



Jurisdictional challenges and enforceability of arbitral awards in the UAE

Ahmed Abdelhafez Badr

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JURISDICTIONAL CHALLENGES AND ENFORCEABILITY OF ARBITRAL AWARDS IN THE UAE [In English]

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Summary

SUMMARY	3
ABSTRACT	10
PART 1: ENFORCEABILITY OF ARBITRAL AWARDS IN THE UAE	33
TITLE 1: THE UAE JUDICIAL SYSTEM AND ITS RELATIONSHIP TO THE ARBITRATION SYSTEM	33
Chapter 1 History and Principles of Arbitration in the UAE	35
Section 1 the Competence of Courts to Recognize Arbitral awards in the UAE	40
§ 1 Enforcement Arbitral awards through DIFC Courts.....	40
§ 2 Enforcement of Awards in the Abu Dhabi Global Market.....	41
§ 3 Enforcement of Awards in the UAE’s Mainland	43
Section 2 Enforcing Foreign Awards and Judgments in the UAE	44
§ 1 Procedure for enforcing foreign arbitral awards in the UAE.....	46
§ 2 Case Laws on Applying the New York Convention to Enforce Awards in the UAE:	51
§ 3 UAE Membership of International Conventions	55
Section 3: Main Rules applicable to Arbitration in the UAE.....	59
§ 1 Severability of an Arbitration Clause and Competent-Competent Doctrine.....	60
§ 2 Applicability of the UAE Procedural Law and Evidence law to arbitration	65
§ 3 Arbitration is an Exceptional Dispute Resolution Mechanism	71
§ 4 Rules Applicable to Arbitral Proceedings in the UAE	75
Chapter 2 the New UAE Federal Arbitration Law	83
Section 1 Improvements in the Federal Arbitration Law:	83
§ 1 Enforcement of Arbitral awards:.....	83
§ 2 Remaining Improvements in the Federal Arbitration Law	86
Section 2 Issues that remain mostly unchanged under the old arbitration chapter of the CPC.....	87
§ 1 Effect of the UAE Arbitration Law on the Grounds to set aside an award:	93

§ 2 Effect of the UAE Arbitration Law on Capacity to enter into arbitration agreements :	96
§ 3 Summary of Grounds to Set-aside Arbitral awards under UAE law	97
§ 4 Summary of Grounds to refuse Recognition or enforcement of an arbitral award under DIFC and ADGM Arbitration Laws	100
TITLE 2: NULLITY OF ARBITRAL AWARDS IN THE UAE	102
Chapter 1: Studying Case laws upholding annulment of Arbitral Awards in the UAE	102
Section 1: Nullity Related to Exceeding the Time–Limit for Rendering an Award	102
§ 1: Case Laws that Nullified Arbitral awards Due to Exceeding Time Limit	106
§ 2: the DCC Annulled an arbitral award since it was not dated and as such the judge was unable to verify the time-limit	108
Section 2: Nullity Due to Article 216.1 (c) of the UAE Civil Procedures Code (Article 53.1.g of the Federal Arbitration Law).....	111
§ 1: Arbitrators’ Failure to take an oath for witnesses	112
§ 2: Nullity related to Absence of Deliberations between the Tribunal Members	116
§ 3: Remaining Procedural Flaws including Article 216.1.c (Article 53.1(g) of the Federal Arbitration Law).....	120
Section 3: Nullity Related to other Procedural Irregularities	131
§ 1 Nullity Related to the incompetence of an Arbitrator to adjudicate the dispute	131
§ 2: Nullity Related to Public Order	136
§ 3: Summary of remaining Procedural Irregularities.....	141
Chapter 2: Summary of the Case Laws Confirming Setting Aside Arbitral awards in the UAE	160
Section 1 Case Laws Annulled Awards due to Lack of Capacity to Enter into Arbitration Agreements.....	160
Section 2 Case Laws Annulled Awards due to Exceeding Time limit.....	165
Section 3 Case Laws Annulled Awards for Other Grounds	167
§ 1 Jurisdictional grounds to set aside arbitral awards.....	167
§ 2 Arbitral awards annulled due to issues violations of the <i>principe de la contradiction</i> , right of defense and due process	173
§ 3 Annulment related to public order considerations.....	175
§ 4 Annulment related to Procedural Irregularities	178
PART 2 JURISDICTIONAL CHALLENGES IN ARBITRATION DISPUTES IN THE UAE AND ENFORCEMENT OF AWARDS	184
TITLE 1: THE JURISDICTIONAL CHALLENGE DUE TO LACK OF REQUISITE AUTHORITY TO AGREE TO ARBITRATION	188

Chapter 1: The UAE Law Stance in Relation to Authority to Arbitrate.....	192
Section 1: Difficulties in the UAE law dealing with authority to arbitrate	192
§ 1 Traditional Approach with regards to the authority to arbitrate	192
§ 2 Case Laws Supporting Annulment of Awards due to lack of Requisite Authority to Bind Companies to Arbitration	197
§ 3 Sever Criticisms to the UAE Courts for not being an arbitration-friendly jurisdiction.....	200
Section 2: Doctrines in the UAE Law Supporting Recognizing Arbitration Jurisdiction.....	201
§1: THE Jurisdictional Rules for Protecting Weaker Parties	202
§ 2: Timing for Jurisdiction Challenges.....	204
§ 3: Subsequent Ratification for Arbitration Agreements.....	207
Chapter 2: Estoppel and Apparent Authority Doctrines to recognize Authority to Arbitrate	211
Section 1: Agency by Equitable Estoppel	211
§ 1 Estoppel Legal Framework in English Law.....	211
§ 2 Estoppel Legal Framework in the UAE Law	212
§ 3 Parties are precluded from causing nullity while claiming it.....	213
Section 2: Apparent Authority Doctrine	216
§ 1 Apparent Authority Doctrine in French and English laws as compared with the UAE law.....	216
§ 2 Case laws on Apparent Authority in the UAE law	218
§ 3 Applicability of the Apparent Authority Doctrine regarding Arbitration Agreements under UAE law:	222
Section 3: The Modern view of Cassation Judgments in Dubai as opposed to Abu Dhabi	224
§ 1 First wave of improvement (from 2007 to 2013) in Dubai and Abu Dhabi	225
§ 2 Second Phase of Improvement (from 2015 to 2018) in Dubai	228
§ 3 Relapse to the Old Traditional Approach	233
§ 4 Summary provisions Supporting and opposing Arbitration Jurisdiction	237
Chapter 3: Remaining Jurisdictional Challenges for Arbitrations in the UAE	239
Section 1 Jurisdiction of DIFC Court to hear a Claim for Judicial Review of Arbitral awards	239
§ 1 Execution of foreign judgments through DIFC Courts, enforcement within Dubai.....	242
§ 2 The Dubai Judicial Committee to Resolve Conflict of Jurisdiction.....	243

§ 3 Decisions on Jurisdictional Conflict by the Judicial Committee.....	245
Section 2: Other Jurisdictional Challenges in the UAE	250
§ 1 Enforcement of Awards in the Abu Dhabi Global Market.....	250
§ 2: The jurisdiction when the underlying contract is terminated or invalid under UAE law	251
§ 3: Arbitrability of the Escrow Law	256
§ 4 The jurisdictional Challenges on Assets Assigned under Finance Agreements	260
§ 5: The jurisdictional challenges Related to Failure to Assign Specifically the Agreement to Arbitrate	266
§ 6: The jurisdictional Challenges on Piercing the Corporate Veil in the UAE Law	271
TITLE 2: THE JURISDICTION FOR COMPLEX ARBITRATIONS IN THE UAE	280
Chapter 1: The power conferred upon an arbitral tribunal by the operation of the UAE law to support upholding jurisdiction on multi-contract arbitrations.....	283
Section 1 Consolidation of Arbitration under UAE law	283
§ 1 Dubai Court of Cassation Case Law on Consolidation of Arbitration Claims and Case laws	287
§ 2 UAE Cassation Decision with regards to Consolidation of Cases in Judiciary	290
§ 3 Powers Conferred upon an arbitral tribunal by the Institutional Arbitration Rules	291
Section 2 Powers Conferred upon an arbitral tribunal by the parties	293
§ 1 First: Parties' intention to have a single transaction	294
§ 2 Second: parties' Contemplation.....	297
§ 3 Third: parties' reasonable expectations	297
Section 3 Views of Scholars Supporting Consolidation	299
Chapter 2 International Practice Supporting Consolidating Multi-Contract Arbitration	300
Section 1 Position of ICSID Arbitrations.....	300
Section 2 Position of the English Courts	301
Section 3 Position of French Courts.....	305
§ 1 Determining the Commercial Viability of Consolidation (View from the U.S Courts compared with French Courts).....	308
§ 2 Arbitration Conventions and Rules	311
Chapter 3 Opposing Views to Consolidation	314

