The Complex Task: Can the Palestinian Law of Arbitration Become More User-friendly Towards International Commercial Arbitration?

Mohammad A. Abu Shehab*

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1. Introduction

This research examines several controversies and ongoing hurdles arising from the rules of the Palestinian Law on Arbitration No.12 of 2001 (the PLA) relating to international commercial arbitration. This examination is critical for Palestine as the Palestinian Authority (the PA) desires to encourage the international business community to resolve their disputes in Palestine. That is because the determination of the place of arbitration is essential for parties drafting international arbitration agreements. It may be the second most crucial decision following the choice of the arbitrators in preparing for international arbitration.[1]

The current rules of the PLA contain multiple theoretical and practical problems that reduce the probability of the Palestinian arbitration environment from appealing to foreign investors.[2] However, the PA is trying to improve the arbitration environment as the draft for the new arbitration law is discussed and revised.[3] Based on the current attempt to amend the PLA, this research highlights several problems the PA should consider when building a practical legal framework to govern international arbitration.

This research uses comparative legal systems as a model for improvement, most notably Egypt, the United Arab Emirates (UAE), and Dutch law. The Egyptian and UAE laws are considered for two reasons: 1. their shared legal history with Palestine since all three countries were part of the old Ottoman legal system. 2. their recent legal developments in international arbitration through establishing

* Lecturer of Private Law, Faculty of Law, An-Najah National University, Nablus, Palestine PhD Candidate, School of Law, Utrecht University, Utrecht, the Netherlands, Mohammad.eu@najah.edu.

[1] N. Blackaby, C. Partasides et al., "Chapter 1. An Overview of International Arbitration", in *Redfern and Hunter on International Arbitration* (Oxford: Oxford University Press, 2015), p.27.

[2] This research is part of a PhD project in which the author will address the problems of the arbitration system in Palestine and examine how it can be improved while on the verge of establishing a modern Palestinian state. Examples of the gaps and obstacles facing the Palestinian arbitration system, and therefore addressed by other parts of the PhD project, include the lack of a proper enforceable legal framework for foreign arbitration awards, the lack of special substantive rules governing international commercial arbitration, and the absence of a third party's role in the arbitration process.

[3] The draft of the new arbitration law is now under review by the Palestinian ministry council. However, most of the provisions of this current draft law do not provide a pivotal change to improve the current situation of international commercial arbitration.

strong institutions, legislative amendments, and notable court precedents.[4] On the other hand, Dutch law is considered because it provides respectable examples for comparison. The Netherlands has a developed legal and judicial approach towards international commercial arbitration and hosts one of the leading arbitration institutions, namely The Hague Permanent Court of Arbitration, which has played a significant role in international commercial arbitration for quite some time. Also, part of this research has been done from inside The Netherlands, which has given the author a better understanding of the Dutch legal system in judicial practices.[5] Further, the UNCITRAL Model Law is highly regarded in this research for two main reasons: a primary object of this Model Law is to promote the harmonisation and uniformity of national laws on international arbitration, and it would make the PLA more user-friendly and attractive to foreign investors and their representatives.[6]

The discussion is divided into two main sections. In section 2, the research starts its argument by criticising the current approach of the PLA for defining the international nature of the arbitration. Defining the concept of "international arbitration" leads, in fact, to determining the jurisdiction of the national judiciary to implement the relevant legal aspects of the dispute. As this research will show later, one of the features of international arbitration is its independence and the originality of the state's judiciary. By defining the concept of international arbitration, applying the substantive and procedural rules of the arbitration system at an international level can be drawn. Consequently, analysing the need for the special treatment of international arbitration, for example, the degree of judicial scrutiny on international commercial arbitration among the Palestinian legal system, which is the core of the third section of this research, starts with the sole definition of international arbitration in the country.

Section 3 will discuss the importance of harmonisation of the PLA, comparative legal systems in general, and the Model Law in particular. This section suggests several areas that Palestinian legislators may target to achieve a quick and effective harmonisation: the principle of Competence-Competence, the written requirements for arbitration agreement, and the authority of arbitrators related to interim measures. This section will also argue the need to adopt a balanced judicial review approach towards international arbitration that ensures the independence of

[4] In Egypt, Law 27/1994 on Civil and Commercial Arbitration (the Arbitration Act) is the primary legislation regulating arbitration. It applies to domestic and international arbitrations seated in Egypt and those which the parties have chosen to subject to the act. Meanwhile, in the UAE, the new Federal Law No.6 of 2018 on Arbitration was published in the Federal Official Gazette no.630 of 15 May 2018 and came into force last June. This new regulation revokes the previous outdated and non-comprehensive UAE Chapter on Arbitration in arts 203 to 218 of the UAE Civil Procedures Law No.11 of 1992. Besides the UAE Federal Law on Arbitration, there are separate jurisdictions and court systems in the UAE's free zones, including the Dubai International Financial Centre-London Court of International Arbitration (DIFC) and the Abu Dhabi Centre for Conciliation and Commercial Arbitration (ADCCAC). Nevertheless, this research will only focus on the Federal Law because the DIFC and ADCCAC arbitration regulations are modeled on the "common law" system rather than a "civil law" system applied in Palestine.

[5] The Netherlands, the new regulations entered into force on 1 January 2015 concerning arbitrations commenced on or after 1 January 2015. The new regulations amended the former Dutch Arbitration regulations, which dates to 1986, many aspects of which remain unchanged in the new rules.

[6] The United Nations General Assembly, in its resolution 40/72 of 11 December 1985, recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice", see the UNCITRAL, Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006, p.28.

arbitration as a private forum for resolving disputes and, at the same time, protects the fairness and effectiveness of arbitration through supportive courts actions.

2. Reshaping the Palestinian approach to the definition of international arbitration

2.1 Introduction

It is essential to begin the analysis with the definition of international arbitration because defining the international nature of arbitration is crucial for implementing the private international legal regime on arbitration.[7] Defining arbitration as "international" leads to the implementation of different legal rules, as alternate regulations apply to international and domestic arbitration. These differences range from the competent court for setting aside and challenging arbitral awards to the extent that national rules govern the arbitration procedures, such as national public policy. Further, the international nature of arbitration is frequently, and increasingly, raising the debate over whether a set of specific substantive rules within the legal framework should apply to international arbitration.[8]

Generally, determining whether an arbitration award is domestic, international, or foreign depends upon the related legal system, which can be either (i) the law of the forum or (ii) the law of the enforcement country.[9] This fact is asserted through art.I of the New York Convention (NYC), which defines foreign awards as awards that (i) are "made" in a state other than the Contracting State where recognition is sought, or (ii) are "not considered as domestic awards" under the law of the recognising state. This results in various approaches to defining the international character of arbitration. Among these approaches are the broad criteria adopted by the UNCITRAL Model Law on International Commercial Arbitration (the Model Law), the legal theory for defining international arbitration.[10] The Model Law depends on various standards ranging from the nationality and the place of business of the parties,[11] the nature of the dispute,[12] the place of arbitration selected,[13] to the parties' consent in considering their arbitration to be international.[14] Another approach to defining international arbitration concentrates on the nature of the dispute through an economic criterion to determine the international character of arbitration, as is the case with the French and International Commercial Chamber (ICC) legal system or the economic theory defining international arbitration.

Due to this variation of approaches among different legal systems, an award that one state considers "domestic" might be considered by another state, where

[7] E. Gaillard and J. Savage (eds), "Part 1: Chapter II—Sources of International Commercial Arbitration", in *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), p.170.

[8] Gaillard and Savage, "Part 1: Chapter II—Sources of International Commercial Arbitration" in *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999), pp.9–62.

[9] Blackaby and Partasides, "Chapter 1. An Overview of International Arbitration" in *Redfern and Hunter on International Arbitration* (2015),p.11.

[10] It is also adopted by NYC, Swiss Private International Law, and the Amman Arab Convention of Arbitration of 1987 (art.II).

[11] Article 1.3.a NYC.

[12] Article 1.3.b.i and ii NYC.

[13] Article 1.3.c NYC.

[14] Article 1.3 NYC.

enforcement is sought, as not being "domestic".[15] In this regard, Sir Robert Jennings, former President of the International Court of Justice, said in the preface to the first edition of his book:

> "International commercial disputes do not fit into orthodox moulds of dispute procedures—they lie astraddle the frontiers of foreign and domestic law—and raise questions that do not fit into the categories of private international law either. Not least, they raise peculiar problems of enforcement."[16]

Therefore, based on the variety of approaches mentioned above, the PA needs to create clear and modern definitions of domestic, foreign and international arbitration awards. Their approach should consider the legal hurdles that investors in the Palestinian market face, i.e. outdated laws, inexperienced judiciary and political barriers to investment.[17] This effort will be consistent with its aim to improve the arbitration environment for businesses and be consistent with its obligations under arbitration conventions, namely the NYC and Riyadh Convention.[18] It is essential to answer the question regarding the best model for the PLA to adopt regarding international arbitration. Also, are there any innovative approaches towards international arbitration that would work well in the harsh Palestinian legal environment?

