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## VALIDITY OF THE ARBITRATION CLAUSE IN THE INTERNATIONAL EMPLOYMENT CONTRACT: THE VIEWPOINT OF THE GCC COUNTRIES

### Abstract

*In this paper we will evaluate the significance of the arbitration clause in international employment contracts. Our aim is to understand how this particular alternative dispute resolution (ADR) mechanism is utilized in the Gulf Cooperation Council (GCC) countries. Even though the law in several countries aims to protect employees by prohibiting arbitration agreements (due to considerations of employee protection), we argue that it should be optional for the employee to enter into labour agreements with arbitration clauses. This is especially important when the arbitration agreement achieves the employees' interests, and is agreed upon with informed and clear consent. We will engage with arguments which advocate the prohibition of arbitration agreements within Individual Employment Contracts (IECs); whilst taking the position that the flexibility, speed, confidentiality and predictability of arbitration provides specific advantages to international employees compared to litigation before court. Furthermore, in the context of a desire on the side of GCC countries to attract high-skilled labour (and when there are many misconceptions regarding the adjudicative functions of labour law courts in the GCC), arbitration clauses can play a significant role in mediating between different legal cultures.*

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## Keywords

*International arbitration, Arbitration clause, Labour law, Employment contract, GCC countries, Comparative law.*

## INTRODUCTION

The global labour market is ever more characterized by a notable increase in individual disputes stemming from routine worker grievances and complaints.<sup>1</sup> In an increasingly contentious setting, we must reflect on the reality that “conflict and its management are permanent features of organizational life... with important implications for a wide range of employer- and worker-related issues”.<sup>2</sup> Labour law disputes concern all conflict deriving from “the conclusion, existence, or termination of individual employment contracts and/or collective labour agreements”.<sup>3</sup> This covers the scope of formal disputes within the labour law, although labour law itself is concerned with the protection of workers both within contractual agreements, and in informal kinds of employment relations.

The underlying causes of this rise in disputes are multifaceted and vary across countries and regions. However, common factors include the expansion of individual rights protections, declining trade union density and collective bargaining coverage, heightened employment termination risks and unemployment rates,<sup>4</sup> diminishing job quality

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<sup>1</sup> International Labour Office, *Social dialogue: Recurrent discussion under the ILO Declaration on Social Justice for a Fair Globalization*, Report VI, International Labour Conference, 102nd Session, Geneva, 2013.

<sup>2</sup> A. Koukiadaki, *Individual and collective dispute resolution systems – A comparative review*. International Labour Organization, 2020, p. 124, available at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_760828.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_760828.pdf) [last accessed 18.05.2023].

<sup>3</sup> A.D. Roo, R. Jagtenberg, “Mediation in the Netherlands: past – present – future”, in E. Hondius, C. Joustra (wds), *Netherlands Reports to the Sixteenth International Congress of Comparative Law*, Oxford: Intersentia, 2002, p. 189.

<sup>4</sup> International Labour Office, *World Employment and Social Outlook: Trends*, 2015, available at: [https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms\\_337069.pdf](https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_337069.pdf) [last accessed 18.05.2023].

and security due to diverse employment contractual arrangements, and increased inequality resulting from segmented labour markets.<sup>5</sup>

The growing complexity and diversity of individual disputes places significant pressure on the adjudicative resources of states. This gives rise to numerous challenges, including concerns about costs, case overloads, delays, lack of independence and impartiality, complex procedures, fragmented services, limited access, ineffective remedies, and reduced opportunities for voluntary settlement through social dialogue. In response, countries have undertaken reviews and reforms, establishing new dispute resolution institutions, modifying existing ones, and introducing innovative techniques such as telephone-based resolution and one-stop services to streamline access to remedies.<sup>6</sup>

The laws of the Gulf Cooperation Council (GCC)<sup>7</sup> countries do not expressly regulate the validity of arbitration agreements in IEC in their labour laws.<sup>8</sup> Consequently, opposite perspectives have been raised by the courts of cassation.

The goal of this research is to clarify these legally ambiguous ideas, as most foreign companies engage in business with the GCC and are allowed to establish new companies with 100% ownership.

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<sup>5</sup> International Labour Office, *supra* note 1, p. 20.

<sup>6</sup> International Labour Office, *supra* note 1, p. 20.

<sup>7</sup> The GCC includes Kuwait, Oman, Saudi Arabia, Bahrain, Qatar, and UAE. All of these countries apply the civil law system, and they are parties in several agreements to unify legal regulations. See, for example, The Unified Economic Agreement Between the Countries of the GCC, entered in force on 1 December 1981, available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3105/download> [last accessed 26.9.2023].

<sup>8</sup> The authors of this article solely focus on the issue of the validity of the arbitration clause in the International Employment Contract (IEC), while the arbitration clause in the collective employment contract “union” is recognized in all GCC legal systems without dispute. It is important to note that in France, the Labour Code recommends the inclusion of arbitration as an optional provision in collective agreements to address collective conflicts. Collective disputes encompass not only the rights established in currently active collectively bargained agreements, but also extend to mere economic interests. Informal methods for resolving such disputes, primarily through arbitration, have traditionally been of a voluntary nature. See Y. Tarasewicz, N. Borofsky, “International Labor and Employment Arbitration: A French and European Perspective”, *ABA Journal of Labor & Employment Law*, 2013, Issue 8, p. 349.

The validity of arbitration in IEC is arguable and it is rarely used in labour disputes because of the different viewpoints of legal regimes in upholding the clause.<sup>9</sup> France, for example, has prohibited the agreement of arbitration for future disputes in IEC for several years.<sup>10</sup> On the grounds of procedural and substantive unconscionability, the judicial systems in many countries reject arbitration clauses in IEC because the employee's consent is not clear and may be procured by an unfair contract of adhesion or trickery.<sup>11</sup>

Generally, GCC countries refuse to uphold arbitration clauses in IEC.<sup>12</sup> On the one hand, labour law regulations in the GCC countries do not preclude employees and employers from explicitly agreeing to arbitration in an IEC.<sup>13</sup> On the other hand, they believe that the articles and provisions of the labour law are part of public policy, so the parties (employee and employer) may not agree on contravention of the law.<sup>14</sup>

The common law viewpoint is in favour of permitting the arbitration agreement in IEC, provided that the employee has a reasonable un-

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<sup>9</sup> The U.S. Supreme Court utilizes a "liberal federal policy favouring arbitration agreements" - *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U. S. 1, 24 (1983) - including disputes based upon legal rights, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

<sup>10</sup> Cass. soc. November 5, 1984, 1986 Rev. Arb. 47, commentary M.-A. Moreau-Bourlis, cited from B. Castellane, "Arbitration in Employment Relationships in France", *Journal of International Arbitration*, 2009, Issue 26, p. 294. See also ICC Award 2558 of 1976, S. Jarvin, Y. Drains, *Collection of ICC Arbitral Awards, 1974-1985*, ICC Pub., 1990, p. 305.

<sup>11</sup> P.M. Panken, N.G. Popper, "Arbitration in the Non-Union Employment Setting: Recent Developments in Employment Arbitration", *Practical Law*, 2017, Issue 63, p. 29.

<sup>12</sup> Cases rarely (only one in Kuwait) upheld the Arbitration clause. Meanwhile other Arab countries, such as Jordan and Lebanon, hesitated in the last period between permit Arbitration in IEC based on the freedom of contract principle, prohibiting it owing to public policy.

<sup>13</sup> Labour laws in all GCC countries determine only the filing method of the employment suit before the court. See, for example, the Kuwait labour code in English, available at: <https://www.manpower.gov.kw/docs/LaborLaw/KuwaitLaborLaw-English.pdf>, the Saudi labour code, available at: <https://hrsd.gov.sa/sites/default/files/LABOR%20LAW.pdf>, the Qatari labour code, available at: <https://qatarlaborlaw.com/qatar-labor-law/>, the UAE labour code, available at: <https://www.uaelaborlaw.com>, the Bahrain labour code, available at: <https://lmra.bh/portal/en/page/show/199> and the Oman labour code, available at: <https://linksy.io/KwHsmW> [last accessed 26.9.2023].

<sup>14</sup> See, e.g. the concept of public policy: A.A. Salamah, *Principle in International Conflict of Laws*, Dar Alnahda Alarabia Press, 2008, p. 581-633.

derstanding of the terms of the IEC,<sup>15</sup> even if the contract was signed electronically by clicking on “I agree” to the terms of employment.<sup>16</sup>

The problem of the validity of arbitration in IEC appears in multinational relationships when the employment contract is governed and applied in several countries and involves the interest of international commerce. The issue may arise when there is a divergence between an applicable law of the employee’s country that permits the agreement of arbitration and an applicable law of the employer that prohibits such an agreement when it is not agreed upon or otherwise in the IEC itself.<sup>17</sup>

These restrictive viewpoints towards allowing arbitration in IEC have faced many challenges in reality, especially when the employee is in favour of arbitration or in the event that the employee’s applicable law allows the arbitration agreement in IEC. Such obstacles allow civil law countries to relax their restrictions against the validity of arbitration agreements in international IEC. Hence, the French Social Chamber decided that the existence of an arbitration clause in an employment contract gives employees the right to avail themselves of the arbitration clause, and they remain free to litigate the dispute before the court, naturally binding the employer.<sup>18</sup>

While some jurists have suggested upholding the application of public policy theory and exclusive jurisdiction for the court to protect the employees as the weaker party,<sup>19</sup> it is necessary to develop a sound theory that reconciles the rights of employee and employer and constructs

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<sup>15</sup> In *Cullinane v. Uber Techs., Inc.*, Civ. A. No. 14-14750- DPW, 2016 U.S. Dist. LEXIS 89540, at 14-17 (D. Mass. 11 July 2016); see also *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1033-34 (7th Cir. 2016).