Section 1 Challenges to Consolidation of Arbitrations	315
§ 1 Arbitral Awards Denying Consolidation reviewed.....	315
§ 2: The Scope of the Arbitration Agreements	316
§ 3 Parties' Autonomy to Choose Arbitrators	317
§ 4 Confidentiality of Arbitration in Relation to Consolidation	320
Section 2 Position of English Courts Supporting Fragmentation of Disputes in Case of Conflicting Jurisdiction Clauses	321
Section 3 Position of U.S Courts Supporting Fragmentation of Disputes	322
Section 4 Consolidation Where Conflicting Jurisdiction Clauses Exist	323
TITLE 3: RECOGNITION OF ARBITRAL AWARDS IN INTERNATIONAL JURISDICTIONS & LEGISLATIVE REFORMS PROPOSED TO THE UAE LAWS AND THE UAE JURISPRUDENCE TOWARDS ARBITRATION	330
Chapter 1 Enforcement of arbitral awards, Comparative Approach to France and Other Jurisdictions	331
Section 1: General Principles Applicable to Arbitration in France	334
Section 2: Setting aside Arbitral Awards by French Courts	349
§ 1 French Courts Setting Aside Arbitral Awards	349
§ 2 French Courts Denying Setting Aside Arbitral Awards in France.....	362
§ 3 Enforcing awards in France even if set aside by the national courts of the seat of the arbitration	366
§ 4 Comparison of Enforcing Domestic vs. International Arbitral awards in France	371
Section 3: Enforcing Arbitral awards in Other Jurisdictions	373
§ 1 Enforcing Arbitral awards in English Courts	374
§ 2 Enforcing Arbitral awards in the United States' Courts.....	376
Chapter 2: Mitigating Factors to Arbitration Risks, Third-Party Litigation Funding	378
Section 1: Claims for Damages in Real Estate Disputes under UAE law.....	381
§ 1 Legal Framework for Claims for Damages under UAE law	381
§ 2: UAE Supreme Courts Judgments that awarded loss of Rent.....	383
Section 2: Challenges facing Litigation Funders in the UAE:	384
§ 1: Effect of Global Financial Crisis on real estate projects in the UAE.....	385
§ 2: Properties Completion Dates which are unspecified	389

§ 3: Anticipated Completion Date is not an Excuse to Default Contractual Obligations.....	391
Section 3: Limitation of Liabilities under UAE law	392
§ 1: Legal Doctrine	392
§ 2: UAE Jurisprudence on limitation of liability as a mandatory provision.....	395
§ 3: Opinions of Law Firms.....	398
Chapter 3: Proposed Improvements to the UAE Law and the UAE Jurisprudence	399
Section 1: Legislative Reforms	400
§ 1 Limiting Grounds to set aside arbitral awards	400
§ 2 Requisite Authority to Enter into Arbitration Agreements	415
§ 3 Remaining Legislative Improvements	420
Section 2: Improvements Proposed to the UAE jurisprudence	428
§ 1 Potential Criminalization of Arbitrators in the UAE	428
§ 2 Arbitration Clause incorporated by reference	432
§ 3 Managing Consolidation of Multi-contract Arbitrations	434
§ 4 Remaining Improvements Proposed to the UAE jurisprudence.....	436
TABLE OF ABBREVIATIONS	442
BIBLIOGRAPHY	444
CASE LAWS – ABU DHABI COURT OF CASSATION	444
CASE LAWS - DUBAI COURT OF CASSATION	448
CASE LAWS – UAE - UNION SUPREME COURT	461
CASE LAWS - DIFC COURTS AND JOINT JUDICIAL TRIBUNAL.....	464
CASE LAWS - COURTS OF ENGLAND AND WALES.....	465
CASE LAWS - US COURTS.....	467
CASE LAWS - FRENCH COURTS	470
CASE LAWS - OTHER JURISDICTIONS	484
PUBLISHED ARBITRAL AWARDS	485

TABLE OF LEGISLATION: UAE 486

TABLE OF LEGISLATION AND CONVENTIONS: OTHER JURISDICTIONS 488

SECONDARY SOURCE – BOOKS & ARTICLES 491

TABLE OF CONTENTS.....ERROR! BOOKMARK NOT DEFINED.

Abstract

The United Arab Emirates (UAE) is one of the major emerging markets in the world. The economy of the UAE is the second largest in the Middle East (after Saudi Arabia), with an estimated gross domestic product (GDP) of USD 1422 billion in 2017¹.

Since the 1990s, the UAE government put into action strategic plans to reduce reliance on oil production and attract foreign investments into the country. These plans included investing heavily in education, opening free trade zones offering 100% foreign ownership and zero taxes, promoting political and economic stability and having a reliable and independent legal system.

The UAE's successful efforts at economic diversification reduced dependence on oil revenues to 30% of the GDP² ³.

In connection with this economic development, the UAE attempted to establish a modernized legal system to accommodate domestic and foreign parties demanding efficient and independent dispute resolution.

Many local and international companies, as well as individual investors operating in the UAE, agreed to submit their disputes to arbitration in their contracts as a neutral, efficient, predictable, and easily enforceable dispute resolution mechanism.

Arbitration (or Tahkim in Arabic) is part of the local custom in the Arab world whereby ordinary people used to refer their disputes to the head of the tribe for efficient resolution. Arbitration is reported to be used by the Arabs as early as the 7th century and continued until now in the small tribes in the Arab states, where specific moral authority is given to the head of the tribe.

However, historically, and due to specific incidents that happened during the western occupation to the Arab world, arbitration was frequently perceived in the Middle East as a western process that is neither naturally nor culturally connected to the traditional judicial system that was rooted in the Middle East's more developed countries in the 1950s and 1960s.

This perception was enforced in the UAE by a case involving the Abu Dhabi (before forming UAE). *Petroleum Development (Trucial Coast) Ltd. and the Ruler of Abu Dhabi* concerned the geographic scope of an oil

¹ The official portal of the UAE government citing the [Economic Report 2018](https://www.government.ae/en/about-the-uae/economy) released by the UAE's Ministry of Economy, available online <https://www.government.ae/en/about-the-uae/economy>

² ["Diversification raises non-oil share of UAE's GDP to 71%",](https://www.government.ae/en/about-the-uae/economy) also see the official portal of the UAE government, indicating the contribution of the economic sectors to the GDP of the UAE for 2017, available online <https://www.government.ae/en/about-the-uae/economy>

³ The World Fact-book <https://www.cia.gov/library/publications/the-world-factbook/geos/ae.html>

concession granted by the Sheikh of Abu Dhabi. A contract was made in Abu Dhabi and wholly performed in it⁴ and called for the application of principles rooted in the proper sense and common practice of civilized nations.

The terms of the concession agreement called for the application of principles rooted in the good sense and common practice of civilized nations and the agreement was entirely performed in Abu Dhabi. Lord Asquith, the arbitrator, stated in its award that:

"This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of the law were applicable, it would prima facie be that of Abu Dhabi."

Despite admitting that Abu Dhabi laws are, in normal circumstances, applicable to the dispute, Lord Asquith decided that:

*"No such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran, and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial contracts."*⁵

Lord Asquith therefore disqualified Abu Dhabi law as the proper law governing the concessions disputed. The wording above appeared not to be fully respectful to the systems applicable in the Middle East at that time.

Lord Asquith further determined that the English law was applicable and, therefore, he determined that:

"Some of its rules [of English Law] are in my view so firmly grounded in reason, as to form part of this broad body of jurisprudence."

As such, Lord Asquith applied the English law to the dispute regarding an oil concession agreement on an Arab soil without the specific agreement of the parties to refer to the English law and the particular concern of Abu Dhabi to refer the dispute to the English law.

As a result, this decision remained infamous to many Arab jurists and judges and likely contributed to the present animosity towards arbitration⁶.

Two years later, a similar approach was adopted in another case that involved the state of Qatar in 1953, where the arbitral tribunal decided that the Qatari law was the proper law to apply, but then refused to apply the Qatari law on the ground that:

⁴ Imperialism, Sovereignty and the Making of International Law by Antony Anghie, 2007 edition

⁵ In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi, International Comparative Law Quarterly 247 (April 1952); International Law Reports 144 (1951), available online <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/arbitration-between-petroleum-development-trucial-coast-ltd-and-sheikh-of-abu-dhabi/C736D78098735810D8D2ACC801502705>.

⁶ Arbitration and the Arab Middle East: Some Thoughts from a Commercial Practitioner By Howard Stovall http://cidra.org/winter_2010_newsletter_3

*"I am satisfied that Qatari law does not contain any principles which would be sufficient to interpret this particular contract."*⁷

The same dismissive approach to Arab laws was applied a few years later against the Kingdom of Saudi Arabia, where the arbitral tribunal found that

*"Some of the effects of the Concession Agreement cannot be governed by the law of Saudi Arabia, both because of objective considerations and because of the subsequent conduct of the Parties."*⁸

Demonstrably, the history of arbitration in the Arab world has not been supportive (and sometimes has even be derogatory) to the national laws of the Arab countries, seemingly favoring western laws. This history strengthened the view that arbitration is a western dispute resolution mechanism not one that has been an integral part of the legal system in the Middle East for centuries.

Unsurprisingly, then, many Arab countries became suspicious that international arbitration, as a perceived western process, would not provide them with a fair resolution to their disputes.

This could explain, to some extent, the existing animosity of certain national courts in Arab countries to international arbitration. By way of example, the state entities in Saudi Arabia are still forbidden until now by law from agreeing to arbitration without obtaining explicit consent by the President of the Council of Ministers or a legal provision permits that entity to enter into arbitration⁹.

Furthermore, in most other Arab states:

- (1) arbitration agreements represent an effective waiver of the fundamental right to litigate cases before the judiciary,
- (2) the scope of the arbitration agreements must be narrowly constructed to specific issues in dispute, and
- (3) Moreover, agreeing to arbitration in many Arab countries require certain problematic capacity requirements.

This historical background is closely connected to issues being studied in this dissertation as it accounts for the lack of full recognition of arbitration as a dispute resolution mechanism in the UAE.

