) of NYC and article 1 (1) of UNCITRAL which stipulated that the dispute must arise out of legal commercial, otherwise, the award will not be recognized and enforced by the place of enforcement of the arbitral award. However, they did not provide the exact meaning of the

[186] Convention of the Settlement of Investment Dispute between States and Nationals of other States (Washington/ICSID Convention), 1965, article 25 (1).
[187] Ibid, article 25.

commerciality which authorized the courts to interpret the definition according to its national legal system, and this led to a gap in the arbitration system as commonly known that each state has its own legal system, culture, religion, and so on which are different from other legal systems. Therefore, what dispute is considered as legal commercial under legal system of one state may not be considered as commercial dispute under a different state.

3.8.2 The requirements of valid award

The arbitral award shall go through some requirements to have the credibility of a valid award, such requirements could notice in article 48[188] as follows:

1- The majority of the arbitral tribunal must decide the questions;
2- The members of the arbitral tribunal who agree on the arbitral award shall sign it, and the award must be in writing;
3- The tribunal shall state the reason which the award based on and must covered all the submitted questions;
4- All the tribunal members shall state their opinion of the rendered award including that member who against the majority opinion.

Further, article 45 (2)[189] provides if the one of the disputed parties fails to attend the arbitration proceedings the other party could require the tribunal to deal with the submitted questions before it in order to render the award, however, the tribunal must not issue the arbitral award before notifying the failed party, and gives him/her a

[188] Ibid, article 48 (1) (2) (3) (4).
[189] Ibid, article 45 (2).

chance to present his/her case, unless the tribunal finds that the failed party is unwilling to present.

3.8.3 The annulment of the award

The debtor party has some defences that may challenge the recognition and the enforcement of the arbitral award through a written application to the Secretary General. Such defences could be seen in article 52 (1) as follows:

a- The constitution of the arbitral tribunal was not well constituted;

b- The tribunal acted beyond its authority;

c- One of the tribunal members is involved in corruption;

d- The major rules of procedures were violated;

e- The tribunal failed to state the reason that the arbitral award is based on;

5- Upon request of the resisting party of the enforcement which the enforcement must be suspend until the committee gives its decision over such request;

6- If the award is annulled, then any of the disputed parties could request a transfer of the arbitral award to a new arbitral tribunal. This paragraph is very important which the NYC and UNCITRAL fail to provide such provision as may after the application of resisting the enforcement is successfully won by the debtor party, then the court must refer the disputed parties to a new tribunal to settle the same dispute as far as they previously agreed to settle their dispute through arbitration mechanism.

3.8.4 The Recognition and Enforcement of the Award

The recognition and enforcement of the award is binding on both the disputed parties and the contracting states. An article 53 (1) that provides the disputed parties are bound by the arbitral award and such award is not subject to appeal, other than exceptions that provide in this convention, so the parties have to comply with the award, whereas only the enforcement may delay according to the stated provisions in this convention. While the binding on the signatory states could notice in article 54 as follows:

1- The arbitral award is binding on the signatory state which has to enforce upon fulfilling the required requirements and must be effective as the same as the judgement has to be final. The contracting state that has a federal system which perhaps enforce the award through the federal court;
2- The creditor party bears the responsibility of satisfying the competent court or any other authority through a certified copy of the award from the Secretary-General;
3- The enforcement of the award has to follow the laws of the state where the recognition and enforcement are sought. However, the award must not deal with as a second degree and the defence of the state immunity is unacceptable according to article 55.

3.9 Arab Convention on Commercial Arbitration

This convention was founded in Sultanate of Oman in 1982 which 13 Arab States are members of it including Yemen that joined the convention in 1982 and entered into force in 1982.[190] The main purpose of this convention is to establish a consensual Arab

[190] Arab International Union for Arbitration, "Arab Convention on Commercial Arbitration," accessed April 17, 2016, http://www.aifa-eg.com/oman-agreement.html.

trade system to cope with international trade.[191] It is mainly legislated to settle the disputes among natural and legal persons that arise out of a commercial relationship,[192] whereas the Arab International Union for Arbitration is authorized to settle arising disputes. The award rendered by the tribunal is binding and the high court of each state is the competent authority which has to enforce the award unless it is contrary to the public policy.[193] As Yemen is addressed, public policy ground provides in section 53 (g) that the arbitral award will be refused if it is in violation of public policy.[194] Similarly, section 55 (b) provides that the foreign award cannot be enforced if the competent court considers it as against public policy.[195] In section 53 the debtor party has to apply to the court to set aside the arbitral award while, section 55 the court itself will reject to enforce the arbitral award even without the debtor party's application to set aside it. *Abdul Baqi Abdul Qadir* v *Zayn bint Ahmad Hashim,* Commercial Appeal No.2 of 1977, it was held that the award will not be enforced if breached the public policy.

3.10 Riyadh Arab Convention for Judicial Cooperation

All Arab states have joined this convention, including Yemen which signed the convention in 1983 and became enforceable on 1985.[196] However, Egypt and the Federal Islamic Republic of Comoros have not joined this convention.[197] The convention recognizes and enforce any legal decision such as an arbitral awards and court judgements as far as it is based on the judiciary procedures, the court, or

[191] Ibid.
[192] Arab Convention on Commercial Arbitration 1982, article 2.
[193] Ibid, article 35.
[194] Yemeni Arbitration (Act No. 22) 1992, section 53 (g).
[195] Ibid, section 55 (b).
[196] Robert Karrar, *Commercial Arbitration*, Gary World Edition, 2013.
[197] Husain M. Al-Baharna, "The Enforcement of Foreign Judgements and Arbitral Awards In the GCC Countries with Particular Reference to Bahrain," *Arab Law Quarterly, Vol*. 4 (May 1989): 336.

authorized body.[198] The place seat of the arbitration can hold in any of the signatory states.[199] Such decision is binding and must be recognized and enforced in the signatory states.[200] However, the signatory states are not obligated to execute the decision that is issued against the government or the official staff while doing his/her duties.[201] Article 30 provides that the award may rejected in the following circumstances:

a- If the award contravened principles of the *Shari'a*, constitution, or public policy;
b- If did not serve the resisting body a notice of the proceedings or did not give the sufficient time to defend his/her case;
c- If any of the disputed parties is not competent;
d- If the dispute is under the court proceedings.

While the enforcement of the judgement could notice in article 31 as follows:

a- The judgement is issued from recognized court of the place seat, such award became enforceable when it is enforceable in the place seat of the arbitration;
b- The procedures that conducted disputes which not within the convention are subject to the law of the place of enforcement of the arbitral award.

After the application of the enforcement at the state where the enforcement is sought, then the judiciary of that state will supervise the award and check the finality of the award based on the requirements provided by the convention but not to review the arbitral award. The judiciary supervision may order coercive actions to enforce the

[198] Riyadh Arab Convention for Judicial Cooperation, article 25 (b) (c).
[199] Ibid, article 25 (b) (c).
[200] Ibid.
[201] Ibid.

award.[202] The requirements for the application of the enforcement at the state where the enforcement is sought are mentioned in article 34 as follows:

a- A certified copy of the competent court;
b- A certificate to prove that the judgement is final;
c- All related copies must be certified and at the time of the enforcement and shall get the signature of the execution judge at the place of enforcement of the arbitral award.

Without prejudice to the articles 28 and 30, the convention specifically stated in article 37 that the arbitral award is binding on all signatory states except in the following grounds:

a- If the dispute is not appropriate to be settled under the law of the place of enforcement of the arbitral award;
b- If the tribunal rendered an award to enforce a term or arbitration agreement that is void;
c- If the qualification of the arbitrators is not according to the terms agreed by the disputed parties or the law of the place seat;
d- If a proper notice of the arbitration proceeding is not given to the disputed parties;
e- If the award is against principles of the *Shari'a* or the public policy of the place of enforcement of the arbitral award.

[202] Ibid, article 32.

3.11 The International Laws on States Commitments and Obligations

In order to know the effectiveness of the arbitral award against the state or national of the state that is not signatory to NYC, the researcher has to go through international law whatever treaties, custom, or general principles that are relating to the states' commitments and obligations. As article 38 (1) provides that international law can be treaties, custom, and general principles. Thus, the followings could be referred.

a- International Law and Municipal Law

All states have the sovereignty over their region which no state could interfere with the sovereignty of another state, even that states that are powerful have no right to do so.[203] Each state has its own domestic laws to arrange the relationships among its jurisdictional region so that the international law such as human rights and international investment law to arrange the relationships among the states and foreign nationals as well.[204] The international law is considered as more superior than the domestic law as it is dominant among states over the world. Thus, a state when breaching any rule of international law can't rely on its own domestic laws and sovereignty principle, the international law must prevail.[205] For more understanding, refer to article 3 which provides that international wrongful acts committed by a state must be subject to international law.[206] Article 27 provides that when the state fails to fulfill its responsibility in international agreement, it can't justify such failure by its own municipal law.[207] Additionally, the state can't

[203] Malcolm N. Shaw, *International Law*, Seventh Edition. (United Kingdom: University Printing House, Cambridge CB2 8BS, 2014), 92-95.
[204] Ibid.
[205] Ibid.
[206] International Law Commission's Article on State Responsibility, article 3.
[207] The Vienna Convention on the Law of Treaties 1969, article 27.

claim that its ratification of the treaty led to contravention of its own municipal law in order to justify its failure to carry out its responsibility.[208]

b- Immunity from Jurisdiction

In the past, each state has sovereign which prevents another state from interfering with its affairs.[209] So, the court shall refuse to hear cases that related to a sovereign of the foreign state as previously, the trade exchange among states is limited to tax collection.[210] Nowadays, global trade faces difficulties of the extremely state immunity as trade is expanding tremendously among the states and nationals of the states as well, so that the jurisdictional immunity is impossible to follow.[211] Article 20 provides that waiver of immunity cannot be claimed to escape from execution.[212] For instance, there are commercial agreements among the states or the foreign nationals and the place seat, if one of the parties to the contract breaches the contract terms, then the court has no jurisdiction to hear the case for lack jurisdictional authority as one of the parties is a foreigner.[213] Therefore, the jurisdictional immunity is not anymore applicable to exempt the state activities from execution in the matter of commercial transaction.[214] Article 19 provides non-state could take an execution action through an order of the court of another state which leads to arrest or seize of property of another state except if there is written consent stated in an international agreement or arbitration agreement.[215] It is important to refer to one state law to clarify the immunity principle, For example,

[208] Ibid, article 46 (1).
[209] Ray August, *International Business Law: Text, Cases, and Readings*, Fourth Edition. (United States of America: Pearson Education, Inc., 2004), 156.
[210] Ibid.
[211] Ibid.
[212] United Nations Convention on Jurisdictional Immunities of States and Their Property, article 20.
[213] Ibid.
[214] Shaw, *International law*, 522.
[215] UN Convention on Jurisdictional Immunity.

section 3 (3)[216] of United Kingdom State Immunity Act clarifies the meaning of commercial transaction:

1. Any supply of service or goods contract;
2. Any contract for financial obligations;
3. Any contract for commercial transactions or activities, financial, professional, industrial or the like.

Therefore, any contract comes under the scope of section 3 would be subject to jurisdictional application which the principle of the sovereignty or immunity will have no effect. Further, section 3 (1) of the same Act provides that the state cannot claim immunity to escape from obligation in commercial contracts.

At the modern time, the international law replaced extreme state immunity by limited state immunity, which the foreign state actions cannot litigate in the court of another foreign state if the matter is relating to government action that may lead to negative effects but the foreign state is liable for commercial actions and the immunity will not apply in commercial issues.[217] It is necessary to refer to the case of *KJ International* v *MV Oscar Jupiter*,[218] the commercial transaction is not necessary in order to have judicial jurisdiction as far as commercial purpose hold place when the Romanian government sailed the ship to one company, even the characteristic of commercial transaction could not be noticed as commercial by the state immunity defence is rejected.

[216] UK State Immunity Act 1978.
[217] August, *International Business Law*, 157.
[218] *KJ International* v *MV Oscar Jupiter* 131 ILR, P. 529.

3.12 The International Agreements

The states that have a trade with other states, mostly do Bilateral Investment Treaties (BITs) in order to protect the national investors' rights in case of expropriation of their investment rights.[219] On other words, the agreements mostly focus on the obligations of the place seat of the investment and the investors' rights and less concentrated on the investors' obligations and exporting state obligations.[220] Such agreements try to protect the investors of place seat in case of violation of international law, investment rights, enforcement of arbitral awards, whereas the legal action could be taken by the original state of the investors against the place seat of the investment.[221] BITs are mostly stipulates that the place seat of the investment should be treated with foreign investors as the same as national investors as well as in the matter of the proceedings, procedures, and the enforcement of the dispute settlement systems. [222] Also, the investment treaties require equal treatment of the foreign investors who have the investment in the place seat so the international law provides the minimum standard of treatment of foreign investors.[223]

The disputed parties could refer to the ICSID mechanism if there are BITs between the disputed parties, the ICSID mechanism could also apply to settle the investment disputes even one of the disputed parties is not a signatory state or not a national of a signatory state.[224] Yemen has signed 47 Bilateral Investment Treaties with various states around the world which stipulates the condition of settlement of disputes of

[219] Asif H Qureshi and Andreas R Ziegler, *International Economic Law*, Third Edition. (London: Sweet & Maxwell, 2011), 497-499.
[220] Ibid.
[221] Ibid.
[222] Ibid, 503, 506.
[223] A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law Int'l, 2009), 232-319.
[224] Ziegler, *International Economic Law*, 526-527.

investment among the states,[225] this means Yemen has no open gate to escape from the execution of international arbitral awards. Refer to the case of *Desert Line Projects L.L.C* v. *Republic of Yemen,*[226] in this case the claimant in Desert Line Project L.L.C (hereinafter referred as D.L.L) which was established under Omani law, while the respondent is the Republic of Yemen (Yemen). The claimant entered into numerous contracts at different times with the respondent for construction of asphalt roads in different places in the country. They agreed to settle their dispute amicably and executed an arbitration agreement and its award is deemed as enforceable and final.

On 9 August 2004, the tribunal issued the award in favour of DLP and entitled it amount for works done YR18, 447,857,500 plus additional costs at an amount of YR 1, 520,620,929. However, the respondent did not execute the arbitral award. After disappointed hopes of the judiciary regarding the enforcement of the arbitration award, on 2nd August 2005 the claimant individually filed a request for intervention of the International Center for Settlement of Investment Dispute (ICSID). The ICSID rendered the arbitral award in favour of Desert Line Project L.L.C.

3.13 Expropriation

Expropriation comes into the picture when the place seat of the investment violates the rights of the foreign investor such rights like assets or refuse to enforce arbitral awards without judicial reasonable grounds.[227] In the arbitration, the creditor party can challenge the place of enforcement of the arbitral award in case of rejecting to enforce

[225] General Investment Authority, Free Trade & Investment Agreements, accessed April 24, 2016 file:///D:/after%20Quoloqum/court%20supervision/%D9%85%D9%88%D9%82%D8%B9%20%D9%8A%D9%88%D8%B6%D8%AD%20%D8%A7%D9%84%D9%8A%D9%85%D9%86%20%D9%88%D8%A7%D9%84%D8%A7%D8%AA%D9%81%D8%A7%D9%82%D9%8A%D8%A7%D8%AA%20%D8%A7%D9%84%D8%AF%D9%88%D9%84%D9%8A%D8%A9.htm.
[226] *Desert Line Projects L.L.C* v. *Republic of Yemen* (ICSID case No. ARB/05/17).
[227] Ziegler, *International Economic Law*, 517.

the arbitral award without any reasonable ground of such refusal.[228] The international law classified the expropriation into two types; one is lawful expropriation and this occur when there is no discrimination against the foreign investor who must pay damages for breach of obligation while the second expropriation must pay damages for violation of expropriation which violated international law as well, and this is usually happen when there is discrimination and infringement of owned right by foreign nature or legal person.[229] However, the refutation of the foreign state court's decision is not easy except if there is the unambiguous misconduct of the court which led to infringement of the justice.[230]

For more understanding, refer to the case of *Saipem* v *Bangladesh*.[231] In this case, the contract made between Saipem and Petrobangla (Bangladeshi national oil company) which contained an arbitration agreement to be held in Bangladesh through ICC Arbitration. The award was rendered in favour of Saipem but could not enforce it in Bangladeshi court where the Petrobangla has its valuable assets. The refusal was due to bias. Saipem filed an action at ICSID based on BIT agreement between Italy and Bangladesh government. The tribunal held that the Bangladesh court illegally invoked the jurisdiction of the tribunal which breached the international law by exceeding the authority of supervising the arbitration process. As a result of preventing Saipem from investment and the misconduct of the court, compensation was awarded to Saipem.

Based on the above international law, treaties, and cases, could mean that Yemen is obligated to enforce the IAA whether it is signatory of NYC or not, it cannot disappear

[228] Ibid.
[229] Ibid.
[230] *Mondev Int'l Ltd*. v. *United States*, ICSID Case No. ARB (AF)/99/2, NAFTA Ch. 11, 127 (11 Oct. 2002).
[231] *Saipem* v *Bangladesh*, ICSID Case No. ARB/05/07.

under an umbrella to escape from commitment and execution whereas the sovereign immunity cannot apply as a shield to avoid its consent of entering arbitration agreements under argument of violation of the municipal law or non-ratifying NYC.

Thus, in the case of non-enforcement of IAA as a result of the adverse effects of insufficient YAA, tribalism, corruption, or the like so that the foreign investor could refer to his/her original state to take an action of expropriation on behalf. Whereas, Yemen has signed 47 Bilateral Investment Treaties with various states around the world which stipulates the condition of settlement disputes of the investment among the states.[232] This means Yemen has no open gate to escape from the execution of IAA. Therefore, the researcher sees non-ratifying of the NYC by Republic of Yemen leading to negative effects on Yemeni businessmen and the national economy as a whole, so that the researcher strongly advises the Yemeni government to ratify NYC which could lead to positive effects on the investment and the economy, Yemen could not be more reserved and careful than 156 states that have ratified NYC. Further, Yemen is a signatory state in ICSID, Arab Convention on Commercial Arbitration, international law, BITs. This means that Yemen is obligated under such international conventions, international law, and agreements so what could be the rationale for non-ratifying NYC?

[232] General Investment Authority, Free Trade & Investment Agreements, accessed April 24, 2016 file:///D:/after%20Quoloqum/court%20supervision/%D9%85%D9%88%D9%82%D8%B9%20%D9%8A%D9%88%D8%B6%D8%AD%20%D8%A7%D9%84%D9%8A%D9%85%D9%86%20%D9%88%D8%A7%D9%84%D8%A7%D8%AA%D9%81%D8%A7%D9%82%D9%8A%D8%A7%D8%AA%20%D8%A7%D9%84%D8%AF%D9%88%D9%84%D9%8A%D8%A9.htm.

3.14 Conclusion

At the end of the chapter, the researcher answered research question one and achieved research objective one and two. Based on international conventions, rules, agreements, and law which found that YAA is not parallel to cope with issues that are relating to the enforcement of IAA. YAA failed to include some sections that are relating to the proceedings and processes of the enforcement of IAA which are important guidelines to the disputing parties, the tribunal, and the competent courts in order to treat the disputing parties equally and give justice to all. Such missed articles are as follows:

1) Section 53 is insufficient. It is lack of paragraphs to provide sections as right for the debtor party to resist the enforcement of the arbitral award based on the proper notice of the appointment of the arbitrator and the arbitral proceedings to each of the disputed part. The notice of arbitration is very important to be stipulated in the Act. The resisting party of the enforcement is usually challenge under the ground of non-receiving a notice of arbitration, post to wrong address, or no research conduct has of the last known address of the respondent. It is a big gap to ignore such authority. Also, the effectiveness of the arbitral award in case of the award not binding yet. The position of the award that is not final yet shall be clear. Otherwise, the party who the arbitral award is in his/her favour may apply for the enforcement of the arbitral award. Even the majority of the arbitral tribunal not signed yet. Thus, such authority is fundamental factor of the enforcement of the arbitral award. YAA leaves big gap not only for the disputed parties to be confused, but the court itself needs sufficient guideline to render correct decision;
2) Section 53 of YAA needs to amendment, especially, paragraph (b) which provides that the award cannot be enforced if any of the parties is incompetent, such

paragraph is repeating the same thing as paragraph (a) which provides that the resisting party who was an incompetent person at the time of signing the arbitral agreement can challenge the arbitral award;

3) The YAA is silent about the power of the tribunal to impose sanction on the debtor party in case of failure to disclose the documents or refuse to enforce the arbitral award. The unwilling party may intentionally reject to cooperate with the arbitral tribunal in order to delay procedures and processes as long as the arbitral tribunal is limited of such jurisdiction. It has to refer to the court to have the order. It makes the arbitral tribunal meaningless. However, provide such jurisdiction to the arbitral tribunal will make the national arbitration system stronger;
4) The procedures especially the requirements to set aside the arbitral award before the competent court are not adequate. YAA supposes to provide the requirements to set aside or refusal of the arbitral award such as submit the final arbitral award, the claimant's statements, the arbitration agreement, and so on;
5) The right of the debtor party to resist the enforcement based on the arbitrator's bias. Such provision to be included is necessary as bias is breach of natural justice. Bias is sufficient ground to set aside or refusal. Indeed, YAA supposes not only to provide a provision relevant to bias to set aside or refusal the arbitral award, but shall have provisions to prevent any effect may lead to bias such as requests the arbitral tribunal to submit declaration that the arbitrator/arbitrators have no interest of the dispute or has no relationship with any of the disputed parties;

6) the enforcement proceeding, how many days the enforcement takes, the allowed time period for the debtor party to set aside or refusal against the enforcement of the arbitral award, the proceedings are taken for the enforcement in case of resisting enforcement. YAA left extensive jurisdiction to the competent court. It

is unreasonable that the debtor party to come after long period to set aside the arbitral award. I have referred to other national arbitration system such as section 37 (4) of Malaysian Arbitration Act 2005 that provides an application for setting aside may not be made after expiry of ninety days from the date on which the party making the application had received the award. Therefore, It is a loophole in YAA for non-stating the allowed period of the debtor party to recourse against the award;

7) What procedures and proceedings are in case of an application to vacate the arbitral award in the place seat of the arbitration are. Once the creditor party applied for the confirmation of the arbitral award in the competent court, the lost party has to know the procedures and processes in case he/she wants to oppose the enforcement application. Also, YAA has to clarify the requirements as well as the allowed period to vacate the arbitral award. If the rendered award is vacated in the host state of the arbitration, it should be enforced against the debtor party in Yemen? Different national arbitration systems have different positions. Some systems enforce the arbitral award if fulfills the requirements under their national arbitration laws, while others do not. The position in Yemen on this issue is silent so YAA has to be amended to come with such provision;
8) What the effect is in the matter of discovering credible evidence that may change the award or the evidence which the award is based on was forged, misrepresentation, fraud, or false testimony, and the allowed period to set aside or refusal to the enforcement. In case of rejecting these grounds to set aside the arbitral award will put the court in breach of natural justice. These factors are very important to be clear known. Ignoring such factors by YAA is huge gap. As it

would be breached of natural justice if the arbitral award is based on forge, misrepresentation, fraud, or false testimony. YAA has to include authority clarifying the position in case the arbitral award is based on such mentioned factors. Also, the allowed period to set aside the arbitral award, whether such grounds can be applied even after lapse of time as they are considered as reasonable reasons;

9) The YAA will be stronger to specify an article which provides the jurisdiction of the foreign tribunal to request the Yemeni competent court to take coercive actions to perform the award of interim measures of protection;

10) Need for re-arbitration in order to correct the minor mistakes instead of setting aside the award. YAA is silent on this position. It has to clarify whether that is left for the court' discretion to order the parties to refer back to the arbitral tribunal or to decide by itself. Such discretion will make the arbitration agreement meaningless. Often, the parties prefer to settle their dispute by arbitration mechanism. This is because of the speed in settling the dispute. So, referring the dispute to the court because of minor mistakes will delay the settlement. This is against the parties' autonomy. Hence, YAA has to be clear regarding arbitral awards with minor mistakes, are the parties have to refer back to the arbitral tribunal or to the court? It is better to refer back to the arbitral tribunal to correct the minor mistakes;

11) YAA shall stipulate the period of time for the enforcement judge to grant the enforcement of the arbitral award. The enforcement of the arbitral award supposes to achieve the purpose of the arbitration. The fast procedures and processes are fundamental features in arbitration system. Then, leaving the enforcement without

limited period is adversely affecting such feature. Especially, if the lost party neither resist the enforcement nor has reasonable grounds to do so.

Moreover, Yemen is found to be a non-convention state to NYC while it is a member in other international conventions and BITs. Such non-ratification may affect the enforcement of IAA if the place seat of the arbitration holds is Yemen as the convention allows the court of the signatory states to refuse to recognize and enforce the award based on the reciprocity reservation in article 1 (3) which provides that the convention states could refuse the foreign award if rendered in the non-signatory state. Thus, some states entered the convention after being assured the permission of reciprocity reservation is provided by the convention like the United States of America. Moreover, Republic of Yemen and Yemeni businessmen cannot escape from execution or the enforcement of IAA based on the argument that Yemen is not a signatory-state to the convention or even on the jurisdictional immunity as IAA can be enforced by other laws rather than NYC as well as the international law replaced extreme state immunity by limited state immunity. The foreign state shall perform commercial agreed terms contracted with other parties. Hence, Yemen is liable for commercial actions and the immunity will not apply in commercial issues. As could be noticed in the case of *KJ International* v *MV Oscar Jupiter 131 ILR, P. 529,* it was held that the state is liable towards its obligations as agreed in the commercial agreements with others so that the state could not argue based on the jurisdictional immunity to escape from duties.

CHAPTER FOUR

THE TRIBALISM IN YEMEN

4.1 Introduction

The Yemeni society is considered as a tribal society compared to other Arab countries because of the large existence of the tribes in the rural areas. As a consequence of the tribal existence, there have been a spread of the tribal culture in the society.[1] According to Arun, the tribal culture could be introduced through values, ideas, knowledge, and beliefs.[2] The nature of collectivism is the existence of a huge number of families who have a strong loyalty to protect each other as one group.[3] The tribal culture puts more emphasis on the interest of the tribes as well as the tribal members only.[4] The tribes do not bother about other things except their tribes.[5] As a result of this attitude the politics and the economy of Yemen became worse.[6] The tribes in Arab society are still in existence and impact on the public culture, behavior, kinship, and attitude.[7] It is

[1] J. E. Peterson, "Tribes and Politics in Yemen," (2008): 1, accessed October 9, 2016, http://wwijdanww.jepeterson.net/sitebuildercontent/sitebuilderfiles/APBN-007_Tribes_and_Politics_in_Yemen.pdf.
[2] Arun Agrawal, "Dismantling the Divide between Indigenous and scientific knowledge," *Development and change* 26.3 (1995): 8.
[3] Geert Hofstede and Gert Jan Hofstede, *Cultures and organizations: Software of the mind*, Vol. 2. (London: McGraw-Hill, 1991), 91-92, accessed October 10, 2016, http://testrain.info/download/Software%20of%20mind.pdf.
[4] Arafat Madabesh, "The Equation of the Tribe in Yemen," *Middle East Newspaper*, November 11, 2010.
[5] Ibid.
[6] Ibid.
[7] Mohammed Abobaker Baabbad Shamharir Abidin, "Tribalism and Perceived Auditor Independence: A Research Opportunity in the Arab World," *International Business Management* 9 (6) (2015): 1306.

difficult to ignore the adverse effect of tribes on the social political and economic issues.[8]

The majority of the Yemeni population live in rural areas.[9] The urban people who live in cities are estimated 35% only, while rural people are 16 million out 25 million of Yemen's population.[10] According to Peterson, the tribes are a major constitution of Yemen society so that the tribes are main component of the Yemeni society.[11] According to Tribalism Index Scores, 2009, Republic of Yemen is ranked at number 7 out of 160 countries in the world, a ranking of 1 is considered as the highest rate, while a ranking 160 is considered as the lowest rate.[12] Thus, tribalism has a strong impact on the political affairs, traditional life, and the society as a whole.

Historically, Yemen is a tribal country with powerful tribes who interfere with the political and economics' affairs till today.[13] Such interference in the political and economic policy of the country leads to the state paying a huge amount to provide for the tribes' interest.[14] Tribes in Yemen are historically rooted, and till the present time, it has a significant impact on social, economic, and political life. It should be noted that the tribal structure is very strong in the northern part of Yemen, while in the south of Yemen, it is weaker. The weakness in the south is because southern Yemen was an

[8] Baabbad "Tribalism and Perceived Auditor Independence," 1306, quoted in Geert Hofstede and Gert Jan Hofstede, *Cultures and organizations: Software of the mind*, Vol. 2. (London: McGraw-Hill, 1991).
[9] Erwin Van Veen, *From the Struggle for Citizenship to the Fragmentation of Justice: Yemen from 1990 to 2013* (Netherlands Institute of International Relations Clingendael, 2014), 17, accessed December 14, 2015, https://reliefweb.int/sites/reliefweb.int/files/resources/Yemen%20-%20Fragmentation%20of%20Justice%20-%202014%20-%20Erwin%20van%20Veen_0.pdf.
[10] Ibid.
[11] Peterson, "Tribes and Politics in Yemen," 1.
[12] David Jacobson and Natalie Deckard, "the Tribalism Index: Ulocking the Relationship between Tribal Patriarchy and Islamists Militants," *New Global Studies* 6.1 (2012): 10-11, accessed December 5, 2016, https://www.degruyter.com/view/j/ngs.2012.6.issue-1/1940-0004.1149/1940-0004.1149.xml.
[13] Amr Hamzawy, *Between Government and Opposition: the Case of the Yemeni Congregation for Reform* (Carnegie Endowment for International Peace, 2009), 2, accessed May 6, 2016, http://carnegieendowment.org/files/yemeni_congragation_reform.pdf.
[14] Ibid.

independent country till 1990 that was called the People's Democratic Republic of Yemen (PDRY). It followed communist regime which was totally against tribal intervention with the state affairs.[15] Hence, it could find the presence of tribal is more spread in the north of Yemen, at the same time the enforcement of the law is quite acceptable in the south even though it is still weak.[16]

4.2 The Definition of the Tribe

Tribe is a group of people mostly belonging to one lineage due to the name of a tribal alliance that is considered to be a grandfather of the tribe, and consists of several clans. The members of the tribes often live in a joint territory upheld as their home, and they speak a distinctive tone, and they have a homogeneous culture or a common solidarity (i.e. neurological) against external elements at least.[17] According to Oxford Dictionary defines the tribe as a group of people have same culture and language and descendants of one ancestor and ruled by one leader.[18]

4.3 The Background of the Tribal Arbitration

As tribalism' role is shown in this study, it has to address the tribal arbitration through an application of the tribal customary law as follows:

[15] Erica Gaston and Nadwa Al-Dawsari, Dispute Resolution and Justice Provision in Yemen's Transition (April, 2014), 5. United States Institute of Peace, accessed December 27, 2015, http://www.usip.org/sites/default/files/SR345_Dispute-Resolution-and-Justice-Provision-in-Yemen%E2%80%99s-Transition.pdf.
[16] Ibid.
[17] Seth Godin, The Tribes Casebook, accessed September 28, 2016, http://sethgodin.typepad.com/seths_blog/files/CurrentTribesCasebook.pdf.
[18] *Oxford Dictionary*, 2016.