2.2 The current definition of international arbitration in Palestine and its problems

The PLA has adopted a broad definition of international arbitration, derived from art.1.3 of the Model Law. The PLA, in its art.3, put forward several conditions for considering arbitration to be international.[19] This approach reflects a traditional principle of the conflict of laws. If one of the arbitration's elements is international, then it is international arbitration.[20] Under art.3 of the PLA, an arbitration is considered international if the issues at conflict are related to economic, trade or civil matters in the following cases: (a) it is between parties from different states;[21]

[15] A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 2004), pp.13–22.

[16] Blackaby and Partasides, "Chapter 1. An Overview of International Arbitration" in *Redfern and Hunter on International Arbitration* (2015), p.52.

[17] The Palestinian judiciary rarely reviews international trade matters. Of all the cases studied for this research, none were related to international trade. Many factors contribute to the lack of international trade matters dealt with by Palestinian courts. Besides the lack of a proper investment environment, the political situation in Palestinian plays a significant role. However, this research focuses on the legal and practical deficiencies in the Palestinian legal environment and its approach to international commercial arbitration. That means that this research will not focus on the political hurdles of investment in Palestine, which has already received some attention in academic discourse.

[18] Palestine is a member of the Riyadh Arab Convention on Judicial Cooperation, 6 April 1983. It is a regional multilateral convention between the Arab States and thus applies only to foreign awards made in other member states.

[19] Article 3 PLA states that "the arbitration agreement is considered International if the issues at conflict are related to economic, trade, or civil matters in the following cases: (a) if the headquarters of the parties in arbitration are in different countries at the time of conclusion of the arbitration agreement. If any of the parties have several business centres, their headquarters shall be defined as the centre that is more closely linked to the arbitration agreement. If any of the parties have no business centre, their place of residence shall be considered. (b) If the issues at conflict included in the arbitration agreement are linked to more than one country. (c) If the headquarters for each of the parties in arbitration are in the same country upon signature of the arbitration agreement and one of the following centres is in another country: a) the seat of the arbitration procedures specified in the arbitration agreement or explained in the arbitration agreement. B) the location for implementing an essential part of the commitments arising from the parties" trade or contractual relation. C) the place that is most linked to the issues at conflict". Un-official translation.

[20] F.M. Sami, التحكيم التجاري الدولي: دراسة مقارنة لأحكام التحكيم التجاري الدولي (*The International Commercial Arbitration: A Comparative Study of International Commercial Arbitration Awards*) (Jordan: Dar Al Thaqafa, 2009), p.100.

[21] Article 3.a PLA.

or (b) if the issues at conflict included in the arbitration agreement are linked to more than one country;[22] or (c) the parties' underlying commercial relationship provides for (substantial) performance outside the state where the parties have their places of business.[23]

Nevertheless, the PLA has deviated from the Model Law by excluding the Model Law's reference under paragraph (c) of art.1.3 to grant the parties the discretionary authority to confer an international character on the arbitration if the parties agree that the subject matter of the dispute relates to more than one country. By doing so, the PLA has taken away the parties' autonomy in deciding the internationality of their dispute, leaving that authority to the courts alone.[24] This approach is explicitly harmful to the parties' ability to resolve their dispute in a cost-effective, neutral and expeditious manner. This can only be achieved through granting the parties the autonomy needed to choose not only the place of arbitration, but the arbitrators, the procedural rules, and whether the award is international or not.

The implementation of PLA's art.3 leads to confusion for applicability as it leaves room for the courts to decide on the "international" definition of the arbitration award. Two examples of this confusion can be provided. First, the PLA adopts terms that cause disagreements, such as "the place mostly related to the issues at conflict" or "the business centre closely linked to the arbitration agreement". The terms "most related" and "closely linked" are ambiguous, and the PLA does not provide a clear standard for courts to consider when defining these terms. Second, the PLA, in art.3.3, has defined "foreign arbitration" as arbitration conducted outside Palestine, without any additional requirements. This definition is confusing because the PLA stated earlier in art.3.2.3a that international arbitration might occur outside Palestine, overlapping with foreign arbitration mentioned in art.3.3. This confusion might not be a significant problem for advanced legal systems with strong court precedents. However, the Palestinian judicial system suffers from a lack of experience and precedents on international arbitration, mainly because the PA and its judiciary are newly formed,[25] making it hard to analyse and correct ambiguous and contradictory legal terms without legislative guidelines. This lack of accuracy in the concept of international arbitration in the PLA provides the court with additional powers to intervene in the arbitral process by implementing and interpreting arbitration clauses.

By adopting the Model Law approach, the PLA increases the judiciary's control over international arbitration by giving the judge broader powers to distinguish the essential elements in international arbitration. As Professor Gary Born noticed, the standard adopted by the Model Law is a broad standard based on geographical foundations. Therefore, the Model Law criteria open the way for broader intervention by the courts in the definition of "international arbitration".[26] For example, when determining the international character of arbitration based on the

[22] Article 3.b PLA.

[23] Article 3.c PLA.

[24] Unlike art.3 of the United Arab Emirates (UAE) law on arbitration, which indicates this right to the parties. The Egyptian Law on arbitration also gives this right to the parties.

[25] Palestine has issued its first arbitration law in 2000, following the establishment of the Palestinian Authority after the Oslo accord in 1995.

[26] G.B. Born (ed.), "Chapter 2: Legal Framework for International Arbitration Agreements", in *International Commercial Arbitration* (The Netherlands: Kluwer Law International, 2021), p.349.

Model Law approach, the court must list all the foreign elements related to a specific legal relationship. It also separates the decisive elements from the non-influencing elements according to the degree to which they are linked to one or multiple legal systems.[27] This approach will give the judge a broad authority to define arbitration as international. The Model Law's standard also increases the judiciary's burden and opens the way to legal interpretations and controversies for the Palestinian judiciary, leading to prolonged litigation. This is because legal relationships that include a foreign element are not considered sufficient to consider arbitration as international; rather, the foreign component must be influential and productive.[28] Thus, the courts must make extensive efforts in evaluating the arbitration agreement, which may take years based on the current speed of the Palestinian judiciary.[29]

This research does not intend to criticise the Model Law in its entirety; instead, it criticises the adoption of the Model Law's approach by the PLA. This conclusion is reached due to several problems that make the Model Law's approach unsuitable for the Palestinian judiciary and the Palestinian legal system in general. The first issue is an outdated legal system, as most Palestinian laws were enacted during the Ottoman era (early 19th century) or in the British Mandate era (1922–48), with or without minor amendments. The second issue is the judges' lack of experience, as the Palestinian judiciary was only established in 1995 with almost no international arbitration cases to observe.[30] Third, the Palestinian economy requires foreign investors to boost its economy. Therefore, a suitable arbitration system is needed to encourage foreign investors to do business in Palestine by providing a dispute resolution mechanism separate from the national court system. The current PLA adoption of the Model Law approach provides a wide range of opportunities for the court to intervene with the arbitration process, hugely affecting the aim of separating the arbitration process from the national judiciary.

In fact, the model law approach has been successfully adopted by several legal systems, most notably, in the Arab region, by the Egyptian Arbitration Law No.27 of 1994 (EAL). The EAL has copied most of the criteria mentioned in the Model Law. Nevertheless, the Egyptian judiciary dates to the late 18th century, with more than a century more experience than the Palestinian judiciary.[31] Egypt also benefits from an open and large economy with considerable arbitration experience.[32] Therefore, it has extensive experience dealing with complex arbitration cases, compared with the Palestinian judiciary, making applying the Model Law broad criterion easier.

On the other hand, the EAL has made changes to its adoption of Model Law that reduces the intervention of the judiciary while defining international arbitration.

[27] N. Ibrahim, مركز القواعد عبر الدولية اما التحكيم الاقتصادي الدولي (*Center for Transnational Rules of International Economic Arbitration* (Alexandria: Dar El Fker Egamie, 2002), p.84.

[28] M. Abd-Almajeed, الأسس العامة للتحكيم الدولي والداخلي (*General Principles of International and Internal Arbitration*) (Alexandria: Dar Al-Ma"rifa, 2001), p.45.

[29] The length of the appeal process can vary, with a minimum time of one year, but in some cases, it can be up to seven years. For example, the Palestinian Court of Cassation, Case No.171/2004. The enforcement request was filed in 1997. However, the final judgment of the Court of Cassation was issued in 2004.