In particular, this historical context has a reflection, even indirectly, on the main issue being studied in this dissertation, namely:

- The frequent number of arbitral awards being annulled in the UAE, and

⁷ Ruler of Qatar v. International Marine Oil Company, Ltd., 20 International Law Reports 534 (1953)

⁸ Saudi Arabia v. Arabian American Oil Company, 27 International Law Reports 117 (1963).

⁹ Arbitration in the Kingdom of Saudi Arabia, by Shearman and Sterling LLP, available online, <https://www.shearman.com/~media/Files/NewsInsights/Publications/2017/01/Arbitration-in-the-Kingdom-of-Saudi-Arabia-IA-012017.pdf>

- The jurisdictional challenges to arbitral tribunals in the UAE.

Having this negative perception in mind, and following the globalization of international trade opening channels between the Middle East and the western world, Middle Eastern countries were forced to accept that arbitration has been increasingly accepted worldwide to resolve domestic and international commercial and investment disputes. More than 13 Arab countries joined the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') which enables enforcement of an award in any of its 159 Contracting States¹⁰ to ease enforcement of arbitral awards.

This progress came into force despite the fact that international arbitration was perceived as a submission to the Western process that may not provide sufficient consideration to the Arab laws and customs.¹¹

Further, many Arab countries have actually adopted a modern arbitration law based on the model law prepared by the United Nations Commission on International Trade Law ("the UNCITRAL Model Law")¹².

Therefore, establishing legislative and institutional structures in the UAE that are supportive to arbitration is an important pillar to support the UAE's economic environment and therefore the UAE government's strategic plans to diversify the economy and continue growing even after oil production ceases.

In an attempt to support the UAE's efforts at economic diversification and reduced dependence on oil revenues, the UAE government implemented long term plans to develop and modernize the arbitration processes in the UAE. It created modern arbitral institutions, including the Dubai International Arbitration Center (DIAC) established by the Chambers of Commerce of Dubai, the Dubai International Financial Centre (DIFC Arbitration Center), the Abu Dhabi Commercial Conciliation and Arbitration Center (ADCCAC) and Abu Dhabi Global Market Arbitration Center (ADGM). Each of these arbitral institutions provides appropriate rules for their functioning.

The UAE has also introduced financial free zones, specifically DIFC in Dubai and the Abu Dhabi Global Market in Abu Dhabi; both based on English laws in order to attract foreign investors familiar with common law jurisdictions.

The UAE also joined the New York Convention on 2006 in order to streamline enforcement of foreign arbitral awards in the country.

However, the UAE is facing a profound problem in its arbitration system; this problem is well known in the arbitration community in the UAE and can be identified by searching articles and reports issued by local and international law firms operating in the UAE.

¹⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the New York Convention), 330 U.N.T.S. 38 (1959)

¹¹ ARBITRATION AND THE ARAB MIDDLE EAST: SOME THOUGHTS From a Commercial Lawyer by Howard L. Stovall; and Kemicha, "Arbitration in the Arab World in the Twenty-First Century", in Ballantyne and Stovall, eds., Arab Commercial Law: Principles and Perspectives (2002).

¹² The 1985 - UNCITRAL Model Law on International Commercial Arbitration, prepared by UNCITRAL, and adopted by the United Nations Commission on International Trade Law on 21 June 1985. www.uncitral.org.

In essence, arbitration is a relatively expensive dispute resolution mechanism. Arbitration centers, arbitrators, party representatives, and experts typically charge considerable fees for their services in arbitration cases.

Further, arbitration is not always the most efficient dispute resolution mechanism; arbitration could involve many complicated technical and legal matters that may take years of litigation. Further, parties believing that arbitration is not proceeding in their favor tend frequently to obstruct the proceedings and develop tactics to complicate and prolong the arbitral proceedings.

In 2013, the United Nations Conference on Trade and Development (UNCTAD) reported that arbitration centers' fees and tribunal expenses and fees, on average, exceeded USD 8 million per party per case.

A study of investor-state arbitrations carried out under the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID) concluded that between the financial years 2011 and 2015, on average, claimants and respondents incurred costs of approximately USD 5.6m and USD 4.9m, respectively per case.¹³

Under these circumstances, it is undesirable for a party to an arbitration to consume considerable time, money, and resources in arbitral proceedings to obtain a favorable award and then face a situation where the national courts set aside the arbitral award in which hundreds of millions, or even billions of dollars, are at stake. As such, the award cannot be enforced in the judiciary and all costs and time paid to obtain the award go in vain.

This background raises several critical issues as addressed by this dissertation:

Annulment of Arbitral Awards in the UAE

After rendering an arbitral award, the award debtor may decide to oppose the recognition or enforcement of the award by the national court where the award creditor seeks to enforce its award within its jurisdiction.

Annulment of arbitral awards after a judicial review means, in effect, that the party who won the arbitration but lost the enforcement challenge will need to restart new arbitral proceedings from the beginning and the process will start over again. This is a daunting prospect for even the most determined, sophisticated, resilient claimants where they need to re-spend considerable time, and costs to obtain a new arbitral award in case the reason for setting aside the award is related to lack of substantive jurisdiction by the arbitral tribunal or other procedural defects.

This issue becomes more relevant, severe, and frustrating when the grounds predicated upon to set aside the arbitral award are related to insignificant procedures that are neither determinative to the eventual outcome of the dispute nor relevant to the integrity and coherence of the arbitral award or proceedings.

In the UAE, recognizing arbitral awards is a significant concern to parties to arbitral proceedings and to arbitrators taking the most care to render awards enforceable at law and even to the arbitral institutions.

¹³ Source: Queen Mary University of London & White & Case, 2015 International Arbitration Survey

Many law firms operating in the UAE are aware that arbitral awards are being set aside by the UAE courts for apparently insignificant technical faults.¹⁴ This fact is being admitted publically in arbitration conferences and can be found in many articles and dissertations¹⁵.

The insignificant reasons for setting aside arbitral awards as well as the number of cases confirming the setting aside of arbitral awards, and establishing rules for future setting aside of awards by lower national courts, has led many commentators to label the UAE as being an unfriendly jurisdiction to arbitration.

In order to demonstrate the significance of the problematic issue that this dissertation is addressing, below are quotes from law firms operating in the UAE that addressed this problem in their published articles:

The Global Arbitration Review (GAR), which is the leading resource on international arbitration news and community intelligence, published under its 2016 review for the UAE that:

“It is common for losing parties to challenge awards on procedural grounds that they have not raised previously and are only loosely connected to the CPC; this may appear to be spurious and unjust. Many parties seek to stretch the wording of the CPC far beyond what it was intended to guard against in an attempt to establish some defective procedural issue. However, despite this seeming manipulation of the system, the UAE Courts continue to be prepared to hear these questionable arguments. Furthermore, it is clear from reported case law that the courts habitually interpreted the CPC provisions inconsistently and have frequently annulled awards because of only a minor technicality. Any party involved in arbitral proceedings in the UAE must therefore be aware of this”¹⁶

The International Chamber of Commerce (ICC), the world’s largest business organization, representing more than 45 million companies in over 100 countries¹⁷, described arbitration in the UAE, as follows

“Given the broad and not always arbitration-friendly language used in the current law, the UAE courts have sometimes tended to issue restrictive or inconsistent decisions, which have led parties to become wary of the courts’ powers to intervene in or interfere with the arbitral proceedings. While the UAE Government has

¹⁴ Enforcement of Arbitral Awards in the UAE by Chris Mills and Richard Bell of Clyde and Co. Dubai, available online <https://www.clydeco.com/insight/article/enforcement-of-arbitral-awards-in-the-uae>

¹⁵ By way of example, Dr. Habib Al Mulla, Chairman of the Dubai International Arbitration Center, in a conference in DIFC, indicated *“the enforcement of arbitral awards in the Dubai Courts is a major concern.”* In the GAR event in the DIFC, Essam Al Tamimi indicated that *“national courts sometimes set aside arbitral awards for silly reasons.”*

¹⁶ Global Arbitration Review - Arbitration News, Features, and Reviews. The European, Middle Eastern and African Arbitration Review 2016 by Ian Clarke, Anna Gee, Charles Lilley and Polly Lockhart of Berwin Leighton Paisner LLP, 19 October 2015, <https://globalarbitrationreview.com/insight/the-european-middle-eastern-and-african-arbitration-review-2016/1036963/united-arab-emirates>

¹⁷ ICC website <https://iccwbo.org/about-us/>

attempted in recent years to find solutions to issues that have arisen, some of these attempts have resulted themselves in further skepticism”¹⁸.