4.3.1 The Tribal Alternative Dispute Resolution Mechanisms (TADRM)

The tribes are a part of Yemeni society so that the customary law as an inherent system based on culture.[19] The disputed parties choose the wise men in the community to resolve their disputes.[20] The customary law is not that perfect to solve the society conflicts and brings justice as a whole, but is not worse than the official law.[21] Furthermore, the people prefer to solve their disputes through TADRM because of the lack of independent judiciary since the government itself is unwilling to implement the court's orders against powerful people such as political persons and tribal leaders.[22] Therefore, the people refer to the tribal law instead of an official system because of various negative factors in the official system such as weakness, unqualified judges, non-enforcement of judgements, and slow procedures.[23] Also, the official justice system is less developed in the northern areas that are dominated by the tribes and where the number of official courts is very limited.[24] In the urban governorates, tribal law is often used while in the southern governorates, it exists but in a weaker form.[25] As a consequence of the weakness of the official justice system and non-enforcement of the court judgements, trial cases in the court system is declining.[26] In 2013 trial cases in Aden province declined at a rate of 44%, Sana'a 41%, and Taiz 35%.[27] The tribal arbitration mechanism could be used to solve disputes among tribal members

[19] James McCune, Tribes and Tribalism in Yemen. A Joint FCO Research Analysts and Stabilisation Unit Workshop (April 26, 2012), accessed September 28, 2016, http://webarchive.nationalarchives.gov.uk/20141014133309/http://www.stabilisationunit.gov.uk/attachments/article/523/Tribes%20and%20Tribalism%20in%20Yemen%20%20workshop%20report_FCO%20and%20Stabilisation%20Unit_2012.pdf.
[20] Ibid.
[21] Ibid.
[22] Brian Katulis, Countries at Crossroads 2004- Yemen (2004), accessed October 18, 2016, http://www.refworld.org/docid/473868f963.html.
[23] Gaston, Dispute Resolution and Justice Provision in Yemen's Transition, 3.
[24] Ibid, 5.
[25] Ibid.
[26] Ibid, 9.
[27] Ibid.

themselves as well as disputes between tribes and the state.[28] Therefore, some officials recommend application of TADRM to solve some disputes like murder issues.[29] Some judges unofficially advise the disputing parties to settle their dispute by TADRM as long as it is recognized by the official law.[30]

In addition, the tribal conducts and operations are well recognized by the government. Even, the government itself requires a tribal interference to settle complex issues that arise between the tribes and the government.[31] The government also invites the tribes to settle the tribes and the business issues within the tribal region.[32] For instance, in May 2010 American drone killed Yemeni deputy governor in Marib provenance.[33] The former president Ali Abdullah Saleh proposed to settle the dispute that arose between the government and the deceased's tribe by TADRM.[34]

Through interviewees of Court of Appeal judges, academicians, and arbitrator. Respondent 1 suggested that:

> *in order to improve the arbitration system in Yemen, recommended the development of institutional arbitration and stay away from non-institutionalized arbitration referring to The tribal alternative dispute resolution Mechanisms because tribal men are not aware of legal procedures and pleading which the court faces difficulties in implementing the arbitral award and lead recourse the award so suggested to repeal section 45 of YAA that provides the recognition of TADRM*.[35]

[28] Ibid, 3.
[29] Ibid, 6.
[30] Ibid.
[31] Ibid, 8.
[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Interview with Court of Appeal judges, academician, and arbitrator, December 11-20-25-27, 2016.

Respondent 2 said that:

> *To improve arbitration, it must concentrate on institutional arbitration and the legal persons have to send abroad to study, this in order to make use of international experience in the field of arbitration. Yemen lacks qualified experts in the area of arbitration. Also modify the current arbitration Act in accordance with the standards of international arbitration laws.*

Respondent 3 stated that:

> *The amendment of the Arbitration Act (22) 1992 as it does not comply with international arbitration laws. In addition, speedy actions for the enforcement of the arbitral awards and not to delay a decision regarding acceptance or rejection on the part of the lost party's application to set aside the enforcement of the arbitral award. Also, to upgrading in this area, the judges have no experience in the field of international arbitration. Thus, it is necessary to have qualified staff to handle complex arbitration cases.*

Respondent 4 mentioned that:

> *The formal judiciary and arbitration system are interrelated to each other. The arbitration system would be better if improves the performance of the judiciary to overcome rampant corruption. Also, the independence of the judiciary from the Executive Branch is very important so there must be restrictions on politicians to prevent interference in the judiciary. As commonly known that not all lost parties voluntarily implement arbitral awards, so only independent judiciary can provide effective assistance and control to the arbitral tribunal. Also, the arbitration Act must repeal the recognition of TADRM. It is irrational to equal TADRM as a judgment of the Court of the First Instance.*

Respondent 5 stated that:

> *To improve the arbitration system in Yemen, the practice of separation of power must be encouraged. The Constitution provides for the independence of the judiciary, but it amounts to ink on paper only. Also, ratifying the New York Convention and the amendment of the current arbitration Act are very necessary for improving the arbitration system in Yemen.*

Thus, the interviewees concentrated on key suggestions to improve the arbitration system in Yemen such as improving institutional arbitration, the separation of power, amendment of the current Yemeni Arbitration Act, and ratification of the New York Convention 1958. Also, YAA has to be amended as there are sections adversely affecting the arbitration system in Yemen such as section 45 of YAA that recognizes the tribal award which is equivalent to primary court judgement. However, discrepancy or divergence among interviewees, especially, in the matter of repeal section 45 that provides the recognition of TADRM. It is irrational to repeal TADRM before starting judicial reforms. As it confirmed above by interviewees there is a lack of independence of the judiciary, because of the interference in judicial operations from the politicians as well as the rampant corruption that ravage the judiciary. Regarding the qualified experts in arbitration areas, the judiciary supposed to send judges to overseas to attend workshops in this field. This is a gap for future study to identify whether the unqualified experts in arbitration system will adversely affect the enforcement of IAA in Yemen. Respondent 5 recommended, ratifying the New York Convention in order to improve the national arbitration laws. Hence, based on interviewees' recommendations, the researcher discussed the reasons behind non-ratification of NYC in chapter three to rebut the Yemeni legislator' excuses of continually refusing to ratify it. Especially, the effect of NYC on *Shari'a* and the public policy as a whole.

4.3.2 The Function of the Tribal Customary Law

Each tribe is independent and has its own tribal leader who presides over its internal affairs. The leader handles disputes which may arise between individuals and other

tribes in their area without requesting the assistance of the State.[36] There is no law defining and regulating the relationships between the various tribes but the tribal customary laws regulate and control the tribal social organization.[37] These laws are able to regulate inter-tribal relationships and provide a high degree of homogeneity among the tribes in all respects.[38]

The main functions of the tribal customary laws are as follows:

1. To regulate the relationship between the tribal members in terms of their rights and obligations towards each other and their tribes.[39] The tribe has local governance so they practice tribal rules.[40]
2. To regulate the relationship among the tribes in matter of ensuring stability and security, settle disputes among tribesmen, regulate the power and influence of each tribe.[41] The tribes have different levels of power. So in the arbitration system, the less powerful tribe maybe under the protection of a more powerful tribe.[42]

4.3.3 The Features of the Tribal Alternative Dispute Resolution Mechanism

The tribes play an important role in ensuring the stability of the society through conciliation.[43] The tribal role extended to resolving political disagreements in the

[36] Wijdan Al- dafaee, "The impact of tribal political system stability on pluralism in Yemen," accessed July 26, 2017. http://wijdan-aldefaee.blogspot.my/.
[37] Ibid.
[38] Ibid.
[39] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice*, 40.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Nadwa Al-Dawsari, "Tribal governance and stability in Yemen," the Carnegie Papers, Carnegie Endowment for International Peace (April 2012): 5, accessed December 31, 2016, http://carnegieendowment.org/files/yemen_tribal_governance.pdf.

country.[44] In urban areas, the tribal customary laws are dominant and people prefer to settle their disputes through the customary laws than the courts.[45] The customary law is more effective and has faster proceedings than the court system.[46] The people do not fully trust the court system because of rampant corruption, lack of independence and integrity.[47] The government itself is weak and is unable to enforce the laws and the courts' judgments.[48] From an interview regarding confidence in the court system, it was found that 29% of respondents confirmed that they are not comfortable with court litigations, 19% are a little comfortable, 22% are much comfortable, and 7% are very much comfortable.[49] This means that the government is unwilling to combat the spread of corruption in government institutes. Thus, the people do not fully trust the formal laws to settle their disputes fairly.

The tribal customary laws are complementary to the formal laws.[50] The formal laws also does not weaken the tribal customary laws.[51] On the other hand, the tribal customary laws are not always in tandem with the formal law. In case of Aal Baras 2007 in Shabwa governorate, a dispute between two subtribes of Aal Baras led to five persons being killed. The court conducted the case and found ten persons guilty with seven, out of the ten, sentenced to death. The tribal leaders of the sub-tribes did not agree with the court's judgment because the seven sentenced to death is not equal to the five persons killed stating that this will lead to revenge killings. Through

[44] Ibid, 5-6.
[45] Ibid, 8.
[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Daniel Corstange, "Tribes and the Rule of Law in Yemen," prepared for delivery at the annual conference of the Middle East Studies Association, Washington, DC. (November 2008): 34, accessed December 31, 2016, https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=Nadwa+Al-Dawsari%2C+%22Tribal+governance+and+stability+in+Yemen%2C%22+the+Carnegie+Papers%2C+Carnegie+Endowment+for+International+Peace+%28April+2012%29%3A+&btnG=.
[50] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice*, 38-39.
[51] Ibid.

negotiation between the tribal leaders, they reached an agreement to sentence only five to death instead of seven.[52] The formal law may not function appropriately if tribal customary laws are abolished.[53] The judges themselves resolve disputes in their communities through the tribal customary laws.[54] This is because, the formal laws may not be suitable in handling some disputes because the tribal customary law is closer to the traditions and culture of the Yemeni society.

The Yemeni formal law itself does not go against settling disputes through other means of ADR.[55] Section 45 of YAA provides that the arbitral tribunal has to settle dispute based on the laws agreed by the disputing parties, if the disputing parties did not mention their preferred law, then, the arbitral tribunal has to settle it based on international law and the principles of justice and has to take into consideration the customary laws.[56] The judge Yehya Al-Mawri, who is a Supreme Court member, stated that YAA strengthened the tribal relationship with the state through the law.[57] In addition, the Yemeni law is not adequate and also not effective. Hence the official law is not the supreme law in the country which this is one of the main reasons people prefer to settle their disputes through the tribal law.[58] To sum it up, the formal legal system is not well-established in Yemen.[59] Hence, the tribal arbitral award is recognized by the law and if the debtor party resists the enforcement of the award, then the Court of Appeal will recognize it in the same manner as primary court judgment.

[52] Gaston, "Dispute Resolution and Justice Provision in Yemen's Transition," 6.
[53] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice,* 39.
[54] Ibid.
[55] Gaston, "Dispute Resolution and Justice Provision in Yemen's Transition," 6.
[56] Yemeni Arbitration Act No. (22), 1992, Section 45.
[57] Al-Dawsari, "Tribal governance and stability in Yemen," 8.
[58] Laili al-Zwaini, "State and Non-State Justice in Yemen," Paper for the Conference on the Relationship between the State and Non-State Justice Systems in Afghanistan (December 10-14, 2006): 15, accessed November 11, 2016, http://www.usip.org/sites/default/files/ROL/al_zwaini_paper.pdf.
[59] Travis Morris and Rebecca Trammell, "Formal and Informal Justice and Punishment Urban Law and Rural Mediation Rituals in Yemen," *Race and Justice*, Vol 1, Issue 2, (March, 2011): 134.

According to *Sheikh* Salim Awad Abu Zaid Al-khulaifi,[60] one of the elders of the tribe Al-Khalifa in Ataq City, said that "Customs are above the law, especially in light of the current security situation. Nowadays, customs are governing the country as courts are closed". He continued: "if one disobeys the customs, the tribe will cut his blood ties announce it publicly". This indicates that the customs are very strong and it is the backbone of the tribe, there is no place for bandits among the tribes. In tribal custom there is something called *almhadsh* governance which awards hundreds of thousands of dollars as punishment for crimes of murder and treachery and waylay. Praise be to Allah the people trust our judgments more than courts, which courts have lost their confidence and lost credibility throughout the provinces of Yemen".

Adnan Al Mansouri narrated an arbitration case caused by dispute on agricultural land between tribal leaders[61] "there was a dispute between my family and one of the villagers on share of the land. We were about fighting, so we submitted an interim measures of protection such as cars or guns or other to ensure the enforcement of the award. The *Sheikh* rendered the award and the parties enforced it. He continued: "we chose *Sheikh* and didn't choose the Court as the tribal arbitration is faster and is not costly, and we have no doubt about the integrity of the rule of *Sheikh* compared the provisions of some corrupt judges. TADRM handed down judgement in less than a week". This means that the tribal arbitral award is faster and cheaper than the litigation of the court. The people trust tribal customary law because its main object is to keep

[60] Abdurahman Shakir, "Many Yemenis Prefer Arbitration Tribal Law," *Raseef 22 express*, August 11, 2015, accessed August 26, 2016, https://raseef22.com/politics/2015/08/11/many-yemenis-prefer-arbitration-to-rules-of-law/.
[61] Ibid.

the stability of the society so the tribal arbitrator or arbitrators handle the cases honestly and fairly.

On the other hand, the weakness of the judiciary and the state as a whole could be as a result of the spread of the power of tribes who resist reforms of government institutions.[62] From the results of interviews of Court of Appeal judges, academicians, and arbitrator that was conducted on (2016, December), they suggested that:

> *in order to improve the arbitration system in Yemen, they all recommended that the development of institutional arbitration and stay away from non-institutionalized arbitration like The tribal alternative dispute resolution Mechanisms because tribal men are not aware of legal procedures and pleading which the court faces difficulties to implement the arbitral award and lead recourse the award so they suggested to repeal section 45 of YAA that provides the recognition of TADRM*.[63]

Thus, YAA has to be amended as there are sections that adversely affect the arbitration system in Yemen such as section 45 of YAA which recognizes the tribal awards as equivalent to primary court judgement. Undoubtedly, institutional arbitration is the only suitable to settle commercial disputes. Foreign investors will not agree to settle the raising dispute or may raise in the future by TADRM. TADRM is only suitable to settle minor local disputes. However, YAA applies over international and local disputes, thus, the Yemeni legislator should amend section 45 instead of repealing, that is, to apply over local disputes only. However, the researcher point of view is against this recommendation of repealing section 45 at this moment because local people do not fully trust the court system, this is on account of there is a lack of independence of the judiciary and the rampant corruption that can change the judgement for the party who pays more. TADRM replaced more than two-third of the court functions.

[62] Corstange, "Tribes and the Rule of Law in Yemen," 23.
[63] Interview with Court of Appeal judges, academician, and arbitrator, December 11-20-25-27, 2016.

According to Laili al-Zwaini, the TADRM settles most of the society disputes (about 80%), by applying customary laws. Thus, it has to reform the judiciary before getting started in repealing section 45. Repealing the section before reforming the judiciary will lead to disruption of peoples' interests.

Experts on the rule of law advised against the recognition of tribal customary laws. They consider the tribal arbitrators as ignorant of the processes and proceedings of the tribal customary laws. The tribal customary law is more likely to be set aside because of breach of justice proceedings. However, the experts criticized the role of tribal customary law, but failed to refer to the necessary reforms that have to be taken to improve the judiciary. Especially, to combat the rampant corruption in the judiciary. Indeed, the tribal customary law is the fundamental element to keep Yemen stable. It is a well-known fact that after the Arab Spring, all government institution and security have collapsed. Nowadays, the tribal customary court is performing the functions of the government courts such as settling disputes among the citizens and maintaining security. The situation in Yemen is better than other Arab countries that are affected by Arab Spring and this is due to the maintenance of law and order through customary laws.

4.3.4 The Jurisdiction of the Tribal Customary Laws

The Yemeni law allowed the disputing parties to settle their differences in civil cases through arbitration and settlements outside the formal justice system based on section 45 of YAA.[64] The formal law limited litigation in criminal cases to formal justice which the public prosecution only has jurisdiction. However, TADRM can be used for

[64] Yemeni Arbitration (Act No. 22) 1992, section 45.

all type of disputes whether civil cases, commercial cases, criminal cases, or family matters.[65] The TADRM interferes to settle even criminal disputes which only the official court system has exclusive jurisdiction to deal with.[66] Criminal matters as mentioned in the law are administered by state prosecutors and require appropriate punishment on committed crimes. Such punishment is a right of the general public and not a right of the victim only.[67] The Yemeni law in section 21 of the code of criminal procedure provides that a state prosecutor has the jurisdiction in criminal proceedings and lawsuits in court.[68] Section 22 provides that the public prosecutor is not allowed to stop criminal proceedings, disrupt its progress, waived judgment or stop Implementation except in cases defined by law.[69] To understand tribal customary law interference in criminal matters, a dispute between Yahya and Salih can be referred to.[70] In this case Yahya crushed Salih' crate of tomatoes accidently. Yahya offered to compensate Salih for damages to his crate but Salih refused. When Yahya walked away, Salih stabbed Yahya from behind. The tribal leader arbitrated the case and awarded Yahya YR 65,000 that equivalent to $14, 444 in 1978.

This means that the civil cases and criminal cases are not distinguished under the tribal customary law. The tribal customary law is more suitable to traditions and culture. As previously noticed an Aal Baras case 2007, the court judgment will make the dispute more complex, so the disputed parties agreed on another dispute resolution mechanism like tribal customary law instead of the formal law. However, the tribal arbitrator does

[65] Gaston, Dispute Resolution and Justice Provision in Yemen's Transition , 4.
[66] Abdlul Nasir Al- Muwadda, "Formal and Customary Adjudication in Yemen," accessed August 26, 2016, http://almuwadea.blogspot.my/2014/10/httpema_12.html.
[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Najwa Adra, "Tribal Mediation in Yemen and its Implications to Development," (2011), 5, accessed August 28, 2016, http://www.najwaadra.net/tribalmediation.pdf.

not rule on prison or death sentence. This will lead to increase in crimes as there is no deterrence to crimes. So, the researcher encourages to reform the formal judiciary to settle all disputes.

4.3.5 Types of the Tribal Arbitration

Based on Al- Muwadda said that the disputed parties are free to agree on the type of the arbitration as follows:[71]

1- Non-appealable arbitration: the disputed parties will agree on the quality of the arbitration where there is no right of appeal after the award either to the government court or a higher customary body (final and binding).
2- Appealable arbitration: this kind of arbitration allows the disputing parties to appeal which TADRM is considered in formal justice as primary court judgement. It is noteworthy that the appellant bears the burden of appeal if the appellate body endorsed the sentence with an apology and slaughter of a sheep or cattle for appealing the arbitrator's award. If the appellate body set aside the previous arbitrator' award, the arbitrator or arbitrators has to pay for the appeals process commitments.

4.3.6 The Proceedings and Processes of the Tribal Customary Arbitration

There are several ways to customary arbitration:

1- The first approach:[72] the respondent appoint the claimant as a judge and opponent at the same time. Normally, the respondent or his family or his tribe

[71] Al- Muwadda, "Custom Tribal Warfare: an Analytical Descriptive Study,"
[72] Ibid.

delivered guns (weapons) to the claimant or his family or his tribe. These guns act as an interim measures of protection to the arbitrators to ensure the enforcement of the award and proof of good faith. Once the guns are accepted, this period considered guns as a truce so must not commit any illegal acts that will adversely affect the case proceedings.

2- The second approach:[73] the claimant delivers guns to the *Sheikh* or the wise man. The person who received the guns call the respondent. Then, the disputing parties make an arbitration agreement. After they agreed on the type of arbitration and the arbitrator which is often the same person who took guns from both parties. But, custom rule gives each party the right to change or include other arbitrators.

3- The third approach:[74] That the third party tribal man interferes by taking an interim measures of protection from disputing parties.

Moreover, the *Sheikh* is responsible for solving all disputes between tribal members and third parties or among the tribal members themselves.[75] If the *Sheikh* sees that he is not competent to deal with serious disputes, he may call for assistance of another tribe's *Sheikh*.[76] Disputes between different tribes need a tribal expert (Maragha).[77] Every tribe has its own maragha, if it does not have, then it will ask for the advice of a maragha from another tribe.[78] Furthermore, the tribal customary law settles disputes

[73] Ibid.
[74] Ibid.
[75] Andjelkovic-Al Amry, Sonja, and Nina Scherg, "Traditional Conflict Management in Yemen," (March 2005): 6, accessed August 28, 2016, http://www.yemenwater.org/wp-content/uploads/2013/07/Traditional-Conflict-Management-Yemen.pdf.
[76] Ibid.
[77] Ibid.
[78] Ibid, 7.

based on the negotiation, forgiveness, dialogue, transparency, accountability, tribal rituals and customs.[79]

4.3.7 The Interim Measures of Protection

Yemeni people prefer to resolve their commercial disputes through tribal mechanism because the tribal mechanism is more effective than the formal system.[80] Usually the tribal leader who is appointed as arbitrator takes an interim measures of protection such as arms or cars from the disputing parties to ensure the enforcement of the award (*Hukm*).[81] In some cases, each party to the dispute has to bring his *Sheikh* as a guarantee of the enforcement of the award and to show good intention to prevent further commitment of offence during the arbitral proceedings and processes.[82] If the debtor party fail to honour the award, then he will lose his rights, support, and protection of his tribe.[83]

4.3.8 Compensation under the Tribal Customary Law

The tribal arbitral awards are insufficient punishment for the committed crimes. As mentioned earlier, in tribal custom there is no imprisonment or death sentence.[84] All penalties are material compensation, sums, land, animals, abandonment of the perpetrator, or planting.[85] The limitation of the punishment to just material compensation and the absence of any form of corporal punishment or imprisonment in criminal cases lead to nonchalant attitude by the perpetrators. Especially, those from

[79] Ibid, 8.
[80] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice*, 8.
[81] Ibid.
[82] Nadwa Al-Dawsari, "Tribal Governance and Stability in Yemen," 10.
[83] Ibid.
[84] Ibid.
[85] Ibid.

rich powerful tribes.[86] The tribal customary law' aim is to maintain harmony in the society, it insists more on the individuals' rights than penalizing perpetrators of crimes.[87] However, in serious offences the cash compensations are not preferable.[88] Such types of compensation are not effective, as they will encourage the perpetrators to continue with criminal acts. So, the crimes of murder, robbery, rape will be increase if there is no strong deterrence.

4.3.9 The Tribal Arbitral Award

The tribal award is depends on the agreed type of the arbitration. The non-appealable arbitration is final and binding while the appealable arbitration is not final.[89] The decision made by the tribal arbitrator can be appealed twice to two higher layers of tribal justice if one or both of the disputing parties disagree.[90] The settlement of the dispute is often solved by moral pressure than physical coercion.[91]

4.3.10 The Overview of the Tribal Dispute Resolution Mechanism

According to Omar Bawazir, TADRM is more favourable than the formal law.[92] As the formal system became weak because of non-enforcement of the judgments and the rampant corruption.[93] Legal practitioners are claiming that the tribal arbitrators are not qualified to engage in arbitration.[94] Hence, their tribal award are usually set aside.[95]

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[86] Ibid.
[87] USAID, "Tribalism, Governance and Development," (September 27, 2010), 22.
[88] Ibid.
[89] Al- Muwadda, "Custom Tribal Warfare: an Analytical Descriptive Study,"
[90] Gaston, Dispute Resolution and Justice Provision in Yemen's Transition.
[91] Al- Muwadda, "Formal and Customary Adjudication in Yemen,"
[92] Omar Saleh Abdullah Bawazir, Hairuddin Megat Latif, Mohammad Azam Hussain, "The influence of the Tribal Dispute Resolution Mechanism on the Arbitration System in Yemen" *International Journal of Trend in Research and Development*, Volume 4 (4), ISSN: 2394-9333: 740, accessed October 5, 2017, http://www.ijtrd.com/papers/IJTRD10850.pdf.
[93] Ibid.
[94] Ibid.
[95] Ibid.

However, in order to set aside TADRM, the judiciary has to be reformed.[96] The people do not fully trust the courts as bribery can influence the judge's rulings and independence.[97] It is commonly known that government institutions have collapsed since the Arab Spring of 2011 so the custom substituted the official institutions.[98] Therefore, Yemen has maintained a kind of stability because of the existing of the TADRM and the custom as a whole.[99]

As a result of the lack of the enforcement of the law, the people prefer to solve their disputes by customary laws that are supervised and administered by *Sheikhs* as they have the power to enforce the customary laws. Additionally, the state does not fully extend its sovereignty over the territory as mentioned above. Throughout the tribal mechanism arbitration, often *Sheikhs* take an interim measures of protection from the disputing parties to ensure enforcement of the decisions. It is traditionally considered as shameful if debtor parties reject the *Sheikh's* decision. Thus, the collapse of the judicial institutions is because the citizens do not fully trust the formal courts as rampant corruption adversely affect the courts' judgments. The researcher is not a supporter of TADRM, because the formal law is the gate towards civil State. But, before overcome TADRM the formal judiciary shall be reformed of corrupt effects and interventions of politicians and tribes.

[96] Ibid.
[97] Ibid.
[98] Ibid.
[99] Ibid.

4.4 The Role of Tribes in Society and the State

The tribes assist the state in maintaining internal security in the tribal regions as well as protect the state borders from outside interference.[100] The tribes take responsibility from the government to provide basic facilities such as electricity and water supplies.[101]

Historically, the tribal law works together with the official law, this is since the ruling of *Imam* in 1904.[102] The studies have shown that 80% of disputes are settled by the tribal arbitration mechanism.[103] In fact, this high percentage is as a result of the weakness of the judiciary which has unqualified staff and the inability to enforce the court's judgements.[104] Also, the tribal law is effective as the *Sheikhs* guarantee the enforcement of the tribal awards.[105] Moreover, the procedures and proceedings are easier than the court procedures.[106] The tribal law recognizes two approaches to settling the disputes that are *sulh* (reconciliation) and the *tahkim* (arbitration) which the applicant law is based on the region, custom, and tradition.[107] Furthermore, not all acts by the tribes are bad or illegal which the tribes contribute to settle the arising disputes among citizens by the tribal law with Dar Al-Salaam considered as the tribal tribunal that is recognized by the Yemeni law.[108]

[100] Hamzawy, *Between Government and Opposition*, 4.
[101] Ibid.
[102] Ibid, 50.
[103]Ibid.
[104] Ibid, 51.
[105] Ibid.
[106] Ibid
[107] Ibid.
[108] Laili al-Zwaini, "State and Non-State Justice in Yemen," Paper for the Conference on the Relationship between the State and Non-State Justice Systems in Afghanistan (December 10-14, 2006): 44, accessed November 11, 2016, http://www.usip.org/sites/default/files/ROL/al_zwaini_paper.pdf.