[30] See fn.17 above.

[31] After France, Egypt was among the first countries in the world to establish a judicial institution. The beginning was in 1875 with the enactment of the modern codification under which the Mixed Courts were established. For more information see M.S.W. Hoyle, "The structure and laws of the mixed courts of Egypt" (1986) 1(3) *Arab Law Quarterly* 327–357. *doi: 10.2307/3381755*.

[32] Egypt's GDP is US$361.85 billion, while the PA's GDP is significantly smaller at only US$16.28 billion.

For example, EAL's art.3 defines the "place of business" mentioned in Model Law as the principal place of business of the parties. This slight language change provides a clear standard interpretation that will prevent any theoretical disagreements among courts on the definition of "place of business". In addition to its adoption of Model Law, the EAL has also adopted other measures to define international arbitration, thus reducing the judiciary's authority to decide the arbitration's international nature. For example, art.3.2 of EAL states that the simple fact of resorting to a permanent arbitral institution means that the arbitration becomes international, which is called the institutional arbitration criterion. The institutional approach will be discussed further in the following section.

2.3 The best model to be adopted by the Palestinian Law of Arbitration

As indicated above, the PLA uses mostly geographical conditions to define international arbitration, relying on the Model Law approach. However, the PLA excludes the economic standard from international arbitration, despite the implicit reference to it when defining domestic arbitration by including the phrase "if it is not related to international commercial".[33] Therefore, this sub-section recommends two models to be considered by the Palestinian legislators to improve their approach to international arbitration: (a) the economic standard adopted by the ICC; and (b) the Institutional Arbitration criterion.

2.3.1 The economic standard

The economic standard focuses on the nature of the dispute to determine the international character of arbitration. According to this economic standard, the relationship elements may be geographically concentrated in one country, yet the relationship is classified as international if it includes, for example, payment through an international bank transfer.[34] On the contrary, the legal relationship may contain several foreign elements, such as the different nationalities of the parties, which makes it international according to the standards of Model Law. However, it may not be considered international according to the economic standard if the nature of the relationship is concentrated in one country.[35]

The economic standard is widely accepted by the French judiciary, which has commonly shaped the rules of the ICC. It provides that arbitration is international if it applies to an international commercial relationship from an economic point of view. Further, it seems that the economic standard has spread, as it was adopted by the European Arbitration Agreement of 1961[36] and stipulated in art.809 of the Lebanese Code of Civil Procedure[37] (which defines "international commercial arbitration" as "arbitration that relates to the interests of international trade"), and

[33] Article 3 PLA.

[34] R.A. Zaid, الأسس العامة في تحكيم التجاري الدولي (*General Boundaries in International Commercial Arbitration* (Cairo: Dar Elfikr El Arabi, 1981), pp.35–36.

[35] M. Jamal and Abdel-Aál, التنظيم القانوني للتحكيم الدولي والداخلي في ضوء الفقه وقضاء التحكيم (*The Legal Regulation of International and Domestic Arbitration in the Light of Jurisprudence and Judiciary*) (Alexandria: Monshaát El-Maárif, 1998), pp.23–24.

[36] Article I of the 1961 European Convention on International Commercial Arbitration.

[37] Law No.90 of 1983.

it was adopted by the Portuguese law, the ICC and the French judiciary.[38] For example, the ICC rules cover disputes that contain a "foreign element", even if the parties were nationals of the same country. An explanatory booklet issued by the ICC states:

> "[T]he international nature of the arbitration does not mean that the parties must necessarily be of different nationalities. By virtue of its object, the contract can nevertheless extend beyond national borders, when for example, a contract is concluded between two nationals of the same state for performance in another country, or when it is concluded between a State and a subsidiary of a foreign company doing business in that state."[39]

Even though the EAL broadly adopts Model Law, there is an economic criterion in the EAL, which calls upon the notion of international commerce. EAL states in this respect the following: "Within the context of this law, the arbitration is international whenever the subject matter is a dispute relating to international commerce". EAL then quotes a geographical criterion, for example, when the arbitration is linked to more than one state.[40]

This research argues that the economic approach is more suitable for the Palestinian legal system to establish proper rules for international commercial arbitration. The economic criterion is consistent with the current reality of international business relationships. It attaches particular importance to the nature of disputes and provides arbitration with the necessary international character, regardless of the geographical elements of the business relationship.[41] Further, the economic approach avoids the issues arising from the conflict of laws, usually associated with the Model Law approach, as it subjects the dispute directly to international trade rules.[42] Consequently, the adoption of economic criteria by the PLA will reflect a sound policy as it will reduce the burden on the judiciary when examining the definition of international arbitration. This result will be suitable for the current situation within the Palestinian judiciary.

The economic standard also prevents one or more parties in a domestic relationship from using fraudulent methods to make their dispute appear international to avoid the strict rules of national public policy that may be deemed inapplicable to international arbitration. This usually occurs by applying conditions adopted by the current PLA approach, while these conditions are not related to the dispute submitted to arbitration.[43]

[38] Article 3 of the Portuguese law and art.1492 of the new Code of Civil Procedure. Furthermore, art.1504 of the revised French Code of Civil Procedure states that "an arbitration is international when international trade interests are at stake". See Decree 2011–48 of 13 January 2011, Bk IV, Title II, art.1504; see also Conducci, "The arbitration reform in France: Domestic and international arbitration law" (2012) 28 Arb Int'l 125. The current ICC rules cover "all business disputes, whether or not of an international character", suggesting a readiness to administer purely "domestic" disputes, if appropriate.

[39] ICC, *The International Solution to International Business Disputes: ICC Arbitration* (Dubai, United Arab Emirates: ICC, 1977), pp.301, 19.

[40] D. Luo and J. El-Ahdab, "Arbitration in Egypt", in *Arbitration with the Arab Countries* (The Netherlands: Kluwer Law International, 2011), pp.155–223.

[41] Jamal and Abdel-Aál, "Arbitration in Egypt", in *Arbitration with the Arab Countries* (The Netherlands: Kluwer Law International, 2011), p.80. Also, in this regard, see Sami, *The International Commercial Arbitration: A Comparative Study of International Commercial Arbitration Awards* (2009), p.103.

[42] Sami, *The International Commercial Arbitration: A Comparative Study of International Commercial Arbitration Awards* (2009), p.13.

[43] Sami, *The International Commercial Arbitration: A Comparative Study of International Commercial Arbitration Awards* (2009), p.130.

Notwithstanding, the Palestinian legislator needs to consider the broad sense of the economic relationship to include commercial and non-commercial work. This will avoid the confusion of applicability by the Palestinian courts and decrease the burden on the judges when considering arbitration as international, instead of analysing multiple elements of the dispute, as is the current PLA approach. That is because the court should have the least amount of intervention in analysing the nature of the dispute. The legislature can swiftly achieve this by having a general definition of international trade.[44] In this regard, E. Loquin states: "In the field of international trade, the concept of commercialism does not mix with commercial work in the strict and technical sense that is common in the law of intervention".[45]

For example, in the French case of *V 2000 v Project XJ 220 ITD*,[46] the French Court of Appeal ruled that international arbitration agreements are presumptively valid even in contracts not involving merchants. In this case, an English automobile company (Jaguar) planned to produce and market the latest version of its product (Jaguar XJ 220 limited edition). Through its partner, Jaguar France, Jaguar signed a sale agreement with a French national (Philippe Renault) to sell him a Jaguar XJ 220 at $500,000. Renault later changed his mind and sought to cancel his order. He sued Jaguar France before the Tribunal de Grande Instance of Paris to nullify the contract and obtain a refund of the amounts paid. Jaguar France challenged that court's jurisdiction by invoking the arbitration clause mentioned in art.14 of the agreement, which conferred jurisdiction to an arbitrator appointed by the President of the Law Society in London. Renault argued that the arbitration clause was invalid because, among other things, it was a domestic arbitration as he was not a merchant; therefore, the President of the Law Society in London had no jurisdiction over the dispute. The Tribunal de Grande Instance agreed with Renault by dismissing the jurisdiction of the President of the Law Society in London as the sale of the Jaguar XJ 220 did not involve international trade interests. According to the Court, the arbitration clause was void because Renault was not a merchant and did not intend to resell the Jaguar XJ 2020; instead, it was for personal use. Jaguar France appealed. The court of appeal, however, did not agree with the Tribunal de Grande Instance's decision. It stated that regardless of the legal role Jaguar or Renault played, the agreement had involved international trade interests within the meaning of art.1492 of the new Code of Civil Procedure, as it provided a transfer of goods and money across borders.[47] The Paris court of appeal also ruled that:

> "The international nature of an arbitration must be determined according to the economic reality of the process during which it arises; in this respect, it is sufficient if the economic transaction should entail a transfer of goods, services or funds across national boundaries, while the nationality of the parties, the law applicable to the contract or the arbitration, and the place of arbitration are irrelevant."[48]

[44] Palestinian law, as most legislation worldwide, starts with a definition article (art.1). Therefore, it can include a definition of economic relations that mirrors the aims to improve the approach towards international arbitration.