Bryan Cave Leighton Paisner asserts that:

“While arbitration is becoming increasingly popular in the UAE, common procedural issues continue to be raised which threaten the efficiency of proceedings and the enforcement of final awards. ... It can sometimes be difficult to be certain what is and is not acceptable. With uncertainties threatening to invalidate an often long-awaited decision, it is best to remain cautious”¹⁹

Bryan Cave Leighton Paisner argues further that:

“The UAE’s position on domestic arbitration is mixed. Common law lawyers will find it surprising that some courts take such an overly technical approach to compliance with the local arbitration law, even allowing a respondent to rely on its own failings to annul an award.”²⁰

Similarly, Clyde and Co. LLP confirm that:

“Despite the fact that arbitration is an increasingly popular and accepted form of dispute resolution in the UAE, we have seen UAE courts continue to rely on the requirements set out in the Civil Procedure Code [which are replaced by the UAE Federal Arbitration Law] to annul arbitral awards. In many cases, Awards have been annulled on simple procedural grounds”²¹

DWF (Middle East) LLP provides that:

“The UAE Courts even proved susceptible to formalistic procedural grounds, which are commonly invoked in the ratification process of domestic awards under the applicable provisions of the UAE Civil Procedures Code, for setting aside foreign awards. A flagrant example of the formalism applied to domestic awards is the infamous Bechtel case (International Bechtel v. Department of Civil Aviation of the Government of Dubai, Dubai Court of Cassation, petition No. 503/2003, judgment dated 15 May 2005), in which a Dubai award involving a foreign party was set aside by the Dubai Court of Cassation for failure by the arbitrators properly

¹⁸ International arbitration advances in the UAE and MENA region, Dubai, 04/05/2018, by Matthew Weiniger and Roland Ziade of Linklaters; <https://iccwbo.org/media-wall/news-speeches/guest-blog-international-arbitration-advances-dubai-mena-region/>

¹⁹ *Ibid*

²⁰ Is the UAE arbitration friendly? June 17, 2015 by Anna Gee of Bryan Cave Leighton Paisner, <https://www.lexology.com/library/detail.aspx?g=1df89304-c9d3-42bd-b6ae-491bdb41b5a7>

²¹ Dispute resolution in Abu Dhabi: part 3: commercial arbitration in Abu Dhabi by Richard Bell and Rebecca Soquier of Clyde and Co. LLP; <https://www.lexology.com/library/detail.aspx?g=0f6e67ea-3a7f-4b48-9fcb-1e260a50b7db>

to follow the oath-taking procedure which is mandatory for the hearing of witnesses under the UAE Civil Procedures Code”²²

In addition, Hadeef and Partners magnified the importance of the jurisdictional matters in arbitration by confirming that:

“This once-grey area [jurisdictional issues for arbitration] has prevented many from pursuing arbitration proceedings. Many viewed the risk of having an arbitral award annulled for lack of authority of the opposing side to be too great a risk”²³

This dissertation studies this particular problem; it starts with a brief introduction to the UAE judicial system, including different jurisdictions and courts within the UAE that are competent to recognize and enforce arbitral awards.

In order to understand and diagnose this problem, it is essential to understand the grounds to set aside arbitral awards in the UAE. To this end, it was insufficient to read the Articles of law only. Instead, it was imperative to study an extensive number of case law in the UAE to conclude the UAE courts’ approach, interpretation, and application of UAE law to arbitral awards being set aside by the judiciary.

Studying UAE jurisprudence on cases confirming setting aside arbitral awards is one of the main themes being studied in the First Part of this thesis; the span of the study extends from 1995 to 2018.

In order to diagnose the root causes of setting aside arbitral awards, it was essential to study each case that confirmed setting aside arbitral awards by UAE courts.

Out of several hundred case laws in the UAE included in the study, over one hundred thirty case laws confirmed setting aside both domestic and international arbitral awards; each of these case laws was analyzed and discussed with particular emphasis on the problematic issues or procedure causing annulment.

Indeed, this list is non-exhaustive, but only it illustrates that the UAE laws (even after the latest amendments) and the interpretation of the UAE courts to the UAE laws are generally not supportive of arbitration. Setting aside this large number of arbitral awards is a significant challenge facing the UAE government’s successful efforts towards modernization of the UAE legal system, which is part of the overall plans of the UAE government.

While the UAE courts’ recognition and acceptability of arbitration improved over time, parties seeking to invoke an arbitration agreement or enforce an arbitral award in the UAE should need to be mindful of 'the

²² Kluwer Arbitration Blog, Enforcement of New York Convention Awards in the UAE (Part I): Quo vadis? Gordon Blanke (DWF (Middle East) LLP)/July 26, 2012, <http://arbitrationblog.kluwerarbitration.com/2012/07/26/enforcement-of-new-york-convention-awards-in-the-uae-part-i-quo-vadis/>

²³ Hadeef in Courts – A New Approach on Authority to Bind Companies to Arbitration in the UAE, available online <http://www.hadeefpartners.com/News/278/Hadeef-in-the-Courts---A-New-Approach-on-Authority-to-Bind-Companies-to-Arbitration-in-the-UAE->

historical judicial hostility toward arbitration' or the failure of state arbitration law to mandate enforcement of arbitration agreements.

In order to suggest solutions to this problem, the research takes a comparative approach to contrast the UAE recognition and enforcement process of arbitral awards with more developed jurisdictions.

France, naturally, is the primary jurisdiction for this comparative research. France has an international reputation as being one of the most (if not the most) supportive jurisdiction to recognizing arbitral awards and arbitration in general as a dispute resolution mechanism.

Despite consuming considerable time searching for cases where the French courts set aside arbitral awards, only twenty-two case laws were identified where the French courts upheld the setting aside of arbitral awards. This relatively low number confirms the worldwide reputation that annulment of arbitral awards by the French courts is factually a rare incident given the considerable number of awards seated and/or being enforced in France.

Further, the study of the grounds used by the French courts to uphold setting aside arbitral awards reveals that only serious procedural irregularities affecting the outcome of the dispute or the integrity of the arbitral process constitute grounds to set aside awards. This would demonstrate the French Courts' positive attitude towards arbitral awards even if such awards were set aside in the country of the seat of arbitration.

These grounds include fraud, corruption, the underlying contract is illegal or contains severe irregularity, issues related to an arbitrator's impartiality or independence, public policy, violating the due process including the *Principe de la contradiction* and equal opportunity to each of the parties to present its respective cases, and the arbitral tribunal wrongfully upholds or declines jurisdiction.

All these grounds are serious issues affecting the proper administration of justice and go deep to the substance of the arbitration process.

In contrast, the study of the UAE jurisprudence regarding setting aside arbitral awards in the UAE reveals that relatively insignificant technicalities were used as grounds to set aside arbitral awards. This includes lack of explicit and specific authority to enter into arbitration agreements, exceeding the time-limit to render a final award, lack of signature for each page of the award, failure to provide a date to the award, arbitrators not signing the award within the territories of the UAE, failure of a witness to swear an oath according to the format adopted in courts, and failure to comply with the pre-arbitration procedures.

The broader comparative perspective reflects a consistent pattern that most developed jurisdictions generally respect, support, and recognize arbitral awards. This has developed a general perception among parties to arbitration that arbitral awards, once issued, should be enforced voluntarily before initiating the enforcement process, whereby award debtors do not seek annulment and voluntarily satisfy the arbitral awards before the commencement of the enforcement proceedings due to their prior knowledge that national courts are likely to recognize and respect to arbitral awards.

A Queen Mary Arbitration Survey asking about enforcement in 2008 found that:

“84% of the participating corporate counsel indicated that, in more than 76% of their arbitration proceedings, the non-prevailing party voluntarily complies with the arbitral award; in most cases, according to the interviews, compliance reaches 90%.”²⁴

Another academic analysis on enforcement of international arbitral awards issued by the American Arbitration Center reveals that (i) 89% of awards complied are satisfied before any court orders were issued, and (ii) majority of awards denied enforcement were related to lack of assets of the award debtor, rather than lack of a credible enforcement process. The study concluded the following:²⁵

American Arbitration Association (AAA) Arbitral Awards	
Award Complied	100
Voluntary Compliance	61
Compliance after Negotiations	27
Court Orders	12
Refused Execution	35
Reasons cited for non-compliance by the prevailing party	
Bankruptcy	14
Disappearance	6
Non-responsiveness	9
lack of practical court enforcement	6

In a survey conducted by PwC and Queen Mary University in 2008, voluntary compliance of arbitral awards in the US reached, in most cases, to 90%. The study concluded that:

“Although an arbitration process can lead to an enforced arbitral award, this study reveals that voluntary compliance with an award, or settlement is the most common outcome from arbitration procedures.”²⁶

Another survey from 2008 found that users of arbitration reported that only 11% of all cases required the usage of enforcement proceedings to satisfy awards. Less than 3% of cases had genuine problems with enforcement. Even then, the most prevalent problem was that the opposing party lacked assets (46% of the 3%) and an even

²⁴ International Arbitration: Corporate attitudes and practices 2008 by PwC and Queen Mary University of London 2008, pg. 2, available online <https://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf>

²⁵ Towards a Science of International Arbitration: Collected Empirical Research by Christopher R. Drahozal, Richard W. Naimark, by Kluwer Law International; 1st edition, January 7, 2005

²⁶ International Arbitration: Corporate attitudes and practices 2008 - PwC and Queen Mary University of London 2008

smaller minority were related to problems with the New York Convention (6% of the 3%) or hostility to the enforcement of foreign awards (17% of the 3%).²⁷

Similarly, most arbitral awards in awards England, Wales, and Northern Ireland are enforced voluntarily by award debtors.²⁸ A high evidentiary threshold should be met in order for the grounds for challenging awards to be met, and rare are those cases where the challenges have been found successful.²⁹

The above surveys and studies reinforce the theory that voluntary compliance with arbitral awards is a fundamental feature of most modern jurisdictions.

The above position is clearly far more developed than the position in the UAE, where many arbitral awards are being annulled which motivates awards debtors not to satisfy awards voluntarily. Instead, the UAE courts' repeated precedents for annulling arbitral awards and the unpredictability of the results of the recognition cases incentivizes award debtors to behave more obstructively both during the arbitral proceedings and during the enforcement of arbitral awards before national courts.