4.5 Tribes and the State Interrelationship

As mentioned before[109] the tribes work with the state since the *Imam* who established the Mutawakkilite Kingdom of Yemen in 1904 in protecting the borders from outside interference as long as securing the regions that the state was incapable to spread its soldiers in that areas.[110] This interrelationship between the state and the tribes is currently continuing as some tribes fight the *Huthi*[111] movement that is rebelling against the state.[112] Till now the tribes are important to the state's stability.[113] Studies have shown that sons of tribal leaders who are educated hold 13% of government positions.[114] Tribes possess deadly weapons and with that protect their own members, cooperate with the state to secure some places, provide some social services, and negotiate with the government to limit the government's control in the tribal region.[115] Indeed, there is a negotiated agreement between the government and the alliance tribes stipulating the tribes' contribution to maintaining security in some regions.[116]

So, the tribes and the state have a joint function in the unsecured regions which the tribal men replaced the performance of the soldiers' task.[117] This was confirmed by the former president Saleh through an interview which he said that the state is a portion of

[109] See footnote 42.
[110] Marc Lynch, "Arab Uprisings: Yemen: the Final Days of Ali Abdullah Saleh?" (March 24, 2011), 20, accessed October 23, 2015, http://www.pomeps.org/wp-content/uploads/2011/03/POMEPS_BriefBooklet3_Yemen_WEB-Rev.pdf.
[111] Huthi: is a religious, political, and armed movement. It is located in northern part of Yemen, Saada. It is commonly known as Al- Huthi on behalf of its founder Badr Eddin Al-huthi who is the religious leader of this movement.
[112] Ibid.
[113] Daniel Egel, "Tribal Diversity, Political Patronage and the Yemeni Decentralization Experiment," (January, 2010): 7, accessed November 29, 2016, http://ecommons.luc.edu/cgi/viewcontent.cgi?article=1147&context=meea.
[114] Life, Political Party, "Building Democracy in Yemen," (2005): 98, accessed November 25, 2016, http://www.idea.int/publications/dem_yemen/upload/Yemen_country_report_English.pdf.
[115] Hamzawy, *Between Government and Opposition*, 4.
[116] Derek B. Miller, *Demand, Stockpiles, and Social Controls: Small Arms in Yemen* (Switzerland: Graduate Institute of International Studies, 2003), 5.
[117] Ibid.

the tribal collection of people.[118] According to Tribalism Index Scores (TIS), 2009 Republic of Yemen is ranked at number 7 out of 160 countries in the world, figure 1 is considered as the highest rate, while figure 160 is considered as the lowest rate.[119] Number 7 is a high rate, so this rate is considered as a negative as tribes are one of the factors that adversely affect the growth of the Yemeni national economy as well as the good performance of the government institutions and they do various illegal acts, such facts are cited by clear evidence in this research. TIS classification of highly tribal countries is based on failed states, weak center, instability, poverty, violence, and other problems.[120]

The tribes do not have the ability to contribute in building the institutions as themselves breach their duties and usually break the law.[121] This is admitted by the Deputy Minister of Communication when he announced that the northern areas are less developed as they under the control of the tribes.[122] The tribes have influence over the society and dominate the position of the government institutions more than the state even though the influence is unofficial.[123] Therefore, the government has no sovereignty over all land in order to extend its authority and ensuring the application of the law.[124] Furthermore, the government faced difficulties in implementing its policies because it is faced with the tribal resistance in cases where such policies are against tribal interest.[125] Especially, the tribes that are located in the north of Yemen.[126]

[118] Ibid.
[119] Jacobson, "the Tribalism Index," 10-11.
[120] Ibid. 7.
[121] Ahmad Ali Al-Ahsab, "What Makes Yemen's Spring Different," The Arab Spring and Arab Thaw: Unfinished Revolutions and the Quest for Democracy (April 2016): 9.
[122] Ibid. 10.
[123] Ibid. 9.
[124] Elham M. Manea, "Yemen, the Tribe and the State," This paper was presented to the International Colloquium on Islam and Social Change at the University of Lausanne (October 11, 1996), accessed November 28, 2016, http://al-bab.com/albab-orig/albab/yemen/soc/manea1.htm.
[125] Peterson, "Tribes and Politics in Yemen," 7.
[126] Ibid.

According to Syed Hussein Alatas, the tradition is one of the factors that lead to corruption which nepotism requires the tribe or the family to protect each other so that the traditional responsibility to the family members is an impediment towards fighting the corruption.[127] Thus, the enforcement of IAA is more likely to face difficulties to implement in cases where the debtor party is tribal. The lost party will refer to his/her tribe to protect him/her against the court legal actions as well as the lack of the court control over the tribal regions which the tribal law dominates over the official law.

4.6 Tribal Confederation

The tribes that are considered as powerful in Yemen have confederation especially, the tribes that live in the same geographical place.[128] They come together as one group to assist their own tribal members.[129] For example, the tribal confederation is consist of *Hashid* that is considered as political tribe because of its influence on the state policy, and the former president Ali Abdullah Saleh's tribe is a part of *Hashid* confederation and *Bakil* which is considered as the biggest confederation tribe.[130] Such two tribes are located in the north of Yemen, especially around the capital Sana'a. The population of that two tribes is estimated at about fifty five thousand people.[131] Both tribes descended from the tribe of *Hamdan* and also there are several branches of the tribes of these two tribes.[132]

[127] Syed Hussein Alatas, *the Sociology of Corruption* (Singapore: Donald Moore Press Ltd, 1968), 49.
[128] Peterson, "Tribes and Politics in Yemen," 2.
[129] Ibid.
[130] Unit, Economist Intelligence, "Yemen Country Profile 2015," accessed October 1, 2016, http://reliefweb.int/sites/reliefweb.int/files/resources/acaps_country_profile_yemen_24july2015.pdf.
[131] Peterson, Tribes and Politics in Yemen, 4.
[132] Ibid.

The government knows the tribes' power so that they work together to protect the country borders and secure other places inside the state's sovereignty.[133] The tribal confederation consist of *Hashid* that is considered as a political tribe because of its influence on the state policy, and the former president Ali Abdullah Saleh's tribe is a part of *Hashid* confederation while *Bakil* is considered as the biggest confederation tribe.[134] The *Hashid* and *Bakil* are the most crucial tribes that the state often rely on to achieve their objectives. Such cooperation between the tribes and the state could be noticed from the time of *Imam* Yahya, the former king of Yemen.[135] Until today 2015, the state used the tribes to fight *Hutthi* movement. It should be noted that most of the military members belong to the tribes.[136] Hence, the state without the tribal support can't control the country.[137] The government is afraid in case the tribes opposed its policy.[138] The former president Saleh learned a lesson from the former president Ibrahim Al-Hamdi as the latter was assassinated when he planned to build a modern state which is a far from the tribal interference. Hence, former president Saleh be ensured the satisfaction of the tribal *Sheikhs* through supporting them with multiple facilities and sharing the ruling of the country alongside the tribal leaders.[139] This is why the politicians get prior consent from *Sheikhs* in making some decisions.[140]

[133] Lynch, "Arab Uprisings," 20.
[134] Unit, Economist Intelligence. "Yemen Country Profile 2015." accessed October 25, 2016, http://reliefweb.int/sites/reliefweb.int/files/resources/acaps_country_profile_yemen_24july2015.pdf.
[135] Lynch, "Arab Uprisings," 20.
[136] Ibid.
[137] Al-Ahsab, "What Makes Yemen's Spring Different," 7.
[138] Miller, *Demand, Stockpiles, and Social Controls*, 37.
[139] Al-Ahsab, "What Makes Yemen's Spring Different," 7.
[140] Ibid, 8.

4.7 Interrelationship of the Tribes and the Politics

In Arab countries, the influence of tribes on politics and economy varies from state to state.[141] In some states, tribal influence on the decision of government in politics and economy is strong while in other states it is weak.[142] In Yemen, the tribes play fundamental role in politics.[143] They exploit the weaknesses of government institutions. They use force and power to share in the political decision of the government.[144] Moreover, the government supports the tribes' leaders who are in alliance with the government so that most members of the House of Representatives are represented by famous tribal *Sheikhs*.[145] In addition, the former president Ali Abdullah Saleh has intentionally strengthened tribal power in order that none could rule except him.[146] As a result, Ali Abdullah Saleh's tribes have lion's share in the politics and the army.[147] Therefore, the government has to pay attention to the tribal leaders.[148]

Consequently, the government set up Ministry of Tribal Affairs to provide the tribal *Sheikhs* huge financial aids and other facilities.[149] These actions amount to abuse of public fund such as abusive use of oil revenues to buy the loyalties of tribal leaders.[150] Hence, the tribes are considered as one of the core elements that lead to the

[141] Ted Liu, Ethnicity and Tribalism in Arab Transition (2012), accessed October 28, 2016, http://fride.org/download/PB_137_Ethnicity_and_Tribalism_in_Arab_Transitions.pdf.
[142] Ted Liu, Ethnicity and Tribalism in Arab Transition (2012), accessed October 28, 2016, http://fride.org/download/PB_137_Ethnicity_and_Tribalism_in_Arab_Transitions.pdf.
[143] Egel, "Tribal Diversity, Political Patronage and the Yemeni Decentralization Experiment," 7.
[144] Ibid.
[145] Lynch, "Arab Uprisings," 21.
[146] Sami Kronenfeld and Yoel Guzansky, "Yemen: A Mirror to the Future of the Arab Spring," *Milatary and Strategic Affairs* 6.3, (2014):83-84, accessed October 30, 2016, http://www.inss.org.il/he/wp-content/uploads/sites/2/systemfiles/SystemFiles/05_Kronenfeld_Guzansky.pdf.
[147] Ibid.
[148] Egel, "Tribal Diversity, Political Patronage and the Yemeni Decentralization Experiment," 8.
[149] Ibid.
[150] Ali AL-hamed and Kevin Bishop, "Policy Brief: Beyond the Saleh Regime," (June 2012):13. *The Institute for the Gulf Affairs*, accessed October 31, 2016, http://www.gulfinstitute.org/wp-content/uploads/2012/06/yemen-beyond-the-saleh-regime.pdf.

corruption.[151] They are one of the factors causing Yemen to be the poorest Arab country.[152] The government deliberately arrange the involvement of the tribal leaders in the politics in order to gain their loyalty to support political parties during elections.[153] Studies have shown that 40% of parliament membership in 2003 election are tribal men whereas such members do not have any basic qualifications.[154] So, this will save the government from any control and accountability of misconduct and corruption.[155] The *Sheikhs*, political parties, and the government exchange the interest so that in return of tribes support, the *Sheikhs* gain special privileges such as getting monthly salaries, cars, houses, and positions. This is why some *Sheikhs* did not support the Arab Spring in 2011 because they are part and parcel of the current corruption.[156] Thus, appointment of the tribal men into powerful position in the army even without qualifications is the trend.[157]

Due to the absence of a strong central state, the Yemeni tribes carry out all the functions of economic, political, social, and cultural state. The tribes play the most prominent role in politics of Yemen. This could be seen in Arab Spring 2011, as the tribes were one of the first forces that supported the revolution. Further, the relationship between the tribes and the executive has become an integral relationship which serves as an obstacle towards the modern state. The state relinquishes part of its jurisdiction to the tribal leaders; the *Sheikhs* become representatives of the state. In return, the state pays them salaries to help them perform these functions and enable

[151] Ibid.
[152] Kronenfeld, "Yemen: A Mirror to the Future of the Arab Spring," 79.
[153] Al-Ahsab, What Makes Yemen's Spring Different, 4.
[154] Ibid, 3-4.
[155] Ibid.
[156] Ibid, 3.
[157] International Crisis Group, "Yemen's Military-Security Reform: Seeds of New Conflict?" (April 2013), International Crisis Group Working to Prevent Conflict Worldwide, accessed October 31, 2016, https://www.files.ethz.ch/isn/163124/139-yemens-military-security-reform-seeds-of-new-conflict.pdf.

them to control the Legislative Council. Thus, the government is without effectiveness in tribal areas, the tribes that manage the affairs in their areas. It means that there has been collusion between the *Sheikhs* and the ruling elites. The continuation of the elite in power depends on the use of tribal power and the persistence of tribal leaders in control and get benefits. This has weakened the state, and it has led to its complete failure to achieve a developmental achievement. In addition, the involvement of tribal men in the political institutions helped to extend the influence of the tribal leaders not only at the level of their tribes, but also throughout the country. Thus, it has to socialize them within the institutions that they head in the state.

The Respondents, 11, 12, and 13 of COCA answered the relating questions to the tribalism interference on the COCA's good Performance.[158] When the interviewees were asked to confirm whether the tribal leaders interfere in COCA' good performance, the all respondents confirmed such interference. The respondent 11 States that "Yes, there is interference", respondent 12 stated that "in my department I have not met such interference maybe such thing happens in other states", while respondent 13 stated that "we are an under developed country so we get the interventions effect on the COCA operations". This means that the tribes interfere in most government activities and such intervention is an indication of the unlimited power of the tribes in Yemen. Even though, section 3 of Yemeni Central Organization for Control and Auditing (Act No. 39) 1992 provides that COCA an independent regulatory body. Also, section 22 provides that authority shall be independent in the performance of its duties. No party shall interfere in the affairs of the Agency, its branches or its employees in any way whatsoever. However, the Act lacks strong

[158] Interview with the Central Organization for Control and Auditing, December 13-23-28, 2016.

provisions to prevent the interference in COCA operations. No provision provides punishment against interference in its performance. The majority of interviewees confirmed that the tribal men still interfere even though the Act provides its independence. The researcher referred to anti-corruption agencies such as COCA to understand the tribes' power and their interferences in all the government institutions. To give good background that the tribes not only interfere in the judiciary, other than, all the government institution. This will help the government to come out with general solutions to overcome tribalism impediments. This impediment will not be eliminated by stopping their interference in the judiciary. The judiciary is one of the government bodies so it is vain to fight it from the judicial institution, while, they are powerful in other bodies. The independence of the three bodies, which are, parliament, executive, and the judiciary are interrelated to each other. None of these will be protected from tribal interferences while, other bodies under the tribal tutelage.

Moreover, tribes do interfere on Public Funds Prosecution's good performance.[159] Throughout the interview of the three Public Funds Prosecution (Respondents 8, 9, and 10) and SNACC, respondent 8 stated that:

> *As we are a third world country so the interference from tribes in judge's operation is more expected but this depends on the strength of the judge and the prosecutor to reject any adverse effect on his/her judgement.*

Respondent 9 stated that:

> *I actually don't know that there are tribal interventions in our operations. Until now I haven't received any recommendations or*

[159] Interview with Public Funds Prosecutions, December 6-23-27, 2016.

> *telephone in order to withdraw any case involving corruption in public funds.*

While respondent 10 stated that:

> *Yes, such interventions affect our performance. We are a tribal society so the intervention is expected. As far as the tribes are considered as disobeyers of the law so their intervention will lead to negative effects on judicial operations.*

In addition, in an interview of the Interference in SNACC Affairs from the Tribes.[160] Interviewee of SNACC (Respondent 6) said:

> *There is pressure on us because of the intervention of the tribes. We are a part of the public system which all state institutions suffer from imbalances, wrong policies and pressures.*

Therefore, three respondents agreed that tribal interference occurs in the Public Funds Prosecution and adversely affect their performance. On the other hand, only one respondent has not faced such interference. It can be noticed that the tribes are large in number hence are not easy to fight. The former president Ibrahim Al-Hamdi was assassinated when he tries to limit the tribal intervention in the government institutions.[161] So, any policy plans to reduce the tribal intervention has to be done through appropriate strategies. Thus, assassinations of judges are expected if they did not listen to the tribal recommendations and interference in the judicial operations. As individuals risk and dread influence our freedom and respectability. However, the politicians themselves could not protect their lives, so the judges are less protection. The tribal leader will interfere to judge on the enforcement of the arbitral awards. As a result, the judges will bias in favour of tribal member as the lost party will resort to

[160] Interview with the Head of the Supreme National Authority for Combating Corruption, December 27, 2016.
[161] Al-Ahsab, "What Makes Yemen's Spring Different," 9.

his/her tribe to protect him/her from any court legal actions. Thus, it is highly expected that the tribalism impediment will adversely affect the judges' good performance, especially, on the enforcement of IAA in case the lost party is tribal man.

The official persons strive hard to involve the tribes in political affairs in order to get the tribal leader and tribesmen support.[162] Thus, a lot of the tribal members have membership in the political parties.[163] Hence, the political parties much depend on the tribal alliances to win victory in the parliamentary election.[164] The politics in Yemen depends on the tribes to have a participation in making political decisions,[165] especially, the tribes in the northern part of Yemen as they are powerful.[166] However, in southern part of Yemen the dependence on the tribes is weak because the southern part was under the British rule and influenced by the socialist rule and did not allow the tribes' interventions in the affairs of state.[167] However, after the unification 1990, the regime of president Saleh has attracted the tribes that are located in the southern part to participate in political affairs and they are likely to become influential as those tribes in the northern part.[168] Hence, because of the great influence of the tribes in politics so that the political men prefer to get marriage with tribal females in order to ensure kinship with the tribes.[169] This practice been followed by the former president of Yemen Ali Abdullah Saleh who has married four tribal women.[170] Thus, some

[162] Life, "Political Party," 91.
[163] Ibid.
[164] Ibid.
[165] Amber Salwa Murbarak, "The Political and Economic Transformation of Yemen, 1968-1998. Diss. Durham University, 1999" (PHD' thesis, Durham University, 1999), 12.
[166] Ibid.
[167] Ibid.
[168] Murbarak, "The Political and Economic Transformation of Yemen" 12.
[169] Al-Ahsab, What Makes Yemen's Spring Different, 6.
[170] Ibid.

foreign countries are confused when dealing with Yemen in relating to diplomatic matters because of the tribal interference in the public policy of the state.[171]

The tribal influence in political affairs is impossible to ignore. It is important to refer to Arab Spring revolution in 2011 to show the influence of tribalism on state policy in Yemen where the revolution was against Ali Abdullah Saleh.[172] He was toppled down because some tribes did not support him as they did before.[173] The same revolution 2011, *Sheikh* Sadiq Al-ahmer who is *hashid* tribal leader with other tribal alliance protected rebels from the military attack.[174] During the revolution, the former president Saleh called for a tribal conference to face the revolution pressures that requiring his resignation but the conference failed because of some major *Sheikhs* did not attend.[175] The failure to hold the tribal conference caused the resignation of Ali Abdullah Saleh involuntarily. The former president Saleh lost the game and handled out the presidency to his former vice president Abd Rabbah Hadi through gulf initiative for temporary transition of the authority to a national unity government.

The political parties should be independent of any tribal influence. Indeed, they rely on the tribal support to establish the regime. The tribal members in General People's Conference which is the ruling party constituted about 30%[176] while *Islah* party that is the strongest opposition party is constituted of tribal members as well.[177] One of the obstacles facing political reforms is tribalism.[178] Under the tribal influence, the

[171] Edward Burke, "One Blood and One Destiny? Yemen's Relations with the Gulf Cooperation Council. Kuwait Programme on Development, Governance and Globalisation in the Gulf States," (2012): 7, accessed November 2, 2016, http://eprints.lse.ac.uk/55241/1/Burke_2012.pdf.
[172] Ibid, 1.
[173] Ibid.
[174] Ibid, 8.
[175] Ibid.
[176] Life, "Political Party," 98.
[177] Al-Ahsab, What Makes Yemen's Spring Different, 10.
[178] Life, "Political Party," 20.

appointment standard of the political posts does not depend on the qualification and experience but mostly relying on the tribalism standard.[179] Based on Hofstede' theory, under tribalism there is the culture dimension of collectivism. The culture dimension exists where there is a huge number of families with strong loyalty to protect each other as one group.[180] As far as the tribes influence the executive body, the enforcement of IAA is more likely to fail because of tribal interference to protect their own tribal members against any court coercive enforcement.

4.8 Interrelationship of Tribes and the Army

The majority of the military members are from the tribes.[181] Thus, the weakness of the army and the state is because of the strength of the tribes.[182] As long as there is an interrelationship between the army and the tribes, they cannot be considered as nationalistic to protect the country's interest.[183] This was confirmed through Arab Spring when some tribal *Sheikhs* supported the 2011 revolution the soldiers withdraw from the military barracks and joined their own tribes.[184] The tribes dominate the military positions so that the tribes misused such positions to work for their own interest and selfishness. This was noticed after the country' unification in 1990 and the victory of the northern part over the southern part in the civil war of 1994. The victory led the northern tribes to have a dominant position over the national sources.[185] Furthermore, a 2006 study carried on by the United States embassy in Yemen have

[179] Ibid.
[180] Hofstede, *Cultures and Organizations*, 91-92.
[181] Lynch, "Arab Uprisings," 21.
[182] Burke, "One Blood and One Destiny," 11.
[183] Al-Ahsab, What Makes Yemen's Spring Different," 5.
[184] Ibid.
[185] Glenn E. Robinson et al, "Yemen Corruption Assessment," (September 25, 2006): 15. This publication was produced for review by the United States Agency for International Development, accessed November 24, 2016, https://photos.state.gov/libraries/yemen/231771/PDFs/yemen-corruption-assessment.pdf.

shown that the tribes and the army are the major components that drain capabilities and wealth of the country.[186] The Ministry of Tribal Affairs pays monthly salaries and other facilities like houses, lands, guards to a number of six thousand of the tribal *Sheikhs*.[187]

4.9 Interrelationship of the Tribes and the Economy

The tribes have an adversely influence over the business life especially, in the matter of the protection among the tribal members.[188] The tribes are the main cause of the deterioration of the national economy. This is because the tribes cause the weaknesses of internal security, government institutions, and non-enforcement of laws.[189] As a result of weak institutions in Yemen, the tribes exploit that to drain a lot of money from the state.[190] The central government is incapable of enforcing its sovereignty over all national territory.[191] Thus, bearing the tribes obligations to protect the border and share in keeping security has to pay back to tribes' leaders. Therefore, the Ministry of Tribal Affairs pays to over than six thousand tribal *Sheikhs* monthly salaries, accommodation, provide cars, guards, and so on.[192] Thus, foreign investors are not willing to invest their money in a country that has less effective laws to protect their rights. They also do not want to invest in a country that does not have full sovereignty over its land. Otherwise, they are more likely to lose their rights and could only protect

[186] Amb. Marwan Noman and David S. Sorenson, "Reforming the Yemen Security Sector," CDDRL working papers number 137, (June 2013), accessed November 24, 2016, https://cddrl.fsi.stanford.edu/sites/default/files/No_137_Yemen.pdf.
[187] Egel, "Tribal Diversity, Political Patronage and the Yemeni Decentralization Experiment," 1, 8.
[188] Baabbad, "Tribalism and Perceived Auditor Independence," 1306.
[189] Corstange, "Tribes and the Rule of Law in Yemen," 3-4.
[190] Sarah Philips, *Evaluating Political Reform in Yemen* (Carnegie Endowment for International Peace, 2007), 19, accessed December 27, 2016, http://carnegieendowment.org/files/cp_80_phillips_yemen_final.pdf.
[191] Ibid.
[192] Ibid.

their rights by illegal methods through asking of protection from tribal leaders or pay bribe that could lead to losses for the foreign investors.

According to the Human Development Index of the United Nations Development Programme (UNDP) , Yemen is one of the less developed countries of the world which ranking number 144 out of 173 countries and one of the poorest countries at the Arab level.[193] Even, the foreign aids unwilling to support the government to overcome the economic crisis that face the government.[194] Such unwillingness because of the interference factors of the tribes and the army in the state as well as the rampant corruption that spread in the government institutions.[195] The army is considered as a fundamental contributor to the economy. For instance, there was business council named Military Economic Corporation (MECO) which was later renamed Yemeni Economic Corporation (YECO).[196] This means that the military members do business which if there is a commercial dispute between the military member and foreigner investor the enforcement of IAA may not be implemented because the military member is more likely to resort to his own tribe to protect him/her from the competent court's coercive actions as far as the most of the military members come from tribes.[197] Corruption comes from the patronage and alliance, especially those who have power that is more likely to misuse it in their favour.[198] The tribes increase the commercial risk as they commit illegal acts against foreigners in Yemen.[199] Other factors that are

[193] Miller, *Demand, Stockpiles, and Social Controls*, 4.
[194] Burke, "One Blood and One Destiny," 19-20.
[195] Ibid.
[196] Ibid, 4.
[197] International Crisis Group, "Yemen's Military-Security Reform: Seeds of New Conflict?," 4, accessed December 30, 2016, https://www.files.ethz.ch/isn/163124/139-yemens-military-security-reform-seeds-of-new-conflict.pdf.
[198] Asian Institute of Management, Reports on the Anticorruption Reform: Corruption and Development, How anti-Corruption Can Be Integrated into Development Measures to Ensure Sustainable Development and Inclusive Growth (Makati: Asian Institute of Management, 2013), 10.
[199] DOC (Department of Commerce). *Doing Business in Yemen- A Country Commercial Guide for U.S. Companies*. USA: the U.S. (2008), 11, Department of Commerce's Trade Information Center, accessed

more likely to cause weakness of the national economy like decreasing production of the natural sources that Yemen depends on the oil and gas at a rate of 70%, as well as the increasing proportion of the population, coincides with the government's failure to provide the basic needs like the supplement of electricity and water.[200]

Currently, the tribal members involve in business which they have the business contract with other people.[201] This means the tribal business members have business contracts with local and foreign businessmen which could adversely affect the arbitration system at the time of the enforcement of arbitral awards. Thus, the Yemeni government has to develop strategies to overcome such tribal impediments on the enforcement of IAA.

4.10 Illegal Activities by the Tribes

Regrettably, the tribes perform actions that distort the image of the country in order to coerce the government to execute their numerous requirements like providing services in their region, get employments for their tribal members, interest for the tribes, and so on.[202] The tribes in Yemen do not recognize the principle of justice that all the people are equal before the law, so that it can notice some unlawful actions against the governmental institutions, social institutions, and the civil life as a whole.[203] Also, kidnapping foreigners is increasingly widespread since 2000.[204] For example, the German who was a diplomatic man and his family kidnapped for several days in

December 31, 2016, https://www.scribd.com/document/73605245/Doing-Business-in-Yemen-A-Country-Commercial-Guide-for-U-S-Companie.

[200] Michael Makovsky et al., *Fragility and Extremism in Yemen: a Case Study of the Stabilizing Fragile States Project* (Washington, D.C.: Bipartisan Policy Center, 2011), 42.

[201] Robinson, "Yemen Corruption Assessment," 14-15.

[202] DOC (Department of Commerce). *Doing Business in Yemen*, 44.

[203] Hamzawy, *Government and Opposition,* 2

[204] Ibid.

December 2005 as well as tourists who hold Italian nationality were kidnapped in Mareb governorates by a tribe in order to force the government to implement tribal interest.[205] They usually look for their interest even to break the law so they often abuse the rights of others.[206] The reason behind such abuse is that the tribes have more deadly weapon than the state.[207] Hence, the *Sheikhs* fight the government soldiers with their own bodyguards to prevent the implementation of some government orders that conflict with tribal interest.[208]

According to an official from the Ministry of Foreign Affairs, the weapon spread in the hands of people is estimated of fifteen to sixteen million pieces which most of it stocked in tribal warehouses.[209] Tribes behave as that a sovereign state so they have their own prison to imprison their opponents even without trial, this is because the state does not have a sovereignty over all the land.[210] Even though, article 48 that provides that none has the right to detain any citizen unless by an order from the judge or the prosecutor.[211] Thus, if the tribes have the capacity to fight with government soldiers and break the law that means the court could not enforce IAA against tribal debtor parties and cannot even seek the help of the police to take coercive actions. Also, if the tribes have their own prison to detain their opponents so that the creditor party is more like to be imprisoned if he/she insist on the follow-up his/her rights.

[205] Ibid.
[206] Lynch, "Arab Uprisings," 21.
[207] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice*, 44.
[208] Al-Zwaini, "State and Non-State Justice in Yemen," 32.
[209] Miller, *Demand, Stockpiles, and Social Controls,* 6.
[210] Katulis, Countries at Crossroads 2004- Yemen.
[211] Yemeni Constitution, article 48.

The tribes are an obstacle to the democratic and civilized methods of political life as well as individual freedom to practice personal activities.[212] They do not recognize the constitutional principle that all citizens are equal before the law.[213] Therefore, the common rule that provides all the citizens are equal is not practiced in Yemen whereas some persons who have a power whatever such power comes from businessmen, tribal confederation, or political persons which they enjoy special privileges and protections other than normal citizens.[214] Even though, all the Yemeni laws provide that all the citizens are equal before the laws,[215] the people do not believe in the effectiveness of the rule of law.[216]

The tribal men are ignorant and less educated.[217] Hence, the phenomenon of revenge among the tribal members which they often kill in tribal conflicts and this even affects the innocent tribal men as far as they belong to that tribal enemy.[218] The *Sheikhs* involve in many illegal activities such as enrolling ghost soldiers in the army to get the beneficial salaries back to their own interest as well as trading heavy weapons that supposedly to be in a position of the army only.[219] Therefore, the tribes are less educated and perform such acts that are contrary to the law so that it is impossible to implement the court orders and to enforce the IAA against their own tribal debtor parties. So, Syed Hussein Alatas's view is confirmed when he said that the tradition is one of the factors that lead to corruption while nepotism requires the tribe or the family

[212] "Those Twentieth Century Tribes How should your Marketing Department Deal with the Good, the Bad, and the Ugly?" accessed December 18, http://www.rmastudies.org.nz/documents/TribalismQuest.pdf.
[213] Hamzawy, *Government and Opposition*, 2.
[214] Life, "Political Party," 20.
[215] Ibid, 21.
[216] Ibid, 20.
[217] Corstange, "Tribes and the Rule of Law in Yemen," 17
[218] Ibid, 20.
[219] International Crisis Group, "Yemen's Military-Security Reform," 30-32.

to protect each other.[220] So, the traditional responsibility to the family members is an impediment towards fighting the corruption.[221]

4.11 Interrelationship of the Tribal Customary Law and the Official Law

The justice system in Yemen is merged system between the tribal law and the official law and sometimes, the courts refer to the *Sheikhs* to settle the dispute between the victim and the offender.[222] Hence, the judiciary in Yemen applies formal system and customary system.[223] The dominance of the tribal law is because the tribes control the rural areas where the government cooperates with tribal leaders to secure some areas that are out of the government control.[224] People prefer to solve their disputes by TADRM because they consider the government institutions as weak and the government at the center does not have full control over all the state's local territory.[225] It is commonly known that the urban prefer to settle their dispute by the formal system, especially commercial issues like commercial arbitration. However, Yemeni people prefer to refer their commercial disputes to tribal mechanism because the tribal mechanism is more effective than the formal system.[226] As usually the tribal leader who is appointed as arbitrator takes an interim measures of protection such as arms or cars from the disputed parties to ensure the enforcement of the award.[227] Studies have shown that 80% of disputes are solved by the customary law mechanism.[228] But, the decisions by the tribal arbitrator can be appealed twice to two higher layers of tribal

[220] Alatas, *the Sociology of Corruption*, 49.
[221] Ibid.
[222] Travis Morris and Rebecca Tramme, "Formal and Informal Justice and Punishment Urban Law and Rural Mediation Rituals in Yemen," *Race and Justice* 1.2 (2011): 132. Accessed February 1, 2016, http://sci-hub.cc/10.1177/2153368710386554.
[223] Ibid.
[224] Ibid, 135.
[225] Gaston, Dispute Resolution and Justice Provision in Yemen's Transition.
[226] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice*, 8.
[227] Ibid.
[228] Ibid.

justice if one or both of the disputed parties disagree.[229] Furthermore, the judiciary in Yemen suffers from corruption and other factors so that the judges receive bribe, are unqualified, make ineffective judgements, the cost is high, and political interference can change the verdicts.