<sup>16</sup> In *Schwalm v. TCF Nat’l Bank*, 226 F. Supp. 3d 937, 940 (D.S.D. 2016), the court held that a completed and agreed to online employment application created a binding arbitration agreement; see also *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014). Even though this view is not agreed upon, in the U.S., a bill (“Arbitration Fairness Act of 2015”) proposed that invalidation of arbitration in employment disputes is based on the employee being the weaker party.

<sup>17</sup> The standard transaction involves more than one state economy; see E. Gaillard, J. Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International, 1999.

<sup>18</sup> Cass. soc. 16 February 1999, *Sté Chateau Tour Saint Christophe v. Astr6m*, (1999) Riv. A 1B. 290, commentary M.-A. Moreau. Castellane *supra* note 10, p. 293.

<sup>19</sup> See K. Al-Hindiani, A.R. Abdulrida, *Explaining the Provisions of Kuwaiti Labor Law*, Kuwait, 3rd ed, 2018, p. 18.

a clear application of the validity of the arbitration clause in IEC, which provides safety and stability in the field of international labour.

## I. RESEARCH METHODOLOGY

This research intends to shed light on the cases in which the courts – especially in GCC countries<sup>20</sup> – have refused to rule in favour of the arbitration agreement in IEC, cases in which the courts claim the possibility of rebuttal and in which legislators’ arguments achieve employee–employer objectives and reasonably meet the legitimate expectations and protections of the employee.<sup>21</sup>

The primary research question is: How do the philosophy of protecting the employee as a weaker party and the public policy theory influence the acceptance or refusal of arbitration in IECs? Additionally, the study will examine objections from employees who prefer arbitration over the courts and propose a solution for non-supporting legal systems to ensure the effectiveness of arbitration in IECs.

The research will adopt a multi-faceted approach, combining legal philosophy, comparative analysis, and empirical investigation. It will begin by analysing the philosophy behind the protection of employees as the weaker party in IECs and the role of public policy theory in shaping legal systems. The study will then weigh the arguments for the refusal of arbitration in IECs, considering the perspectives of various stakeholders and examining the objections raised by employees who prefer arbitration over traditional courts.

The research methodology employed in this study aims to elucidate the distinctions between the USA (common law) and Europe and GCC (civil law) concerning the determination of the validity of arbitration agreements in the IEC. The comparative analysis will focus on non-sup-

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<sup>20</sup> Because of the lack of judgment in the GCC, the research relied on several U.S. and European judgments to validate the modern viewpoints of IEC arbitration.

<sup>21</sup> Some argue that employment arbitration has several economic benefits, such as expediency, and is a necessary way to form an increasingly competitive marketplace. See M.P. Bock, “A Few Circuit Citys Back, One Giant Luce Forward: A Review of the Ninth Circuit’s Interplay with the National Policy Favoring Arbitration in the Employment Contract Setting”, *Willamette Law Review*, 2005, Issue 41, p. 535, 547.

porting legal systems that have limitations or restrictions on the use of arbitration in IECs. The research will explore how these legal systems approach the protection of employees and analyse the arguments for and against the acceptance of arbitration in such contexts.

The study will draw upon a variety of sources, including legal literature, international conventions, case law, legal doctrines, empirical data, and employee surveys. Relevant laws, regulations, and judicial decisions pertaining to IECs will be collected and analysed from different jurisdictions with non-supporting legal systems. The interpretation and evaluation of these sources will be conducted with careful consideration of their contextual relevance and the specific legal frameworks under scrutiny.

Additionally, an analysis of relevant case law pertaining to arbitration validity is conducted. Four common arguments challenging the validity of arbitration in the IEC are examined: lack of consent, mandatory mediation, exclusive Labour Court, and arbitration fees. Furthermore, the study highlights prevailing trends in arbitrability concepts. These trends primarily arise from the universal pursuit of enhancing productivity for both corporations as employer and employees for judicial proficiency.

This research will begin by analysing the philosophy of IEC in protecting the employee as a weaker party and the public policy theory. Then, the authors will weigh the arguments for the refusal of arbitration in IEC and examine the objections of employees who prefer arbitration rather than the courts. Finally, the research concludes by suggesting a solution in relation to international IECs for non-supporting legal systems and proposes a valid arbitration clause to prevent dismissal by the courts.

## **II. THE NOTION AND PHILOSOPHY OF INDIVIDUAL EMPLOYMENT CONTRACT**

All GCC countries follow the civil law system, whereas this research considers foreign international business relationships, which should be helpful in explaining the viewpoints of the common law system.

Legislators grant several forms of protection and privileges to workers under labour regulations, given their weaker position in an IEC.<sup>22</sup> This protection is characterized in labour regulation content as the minimum privilege standard that covers missing clauses in an employment contract.<sup>23</sup>

However, some rights are arguable, whether they are against the employee's protection or not. Sometimes, labour regulation can be silent about a specific matter, such as arbitration in IEC. Therefore, jurists are divided as to whether mandatory arbitration violates the minimum standard of protection where the worker is forced, with no meaningful opportunity, to reject the contract.<sup>24</sup>

The legal view towards arbitration in IEC changed from hostile to welcoming in common law countries<sup>25</sup> when the U.S. Supreme Court overruled its previous precluded judgments and affirmed that "We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution".<sup>26</sup>

However, some French courts accepted the concept of arbitration in IEC until the French legislature revised the labour code to prohibit such an agreement during or before the employment relationship, per-

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<sup>22</sup> G. Rühl, "The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy", *Journal of Private International Law*, 2014, Issue 10, p. 335-355; see also the GCC Labour Law Provisions *supra* note 13.

<sup>23</sup> See Article 6 in the Kuwaiti labour law that states, "Without prejudice to any more advantageous benefits and rights granted to workers in individual or collective contracts, special regulations or by-laws observed by the employer or in accordance with professional or general customs, the provisions of this Law shall represent the minimum level of worker's rights". See also the same Article under the UAE Labour Law No. (7), Qatari Labour Law Article (4), Omani Labour Law Article (3) and Saudi Labour Law Article (8).

<sup>24</sup> See, e.g. *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 383 (S.D.N.Y. 2002), in which the court refused to enforce an arbitration agreement where the employee was given only 15 minutes to review a one to six-page contract by the employer.

<sup>25</sup> *Scott v. Avery*, 10 Eng. Rep. 1121, 1138 (H.L. 1856); see, e.g. C.W. Summers, "Labor Law as the Century Turns: A Changing of the Guard", *Nebraska Law Review*, 1988, Issue 67, p. 7.

<sup>26</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). 626-7.



mitting the arbitration agreement only after the IEC is terminated or expired.<sup>27</sup>

This orientation is followed by major GCC courts,<sup>28</sup> which are governed by the main argument that the philosophy of IEC is to protect employees, who are the weaker party in the IEC,<sup>29</sup> and that employment rights are related to public policy.<sup>30</sup>

This theory against arbitration in IEC should be distinguished cautiously between the labour claim based on the IEC and the claim based on statutes.<sup>31</sup> A distinction should also be drawn between procedural rights as the method of dispute resolution, substantive rights in labour law for the protection of the employee, and, finally, the distinction between the mandatory rules and public policy, as follows:

## 1. LABOUR CLAIM BASED ON AN INDIVIDUAL EMPLOYMENT CONTRACT V. STATUTORY CLAIMS

This issue is raised when an employee signs an arbitration agreement, waiving his/her rights in order to claim such disputes governed under statutes including sex discrimination, harassment, and anti-competition and intellectual property rights.<sup>32</sup>

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<sup>27</sup> Article 511-1 clause 6 in the French labour code was revised on 6 May 1982. *Jurisclassneur. Procédure civile. Fascicule 432, 6,1994; Cass. Soc. 12 Fev 1985: Rev. Arb.19865, p. 47 note M.A. Moreau. Cited from A. Julisaty, "Arbitration and Labor Cases", *Lawyers Journal – Lebanon*, 2011, Issue 5, p. 5.*

<sup>28</sup> The Kuwait and Bahrain courts followed the same decision.

<sup>29</sup> For more about the philosophy of the weaker party in the contract "employee" see: M. Hesselink, *Justifying Contract in Europe: Political Philosophies of European Contract Law*, Oxford University Press, 2021, p. 272.

<sup>30</sup> Al-Hindiani, Abdulrida, *supra* note 19, p. 41, 146; see also A. Nujidah, *A Comprehensive in Qatari Labor Law*, Dar Alnahda Alarabia Press, 2017, p. 172.

<sup>31</sup> This is true whether the statutory claim is passed on the labour code or any law that contains some mandatory rules that cannot be arbitrable, for example a fraud claim under the Securities Act, see *Wilko v. Swan*, 346 U.S. 427 (1953).

<sup>32</sup> This issue is widely raised in the U.S., especially in sex discrimination and harassment claims, whereas these claims are usually sued under the Tort concept, which is not criminally the same as in the civil law system. A. Abrams, *More than 81 of the largest companies in the U.S. require arbitration in statutes claims*; Time 27 February 2019, available at: <https://time.com/5538028/consumer-arbitration-agreements/> [last accessed 10.02.2023].