[45] E. Loquin, note on Court of Appeal, Paris, 13 June 1996, JDI 1997, p.151.

[46] ***

[47] 7 December 1994, *V 2000 v Project XJ 220 ITD*, 1996 Rev. Arb. 245 (Paris Cour d'Appel).

[48] Judgment of 14 March 1989, *Murgue Seigle v Coflexip*, 1991 Rev. Arb. 345, 355 (Paris Cour d'Appel). Unofficial translation from Hassan Mohammed Darwish,. "Critical Study of the Concept of International Arbitration in the UAE: Identifying Problems Affecting the Recognition and Enforcement of Foreign Arbitral Awards", University of

2.3.2 The institutional arbitration criterion

The "institutional arbitration" criterion introduced by the Egyptian legislature is novel in the Arab world and does not mirror any of the criteria under art.1.3 of the Model Law.[49] It shows a clear legislative intent to support institutional arbitration by granting "international nature" to any arbitration conducted by a well-known arbitration institution. This international nature will exempt the arbitration from being governed by the same rules that govern domestic arbitration. For example, it allocates jurisdiction over institutional arbitral proceedings to the Court of Appeal and not the courts of the first instance; it also applies international public policy to the arbitration procedures instead of national public policy. Accordingly, in a dispute between two Egyptian companies, the arbitration will be considered international by EAL if the parties agreed on resorting to the Cairo Regional Centre for International Commercial Arbitration.[50] This approach will boost the credibility of institutional arbitration and denote apparent legislative favouritism towards institutional arbitration irrespective of whether the institution is in Egypt or abroad. In this regard, The Cairo Court of Appeal upheld in a 2010 judgment, ruling that:

> "The mere reference to a permanent arbitration institution located in Egypt or abroad confers upon arbitration the international character, notwithstanding that all factors of the commercial dispute relate to Egypt. Since the arbitration relating to the current dispute took place under the auspices of the Cairo Regional Centre for International Commercial Arbitration, it shall be deemed international from the viewpoint of the law."[51]

In summary, the PA should take progressive measures to enable the Palestinian arbitration environment to become a viable option for investors to resolve their disputes expeditiously instead of being a source of costly and protracted conflict between commercial entities. Due to political instability, the inexperienced judiciary, and the outdated legal system, it is necessary to improve the scope of Palestine's international commercial arbitration. Therefore, the PA should adopt a new legal approach to prevent international arbitration from being affected by the complex realities of the Palestinian legal system, which will then encourage the international business community to conduct business in Palestine.

The PA does not need to have a broad and complex definition of international arbitration, as Palestine is yet to become such a well-established economy that international businesses are keen to settle their disputes according to its laws. It is the unrelenting reality that the Palestinian legislature needs to realise before amending the law. At the time that this research is being written, a new arbitration law is being drafted. Therefore, it is an opportunity for the Palestinian legislature to consider its current approach to the definition of international arbitration and what is suitable for the Palestinian legal system. The economic standard has its

Essex, 2016. Online at *http://repository.essex.ac.uk/18812/1/Hassan%20Arab-%20Final%20Thesis%5B890%5D.pdf* [Accessed 15 July 2021].

[49] Article 3.2 of the EAL states that "arbitration is considered international if the arbitration parties agreed to resort to a permanent arbitration institution located inside or outside Egypt". Unofficial translation.

[50] Cairo Court of Appeal, Commercial Cir. 63, Case No.64 of J.Y. 113, Hearing Sess. (19 March 1997); *see also* Cairo Court of Appeal, Commercial Cir. 50, Case No.45 of J.Y. 1995, Hearing Sess. (5 June 1996).

[51] Cairo Court of Appeal, Commercial Cir. 7, Appeal No.10 of J.Y. 127, Hearing Sess. (6 September 2010). Unofficial translation.

drawbacks. For example, the economic approach ignores the fact that the nationality of the parties is a consideration that is highly relevant to the primary purpose of the international arbitral process. Because parties do not have confidence in and familiarity with the courts of the home jurisdiction of their counterparty, they enter into international arbitration agreements.[52] However, the economic standard is the most suitable solution currently, as this research discussed earlier. The PA should also consider the institutional arbitration criterion that the EAL introduced. This criterion will boost the credibility of its international arbitration institution (i.e. the Palestinian International Arbitration Chamber). It will also encourage investors to conduct their business in Palestine, knowing that any disputes will be resolved by an institution outside the restrictive Palestinian outdated rules.

3. The need for harmonisation and a balanced judicial review of international commercial arbitration in Palestine

3.1 Introduction

When conducting international arbitration, or when enforcing an arbitration award in Palestine, reviewing the PLA is essential, as it is the law of the place of arbitration or the enforcing country's law.[53] The problem is that PLA still has characteristic mandatory procedural laws that could hinder the parties' expectations when they have adopted a specific set of arbitration rules. In this regard, although parties who choose international arbitration want to have their disputes resolved by a private forum, Palestinian national courts, whether as the courts of the place of arbitration or enforcement, are likely to have broad authority over the arbitration process. Hence, one of the expected advantages of international arbitration, the independence of arbitration from national courts, will be hindered by PLA's peculiar mandatory procedures and the undesired involvement of the national courts.

To resolve this problem, the Palestinian legislator must harmonise the law and practices of the PLA with international best practices and approaches and, therefore, reduce the impact of outdated legal standards on international commercial arbitration. The harmonisation should include the shared understandings of treaties such as the New York Convention, the Model Law, the laws of comparative states, and other scholarly works. In addition, the Palestinian legislator should reconsider its current approach towards the court's authority when reviewing arbitration awards and adopt a modernised system that ensures the speed and finality of arbitration and, at the same time, does not prejudice the fairness and enforceability of the award.

While considering the above, the following section will first discuss what harmonisation means for the PLA and how it can be achieved. This section will also discuss the scope of the Palestinian judicial review of arbitration awards.

[52] To read more on this, see: Born (ed.), "Chapter 2: Legal Framework for International Arbitration Agreements", in *International Commercial Arbitration* (The Netherlands: Kluwer Law International, 2021), p.362.

[53] Besides any other laws applicable in the country where enforcement is sought depending on the case presented.

3.2 Harmonising the PLA with the best up-to-date standards of international arbitration

For the PA to improve the environment for international commercial arbitration, it must consider harmonising the PLA with the most efficient legal theories and practices. Harmonisation of international law and best practice is widely accepted internationally as the way to reduce gaps between national arbitration laws and, eventually, improve the environment for international commercial arbitration.[54] Legal harmonisation promotes arbitration efficiency by minimising the scope for misunderstandings, especially in disputes involving jurisdictional matters and legal conflicts.[55] In this regard, the Palestinian legislator first needs to consider amending the PLA to meet the models set by international and regional arbitration practices. Even though Palestine is a party to multiple conventions related to international arbitration, such conventions have limited effects on the Palestinian reality. For example, Palestine has been a contracting state to NYC since 2015. However, it has not yet issued the necessary enforcing decree for NYC to be considered a part of the Palestine legal system.[56]

The PLA, on the other hand, does not respect NYC art.III. The latter states that contracting states "shall not impose substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards". Despite signing the NYC, the PLA has not yet harmonised its laws to align with NYC's approach as the PLA still imposes many conditions on enforcing foreign arbitration awards. By way of example, the PLA does not provide a time limit for a judge to grant the exequatur for the enforcement of foreign arbitration awards. Though this rule is purely procedural, it imposes an additional restriction on foreign arbitration awards, considering the time-consuming procedures of Palestinian courts.[57]

Also, Palestine should consider the standards mentioned in the Model Law, as multiple countries worldwide already accept the Model Law as the standard for their laws.[58] Although this research has criticised the adoption of art.1.3 of the Model Law as unsuitable for the Palestinian reality, it does not suggest that the PLA should not harmonise its rules with other features of Model Law.[59]

[54] R. Brazil-David, "Harmonization and delocalization of international commercial arbitration" (2011) 28(5) *Journal of International Arbitration* 445–466.

[55] J.J. Spigelman, "Transaction costs and international litigation" (2006) 80 *Australian Law Journal* 438.