Moreover, some judges and prosecutors, as well as lawyers, were threatened by local *Sheikhs* to release some cases in order to be settled by tribal laws or to hold a decision in their favour.[230] This means that the judiciary is a weak institution.[231] Even, in some cases found that judges unofficially advise the disputed parties to solve their dispute outside the court.[232] The Yemeni law itself does not mind to settle disputes by other means of ADR.[233] Section 45 provides that the arbitral tribunal has to settle the dispute based on the laws agreed by the disputed parties. If the disputed parties did not mention their preferred law then, the arbitral tribunal has to settle it based on the international law and the principles of justice and has to take into consideration the customary laws.[234] This means the rendered award by the tribal customary law will be enforced as procedures and processes of the award rendered by the arbitral tribunal. The judge Yehya Al-Mawri who holds a position as Supreme Court member says that Yemeni Arbitration (Act No. 22) 1992 strengthened tribal relationship with the state through the law.[235] In addition, the Yemeni law is not sufficient, and as well ineffective, so that the official law is not the supreme law in the country which this is one of the main

[229] Gaston, Dispute Resolution and Justice Provision in Yemen's Transition, 4.
[230] Ibid, 6
[231] Ibid, 4.
[232] Ibid, 6.
[233] Ibid.
[234] Yemeni Arbitration (Act No. 22) 1992, section 45.
[235] Al-Dawsari, *Tribal governance and stability in Yemen*, 8,

reasons why the people prefer to settle their dispute by the tribal law.[236] To sum up, the formal legal system does not strongly exist in Yemen.[237]

According to United States Institute of Peace report from a survey of some provinces in 2013, 20% of the courts are closed because of insecurity and political instability and this rate is expected to increase in other urban provinces to 60% for the same reasons.[238] For example, in Aden that is considered as a highest urban province, studies have shown that the cases brought in 2013 decreased to often 44% (from 12,239 to 6,640) compared to 2010, while in Taez as the second urban state in the north around 41% decreased (from 13,032 to 8,464).[239]

As a result of the lack of the enforcement of the law, the people prefer to solve their disputes by customary law that are supervised and administered by *Sheikhs* as they have power. Also, the state does not fully extend its sovereignty over the territories mentioned above. Throughout the tribal mechanism arbitration, often *Sheikhs* take interim measures of protection of the disputed parties to make sure they enforce decisions. It is traditionally considered shameful if the debtor party rejects the *Sheikh's* decision. Thus, the collapse of the judicial institution because the citizens don't trust the formal court anymore.

4.12 The Tribes Interference in the Judiciary

The Judiciary has to be an independent branch which constitutionally authorized to settle disputes by provide fair solutions and protect rights and liberties stated in the

[236] Al-Zwaini, "State and Non-State Justice in Yemen," 15, accessed December 31, 2015http://www.usip.org/sites/default/files/ROL/al_zwaini_paper.pdf.
[237] Morris, "Formal and Informal Justice and Punishment," 134.
[238] Gaston, Dispute Resolution and Justice Provision in Yemen's Transition, 9.
[239] Ibid.

constitution and the law.[240] The main objectives of the judiciary are to handle all brought cases to court fairly, work together with Chief Justice of the Supreme Court to achieve the rights, duties mentioned in the constitution, and provide legal services to ensure the effective operation of the judicial system throughout the state.[241] Furthermore, it is responsible for supervising cases and the judicial system.[242] The law protects the judicial members and the independence of the judiciary as a whole and criminalize any threat, violence, or any illegal action that impede the judicial operations punishable with imprisonment not less than three years and not more than ten years.[243] Also, the punished with an imprisonment not less than three years against any person who supported and incited for non-implement of the laws.[244] Furthermore, the law punished with an imprisonment for a period not exceeding three years against any civil servant or *Sheikh* who interfere at the judge or the court in favour of any of the disputed parties or harm any of the disputed parties through recommendation, order, or demand.[245]

In addition, the judge shall be punished by an imprisonment not exceeding seven years if he/she deliberately make a judgement based on a recommendation, demand, or bias in favour of one of the disputed parties.[246] However, in Yemen, the *Sheikhs* have a close tie with some judicial officers.[247] They may observe together some dispute resolutions in the community.[248] Even, sometimes the judge indirectly advise the

[240] Chief Justice, "The Judiciary," (1972), accessed December 29, 2016, http://199.20.64.195/treasury/omb/publications/09budget/pdf/98.pdf.
[241] Ibid.
[242] Ibid.
[243] Yemeni Crimes and Penalties (Act No. 12), 1994, section 131 (2).
[244] Ibid, section 135.
[245] Ibid, section 187.
[246] Ibid, section 188.
[247] Gaston, Dispute Resolution and Justice Provision in Yemen's Transition, 6.
[248] Ibid.

disputed parties to solve their dispute by tribal law.[249] This means the government institutions are weak. As a result, the local protectionism exists.[250] The tribes are one out of five who take advantage of a weak and corrupt institution.[251] Thus, they misuse such weakness to protect their own tribal members from any court's control or assistance to the tribunal to enforce arbitral awards. The arbitration will not succeed in Yemen as far as government institutions are ineffective and unable to force tribal debtor parties to pay their debts.[252] So, IAA will face difficulties as the court control and assistance are major importance to enforce the arbitral awards and to make a success of the arbitration system as a whole.[253]

Kinship could adversely affect auditor's independence to in favour of his/her own kinsmen.[254] The same is expected to have the same effect which the tribes have an effect on the judiciary independence because family relationship could lead the judge to bias in favour of his own tribal party. Tribalism in Arab culture is to protect the tribes' interest as well as the tribal members' interest[255] and the tribal interrelationship adversely affect the judges' independence.[256] Similarity, the judges could not perform their functions because of the threat of *Sheikhs* against the judges.[257] They pressure

[249] Ibid.
[250] Robinson, "Yemen Corruption Assessment," 13-14.
[251] Noman "Reforming the Yemen Security Sector,"
[252] Ibid.
[253] Ibid.
[254] Baabbad, "Tribalism and Perceived Auditor Independence," 1306.
[255] Baabbad, "Tribalism and Perceived Auditor Independence," 1306, quoted in Anthony, John Duke, "Saudi Arabia: from tribal society to nation-state," International Research Center for Energy and Economic Development< Boulder, Colo.>: *The International Research Center for Energy and Economic Development* (1982): 93-98.
[256] Baabbad, "Tribalism and Perceived Auditor Independence," 1306, quoted in Roszaini Haniffa, and Mohammad Hudaib, "Locating audit expectations gap within a cultural context: The case of Saudi Arabia," *Journal of International Accounting, Auditing and Taxation* 16.2 (2007): 179-206.
[257] Gaston, Dispute Resolution and Justice Provision in Yemen's Transition, 6

them to abstain to give a judgement in some case or transfer it to tribal law or give a judgement in favour of the *Sheikhs.*[258]

The family relationship could adversely affect the auditor's independence through threat.[259] Hence, the tribes could threaten the judges if taken any coercive actions towards the enforcement of IAA against the tribal debtor party. For instance, in one case the *Sheikh* came to public prosecutor's office and has threatened him if he released the detainee.[260] Otherwise, such releasing will lead to a murder.[261] The public prosecutor considered the interference as a threat against his life and the detainee's life.[262] In another type of interference, the punishment of transfer of judges because he issued a judgement against a prominent *Sheikh.*[263] The same happened to a lawyer when they represented their clients before the court in regions that are controlled by tribes which such *Sheikhs* considered that as conflict with local tribal authority.[264] The government itself does not will to enforce the court's orders against tribal leaders which means the judiciary suffers from a lack of independence.[265] The judicial body is not effective because of the existence of the tribal influence.[266] Therefore, there is a high probability of failure of the enforcement of IAA in Yemen if the government does not prevent the tribe's interventions in the affairs of the judiciary. Such impediment to enforce the arbitral award in Yemen because of the tribalism influence is confirmed through an interview with Court of Appeal judges.

[258] Ibid.
[259] Baabbad, "Tribalism and Perceived Auditor Independence," 1305.
[260] Gaston, "Dispute Resolution and Justice Provision in Yemen's Transition," 7.
[261] Ibid.
[262] Ibid.
[263] Ibid.
[264] Ibid.
[265] Katulis, Countries at Crossroads 2004- Yemen.
[266] DOC (Department of Commerce). *Doing Business in Yemen*, 41.

> Respondent 1 stated that "*sometimes there are interventions by tribesmen when a tribal person is a party to the case. Sometimes there is a refusal to appear before the court"*. Respondent 2 Said that *"tribal intervention occurs"*. Respondent 3 stated that *"most interference in judge's decisions is tribal interference"*.

At the outset, the government itself is not willing to rectify the tribalism impediment. All interviewees confirmed the theory that the government encourages the tribal rebellion against court decisions. The researcher analysed that the tribes are classified as political ally of the executive branch so the executive ignores the tribal rebellion. On the other hand, the tribes are part of the executive, thus, they imitate the political interference in the judiciary. In reality, the tribal leader is seen as a higher authority than the judiciary and the government is silent to maintain the tribal power alliance. The interviewees' confirmation of the tribal influence is to ensure the theory that confirms the tribal threat of the judges and lawyers. As a consequences, is it possible that the judge, lawyer, or arbitrator will risk his/her lives? Surely, such threat will negatively affect their good performance. Therefore, the creditor party will face difficulties in enforcing the international arbitral award if the debtor party is tribal. Also, the independence of the judiciary and impartiality are very important to achieve justice, so the lack of such fundamental elements in Yemeni judiciary will lead to negative effects on justice. As the court control and assistance are major importance to enforce IAA, the enforcement against the tribal debtor party will fail.

In the matter of the effectiveness of the tribal alternative dispute resolution mechanism on the arbitration system. The three Court of Appeal judges stated that:

> *In order to improve the arbitration system in Yemen, they are all recommended the development of institutional arbitration and stay away from non-institutionalized arbitration like refer to TADRM because tribal men are not aware of legal procedures and pleading*

> *which the court faces difficulties to implement the arbitral award and lead recourse the award.*[267]

I do concur the layman like tribal men won't matter the administer of common equity as a result of their ignorance of essential standards of guidelines. The natural of justice is more likely to be breached. As a result, the resisting party well make an application to set aside the tribal award. However, the people's autonomy who choose to refer the customary law instead of the court system. People do not fully trust the court system because of the tribalism impediment and corruption. So, the tribal leader award is credible and honest because of no such influences. Hence, the reforms of the judiciary is the only solution to overcome the TADRM. On the other hand, TADRM will not affect the enforcement of IAA because the foreign investor will not agree to arbitration clause that provides referring to TADRM to settle commercial dispute. This is because neither he/she nor his/her lawyers are aware of such type of alternative dispute resolution.

Furthermore, regarding the effectiveness of the tribalism interference on the enforcement of international arbitral award. Respondent 4 confirmed that:

> *The tribes are strong in the composition of the society and have the power to challenge any coercive actions that may be taken by the court to enforce the IAA against their tribal members.*[268]

Also, according to Respondent 5 said that:

> *70% of Yemeni people are tribal, that the majority of citizens are from tribes. Besides, the high proportion of ignorance leads to indiscipline and disobedience of law and order. Tribal interventions major constraints that threaten the judiciary and contribute to*

[267] Interview with Court of Appeal judges, December 11-20-27, 2016.
[268] Interview with academicians, December 25-26, 2016.

> *undermining. That's why the tribes don't understand the law. I personally imprisoned a tribal person accused during the trial. As a result, I received several calls from tribal leader asking for the release of the accused and other calls threatening me if I did not release him. To be an independent judiciary there has to be security protection of judges against any arbitrary act. Such threats will definitely affect us negatively and make us bias.*

In addition, the same question to the Respondent 14 confirmed that:

> *The tribalism interference occurs to prevent the enforcement of the arbitral award in some cases. The tribal leaders interfere and influence judges' operations to prevent them from taking coercive actions to enforce the arbitral award that judges usually take such as imprisonment, seizure of the lost party's assets. The enforcement of the arbitral award is difficult when the lost party is a tribal person or his/her assets are in the tribal area, so the implementation is a bit difficult because the tribe controls the lands and enforcement is difficult on its territory as the tribes protect their own people.*[269]

The interviewees confirmed the tribalism impediment on enforcement of IAA. Undoubtedly, the judge will be afraid for his life, especially, the theories stated that the tribes use an illegal ways such as kidnapping to force their opponents to carry out their interests. Moreover, the court will hesitate to take any coercive actions to enforce the arbitral award against the tribal debtor party as his/her own tribe will protect him/her. The tribes will use their power to protect their members as far as they care more about their own interest. Especially, the government has no sovereignty over all the land. The theories stated that numerous of soldiers killed in tribal areas because of entering the land without prior permission from the tribes. All in all, is it conceivable the police will catch up the court's requests to enforce IAA? Surely, none will put his life in risk, unless, General strategy of the state to strengthen the judiciary. All in all, the enforcement of IAA against the tribal debtor party will fail because the court

[269] Ibid, December 27, 2016.

interference is major importance to implement IAA if the debtor party refused to enforce it voluntarily.

4.13 The Strategies to Socialize the Tribes

It is commonly known that the tribes are an important element of the Yemeni society. The tribes contribute in many positive ways. The major contribution is that the tribes have been involved in many battles against al-Qaeda.[270] Some accounts say that the tribes do not cause underdevelopment while others say underdevelopment is caused by the tribes.[271] However, to overcome such impediments there has to be a reform of government institutions to combat corruption, separation of power, improvement in education quality, and so on. The researcher believes that the law alone will not be effective if other reforms are not performed to check other impediments. Thus, this study examined the legal and social impediments. For instance, the legislators could make sufficient laws, but the enforcement will be a problem if the majority of people are not ready to respect the rule of law and the institutions are weak to enforce such laws.

The tribes consider themselves as paramount inside the state sway which they do not permit the state to enter their domains without prior consent, so numerous officers slaughtered because of entering the tribal domains without giving a sensible avocation as well as disallowing the authorities to perform their obligations and hindering the state from extricating the characteristic sources. Tribes carry on as that an imperial state so they have their claim jail to detain their adversaries indeed without trial, this

270 Al-Dawsari, "Tribal Governance and Stability in Yemen," 7.
271 Corstange, "Tribes and the Rule of Law in Yemen," 3-4.

is because the state does not have a sway over all the land.[272] The central government is incapable of upholding its sway over all national domains.[273] Thus, the state has to spread its sovereignty over the land to reform the national security. Thus, the national security forces have to be controlled by the state.[274] The government has no sway over all land in arrange to expand its authority and guaranteeing the application of the law. Moreover, the government confronted challenges in actualizing its approaches since it is confronted with the tribal resistance in cases where such arrangements are against tribal intrigued. Hence, Pull the power out of the tribes and let them be aware that they are subject to government and the rule of law. This will help even the judiciary to carry out its operations in the tribal regions. Also, this will have positive effects on the arbitration system which the court could take coercive actions against the lost party in case refer to his/her tribe for protection.

Education in Yemen is insufficient as over 50% of the populations are illiterate.[275] The Ministry of Education stated that they do not have enough qualified teachers.[276] It is commonly known that the rural people are less educated. This means the tribes who are mostly illiterate people live in the rural areas. Thus the government should have plans to improve the education system. The researcher believes that if Yemen got a good ruler through an election cannot reform the government institutions and develop the country unless overcome the illiteracy. It has to learn from the history that the tribes assassinated the former president Ibrahim Al-Hamdi when he tried to modernize the

272 Katulis, Countries at Crossroads 2004- Yemen.
273 Lynch, "Arab Uprisings," 20.
274 Noman, "Reforming the Yemen Security Sector,"
275 Christopher Boucek, *Yemen: Avoiding a Downward Spiral*, Vol. 12. (Washington DC: Carnegie Endowment for International Peace, 2009), 10, accessed January 6, 2017, http://carnegieendowment.org/files/yemen_downward_spiral.pdf.
276 Ibid.

state governance and prevent their influence on the executive.[277] Therefore, the government must have plan for a term not less than ten years to have people who are conscious and have an understanding of dealing with modern state institutions.

From an interview of experts on the rule of law, "they advised against the recognition of tribal customary laws. They consider tribal arbitrators as ignorant of the processes and proceedings of the tribal customary laws. The tribal customary law is more likely to be set aside because of breach of justice proceedings". However, the experts criticized the role of tribal customary law, but failed to refer to the necessary reforms that have to be taken to improve the government institutions. Especially, to combat the rampant corruption in the judiciary. Sometimes, the tribes' actions benefit the society. For example, the tribal customary law is the fundamental element that has kept Yemen stable. It is a well-known fact that after the Arab Spring, all government institution and security have collapsed. Nowadays, the tribal customary court is performing the functions of the government courts such as settling disputes among the citizens and maintaining security. The situation in Yemen is better than other Arab countries that are affected by Arab Spring and this is due to the maintenance of law and order through customary laws. Therefore, the government fizzled to allude to the fundamental changes that have to be taken to improve the judiciary. Particularly, to combat the rampant corruption in the judiciary. The government has to plan and implement the strategies towards fighting corruption.

Yemen is a major consumer of small arms which the people do not use weapon for offence, hunting, defence but it is used for symbols status.[278] The small arms in the

[277] Al-Ahsab, "What Makes Yemen's Spring Different," 7.
[278] Miller, *Demand, Stockpiles, and Social Controls*, 5

possession of the citizens are estimated of 50 million which is selling without restriction and regulation.[279] Thus, the tribes have deadly weapons more than the government.[280]The tribal men have to always carry small arms along with them on street, market, wedding, and so on.[281] This is an impediment towards the reform of the government institutions. The tribes feel they are sovereign over the state so they oppose government policies if such policies do not benefit them. Also, FDI is impossible to be attracted in a state that has no sovereignty over its people. The foreign investor will highly expect impediments in unstable state. Therefore, the withdrawal of weapons from the citizens is a very important step to creating a strong state.

4.14 Arbitral and Criminal Cases to Prove the Tribalism Impediment on Enforcement of IAA and the Judiciary as a whole

Below are two cases that proof the influence of the tribes on the court:

4.14.1 Arbitral Case 1

Desert Line Projects L.L.C v. *Republic of Yemen*,[282] in this case, the claimant in Desert Line Project L.L.C (hereinafter referred as D.L.P) which is a construction company established under Omani law, while the respondent is the Republic of Yemen (Yemen). As facts, the claimant entered into numerous contracts at different times with the respondent for construction, of asphalt roads in different places in Yemen. By late 2003, the claimant had performed all works of the construction except for outstanding works under contracts 4 and 6. On 10 November, dispute arose between the parties in

[279] Ibid.
[280] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice*, 4.
[281] Miller, *Demand, Stockpiles, and Social Controls*, 44.
[282] *Desert Line Projects L.L.C* v. *Republic of Yemen* (ICSID) case No. ARB/05/17)

matter evaluation of works done. Further, the D.L.P was prevented by the military personnel from demanding payment of outstanding invoices and threatened the D.L.P'S representative (Ahmad bin Farid AL-sorimah). The conflict with the army resulted in arrest three of the claimant's personnel and some of the claimant's equipment were stolen. Also, *Sheikh* Mouthir El Chzil who is tribal member threatened D.L.P's representative by shooting him with a deadly weapon on 30 June 2006, demanding him to stop working on Al-Mahweet highway. The claimant immediately sent a letter to the president of Yemen to seek for protection and security. On 26 June 2004, the claimant represented by its chairman, and the respondent represented by the Minister of Public Works-Highways. They agreed to settle their dispute amicably and entered into an arbitration agreement that its award is deemed as enforceable and final, the arbitration proceedings were conducted by the Yemeni Arbitral Tribunal.

On 9 August 2004, the tribunal issued the award in favour of D.L.P and entitled it to amount for works done YR18, 447,857,500 plus additional costs at an amount of YR 1, 520,620929. However, on 22 September 2004, the Republic of Yemen applied to Yemen Courts to set aside the arbitration award. On 22 December 2004, the claimant filed a counterclaim action in Yemen Court, seeking a rejection of the respondent's request to set aside the award, and claimed its enforcement. After disappointed hopes of the judiciary regarding the enforcement of the arbitration award. The Yemen Court of Appeal neither enforce the arbitral award not set it aside.

It is clear from the case that the tribal influence on the FDI as well as the military power that most of the military members are tribal members too. It could be concluded there is no enforcement of the IAA, nor has judicial supervision taken any action

against the debtor party (the respondent) to enforce the IAA. It was noticeable from the facts, the respondent's argument is not based on article 53 of YAA that give a right to refuse the award if the resisting party proves any of the grounds provides by the article. According to arbitration agreement signed by the disputing parties, the arbitral award is binding and no party has to appeal. Thus, what is the reason behind non-enforcement granted by the competent court? Especially, the court has no jurisdiction to ignore the enforcement of the arbitral award without justification as stated in article 53 of the Act.

We can see the gap that YAA left extremely discretion to the competent court in the matter of the enforcement period of the arbitral award. The enforcement of the arbitral award is the main purpose of the arbitration. The fast procedures and processes are fundamental features in arbitration system. Then, leaving the enforcement without a limited period adversely affects such feature. Especially, if the lost party resist the enforcement nor has reasonable grounds to do so. As a result, the Yemen court procrastinated the enforcement. Especially, it could not determine any ground to set aside the arbitral award based on section 53 or 55 of YAA. This means that YAA has to be modernised by strong relevant provisions of the enforcement of IAA. It has to relate this case to the interview with Respondent 4, he stated his own experience in enforcing the arbitral awards by exercise effective monitoring as mentioned two arbitral cases which one creditor party forcibly referred to reconciliation after procrastination of the place of enforcement of the arbitral award while the second creditor party enforced it after long time of fighting for his rights of enforcement. The arbitral awards will be vain and the disputed parties are more likely to delay the procedures by procrastinations as well as procrastination in the enforcement of the arbitral award which will lead to losses on the creditor party and may lose other transaction because

of the lack of financial liquidity. Hence, YAA shall stipulate the period of time for the executive judge to grant the enforcement of the arbitral award. Therefore, the researcher analyses that the judicial institution is weak and the competent court has no power to enforce the award rendered by Arbitral Tribunal, especially, the court supervision has to enforce it against the resisting enforcement who are the army and the tribe and politicians. Thus, the competent court is incapable to take any coercive actions against the tribal party, the military party or the official party in order to enforce the IAA.

4.14.2 Criminal Case 2: (about non-implementation of the law on the tribe)[283]

It is necessary to have a case to support the claim that the tribe is above the law and the law can only be enforced against weak people but not against the tribes' leaders and their members. The facts of the case are that the defendant is a tribal leader (Ali Abdo Rabo Al-Awadhi) and the plaintiffs are the parents of two dead persons at the age of nineteen. In this case, during ceremony marriage for Al-Awadhi family on 14/05/2013 that held in Sana'a, the guardians of *Sheikh* Ali Al-Awadhi intercepted the two dead persons' car and shoot them without apparent reason. The parents started to file an action in the court but the police did not take any investigated action of the incident. Till this moment, the case has not been tried. In this case the public prosecutor who is part of the court in criminal cases is supposed to instruct the police to investigate the incident and file the case alongside the dead boys' parents. Undoubtedly, the tribal influence existed and prevented the police and the public prosecutor to investigate. This means that the whole system in Yemen is adversely influenced by the tribes,

[283] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice*, 34.
"Case of Killing Two Persons from Aden," Aden Alghad, May 17, 2013. Accessed December 27, 2015. http://adengd.net/news/50459/#.VoDH1_lYrIU.

particularly the judiciary. The same position of tribal impediments to carry out the judicial operations will occur, especially, the most important stage in arbitration system, that is, the enforcement of IAA. The enforcement will fail as the tribal debtor party will refer to his/her own tribe to protect him/her from the court legal actions. Particularly, if the tribal debtor party's assets in tribal areas, the court will face difficulties to enforce the award as the tribal areas out of the state sovereignty. Surely, the tribal members will come as one person to protect their own member of the court orders. Therefore, the arbitration system will not succeed in a country that does not have full sovereignty over its land as well as the independence of the judiciary.

The above mentioned two cases clarify that the Yemeni judiciary is not independent as far as the tribal influence is concerned. So the enforcement of international arbitral award is more likely to fail in cases where the debtor party is tribal.

4.15 Conclusion

Throughout the above discussion, information from interview respondents and the legal cases answered the research question two and achieved research objective three and confirmed the adverse impact of tribalism on the competency of the court of appeal towards the enforcement of international arbitral awards in Yemen. The tribes handle some disputes among the members of the community. Tribes have positive contributions to the community through TADRM. People resort to tribal *Sheikh*s to resolve their disputes because of the weakness of the judiciary, rampant corruption, and the interventions of the executive branch and the army in the judiciary. The arbitration system and the court system are interrelated. The government should reform the judiciary. Enforcement is the most important stage in arbitration system, commonly known that not all arbitral awards is voluntarily enforced. The court role is

necessary in case the lost party refused to implement the arbitral award. The court plays important role regarding the control and assistance. So, the arbitration system will not succeed without independent judiciary. The theories, cases, and interviewees have shown that the Yemeni judiciary lacks independence. The tribal leaders interfere in the judicial operations. As the tribes are powerful. They have influence over the main sources of income of the country. They have influence on the state policies and economy. YAA itself empowers them by recognizing the customary law. The tribal award is recognized as primary court decision. Moreover, the tribes breach the law and do illegal operations to force the government. Sometimes, the government fail to listen to their requirements. As a reaction, the tribes do kidnapping of foreigners, disruption of public interests, and the like. This is because the government has no sovereignty over all the land. Confirming such factors answered the research question that the tribes will impede the enforcement of IAA. The tribes will interfere to protect their own members from the court's orders. The court's order will not be implemented in some areas as that areas are under the control of the tribes. Also, the tribal leaders will influence the judges or the creditor party by threat to kidnap or harm him/her. It means that the arbitration system will not succeed in Yemen unless the government not only control the whole territory but must subjugate the tribes to the law. The constitutional principle of all citizens are equal before the law and should not only be practiced but must be enforced.

This reflects negatively on the role of the arbitration system in Yemen which cannot succeed as far as the judiciary is not independent. The government should provide an appropriate environment for the judiciary to perform its operations without tribal interference. YAA has to be amended by repealing section 45 which provided that the recognition of the customary law. This section authorizes layman to be appointed as

arbitrator. This not only adversely affect the judicial operations because of setting aside the tribal awards that led to pile up of cases in the courts. However, such amendment of YAA has to follow up after the reforming of the judiciary. The current judiciary is incompetent to replace the customary law functions. As the customary law plays important role in settling issues among citizens at a rate of 80%. Most of the disputes in the country is settled by the customary law and not the court. If the government is really serious to improve the image of the country and attract FDI, as well as the success of the arbitration system, it must develop a strategic plan to refine the role of the tribes by reducing the excessive power of the tribes such as withdrawal of all types of weapons from citizens, control all state lands, not to allow the tribes to intervene in politics in order the dominate the state and its power remains the only one. Also, the real application of the constitutional principle that all the citizen are equal before the law is one of the most important pillars to stabilize the country and enforce IAA. In addition, educational strategy should be considered. It is the most important strategy that can socialize the tribes, it can refine their behavior without force. But, it has to go through a period of not less than ten years.

As far as the lack of the independence of the judiciary, non-state capacity to control the whole state land, the strengthens and power of the tribes, and the traditional responsibility that imposes on the tribesmen to protect each other as a one group so that the enforcement of IAA will be impeded in Yemen. The two cases mentioned before confirmed the weaknesses of the judiciary and inability to take any coercive enforcement against tribal parties to disputes. So, the enforcement of IAA will face difficulties in Yemen because of the adverse tribal influence on the judiciary. These two cases confirmed that the arbitration system will not succeed in Yemen. The independence of the judiciary is very important as it supports control and assistance to

implement the arbitral procedures and processes. The tribal influence is an impediment towards the enforcement of IAA. The creditor party will face difficulties to enforce the arbitral award, especially when the debtor party is tribal member. He/she will refer to his own tribe to protect him/her against any court legal actions. The tribe will come as one group to protect their own members against outsiders whatever that official operations or unofficial.

CHAPTER FIVE

CORRUPTION IN YEMEN

5.1 Introduction

Yemen is a member of the United Nations Declaration against Corruption and Bribery in International Commercial Transactions.[1] The Yemeni national system criminalizes bribery given by nationals to a foreign public officer.[2] The rampant corruption in state institutions is one of the main factors responsible for spreading the Arab Spring Revolution to Yemen in 2011.[3] The demonstrators took to the streets looking for justice, dignity, rights of citizenship, and equality among citizens.[4] Republic of Yemen has all the factors leading to corruption.[5] The rampant corruption in the Yemen was not able to be overcome through simple strategies.[6] Indeed, corruption has to be combated by those holding high levels of authority.[7] Unfortunately, officials are corrupt because of their personal interests.[8]

[1] The Secretary-General, *Implementation of the United Nations Declaration against Corruption and Bribery in International Commercial Transactions* (Vienna: Commission on Crime Prevention and Criminal Justice, 2002), 2, accessed October 30, https://www.unodc.org/pdf/crime/commissions/11comm/6e.pdf.
[2] Yemeni Anti-Corruption, (Act No. 39) 2006, section 30.
[3] Sami Kronenfeld and YoelGuzansky, "Yemen: A Mirror to the Future of the Arab Spring," (2014):80, accessed October 30, 2016, http://www.inss.org.il/he/wp-content/uploads/sites/2/systemfiles/SystemFiles/05_Kronenfeld_Guzansky.pdf.
[4] Ibid.
[5] Glenn E. Robinson et al, Yemen Corruption Assessment (September 25, 2006): 15. This publication was produced for review by the United States Agency for International Development, accesed July 28, 2016, https://photos.state.gov/libraries/yemen/231771/PDFs/yemen-corruption-assessment.pdf.
[6] Ibid.
[7] Ibid.
[8] Ibid.