Indeed, the robust enforcement mechanism involving legislative reforms and national courts' interpretation of the law in a manner supportive to arbitration ensures that majority of award debtors comply with arbitral awards without the need for lengthy enforcement proceedings and cause few cases actually to require the usage of these enforcement mechanisms.³⁰ This would improve user confidence in arbitration and would enhance the perception that the system works.³¹

Legislative reforms and improving the UAE courts' attitude towards arbitral awards would frequently improve timely voluntary compliance with arbitral awards, which would positively impact the efficiency of arbitration in

²⁷ Multi-party and Multicontract arbitration mechanisms in international commercial arbitration a study on institutional rules of consolidation, joinder, and intervention from a Finnish perspective, Professor Dan Frände Project on Arbitration 2013, p. 345-347.

²⁸ Practical Law: Arbitration procedures and practice in UK (England and Wales): overview, Stephen Jagusch and Epaminontas E Triantafyllou Quinn Emanuel Urquhart & Sullivan LLP, available online:

[https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

²⁹ English Courts Set Aside Award on Grounds of Serious Irregularity by Maguelonne de Brugiere of Herbert Smith Freehills LLP, Kluwer Arbitration Blog, March 24, 2015, available online:

<http://arbitrationblog.kluwerarbitration.com/2015/03/24/english-courts-set-aside-award-on-grounds-of-serious-irregularity-under-section-68-of-the-arbitration-act-1996/>

³⁰ Judging the Effectiveness of Arbitration through the Assessment of Compliance with and Enforcement of International Arbitral awards ... - Oxford Journals, by Q Tannock, Oxford University Press, *Arbitration International*, Volume 21, Issue 1, 1 March 2005, Pages 71–90

³¹ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (2009)

resolving commercial disputes and reduce the gap between the UAE and more developed jurisdictions as set out above.

Moreover, the issue of setting aside arbitral awards by the UAE mainland courts is more serious due to the following issues:

1. The UAE Federal Arbitration introduced on 16 June 2018 does not introduce noticeable improvement compared to the Repealed Arbitration Chapter of the UAE Civil Procedures Code that used to govern the arbitration procedures, especially with respect to the annulment of arbitral awards. Therefore, the large number of case laws confirming annulment of arbitral awards remains a continuing risk.
2. The jurisdiction of DIFC Courts to recognize arbitral awards was curbed by the consistent decisions issued by the joint judicial committee formed to resolve the conflict of jurisdictions between Dubai mainland and DIFC Courts in the years 2017 and 2018, and
3. The Abu Dhabi Global Market Courts have not been tested for many cases to understand whether they can enforce arbitral awards in the mainland of Abu Dhabi.

Therefore, enforcing arbitral awards in the mainland of the UAE, relying on the provisions Federal Arbitration Law, and prosecuting actions before the UAE national courts remain, by far, the most frequently used venue to enforce arbitral awards in the UAE. This particular venue has significant limitations, including the provisions of law and application by the UAE courts. This is one of the main issues being studied by this dissertation, with proposed solutions to it also presented.

Prudent arbitrators should be mindful throughout the arbitration proceedings of technicalities that may give rise to challenges against their awards during actions of enforcement. Many arbitral tribunals consider the enforceability of their eventual awards and protecting these awards against actions of annulment in the judiciary as one of the main issues in conducting the proceedings, especially in jurisdictions that are not habitually supportive of arbitration.

This thesis provides a practical guide to arbitrators and parties acting in arbitral proceedings seated in the UAE or that are envisaged to be enforced in the UAE on the procedures and matters that should be observed in order to have arbitral awards enforceable at in the UAE national courts.

Studying the procedural issues in arbitration affecting recognition and enforcement of arbitral awards in the UAE is particularly useful for arbitrators who do not have a legal education. The rising trend in modern arbitration is to have professionals from engineering and finance act as arbitrators in cases in jurisdictions where the due process and public policy considerations in relation to arbitration are of particular importance.

In order to understand thoroughly the UAE courts' interpretations of the UAE law that caused setting aside this considerable number of arbitral awards, this dissertation will study more than 220 case laws related to the subject and will address the ongoing improvement in the UAE Cassation decisions in respect of recognizing arbitral awards.

Nullity Related to Exceeding the Time – Limit for rendering an award

Unlike the UNCITRAL Model Law, the UAE law allows setting aside arbitral awards in case the time-limit for rendering the final award is exceeded by the arbitral tribunal.

In principle, UAE law respects the parties' liberty to agree to a specific time-limit for the arbitral award; they need to adhere to this time-limit. However, in the event the parties did not agree on the time-limit, the arbitrators need to render the award in six months.

The UAE jurisprudence confirms that any extension of the time-limit for rendering the final arbitral award must take place in one of the following forms:

- (1) Either written agreement between the parties to extend the time-limit,
- (2) One of the parties has to obtain a court judgment that the time-limit is extended. In such a case, the action must be brought before the court before the expiry of the old timeframe, or
- (3) The mere silence of one of the parties to the extension of the proceedings shall not mean an implied acceptance since silence is not an acceptance under UAE law.

At the expiry of the arbitration agreement, the parties can take any of the following actions:

- (1) Either go to the national courts and claim the expiry of the arbitration agreement and bring a court action instead, or
- (2) Wait until the award is issued (given that it needs to establish its position for the claim of expiry of the arbitration agreement during the proceedings) and then the award debtor can bring an action to claim nullity of the arbitral award.

Other grounds for nullity of arbitral awards in the UAE are:

1. Arbitrator's failure to take an oath for witnesses
2. Nullity related to lack of deliberations between the tribunal members
3. Nullity related to arbitrator's failure to set forth the first hearing date in the award
4. Nullity related to arbitrator's failure to set forth the full name of the parties and date in the supplemental award
5. Nullity related to the arbitrator's failure to suspend the proceedings when one of the arbitrator's fitness to serve was being challenged
6. Nullity related to piercing the Corporate Veil
7. Nullity related to granting more than the relief sought by the prevailing party granting due to granting compound rather than simple interest
8. Nullity related to the arbitral tribunal's failure to sign all pages of the award

9. Nullity related to the arbitral tribunal's failure to exhibit a copy of the agreement to arbitrate
10. Nullity related to the incompetence of an arbitrator to adjudicate the dispute
11. Nullity related to misapplication of rules related to the party's failure to appoint an arbitrator

In contrast, the *Conseil d'Etat* in France identified that the grounds for setting aside an arbitral award are limited to the following:

- (1) *Arbitrability*: Where a public body enters into an agreement to arbitrate (or arbitration clause in an agreement) in violation of a rule or law that imposes resorting to administrative courts.
- (2) *Irregularities*: including the circumstances where (i) the arbitral tribunal wrongfully upholds or declines jurisdiction, (ii) the arbitral tribunal is not properly constituted (including as to matters of independence and impartiality), (iii) the arbitral tribunal awards more than sought by one of the Parties, (iv) the arbitral tribunal does not respect due process or (v) the arbitral award does not provide reasons.
- (3) *Award contrary to public policy*: including the circumstances where (i) an award where the underlying contract is illegal or contains severe irregularity, including lack of consent, (ii) the award does not take into account rules and rights applicable to public entities, including the principle of the restraint transferability of certain property rights, and the principle that prerogatives in the public interest cannot be waived, or (iii) the award does not take into account EU public order rules.³²

Therefore, it is clear that grounds to set aside arbitral awards are more extensive in the UAE than other jurisdictions, specifically France, which causes the setting aside of a more significant number of awards in the UAE compared with other parts of the world.

The Jurisdictional Challenges against Arbitrators' Powers in the UAE

Part 2 of this thesis addresses the jurisdictional challenges facing arbitrators in the UAE. Arbitration is essentially a consensual system of dispute resolution; the primary source of an arbitral tribunal's jurisdiction stems from the contracting parties' valid agreement to arbitrate and within the scope of the matters expressly agreed to be submitted to arbitration. In case an arbitral tribunal exceeds its substantive jurisdiction, national courts may not recognize the eventual arbitral award.

The interconnection between Part 1 and Part 2 of thesis is clear, Part 1 demonstrated *inter alia* (27) twenty-seven case laws confirming setting aside arbitral awards for reasons relating to arbitral tribunals dealing with matters or differences not consensually submitted to arbitration by the parties.

³² French Conseil d'Etat, Assembly, 9 November 2016, no. 388806, Société Fosmax LNG v. Groupement d'entreprises STS available online <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000033364623>

Arbitration is an exceptional form of dispute resolution; it involves a waiver of a contracting parties' fundamental right to submit their disputes to the judiciary.

Issues related to the jurisdiction of arbitral tribunals are a critical pillar for the stability of transactions and security of the resulting arbitral awards.

The authority of an arbitral tribunal to prosecute a claim, known as the arbitrators' jurisdiction, arises primarily out of a valid and enforceable arbitration agreement, which is broad enough in scope to accommodate the nature of the disputes between the parties and the specific parties to the arbitration. In case any of the parties contests the arbitral tribunal's jurisdiction, the arbitral tribunal's power to decide on that may become an issue. Furthermore, the arbitral tribunal's decision on jurisdiction is subject to the supervision of the national courts.

Arbitral tribunals should act within their limited jurisdiction and deal only with the matters validly submitted to arbitration. National laws of most jurisdictions, including France and the UAE, emphasize the principle that an arbitral tribunal should not exceed its jurisdiction.