[56] In this regard, the Palestinian constitution ruled that international treaties that add to existing domestic laws are not self-executing (i.e. NYC). Implementing legislation is necessary for the treaty to have the force of law. Canonically, it is the implementing legislation, not the text of the treaty, which will be given direct application by national courts. For more on this, see M.A. Abu Shehab, "An analysis of the enforcement of foreign arbitration awards in Palestine: realities, Drawbacks, and Prospects", *Arab Law Quarterly*. *doi: 10.1163/15730255-BJA10062*.

[57] See fn.56 above.

[58] Legislation based on the UNCITRAL Model Law has been enacted in: Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Bulgaria, Cambodia, Canada, Chile, China (Hong Kong and Macau Special Administrative Regions), Croatia, Cyprus, Denmark, Egypt, Estonia, Germany, Greece, Guatemala, Hungary, India, Iran, Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Oman, Paraguay, Peru, the Philippines, Poland, the Republic of Korea, the Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Tunisia, Turkey, Ukraine, the UK (Scotland), Bermuda (overseas territory of the UK), and the US (California, Connecticut, Illinois, Louisiana, Oregon, and Texas; Uganda, Venezuela, Zambia, Zimbabwe). Available at *www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html*.

[59] The Model Law deals with all stages of the arbitral process: Chapter II deals with Arbitration Agreement, Chapter III deals with Composition of the Arbitral Tribunal, Chapter IV deals with Jurisdiction of the Arbitral Tribunal, Chapter V deals with Conduct of the Arbitral Proceedings, Chapter VI deals with Making of Award and Termination

Notwithstanding, this research suggests three significant issues that the PA should consider when attempting to harmonise the PLA with international best practice: the competence-competence principle, the approach towards formation requirements, and interim measures.

3.2.1 The competence-competence principle

Competence-competence means that "international arbitral tribunals have the power to consider and decide disputes concerning their own jurisdiction".[60] It is a broadly adopted principle that almost every legal region has its own version of the competence-competence principle. This principle is contained in art.16[61] and reflected in art.8 of Model Law, which places any court under the obligation to refer parties to arbitration unless the arbitration agreement is invalid, inoperative, or incapable of being performed.[62]

The PLA has followed the approach of Model Law through its arts 7 and 16, respectively. Nevertheless, there are multiple instances in practice where Palestinian courts had decided on the existence and validity of an arbitration agreement before or while arbitral proceedings were still pending and irrespective of the arbitral tribunal's jurisdiction. The Palestinian courts based this interference on PLA art.7, which is different from Model Law art.8, albeit similar in purpose. Article 7 of the PLA states that:

> "If any of the parties of arbitration initiates any legal action before any court against the other party regarding a matter that was agreed upon to be referred to arbitration, the other party, before debates start on the claim, shall have the right to request from the court to end this procedure. In which case, the court must make this ruling if it is convinced of the validity of the arbitration agreement."[63]

By analysing it, PLA art.7 provides considerable authority to the courts when deciding to refer the matter for arbitration by allowing the courts to extensively examine the arbitration agreement and analyse the merit of the dispute to be "convinced" that the arbitration agreement is valid. However, the PLA provides no guidance on the standard of examination that the court may undertake in determining whether the arbitration agreement is void or incapable of being performed. Still, based on past practices of the courts, they mostly will decide to hear party pleadings before deciding on whether to refer the dispute to arbitration

Proceedings, Chapter VII deals with Recourse Against the Award and Chapter VIII deals with Recognition and Enforcement of the Award.

[60] G.B. Born, "Chapter 7: International Arbitration Agreements and Competence-Competence", in *International Commercial Arbitration* (The Netherlands: Kluwer Law International, 2021), pp.1139–1348.

[61] Article 16.1 of Model Law states that "the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null, and void shall not entail ipso jure the invalidity of the arbitration clause".

[62] Article 8 of Model Law states that: "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed".

[63] Unofficial translation.

or not.[64] For example, in the Nablus Court of First Instance, the defendant, whom the author represented, pleaded the existence of an arbitration agreement based on PLA pled 7 in a sale of goods agreement. In that case, the court refused to grant the plea and did not refer the dispute to arbitration, ruling that the arbitration agreement did not cover matters related to executing the sale contract. Instead, it only covered disputes related to the formation of the contract.[65] This decision was a clear violation of the competence-competence principle as the court had reviewed the case's merit and the scope of the arbitration agreement, which should be reviewed by the arbitral tribunal, not the court.

The PLA should harmonise its rules on this matter and amend art.7 to align with the Model Law approach. Comparative legal systems can provide examples for harmonisation on this matter. For instance, EAL art.13 provides that the court must rule that a case is not accepted if the other party demands so before making any request or defence. This article is progressive as it does not provide the court with any authority to decide on the matter. It must not accept the case once one of the parties raises the existence of an arbitration agreement.[66] This implies that national courts can only exercise a prima facie review to ensure the mere existence of an arbitration agreement and that the arbitral tribunal enjoys superiority to decide on its competence over state courts.[67] In this regard, the Egyptian court of cassation ruled that:

> "The text in the first paragraph of Article 13 indicates that the legislator had explicitly asserted that if the defendant pleads before the court in a dispute that includes an arbitration agreement, the court must respond and rule not to accept the case, provided that the plea is raised before making any request or defence in the case."[68]

In the same context, art.1022a of the Dutch Code of Civil Procedures (DCCP) has followed art.8 of Model Law. It states that "If a dispute in respect of which the parties have concluded an arbitration agreement is brought before a court *before* arbitral proceedings are commenced, the court is obliged to declare that it lacks jurisdiction if one of the parties invokes the existence of the arbitration agreement".[69] Nevertheless, DCCP art.1022 has taken a step further from Model Law by stating, in art.1022c, that the court shall only declare that it has jurisdiction if the requested decision cannot, or not promptly, be obtained in arbitral proceedings. Therefore, Dutch law has guarded the competence-competence principle by providing the court only a prima facie authority to review arbitration agreements with limited

[64] O. Takrouri, أسس التحكيم المحلي والدولي (*The Principles of Domestic and International Arbitration*) (Nablus: Alshamel Publishing & Distribution, 2019), p.118.

[65] Nablus Court of First Instance, Case 492, 2020.

[66] However, the court examination of the arbitration agreement to stay proceedings is conditioned on the defendant's objection, such that the court is not under any obligation to reject the case *ex officio* for the mere existence of an arbitration agreement.

[67] EAL art.13.1 was argued to be unconstitutional before the Supreme Constitutional Court because it violates the citizens' right to access justice. However, the Supreme Constitutional Court confirmed the validity of EAL art.13.1, holding that it merely gives effect to the parties' agreement to resort to arbitration. See Supreme Constitutional Court, case 155, constitutional year 20, hearing session 13 January 2002.

[68] Appeal No.11701 of the Judicial Year 84 of the Commercial Circuits—Session 03/24/2016. Unofficial translation.

[69] The Dutch Arbitration Act contains two sets of provisions for "staying" court proceedings considering an existing arbitration agreement. One pertains to an arbitration agreement that specifies the Netherlands as the seat of the arbitration (DCCP art.1022), and the other relates to an agreement that refers to a seat outside the Netherlands (DCCP art.1074). Substantively, there is no difference between these two provisions. In both cases, the court will consider the arbitration agreement if a party invokes it before raising any defense on the merits.

jurisdiction in exceptional circumstances if the arbitration procedures cannot resolve the matter. The court has no discretionary authority in this regard; it may solely examine whether the arbitration agreement is valid. The District Court of the Hague took a more progressive approach by ruling that, if a dispute that includes an arbitration agreement is filed at the court after arbitral proceedings have been commenced, the court is not entitled to investigate the validity of the arbitration agreement, leaving this authority to the arbitral tribunal.[70]

3.2.2 Liberalism in writing requirements

The PLA has a strict rule on the writing requirement, the same approach as multiple legal regimes like Jordan,[71] Lebanon[72] and NYC.[73] However, drafting a written document is impossible or impractical in several situations, such as trade deals resulting in fast negotiations. In such cases, with the parties' consent to arbitrate, the validity of the arbitration agreement should be recognised.[74] In light of drafting a new arbitration law, the PA has an opportunity to respect arbitration abroad more and make arbitration less rule-bound (and more informal) by liberalising the writing requirements. Theoretically, the PA can liberalise writing requirements at various stages, either for the stay or the enforcement stage. However, it does not seem sufficient to justify such distinctions, as the distinction would add significant complexity to the implementation of the PLA. Therefore, this research recommends a single liberalised regime applicable to both stays and enforcement from abroad, inspired by the 2006 revision of the Model Law's approach to writing requirements.