5.2 Definition of Corruption

According to the United Nations Convention against Corruption. Corruption is an insidious plague that has a broad range of corrosive consequences on societies. It undermines democracy and the rule of law, leads to infringement of human rights, mutilates markets, disintegrates the first-class of ways of life and permits prepared wrongdoing, fear mongering and other dangers to human security to thrive.[9] The signatory-states of the convention are concerned about the seriousness of problems and threats posed by using corruption to the stability and security of societies, undermining institutions and values of democracy, moral values and justice and jeopardizing sustainable development and the rule of regulation.[10] Further, the purpose of the convention is addressed in article 1(c) that provides fighting corruption in order to promote integrity, accountability and proper management of public affairs, and public property. In domestic law, corruption is defined as the misuse of granted authority to pursue personal interests, abusing taxpayers' money for personal interests, and any adverse impact on government institutions.[11]According to Syed Hussein Alatas, corruption is like a cancer.[12] Official and government transactions become less powerful, when illegal transactions could be done through other means.[13]According to section 30 (3) of Yemeni Anti-Corruption, corruption involves abusing public powers for private interests.[14]

[9] United Nations Convention against Corruption, 2003, article III. https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (accessed May 9, 2018).
[10] Ibid, 5.
[11] DFID's Anti-Corruption Strategy for Yemen (January 2013). Department for International Development, accessed November 24, 2016, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/213908/anti-corruption-strategy-ye.pdf.
[12] Syed Hussein Alatas, *the Sociology of Corruption* (Singapore: Donald Moore Press Ltd, 1968), 4.
[13] Ibid.
[14] Yemeni Anti-Corruption, (Act No. 39) 2006, section 2.

5.3 Bribery

Undoubtedly, bribery adversely affects government activities, enforcement of the law, government officials' operations, culture, and the morals.[15] Any crime, including corruption, which adversely affects justice has a place in the Penal Code; in this case "bribery".[16] Bribery is a part of corruption. The giver induces the public officer by gift in order to consider the giver's interest.[17] In other words, a person gives money or favors to violate the rights of others or to escape from duties. Bribery is one of the forms of corruption which includes money, kickbacks, bonuses, discounts, services, and wages, anything to make the procedures faster and avoid obstacles.[18] Firms must pay bribes in order to have fewer taxes, get licenses, avoid the law, and prevent competitors' operations.[19] Thus, the firms need to pay bribes to the public officer to continually operate the business.[20] The government's orders as well as the law are unenforceable because of rampant corruption in the government institutions.[21] Bribery is considered the main factor that leads to corrupt administrations, when the government employee often immediately asks for a bribe to proceed with an applicant's request.[22] Some businessmen use bribery to move applications faster or impede his competitor's processes.[23] Bribery must be paid to facilitate projects.[24]

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[15] PeterLarmourand Nick Wolanin. *Corruption and anti-corruption* (Australia: Australia National University Press, 2013), 135, accessed November 26, 2016, http://www.oapen.org/search?identifier=459931.
[16] Yemeni Anti-Corruption, (Act No. 39) 2006, section 30 (3).
[17] Alatas, *the Sociology of Corruption*, 11.
[18] Inge Amundsen, "*Political corruption: An introduction to the issues,"* Chr. Michelsen Institute (1999), 11, accessed December 25, 2016, https://brage.bibsys.no/xmlui/bitstream/handle/11250/2435773/WP1999.7%20Inge-.
[19] Xun Wu, "Corporate governance and corruption: A cross-country analysis," *Governance* 18.2 (2005): 153.
[20] Jay Van Wyk et al., "Risk management and the business environment in South Africa," *Long Range Planning* 37.3 (2004): 271.
[21] Brian Katulis, Countries at Crossroads 2004- Yemen (2004), accessed August18, 2016, http://www.refworld.org/docid/473868f963.html.
[22] Robinson, "Yemen Corruption Assessment," 9.
[23] Ibid.
[24] DOC (Department of Commerce). *Doing Business in Yemen- A Country Commercial Guide for U.S. Companies*. USA: the U.S. (2008), 45, Department of Commerce's Trade Information Center, accessed

Specifically, the judicial sector is the biggest institution involved in corruption. Judges issue judgements in favour of the party who pays higher bribes. Bribery may be more powerful than evidence.[25] The offending party could be released from prison to escape justice by paying a bribe.[26] According to a study on bribery that was conducted by a Yemen Polling Center, 64% of the respondents agreed that the judiciary is the most corrupt institution.[27]

The Court of Appeal judges provided information relating to the conducting trials of corruption cases.

> Respondent 1 said that "*Anti-corruption laws are legislated to protect the corrupt persons because we have never heard any minister or senior officer having been held accountable or convicted".* Respondent 2 said that "*There are issues related to judicial corruption,"* while Respondent 3 said *"There is no corruption in my department, but when I was a member in the Judicial Inspection Board (JIB) I have dealt with breach of duty issues by judges".*

As a result of the interview, the above majority judge interviewees confirmed the above theory. This means that the debtor party in the arbitration system is more likely to pay a bribe to the court to impede the creditor party's application that seeks the enforcement of the arbitral award as far as corruption is widespread in Yemeni government institutions. The individuals prefer to settle their disputes by the arbitration mechanism than the court system since the court may be debased as bribery will influence the result of the judgment. Be that as it may, the parties still cannot run away from the court particularly, on the off chance that the debtor party refused to

December 31, 2016, https://www.scribd.com/document/73605245/Doing-Business-in-Yemen-A-Country-Commercial-Guide-for-U-S-Companie.

[25] Robinson, "Yemen Corruption Assessment," 12

[26] Travis Morris and Rebecca Tramme, "Formal and Informal Justice and Punishment: Urban Law and Rural Mediation Rituals in Yemen," *Race and Justice* 1.2 (2011): 146, accessed February 1, 2016, http://sci-hub.cc/10.1177/2153368710386554.

[27] Robinson, "Yemen Corruption Assessment," 12.

enforce the arbitral award voluntarily. The arbitral award will not be compelling without the court interference. Especially, the enforcement of the arbitral award is the most important stage in arbitration. Hence, in the event that the place of enforcement of the arbitral award is in a corrupt country such as Yemen the enforcement will be impeded. Bribery will hinder the implementation and the creditor party is expected to lose his rights. The debtor party is more likely to pay bribe to impede the enforcement of IAA. According to Gary, corruption in a few countries makes the commercial arbitration unsatisfactory.[28] Hence, the corruption impediment will lead to non-enforcement of IAA.

Academicians of Yemeni universities provided information in the matter of the difficulties in enforcing international arbitral awards. Respondent 4 said that:

> *There are difficulties such as the lack of implementation of the arbitral award by the parties, I was a representative of one of the parties of the arbitration, and the debtor party rejected enforcement of the arbitral award. Although the Court of Appeals held that the award is binding, no coercive action was taken. This forces us to enter into a reconciliation to reduce the amount held in the arbitral award. This indicates that the enforcement of IAA will face difficulties.*

Respondent 5 said that:

> *Yes, especially the difficulties like political interventions, for me intervention of the Minister of Justice based on a complaint from the Minister of Finance, and because of my judgement to implement the arbitral award. I ordered the state to implement the arbitral award in the amount of $7 million. This arbitral award has been rendered by the legal Affairs, then the Ministry of Trade and Fund recourse against the arbitral award applied by the trader. As a result of my confirmation of the validity of the award, so the Minister of Finance*

[28] Gary B. Born, International Arbitration: Law and Practice (The Netherlands: Kluwer Law International, 2012), 16-17.

complained to the Minister of Justice against me. Then, the Minister of Justice insulted me by improper words.

Therefore, the enforcement of international arbitral award will face difficulties in case the debtor party did not implement the award voluntarily. The creditor party must not rely on the court to take coercive actions to force the debtor to implement it. The researcher advises the creditor party to request interim measures of protection to ensure the enforcement of the award. This is because bribery and other interventions will adversely affect the enforcement of IAA. The interviewees confirmed that bribery could adversely affect the enforcement of IAA in Yemen because it is widespread in Yemeni government institutions. So, the arbitration system in Yemen will not succeed as long as bribery is widespread in the judiciary. The judiciary has to be serious in fighting corruption, so the anti-corruption agencies have to be effective to fight corruption in all government institutes. Respondent 4 stated his own experience as an arbitrator of the creditor party. The creditor party rights have been lost because the court failed to take coercive actions to enforce the arbitral award. This means that the debtor party used the behind door such as pay bribery to escape from the implementation of the arbitral award. While, respondent 5 stated his own experience as a judge. He was insulted because of enforcement of the arbitral award that was already rendered by the arbitral tribunal. It means that the judiciary is not independent from the executive branch. Thus, the creditor party is more likely to lose his right if the debtor party has good relationship with political persons. They are more likely to interfere to have adversely effect on integrity and independence of the judge or at least to disturb the judge's good performance.

According to Javorcik, when government corruption is low, FDI in the nation or national companies becomes more attractive. Widespread corruption is more likely

reduce the FDI.[29] Bribery is adversely related to FDI because business operations become more expensive.[30]Also, the corruption rate is the true standard that affects the investors' decision in order to invest in the host country.[31] Corruption is one of the main impediments that face the growth of FDI and should be reformed.[32] Failure to attract investment because of corruption is there.[33] Foreign investors avoid investment in the host countries that have corruption because corruption leads to insecurity, increased costs of business, and ineffective operations.[34] If the owner of the project needs to obtain an import license or otherwise, he/she shall only pay for the service, in order to facilitate the transaction, otherwise his/her project will remain stalled and will not be able to work correctly. Thus, the projects in corrupt countries are less successful. As illegal payments such as bribery gratification can greatly increase the cost of the projects so FDI reduces. Thus, reformers want to combat bribery, overcome corruption, and attract FDI to the country which will yield income to the government treasury.[35] Bribery adversely affect the enforcement of the law and it is an obstacle to FDI.[36] Judgements are not executed on time because of the malpractices that bribery

[29] Javorcik, Beata S., and Shang-Jin Wei, "Corruption and cross-border investment in emerging markets: Firm-level evidence," *Journal of International Money and Finance* 28.4 (2009): 1.
[30] Paulo Júlio, Ricardo Pinheiro–Alves, and José Tavares, "Foreign direct investment and institutional reform: evidence and an application to Portugal," *Portuguese Economic Journal* 12.3 (2013): 3.
[31] Aparna Mathur and Kartikeya Singh, "Foreign direct investment, corruption and democracy," *Applied Economics* 45.8 (2013): 991-1002.
[32] Ahmad Hamoud AL-Shebami, Mahmoud Khalid Almsafr, Mohd Nor Shaari, "A bounds testing approach to co-integration: Determinants of foreign direct investments inflows to Yemen." *Journal of Advanced Social Research* 3.7 (2013): 189.
[33] Arfan Shahzad, and Abdullah Kaid Al-Swidi, "Effect of Macroeconomic Variables on the FDI inflows: The Moderating Role of Political Stability: An Evidence from Pakistan," *Asian Social Science* 9.9 (2013): 274.
[34] Quazi, Rahim, Vijay Vemuri, and Mostafa Soliman, "Impact of Corruption on Foreign Direct Investment in Africa," *International Business Research* 7.4 (2014): 2, accessed November 24, 2016, https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=Quazi%2C+Rahim%2C+Vijay+Vemuri%2C+and+Mostafa+Soliman%2C+%22Impact+of+Corruption+on+Foreign+Direct+Investment+in+Africa%2C%22+International+Business+Research+7.4+%282014%29%3A+&btnG=.
[35] Glenn E. Robinson et al, "Yemen Corruption Assessment," (September 25, 2006): 22-24. This publication was produced for review by the United States Agency for International Development, accessed November 24, 2016, https://photos.state.gov/libraries/yemen/231771/PDFs/yemen-corruption-assessment.pdf.
[36] DOC (Department of Commerce). *Doing Business in Yemen*, 32.

create.[37] FDI is low because of the spread of bribery that the foreign investors have to pay to facilitate business procedures and operations as well.[38] Bribery even penetrates the court system.[39] According to the 2015 Transparency International statistic, Yemen is placed among the first eighteen most corrupt countries in the world.[40] Thus, in nation such Yemen, the proprietor of the tasks will be compelled to pay off. Similarly, the creditor party will fail to implement the arbitral award as corruption is widespread in the judiciary. The arbitration system will not succeed unless, the creditor party paid bribe to the court. The court control and assistance is important in arbitration system. Especially, when the debtor party resists the enforcement of the arbitral award, so that without minimum intervention the arbitration system will not succeed.[41] Therefore, the judiciary has to be reformed to improve the arbitration system in Yemen.

Corruption is like cancer, it only gets worse and spreads unless drastic action is taken.[42] Any activity can be conducted through legal procedures or illegal procedures as long as a back door can be used to obtain illegal transactions.[43] Corruption weakens service so the investors have to pay a bribe in order to get satisfactory service.[44] As a result, bribery in Yemen is widespread because the laws that relates to combating corruption are not sufficiently enforced; the government officials break the law and practice

[37] Ibid.
[38] Júlio, "Foreign direct investment and institutional reform," 3.
[39] Amer Abdulhafez and Khalid Al-Udeini, "Bribery in Yemen," Sana'a: Yemen Polling Center," 5, accessed October 1, 2016, http://www.yemenpolling.org/advocacy/upfiles/YPCPublications_Bribery-In-Yemen---August-2006.pdf.
[40] Transparency International," Google Corruption Perception Index (CPI)," last modified 2015, accessed December 5, 2015, http://www.transparency.org/cpi2015.
[41] United Nations Conference on Trade and Development, "Dispute Settlement: International Commercial Arbitration," (New York and Geneva, 2005), 3, accessed April 25, 2016, http://unctad.org/en/docs/edmmisc232add42_en.pdf.
[42] Alatas, *the Sociology of Corruption*, 4.
[43] Ibid.
[44] Abdo Moghram "Political Culture of Corruption and State of Corruption in Yemen," *Sana'a: Sana'a* University (2004): 11, accessed October 2, 2016, https://www.scribd.com/document/73242010/Political-Culture-Corruption-Yemen-2004.

corruption.[45] Thus, corruption is an impediment to enhancing governance in Yemen.[46] It is important to refer to the study carried out by Abdulhafez Al-Udeini (2006)[47] which has shown that over 78% of the respondents agree that the bribery in government institutions is common. Moreover, 94% confirm that bribery is widespread in some government institutions, while only 0.3% of respondents agree that the government institutions are rarely affected by the bribery. The respondents could not ignore the truth because the adverse effect of corruption is clear. According to Syed Hussein Alatas, no officials can deny the prevalence of widespread corruption because its effect is painfully clear.[48]

5.3.1 Forms of Bribery[49]

It is important to state the most common form of bribery is gift giving; it adversely affects the receiver's fair practices.[50] According to Ibn Khaldun, the basis of corruption is emotion.[51] The amount of the bribe paid depends on the advantage that would be gotten by the giver.[52] A study conducted by Kim has shown that the purpose of bribery is to take advantage of government power to avoid duties and sanctions.[53] This means the debtor party could pay a bribe to the judge of the appropriate court to impede the

[45] Ibid.
[46] Ibid.
[47] Abdulhafez, "Bribery in Yemen," 11
[48] Alatas, *the Sociology of Corruption*, 6.
[49] *MACC & FIGHTING CORRUPTION: A guide towards enhancing public awareness* (Putrajaya: 2015), 33-34.
[50] Mihaiela Ristei, *Competing formal and informal institutions in a democratizing setting: An institutional analysis of corruption in Romania* (United States: Western Michigan University, 2010), 17, Accessed January 13, 2017, http://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=1623&context=dissertations.
[51] Alatas, *the Sociology of Corruption*, 9.
[52] Seung-HyunLee et al., "Why do firms bribe?," *Management International Review* 50.6 (2010): 775-796.
[53] Byeong-Yeon Kim, "Markets, Bribery, and Regime Stability in North Korea," EAI Asia Security Initiative Working Paper No.4, (2010): 23, accessed January 13, 2017, http://121.78.112.190/data/bbs/eng_report/2010040811122565.pdf.

enforcing of IAA. Bribery is widespread in the Yemeni government institutions so it is more likely to adversely affect the enforcement of IAA.

Yemeni law explicitly prohibits bribery. It criminalizes giving or receiving any forms of money or gifts in exchange for treatment that is in different from others. This could be seen in section 151 that provides that the public officer who receives, asks for, or promises bribery in order to do something or abstain from doing something which breaches his or her duties is punished with not more than ten years imprisonment; if that bribery does not breach his/her duties, the punishment is not more than three years.[54] Even though the public officer received or asked for a bribe after the work is done and breached his/her duties, this is still considered as a bribe which is punished with not more than seven years.[55] Also, the giver who proposed to give the public officer any money, gifts or the like in order to do something or to abstain something which breached his/her duties, is punished for a term not more than three years, and if that gift is given by the giver in order to get his/her rights, he is still punished with a term not more than one year.[56] In addition, the mediator who helped the receiver or the giver to commit the bribery offence and has a knowledge of its purpose is punished with the same punishment for both the receiver and the giver.[57]

5.3.2 Gift is Considered as Corruption

A gift is considered as corruption if the recipient has a formal agreement, the given gift will affect the decision-maker, or the value of the gift is proportionate with the

[54] Yemeni Crimes and Penalties (Act No. 12) 1994, section 151.
[55] Ibid, section 153.
[56] Ibid, section 154.
[57] Ibid, section 155.

purpose or goal.[58] In addition, according to Syed Hussein Alatas, there are five approaches lead to corrupt officials such as giving money, providing a lavish lifestyle, food and drink, gifts, Entertainment, Concerts, and Birthday Parties.[59] in bribery offence, the prosecutor have to prove prima facie.[60] There should be strong evidence against the accused to be called to answer it.[61] If the prima facie is made by the prosecutor, the, the accused must rebut it.[62] On the other hand, if the prosecutor failed to satisfy the court by sufficient answer, then there is no prima facie and the accused has to be released.[63] However, if there is prima facie, then the burden of proof shall be shifted to the accused to rebut it, if the accused failed to rebut it.[64] The court will be adduced by the evidence that the facts of the bribery are existed.[65]

At the time of acceptance of the bribery by the accused (decision-maker).[66] It should be proven the gift was given and accepted as inducement or reward.[67] Then, the decision-maker has to explain the facts in rebuttable that charge are true.[68] Thus, the prosecutor shall prove the facts without reasonable facts. Otherwise, the accused will be entitled to an acquittal. The provided evidences by the prosecutor are subject to high standard of evaluation.

[58] *MACC & Fighting Corruption,* 119.
[59] Alatas, *the Sociology of Corruption,* 51.
[60] Hamid Ibrahim & Nasser Ibrahim, *Bribery & Corruption* (Malaysia, Gavel publications, 2011), 96-97.
[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Ibid, 97.
[67] Ibid.
[68] Ibid.

5.4 Corruption and the Economy

Yemen is considered as the poorest country in the Arab world, chiefly because of corruption and increasing population with few available jobs.[69] According to UNDP Human Development Index states that Yemen is ranked number 133 out of 169 countries in the world, which means 50% of the population lives under the red line of poverty.[70] Most of Yemeni people live in rural areas and rely on agriculture as a main source for their income. The U.S. Agency for International Development in its 2006 Report about Yemen Corruption Assessment has shown that even with the efforts towards anti-corruption by the government, 30% of the government revenue was never deposited in government accounts.[71]

The state depends on oil revenue at rate of 75%.[72] However, oil is expected to dry up so Yemen has to find FDI to support the national economy. FDI could be achieved through combating the widespread corruption in the government institutions as well as improving the regulations and reforming the government institutions.[73] The government made an effort towards the improvement of local and foreign investment such as a policy of standardized treatment and treating all investors equally.[74] Moreover, establishing the General Investment Authority in 1992 created cooperation with the World Bank's Foreign Investment Advisory Service in order to update

[69] Christopher Boucek, *Yemen: Avoiding a Downward Spiral*, Vol. 12. (Washington DC: Carnegie Endowment for International Peace, 2009), 4, accessed January 14, 2017, http://carnegieendowment.org/files/yemen_downward_spiral.pdf.
[70] David B. Carment, "The New Terrorism: Understanding Yemen." *Canadian Defence& Foreign Affairs Institute, CDFAI* (March, 2011): 2, accessed January 15, 2017, https://d3n8a8pro7vhmx.cloudfront.net/cdfai/pages/42/attachments/original/1413673977/The_New_Terrorism_Understanding_Yemen.pdf?1413673977.
[71] Boucek, *Yemen: Avoiding a Downward Spiral*, 9.
[72] Ibid, 4.
[73] DOC (Department of Commerce). *Doing Business in Yemen,* 11.
[74] Country Watch, "Yemen, Review 2016," accessed September 28, 2016, http://www.countrywatch.com/Content/pdfs/reviews/B484LL8Q.01c.pdf.

weaknesses in Yemeni laws that are related to investment.[75] On the other hand, other parts of the law such as the enforcement of the labour law, regulation and tax laws, and investment law are not able to cope with international investment standard, so they have to be updated.[76] In addition, the weak judicial institution, corruption, bribery, and low transparency have adverse effects on investment climate.[77] Development depends on accountability, transparency, and integrity. Corruption grows in the absence of these elements.[78] As a result, corruption leads to the weakness of government's institutions as well as serves as an impediment to the development of FDI.[79] Yemen needs an appropriate environment for FDI along with less corruption, effective laws to protect rights of individuals and businesses, and transparency.[80]

Corruption is considered as the main cause of poverty in Yemen as well as the currently depressed national economy.[81]According to the US Embassy Report 2006 that was written in Sana'a, the tribes and army are composed of two elite groups out of five who take advantage of rampant corruption in the country, and the lion's share goes to the tribal leaders. It is not surprising that they hold the state's main military and security positions.[82]

[75] Ibid.
[76] Ibid.
[77] DOC (Department of Commerce). *Doing Business in Yemen,* 10.
[78] Asian Institute of Management, Reports on the Anticorruption Reform: Corruption and Development, How anti-Corruption Can Be Integrated into Development Measures to Ensure Sustainable Development and Inclusive Growth (Makati: Asian Institute of Management, 2013), 4.
[79] Ibid, 4-6.
[80] Júlio, "Foreign direct investment and institutional reform," 2.
[81] Gary Rodrick Casper, "Poverty: Inhibitor of Yemeni Revolution," (2014): 9, accessed February 2, 2017, http://digitalcommons.northgeorgia.edu/cgi/viewcontent.cgi?article=1245&context=ngresearchconf.
[82] Amb. Marwan Noman and David S. Sorenson, "Reforming the Yemen Security Sector," (June 2013). Working Paper by Center on Democracy, Development, and the Rule of Law Freeman Spogli Institute for International Studies, accessed February 3, 2017, https://cddrl.fsi.stanford.edu/sites/default/files/No_137_Yemen.pdf

The researcher conducted a survey with respondents of COCA to understand the military power and its capacity to interfere in the government affairs.

> The respondent 11 Said "*Yes, I have dealt with one corruption case, army officers have pressured us to withdraw a case, but we refused,"* respondent 12 Stated *"military officers do not interfere in our branch, perhaps in some other provinces,"* while respondent 13 stated *"Yes, we receive recommendations, and this depends on the head of COCA and his impartiality to accept or reject such recommendations. If he is honorable judge will reject any kind of interference that may affect his impartiality and fair-mindedness, but if he is looking for upgrading, without prejudice, he will accept such recommendation and interference".*

Furthermore, according to respondents of PFP that the researcher met to investigate the interference in PFP affairs from the military.

> Respondent 8 Stated that:
>
> *If a member of the military committed any offence, none can trace him if his military unit protects him. The military supposes to follow up our instructions without procrastination.*
>
> Respondent 9 Said that:
>
> *Yes, there is interference from the military such as receiving formal letters and calls to intervene in our operations. But, we do not accept. Similarly, such interferences do not affect our operations.*
>
> While Respondent 10 Stated
>
> *Yes, there is interference from the military, if someone says there is no intervention, he or she has no credibility. But the acceptance or rejection of the intervention depends on the integrity of the judge.*

Thus, the vast majority of the respondents of both COCA and PFPs confirmed the military interference, has ability to put pressure on COCA and PFP which adversely affect their operations. This means that the government institutes in Yemen suffer from

multiple outside interferers that adversely affect their performance and operations. As long as such interferers like military interferes in government institutions, they are more likely to interfere in the court to stop any coercive actions against the military member. Thus, the IAA is expected to face difficulties if the debtor is military. As The armed force is considered as a vital supporter of the economy. For event, there was commerce chamber named Yemeni Economic Corporation (YECO).[83] This implies that the military individuals do commerce which in the event that there is a commercial dispute between the military party and non-native investor or even local, the enforcement of IAA may not be effected since the military party is more likely to resort to his own tribe to secure him/her from the competent court's coercive actions as the most of the military individuals come from tribes.[84] Corruption comes from the support of the patronage and alliance, particularly those who have control that is more likely to abuse it in their support.[85]

Yemen needs more financial aid to support its depressed economy.[86] However, the donors do not trust the corrupt government to receive assistance and employ it for the public interest.[87] This leads to less aid from Western countries and Gulf Cooperation Countries (GCC).[88] Also, FDI has been stunted as the investors are not confident to invest in an environment that lacks transparency and sufficient institutions.[89]

[83] Burke, "*One Blood and One Destiny*," 4.
[84] International Crisis Group, "Yemen's Military-Security Reform: Seeds of New Conflict?," 4, accessed December 30, 2016, https://www.files.ethz.ch/isn/163124/139-yemens-military-security-reform-seeds-of-new-conflict.pdf.
85 Asian Institute of Management, Reports on the Anticorruption Reform: Corruption and Development, How anti-Corruption Can Be Integrated into Development Measures to Ensure Sustainable Development and Inclusive Growth (Makati: Asian Institute of Management, 2013), 10.
[86] Boucek, *Yemen: Avoiding a Downward Spiral*, 22.
[87] Ibid.
[88] Ibid.
[89] Robinson, "Yemen Corruption Assessment," 6.

According to Transparency International's Corruption Perception Index, Yemen is one of the least transparent countries, which ranks number 161 out of 175.[90]

Through an interview with respondents of COCA in the matter of the importance of independence, good integrity, and transparency in the Central Organization for Control and Auditing (COCA). Respondent 11stated:

[With] Politicians, there is no transparency. There is exploitation because Yemeni Central Organization for Control and Auditing (Act No. 39) 1992 prevents communication with civil society organizations and the media.

Respondent 12 said that:

> *Independence, integrity and transparency exercised 90% in our administrative actions. But unfortunately, we lack media, so citizens are unaware of the role of COCA because the law prevents us to declare any information to the society without the approval of the head of COCA.*

Respondent 12 added:

> *We have found serious corruption issues that affect the public funds but when we referred the case to the Prosecutor's Office we were surprised he dismissed our case under the reason of no evidence. Despite our awareness of its clarity, prosecutors rarely justify the reason behind the dismissal of the case.*

While Respondent 13 stated that:

> *Transparency is restricted. The laws prevent us to communicate with the media, as the media follows political parties, so they use the information for libel and political purposes.*[91]

[90] Unit, Economist Intelligence, "Yemen Country Profile 2015," accessed February 5, 2017, http://reliefweb.int/sites/reliefweb.int/files/resources/acaps_country_profile_yemen_24july2015.pdf.
[91] Interview with the Central Organization for Control and Auditing, December 13-23-28, 2016.

Furthermore, according to respondents of PFP that the researcher met to examine the importance of independence, good integrity, and transparency important value in the Public Funds Prosecution (PFP).

> Respondent 8 Stated *"Yes, practicing transparency is valuable because without it may lead to incorrect procedures or breach of duty,"* Respondent 9 Stated *"We practice independence, good integrity, and transparency in PFP,"* while Respondent 10 stated *"Our department practices independence, good integrity, and transparency in our operations".*[92]

In addition, According to respondents of the academicians that the researcher conducted to survey information on the independence, good integrity, and transparency practiced in the judiciary and anti-corruption agencies.

> Respondent 4 said *"The practice is rare and whoever practices it faces difficulties such as transferring from office or creating problems for him or her"*, while respondent 5 Stated *"Such things are not practiced".*

The interview from COCA shows the majority of the respondents confirmed the independence, good integrity, and transparency are restricted, especially Yemeni Central Organization for Control and Auditing (Act No. 39) 1992 which prevents the COCA department to communicate with the society in order to be aware of their operations. On the other hand, majority of respondents through interview from PFP confirmed the practice of independence, good integrity, and transparency. This estimates that independence, good integrity, and transparency are practiced in Yemen at rate of only 50%. However, the interview with the academicians is inconsistent with the view of PFP that independence, good integrity, and transparency are not practiced in Yemen. At best, this estimates that independence, good integrity, and transparency

[92] Interview with Public Funds Prosecutions, December 6-23-27, 2016.

are practiced in Yemen not at rate of 50%, at 25%. This rate confirms what has been supported in the theory which considered Yemen as one of the lowest country in terms of independence, good integrity, and transparency in the government institutions, as well as accurate statistics is totally lacking. Independence, good integrity, and transparency are very important to be practiced in government institutes to have good performance. Therefore, lacking such importance elements will adversely affect the impartiality and independence of the judiciary and all other institutions. Lack of independence, integrity, and transparency will lead to unfair and unequal treatment among citizens.