These statutory claims are different from the mandatory provisions under labour law.<sup>33</sup> Each statutory claim should be considered on a case-by-case basis when it comes to the general rules of arbitrable claims, whether the claim is at the parties' free disposal or not.<sup>34</sup> Mostly, the public policy defence of "public interests" is the main obstacle in considering whether the claim is arbitrable or not, which is to be determined by state discretion rather than the individual's, i.e. the employer.<sup>35</sup>

While GCC courts diverge on claims raised by labour law and claims raised by the employment contract, the Dubai court of cassation, for example, held that "Any rights of employees granted and governed under the labour law are related to public policy, given that its provisions are mandatory rules that may not be violated. However, the rights granted and regulated by the contract are dischargeable and deposable".<sup>36</sup>

Therefore, several jurists and courts have allowed employment arbitration only for claims that are not governed under labour law.<sup>37</sup> In the Netherlands, for example, only disputes relating to contractual rights can be arbitrated, primarily involving senior managers who have negotiated their financial entitlements in the event of early termination of employment. However, disputes solely concerning the decision to

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<sup>33</sup> This will be considered in the next subsection; therefore, some courts are mixed on these issues and permit arbitration only if the claim arises from a provision in the employment contract, not labour law. However, the U.S. often refers to statutes claim, i.e. any claims other than labour law.

<sup>34</sup> See Chapter 12 (Arbitration) under the Kuwaiti Civil and Commercial Procedures law, Article 173: "Agreement to arbitrate may be made in respect of a specified dispute. Likewise, agreement to arbitrate may be made in respect of all disputes which arise from the implementation of a specific contract. Written proof of arbitration shall be required. Arbitration is not permitted in matters which permit compromise. Likewise, only he who has capacity to dispose of a right which is the subject matter of a dispute may agree on arbitration". The same provision is included under Article 2\4 in the 2018 UAE Law of Arbitration No. 6.

<sup>35</sup> A.J. Wilcke and I. Wildhaber, "Arbitrating Labour Law Disputes in Switzerland", *Journal of International Arbitration*, 2010, Issue 27, p. 634.

<sup>36</sup> See Dubai Court of Cassation (Appeal number 5 of 2003 - dated 27 April 2003).

<sup>37</sup> M.A. Altarawnah and N.H. Alhjaya, "Electronic Arbitration", *Law Journal*, 2003, Issue 2, p. 210. See *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 430 (9th Cir. 2015), which finds that pre-dispute agreements to avoid California's Labor Code of 2004 claims are unenforceable, as they go against public policy.

terminate employment itself are not arbitrable and must be resolved through court proceedings. Therefore, multiple jurisdictions can consider the case in parallel.<sup>38</sup>

Conversely, it is arguable that all employment claims, whether governed under the law or the contract, should be arbitrable, but the arbitrator cannot rule contrary to the mandatory rules under labour law. This separation of claims between the court and arbitration does not help the parties, nor is it applicable in practice.

## 2. PROCEDURAL V. SUBSTANTIVE RIGHTS

Once the validity of the arbitration agreement in IEC is examined, a distinction should be made between arbitration as a procedural way of hearing the claim, and the substantive rights for the protection of the employee in labour law. The question that should be studied is whether arbitration is applicable to protect employees' rights and whether the court would be a better resolution than arbitration.<sup>39</sup>

In employment arbitration agreements, employees waive their constitutional right to a trial, which means they are surrendering several guaranteed rights by statute.<sup>40</sup> However, this argument also applies to all arbitrable disputes, which are, in all cases, limited by the provisions of law.<sup>41</sup>

The U.S. courts went beyond the public policy defence in their previous judgment,<sup>42</sup> holding that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the stat-

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<sup>38</sup> R. Jagtenberg, A. Roo, "Employment Disputes And Arbitration An Account Of Irreconcilability, With Reference To The EU And The USA", *Zbornik PFZ*, 2018, Issue 68, p. 171-192.

<sup>39</sup> Castellane, *supra* note 10, p. 295.

<sup>40</sup> M. Savare, "Clauses in Conflict: Can an Arbitration Provision Eviscerate a Choice-of-Law Clause?", *Seton Hall Law Review*, 2005, Issue 35, p. 597, 59.

<sup>41</sup> There are several mandatory rules that arbitration award cannot ignore, such as award without reason or award that violates the parties' right of defence, otherwise it will be invalidated. See A. Atiiah, *Kuwaiti Arbitration Law*, Kuwait University Press, 2012, p. 550-559 (in Arabic).

<sup>42</sup> In *Wilko v. Swan*, 346 U.S. 427 (1953), the court voided an arbitration agreement invoked in connection with a fraud claim under the Securities Act and held that a waiver

ute; it only submits to their resolution in an arbitral, rather than a judicial, forum".<sup>43</sup>

Therefore, arbitrating employment disputes should not remove mandatory provisions or substantive rights in labour law. In the Labinal case, the Court of Appeal of Paris held that arbitrators must employ the protective provisions of labour law.<sup>44</sup> Thus, treating arbitration as a procedural method was the U.S. Congress's motive when it passed the Federal Arbitration Act, supporting a procedure that can be cheaper and quicker than litigation before the court.<sup>45</sup>

Consequently, arbitration itself as a dispute resolution method should not prejudice the parties or employee protection if it is considered a procedural right of the contractual claim. However, could it be prohibited because arbitration in IEC is against mandatory provisions or public policy?

### 3. MANDATORY RULES V. PUBLIC POLICY

Labour law is a main area of law in which public interest and social consideration are significant, and the state desires to protect the weaker party in employment relationships by providing the minimum standard of rights,<sup>46</sup> including limiting the arbitrability of employment disputes.<sup>47</sup> These limits are under the state's discretion, which is usu-

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of the substantive statutory law was invalid, so several federal courts interpreted this decision as "public policy" defence.

<sup>43</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, *supra* note 26, p. 628. See *Gilmer v. Interstate/Johnson Lane Corporation*, *supra* note 26.

<sup>44</sup> Regional Court of Appeal (Paris), 19 May 1993, Rev. Arb. 645, commentary Ch. Jarrosson, 1993 J.D.I. 957, commentary L. Idot, cited from H.A. Alhaddad, *General Principle in International Commercial Arbitration*, Manshorat Alhalabi Press, 2010, p. 410.

<sup>45</sup> J.O. Shimabukuro, J.A. Staman, *Mandatory arbitration and the Federal Arbitration Act*, 2017, p. R44960, available at: <https://fas.org/sgp/crs/misc/R44960.pdf> [last accessed 10.02.2023].

<sup>46</sup> Article 6 of the Kuwaiti labour law states that "without prejudice to any more advantageous benefits and rights granted to workers in individual or collective contracts, the provisions of this Law shall represent the minimum level of workers' rights".

<sup>47</sup> See, e.g. S. Besson, "Sports Arbitration: Which Lessons for Employment Disputes?", *Sports Arbitration: A Coach for Other Players?*, 2015, Issue 41, p. 166.

ally stipulated through mandatory rules or by the general rule of public policy.

Mandatory rules (*jus cogens*) are rules that cannot be agreed upon. These rules are part of public policy, but they do not constitute all of its provisions. In contrast, public policy is more comprehensive, containing any roles related to the state's security, customs, economy or society.<sup>48</sup>

Public policy is either "directed", indicating that the law may exclude the explicit application of some provisions, such as banking operations and commodity pricing, or "protected", indicating that the court should decide whether the agreed-upon provisions or rules, such as labour law, which is mainly regulated to protect employees' interests, violate public policy.<sup>49</sup>

Therefore, the defence of public policy is an exceptional tool that the court cannot overuse except with narrow limits to preserve society's public interests, which are under the examination of the court of cassation, especially when they controvert the parties' autonomy (freedom of contract principle).<sup>50</sup>

The problem of arbitration in employment disputes in IEC is that there are no mandatory rules in GCC labour laws that prohibit such agreements or explicit public policy rules. For example, Germany obviously stipulates that employment disputes are not arbitrable.<sup>51</sup> On the other hand, Netherlands allows voluntary arbitration under restrictions.<sup>52</sup> Subsequently, it remains under the court's consideration whether arbitration really deprives the weaker party in the contract (employees) of their rights, or violates the public interest of society.

Generally, mandatory rules do not prevent contractual parties from agreeing to arbitration. For instance, an agent's right to an indemnity in the case of an agency terminating a contract can be submitted for ar-

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<sup>48</sup> See M. Arafa, *The Private International Law*, Dar Alfecker Press, 1st ed, 2013, p. 437-8 (in Arabic).

<sup>49</sup> See Salamah, *supra* note 14, p. 586.

<sup>50</sup> See e.g. A. Nussbaum, *Principle of Private International Law. Comparative Study*, 1943, p. 119. See, for example, the Kuwaiti court of cassation rule that distinguishes between international and national public policy and affirms a higher rate of interest than what is governed under domestic law (Appeal No 1071/2008 commercial 3).

<sup>51</sup> See Art. 101 para. 3 of the German Act governing labour courts.