In French law, an arbitral award may be challenged where *"the arbitral tribunal wrongly upheld or declined jurisdiction."*³³

The UAE law does not deviate from this rule, the UAE Federal Arbitration Law provides as a ground to set aside or oppose enforcement of an arbitral award that *"the award contains decisions on matters not falling within the terms of the submission to arbitration or beyond its scope."*³⁴

In addition, most the international conventions related to arbitration confirm the same principle. The New York Convention provides that recognition of an arbitral award may be refused when the award deals with matters beyond the scope of the submission to arbitration. It states that:

*"Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration."*³⁵

The broad primary categories of the jurisdictional challenges that regularly raised by the parties include:

- (1) The Existence, validity, and enforceability of the arbitration agreement; and
- (2) The Scope of the arbitration agreement;

³³ Articles 1492 and 1520 of the French CCP

³⁴ Article 53.1(h) of the UAE Federal Arbitration Law

³⁵ Article V (c) of the New York Convention

The majority of national laws and rules of arbitration by arbitral institution provide that a party who wishes to challenge the arbitrator's jurisdiction should raise the challenge at the beginning of the arbitration proceedings, or as soon as the objecting party becomes aware of the grounds for the challenge, failing which, the right of the party to object jurisdiction shall be waived. However, jurisdictional challenges may be raised to national courts even after an award is rendered. Some of the jurisdictional challenges are genuine, but many others are used for purely tactical reasons; as a result, it is good practice for arbitrators to confirm with the parties that they do not have jurisdictional objections to deciding the dispute.

Set out below the main jurisdictional issues studied in this dissertation:

1. **Capacity to enter into arbitration agreements:** One of the profound jurisdictional issues in the UAE is the fact that the UAE laws contain provisions that make it increasingly difficult to enter into a valid agreement to arbitrate. In general, UAE law requires contracting parties to verify the internal authorization of their counterparties in order to ensure that the general assembly of joint-stock companies or the general manager of limited liability companies (LLC) signs the agreement to arbitrate.

Moreover, even if the signatory to the contract that includes an arbitration clause is having a general power of attorney, this shall not be valid authorization to bind a party to arbitration unless the delegation specifies arbitration by itself.

Consequently, entering into arbitration agreements is problematic for all types of legal entities in the UAE. It appears a rare case where a manager of an LLC company signs an agreement and further it is factually rare to have the general assembly of public joint-stock companies sign agreements.

Even if there is a proper delegation by these authorities, it remains problematic whether the authority given for those individuals representing the company were specific and expresses to arbitration, where the general power of attorney shall not be sufficient to delegate a person to arbitration.

The Dubai Court of Cassation was clear that when contracting parties enter into an arbitration agreement, each party must review and verify the authority of its counterparty to enter into arbitration and this authority must be clear, explicit, and specific.

Applying this principle could affect the safety and confidence in commercial transactions in general.

Failure to observe this standard has caused tens of arbitral awards to be set aside by the UAE courts; this dissertation cites twenty-seven case laws issued by the UAE Supreme Courts confirming the setting aside of arbitral awards for reasons related to the incapacity of the signatory to bind a legal entity to arbitration.

This procedure is utterly impractical as contracting parties should have confidence in the representation of their counterparties in contracts and should not doubt or question the internal authorizations within the parties representing their organizations.

However, the UAE jurisprudence has historically undergone two phases of improvements in this regard:

- (1) The first phase of improvement (from 2007 to 2013) in Dubai and Abu Dhabi: During this phase, the Dubai Court of Cassation held that the authority to bind a party to an arbitration agreement could be

express, implied, or ostensible. This judgment softened the strict approach customarily requested of parties to verify the actual authority granted to agents to arbitrate rather than relying on apparent authority.

- (2) The second phase of improvement (from 2015 up to 2018) in Dubai only, starting from the year 2015: The Dubai Supreme Court has issued important judgments that depart from their former approach concerning authority to enter into arbitration agreements.

These judgments do not represent the consistent decisions of the UAE Supreme Courts since some conflicting decisions have been decided to the contrary. However, since this thesis supports the arbitration jurisdiction when validly agreed to it, these judgments upholding the arbitration jurisdiction represent the modern approach of the UAE courts in recognizing and enforcing agreements to arbitrate.

This recent positive movement in the second phase with regard to acceptance of arbitration jurisdiction is only in the Emirate of Dubai. On the other hand, the situation is entirely different in Abu Dhabi; therefore, the remaining emirates under the Union Supreme Court jurisdiction mostly still follow the first phase of improvement set out above.

Furthermore, the Dubai Court of Cassation itself tends to relapse from this modern view; this emerged in particular jurisprudence by the Dubai Court of Cassation, where the traditional approach was accepted before the court. Therefore, this improvement is not in all courts in the UAE (only in Dubai Courts) and even the decisions of the Dubai Courts are inconsistent in this regard since a number of recent decisions depart from this view.

Following the issuance of these decisions by the Dubai Court of Cassation, when parties proceed to ratify arbitral awards before the Dubai Courts and rely on these recent Cassation decisions before the lower courts in Dubai, still certain lower courts' do not follow the same jurisprudence of the Dubai Court of Cassation's traditional approach.

This contradiction has increased the unpredictability of the UAE courts' acceptability of arbitral awards and provides arbitration practitioners substantial doubts that their decisions may be recognized or enforced. As stated above, the enforceability of awards is one of the focuses for arbitrators.

One of the essential recommendations of this dissertation is that the modern jurisprudence supporting the arbitration jurisdiction should be incorporated in UAE law and/or the practice of the UAE courts which keep issuing contradictory decisions in that respect, this can be performed regardless of whether the jurisprudence supporting this view is from the UAE or from other developed jurisdictions, notably France.

2. **The Jurisdiction of the UAE Financial Free zones:** Recent years witnessed the rise of the financial free zone jurisdictions in Abu Dhabi and Dubai and using these jurisdictions, which are adopting the common law model and are supportive to arbitration, as a conduit to enforce arbitral awards outside the national courts of the UAE is an increasing trend. This dissertation addresses this phenomenon, which created a conflict of the jurisdiction

The first financial free zone is the DIFC Courts, which is based in the DIFC that is a separate financial free-zone with its own set of laws based on have been supportive of recognizing arbitral awards.

The analysis of the jurisdiction of DIFC Court to hear a claim for judicial review of arbitral awards is illustrated in detail in this dissertation.

Having regards to the unpredictability of the mainland courts Dubai (and indeed the UAE generally) in enforcing arbitral awards and the considerable number of arbitral awards that were set aside by the Dubai Courts, parties were seeking to enforce arbitral awards in DIFC Courts as a conduit to enforce arbitral awards in Dubai Courts in order to circumvent the use of Dubai Courts that were labeled as being anti-arbitration friendly.

DIFC Courts confirmed, in a number of decisions, that they have jurisdiction to hear claims for ratifying and enforcing arbitral awards even in the event where the award debtor has no assets in DIFC.

Following the issuance of these decisions, many law firms in the UAE considered the impact of those decisions to be potentially very significant, and capable of altering the enforcement landscape in the UAE.³⁶

Law firms predicted that if the Dubai Courts follow this principle, the result may be that some judgments, which the Dubai Courts may not have enforced directly, would now be capable of enforcement in Dubai using this route.

Therefore, the DIFC Courts were being used as a conduit to enforce arbitral awards and foreign court judgments in the Dubai mainland. Parties and law firms expected to use this conduit to overcome the significantly problematic issues set out in Part 1 of this thesis regarding the unpredictability of the Dubai mainland courts (and indeed the UAE generally) in enforcing arbitral awards and the considerable number of awards which were set aside by the Dubai Courts. It is well known in the UAE that the DIFC Courts are more favorable to arbitration than Dubai mainland Courts of both domestic and foreign arbitral awards than the Dubai mainland courts.

Therefore, the connection between the annulment of arbitral awards and the jurisdictional matters is cohesive; one problem leads to the other.

This situation created a conflict of jurisdiction between DIFC and Dubai onshore courts. The Dubai government established a Joint Judicial Committee in order to resolve this conflict, which issued a number of important decisions in this regard.

Generally, the Joint Judicial Committee ruled in favor of the Dubai Courts whenever any conflict of jurisdiction exists unless the dispute has a specific connection to the DIFC financial free zone. The committee reasoned that the Dubai Courts have the 'general jurisdiction'.

³⁶ Enforcement of foreign judgments in the UAE - A new dawn, by Henry Quinlan, Adam Vause, Charlotte Leith and Sam Stevens of DLA Piper; <https://www.dlapiper.com/en/uk/insights/publications/2016/03/foreign-judgments-in-the-uae/>

3. **The Jurisdiction of the ADGM:** The ADGM is a new jurisdiction established in 2013 in Abu Dhabi Free Zone. The ADGM is a common law jurisdiction that has an independent court system and judicial authority that are separate from the UAE federal laws as well as the Abu Dhabi laws.

Unlike the DIFC Courts, the ADGM has adopted the entirety of the English common law. In addition, the ADGM adopted a modern arbitration law enacted by the Board of Directors of the Abu Dhabi Global Market.

On 11 February 2018, the ADGM courts entered into a Memorandum of Understanding with the Abu Dhabi Judicial Department, to allow for the reciprocal enforcement of judgments, decisions, orders, and ratified or recognized arbitral awards between the ADGM Courts and the Abu Dhabi courts³⁷.