It is necessary to relate the institutional legal framework in charge of corruption to the enforcement of IAA in Yemen because the rampant corruption in COCA and PFP will not only have negative effects on such institutions. It adversely affect all the government institutions, including the judiciary. The researcher can support this argument by referring to Asian Institute of Management that has shown through studies that corruption leads to the weakness of government's institutions as well as serves as an impediment to the development of FDI.[93] Thus, the enforcement of IAA in Yemen will fail because the court interference to enforce IAA against the debtor party is a major problem. Hence, the corruption impediment will lead to failure to enforce IAA in Yemen. This argument is based on Gary's theory, that is, corruption in some countries makes the arbitration of the international commercial issues unacceptable in the national courts of those corrupt countries.[94]

[93] Asian Institute of Management, Reports on the Anticorruption Reform: Corruption and Development, How anti-Corruption Can Be Integrated into Development Measures to Ensure Sustainable Development and Inclusive Growth (Makati: Asian Institute of Management, 2013), 4-6.
[94] Gary B. Born, *International Arbitration: Law and Practice* (The Netherlands: Kluwer Law International, 2012), 16-17.

5.5 Anti-Corruption Laws and Agencies

The Anti-Corruption Laws play an important function in combating corruption in government institutions because it is abundantly clear that the spread of corruption negatively affects the implementation of rules of law.[95] Currently, Yemen has enacted some Anti-Corruption Laws to reduce or overcome rampant corruption such as Law No. (17) Of 2013, which amends some articles of Law No. (1) For the Year 2010 Concerning Combating Money Laundering and Financing of Terrorism, and Law No. 39 of 2006 on Anti-Corruption. Furthermore, it establishes organization for the purpose such as Central Organization for Control and Auditing, Public Funds Prosecution, and National Authority for Combating Corruption. However, these laws and organizations are not sufficiently effective as there is no enforcement, which will be discussed further in more detail.[96] Moreover, the heads of the legal system are weak.[97] The Parliament which has no ability to challenge the Executive body on the matters like corruption or the breach of the law because the legislature is influenced by the Executive Branch.[98] Without separation of powers, it is hard to gain independence to make sufficient decisions based on sound decision making.

The poor accountability of corrupt officials is confirmed through an interview of Respondent 1 stated that:

> *Anti-Corruption Laws are legislated to protect the corrupt officials because we have never heard of any minister or senior official been held accountable or convicted. Because of granted immunity, there are a lot of corrupt officials transferred to the Consultative Council instead of being prosecuted.*

[95] Ibid, 6.
[96] Boucek, *Yemen: Avoiding a Downward Spiral*, 9.
[97] Life, Political Party, "Building Democracy in Yemen," (2005), 21, accessed February, 5, 2017, http://www.idea.int/publications/dem_yemen/upload/Yemen_country_report_English.pdf.
[98] Ibid.

The strict laws will help to prevent committing crimes such as interfering in the judicial operations. This will contribute to reform the judiciary. The independence of the judiciary will lead to positive effects on the enforcement of IAA. In this position the creditor party will enforce IAA without outside interferences or impediments. Especially, if creditor party made an application of the enforcement at the court with attach the requirements under section 60 of YAA as well as the debtor party has no defence based on the grounds provided in sections 53 and 55 of YAA. However, the Yemeni constitution provides the independence of the judiciary and the Penal Code punishes of that. The most function is that the laws must not only be written but, shall be practiced. On the other hand, the laws have to be amended in order to reform all government institutions. It has to repeal all sections that exempt politicians from investigation or provide them immunity. Such as section 7 excluded the jurisdiction of COCA to take any action against the breaches committed by ministers, deputy ministers, and governors; they can only make a report about it to the President of the Republic and the Prime Minister.[99] Such section encourages politicians to get involved in misuse of power and utilization of public funds as their own private property. This theory is confirmed by the scholar Syed Hussein Alatas that there are specific factors that cause corruption such as absence of accountability and absence of the Anti-Corruption Agencies .[100]

There are accusations related to corruption, but without trial because the accused persons are considered too powerful to be trialed. The Supreme Judicial Council has

[99] Yemeni Central Organization for Control and Auditing (Act No. 39) 1992, section 7.
[100] Alatas, *the Sociology of Corruption*, 47-48.

no sufficient staff to deal with corruption cases.[101] Yemen needs to increase transparency, accountability, anti-corruption laws, and independence of the judiciary. The government itself is unwilling to enforce the court's orders against persons in authority, which means the judiciary lacks independence.[102]

Fighting corruption in Yemen is ineffective because the Yemeni Government is unwilling to challenge the widespread corruption. This is confirmed by Respondent 6, who has stated "*Fighting corruption needs good governance and a stronger political will. Otherwise, we will stay as camels wander in the desert".*[103] The researcher notices that the government survives along with corruption so they misuse the delegated power to gain more allies. However, at the end, all persons in authority and citizens will lose like what happened in terms of destruction during the Arab Spring which also affected Yemen. In addition, the researcher analysed that the strategies of the states that help acts of neglect and don't mean to fight the corruption in order to keep alliance together with the powerful individuals. Often, separation of power does not exist in corrupt countries. Thus, the judiciary is considered as a part of executive in such corrupt countries. This could be seen in this study, the anti-corruption agencies have no power to investigate highly placed officers in corrupt case, particularly Yemeni Occupants of the Senior Posts Act 1995 (OSPA) which limits jurisdiction of the Supreme National Authority for Combating Corruption (SNACC) to investigate politicians unless two-third of the parliament withdrew the immunity of such ministers, deputy ministers,

[101] Laili al-Zwaini, "State and Non-State Justice in Yemen. Paper for the Conference on the Relationship between the State and Non-State Justice Systems in Afghanistan," (December 10-14, 2006): 27, accessed February 11, 2017, http://www.usip.org/sites/default/files/ROL/al_zwaini_paper.pdf.
[102] Katulis, Countries at Crossroads 2004- Yemen.
[103] Interview with the Head of the Supreme National Authority for Combating Corruption, December 27, 2016.

governors and the likes. This very complicated procedures is in place in order to protect the politicians from justice.

In addition, the politicians in corrupt countries do not practice the principle of separation of power because the judiciary will set aside their illicit choices and will shield the investors from unfairness of the state and its revocation of its obligations. The researcher analysed that the politicians breached the contract with Desert Line Projects L.L.C because of corruption. Particularly, when the arbitral tribunal rendered the arbitral award in favour of the claimant, however, the court failed to enforce it. This means that there was high level behind non-enforcement of IAA. It is necessary to refer to the case of *Desert Line Projects L.L.C* v. *Republic of Yemen,*[104] in this case the place seat of the arbitration was in Yemen. The arbitral tribunal rendered the international arbitral award in favour of the claimant, which was against the government. The respondent applied to set aside IAA while the claimant applied to enforce IAA. However, the Yemen court failed to enforce the international arbitral award. Especially, it could not determine any ground in the respondent's defence to set aside the arbitral award based on section 53 or 55 of YAA. The court intentionally procrastinated the enforcement without giving any reasonable justification.

There are four agencies are officially in charge of anti-corruption:

1. **The Central Organization for Control and Auditing (COCA):** This agency was established according to the Republican Degree No 39/1992 on the Central Organization for Control and Auditing.[105] The main function of COCA is to observe and audit public funds, observe and control the public management,

[104] *Desert Line Projects L.L.C* v. *Republic of Yemen* (ICSID case No. ARB/05/17).
[105] Al-Zwaini, "State and Non-State Justice in Yemen," 28

and investigate the corruption claims.[106] This organization is responsible for financial supervision, supervision over performance, follow-up implementation of the plans, legal supervision, and evaluation of legal and regulatory conditions.[107] It also has the right to file complaints to the judiciary against issues that can harm the public interest, after thirty days of informing the specific administration to take legal action to fix that problem.[108] Thus, it observes the performance of the government administrations and institutions.[109]

The law provides for independence of COCA. Article 22 provides that no authority has the right to interfere in the operations of COCA.[110] Furthermore, the members COCA are not allowed to practice any kind of business which may adversely affect the independence of COCA whether in direct or indirect approaches.[111] However, according to Laili al-Zwaini "COCA is considered as a part of the Executive Branch because its members are not held to a decision by a judge and do not release information to the public. They only report such corruption cases to the Parliament and the serious ones to the President of the State who has power to make his own judgement, even to release the accused person without punishment".[112] Clearly, many cases are not prosecuted because of political interference.[113] Furthermore, section 7 excluded the jurisdiction of COCA to take any action against the breaches committed by

[106] Yemeni Central Organization for Control and Auditing (Act No. 39) 1992, section 4 (a) (b) (c).
[107] Ibid, section 5 (1) (2) (3)
[108] Ibid, section 7.
[109] Al-Zwaini, "State and Non-State Justice in Yemen," 28.
[110] Yemeni Central Organization for Control and Auditing (Act No. 39) 1992, section 22.
[111] Ibid, section 23.
[112] Al-Zwaini, "State and Non-State Justice in Yemen," 29.
[113] Robinson, "Yemen Corruption Assessment," 9.

ministers, deputy ministers, and governors; they can only make a report about it to the President of the Republic and the Prime Minister.[114]

Regarding to the political interference on the COCA's good performance.

Respondent 11 stated that:

> *Yes, there is interference. The local and central authority interfere by sending formal letters to withdraw corruption case files. I personally suffer from that interference either from the governors or the deputies or the ministers.*

Letters from officials sent to COCA, the prosecutor, and the court to acquit the accused, Respondent 12 stated:

> *COCA is an independent regulatory body, but we are in a developing country so get the interventions effect on the COCA operations, we aspire to amend the constitution to provide for an independence of COCA. We are quite independence in the matter of employment by a rate of 75%. Interventions such as minister's orders to perform particular task in his foundation while the orders of COCA supposed to come from the President or the Prime Minister, but as a branch accept the orders from the governor, and we as an independent are supposed to exercise our duties over the Executive Branch, including the Governor. There are many officials that order COCA to perform particular tasks which supposed to request only.*

While Respondent 13 stated that:

> *According to Article (3) of COCA 1992 provides for the independence of COCA. The former head of COCA was appointed by President of the Republic, and this is a violation and interference in the affairs of COCA. The COCA follows the Office of the President, and the President belongs to a political party. So, there is a lack of independence.*

[114] Yemeni Central Organization for Control and Auditing (Act No. 39) 1992, section 7.

All three respondents agreed that the independence of COCA is only in name, whereas the politicians interfere in COCA operations and issue orders to COCA to carry some tasks. This means that COCA is considered as a branch of the Executive Body. Thus, COCA lacks independence which leads to negative effects on its operations.

2. **Public Funds Prosecution (PFP):** has jurisdiction to conduct the investigation relating to the public funds.[115] It works as a mediator between COCA and the Public Funds Courts (PFCs).[116] Whereas, the PFP usually receives the cases from COCA in order to file those cases to PFCs, but sometimes receives cases from the Attorney General's office relating to departmental claims under its ministries.[117] The PFP and COCA are inter-related in the matter of carrying out the investigation to find out the evidence. However, public funds prosecutors are not qualified because they lack knowledge of accounting and auditing.[118] Also, their jurisdiction is limited, they cannot investigate against parliament members, ministers, deputy ministers, and governors.[119] According to Glenn, the public funds prosecutors received bribes and there is no evidence of threats that force them to dismiss the cases.[120] He said evidence have led to 31 cases in the last 10 to 15 years but only 18 cases were filed in the court, while 13 cases were dismissed from trial.[121]

[115] Yemeni Ministerial Decree No. (158) for the year 1992 on public funds, section 4.
[116] Robinson, "Yemen Corruption Assessment," 15.
[117] Ibid.
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Ibid.

After indictment, the cases are referred to PFCs: this agency was established in 1996 by residential order to combat the rampant corruption that appeared clearly after the Yemeni unification in 1990. Such agency constitutes of three judges and located in five provinces that are Sana'a, Aden, Ta'iz, Hadramout, and Hodeidah. The main function of PFCs is to combat bribery, fraud, forgery and fabricate of legal documents, etc. The operations are not well discharged because PFCs get financial support from the Executive Body. [122]

However, all the respondents whom are related to PFPs negate that theory through an interview in the matter of the sources of financing for Public Funds Prosecution (PFP). If an executive body provides the Public Funds Prosecution (PFP), it will lead to intervention in Public Funds Prosecution (PFP). Respondents stated that *"sources of financing are independent and the executive does not interfere in the sources of financing. The only interference comes from the politician and the military."* This was confirmed by the majority of the three respondents about PFP judges. In short, the majority of respondents confirmed the political and military interference. Thus, the good performance of PFP will be negatively affected.

3. **The Supreme National Authority for Combating Corruption (SNACC):** this agency was established according to Yemeni Anti-Corruption (Act No. 39) 2006. It was based on the national policy to combat the widespread

[122] Ibid, 14.

corruption in the country.[123] The main jurisdiction of SNACC can be seen in section 8 as follows:[124]

1- Receiving any reports or claims relating to corruption.
2- Receive financial disclosure.
3- Investigating the corruption matters and bringing them before the court.
4- Make the public aware of the seriousness of corruption on the national economy.

The SNACC has no authority to try any corruption cases or publish any information relating to the public without prior consent from the executive body.[125] The studies have shown that SNACC does not have sufficient power to combat the rampant corruption in the country. It received over 500 claims but only investigated at most 25 claims.[126] It seems that COCA and SNACC are not independent because the executive has absolute power over their jurisdiction. This will lead to interference in their performance.[127] Such practice contravenes section 15 which provides that the SNACC is independent, and no any authority or person could interfere in its operations.[128] The punishment of contravening this article is an imprisonment not exceeding five years or a fine not exceeding five million riyals.[129] For questions, SNACC

[123] Al-Zwaini, "State and Non-State Justice in Yemen," 29.
[124] Yemeni Anti-Corruption, (Act No. 39) 2006, section 8.
[125] Al-Zwaini, "State and Non-State Justice in Yemen," 29.
[126] Ibid, 29-30.
[127] Ibid.
[128] Yemeni Anti-Corruption, (Act No. 39) 2006, section 15.
[129] Ibid, 41.

cooperated with Public Funds Prosecution and has mostly the same function of COCA.[130]

Through an interview of Respondent 6 that the researcher conducted regarding to influence of politicians on SNACC's good performance. Stated that "they do not intervene directly because the law prohibits it, but we are still suffering from pressures". In addition, in the matter of interference in SNACC affairs from the military. Stated that:

> *There is pressure put on us because of the intervention of the military. We are a part of a public system which all state institutions suffer from imbalances, wrong policies, and pressures. We fight such pressure and intervention, but this has adversely affected our performance and operations. Also, the politicians lack intention to eradicate or at least reduce corruption.*

Furthermore, the sources of financing for SNACC. If an executive body provides SNACC with resources, it will lead to intervention in SNACC. Stated that:

> *We have an independent budget in name. But, as our authority grants it, there is a lack of independent budgeting and that impact our operations. Such adverse effects exist like not paying expenses for the operations such as investigation. So, defaulting on payments of expenses makes anyone susceptible to temptation. Also, Occupants of the Senior Posts Act 1995 (OSPA) limit our jurisdiction to investigate politicians unless we grant the immunity.*

The above answers confirmed the theory that SNACC is not independent. The politicians and military interfere in its operations. Undoubtedly, such interference will adversely affect the SNACC operations and good performance to fight corruption. Also, regarding the sources of financing,

[130] Al-Zwaini, "State and Non-State Justice in Yemen," 29.

SNACC is not independent as far as the executive estimates the budget and grants it. This will lead SNACC to be a part of the Executive Branch. Moreover, OSPA violates the constitution because Article 41 provides all citizens are equal before the law. So, the laws have to be amended.

4. **Judicial Inspection Board (JIB):** is a part of the Ministry of Justice. It was established based on sections 92 and 97 of the Law on Judicial Power 1991.[131] One of the functions of JIB is to review courts' operations, judges' performance, and complaints against judges.[132] The JIB evaluates the judges and the Supreme Judicial Council has the jurisdiction of disciplinary action.[133] However, JIB operations seem to be ineffective as there are no published statistic about corruption cases.[134] Its performance is considered weak because there no corruption issues have been addressed.[135] This is especially true with regard to its role in the systematic inspection of courts.[136] Even though there are some complaints of citizens against corrupt judges, no action is taken by JIB.[137]

The researcher noticed such faults through an interview with a member respondent of JIB in providing statistics about number of judges, or court officers that have been prosecuted in the Supreme Judicial Council. The Judicial Inspection Board (respondent 7) stated that *"there are no statistics"*.[138]

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[131] Laila Al-Zwaini. *The Rule of Law in Yemen Prospects and Challenges* (The Netherlands: Hiil, 2012), 28.
[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Erica Gaston and Nadwa Al-Dawsari, Dispute Resolution and Justice Provision in Yemen's Transition (April, 2014), 35, 46. United States Institute of Peace, accessed March 18, 2017, https://www.files.ethz.ch/isn/184170/PW99_Justice-in-Transition-in-Yemen.pdf.
[136] Ibid.
[137] Ibid.
[138] Interview with Judicial Inspection, December 22, 2016.

This means that the JIB operations are completely ineffective and inefficiently administered, if they do not have any statistics about the corrupt judges or court officers who have been prosecuted in the Supreme Judicial Council.

Moreover, the JIB is infiltrated by members of the intelligence service.[139] Politicians also interfere in the JIB operations.[140] According to a respondent 7 regarding to the political interference on the JIB's good performance. Stated that:

> *Most of the heads of PFP are intelligence service; this is the justice in Yemen. In 2011, the courts have been closed in a number of provinces and we met the President of the Republic of Yemen Abd Rabo. We also claimed against three of the intelligence services work in the Supreme Judicial Council. We suffer from this interference if the President of the Republic until recently is a head of the Supreme Judicial Council, what do you expect? There is no evidence but that we practiced. The appointments of judges are taken in favour of the intelligence service.*

The interview of the JIB confirmed the theory that provides the JIB operation is weak as no response of the citizens' complaints against the corrupt judges and the inspections over the courts are irregular. Also, the politicians clearly interfere in the judicial affairs.

Anti-corruption efforts, which focused exclusively on launching traditional initiatives such as issuing another ineffective law, launching a new campaign, or setting up another authority for this purpose.[141] It requires an integrated approach to governance

[139] Robinson, "Yemen Corruption Assessment," (September 25, 2006): 23. This publication was produced for review by the United States Agency for International Development, accessed March 18, 2017, https://photos.state.gov/libraries/yemen/231771/PDFs/yemen-corruption-assessment.pdf.
[140] Gaston, Dispute Resolution and Justice Provision in Yemen's Transition, 46.
141 Daniel Kaufman, "corruption effect,"
https://www.imf.org/external/arabic/pubs/ft/fandd/2015/09/pdf/kaufmann.pdf (accessed May 20, 2018).

that tackles corruption systematically, and addresses networks of abuse and corruption.[142] This approach must be characterized by a strong judiciary.[143] It means that anti-corruption agencies and the judiciary are complementary to each other. Fighting corruption will not succeed without investigating the impediments on these government institutions. Thus, the researcher suggest that anti-corruption agencies should come out with solutions regarding the enforcement of IAA. This is because the researcher is aware that the same impediments which adversely affect the anti-corruption agencies also adversely affect the judiciary as well. According to Asian Institute of Management, corruption leads to the weakness of government's institutions as well as serves as an impediment to the development of FDI.[144] Yemen needs an appropriate environment for FDI along with less corruption, effective laws to protect rights of individuals and businesses, and transparency.[145] Therefore, as corruption negatively affects all the governments institutions, the impediments institutional legal framework in charge of corruption are adversely affect the enforcement of IAA through its negative effect on the court system. The study, thus, to improve the arbitration system in Yemen, particularly, the most important stage, that is, the enforcement of IAA. Throughout the interviews of the Central Organization for Control and Auditing (COCA), Public Funds Prosecution (PFP), the Supreme National Authority for Combating Corruption (SNACC), Academicians, Arbitrator, Judicial Inspection Board (JIB), and the Court of Appeal judges, are confirmed that the impediments which adversely affect the anti-corruption agencies are the casual link that negatively affect the enforcement of IAA and the judicial operations as a whole.

142 Asian Institute of Management, Reports on the Anticorruption Reform: Corruption and Development, How anti-Corruption Can Be Integrated into Development Measures to Ensure Sustainable Development and Inclusive Growth (Makati: Asian Institute of Management, 2013), 4.
143 Ibid.
144 Ibid, 4-6.
145 Júlio, "Foreign direct investment and institutional reform," 2.

According to Anselmo Reyes, if the judiciary is involved in the corruption, then arbitration reform will be difficult.[146] Thus, this study reinforces the position by having probative value with precise and multiple evidence that corruption is one of the main impediments which led to failure of the enforcement of IAA in Yemen. It is argued that the arbitration system will succeed and improve in Yemen by eliminating on the corruption in all the government institutions.

5.6 The Judiciary and the Enforcement of the Law

Indeed, the judicial institution is a very important force in increasing foreign and local investments.[147] This can be achieved through accountability, transparency, and integrity.[148] However, the judiciary is not independent of the executive body so it is incapable of combating corruption as far as the executive body interferes in the affairs of the judiciary.[149] The judiciary is not sufficient to conduct commercial disputes because of weak enforcement of the law.[150] If the one of the disputed parties is political, the party who gives the judgement in his favour may lose his right if the second party is powerful or has a relationship with political man.[151] Clearly, the principle of all citizens are equal before the law is not practiced.[152] The *Sheikh* can interfere to release the offending tribal man from the prison[153], and then the *Sheikh*

[146] Anselmo Reyes and Weixia Gu, *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* (2018), 291. Accessed May 21, 2018, https://books.google.com.my/books?hl=ar&lr=&id=FVtCDwAAQBAJ&oi=fnd&pg=PA279&dq=+%22arbitration%22+%22impediment%22,+2018&ots=3gc4wyLxO0&sig=kKFEpOSEv-6bS8nYO_HUVH5S2tg&redir_esc=y#v=onepage&q&f=false.
[147] Robinson, "Yemen Corruption Assessment," 5.
[148] Ibid.
[149] Ibid.
[150] Erwin Van Veen, *From the Struggle for Citizenship to the Fragmentation of Justice: Yemen from 1990 to 2013* (Netherlands Institute of International Relations Clingendael, 2014), 24, accessed December 14, 2015, https://reliefweb.int/sites/reliefweb.int/files/resources/Yemen%20-%20Fragmentation%20of%20Justice%20-%202014%20-%20Erwin%20van%20Veen_0.pdf.
[151] Ibid.
[152] Morris, "Formal and Informal Justice and Punishment Urban Law and Rural Mediation Rituals in Yemen," 132.
[153] Ibid, 149.

may apply his own tribal judgement.[154] As a result, many claimants lose their rights because of corrupt practices by powerful people.[155] This is confirmed by Syed Hussein Alatas, the society that suffers from corruption is adversely affected by unequal judicial performance.[156] Business cases that are hard to settle are more encouraged to resort to tribal protection mechanisms. Prosecutors admit that the judicial system is affected by political interference and corruption and judgements are not enforceable, unless you are General People's Congress member or belong to a tribe to protect your rights.[157] The judicial systems weakness in matters of taking coercive actions to enforce others' rights has negative effect toward attractiveness of FDI.[158] Hence, the Yemenis prefer to settle their dispute by tribal law instead of the formal law because they do not fully trust the state enforcement as far as the corruption is widespread in government institutions.[159] Corruption is notable in Yemen whereas 60% of the court judgements were not enforced.[160] The studies Al-Zwaini have shown that 60% of judgements are not enforced.[161]

According to a member respondent of JIB, in the matter of complaints come to him that related corrupt judge like receiving bribery. Said that:

> *Sometimes the complaints are frivolous, so we ask the complainants to provide an authentication. Most of the complaints are malicious as the complainants do not have evidence. We suffer from a lack of evidence. Sometimes the judge has a broker, and also suffer from a lack of accountability. We found issues with judges because of*

[154] Ibid.
[155] Asian Institute of Management, Reports on the Anticorruption Reform: Corruption and Development, How anti-Corruption Can Be Integrated into Development Measures to Ensure Sustainable Development and Inclusive Growth (Makati: Asian Institute of Management, 2013), 30.
[156] Alatas, *the Sociology of Corruption*, 7.
[157] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice*, 31.
[158] Júlio, "Foreign direct investment and institutional reform," 17-18.
[159] Morris, "Formal and Informal Justice and Punishment Urban Law and Rural Mediation Rituals in Yemen," 142.
[160] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice*, 8.
[161] Al-Zwaini, *the Rule of Law in Yemen Prospects and Challenges*, 66.

> *corruption. I personally attended two cases against two judges who were convicted of corruption.*

The respondent confirmed the theory that bribery adversely affects justice in Yemen as far as there are some cases that have convicted the some corrupt judges. Hence, as long as bribery adversely affected the justice in Yemen so the enforcement of IAA will fail as the bribery will be an obstacle. The debtor party is more likely to pay bribe to the enforcement judge to escape from implementation. On the other hand, the creditor party has to pay more than the debtor party to enforce IAA. In reality, the party who pays more, is likely to win. Thus, the enforcement of IAA is usually procrastinated. According to Anselmo Reyes, the enforcement of the arbitral award faces difficulties in Indonesia. It often requires separate judicial order to force the debtor party to implement it.[162] Such procrastination of non-enforcement is to give opportunity to the judges and court officials to receive bribery.[163]

All in all, the enforcement of laws on commercial issues is insufficient as the judicial bias to the official persons, so the commercial private sector faces difficulties because of such widespread corruption.[164] According to Gary, corruption in some countries makes the arbitration of the international commercial issues unacceptable in the national courts of those corrupt countries.[165]

The Ministry of Human Rights is claiming to infringe others' rights such as trespassing on properties, imprisoning people without trial, and non-enforcement of the court's judgements.[166] A study conducted in 2008 by WorldPublicOpinion.org Poll among

[162] Anselmo Reyes and Weixia Gu, *The Developing World of Arbitration,* 198.
[163] Ibid.
[164] Robinson, "Yemen Corruption Assessment," 9.
[165] Gary B. Born, *International Arbitration: Law and Practice* (The Netherlands: Kluwer Law International, 2012), 16-17.
[166] Al-Zwaini, "State and Non-State Justice in Yemen," 18.

people in 19 countries show that 86% agreed that the people's rights could be enforced based on the measure of power of the country.[167] Therefore, the security and the orders implemented rely on the strong power of the state.[168] Like Yemen, the inability of the military to control all regions of the country led to a fragile state.[169] The studies have proved that Yemen is a fragile state based on various criteria such as ineffectiveness of the state, corruption, violence of some groups like tribes and Al-Qaeda, and less developed countries.[170] Stable countries that have sovereignty over all its regions, have the ability to enforce the law and settle disputes according to the provided systematic rules.[171] Thus, as far as the state is fragile it is more likely to enforce the IAA against the debtor party would not be implemented. Especially, in regions that are uncontrolled by the military or the regions the under the control of tribal men.

5.7 The Independence of the Judiciary

The effective legal system is a fundamental element to encourage the FDI as well as to protect the business environment so that the foreign investors could be assured of the protection of their property and rights as a whole.[172] The constitution provides the independence of the judiciary. Article 149 provides that the judges are only subject to the law and the judiciary body is independent of all other bodies, such as the executive body or legislative body. The same article states that interference in the judicial affairs is considered as a crime that must be punished. Also, section 187 of Yemeni Penal Code provides that those official persons and whoever are strictly prohibited to give

[167] Michael Makovsky et al., *Fragility and Extremism in Yemen: a Case Study of the Stabilizing Fragile States Project* (Washington, D.C.: Bipartisan Policy Center, 2011), 11.
[168] Ibid.
[169] Ibid.
[170] Ibid, 13.
[171] Ibid, 12.
[172] Júlio, "Foreign direct investment and institutional reform)," 3.

recommendations or interfere in judicial procedures and processes; doing so is punishable with not more than three years. However, the judiciary is constitutionally independent from other branches on paper, witch in reality there is no application of what is written in the constitution.[173] The judiciary is considered as a part of the executive body.[174] The President of the Republic is the Head of the Supreme Judicial Council so the executive interferes in the judicial administration.[175] The appointments of judges more depend on the political alliances than qualifications.[176] Thus, the executive is the authority that indirectly appoint and remove the judges.[177] The judicial power is weakened as the judiciary loses control of overseeing the places of detention and investigation.[178] So, the accountability is not effective because of the lack of independence of the judiciary and the impact of corruption on the judiciary's good performance.[179]

According to an interview conducted with the Court of Appeal Judges to survey the independence, good integrity, and transparency practiced in the Yemeni judiciary.

> Respondent 1 stated that *"Yes, [they are] practiced, but not in general because of the spread of corruption in the country,"* Respondent 2 stated "*There are violations such as attacks on judges, non-implementation of the judgements of the judiciary among government agencies, obstruction of some issues such as failing to cooperate with the judiciary to communicate with foreign diplomatic agencies and companies to implement judicial orders and judgements. This obstructs justice,"* while Respondent (3), stated

[173] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice*, 31.
[174] Ibid, 8.
[175] Ibid.
[176] Ibid.
[177] Al-Zwaini, "State and Non-State Justice in Yemen," 27.
[178] Report of the High Commissioner on OHCHR's visit to Yemen (13 September 2011). Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, accessed March 28, 2017, http://www.ohchr.org/Documents/Countries/YE/YemenAssessmentMissionReport.pdf.
[179] Ibid.

> *"No, interventions exist as the conviction and sentence according to the law, with the trial held in public"*.

In addition, the researcher gained information from the same above respondents, regarding to the sources of financing for the judiciary. If the executive body provides the judiciary financially, it will lead to intervention in the judiciary.