<sup>52</sup> Jagtenberg, Roo, *supra* note 38, p. 179.

bitration.<sup>53</sup> This is what Kuwaiti and Dubai courts have ruled in several cases.<sup>54</sup> Therefore, a matter that is linked to public policy because of mandatory rules does not mean it is violating it.<sup>55</sup>

Early jurists in France externally applied the rule of prohibiting arbitration in any article or text containing mandatory provisions or any Act related to public policy.<sup>56</sup> This view changed when the French court of cassation ruled that mere connection of the dispute or links to a law relating to public policy are not reasons for nullifying the arbitration for non-arbitrability,<sup>57</sup> allowing some decision through arbitration in employment disputes.<sup>58</sup>

However, the reason behind prohibiting arbitration is the possibility of the arbitrator violating specific mandatory rules referring to public policy.<sup>59</sup> So, the door is now slightly closed for the dissolution of arbitration agreements and claiming invalidity due to the violation of public policy.<sup>60</sup>

Moreover, some jurists argue that, even when labour law is related to public policy, all claims of employment are not necessarily automati-

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<sup>53</sup> See A. Johnson, "Arbitrating Labor Disputes", in M Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide*, 2nd ed, Kluwer Law International, 2018, p. 1193-1248.

<sup>54</sup> See Kuwaiti Court of Cassation (Ruling No. 1112 of 2009 commercial/2 dated 3 November 2013), Kuwaiti Court of Cassation (Ruling No. 1148 of 2004 dated 18 February 2006) and Dubai Court of Cassation (Appeal number 126 of 2003 – dated 16 November 2003).

<sup>55</sup> See Atiiah, *supra* note 41, p. 89.

<sup>56</sup> The Paris Court of Appeal ruled that the dispute in any tax claim is not arbitrable because the law is related to public policy, 8483- J.C.P-2 9 February 1954, cited from *ibid.*

<sup>57</sup> Tissot landmark case: Court of cassation 28 November 1950. Several lower courts followed the same decision; see L. Idot, note sous Cour de Cassation, Paris, 20 Janvier 1989, *Rev. Arb.*, 1989, p. 280, cited from Alhaddad, *supra* note 44, p. 98.

<sup>58</sup> Cass. Soc., 16 Février 1999, Bull. civ. n° 78; L. Thibierge, "Les Conventions Relatives aux Litiges dans la Loi J21", *AJ Contrats d'Affaires: Concurrence, Distribution*, 2016, p. 523, cited from A. Ishraqia, "Consumption Contract Disputes Referable to Arbitration: A Comparative Study in Lebanese and French Laws", *Kuwait International Law School Journal*, 2021, Issue 9, p. 220.

<sup>59</sup> Some jurists argue that general public policy defence is no longer applicable unless public order is directly violated; see, e.g. *ibid.*, p. 222.

<sup>60</sup> Savage, Gaillard, *supra* note 17, para. 1428.

cally arbitrable – only claims that are related to mandatory rules, such as leave and work injuries.<sup>61</sup>

It is significant to note that the concept of public policy is not accurately defined. It is, in fact, changeable in accordance with a society's concepts and goals. Its scope is different depending on the territory, which is more narrow than internationally.<sup>62</sup>

Therefore, courts and legislators in the GCC countries should balance the local significance of preserving the main public interests against regular interests, allowing individuals to agree on private affairs.<sup>63</sup> However, the interests in disputes about promoting international trade and relations are usually weighed in favour of arbitration.<sup>64</sup>

In studying the real position of an employee as a weaker party, an examination of each argument raised is provided to argue the invalidation of arbitration in IEC, weighing the public interests of the state, whether domestically or internationally.

### III. THE ARGUMENTS OF INVALID ARBITRATION IN EMPLOYMENT DISPUTES

The arbitration agreement, especially in IEC, is constantly challenged because it cannot afford the procedural protections, sometimes substantive, guaranteed by the court.<sup>65</sup> However, several jurists have argued that the situation of highly positioned employees, such as CEOs, allows

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<sup>61</sup> A. Alsanhoury, *AlWaseed in Explaining The Civil Law*, Part 2, Manshorat Alhalabi Press, 2015, Art. 370, p 251.

<sup>62</sup> See M.A. Aljarallah, "Public Policy Under Kuwaiti Private International Law", *Kuwait University Journal of Law*, Issue 4, 2020, p. 44 (in Arabic).

<sup>63</sup> See J. Paulsson, "The Impulse to Arbitrate", in J. Paulson (ed.), *The Idea of Arbitration*, Oxford: Oxford University Press, 2013, p. 1-28.

<sup>64</sup> See A.A.H.M. van Hoek, "Private International Law: An Appropriate Means to Regulate Transnational Employment in the European Union?", *Erasmus Law Review*, 2014, Issue 7, p. 158. The author argues that the international rules upholding the concept of freedom of contract conflict with the domestic public policy of each state.

<sup>65</sup> See Article 182 in Kuwaiti Civil and Commercial Procedural Law, which states that parties can choose the procedures of the arbitration unless they violate public policy. See also the Court of Cassation in Kuwait rule Number 1008/2004 commercial circuit in 25 May 2005.

them to negotiate their contracts differently from regular employees (low skills/not in an advantageous position), who as weak parties cannot negotiate contracts with an employer.<sup>66</sup> In such circumstances, highly positioned employees might be able to afford legal counsel to draft an arbitration clause and review their contract to enjoy several features of arbitration.<sup>67</sup>

Therefore, jurists' arguments usually focus on non-negotiation situations, although the laws in the GCC countries do not regulate diverse rules for such employees. The arguments that are often raised when challenging the validity of an arbitration clause in the IEC will be examined as follows:

### 1. LACK OF REAL CONSENT (UNCONSCIONABILITY)

When an employer imposes an arbitration clause in an IEC by including an "in or out" arbitration clause, employees are forced to surrender their right to access the courts without real consent. The question of consent imposed as a condition for concluding an employer's contract, as the strong party, is a like a sea snake.<sup>68</sup>

Some jurists call this kind of arbitration, where the consent is given under duress, "adhesionary" or "disparate-party" arbitration.<sup>69</sup> However, the evidence of duress is too difficult to prove. Both common and civil law countries consider consent under the general rule of contract.<sup>70</sup>

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<sup>66</sup> Germany does not consider managing directors as employees under German employment law, so their disputes are arbitrable; see R. Trittman, I. Hanefeld, "§ 1030 – Arbitrability", in K.H. Böckstiegel and S. Kröll (eds), *Arbitration in Germany: the Model Law in Practice*, 2nd ed., Alphen aan den Rijn: Kluwer Law International, 2015, p. 100–101.

<sup>67</sup> R. Thomas, E. O'Hara, K. Martin, "Arbitration Clauses in CEO Employment Contracts: An Empirical and Theoretical Analysis", *Vanderbilt Law Review*, 2010, Issue 63, p. 95.

<sup>68</sup> C. Jourdain-Fortier, "Access to Justice and Arbitration: Is Consent to Arbitrate Still at Stake?", in L.V.P. de Oliveira and S. Hourani (eds), *Access to Justice in Arbitration: Concept, Context and Practice*, Kluwer Law International, 2020, p. 35–58.

<sup>69</sup> T.E. Carbonneau, "Arguments in Favor of the Triumph of Arbitration", *Cardozo Journal of Conflict Resolution*, 2009, Issue 10, p. 398.

<sup>70</sup> See *Madden v. Kaiser Found. Hosps.*, 552 P.2d 1178, 1185 (1976): "One who signs a contract is bound by its provisions" (The rule omits citations). See, e.g. F. Wali, *Arbitra-*



Nevertheless, contrary to common fairness, the U.S. Supreme Court does not invalidate the clause of arbitration owing to duress or inequality of bargaining power.<sup>71</sup>

An imbalance in bargaining power exists; however, the question is, has consent been given freely? While some jurists argue that “take-it-or-leave-it” or “take-it-or-be-fired” contracts unilaterally imposed by employers place significant economic stress on the weaker party to sign the IEC,<sup>72</sup> refusing parties the liberty to agree with mutual consent obeys the minimum provisions of public policy.<sup>73</sup>

Some courts reject upholding such arbitration clauses in IECs without other terms or conditions, such as rate-of-pay or work hours,<sup>74</sup> on the grounds that this coercion and economic pressure make the agreement involuntary. However, if “voluntary” means “free from economic pressure”, then the courts must treat arbitration agreements no worse than other contractual terms or conditions, especially when these other conditions violate mandatory rules.<sup>75</sup>

Another issue is whether the arbitration agreement should be a requirement of a job, thus being considered a contract of adhesion and, therefore, substantively unconscionable. The requirements of an adhesion contract in civil law countries, especially GCC countries, are extremely challenging, as they demand substantive, unfair conditions that should not be included in an employment contract.<sup>76</sup>

The U.S. courts often use the “doctrine of reasonable expectations” as a justification to invalidate an adhesion contract at a high standard,

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*tion in the Domestic and International Commercial Disputes*, Manshaat Almaarif Press, 1st ed, 2014.

<sup>71</sup> See *Epic Systems Corp. v. J. Lewis* 138 S. Ct. 1612 (2018), see also Cherine Foty, where the court held that individualized employer–employee arbitration agreements must be enforced as written.

<sup>72</sup> See D.S. Schwartz, “Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration”, *Wisconsin Law Review*, 1997, Issue 1, p. 33, 58.

<sup>73</sup> Carbonneau, *supra* note 69, p. 400.

<sup>74</sup> See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

<sup>75</sup> See R.A. Bales, “Contract Formation Issues in Employment Arbitration”, *Brandeis Law Journal*, 2006, Issue 44, p. 415, 450.