This direct route of enforcement for ADGM Court judgments and/or ADGM arbitral awards in the onshore Abu Dhabi Courts is a significant advantage when compared with the potentially lengthy and complicated onshore recognition and enforcement. The same procedures would apply to foreign court judgments and foreign arbitral awards.

However, applying the same principle, the use of ADGM as a conduit jurisdiction for enforcement of arbitral awards in Abu Dhabi mainland will depend upon the interpretation and application of ADGM's laws in cases that will probably consume extensive practice and time before there is a firm position on the question.

Further, the intervention of the UAE Union Supreme Court into jurisdictional disputes between ADGM Courts and Abu Dhabi onshore Courts may take considerable time to be resolved and the outcome of which cannot be predicted.³⁸

4. **The Jurisdiction on Complex Arbitrations:** Dealing with multi-contract arbitration has created other jurisdictional issues both in the UAE and internationally. In the absence of legislative direction providing for consolidation of arbitral proceedings, different factors could generally affect the decision on jurisdiction as to whether the consolidation of multi-contract arbitrations is appropriate. It is a fact that prudent businesspersons expect a resolution for their entire disputes before the same arbitral tribunal. However, the tribunal deciding on consolidation should be mindful of the statutory powers conferred upon it and should not order consolidation where the tribunal has a risk of not obtaining a decision enforceable at law on the ground of exceeding the substantive jurisdiction of the arbitral tribunal.

³⁷ Direct enforcement of ADGM Court judgments and arbitral awards into onshore Abu Dhabi, by Julian Bailey, Michael Turrini, and Magda Kofluk of White & Case LLP, <https://www.whitecase.com/publications/alert/direct-enforcement-adgm-court-judgments-and-arbitration-awards-onshore-abu-dhabi>

³⁸ Legal developments and funding in the UAE, by Keith Hutchison of Clyde and Co., available online:

<https://www.clydeco.com/insight/article/legal-developments-and-funding-in-the-uae>

The consolidation dilemma can be framed as a struggle between party autonomy and efficiency. On the one hand, ordering consolidation without the consent of all parties can be contrary to party autonomy. As a result, consolidation without consent is not without risk, bearing the risks that may affect the recognition of the award under the New York Convention³⁹.

In the meantime, fragmenting a multi-contract transaction before several arbitral tribunals typically leads to obvious procedural inefficiencies, including the duplication of efforts across multiple proceedings, causing higher attorney fees, arbitrator fees and administration fees, systemic inefficiencies (where competing tribunals deciding similar or identical claims and factual issues) and conflicting results and causations.

Concerning conflicting dispute resolution agreements, the English courts concluded that there is a “*presumption in favor of one-stop adjudication*.”⁴⁰ This presumption poses that parties intend to resolve their disputes in one forum will only be displaced by precise wording to the contrary.

The English courts resolved this question by looking to the agreement that was “at the commercial center of the transaction”⁴¹ or identifying the contract under which the substance of the dispute arose.⁴²

The French Court of Cassation supported consolidation when it was found that the breach in the second agreement fell within the scope of the first agreement.⁴³

The balance of jurists favoring and opposing consolidation under different jurisdictions is studied in detail in the dissertation.

5. The remaining jurisdictional Challenges: The main jurisdictional challenge facing an arbitral tribunal seated in the UAE is related to the capacity to enter into an arbitration agreement. This conclusion is due to the considerable number of the arbitral awards that were set aside due to this jurisdictional matter; and the frequency that parties used and continue using this jurisdictional challenge before both arbitral tribunals and national courts, as analyzed in the case laws set out in this dissertation.

This dissertation shall study each of the above jurisdictional challenges facing arbitral tribunals seated in the UAE in addition to other issues of jurisdiction related to the following:

³⁹ In particular, Article V(1)(d) of the New York Convention

⁴⁰ *Fiona Trust & Holdings v. Privalov & others* [2007] Bus LR 1917 [2008] 1 Lloyd’s Rep 254

⁴¹ *UBS AG v HAS Nordbank AG*, [2009] EWCA Civ 585 [Exhibit 69]

⁴² *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal and Anor* [(2011) EWHC 1842 (Comm)]

⁴³ Decision by the French Supreme Court on 14 May 1996, First Civil Chamber, 1997 Rev. Arb. 535, see Professor Bernard Hanotiau book on Multicontract/ multi-party arbitration situations named Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions, by Prof. By Bernard Hanotiau, Kluwer Law International B.V., 1 Jan 2005 2005 Edition [Exhibit 72]

- (1) The arbitrability of the Escrow Account Law: Following the global financial crisis started in 2008, the Dubai government issued the Dubai law Number 8 for the year 2007, which is one of the essential pieces of legislation in protecting investors' payments into real estate, whereby any real estate developer is obliged to invest purchasers' monies into an escrow account dedicated for the construction of the relevant projects. Despite the importance of this legislation, arbitral tribunals are facing challenges to uphold jurisdiction to apply this law.
- (2) The jurisdictional issues for agreements assigned under financing transactions: the use of Islamic banks is a customary and a prevalent financing structure in the UAE. Islamic banks in the UAE and all over the world, purchase assets being financed and resells these assets to their real investors and other asset purchasers on an installment basis with a premium to make profits to replace interest (this is called in accounting 'sale-leaseback arrangement' when the bank purchases assets from the debtor).

As part of the financing process, investors and contracting parties to Islamic financing agreements enter into an 'asset assignment agreement.' By this agreement, the borrower assigns all its rights and obligations under the sale and purchase agreement to the bank. Furthermore, the bank replaces the real estate or asset purchaser in all clauses in the agreement where the real investor's identity is indicated. As such, the bank becomes the legal owner of the real estate property. Arbitral tribunals are facing jurisdictional issues with respect to challenges to uphold jurisdiction to the party that assigned to the agreement to the bank.

- (3) Jurisdictional challenges related to failure to assign specifically the agreement to arbitrate: Arbitration cases related to construction disputes are the most common form of arbitration disputes in the UAE. The formation of construction contracts takes a complete process, including a tendering process, where the contractor or the developer issues the tender documents to the shortlisted main contractors being considered for the tender. Following the completion of the commercial and technical evaluation and choosing the contractor that the developer will work with, this selected contractor issues an acceptance letter and signs the tender documents that were previously sent by the developer to the contractors.
 - (a) This is a common way of offer and acceptance in this industry, where many technical drawings are exhibited to contracts, and standardized tender documents need to be in place to make sure the tendering process is standardized.
 - (b) Jurisdictional issues are faced by arbitral tribunals in the UAE where this process of reference to arbitration agreements has been problematic with regard to the referencing to arbitration clauses in other documents.
- (4) Jurisdictional challenges on piercing the Corporate Veil: the general rule of LLCs is that the personal assets of shareholders are not available to fulfill the liabilities of the company. However, frequently, the holding company of an LLC company is the genuine party to the agreement since it assumed the obligations under the contract.
 - (a) Since a tribunal's jurisdiction is primarily derived from the parties' express agreement, when piercing a Corporate Veil due to reasons that could be related to the high degree of

dependence of a subsidiary on its holding company, the holding company could have strong resistance that it did not consent to be a party to the arbitration agreement.

- (b) Therefore, the holding company may, and frequently does, raise a jurisdictional challenge that the arbitral tribunal does not have jurisdiction on the dispute, while on the same dispute the arbitral tribunal might validly have jurisdiction with respect to the subsidiary.

The Introduction of the First Arbitration Law in the UAE

The UAE did not have an arbitration law until recently. The arbitration processes seated in the UAE was governed by particular provisions of the UAE Civil Procedures Code, specifically Articles 203 – 218⁴⁴, which were repealed. It was only on 16 June 2018 when the UAE introduced the first arbitration law ("the Federal Arbitration Law"). The thesis studies in detail the effect of the new arbitration law, including provisions that remained unchanged under the new law, improvement in the law, and issues that need improvement in the law.

The Federal Arbitration Law was introduced in the middle of the research process in this thesis, which affected the content thesis to a high extent and necessitated that each provision in the Repealed Arbitration Chapter of the UAE CPC to be cross referenced with the new provisions in the Federal Arbitration Law in order to provide an updated view on the UAE law stand, this process consumed considerable time and effort to be done precisely.

The Federal Arbitration Law and is broadly based on the UNCITRAL Model Law, which has been adopted in 111 jurisdictions across the 80 Model Law States that are commonly perceived to be arbitration-friendly jurisdictions. Exceptions to the UNCITRAL Model Law are set out later in this document.

In substance, it is a fact that the Federal Arbitration Law provided a certain degree of improvement to arbitration in the UAE, in particular for issues related to the enforcement process. However, the law does not provide the necessary reform to the present problems related to the annulment of arbitral awards, which remained nearly unchanged under the Federal Arbitration Law.

A separate chapter in this dissertation focuses on the contradiction between the UAE Supreme Courts; the UAE has three Supreme Courts in Dubai, Abu Dhabi, and the Union Supreme Court, each court has its distinct jurisdiction. While all the Supreme Courts apply the same federal laws, each court interprets differently the same laws regulating the recognition of arbitral awards. This dissertation studies these contradictions and suggests the approach that is more favorable to arbitration and more coherent with French laws.

These cases are analyzed in order to unify the UAE Supreme Courts' interpretation and application of the UAE law.

It is the practice of the UAE lower courts to cite the UAE Supreme Courts' interpretation of the law in their judgments. Having contradicting interpretations of law by the UAE Supreme Courts is an issue that should be resolved by a committee from all the three Supreme Courts.