Respondent 1 stated that:

> *There is supposed to be an independent judiciary according to the budget, but the executive branch funds the buildings and equipment. This leads to interference in the judiciary by the executive branch*.

Respondent 2, stated:

> *The executive does not fund the judiciary, but the executive estimates the judicial budget to intervene in the judicial operation. This estimation goes through the Minister of Justice, who is the executive delegate to exercise broad powers in the judiciary's budget. This leads to interference to the judicial affairs. Sometimes, the executive branch refuses to give the judiciary its completed budget as a result of plans make by the executive. Resulting in failure of the judiciary to set up courts and operating expenses*", while Respondent (3), stated that "*the judiciary has an independent budget, the executive does not fund the judiciary*.

Thus, the majority of the respondents of the Court of Appeal judges at the rate of two out of three confirmed the theories that demonstrate political interference, and a lack of independence, good integrity, transparency, and an independent budget. The independence of the judiciary and impartiality are fundamental elements to achieve justice. Therefore, the creditor party will lose his rights to enforce the arbitral award in Yemen because the judiciary lack of independence and impartiality. This argument matches with This argument is based on Gary's theory, that is, corruption in some countries makes the arbitration of the international commercial issues unacceptable in

the national courts of those corrupt countries.[180] Also, Anselmo Reyes stated that if the judiciary is involved in corruption, then arbitration reform will be difficult.[181] Hence, the arbitration system, particularly, the enforcement of IAA will not succeed in Yemen, unless it overcomes the corruption in all government institutions, including the judiciary.

According to Syed Hussein Alatas, fighting corruption is only successful if the government cooperates with the anti-corruption commission in the investigation of the serious corruption issues.[182] The investigation covers issues in policy, economy, administration, and culture.[183] Furthermore, the studies have shown that the law alone is inefficient to fight the corruption if the politicians are corrupt.[184] Thus, fighting corruption must be a joint cooperation between the legislative, judicial and the executive branches.

Lack of accountability means the country is unstable.[185] According to Garry, some national courts are incompetent to settle international commercial issues because of the lack of judiciary independence.[186] The judiciary is the first institute that must be reformed to combat corruption so the judges have to an appointment based on precise criteria of qualifications.[187] Unfortunately, respondent 1, respondent 5, and respondent

[180] Gary B. Born, *International Arbitration: Law and Practice* (The Netherlands: Kluwer Law International, 2012), 16-17.
[181] Anselmo Reyes and Weixia Gu, *The Developing World of Arbitration*, 291.
[182] Alatas, *the Sociology of Corruption*, 7.
[183] Ibid.
[184] Ibid.
[185] Júlio, "Foreign direct investment and institutional reform," 11-12.
[186] Born, *International Arbitration: Law and Practice*, 12-13
[187] Asian Institute of Management, Reports on the Anticorruption Reform: Corruption and Development, How anti-Corruption Can Be Integrated into Development Measures to Ensure Sustainable Development and Inclusive Growth (Makati: Asian Institute of Management, 2013), 14.

7,[188] suggested that "to reform the judiciary must separate it from any appointments and interventions of any intelligence service".

FDI can be attracted by a secure environment, an official system without tribal interference, and a police system that supports the court judgements beyond the local power.[189] Also, Yemen is insecure, which adversely affects judicial independence as Al-Qaeda terrorists exist in Yemen. Many terrorist attack on several vital areas show this is true.[190] Terrorism is a serious issue that threatens the security and the stability of Yemen.[191] Terrorists thrive because the military is weak as well as the government fails to overcome the political and economic problems.[192] Indeed, the situation became worse after the Revolution of 2011, so Yemen has a big challenge to become more secure.[193] The stability could be achieved through improvement on the military and separating it from the ruling family control, the tribes, and the political parties. The neutrality of the army could contribute to reviving trade as security is a main factor to attract FDI.[194]

5.8 The Politicians' Interference in the Judiciary

The judiciary is an extension of the Executive body; the Executive supervises and administers the Supreme Judicial Council, so the judicial system is dependent on it. Moreover, the judiciary staff is employed according to party affiliations.[195] According

[188] Interview with Judicial Inspection, December 22, 2016.
[189] "Security in Yemen," Google Shared Security Policy Brief. Last modified September, 2014, accessed December 27, 2015, http://www.press.uchicago.edu/books/turabian/turabian_citationguide.html.
[190] Makovsky, *Fragility and Extremism in Yemen: a Case Study of the Stabilizing Fragile States Project*, 2.
[191] Ibid, 7.
[192] Ibid, 4.
[193] Noman, "Reforming the Yemen Security Sector,".
[194] Ibid.
[195] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice*, 8.

to an interview of the Court of Appeal judges that the researcher conducted to gain any interference from politicians on the judge's function.

> Respondent 1 stated *"Some interference exists from politicians,"* Respondent 2 stated *"at the private level politicians did not interfere in my work, but on a general level, political interference in the judiciary happens",* Respondent 3 stated *"There is no interference".*

The majority of the respondents confirmed the theory that the politicians interfere in the judiciary. Even if there was rampant interference, many people would be reluctant to admit it, for fear of retaliation. Thus, if the debtor party has good relationship with politicians, they will interfere to in the judge's operations to stop any coercive actions towards the enforcement of international arbitral award. The independence of the judiciary is vital to have effective arbitration system in Yemen. Particularly, the enforcement of IAA is the vital stage in the arbitration, so if the politicians will interfere at the last stage to impede the enforcement of IAA, at that point, the arbitration system is vain.

The major barrier to challenge the improvement of the judiciary is the political interference as well as tribalism which replace the official law in solving some disputes.[196] Even though, the law punishes with a term not more than three years or a big fine for those who misuse their position and breach the law for their personal benefit or on behalf of another.[197] The judiciary cannot enforce the law because of executive interference whereas the judges are not protected from arbitrary actions that are more likely to be taken by authorized persons in case the commercial court judges

[196] Ibid, 9.
[197] Yemeni Crimes and Penalties (Act No. 12) 1994, section 165 (4).

did not listen to them or give a judgement against them for such actions like transferring the judges from higher level court to lower level court as a punishment.[198]

The researcher has found one case of arbitrary dismissal through an interview to examine the protection of judges against arbitrary dismissal, salary reduction, or transfer. Respondent 1 stated that:

> *I have been removed from office because of my opinion in case I was member of a committee, until the Relieving the Head of the Supreme Judicial Council from office, which a new official issued a sentence to cancel the previous decision by Supreme Judicial Council decision.*

So, the judge is not protected against any aggressive actions that may punish him for taking a decision against politicians' favour. Therefore, the creditor party will lose his rights to enforce the arbitral award in Yemen if the debtor has good relationship with political man. Indeed, even the judge will inclination for the gathering who has great association with government officials if there should be an occurrence of political obstruction. The judge won't manage a ruling against government officials. Politicians will probably rebuff such judge by aggressive actions. Consequently, the implementation of IAA will fail in Yemen as a result of political obstruction.

5.9 The Importance of Separation of Power

The government has to rule the country by the law.[199] This means the government jurisdiction is subject to the law. The separated jurisdiction between the executive and

[198] Robinson, "Yemen Corruption Assessment," 13.
[199] Gopal Sri Ram, "Intensity of Judicial Review: The Way Forward," Thomson Reuters Malaysia Sdn Bhd, (trading as Sweet & Maxwell Asia), (2012, December): 1, accessed January 2, 2017, http://login.westlaw.com.my.eserv.uum.edu.my/maf/wlmy/app/document?&srguid=i0ad8289e0000015f189e244b913c8437&docguid=I3C6107E6C226424DAD81FB65A4D3F8CB&hitguid=I3C6107E6C226424DAD81FB65A4D3F8CB&rank=1&spos=1&epos=1&td=1&crumb-action=append&context=12&resolvein=true.

the judiciary is very important for reform and to fight corruption.[200] The independence of the judiciary should be assured by a judicial committee that appoints the judges based on their experience and merit.[201] The power must be separated among the three authorities. The absence of the separation of power leads to interference by the executive in the judiciary.[202] The independence of the judiciary must not only be written on paper but should be seen to be applied.[203] The independence of the judiciary is not enough to protect the rule of the law but such independence has to be practiced.[204] The judiciary has to reassure the people that their rights are reserved by the law.[205] The investor or the individual has to refer to the court if his/her rights infringed as the court is the guardian of the rule of the law.[206] The judiciary is the last authority for the victim to refer to for protection of the rights.[207] As in the arbitration system the court assistance and control is very important to make the arbitration system succeed. Thus, the creditor party has to refer to the court in case the lost party refused to comply with IAA voluntarily. The people will not trust the settlement of their

[200] Usan Trevaskes and Elisa Nesossi. (2017). "CONTROL BY LAW," *ANU Press.* (2017): 49, accessed January 3, 2017, http://www.jstor.org/stable/pdf/j.ctt1sq5tvf.9.pdf?refreqid=excelsior:53fa0f366fe1e603591294374c7489d8.

[201] Abdullah bin Haji Ahmad Badawi, Y. Bhg Dato' Sri Dr. Ali bin Hamsa, Y.Bhg Dato' Dr. Mohd Tap Bin Salleh. "Rule of Law and the Judicial System." Thomson Reuters Malaysia Sdn Bhd (trading as Sweet & Maxwell Asia). (2013): 6. http://login.westlaw.com.my.eserv.uum.edu.my/maf/wlmy/app/document?&srguid=i0ad82d080000015f18875d6511077530&docguid=IDEA1C00658064F30A8B7E1C04801CE1B&hitguid=IDEA1C00658064F30A8B7E1C04801CE1B&rank=7&spos=7&epos=7&td=148&crumb-action=append&context=7&resolvein=true.

[202] Johnson, G. "Executive power and judicial deference: judicial decision making on executive power challenges in the American states." Political Research Quarterly. 68(1), (2015): 130.

[203] Maidin, A. J., & Abdulkadir, A. B. "Resolving Disputes Arising from Land Development and Environmental Degradation in Malaysia: Proposals for Reforms." Law Review, 76. (2012): 1, accessed January 2, 2017, https://poseidon01.ssrn.com/delivery.php?ID=092093029105097081004016089121123112020052090029040071000079004029082100124067127094062054007100062009029090069020082015013068020021043003048092000127081004093113027029083035096064104022101065100086000074121004017101109030124085084006089001116088098017&EXT=pdf.

[204] Badawi, "Rule of Law and the Judicial System," 6.

[205] Abdulkadir, "Resolving Disputes Arising from Land Development and Environmental Degradation in Malaysia," 14.

[206] Sri Ram, "Intensity of Judicial Review," 2.

[207] Trevaskes, "CONTROL BY LAW," 53.

disputes by the court if the independence of the judiciary is not enforced. As a result, people will refer to other mechanisms to settle their disputes. According to Omar Bawazir, Yemeni people do not fuly trust the court system because of the multiple factors that adversely affect its operations such as non-enforcement of the laws, political interference, corruption, and so on.[208] Hence, Yemeni people prefer to settle their disputes through the TADRM than formal court.

The non-independence of the judiciary and the weakness of the judiciary will make the laws vain.[209] Such things will infringe on the individual rights, it has to make effective judicial review to ensure the executive is administered subject to the rule of law.[210] The judiciary is the last tool to ensure the achievement of the justice. The judiciary should have control and supervision over the prisons to prevent any illegal detention and ensure the enforcement of the law.[211] Such control and supervision will protect individual rights constitute a check on politicians if they wish to breach the law.[212] In non-democratic countries, the rule of law is not practiced, it has to take consideration of the supporters' recommendation.[213] This does not mean that the rule of law does not practiced at all among people but it is rarely supported by the state. Therefore, fairness and justice will not be achieved unless the judiciary operates under full autonomy as provided by the constitution and the law. The politicians must

[208] Omar Saleh Abdullah Bawazir, Hairuddin Megat Latif, Mohammad Azam Hussain, "The influence of the Tribal Dispute Resolution Mechanism on the Arbitration System in Yemen," *International Journal of Trend in Research and Development*, Volume 4 (4), ISSN: 2394-9333:740. Accessed October 5, 2017, http://www.ijtrd.com/papers/IJTRD10850.pdf.
[209] Von Doepp, P., & Ellett, R, "Reworking strategic models of executive-judicial relations: Insights from new African democracies," *Comparative Politics*, 43(2), (2011): 147.
[210] Sri Ram. "Intensity of Judicial Review," 2.
[211] Trevaskes, "CONTROL BY LAW," 53.
[212] Johnson, "Executive power and judicial deference," 128.
[213] Daniel Corstange, "Tribes and the Rule of Law in Yemen," *prepared for delivery at the annual conference of the Middle East Studies Association, Washington, DC*. (November 2008), 15, accessed December 31, 2016, https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=Nadwa+Al-Dawsari%2C+%22Tribal+governance+and+stability+in+Yemen%2C%22+the+Carnegie+Papers%2C+Carnegie+Endowment+for+International+Peace+%28April+2012%29%3A+&btnG=.

practice their authority subject to the law. Exceeding their authority by interfering in the judiciary will adversely affect the independence of the judiciary and the justice. The separation of power has to operate alongside with the government' cooperation and strong state by spread the state sovereignty over that all territory. Handing over the security of some areas to the tribes or other powerful groups will not help the judiciary to perform its operations. As court takes coercive actions against the lost party so has to give the order to the police to arrest the lost party or seize his/her assets. In addition, the absence of corruption, the enforcement of the law, and security prevent the government from misuse of power.[214]

5.10 The Military Interference in the Judiciary

The Yemeni law prohibits any interference in the judiciary from the military.[215] Any attempt to influence the judge to decide in favour of any party whatever either by oral intervention, act, or/and any way is considered as insulting to the judiciary and the punishment is imprisonment for a period not exceeding one year or a fine.[216] Furthermore, any government servant who interferes with a judge or the court in favour of any of the disputed parties or harms any of the disputed parties through recommendation, order, or demand, it punishes with imprisonment for a period not exceeding three years.[217] Also, the judge shall be punished by an imprisonment not exceeding seven years if he deliberately made a judgement based on a recommendation, demand, or bias in favour of one of the disputed parties.[218] However, it is clear that this dysfunctional practice is still happening, rampantly, the military

[214] Veronica L Taylor, "Regulatory rule of law," *ANU Press*. (2017): 400, accessed January 4, 2017, http://www.jstor.org/stable/j.ctt1q1crtm.33.
[215] Yemeni Crimes and Penalties (Act No. 12) 1994, section 1.
[216] Ibid, section 185.
[217] Ibid, section 187.
[218] Ibid, section 188.

plays an important role in determining the path of the judiciary; it is one of the main factors that negatively affect the independence of the judiciary.[219] The military not only controls half to two-third of the seats of the Supreme Judicial Council but also gives recommendation on the judges' appointments and transfer.[220] Moreover, the high military officers often function as judges; they have their own prisons and can imprison their opponents without trial.[221] As a consequence of the military interference the FDI inflows is very low in Yemen[222] because of such interference leads to instability in the country.[223]

According to an interview of the Court of Appeal judges that the researcher conducted to provide information regarding to the interference by military on the judge's good function.

> Respondent 1, stated that "*sometimes there are interventions of army officers when the accused from military unite. Sometimes the army officers rejected our orders which leads us to contact those higher than him/her or we raise the issue to JIB to communicate with the Ministry of Defense in this regard"*, Respondent (2) stated that "military intervenes often," while Respondent (3) stated that *"no military interference happens"*.

Hence, the majority of the respondents of the Court of Appeal Judges confirmed the theory that the military interferes in the judiciary operations. Given the power of the military, it is wise to presume that there are even more untold stories that people are afraid to come forward with. Hence, the debtor is more likely to refer to his/her military unit to protect him/her against any court legal actions. As a consequences, the

[219] Veen, *From the Struggle for Citizenship to the Fragmentation of Justice*, 22.
[220] Ibid.
[221] Ibid, 23.
[222] Ahmad Hamoud AL-Shebami, Mahmoud Khalid Almsafr, Mohd Nor Shaari, "A bounds testing approach to co-integration: Determinants of foreign direct investments inflows to Yemen," *Journal of Advanced Social Research* 3.7 (2013): 193.
[223] Júlio, "Foreign direct investment and institutional reform," 5.

enforcement of IAA will fail in Yemen because of the military interference and disobedience of the court system. The court assistance is major importance to enforce IAA in case the debtor party refused to enforce it voluntarily. This argument is based on Gary's theory, that is, corruption in some countries makes the arbitration of the international commercial issues unacceptable in the national courts of those corrupt countries.[224]

Regrettably, the soldiers who are descendants from tribes have loyalty to their own tribes more than the national interest.[225] This could be seen with Arab Spring, when those supporting *Sheikhs* of 2011 Revolution among the soldiers withdraw from military barracks and joined their own tribes.[226] Also, the military is not neutral as it is involved in the corruption, political, and tribal alliances through looking for beneficiaries from some traders and allegiance to some official persons.[227] According to an interview with an official, "we aware that the military is not neutral but we could not oppose that or even try to reform the problem.[228] Otherwise, we would be dismissed from our jobs and no one wants to violate his/her rights.[229] Additionally, a lot of ghost soldiers are enrolled in the military and receiving monthly salaries.[230] Hence, any attempt to layoff such ghost without compensation will lead to chaos."[231]

[224] Gary B. Born, *International Arbitration: Law and Practice* (The Netherlands: Kluwer Law International, 2012), 16-17.
[225] Ahmad Ali Al-Ahsab, "What Makes Yemen's Spring Different," The Arab Spring and Arab Thaw: Unfinished Revolutions and the Quest for Democracy (April 2016): 5.
[226] Ibid.
[227] "Yemen's Military-Security Reform: Seeds of New Conflict?" (April 2013). International Crisis Group Working to Prevent Conflict Worldwide, Accessed April 2, 2017, http://www.crisisgroup.org/~/media/Files/Middle%20East%20North%20Africa/Iran%20Gulf/Yemen/139-yemens-military-security-reform-seeds-of-new-conflict.pdf.
[228] Ibid.
[229] Ibid.
[230] Ibid.
[231] Ibid.

5.11 Conclusion

At the end of the chapter, the researcher answered research question three and achieved research objective four. Primary data of the interviews and the secondary data, found that the influence of corruption does impede the formation and function of competent courts towards the enforcement of international arbitral awards in Yemen. It is commonly known that the court is the most fundamental element to enforce the IAA. Thus, the judiciary in the enforcing state has to be independent and impartial. However, the research found that some violation in the Yemeni Judiciary and the public system occurs as follows:

The vast majority of the respondents confirmed that the independence of COCA, PFP, SNACC, and JIB is only ink on paper. The politicians and the military interfere in their operations. We can notice from interviews from COCA, PFP, SNACC, and JIB that the majority of the respondents confirmed functional independence, good integrity, and transparency are rarely practiced. The politicians and military are adversely affect their operations. Also, the sources of financing SNACC is not independent as far as the Executive estimates the budget and grants it. Moreover, bribery adversely affects the justice system. In addition, the researcher has found some cases of arbitrary dismissal against judges because of judgements not in favour of the government. Therefore, the judicial system can be considered as a branch of the Executive Body.

Furthermore, the researcher has found out other adverse effects on the enforcement of IAA that are fighting corruption in Yemen is ineffective because the Yemeni government is weak. Not only regulations and stricter laws are very important to fight the corruption but practice is. In Yemen there is a law which protects the corrupt persons such as OSPA. Even though Article (41) of the Constitution provides that all

citizens are equal before the law, it does not happen in practice. Also, the fragility of the state makes it less likely that IAA would be implemented. This is especially true, in the regions that are not controlled by the military or the regions that under the control of tribal men. In addition, the intelligence service penetrates the judiciary.

Anti-corruption agencies receiving complaints. However, it appears that no actions are taken. So the people are sceptical whether anti-corruption agencies are serious in fighting corruption. These issues debilitate their activities, for example, no reaction to the citizens' complaints against the degenerate judges, and unpredictable reviews over the courts. Also, non-enforcement of the law, particularly, non-implementation of IAA.

The solution to all these problems are threefold. Firstly, there is need to be a willing to change, especially on the part of tribal leaders, the military, and other government officials. Secondly, the legislative and judicial system need to have complete separation of powers, to be able to manage their affairs without interferences. Thirdly, there needs to make economic arguments that a Yemen government that plays by the rules could attract more foreign direct investment, and hence a better economy and quality of life, than the current system. How to achieve this is another, much more complicated set of questions and answers.

CHAPTER SIX

CONCLUDING REMARKS

6.1 Conclusion

This study set out to investigate the inadequacy of YAA. It contributes to improving the arbitration system in Yemen to cope with international arbitration system. Especially, the enforcement of IAA. The enforcement of IAA is the most fundamental element in the arbitration. The study finds that more efforts from the legislators and experts in this field to overcome the inadequacy in YAA. YAA is inadequate so the enforcement of IAA will face difficulties to deal with international level of the arbitration.

More importantly, Yemen is non-signatory state to NYC, it is the most fundamental agreement with respect to the enforcement of IAA. This study calls the legislators for great efforts to rethink about the positive effects that Republic of Yemen will lose because of non-ratifying the NYC.

Furthermore, it contributes to the overall literature on the influence of tribalism on the enforcement of IAA. The government is responsible to plan strategies to weaken and prevent tribalism in judicial operations and the public system as a whole. In addition, the impediment of corruption in the enforcement of IAA is more essential as it adversely affect the arbitration system and justice too.

Based on international conventions, rules, agreements, and law which found that YAA is not able to cope with issues that are related to the enforcement of IAA. YAA failed to include some articles that are related to the proceedings and processes of the enforcement of IAA which are important guidelines to the disputing parties, the tribunal, and the competent courts in order to treat the disputing parties equally and give justice to all. Such missed articles are as follows:

1) Allowing appeal under section 28 to the court against the tribunal decision over the agreement validity is inappropriate as the arbitral tribunal understands its jurisdiction and has capability to deal with such dispute more than the court may do;
2) Section 53 is insufficient. It lacks paragraphs to provide sections as right for the debtor party to resist the enforcement of the arbitral award based on the proper notice of the appointment of the arbitrator and the arbitral proceedings to each of the disputed party as well as the effectiveness of the arbitral award in case of the award is not yet binding;
3) Section 53 of YAA needs to be amended, especially, paragraph (b) which provides that the award cannot be enforced if any of the parties is incompetent, such paragraph is repeating the same thing as paragraph (a) which provides that the resisting party who was an incompetent person at the time of signing the arbitral agreement can challenge the arbitral award;
4) The YAA is silent on the power of the tribunal to impose sanction on the debtor party in case of failure to disclose the documents or refuse to enforce the arbitral award;

5) The right of the disputed parties to exclude or limit the right to appeal or challenge the arbitral award as far as UNCITRAL did not oppose the disputed parties' rights to agree on such terms;
6) What the procedures are, especially the requirements of the appeal against the arbitral award before the competent court;
7) The right of the debtor party to resist enforcement based on the arbitrator's bias;
8) The enforcement proceeding, how many days the enforcement takes, the allowed time period of the debtor party to appeal against the enforcement of the arbitral award, the proceedings to be taken for the enforcement in case of resisting enforcement;
9) What the effectiveness is of the vacated award by the state of the place seat;
10) What procedures and proceedings are in case of an application to vacate the arbitral award in the place seat of the arbitration;
11) What the effect is in the matter of discovering credible evidence that may change the award or the evidence which the award is based on was forged, misrepresentation, fraud, or false testimony, and the allowed period to appeal;
12) The YAA shall include an article which provides the jurisdiction of the foreign tribunal to request the Yemeni competent court to take coercive actions to perform the award of interim measures of protection;
13) There should be a re-arbitration in order to correct the minor mistakes instead of setting aside the award;
14) YAA shall mention the allowed period of the debtor party to recourse against the award;
15) YAA shall stipulate the period of time for the enforcement judge to grant the enforcement of the arbitral award.

As far as the enforcement of the arbitral award is concerned, the researcher examined the provisions relating to the enforcement of arbitration laws such as Yemeni Arbitration (Act No. 22) 1992, Yemeni Procedure and the Implementation (Act No. 40) 2002 and international conventions such as Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), UNCITRAL Model Law on International Commercial Arbitration 1985, Convention on the Settlement of Investment Disputes, Arab Convention on Commercial Arbitration, Riyadh Convention for Judicial Cooperation, international laws and Bilateral Investment Treaties to identify the inadequacies in YAA. Throughout the discussion of chapter three the researcher has found YAA is ineffective and incapable of coping with international arbitration and one of the cause of ineffectiveness of arbitration in the Middle East, including Yemen, is the lack of sufficient laws of arbitration.[1]

Yemen is non-signatory state to the convention. Therefore, non-ratifying the convention by Yemen will lead to putting it under exceptional ground of reciprocity reservation that provides the right of the signatory-states to refuse the recognition and the enforcement of arbitral award that are provided in NYC. The same effect, if the arbitral award is rendered outside Yemen the enforcement of the award will base on Yemeni Civil Procedure and Implementation (Act No. 40) 2002 that requires some requirements to enforce the foreign judgements and awards. Especially, section 494[2] which provides that to enforce foreign decisions, it must be based on the reciprocity reservation. Hence, the signatory- states to NYC will not enforce IAA that rendered in Yemen. Also, Yemen will recognize and enforce the judgements and awards that are rendered in the countries that recognize and enforce awards and judgements rendered

[1] Michael Kerr, "Concord and Conflict in International Arbitration," *Arbitration International* 13.2 (1997): 130.
[2] Yemeni Civil Procedure and the Implementation (Act No. 40) 2002, sections 491 and 494.

in Yemen as well as will not recognize and enforce court judgements and arbitral awards are rendered in the countries that do not recognize and enforce judgements and awards are rendered in Yemen.

Non-ratifying the convention is not an immunity for Yemen as well as Yemeni businessmen to escape from an execution of agreements. The foreign award will be enforced against Yemen based on other laws. The arbitral award made outside Yemen can still be enforced against Yemen even though Yemen is non-signatory state to NYC. So, based on the previous discussion, Yemen will be the losing party in the following situations. First situation Yemen is the losing party of non-ratifying the convention because the arbitral award can be enforced against the debtor party outside Yemen. Another situation based on Article I (3) that arbitral award made in Yemen cannot be enforced in the contracting states of NYC.

The international law is considered as more superior than the domestic law as it is dominant among states over the world. Thus, a state when breaching any rule of international law can't rely on its own domestic laws and sovereignty principle, the international law must prevail.[3] To be more understanding must refer to article 3 that provides international wrongful acts committed by a state must be subject to international law.[4] Article 27 provides when the state fails to fulfill its responsibility towards international agreement can't justify such failure by its own municipal law,[5] as well as the state can't claim that its ratification of the treaty led to contravention of its own municipal law in order to justify its failure to fulfill its responsibility.[6]

[3] Ibid.
[4] International Law Commission's Article on State Responsibility, article 3.
[5] The Vienna Convention on the Law of Treaties 1969, article 27.
[6] Ibid, article 46 (1).

Furthermore, the jurisdictional immunity is not anymore applicable to exempt the state activities from execution in the matter of commercial transaction.[7] The international law replaced extreme state immunity by limited state immunity, which the foreign state actions cannot litigate in the court of another foreign state if the matter is relating to government action that may lead to negative effects but the foreign state is liable for commercial actions and the immunity will not apply in commercial issues.[8].

Moreover, the states that engage in trades with other states, mostly do BITs in order to protect the national investors' rights in case of expropriation of their investment rights.[9] Such agreements tries to protect the investors of place seat in case of violation of the international law, investment rights, enforcement of arbitral awards, whereas the legal action could be taken by the original state of the investors against the place seat of the investment.[10] The disputing parties could refer to the ICSID mechanism if there are BITs between the disputed parties, the ICSID mechanism could also apply to settle the investment disputes even when one of the disputing parties is not a signatory state or not a national of a signatory state.[11]

Based on the above international law, treaties, and cases, could mean that Yemen is obligated to enforce the IAA whatever it is signatory-state of NYC or not, it cannot disappear under an umbrella to escape from commitment and execution whereas the sovereign immunity cannot apply as a shield to avoid its consent of entering arbitration agreements under argument of violation of the municipal law or non-ratifying NYC.

[7] Malcolm N. Shaw, *International Law*, Seventh Edition. (United Kingdom: University Printing House, Cambridge CB2 8BS, 2014), 522.
[8] Ray August, *International Business Law: Text, Cases, and Readings,* Fourth Edition. (United States of America: Pearson Education, Inc., 2004), 157.
[9] Asif H Qureshi and Andreas R Ziegler, *International Economic Law*, Third Edition. (London: Sweet & Maxwell, 2011), 497-499.
[10] Ibid.
[11] Ibid, 526-527.

Thus, in the case of non-enforcement of IAA as a result of the adverse effects of insufficient YAA, tribalism, corruption, or the like so that the foreign investor could refer to his/her original state to take an action of expropriation on behalf. Whereas, Yemen has signed 47 Bilateral Investment Treaties with various states around the world which stipulates the condition of settlement disputes of the investment among the states,[12] this means Yemen has no open gate to escape from the execution of IAA. Therefore, the researcher could see non-ratifying of the NYC by Republic of Yemen leads to negative effects on the Yemeni businessmen and the national economy as a whole.

The tribes are a major constituents of Yemeni society.[13] According to Tribalism Index Scores (TIS), 2009 Republic of Yemen is ranked at number 7 out of 160 countries in the world, figure 1 is considered as the highest rate, while figure 160 is considered as the lowest rate.[14] Number 7 is a high rate, so this rate is considered as a negative as tribes are one of the factors that adversely affect the growing of the Yemeni national economy as well as the good performance of the government institutions and they perform various illegal acts, such facts are cited by clear evidence in this research. TIS classification of highly tribal countries is based on failed states, weak center, instability, poverty, violence, and create problems.[15] The tribes have influence over the society and dominate the positions of government institutions more than the state

[12] General Investment Authority, Free Trade & Investment Agreements, Accessed April 24, 2017, file:///D:/after%20Quoloqum/court%20supervision/%D9%85%D9%88%D9%82%D8%B9%20%D9%8A%D9%88%D8%B6%D8%AD%20%D8%A7%D9%84%D9%8A%D9%85%D9%86%20%D9%88%D8%A7%D9%84%D8%A7%D8%AA%D9%81%D8%A7%D9%82%D9%8A%D8%A7%D8%AA%20%D8%A7%D9%84%D8%AF%D9%88%D9%84%D9%8A%D8%A9.htm.