<sup>76</sup> See A. Fooda, *Interpretation of Contract in the Comparative and Egyptian Civil Law*, Manshaat Almaarif Press, 1st ed., 2016, p. 430–440.

such as the one-side contract to “shock the conscience”,<sup>77</sup> which is rarely applied to arbitration agreements in IECs. However, they ruled that “unconscionability requires a substantial degree of unfairness beyond ‘a simple old-fashioned bad bargain’”.<sup>78</sup>

In certain European countries such as Spain and Sweden, it is permissible to use arbitration as an alternative dispute resolution instead of resorting to court hearings, even though this option is infrequently used, without giving rise to concerns about adhesion contracts or public policy.<sup>79</sup>

Therefore, it is argued that this point of view should fail if the employer shows that the employee has real/prima facie consent when concluding a contract<sup>80</sup> or if there is an option to opt out of the arbitration agreement.<sup>81</sup> So, when the employer and employee have expressed willingness to arbitrate as a jurisdictional function, the consent should be legitimate.<sup>82</sup>

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<sup>77</sup> *Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC*, [282 P.3d 1217, 1232] (Cal. 2012).

<sup>78</sup> *Baltazar v. Forever 21, Inc.*, [367 P.3d 6, 12](Cal. 2016)(quoting *Sonic-Calabasas A, Inc. v. Moreno*, [311 P.3d 184, 202](Cal. 2013)). Some courts have held that employment arbitration was unconscionable because it was a contract of adhesion; see *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002). The court stated its reasoning: “[It is] a standard-form contract, drafted by the party with superior bargaining power, which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely”, p. 893 (citations omitted).

<sup>79</sup> See J. Purcell, *Individual Disputes at the Workplace: Alternative Dispute Resolution, 2010 Euro-found survey*, Dublin/Brussels, available at: <https://www.eurofound.europa.eu/publications/report/2010> [last accessed 18.05.2023].

<sup>80</sup> Some authors have proposed a rebuttable presumption against the validity of an arbitration clause in IEC only when the employer shows that the agreement was made through negotiation. See D. Zalesne, “The Consentability of Mandatory Employment Arbitration Clauses”, *Loyola Law Review*, 2020, Issue 66, p. 115, 119.

<sup>81</sup> See *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir. 2002), where the court found that “the genuine possibility to opt-out of the arbitration program” was dispositive and, thus, valid. See, e.g. *Suarez v. Uber Techs., Inc.*, No. 8:16-cv-166-7-30 MAP, 2016 U.S. Dist. LEXIS 59241 (M.D. Fla. 4 May 2016).

<sup>82</sup> Professor Nancy Kim adopts the “conditions of consent, which should consist of: (1) the act of consent - how a consenter has manifested intent, usually through a signed writing or a click-wrap agreement; (2) the knowledge of the consenter - whether a consenter truly understands the consequences of his or her consent; and (3) the voluntariness of the consenter - the degree of societal and contextual pressures exerted on the

Hence, the most effective way to demonstrate employees' consent before the court is to produce a signed acknowledgement letter or article of the arbitration agreement that the employee has read, understood, and agreed to.<sup>83</sup>

## 2. THE LABOUR-EXCLUSIVE COURT

All GCC labour laws, and other civil countries' laws such as Germany's,<sup>84</sup> stipulate that employment disputes should be filed before the labour court.<sup>85</sup> While most of these laws do not explicitly prohibit arbitration, the question is whether this statutory provision gives exclusive jurisdiction to the court.

Many courts and arbitration tribunals have ruled that exclusive court jurisdiction is an arrangement regulation, not a mandatory one,<sup>86</sup> and the arbitration affirms its jurisdiction over the dispute, whereas this provision is not part of public policy.<sup>87</sup>

This approach has been adopted by GCC courts in agent-principal disputes. Although the law exclusively provides the court for agency

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consenter". See N. Kim, *Consentability: Consent and its Limits*, Cambridge University Press, 2019, p. 72.

<sup>83</sup> In these circumstances, courts commonly enforce the arbitration agreement, even if the employee later claims otherwise. See *Sarbak v. Citigroup Global Markets, Inc.*, 354 F. Supp. 2d 531, 541 (D.N.J. 2004) ("Reasonable diligence requires the reading of a contract before signing it. A party cannot use his own lack of diligence to avoid an arbitration agreement", quoting *Brookwood v. Bank of Am.*, 53 Cal. Rptr. 2d 515, 519 (Cal. Ct. App. 1996).

<sup>84</sup> In Germany, the labour courts hold exclusive jurisdiction where the arbitration is expressly prohibited. The primary goal of labour court proceedings is to guarantee a process that is uncomplicated, speedy, and inexpensive. See Purcell, *supra* note 79.

<sup>85</sup> See Kuwaiti law No. 46 of 1987 for establishing the circuit of labour in the court, Article 1: "A labour circuit shall be established in the first instance Court, consisting of one judge, and it shall include one or more chambers as needed, with exclusive jurisdiction to settle labour disputes, whatever their value may be arising from the application of the provisions of the labour law". The same provision is made under Article 219 of the Saudi labour law.

<sup>86</sup> Atiiah, *supra* note 41, p. 94.

<sup>87</sup> See partial award in the case of ICC No. 8420 of 1996, YCA 2000, p. 328.

disputes, the court rules that parties of an agency agreement are free to agree on arbitration.<sup>88</sup>

For example, Kuwaiti *prima facie* courts have jurisdiction to review matters of agency, and such rule is also a mandatory rule.<sup>89</sup> Notwithstanding this, Article 173 of the 1980 Kuwaiti Procedures Code No. 38 (CCPC) stipulates that “it is permitted to agree on arbitration as a method of resolving a specific dispute. Furthermore, it is permitted to agree on arbitration in all disputes arising out of the performance of a certain contract”.<sup>90</sup>

The Kuwait Court of Cassation established a principle for cases considering the exclusive jurisdiction of the court, stipulating that:

exclusion from the competence rules under the CCPC in Article 285 of the Commercial Code does not preclude contracting parties from resorting to and agreeing on arbitration as a method of dispute resolution pursuant to Article 173 of the CCPC (...)<sup>91</sup> In fact, the rationale behind Article 285 was that of simplifying the process of accessing the courts for Kuwaiti contract agents, especially since most principals are domiciled abroad.<sup>92</sup>

Therefore, the stipulation of the exclusive labour court should not be a reason for refusing arbitration in employment disputes; the law addresses the organization of the court system, not limiting parties’ right to arbitrate.

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<sup>88</sup> The Dubai Court of Cassation has ruled that it is permissible to arbitrate in an agency agreement, even if there is an exclusive court; however, in an employment contract, the court ruled that the labour court is the only authorized court to consider the dispute. See Dubai Court of Cassation (Appeal number 55 of 2020 – dated on 2 June 2020).

<sup>89</sup> Article 285 of the Kuwaiti Commercial Code states that “by exception to the rules of jurisdiction of the Civil Procedures Law, the court within the jurisdiction of which lies the place of performance of the contract shall be competent to hear all disputes which arise contract-agency agreements”.

<sup>90</sup> See the comments on the arbitration chapter in I.A. Huneidi, “Arbitration under Kuwaiti Law”, *Journal of International Arbitration*, 1989, Issue 6, p. 77.

<sup>91</sup> The Kuwaiti Court of Cassation (Ruling No. 160 of 2001 dated 30 September 2002).

<sup>92</sup> The Kuwaiti Court of Cassation (Ruling No. 1148 of 2004 dated 18 February 2006).

### 3. MANDATORY MEDIATION

Similar to the exclusivity of judiciary procedure for employment disputes, the law in GCC countries requires that employees file their claims with the Ministry of Labour first for mandatory mediation.<sup>93</sup> The goals of this provision are to settle the dispute amicably through competent mediation by the Labour Department and to notify the Ministry of Labour about the employers' actions and disputes, which raise the question of whether the mediation is mandatory for the employee or not.

Unfortunately, the majority of courts rule in favour of mandatory mediation and dismiss cases that do not follow this procedure or invalidate the arbitration agreement because they violate this provision.<sup>94</sup> The courts have ruled that "litigation procedures are part of public policy, and if the law establishes a specific method for filing a lawsuit, it must be followed".<sup>95</sup> However, other judgments by the courts make it clear that mediation procedures are required before the court only, with no mention of arbitration, by stipulating that "when the employee files their lawsuit against the employer before the domestic courts to claim their labour rights, they must follow the procedures stipulated under national law, except when the condition for this is that the claimed right arises from any of the rights regulated by labour law".<sup>96</sup>

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<sup>93</sup> Article 146 in the Kuwaiti labour law states that "prior to filing a lawsuit, the worker or the beneficiaries through them shall submit an application to the competent labour department, which shall summon the disputing parties or their representatives. In the event that the department is unable to settle the dispute amicably, it shall, within a month after the submittal of the application, refer the case to the Court of First Instance for settlement". The same provision in Article 6 of the UAE labour law, the Emirate provision, states explicitly that the court must consider the case as unaccepted if the employee does not follow the mediation procedure. See also Article 220 in Saudi labour law, which maintains the Department of Labour's right to file the suit after investigating the issue and proceeding with the mandatory mediation.

<sup>94</sup> See Kuwaiti Court of Cassation (Appeal number 251 of 2013 Employment – hearing on 10 November 2014) – in which the court noted that the mandatory mediation way is related to public policy; see also Dubai Court of Cassation (Appeal number 33 of 2002 – dated 30 March 2002).

<sup>95</sup> Dubai Court of Cassation (Appeal number 118 of 2006 – dated on 25 June 2006).

<sup>96</sup> Dubai Court of Cassation (Appeal number 118 of 2005 – dated on 28 December 2005).