The 2006 revisions of art.7 of the Model Law adopted substantially less restrictive formal writing requirements than those prevailing in most jurisdictions, which adequately adhere to international best practices.[75] In amending art.7, the Model Law adopted two options, which reflect two different approaches to forming the arbitration agreement.[76] In this regard, UNCITRAL has exhaustively reviewed the pros and cons of liberalising writing requirements and gives two potential international practices.[77]

[70] District Court the Hague 19 May 2004, JBPr 2004, 63 (see also DCCP art.1052.4).

[71] Article 10 of the Jordan Arbitration Act has explicitly stated that oral arbitration agreements are invalid.

[72] Article 763 of the new Lebanese Civil Procedures Act.

[73] NYC art.II states that "Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." The second paragraph of art.II adds the definition of "agreement in writing" that shall include "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams". Also, other international conventions have adopted the same approach (e.g. Inter-American Convention art.1; European Convention art.I.2.a).

[74] UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006, p.28.

[75] Born, "Chapter 5: Formation, Validity and Legality of International Arbitration Agreements", in *International Commercial Arbitration* (The Netherlands: Kluwer Law International, 2021), p.704.

[76] UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006, p.28.

[77] Article 7 of the 1985 version of the Model Law was similar to art.II.2 NYC strictly requiring an arbitration agreement to be in writing. It states, "The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract." For more information see UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006, p.28.

The first option of the revised art.7 Model law provides broad liberalisation. However, it completely excludes oral agreements that were not "recorded" in any form.[78] This option follows the NYC in requiring the written form of the arbitration agreement, but it recognises that a record of the agreement's contents in any form is equivalent to traditional writing. As a result, the arbitration agreement may take any form, including oral, as long as the agreement's content is recorded. Meanwhile, the second option of art.7 provides complete liberalisation, as has long been true in Sweden,[79] Belgium,[80] New Zeeland[81] and France.[82] For example, the 2011 amendments to French arbitration legislation confirmed that "[t]he arbitration agreement shall not be subject to any requirement as to its form".[83]

Article 5 of the PLA takes a similar approach to the first option provided by the Model Law by stating that: "… (2) The arbitration agreement must be written. (3) The arbitration agreement shall be considered written if it includes a text signed by the parties or implied by exchange of letters, telegrams, or any other written documents between them". However, the Palestinian regulator should consider two differences between the PLA and Model Law to achieve proper harmonisation with the Model Law. The first difference is that the Model Law does not require signatures of the parties or an exchange of messages, as the PLA explicitly does in para.3 of art.5.[84] The second difference is that the Model Law states: "the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing provided that the reference is such as to make that clause part of the contract". It thus stresses that relevant contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration agreement made "by reference".[85]

The Dutch and the UAE[86] arbitration rules have reflected the first option of Model Law art.7 to broadly liberalise arbitration agreements to cover all written form requirements, except for purely oral agreements.[87] Thus, both legal regimes require written agreements but allow electronic data to prove the arbitration agreement.[88] Both legal regimes, and others,[89] accept arbitration by referral, an

[78] Born, "Chapter 5: Formation, Validity and Legality of International Arbitration Agreements", in *International Commercial Arbitration* (The Netherlands: Kluwer Law International, 2021), p.741.

[79] Swedish Arbitration Act s.1.

[80] Belgium Judicial Code art.1681.

[81] New Zealand Arbitration Act Sch.1, art.7.1.

[82] French Code of Civil Procedure art.1507.

[83] French Code of Civil Procedure art.1507.

[84] Also, EAL art.12 provides the same approach by requiring signatures or an exchange of messages between parties. NYC art.II.2 requires that both parties express the will to arbitrate in writing, by their signatures or an exchange of correspondence.

[85] UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006, p.28.

[86] The Federal Law of Arbitration No.6 of 2018.

[87] DCCP art.1021 states that: "For this purpose, an instrument in writing which provides for arbitration, or which refers to standard conditions providing for arbitration is sufficient provided that this instrument is expressly or impliedly accepted by or on behalf of the other party. The arbitration agreement may also be proven by electronic data."

[88] It is worth noting that the EAL does not expressly include the possibility of entering into an arbitration agreement through electronic means. However, it does not exclude it. Therefore, nothing prohibits the conclusion of arbitration agreements by electronic means. Insofar as the electronic communication fulfils the requirement of writing, the arbitration agreement shall be valid.

[89] For instance, art.10 of the Jordanian Law of Arbitration law on arbitration of 2001. In this regard, the Amman Court of Appeal ruled that "The referral of bills of lading to the ship charter agreement that includes an arbitration clause is considered binding on all contracting parties with all the conditions it contained, including the arbitration clause, even if this referral came in a general form", Case number 1919/2014 issued in 2015.

approach that the PLA lacks and should adopt when amending its rules to harmonise with international best practices.

For instance, DCCP art.1021 allows incorporating an arbitration agreement by referencing one instrument into another agreement. For the application of art.1021, it is sufficient that the other party expressly or implicitly accepts the instrument, which contains an arbitration clause in its standard conditions. No further requirement is imposed. The Dutch supreme court ruled in *ABN AMRO v Teisman* that:

> "Neither Article 1020.5 nor Article 1021 DCCP sets special requirements for how the consent to arbitrate is formed. Further, Article 17 of the Dutch Civil Code does not impose any requirements on forming the parties' consent. The legislator seemingly desired to leave the analysis over the substantial form of the parties' consent to the legal practice and jurisprudence. Since the incorporation of collective labour agreements in individual employment contracts is a common way of agreeing on terms of employment, it, therefore, seems correct to assume that an arbitration clause can also be validly agreed on in this way."[90]

In the same context, the UAE court of cassation ruled that:

> "The reference in the construction agreement to resolve any dispute arising between the contractor and the owner per the General Conditions of the International Federation of Consulting Engineers (FIDIC) is sufficient to indicate the parties' consent to arbitrate without the need to mention the arbitration agreement in the construction agreement expressly."[91]

To conclude, it is easier for the PA to harmonise the PLA with the first option of Model Law art.7, as it currently has a similar approach that needs few amendments, rather than making a considerable revision to eliminating the writing requirement. Nevertheless, whichever liberalisation option the PA chooses to harmonise the PLA with, it will be essential to address the situation where the parties incorporate, by reference, a standard form contract that includes an arbitration clause within it.

In the author's opinion, the Palestinian legislator must not be strict regarding the written requirement of the arbitration agreement following the approach taken by multiple comparative legal systems. The liberalisation of the arbitration agreement is needed as commercial litigation has become so expensive and slow in the Palestinian courts.[92] Also, there are problems relating to the cross-border enforceability of judgements.[93] Therefore, it is more important to consider the validity of the parties' consent to an international arbitration agreement rather than focusing on the formal requirements for international arbitration agreements.[94]

[90] See Supreme Court 17 January 2003, *ABN AMRO v Teisman*, NJ 2004, 280. Unofficial translation.

[91] *ABN AMRO v Teisman* Dubai Court of Cassation, Civil Case 100 of 2001. Unofficial translation.

[92] Palestinian Chief Justice M. Ali, "Fifth conference of supreme court presidents 2014", online at: *carjj.org/sites/default/files/ldr_lqdyy_wthrh_fy_ttwyr_lqd_-_wrq_ml_flstyn.pdf* [Accessed 10 March 2020]. Please note that Palestine does not have special commercial courts. Hence, all commercial cases are reviewed in the regular civil courts.

[93] See also S.I. Strong, "What constitutes an 'agreement in writing' in international commercial arbitration? Conflicts between the New York convention and the federal arbitration act" (2012) *Stanford Journal of International Law* 47, 48.

[94] Born, "Chapter 5: Formation, Validity and Legality of International Arbitration Agreements", in *International Commercial Arbitration* (The Netherlands: Kluwer Law International, 2021), pp.675–1026.

3.2.3 Interim measures

Another best practice approach that the PA should consider is regarding interim measures. PLA art.33 has provided that the arbitral tribunal may, while reviewing the dispute, issue an order to take any interim measures it deems appropriate provided that the arbitration agreement allows for that. Also, art.66 of the Executive Regulations of the Arbitration Law (ERA) states that: "If the competent court has authorised the interim measures in a dispute reviewed by arbitration, it may decide to seize or take urgent action without prejudice to the subject matter of the dispute".

There are three concerns with PLA art.33 and ERA art.66. First, the PLA does not give the arbitration tribunal the presumptive authority to decide on interim measures, restricting that authority of the parties' prior approval. It becomes problematic for parties that did not have a previous agreement on interim measures before the dispute arose. It is almost impossible for the party against whom the measures are brought to agree on it. Consequently, the Article will become practically ineffective in the absence of prior consent.