[13] J. E. Peterson, "Tribes and Politics in Yemen," (2008): 1, accessed May 9, 2017, http://www.jepeterson.net/sitebuildercontent/sitebuilderfiles/APBN-007_Tribes_and_Politics_in_Yemen.pdf.

[14] David Jacobson and Natalie Deckard, "the Tribalism Index: Ulocking the Relationship between Tribal Patriarchy and Islamists Militants," *New Global Studies* 6.1 (2012): 10-11, accessed May 5, 2017, https://www.degruyter.com/view/j/ngs.2012.6.issue-1/1940-0004.1149/1940-0004.1149.xml.

[15] Ibid, 7.

even though such influence is unofficial.[16] Therefore, the government has no sovereignty over all land in order to extend its authority and ensuring the application of the law.[17] Furthermore, the government faced difficulties in implementing its policies because it faced with the tribal resistance in case such policies are against the tribes' interest.[18] Especially, the tribes that are located in the north of Yemen.[19]

Based on Hofstede' theory, under tribalism there is the cultural dimension of collectivism. The cultural dimension exists where there is a huge number of families with strong loyalty to protect each other as one group.[20] As far as the tribes influence the executive body, the enforcement of IAA will fail because of the tribal interference to protect their own tribal members against any court coercive enforcement. Therefore, Hofstede' theory is relevant to the problem which the tribal debtor party will refer to his/her tribe to secure him/her against the court legal actions. Also, the court lacks control over the tribal districts. Undoubtedly, the judicial operations face difficulties as long as the government has no sovereignty over all the land.

Based on Primary data of the interviews and the secondary data, it was found that the influence of corruption does impede the formation and function of competent courts in the enforcement of international arbitral awards in Yemen. It is commonly known that the court is the most fundamental element to enforce the IAA. Thus, the judiciary

[16] Ahmad Ali Al-Ahsab, "What Makes Yemen's Spring Different," The Arab Spring and Arab Thaw: Unfinished Revolutions and the Quest for Democracy (April 2016): 9.
[17] Elham M. Manea, "Yemen, the Tribe and the State,", This paper was presented to the International Colloquium on Islam and Social Change at the University of Lausanne (October 11, 1996), accessed May 6, 2017, http://al-bab.com/albab-orig/albab/yemen/soc/manea1.htm.
[18] Peterson, "Tribes and Politics in Yemen," 7.
[19] Ibid.
[20] Geert Hofstede and Gert Jan Hofstede, *Cultures and organizations: Software of the mind,* Vol. 2. (London: McGraw-Hill, 1991), 91-92, accessed May 10, 2017, http://testrain.info/download/Software%20of%20mind.pdf.

in the enforcing state has to be independent and impartial. However, the research found that some violation in the Yemeni Judiciary and the public system occurs as follows:

The vast majority of the respondents confirmed that the independence of COCA, PFP, SNACC, and JIB is only ink on paper. The politicians and the military interfere in their operations. It can be noticed from interview findings from COCA, PFP, SNACC, and JIB that the majority of the respondents confirmed functional independence, good integrity, and transparency are rarely practiced. Also, the sources of financing SNACC is not independent as far as the Executive estimates the budget and grants it. Moreover, bribery adversely affects the justice system. In addition, the researcher has found some cases of arbitrary dismissal against judges because of judgements not in favour of the government. Therefore, the judicial system can be considered as a branch of the Executive Body.

Furthermore, the researcher has found out other adverse effects on the enforcement of IAA:

1- Fighting corruption in Yemen is ineffective because the Yemeni government is weak. Regulations and stricter laws are very important to fight the corruption, but in Yemen there are laws which provide protections to the corrupt persons such as Yemeni Occupants of the Senior Posts Act 1995 (OSPA). Even though Article 41 of the Constitution provides that all citizens are equal before the law, it does not happen in practice.
2- The fragile state makes it less likely the enforcement of IAA would not be implemented. This is especially true, in the regions that are not controlled by the military or the regions that under the control of tribal men.

3- The intelligence service penetrates the judiciary.

These reasons lead to weak their operations such as no response of the citizens' complaints against the corrupt judges, and irregular inspections over the courts. Also, it makes it ineffective in fighting corruption, non-enforcement of the law, especially, non-implementation of IAA.

The solution to all these problems remains threefold. First, there needs to be a willingness to change, especially on the part of tribal leaders, the military, and other government officials. Secondly, the legislative and judicial system need to have complete separation of powers, to be able to manage their affairs without interferences. Thirdly, there needs to be economic arguments made to prove that a Yemen government that plays by the rules could attract more FDI, and hence a better economy and quality of life, than the current system. Just how to achieve this is another, much more complicated set of questions and answers.

6.2 Recommendations

Based on the findings, many recommendations have been concluded. First of all, the researcher strongly recommend amendment of YAA as it is insufficient. The recommendation is based on the fact that YAA is found to be insufficient due to lack of important sections and paragraphs as mentioned before in the findings. The current YAA will impede the enforcement of IAA. Thus, YAA has to be amended to cope with international arbitration system.

Secondly, the researcher strongly advises the Yemeni government to ratify NYC which could lead to positive effects on investment and the economy, Yemen cannot be more

reserved and careful than 156 states who have ratified NYC. Furthermore, Yemen is a signatory state in ICSID, Arab Convention on Commercial Arbitration, international law, BITs. This means that Yemen is obligated under such international conventions, international law, and agreements so what is the rationale of non-ratification of NYC?

Thirdly, to improving the enforcement of IAA in Yemen will reduce the adverse tribal influence on the judiciary and the public system as a whole. The government should stop giving facilities to the *Sheikhs* such as monthly salaries, houses, lands, and guards or any kind facilities that amounts to misuse of public fund. All citizens must be treated equally. The legislature should make strong laws to prevent any interference in the judiciary, and must criminalize such interference. The independence of the judiciary must not only be in theory but should be seen practically. Last but not the least, the government should have plans to socialize the tribes.

Fourthly, a very important step to be taken in order to improve the enforcement of IAA, the judiciary, and anti-corruption agencies is that the state must have a sincere intention to fight corruption as well as real application of what the constitution provides in terms of the independence of the judiciary from the executive and the legislative arm. Also, the parliament should repeal OSPA which limits the jurisdiction of COCA and SNACC to investigate politicians. This Act protects the corrupt politicians.

6.3 Opportunities for Future Studies

Based on the findings of the studies, several recommendations have been made by the researcher. Firstly, the advantages and disadvantages of non-ratifying NYC by Yemen. The researcher has not found any reasons for Yemen unwillingness to ratify the

convention. Especially as the convention allowed the national court of the signatory-states to refuse to recognize and enforce the award based on reciprocity reservation in article 1 (3). Besides, an article V (2) (b) if the award is contradicted with the public policy of the country where the recognition and enforcement is sought.

Secondly, Instability of the country or the weaknesses of the public system are more likely to affect on the arbitration system in Yemen and the judiciary as well. This recommendation is based on United States Institute of Peace report through a survey of some provinces in 2013 which found that 20% of the courts are closed because of insecurity and political instability and this rate is expected to increase in other urban provinces to 60% for the same reasons.[21]

Thirdly, throughout the interviews, the respondents state that the judiciary is dominated by the intelligence service. Hence, the study recommends to eliminate the influence of the intelligence service on the independence of the judiciary.

Fourthly, it was found that the Tribal Alternative Dispute Resolution Mechanism (TADRM) adversely affect the formal arbitration system in Yemen.

Finally, another challenge facing the enforcement of IAA in Yemen is the lack of knowledge and inadequate staff of the Court of Appeal judges and arbitrators to deal with international arbitration.

[21] Gaston, Dispute Resolution and Justice Provision in Yemen's Transition, 9.

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APPENDICES

Appendix A: The Interview from the Central Organization for Control and Auditing (COCA)

Omar Saleh Abdullah Bawazir

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E.maail: bawazeer_uum@yahoo.com

Dear Sir/Madam,

Thank you for your willingness to answer the questions of the interview with regard to the study concerns about the Impediments Faced by Yemen in Enforcing International Arbitral Awards: a Legal Analysis. The purpose of this research is to get a degree of Doctor of Philosophy (Ph.D) in law from Universiti Utara Malaysia. I assure that all information will be used for the research only and they will be kept confidential and will not be treated otherwise. I hope that you would help to complete this study by responding honestly.

Thank you
Yours truly

(Omar Saleh Abdullah Bawazir)
PhD Candidate in Law

SUMMARY OF RESPONSES INTERVIEW:

Place of Interview:

Date/time of Interview or response:

Duration:

Section I: INTERVIEWEE INFORMATION

This section is to gather information about the experts and contains general questions including respondent's background, their qualifications (trainings or experiences), and their field of education.

What is your post/position?

I. How long have you been in this current post/position?

II. Would you like to tell me something about your work and your responsibilities?

(Please comment on how far your responsibilities extend throughout the organization).

III. How did you qualify? Did you qualify by training or by experience?

IV. What is your area of interest?

V. Other than your official duty, have you become a member in any other professional bodies involving arbitration matters? If yes, what was it?

Section II: EXPERT VIEWS

This section is to examine the influence of corruption on the judiciary and tribunals.

1- Can you tell me whether politicians do interfere on the COCA's good performance?
2- Is there interference in COCA from the military?
3- Is there interference in COCA from the tribes?
4- How far important of independence, good integrity, and transparency in COCA?
5- Is independence of COCA protected by the law?
6- Are officers of the Central Organization for Control and Auditing COCA protected against arbitrary dismissal, salary reduction, or transfer?
7- What are the sources of financing for COCA? If the executive body provides the judiciary financially, is it lead to intervention in COCA?

8- Do you have any suggestions or recommendations will be useful and helpful for this study?

RESPONDENT

……

Appendix B: The Interview from Public Funds Prosecution (PFP)

Omar Saleh Abdullah Bawazir

PhD Candidate in Law

School of Law

College of Law, Government and International Studies (Section A)

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E.maail: bawazeer_uum@yahoo.com

Dear Sir/Madam,

Thank you for your willingness to answer the questions of the interview with regard to the study concerns about the Impediments Faced by Yemen in Enforcing International Arbitral Awards: a Legal Analysis. The purpose of this research is to get a degree of Doctor of Philosophy (Ph.D) in law from Universiti Utara Malaysia. I assure that all information will be used for the research only and they will be kept confidential and will not be treated otherwise. I hope that you would help to complete this study by responding honestly.

Thank you
Yours truly

(Omar Saleh Abdullah Bawazir)
PhD Candidate in Law

SUMMARY OF RESPONSES INTERVIEW:

Place of Interview:

Date/time of Interview or response:

Duration:

Section I: INTERVIEWEE INFORMATION

This section is to gather information about the experts and contains general questions including respondent's background, their qualifications (trainings or experiences), and their field of education.

What is your post/position?

VI. How long have you been in this current post/position?

VII. Would you like to tell me something about your work and your responsibilities?

(Please comment on how far your responsibilities extend throughout the organization).

VIII. How did you qualify? Did you qualify by training or by experience?

IX. What is your area of interest?

X. Other than your official duty, have you become a member in any other professional bodies involving arbitration matters? If yes, what was it?

Section II: EXPERT VIEWS

This section is to examine the influence of corruption influence on the judiciary and tribunals.

9- Can you tell me whether politicians do interfere on PFP's good performance?
10- Is there interference in PFP from the military?
11- Is there interference in PFP from the tribes?
12- How far important of independence, good integrity, and transparency important value in PFP?
13- Is independence of PFP protected by the law?
14- Are officers of PFP protected against arbitrary dismissal, salary reduction, or transfer?
15- What are the sources of financing for PFP? If executive body provides PFP, is it lead to intervention in PFP?
16- Do you have any suggestions or recommendations will be useful and helpful for this study?

RESPONDENT

……

Appendix C: The Interview from the Supreme National Authority for Combating Corruption (SNACC)

Omar Saleh Abdullah Bawazir

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Dear Sir/Madam,

Thank you for your willingness to answer the questions of the interview with regard to the study concerns about the Impediments Faced by Yemen in Enforcing International Arbitral Awards: a Legal Analysis. The purpose of this research is to get a degree of Doctor of Philosophy (Ph.D) in law from Universiti Utara Malaysia. I assure that all information will be used for the research only and they will be kept confidential and will not be treated otherwise. I hope that you would help to complete this study by responding honestly.

Thank you
Yours truly

(Omar Saleh Abdullah Bawazir)
PhD Candidate in Law

SUMMARY OF RESPONSES INTERVIEW:

Place of Interview:

Date/time of Interview or response:

Duration:

Section I: INTERVIEWEE INFORMATION

This section is to gather information about the experts and contains general questions including respondent's background, their qualifications (trainings or experiences), and their field of education.

What is your post/position?

XI. How long have you been in this current post/position?

XII. Would you like to tell me something about your work and your responsibilities?

(Please comment on how far your responsibilities extend throughout the organization).

XIII. How did you qualify? Did you qualify by training or by experience?

XIV. What is your area of interest?

XV. Other than your official duty, have you become a member in any other professional bodies involving arbitration matters? If yes, what was it?

Section II: EXPERT VIEWS

This section is to examine the influence of corruption on the judiciary and arbitration.

17- Are cases of corruption involving judges, court officials, and lawyers normally prosecuted in the courts?
18- Do you have any statistic about number of judges, court officers, or lawyers that have been prosecuted in the court?
19- What are sanctions impose on the judges, court officer, and lawyers found to have committed corrupt practice?
20- Can you tell me whether politicians interfere on the SNACC's good performance?
21- Is there interference in SNACC affairs from the military?
22- Is there interference in SNACC affairs from the tribes?
23- How far important of independence, good integrity, and transparency important value in SNACC?
24- Is independence of SNACC protected by safeguards of due process in disciplinary proceedings?

25- Are SNACC protected against arbitrary dismissal, salary reduction, or transfer?
26- What are the sources of financing for SNACC? If executive body provides the Supreme National Authority for Combating Corruption SNACC, is it lead to intervention in SNACC?
27- Do you have any suggestions or recommendations will be useful and helpful for this study?

RESPONDENT

……

Appendix D: The Interview for the Academicians

Omar Saleh Abdullah Bawazir

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Dear Sir/Madam,

Thank you for your willingness to answer the questions of the interview with regard to the study concerns about the Impediments Faced by Yemen in Enforcing International Arbitral Awards: a Legal Analysis. The purpose of this research is to get a degree of Doctor of Philosophy (Ph.D) in law from Universiti Utara Malaysia. I assure that all information will be used for the research only and they will be kept confidential and will not be treated otherwise. I hope that you would help to complete this study by responding honestly.

Thank you
Yours truly

(Omar Saleh Abdullah Bawazir)
PhD Candidate in Law

SUMMARY OF RESPONSES INTERVIEW:

Place of Interview:

Date/time of Interview or response:

Duration:

Section I: INTERVIEWEE INFORMATION

This section is to gather information about the experts and contains general questions including respondent's background, their qualifications (trainings or experiences), and their field of education.

What is your post/position?

XVI. How long have you been in this current post/position?

XVII. Would you like to tell me something about your work and your responsibilities?

(Please comment on how far your responsibilities extend throughout the organization).

XVIII. How did you qualify? Did you qualify by training or by experience?

XIX. What is your area of interest?

XX. Other than your official duty, have you become a member in any other professional bodies involving arbitration matters? If yes, what was it?

Section II: EXPERT VIEWS

This section is to examine the influence of corruption on international arbitral award. In addition, this section intends to come up with the findings of the interview specifying the difficulties and obstacles which both parties may face i.e. either the disputed parties or the arbitrators.

1- In your experience as an academic lecturer have you any information relating to the difficulties in enforcing international arbitral award?
2- If your answer to question (1) is yes, please elaborate what kind of difficulties?
3- Do you have any information about corruption case relating to the arbitration or judiciary?
4- If your answer is NO to question (3), have you ever heard another an academic lecturer has information about corruption case relating to the arbitration or judiciary?
5- If judges or arbitrators are found guilty of corruption charge, what is the punishment imposed by the court?

6- Do you have any information on interference from politicians regarding the arbitration or the judiciary or anti-corruption agencies?
7- Do you have any information on interference from the military against the arbitration or the judiciary or anti-corruption agencies?
8- Whether the tribalism interference affect the enforcement of international arbitral award?
9- Whether the tribal alternative dispute resolution mechanism affect the arbitration system?
10- Do you think that independence, good integrity, and transparency important values in the operations of the arbitration or the judiciary or the anti-corruption agencies?
11- How far practiced of independence, good integrity, and transparency in the judiciary and anti-corruption agencies?

12- Do you think that the independence of arbitral tribunals or the judiciary or anti-corruption is protected by the law?
13- Do you think the arbitrators or judges or the members of anti-corruption agencies are protected against arbitrary dismissal, salary reduction, or transfer?
14- Do you know what are the sources of financing the judiciary and arbitral tribunals or anti-corruption agencies?
15- If executive body supports the arbitration or the judiciary or the anti-corruption agencies financially, do you think it leads to intervention in the arbitration or the judiciary or the anti-corruption agencies?

Section III: EXPERT VIEWS

Examine the processes and the procedures followed by the tribunal and the competent court to enforce the international arbitral awards.

1- In case where the applicant requests the other party (i.e. the defendant) to deposit some amount of money in order to avoid financial damage to the applicant (i.e. the defendant) does not comply with the final arbitral awards, how does the Tribunal and the competent court deals with this?
2- What are the remedies available to the applicant (i.e. the seeking party) if the defendant fails to comply with the international arbitral awards?
3- In case if the defendant fails to comply with the IAA and the applicant incurred no damage suffered by the plaintiff, will the defendant still be punished? Why?
4- In relation to the arbitral awards issued by the Tribunal or the National Court outside Yemen such as to freeze the defendant`s assets in Yemen, what is the mechanism followed in this case?
5- Does the competent court have the power to issue interim measures in arbitration taking place outside Yemen to ensure the enforcement of the international awards if requested by the applicant of the tribunal?
6- What are the requirements to request interim measure of protections?
7- Could the competent court gives assistance to the Tribunal in case of the applicant or the tribunal requested interim measure of protections before issuing the final awards?
8- Does the judiciary exercise effective monitoring on the enforcement of the international arbitral awards?
9- Do judges ensure the timely enforcement of international arbitral awards?

10- Do you have any suggestions or recommendations that will be useful and helpful for effective enforcement of international arbitral awards?

RESPONDENT

……

Appendix E: The Interview from the Arbitrator

Omar Saleh Abdullah Bawazir

PhD Candidate in Law

School of Law

College of Law, Government and International Studies (Section A)

Universiti Utara Malaysia

06010 UUM Sintok

Kedah- Darul Aman

H/P: 0173109496

E.maail: bawazeer_uum@yahoo.com

Dear Sir/Madam,

Thank you for your willingness to answer the questions of the interview with regard to the study concerns about the Impediments Faced by Yemen in Enforcing International Arbitral Awards: a Legal Analysis. The purpose of this research is to get a degree of Doctor of Philosophy (Ph.D) in law from Universiti Utara Malaysia. I assure that all information will be used for the research only and they will be kept confidential and will not be treated otherwise. I hope that you would help to complete this study by responding honestly.

Thank you
Yours truly

(Omar Saleh Abdullah Bawazir)
PhD Candidate in Law

SUMMARY OF RESPONSES INTERVIEW:

Place of Interview:

Date/time of Interview or response:

Duration:

Section I: INTERVIEWEE INFORMATION

This section is to gather information about the experts and contains general questions including respondent's background, their qualifications (trainings or experiences), and their field of education.

What is your post/position?

XXI. How long have you been in this current post/position?

XXII. Would you like to tell me something about your work and your responsibilities?

(Please comment on how far your responsibilities extend throughout the organization).

XXIII. How did you qualify? Did you qualify by training or by experience?

XXIV. What is your area of interest?

XXV. Other than your official duty, have you become a member in any other professional bodies involving arbitration matters? If yes, what was it?

Section II: EXPERT VIEWS

This section is to examine the influence of corruption on international arbitral awards. In addition, this section intends to come up with the findings of the interview specifying the difficulties and obstacles faced by the disputed parties or the arbitrators.

16- Whether the provisions relating to the enforcement of arbitration laws in Yemen are adequate?
17- In your experience as an arbitrator have you faced difficulties in enforcing international arbitral awards?
18- If your answer to question (1) is yes, please elaborate as to what kind of difficulties are?
19- Is there any interference from politicians on the arbitrator's good function?
20- Is there any interference from military on the arbitrator's good function?
21- Whether the tribalism interference affect the enforcement of international arbitral award?

22- Whether the tribal alternative dispute resolution mechanism affect the arbitration system?
23- How far important are independence, good integrity, and transparency to the arbitration?
24- Is arbitration processes independently protected by the law?
25- Do you believe the arbitration processes in Yemen are protected against arbitrary dismissal, salary reduction, or transfer?
26- What are the sources of financing for the arbitration? If the executive body provides the arbitration financially, is it led to intervention in the arbitration processes?

Section III: EXPERT VIEWS

Examine the processes and the procedures followed by the tribunal and the competent court to enforce the international arbitral awards.

11- In case where the applicant requests the other party (i.e. the defendant) to deposit some amount of money in order to avoid financial damage to the applicant (i.e. the defendant) does not comply with the final arbitral awards, how does the Tribunal and the competent court deals with this?
12- What are the remedies available to the applicant (i.e. the seeking party) if the defendant fails to comply with the international arbitral awards?
13- In case if the defendant fails to comply with the IAA and the applicant incurred no damage suffered by the plaintiff, will the defendant still be punished? Why?
14- In relation to the arbitral awards issued by the Tribunal or the National Court outside Yemen such as to freeze the defendant`s assets in Yemen, what is the mechanism followed in this case?
15- Does the competent court have the power to issue interim measures in arbitration taking place outside Yemen to ensure the enforcement of the international awards if requested by the applicant of the tribunal?
16- What are the requirements to request interim measure of protections?
17- Could the competent court gives assistance to the Tribunal in case of the applicant or the tribunal requested interim measure of protections before issuing the final awards?
18- Does the judiciary exercise effective monitoring on the enforcement of the international arbitral awards?
19- Do judges ensure the timely enforcement of international arbitral awards?
20- Do you have any suggestions or recommendations that will be useful and helpful for effective enforcement of international arbitral awards?

RESPONDENT

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Appendix F: The Interview from the Judicial Inspection Board (JIB)

Omar Saleh Abdullah Bawazir

PhD Candidate in Law

School of Law

College of Law, Government and International Studies (Section A)

Universiti Utara Malaysia

06010 UUM Sintok

Kedah- Darul Aman

H/P: 0173109496

E.maail: bawazeer_uum@yahoo.com

Dear Sir/Madam,

Thank you for your willingness to answer the questions of the interview with regard to the study concerns about the Impediments Faced by Yemen in Enforcing International Arbitral Awards: a Legal Analysis. The purpose of this research is to get a degree of Doctor of Philosophy (Ph.D) in law from Universiti Utara Malaysia. I assure that all information will be used for the research only and they will be kept confidential and will not be treated otherwise. I hope that you would help to complete this study by responding honestly.

Thank you
Yours truly

(Omar Saleh Abdullah Bawazir)
PhD Candidate in Law

SUMMARY OF RESPONSES INTERVIEW:

Place of Interview:

Date/time of Interview or response:

Duration:

Section I: INTERVIEWEE INFORMATION

This section is to gather information about the experts and contains general

questions including respondent's background, their qualifications (trainings or experiences), and their field of education.

What is your post/position?

XXVI. How long have you been in this current post/position?

XXVII. Would you like to tell me something about your work and your responsibilities?

(Please comment on how far your responsibilities extend throughout the organization).

XXVIII. How did you qualify? Did you qualify by training or by experience?

XXIX. What is your area of interest?

XXX. Other than your official duty, have you become a member in any other professional bodies involving arbitration matters? If yes, what was it?

Section II: EXPERT VIEWS

This section is to examine the influence of corruption on the judiciary and arbitration.

28- Are cases of corruption involving judges and court officials normally prosecuted in the courts?
29- Do you have any statistic about number of judges or court officers that have been prosecuted in the court?
30- What are sanctions impose on the judges and court officer found to have committed corrupt practice?
31- Are there complaints come to you that related to corrupt judge like receiving bribery?
32- Can you tell me whether politicians interfere on the judge's good performance?
33- Is there interference in judicial affairs from the military?
34- Whether the tribalism interference affect the enforcement of international arbitral award?
35- How far important are independence, good integrity, and transparency important value in JIB?

36- Do you Exercise Independence, Integrity and Transparency in the Judicial Inspection Abroad?
37- Is independence of JIB protected by safeguards of due process in disciplinary proceedings?
38- Is JIB protected against arbitrary dismissal, salary reduction, or transfer?
39- What are the sources of financing for JIB? If executive body provides JIB, is it lead to intervention in JIB?

RESPONDENT

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Appendix G: The interview from the Court of Appeal judges

The Interview from the Judicial Inspection Board (JIB)

Omar Saleh Abdullah Bawazir

PhD Candidate in Law

School of Law

College of Law, Government and International Studies (Section A)

Universiti Utara Malaysia

06010 UUM Sintok

Kedah- Darul Aman

H/P: 0173109496

E.maail: bawazeer_uum@yahoo.com

Dear Sir/Madam,

Thank you for your willingness to answer the questions of the interview with regard to the study concerns about the Impediments Faced by Yemen in Enforcing International Arbitral Awards: a Legal Analysis. The purpose of this research is to get a degree of Doctor of Philosophy (Ph.D) in law from Universiti Utara Malaysia. I assure that all information will be used for the research only and they will be kept confidential and will not be treated otherwise. I hope that you would help to complete this study by responding honestly.

Thank you
Yours truly

(Omar Saleh Abdullah Bawazir)
PhD Candidate in Law

SUMMARY OF RESPONSES INTERVIEW:

Place of Interview:

Date/time of Interview or response:

Duration:

Section I: INTERVIEWEE INFORMATION

This section is to gather information about the experts and contains general questions including respondent's background, their qualifications (trainings or experiences), and their field of education.

What is your post/position?

XXXI. How long have you been in this current post/position?

XXXII. Would you like to tell me something about your work and your responsibilities?

(Please comment on how far your responsibilities extend throughout the organization).

XXXIII. How did you qualify? Did you qualify by training or by experience?

XXXIV. What is your area of interest?

XXXV. Other than your official duty, have you become a member in any other professional bodies involving arbitration matters? If yes, what was it?

Section II: EXPERT VIEWS

This section is to examine the influence of corruption on the judiciary and arbitration.

40- Are cases of corruption involving judges and court officials normally prosecuted in the courts?
41- Do you have any statistic about number of judges or court officers that have been prosecuted in the court?
42- What are sanctions impose on the judges and court officer found to have committed corrupt practice?
43- Are there complaints come to you that related to corrupt judge like receiving bribery?
44- Can you tell me whether politicians interfere on the judge's good performance?
45- Is there interference in judicial affairs from the military?
46- Whether the tribalism interference affect the enforcement of international arbitral award?

47- How far important are independence, good integrity, and transparency important value in JIB?
48- Do you Exercise Independence, Integrity and Transparency in the Judicial Inspection Abroad?
49- Is independence of JIB protected by safeguards of due process in disciplinary proceedings?
50- Is JIB protected against arbitrary dismissal, salary reduction, or transfer?
51- What are the sources of financing for JIB? If executive body provides JIB, is it lead to intervention in JIB?

RESPONDENT

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Appendix H: Consent Form

Dear participant

My name is Omar Saleh Abdullah Bawazir; I am a PhD candidate at the University Utara Malaysia.

You are invited to participate in this research study which aims at studying titled the impediments faced by Yemen in enforcing international arbitral awards: a legal analysis. The following points will highlight the role of the participant and other important issues.

1- You will be kindly asked to participate in an interview with the researcher. Your participation in this study is absolutely voluntary. At the interview you (i.e. the participant) will have the freedom to express your opinions, prior experiences and perceptions regarding whatever the impediments of inadequacy of Yemeni Arbitration Act, tribalism, and corruption on the enforcement of international arbitral awards in Yemen.
2- The participant has the right to withdraw from the study at any time without worrying about any penalties or consequences.
3- The interview location and timing will be decided by the participant to assure his/her convenience. The interview will last for approximately 30 minutes.
4- The participant's identity will be kept confidential, will not be disclosed to any third party and will not be mentioned within the study's body or the final report. A coding procedure will be used to replace the participant's name in order to ensure his/her identity confidentiality. However, the results of the study can be published but without declaring the names of the participants.
5- The interview will be digitally recorded in order to be transcribed later for the purpose of analysis and information extraction. The interview material will be stored securely for a period of two years; after that it will be destroyed.

After clarifying all the important points regarding this study and the participants' role and rights, if you have any further inquiries you may contact the researcher on the following contact information; the researcher's e-mail (bawazeer_uum@yahoo.com) and mobile No. (0060173109496).

Thanks for your participation, your time and efforts are truly appreciated.

Name of Expert:
Title:
Place of Job:
Current Position:
Contact Information
Frequently Used E-Mail:
Official E-Mail (if any)……..
Phone No.:
Signature of the interviewee ----------, Date: ……..

Researcher Information

PhD Candidate (Omar Saleh Abdullah Bawazir) Studying at University Utara Malaysia, College of Law, Government and International Studies (COLGIS).
Place of Job: student at University Utara Malaysia.
Phone No: 0060173109496
E-Mail: bawazeer_uum@yahoo.com