Conversely, a Kuwaiti court held that the mandatory mediation procedure before the Ministry of Labour is the only and exclusive way to proceed with the employment claim before the court. However, this is an exceptional method for filing a suit; generally, what is required to limit this procedure to the judiciary claim is 'only the employment claim before the court'. Whereas arbitration is also an exceptional way to resolve disputes that work outside the court procedures, there is no obligation of the parties to follow regular court procedures. So, requiring mandatory mediation will limit and suspend the provisions and goals of the arbitration, which cannot be acceptable.<sup>97</sup>

This trend is more persuasive than the invalidation of the arbitration agreement because of mandatory mediation,<sup>98</sup> whereas the main aim of such mediation (an obstacle before going to court) is to decrease the employment caseload by the filtering out of frivolous disputes, which is achieved by going to arbitration and archiving the complaints against employers, so the Ministry of Labour can monitor their abuses, as can be reached when the employer agrees to send an arbitration award to the Ministry or by waiving confidentiality.

#### 4. HIGH ARBITRATION FEES

Generally, in employment disputes, the resources for arbitration are extremely expensive for employees, while the debatable amount is relatively low. This may prevent employees from vindicating their rights to claim and access the court.<sup>99</sup>

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<sup>97</sup> Kuwaiti Court of Cassation (Appeal number 318 of 89 Commercial – dated on 21 May 1990).

<sup>98</sup> It is applied in Lebanon and France in several cases; see Cass. Soc., 30 Novembre 2011, note Deloitte, pourvois n° 11-12905 et 11-12906; Rev. Arb. 2012. 333, note M. Boucarron-Nardetto, cited from Ishraqia, *supra* note 58, p. 237.

<sup>99</sup> Besson, *supra* note 47, p. 170. See also the decision in *Green Tree Fin. Corp. Ala v. Randolph*, 531 U.S. 79, 90 (2000): "It may well be that the existence of large arbitration costs could preclude a litigant (...) from effectively vindicating her federal statutory rights in the arbitral".

Therefore, labour law in several countries exempts employees from judicial fees.<sup>100</sup> Thus, the aim is to encourage employees to demand their rights based on their economic conditions and their limited ability to bear judicial fees.<sup>101</sup>

However, this exemption from judicial fees before the state's court does not include attorney's fees<sup>102</sup> and is only applied where the employees are the claimants, not the defendants.<sup>103</sup> The court has the right to rule against the employee, who must pay the lawsuit's cost if the case is dismissed or unaccepted.<sup>104</sup>

Thus, even in the permissible jurisdiction of arbitration in the IEC, the court may refuse to dismiss a lawsuit, claiming such rights in the event of high arbitration fees.<sup>105</sup> In contrast, there is no price competition among arbitrators, and the arbitration providers may charge extra fees that claimants would not be charged in court.<sup>106</sup>

Consequently, the Court of Cassation of Bahrain has issued a new rule that "an Arbitration Agreement in [IECs] is invalid if it is difficult or almost impossible for the employee to arbitrate the claim because of high cost".<sup>107</sup> Accordingly, relying on the contrary of this judgment, the arbitration is permissible in the IEC in Bahrain when the conditions are reasonable, the arbitration takes place in the employee's workplace city, or if the employer bears the arbitration fees.

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<sup>100</sup> See Article 144 in Kuwaiti labour law: "Lawsuits filed by workers or beneficiaries shall be exempted from judicial fees. However, upon the dismissal of lawsuits by the court, the court may order the party who files the case to pay all or part of the court fees. Labour lawsuits shall be heard as summary matters". The same provision is made in Article 5 in the UAE labour law and in Article 10 of Qatar's and Oman's labour law.

<sup>101</sup> A.H. Najeedah, *The Manual of Labor Law and Social Legislations of the United Arab Emirates*, Dubai Police Academy Press, 1998, p. 212.

<sup>102</sup> Dubai Court of Cassation (Appeal number 5 of 2003 – dated on 27 April 2003).

<sup>103</sup> The Emirate Court of Cassation (Appeals number 33,53/18 Judicial – dated on 25 May 1999).

<sup>104</sup> Ibid. See also Article 144 in Kuwaiti labour law, *supra* note 100.

<sup>105</sup> See *Am. Exp. Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2310 (2013).

<sup>106</sup> S. Lingafelter, "Lack of Meaningful Choice Defined: Your Job vs. Your Right to Sue in a Judicial Forum", *Seattle University Law Review*, 2005, Issue 28, p. 803, 813.

<sup>107</sup> Bahrain court of cassation rule dated 22 September 2020. In this case, the employee is a security man with a law salary, and the arbitration is agreed to outside Bahrain.

Hence, the American Arbitration Association provides two different fee allocation rules in the Employment Arbitration Rules: the employer bears the filing costs if they have drafted a standardized arbitration agreement, or the expenses are borne by both parties equally if the arbitration agreement is negotiated.<sup>108</sup>

As a result, to avoid the court's invalidation rule,<sup>109</sup> most employers should stipulate in their employment arbitration clause that the place of arbitration must be located in the city of the employee's workplace and that the employer will bear the fees of the arbitration when the employee is a plaintiff – the same as the labour law rule<sup>110</sup> – with no prejudice against the arbitrators' right to order the employee to pay the cost if the case is dismissed.

#### IV. THE PROPOSED GUIDELINES TO VALIDATE THE ARBITRATION CLAUSE IN INDIVIDUAL EMPLOYMENT CONTRACTS

Undoubtedly, arbitration is beneficial, as the parties bypass litigation in court,<sup>111</sup> especially in expediency, flexibility<sup>112</sup> and finality, encouraging more immediate resolution of malignant labour practices.<sup>113</sup> Although GCC laws expressly stipulate that employment claims should be

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<sup>108</sup> Panken, Popper, *supra* note 11, p. 29, 34.

<sup>109</sup> See *Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 719 (N.D. Il. 2017), p. 1206–1210, 1216. The court invalidated the arbitration clause because it required the cost of arbitration and fees to be shared between the driver and Uber equally.

<sup>110</sup> Some corporations agree to cover arbitration costs in consumer claims – if they are not frivolous and do not exceed \$75,000, see, e.g. the Terms of Service of Pinterest, available at: <https://policy.pinterest.com/en/terms-of-service> [last accessed 26.9.2023].

<sup>111</sup> See S. Shavell, "Alternative Dispute Resolution: An Economic Analysis", *Journal of Legal Studies*, 1995, Issue 24, p. 1, 2 (arguing that arbitration techniques improve efficiency for all concerned parties).

<sup>112</sup> See Huneidi, *supra* note 90, p. 80, which argues that "the most attractive feature of Kuwaiti arbitration is the high degree of flexibility, informality, and the low cost".

<sup>113</sup> See *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) noting that the benefits of arbitration include "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes".



resolved quickly,<sup>114</sup> the reality is different: the court has no obligation to expedite the process, and employment cases regularly take more than three years to finalize.<sup>115</sup>

Furthermore, the International Labour Organization issued Recommendation No. 92 of 1951, which explicitly permits voluntary arbitration in employment disputes,<sup>116</sup> as long as it is fundamentally voluntary and does not involve any charges or fees.<sup>117</sup>

Therefore, permitting arbitration in the IEC may mitigate the responsibility of the courts and end the sluggish litigation and ineffectiveness of judgments. As one jurist states, “It has been decided in the people’s thoughts that the best way to annihilate a right is to litigate before the courts, so that settlement over a quarter of the right – sometimes even abandoning it entirely – is better than wasting time and money”.<sup>118</sup>

Consequently, to develop a sound theory for validating arbitration, the distinction between international and domestic employment contracts should be drawn as in the case of the New York Convention,<sup>119</sup> which clearly differentiated between refusing the enforcement of an award during the possibility of arbitrating the dispute and when the award would be contrary to public policy.<sup>120</sup>

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<sup>114</sup> See Article 144 in Kuwaiti labour law: “Labour lawsuits shall be heard as summary matters”.

<sup>115</sup> Al-Hindiani, Abdulrida, *supra* note 19, p. 109.

<sup>116</sup> Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), Geneva, ILC 34th Session (29 June 1951).

<sup>117</sup> The principle of voluntarism remains unaffected when parties agree to participate in compulsory arbitration as a component of the bargaining process, even though certain costs such as interpretation services, witness expenses, and attorney fees may be incurred by the employee. See M. Ebisui, S. Cooney, and C. Fenwick, *Resolving Individual Labour Disputes: A Comparative Overview*, International Labour Organization, 2016, p. 31- 32.

<sup>118</sup> A. Alsawi, *Arbitration Under Egyptian Law and International Arbitration Rules*, Dar Alnahda Alarabia Press, 2004, p. 7.

<sup>119</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was formulated and signed in New York under the auspices of the United Nations in 1958. It included all the major countries of the Western world, all of the Eastern European countries and is ratified and approved up to this date by 157 states, including all GCC countries, available at: [https://www.euro-arbitration.org/resources/en/nyc\\_convention\\_en.pdf](https://www.euro-arbitration.org/resources/en/nyc_convention_en.pdf).

<sup>120</sup> See Article V of New York Convention: “2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where rec-

This distinction is not addressed under the domestic law of GCC countries, where they are mixed on these two issues, considering that the arbitration agreement in the IEC is non-arbitrable because it violates the public policy *per se*.<sup>121</sup> In contrast, it can be argued that if the subject matter of the dispute is not limited to being certainly arbitrable, as in such employment contracts, it should not be considered contrary to public policy, and courts should be more welcoming to the international arbitration agreement in the IEC, whether upholding the agreement or enforcing the foreign arbitration award, as well as providing the reasonable expectation for the parties.<sup>122</sup>

Therefore, if employment arbitration is allowed domestically, whether by the legislators or by the courts, there should be no issue of recognition or enforcement of international arbitration agreements. Hence, both issues are related as follows:

## 1. ARBITRATION AGREEMENT IN DOMESTIC INDIVIDUAL EMPLOYMENT CONTRACT

The resistant viewpoints of the GCC countries against arbitration in IECs are based on their desire to protect the weak party (employee) in the employment relationship.<sup>123</sup> However, does litigation achieve this goal, and does arbitration actually violate employees' rights?