The second issue is with the ERA text, which adds court consent to decide interim measures. Requiring the court's approval of interim measures decided by arbitrators will prolong and duplicate the litigation, as art.66 of the ERA presents a layer of court intervention to the arbitration process and violates the principle of competence-competence. In practice, this is important as arbitrators lack the power to enforce their orders, which would need to be enforced by a national judge. In that regard, the Palestinian court will follow the rules specified by the Palestinian Code on Civil Procedures (PCCP),[95] including examining the validity of the arbitration agreement. This approach is criticised as it opposes the flexibility and speed that the parties assume in international arbitration.

The third concern relates to the authority of arbitrators regarding interim measures. Even with prior consent by the parties, the tribunal cannot rule on all types of interim measures because it should respect the general rules of the PCCP regarding interim measures, which provides specific conditions for interim measures to be respected.[96] Therefore, the arbitration tribunal cannot order forced execution or seizure of goods, for example, as only the courts have the authority to issue such orders.[97]

The provisions in Model Law relating to interim measures are much more comprehensive and less restrictive than the PLA and ERA. [98] The key differences are the following:

(1) Unlike art.17A of the Model Law, the PLA and ERA do not provide requirements to request interim measures, leaving this task to the PCCP.[99]

[95] Law No.2 of 2001.

[96] Articles 102–114. According to these articles, interim measures will not be ordered unless the following conditions are satisfied: (1) there is an imminent danger or risk of substantial prejudice to the rights of the requesting party; (2) delay to the final decision may prejudice the rights or legal status that the measure aims to protect; and (3) the required measures should not have an impact on the outcome or the merits of the dispute.

[97] Y. al Shindi, التحكيم الداخلي و الدولي في ظل قانون التحكيم الفلسطيني (*Domestic and International Arbitration in Palestine*) (Birzeit: Birzeit University, 2014), pp.233–234.

[98] Article 17A specifies prerequisites for issuing interim measures; art.17D-G add further provisions (for example, providing security). Article 17H provides for enforceability, and art.17J for refusing enforcement. See UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006, p.31.

[99] Law No.2 of 2001.

(2) The PLA and ERA do not include rules describing the procedure for granting interim measures, unlike arts 17B, 17C, and 17D of the Model Law.

(3) The PLA and ERA do not contain rules requiring the parties to disclose any material change in the circumstances based on which measures were requested or granted, unlike the regulations mentioned in art.17F of the Model Law.

(4) Unlike the PLA and ERA, arts 17B and 17C of the revised Model Law allow, subject to certain safeguards, arbitrators to issue interim measures ex parte, that is, in the absence of the opposing party. This means the opposing party cannot frustrate the purpose of requesting interim measures.[100]

(5) Unlike art.66 of the ERA, Model Law does not grant authority for the national courts' approval on interim measures decided by arbitrators.

The Palestinian legislator must reconsider harmonising its laws with Model Law to clarify the role of the arbitration tribunal in issuing interim measures without harmful interference by the national courts.[101] Moreover, providing a broad authority for the arbitration tribunal reflects the parties' autonomy to exclude the state's judiciary from the dispute, especially in international arbitration when one party is usually a foreign national.[102] In addition, providing the arbitral tribunal with this authority leads to achieving the effectiveness of arbitration since the arbitral tribunal will be more familiar than the judiciary with all the subject matter of the dispute and its elements. Hence, the arbitral tribunal is more suitable than the judiciary to evaluate the appropriateness of whether to take interim measures.[103] As a result, the differences mentioned above should be addressed in the following amendment of the PLA or the ERA if the PA is serious regarding improving the arbitration environment. If such harmonisation occurs, the PA will benefit from the comparative approach of regional and international legal systems on interim measures.

For instance, EAL art.24 does not provide the court with the authority to approve the tribunal decision on interim measures. This is a crucial step to limiting the intervention of the national courts in relation to interim measures. According to art.24, if the parties agree, it is accepted that an arbitral tribunal has the authority to order any interim measures, provided that such relief is available under the law applicable to such relief.[104] On the other hand, UAE law has a different approach. It provides presumptive authority to the tribunal to decide on interim measures unless the parties decide otherwise. Meaning the parties have the power to prevent the authority, not to grant it. Also, UAE art.21 does not give the court the authority to review the tribunal"s decision on interim measures.

[100] UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006, p.31.

[101] More on court interference is in s.3.3.

[102] H.A.S. Haddad,مدى اختصاص القضاء الوطني باتخاذ الإجراءات الوقتية والتحفظية في المنازعات" الخاصة الدولية المتفق بشأنها على التحكيم (*The Extent of the National Judiciary's Competence to Take Provisional and Precautionary Measures in International Private Disputes Agreed on Arbitration*) (Alexandria: Dar El Fker Egamie, 1996), p.405.

[103] A.A.S. Al-Hadidi, التدابير الوقتية والتحفظية في التحكيم الاختياري (*Provisional and Precautionary Measures in Optional Arbitration*) (Cairo: Dar Al Nahda Al Arabia, 1997), p.68.

[104] A.A.S. Al-Hadidi, *Provisional and Precautionary Measures in Optional Arbitration* (1997), p.68.

Furthermore, DCCP art.1049 provides that the arbitral tribunal has the authority to take interim measures without the party's prior consent. No requirements exist regarding the form of a tribunal's decision on interim measures.[105] According to DCCP art.1022c, national courts shall only declare authority to order interim measures if the requested decision cannot, or cannot promptly, be obtained in arbitration. Arbitration is, hence, the default means concerning interim measures.[106]

3.3 The scope of the judicial review of arbitration

When parties agree to settle their disputes through a private forum, an extensive judicial review of the resulted arbitral award would, in principle, contrast with the parties' initial contractual desire. However, the binding nature of the arbitral award and its enforceability demand some level of judicial scrutiny.[107] Thus, this research argues that having an efficient, reliable and harmonised arbitration environment requires a balanced judicial review approach that reflects the consensual nature of international arbitration, which desires a dispute settlement mechanism free from judicial intervention.

Based on the current rules of the PLA, national courts have broad authority to intervene in the arbitral awards through setting aside as provided in PLA art.43.[108] This expansion allows, at least in theory, a review of the merits of the dispute by the competent court in certain instances. Therefore, this section will focus on the conditions for setting aside and nullity of the award under the PLA. In summary, the grounds for annulment of an arbitral award under art.43 of the PLA are: (a) if one of the parties lacked the capacity to conclude a binding arbitration agreement;[109] (b) if one of the arbitrators is affected by lack of capacity before issuing the arbitration award;[110] (c) if the award violates public policy in Palestine;[111] (d) the invalidity of the arbitration agreement;[112] (e) the misconduct of the arbitration

[105] It is worth mentioning that DCCP arts 1022a and 1074a were revised in the 2015 amendment of the Netherlands Arbitration Act. The amendment introduces a change from a discretionary to a mandatory regime. Rather than providing that the court "can" declare that it has no jurisdiction in view of all the circumstances (as in old DCCP art.1051.2, the predecessor of arts 1022a and 1074a), the 2015 Arbitration Act provides that the court "shall" declare that it has no jurisdiction if the requested relief can be obtained in arbitration in a timely fashion (arts 1022c and 1074d).

[106] See further on DCCP arts 1022c and 1074d: T. Stouten en L. Stevens, "Het tijdigheidsvereiste van artikel 1022c en artikel 1074d in kort geding", TvA 2016/25. Also, A.D. Josephus Jitta, "Reactie op "Het tijdigheidsvereiste van artikel 1022c en artikel 1074d Rv in het kort geding", TvA 2016/68. See also District Court Amsterdam, 9 April 2015, TvA 2015/75 and District Court Hague 12 June 2015, TvA 2016/15.

[107] H. Abedian, "Judicial review of arbitral awards in international arbitration-a case for an efficient system of judicial review" (2011) 28(6) *Journal of International Arbitration* 553–590.

[108] Article 43 of PLA states that: "All of the parties of arbitration shall have the right to apply for setting aside the arbitral award before the competent court for any of the following reasons: 1) In the event any of the arbitration parties lack of capacity unless represented in the correct legal manner. 2) If the arbitration tribunal or any of its members thereof is affected by lack of capacity before issuing the arbitration award. 3) In case of the violation of the public policy in Palestine. 4) the invalidity of the arbitration agreement or failure to Comply with Contractual Time Limits. 5) Misconduct by the arbitration tribunal or violation of what the parties had agreed on regarding application of legal rules on the dispute or if the tribunal does not abide by the agreement or the subject matter of the arbitration. 6) If the arbitration award is considered null or in case of material violation of procedural rights. 7) If the arbitration award is obtained by fraud or deception unless the awards had been enforced before the discovery of such fraud or deception." Unofficial translation.

[109] Article 43.1 PLA.

[110] Article 43.2 PLA.

[111] Article 43.3 PLA .

[112] Article 43.4 PLA.

tribunal;[113] (f) the material violation of procedural rights;[114] or (g) if the arbitration award is obtained by fraud.[115]

Although the PLA has, to some extent, followed art.34.2 (a) and (b) of Model Law regarding the setting aside, it departed from the exact text of the Model Law to make its rules more adaptable to local requirements.[116] This approach favoured by the Palestinian legislature expands the grounds for judicial scrutiny of arbitral awards compared to art.34 of Model Law. Thus, three differences between Model Law and the PLA are critical here.

The first issue is art.43.3 of the PLA, which states that arbitrators' misconduct is a condition for setting aside. The text "arbitrators' misconduct" is vague and fluid, and the PLA does not provide a clear standard for the definition of arbitrators' misconduct. This condition opens the door for national courts to review the merit of the case to decide on the arbitration misconduct.[117] There is no need for such a condition due to the existence of other conditions. For example, art.43.6 regarding void procedures is sufficient to ensure the fairness of the arbitration process and the arbitrators' conduct without the need for the court to revisit the merit of the dispute.[118] By reviewing comparative regional and international laws with a pro-arbitration environment, none of them includes the arbitrator's misconduct as a condition for setting aside, for example, the EAL, the UAE arbitration rules, or DCCP. In fact, the Egyptian court of cassation has stressed that the arbitrators' conduct is not a sufficient factor for setting aside by ruling that:

> "The arbitral award may not be set aside based on the arbitrators' failure to understand the dispute or violating the law because the claim for setting aside the arbitral award is not a judicial appeal. Accordingly, the setting aside claim does not extend to reconsidering the merit of the dispute and disparaging the final result of the arbitral award. The competent court does not have the right to examine the arbitral award to assess its suitability or monitor the arbitrators' judgment, given that the action for setting aside differs from the judicial appeal."[119]

The second issue is art.43.7, which states that arbitral awards may be set aside if obtained by fraud and deception. This research does not advocate that fraud should not be a part of annulment conditions. However, providing a general definition of fraud and deception will open the way for national courts to tighten control of the arbitration process. Fraud and deception are not mentioned as separate set-aside conditions in Model Law or advanced legal systems like the UAE, EAL and DCCP. Not mentioning fraud and deception as a separate condition does not open the door for the parties to obtain arbitral awards through fraudulent methods

[113] Article 43.5 PLA.
[114] Article 43.6 PLA.
[115] Article 43.7 PLA.
[116] Shindi, *Domestic and International Arbitration in Palestine*) (2014), pp.328–329.
[117] Shindi, *Domestic and International Arbitration in Palestine*) (2014), p.338.
[118] Please note that the term "misconduct" provided in the PLA applies to both ad-hoc and institutional arbitration. Therefore, even if the arbitration institution has its own regulations against misconduct, it will not change the fact that Palestinian courts will apply their own interpretation of "misconduct" even if the award is issued by an international institution, like the ICC. That is because the Palestinian judiciary does not relate "misconduct" with "due process". Therefore, the institution's internal regulations are irrelevant to the Palestinian judge because it's a pure matter of "due process".
[119] Egypt Court of Cassation, case 18309, Judicial Year 89, economic session 27/10/2020. Unofficial translation.

as the violation of public policy or lack of due process conditions covers fraud and deception. On the contrary, eliminating the vague, fluid "fraud and deception" condition will ensure that awards are only set aside if the violation is serious since they would be covered by the public policy condition.[120]

The third issue is that the Palestinian legislator has subjected the setting aside procedures to PCCP.[121] Consequently, the court's decision on setting aside may be appealed before the Court of Appeal and the Court of Cassation, as per ordinary judicial regulations. This approach leads to subjecting the arbitration, which is supposed to enjoy speed and efficiency, to the same routine court procedures that the parties initially wished to avoid.

As for comparative legal systems, Egyptian and UAE legislators specify that setting aside arbitration awards is not subject to the appeals stipulated in the procedural laws for ordinary litigation.[122] It is stressed by both laws that the competent court for setting aside is the Court of Appeal, which means there is only one step for appealing instead of the two steps in PLA art.46.[123] Further, in the Netherlands, the application for setting aside must be made to the Court of Appeal.[124] By agreement, the parties may also exclude recourse to the Supreme Court.[125]

As a final remark on this issue and given its legal reality, the PA needs to abandon the tradition of court intervention and the supervision inherited from its judicial history. The next amendment for the PLA should clarify the limited ability of courts to intervene in the arbitral process. It is vital to address the differences mentioned above to create a sound balance between the independence of the arbitration process and judicial scrutiny. Parties to international arbitration require their disputes to be solved away from national courts, especially in countries where the court system suffers from various hurdles, like Palestine. Suppose the PLA continues to provide the courts with vast powers to intervene in the arbitral process. In that case, the parties to the arbitration will be held up with long, complicated and exhausting court procedures that, in many cases, may take years to resolve.

On the other hand, if the PA eliminates judicial intervention and denies Palestinian courts any jurisdiction in the arbitral process, it may lead to inefficient arbitration. That is because parties in international commercial arbitration also want the arbitration proceedings to be held with integrity and fairness.[126] By way of example, witnesses may not attend or cooperate in the arbitration procedures. Without some degree of court intervention, parties and arbitration tribunals will have no power to force witnesses to attend. This dilemma is what Dr Abdeian stated as the clash between finality and fairness.[127] Therefore, it is essential to draft a new regulation that carefully draws a line between court intervention and the

[120] See the Netherlands Supreme Court 17 January 2003, *IMS v Modsaf*, NJ 2004/384.

[121] PLA art.46 states that: "Taking into account the provisions of art.44 of this law, the due dates applicable to the appeal of decisions made by the competent court shall be subject to the rules and procedures of appeal applicable in the court treating the appeal."

[122] EAL art.51 and UAE art.54.

[123] EAL art.9 and UAE art.54.

[124] DCCP art.1064.a.

[125] DCCP art.1064.a.5. Further, the Dutch Supreme Court stressed the possibility to exclude appeal in cassation against the Court of Appeal's decision on the claim for setting aside. See Supreme Court 4 June 2010, NJ 2010, 312.

[126] In Belgian law, for a time, the courts were prevented from any judicial scrutiny of the arbitration awards taking place in Belgium, as the seat of arbitration, if none of the parties was a national or resident of Belgium. Nevertheless, art.1717.4 of the Judicial Code of Belgium changes this approach by providing the courts with limited jurisdiction.

[127] Abedian, "Judicial review of arbitral awards in international arbitration-a case for an efficient system of judicial review" (2011) 28(6) *Journal of International Arbitration* 554.

independence of the arbitration process. The relationship between arbitration and the judiciary must be a supportive relationship that aims primarily to ensure the smooth running of the arbitration process and achieve the goal of arbitration, which is to issue an enforceable arbitration decision. The court's role should be limited to supervising the arbitration process and ensuring its effectiveness and fairness, not extended to all aspects and procedures. Nor should the court have authority that exceeds the authority of the arbitration tribunal and obstructs its work.

4. Conclusion

If the PA yearns to expand the extent of foreign investment in Palestine, its judiciary and legislature are advised to follow the principles set by Model Law and practices from other comparative regulations, such as examples provided by Egyptian, Dutch and UAE laws.

When amending its arbitration rules, the PA should pay considerable attention to balancing the courts' role in international arbitration. This balance will encourage foreign investors to conduct international arbitration in Palestine, as resolving disputes outside the national court system and obtaining an enforceable arbitral award are the main aims of parties when they choose arbitration as an alternative dispute solution mechanism.[128] This research provided several suggestions on how to reduce the broad authority of the national judiciary. First, the PA should reconsider its approach to the definition of international arbitration that current arbitration laws adopt. An innovative approach should be flexible in considering the harsh reality of the Palestinian legal system and adapting to the arbitration parties' needs. The use of the economic and institutional standards discussed above will provide the needed flexibility for the Palestinian arbitration environment as well as helping the arbitration institutions in Palestine to grow.

On the other hand, it is vital to take adequate measures to harmonise the PLA with the modern international standards introduced by Model Law and other comparative legal systems. As the executive power, the PA has the authority to achieve the necessary harmonisation through new "pro-arbitration" regulations. These should support the competence-competence principle and liberalise arbitration from conventional restrictions, whether related to writing requirements, issuing interim measures, or the scope of judicial scrutiny over international arbitration. Overall, these measures could help the PA eliminate barriers to international arbitration caused by the various levels of judicial control and restrictive rules.

[128] H.L. Yu, "Total separation of international commercial arbitration and national court regime" (1998) 15(2) *Journal of International Arbitration* 151.