In reality, several arguments against arbitration in the IEC do not apply to the GCC legal systems. The empirical study of employment arbitration in these countries cannot be a decisive factor to others,<sup>124</sup> though public policy is changeable.

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ognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country".

<sup>121</sup> Alhaddad, *supra* note 44, p. 418.

<sup>122</sup> See the relation between the arbitrable dispute and the public policy in A. Redfern, M. Hunter, *Law and Practice in International Commercial Arbitration*, Sweet & Maxwell Press, 6th ed., 2015, p. 13

<sup>123</sup> M. Al-Hajeri, *The New Kuwaiti Labor Law*, Aafaq Press, 2018, p. 28.

<sup>124</sup> The authors did not find any empirical study about arbitration in the IEC in the GCC countries, where it is not common or permissible, so they relied on U.S. and European studies.

Several researchers have found that employers substantially benefit in the process of drafting the agreement and selecting the arbitrator, so they are likely to win arbitration cases.<sup>125</sup> Employers generally pay the bill, so they can pre-select arbitrators again and again.<sup>126</sup> Arbitrators also have a financial reason to favour repeated employer customers so that arbitration becomes a business.<sup>127</sup>

These studies raise significant questions which must be addressed, but have led to debate as to the extent of their applicability.<sup>128</sup> In *“An empirical study of employment arbitration: Case outcomes and processes”*, Colvin drew an argument from evidence drawn from reports of the American Arbitration Association (AAA) to a set of findings, specifically that:

1. employees had a more modest win rate among arbitration clauses than in employment litigation trials;
2. employees were awarded smaller financial settlements in arbitration than in employment litigation.<sup>129</sup>

Colvin also noted the existence of a repeat player effect in employer arbitration, whereby employers would have the advantage of having ongoing business relations with the arbitrators, and as a consequence would be in a position to influence their decision making, such that “employee win rates and award amounts are significantly lower where the employer is involved in multiple arbitration cases”.<sup>130</sup>

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<sup>125</sup> K.V.W. Stone, A.J.S. Colvin, *Mandatory arbitration deprives workers and consumers of their rights: The arbitration epidemic*, paper 414, 2015, available at: <https://www.epi.org/files/2015/arbitration-epidemic.pdf> [last accessed 10.02.2023].

<sup>126</sup> A. Colvin, *An empirical study of employment arbitration: Case outcomes and processes*, 2011, p. 18–19, available at: <https://ecommons.cornell.edu/handle/1813/75272> [last accessed 10.02.2023].

<sup>127</sup> According to a 2015 study on arbitration, company repeat players made up 84% of arbitration filings. T. Sobol, L. Barnes, K. Johnson, “Forced Arbitration is a Far Worse ‘Product’ than Jury Trials”, *LAW*, 2019, Issue 360, p. 2 (LEXIS, citing Consumer Fin. Protection Bureau, Arbitration Study [CFPB Study] 56–60 [March 2015]).

<sup>128</sup> See T.St. Antoine, “Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?”, *Ohio State Journal Dispute on Resolution*, 2017, Issue 32:1, p. 1–28. In this article, the author criticizes the empirical study of professor Colvin mentioned above.

<sup>129</sup> A. Colvin, *An empirical study of employment arbitration: Case outcomes and processes*, 2011, p. 1, available at: <https://ecommons.cornell.edu/handle/1813/75272> [last accessed 18.05.2023].

<sup>130</sup> E.g. *ibid.*, p. 1.

These arguments and questions, which of universal applicability, are of specific importance in the USA context, where mandatory arbitration has served as a means of frustrating the access of individuals to remedies. Our specific focus in this paper concerns the role of arbitration in relation to international individual employment contracts in the GCC, and with this in mind we have to underscore that we are exploring the potential value in an expanded role for a procedurally fair and voluntary alternate dispute resolution mechanism.

Additionally, even in the challenging context of the USA, some of the advantages of arbitration emerged in the discussion of Colvin, specifically that the “mean time to disposition in arbitration was 284.4 days for cases that settled and 361.5 days for cases decided after a hearing, which is substantially shorter than times to disposition in litigation”.<sup>131</sup> Additionally, the employer paid the 100% of the arbitration fees in 97% of the cases.

A significant question we would pose in relation to such comparative analysis within legal systems draws on the point raised by Ware that empirical studies “can tell us the relative levels of awards and process costs in arbitration and litigation, but that does not mean they can tell us the relative levels of awards and process costs in arbitration and litigation in comparable cases”.<sup>132</sup> In summary, as Ware argues, we do not have visibility on whether the cases which go to arbitration are comparable to those which are addressed through litigation. The question of the role of arbitration is one which must be resolved at the level of legal policy, and addressing this issue requires that we ensure that all required procedural safeguards are put in place to ensure the fairness of arbitration cases. Arbitration cannot substitute for, nor should it present an impediment to, the ability of individuals to access their statutory rights.

From a public policy perspective, states regulate employment relations in order to ensure that the fundamental welfare of workers is taken into consideration. Arbitration and the utilization of alternative dispute resolutions can appear to serve the aim of a deformalization which weakens the protective status of employment regulations. However, this

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<sup>131</sup> E.g. *ibid.*, p. 1.

<sup>132</sup> S. Ware, “The Effects of *Gilmer*: Empirical and Other Approaches to the Study of Employment Arbitration,” *Ohio State Journal Dispute on Resolution*, 2001, Issue 16, p. 755.

fails to recognize that arbitration is not a replacement for access to legal remedies, but a supplementary avenue to increase access to conflict resolution. As Koukiadaki described, the main elements of an effective dispute resolution system cover (but are not limited to) “preventive emphasis; range of services and interventions; free services; voluntarism and independence”.<sup>133</sup> A fundamental challenge that faces the administration of labour protections concerns the wide variety of contractual relations, and the varying negotiating power of the parties to these relations.

Numerous legal scholars have criticized the fact that arbitrators have been mostly observed as siding with employers and biased against employees and that there were no notable distinctions in results between litigation and arbitration for higher-paid employees.<sup>134</sup> Despite that, it is suggested that the arbitration clause in IEC should not contain the pre-selection of arbitrators, and such procedures should be decided after the dispute is raised, whether by the agreement of the parties or by applying the rules of the institutional arbitration centre.

Furthermore, the confidentiality of arbitration is not always harmful to employees. Some jurists have argued that employers “may be undeterred and even emboldened knowing that the public may never learn of the misconduct” by silencing the employee and hiding systemic violations from the public.<sup>135</sup> It cannot be considered a significant social harm,<sup>136</sup> although confidentiality provisions foreclose contributions by prohibiting the publishing of decisions and keeping employees from discussing their claims.<sup>137</sup>

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<sup>133</sup> A. Koukiadaki, *Individual and collective dispute resolution systems - A comparative review*. International Labour Organization, 2020, p. 124, available at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_760828.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_760828.pdf) [last accessed 18.05.2023].

<sup>134</sup> T. Eisenberg, E. Hill, *Arbitration and litigation of employment claims: An empirical comparison*, 2004, Paper 358, available at: <http://scholarship.law.cornell.edu/facpub/358> [last accessed 10.02.2023].

<sup>135</sup> B.J. Kelly, C.J. Edwards, #MeToo, confidentiality agreements, and sexual harassment claims, 2018, available at: <https://businesslawtoday.org/2018/10/metoo-confidentiality-agreements-sexual-harassment-claims/> [last accessed 10.02.2023].

<sup>136</sup> Zalesne, *supra* note 80, p. 115. The author argues that, because of confidentiality, employees may feel alone and reluctant to speak up for fear of not being believed.

<sup>137</sup> B. Bardner, “Employment Disputes: Point: Arbitration is Not Appropriate”, *Texas Bar Journal*, 2017, Issue 80, p. 152.

These worries and refusals are not identical in GCC countries,<sup>138</sup> where concepts of confidentiality differ. There is no easy access to or publication of the court's decisions, and societies are small enough to know such abuses without having huge corporations, as in the U.S., which may hire more than 100,000 employees.

Therefore, where arbitration is an attractive option for high-level employees,<sup>139</sup> the need for special protection for employees because of these arguments is no longer justified.<sup>140</sup> Additional advantages for some employees include the speed of arbitration proceedings and keeping the dispute confidential.<sup>141</sup>

Moreover, a flexible, inexpensive and easy-to-understand arbitration process is significantly beneficial.<sup>142</sup> For example, the American Arbitration Association has issued simple and clear employment arbitration rules, which are freely available online and provide parties with a list of highly experienced and neutral arbitrators.<sup>143</sup>

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<sup>138</sup> See, for example, L. Green, "Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution", *Notre Dame Journal of Law, Ethics and Public Policy*, 1998, Issue 12, p. 173, 198, stating that "mandatory arbitration fails to protect society's interest for the following reasons: (1) the inequality in bargaining power between the employer and prospective employee; (2) the lack of adequate discovery procedures that are essential to prove instances of discrimination; (3) the lack of legal training possessed by arbitrators; and (4) the lack of a mechanism for social vindication". Most of these inadequacies are not applicable in the GCC countries.

<sup>139</sup> See, e.g. *Dispute between Vivendi Universal and Mr. Messier*, 2003, available at: <https://www.nytimes.com/2003/07/01/business/arbitrators-say-vivendi-owes-messier-23.4-million.html> [last accessed 10.02.2023]. In this case, the tribunal ordered Vivendi Universal to pay its former chairman, more than €20 million regarding his severance indemnities.

<sup>140</sup> Some jurists wonder whether a football player who is considered an employee earning a salary in the millions can still be justified as the "weaker" party; see Johnson, *supra* note 53, p. 1.

<sup>141</sup> See, e.g. M. Novovic, "Loose Lips Sink Ships: Mandatory Confidential Arbitration of Employment Disputes as a Reputational Risk Management Tool", *Journal of International Arbitration*, 2014, Issue 31, p. 541, "Keeping the dispute confidential would limit the reputational risk that may arise from such dispute".

<sup>142</sup> See J.A. Chalk Sr., "Employment Disputes: Counterpoint: Arbitration Has Benefits", *Texas B Journal*, 2017, Issue 80, p. 153.

<sup>143</sup> American Arbitration Association, *Employment arbitration rules and mediation procedures*, 2009, available at: <https://www.adr.org/sites/default/files/Employment%20Arbitration%20Rules%20and%20Mediation%20Procedures%20-%20Nov%202009%20May%202013.pdf> [last accessed 10.02.2023].

In this doubtful situation, the authors do not call for opening the door widely in employment arbitration as in the American concept.<sup>144</sup> However, they suggest that the court on a case-by-case basis, should balance the advantages and disadvantages of allowing arbitration in the IEC, where such an agreement is permitted, with adequate access guarantees to the justice before the court in the enforcement stage.<sup>145</sup>

Therefore, if the arbitration agreement in the IEC includes what the authors suggest – real and clear consent, regular conditions, and the employer bearing the fees – it should be permissible for the employee to choose between court or arbitration.

Consequently, France now favours a model of arbitration for only the weak party. In 2016, a law was enacted to insert an arbitration clause in IEC with a very important safeguard for the employee, who does not have the option of protective jurisdiction. The agreement is unenforceable if the employee does not wish to implement it.<sup>146</sup> This offer is not given to the employer, so if a dispute arises, the employee can choose between resorting to arbitration or litigating before the court.<sup>147</sup>

## 2. ARBITRATION AGREEMENT IN THE INTERNATIONAL INDIVIDUAL EMPLOYMENT CONTRACT

The international employment relationship is quite different in consideration of public policy and society's interests.<sup>148</sup> So, what is the inter-

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<sup>144</sup> In some cases, the court tends slightly towards the employer. See, for example, the case of *Inre Halliburton* 80 S.W.2d 566 (Tex. 2002), when the court ruled that the arbitration clause was enforceable, even when the employees never signed the agreement or reviewed the terms.

<sup>145</sup> See Jourdain-Fortier, *supra* note 68, p. 1.

<sup>146</sup> Act number 1547 of 2016 on the modernization of 21st century justice.

<sup>147</sup> See Article 2061 paragraph 2 of the French Civil Code (para. 1) The arbitration clause must be accepted, unless the party to whom the arbitration clause is opposed has succeeded to the rights and obligations of the party who initially accepted it (para. 2). The clause cannot be used against one of the parties if they have not entered into a contract during the course of their professional activity. La loi n° 2016-1574 du 18 Novembre 2016 – art. 11 (translated by the authors).

<sup>148</sup> The authors are referring to international IEC when one party is foreign or the contract is performed outside of the country.

est of the country if a domestic employer (company) signs an IEC with a foreign employee who works in or outside of the country? Why should the country not recognize such an arbitration agreement or enforce an award if the place of arbitration is outside the country?

The foreign employee may prefer arbitration over litigation in court in the foreign legal system, fearing bias and a slow litigation process, as well as the employment relationship expiring. Also, it is important to promote international economic interest and provide a certain degree of predictability to the parties.<sup>149</sup>

This welcoming trend has been well received in many countries.<sup>150</sup> For instance, the Court of Appeal in Grenoble, France, ruled in 1993 that the arbitration agreement in the IEC is valid when a foreign employee, such as a merchant, is interested in applying the arbitration rules rather than going to a court with a different legal system.<sup>151</sup>

U.S. courts went beyond this point by considering the term “commercial” as it applied at the New York Convention to the employment relationship.<sup>152</sup> “The fact that the employer–employee relationship may include a degree of fiduciary obligation does not deprive it of its commercial character”.<sup>153</sup>

Switzerland has adopted a modern criterion by providing the advantages of international arbitration agreements based on the subject matter of a dispute, which provides that any dispute may be arbitrable if it involves economic interest,<sup>154</sup> and the notion of economic interest com-

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<sup>149</sup> Wilcke, Wildhaber, *supra* note 35, p. 633.

<sup>150</sup> This was deduced in 1998 when the French government withdrew its reservation of Article 3 of the New York Convention about the validity of application in commercial arbitration only. Before this date, the French courts refused to validate such arbitration agreements based on the view that domestic disputes were not arbitrable, as this violated public policy. See Orlean (1961) Rev Crit 778 note, E. Mezger: Clunet 1962, 140, cited from Alhaddad *supra* note 44, p. 409.

<sup>151</sup> Grenoble, 13 September 1993, Rev. Arb. 1994, p. 337, note M. A. Moreau, *Somm.*, Rev. crit 1995, p. 820 *er s.*, cited from Alhaddad, *supra* note 44, p. 415.

<sup>152</sup> *Prograph Int'l Inc. v. Barhydt*, 928 F.Supp. 983 (N.D. Cal. 1996), According to the New York Convention, employment dispute is “commercial”. *S. Glazer's Wine and Spirits, LLC v. Denyer*, 2017 WL 6417810 (D. Haw.).

<sup>153</sup> See *Faberge Int'l Inc. v. Di Pino*, 491 N.Y.S.2d 345, 348 (N.Y. App. Div. 1985).

<sup>154</sup> International arbitrations are governed by federal statute, Chapter 12 of the PILS (Arts. 176–194); see particularly, Art. 177(1) PILS.



prises all claims with a financial value for the parties.<sup>155</sup> This criterion excludes the question of whether the dispute is arbitrable or not, and the only determination for the validity of arbitration is whether the dispute involves economic interest.

This trend, which the authors prefer, promotes the effectiveness of international commercial arbitration towards more recognition and enforcement, which should increase the validity of arbitration.<sup>156</sup> This application has been used commonly in the field of sports arbitration to encourage international competition.<sup>157</sup>

Therefore, applying the defence of international public policy to invalidate the arbitration agreement in IEC should be used minimally – not to consider whether the IEC is arbitrable, but to examine whether this validation violates the basic principle of society.

## CONCLUSION

The comprehensive evaluation of the role of arbitration in international contracts highlights the crucial need to safeguard the interests of the weaker party, particularly in cases where employees are unable to consent to arbitration owing to limited resources or lack of consent. However, the research suggests that if arbitration proceedings adhere to the recommendations put forward, ensuring the incorporation of robust substantive rules derived from labour law, the enforceability of such agreements becomes viable.

A notable proposition emerging from this study is the notion that international arbitration agreements should be regarded as presumptively valid, subject to only limited exceptions. This perspective advocates a departure from the broad defences typically applicable in domestic arbitration and emphasizes the importance of treating international ar-

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<sup>155</sup> The Swiss Federal Supreme Court in the landmark 1992 decision (the *Fincantieri* decision), BGE 118 II 353 para. 3a, cited from B. Berger, F. Kellerhals, *International and Domestic Arbitration in Switzerland*, Stämpfli Publishers, 2015, para. 269. The authors emphasize the complex relationship between public policy and arbitrability.

<sup>156</sup> Alhaddad, *supra* note 44, p. 408.

<sup>157</sup> See, e.g. E. Geisinger, E. Trbaldo-De Mestral, *Sports Arbitration: A Coach for Other Players - ASA Special Series No. 41*, Juris Publishing, Inc., 2015.

bitration as a distinct entity. By adopting this approach, the potential hurdles associated with enforcing arbitration agreements across borders can be mitigated.

It is worth noting that the authors do not fully embrace the principle of "*volenti non fit iniuria*," which mandates the enforcement of arbitration agreements in individual Employment Contracts (IEC). Instead, they present a compelling case by illustrating examples of European nations that allow arbitration under specific conditions. Drawing from these examples, the authors propose the implementation of similar provisions within the GCC, considering the unique interests and circumstances of each country. Through this tailored approach, the enforceability of arbitration agreements in IECs within the GCC can be achieved.

To further strengthen the enforceability of arbitration agreements, the authors suggest certain measures. Firstly, referencing the institutional arbitration centre located in the employee's workplace can enhance accessibility and convenience. Additionally, incorporating opt-out options, signed acknowledgement letters, employer-borne fees, and allowing the right to arbitration to be optional for the employee, all contribute to ensuring fairness and balance in the contractual relationship.

In summary, the authors present a nuanced perspective on the role of arbitration in international contracts, underscoring the importance of protecting the weaker party while striving for enforceability. By advocating the presumptive validity of international arbitration agreements, aligning with specific provisions found in European jurisdictions, and implementing tailored measures within the GCC, the enforceability of arbitration agreements in international individual employment contracts can be effectively realized. This comprehensive approach will not only facilitate fair resolutions, but also promote confidence and trust in the arbitration process within the realm of international contracts.