⁴⁴ Article 212.1 of the Repealed Arbitration Chapter of the UAE CPC, which is consistent with Articles 23.2 and 53.1(d) of the UAE Federal Arbitration Law

Notable examples of these contradictions include the recognition of the doctrine of severability of an arbitration clause, the recognition of the capacity to bind a legal entity to arbitration, and the recognition of arbitration agreements concluded by reference to other agreements.

At the end of this dissertation, a separate chapter is included to draw conclusions on the improvements suggested to the UAE law in order to have a modernized arbitration system in the UAE by which issues of enforceability of arbitral awards as well as issues of jurisdiction in the Second Part of this thesis can be addressed and resolved. These proposed corrective actions involve both legislative reforms to the Federal Arbitration Law and improvements in the UAE courts' interpretation of the existing laws in relation to the recognition of arbitral awards in order to be more supporting to arbitral awards and the arbitration process.

The suggested improvements include discussions and analysis regarding the following topics:

- (a) Direct enforcement of arbitral awards
- (b) Limiting Grounds to set aside arbitral awards
- (c) Requisite Authority to Enter into Arbitration Agreements
- (d) The contradiction between Dubai Courts and Abu Dhabi Courts with regards to the Requisite Authority to Enter into Arbitration Agreements
- (e) The contradiction within Dubai Courts with regards to the Requisite Authority to Enter into Arbitration Agreements
- (f) Time-Limit to issue Final Award
- (g) Authority of DIAC Executive Committee to extend the time-limit
- (h) Assignment of assets under finance agreements
- (i) Severability of an Arbitration Clause
- (j) Potential Criminalization of Arbitrators in the UAE
- (k) The Application of Article 214 of the UAE CPC (Article 54.6 of the Federal Arbitration Law)
- (l) Contradictions within the Federal Arbitration Law
- (m) Nullity related to procedural irregularities
- (n) Arbitrators' Failure to address the full name of the parties and the supplemental award date.
- (o) Piercing the Corporate Veil
- (p) Procedural Estoppel
- (q) Managing Consolidation of Multi-Contract Arbitrations
- (r) Ability to seek a Tribunal-appointed Expert
- (s) Commencing Parallel Arbitration
- (t) Practice in Arbitration in the UAE
- (u) The Use of DIFC and ADGM and Conduit Jurisdiction
- (v) Arbitrators being Members of the Board of Trustees
- (w) Arbitration Clause incorporated by reference

FULL PAPER

Part 1: Enforceability of Arbitral awards in the UAE

TITLE 1: THE UAE JUDICIAL SYSTEM AND ITS RELATIONSHIP TO THE ARBITRATION SYSTEM

In many civil law countries, recognition of arbitral awards does not take the form of new court action; instead, the court will be asked to issue an Exequatur or 'declaration of enforceability'.

In the UAE, arbitral awards cannot be enforced by providing a declaration of enforcement or Exequatur, as is the case in France. Instead, any domestic or foreign arbitral award, whether institutional or non-institutional awards must be ratified and enforced by the Court of Appeal having jurisdiction. The first UAE arbitration law introduced in 2018 (the Federal Arbitration Law) did not introduce substantial improvements on this front.⁴⁵

The action to set aside the award can be escalated to the Court of Cassation.⁴⁶ Further, the enforcement of an arbitral award can, in some circumstances, be suspended until the Court of Cassation decides on the matter.⁴⁷

In addition, the grounds to set aside arbitral awards are substantial, which if any of such grounds exist, the enforcement shall be refused.⁴⁸

As such, it is necessary to provide a high-level understanding of the UAE judicial system.

With the exception of common law jurisdictions in DIFC and ADGM, the United Arab Emirates is a civil law jurisdiction, influenced by French, Egyptian, and Islamic law. As is typical with civil law jurisdictions, there are

⁴⁵ Article 52 of the Federal Arbitration Law states "An arbitral award made in accordance with this Law shall be binding on the Parties, shall constitute res judicata, and shall be as enforceable as a judicial ruling, although to be enforced, a decision confirming the award must be obtained from the Court"

⁴⁶ Article 54.1 of the Federal Arbitration Law states that "The decision of the Court in an action to set aside is final and can only be appealed in Cassation"

⁴⁷ Article 56.1 states that "an action to set aside an arbitral award does not stay its enforcement. Nevertheless, the Court seized of the action to set aside the award may order a stay of enforcement if so requested by a Party showing good cause."

⁴⁸ Article 55.2 of the Federal Arbitration Law states that "The chief justice of the Court or whoever he delegates from among its judges shall order the arbitral award confirmed and enforced within sixty days of submission of the request for its confirmation and enforcement, unless it finds one or more of the grounds for setting aside the award under section 1 of Article 53 of this Law"

no binding precedents, although judgments delivered by Cassation decisions are usually respected, adopted, and cited in the decisions by the lower courts. Only local law firms may appear as counsel before courts in the mainland of the UAE.

As the UAE has positioned itself as a regional business hub, arbitration became a widely used dispute resolution mechanism.

When the UAE was being formed (involving the combination of seven emirates), the UAE constitution was drafted to allow for each emirate, in addition to being affiliated to the federal system, to establish its own local courts. This option was elected by three emirates, namely Ras Al Khaimah, Abu Dhabi, and Dubai.

The Federal Supreme Court that has the exclusive jurisdiction *inertia* where the defendant is a federal body and where cases of conflict of jurisdiction exist between the courts of each emirate⁴⁹.

Whilst there is a federal court system with a Court of Cassation in Abu Dhabi, Dubai and Ras Al Khaimah do not act within the framework of the federal judicial system. Dubai and Ras Al Khaimah in addition to Abu Dhabi are the only emirates having their own courts.

The UAE Supreme Courts in Abu Dhabi, Dubai, and Ras AL Khaimah are the highest courts in the UAE; they will act as an appellate court for the decisions of lower courts and ensure that they apply and interpret the law correctly.

The three emirates of Abu Dhabi, Dubai, and Ras Al Khaimah have their own Courts of Cassation. The Court of Cassation of all other emirates is the Union Supreme Court in Abu Dhabi.⁵⁰

Summary of the UAE National Courts System

Since 2004, Dubai Courts have been divided into two separate jurisdictions, the Dubai national courts were established under Dubai Law No. 3 for the year 1992 and the DIFC courts were established under the Dubai Law No. 12 of 2004 ('the Judicial Authority Law').

⁴⁹ Article 99 of the UAE Constitution provides that the "*USC shall decide on the following matters:*

1. *Disputes among the member emirates of the UAE, or between any one or more emirates and the federal government, if the dispute is referred to the Court upon the request of any of the concerned parties*", translated by AL Tamimi & Co.

⁵⁰ UAE consulate website in the US, also see the UAE government website on the Federal Judiciary <https://www.government.ae/en/about-the-uae/the-uae-government/the-federal-judiciary>

The Dubai Courts adopt the civil law system, while the DIFC Courts follow the common law model and have jurisdiction over all disputes that specify DIFC as a valid choice of court and DIFC free zone related matters that do not involve criminal law or family law⁵¹.

Similarly, the Abu Dhabi courts are divided into national federal courts established pursuant to Abu Dhabi law 23 of 2006 for re-constitution of courts in Abu Dhabi⁵² and ADGM courts Established in accordance with Abu Dhabi Law No (4) of 2013.

Only UAE national lawyers have rights to represent parties before the UAE courts.

According to Federal Law Number (23) for the year 1991 amended by Federal Law Number (5) of 2002 regarding the regulation of the legal profession, only UAE national lawyers with a valid license are allowed to appear before the UAE courts.

With respect to the proceedings, the UAE courts generally rely on written memorandums and documentary evidence rather than oral hearings in civil and commercial cases. When appropriate, matters of technical disputes are often referred to an expert registered with the court. Oral evidence is granted by the court to establish facts of a case.

Chapter 1 History and Principles of Arbitration in the UAE

As mentioned, above, the UAE did not have an arbitration law until 3 June 2018. Instead, certain provisions in the arbitration chapter of the UAE Federal Civil Procedure Code⁵³ (the 'Civil Procedure Code or CPC') used to regulate arbitration seated or being enforced in the UAE.

The UAE has three main arbitration institutions:

First: The Dubai International Arbitration Centre ('DIAC'), which is regarded as the largest arbitration center in the Middles East⁵⁴, it was primarily established by the Dubai Chamber of Commerce and Industry in 1994 as the Centre for Commercial Conciliation and Arbitration. DIAC has rules established by Dubai decree number 11 of the year 2007; the majority of the DIAC are consistent with foreign international arbitrators. However, the DIAC rules have not been updated since 2007, therefore, 12 years of practice between 2007 until 2019 have resulted in several variables and developments, including complex arbitrations, which DIAC may not have coped with.

⁵¹ Enforcing foreign judgments in Dubai by Tarek Shrayh, Al Tamimi and Co. <https://www.tamimi.com/law-update-articles/enforcing-foreign-judgments-in-dubai/>

⁵² Abu Dhabi Courts website <https://www.abudhabi.ae/portal/public/ar/homepage/labour-law-and-employment/labour-law/court-system-in-abu-dhabi;jsessionid=kQJvYxTfvpqQGymNVgG1bTVgvlhzQcTm2LBFnjJ2qCJyy1bsmhh6!-1856977464!-1570298771!1488015039558>

⁵³ UAE Federal Law No. (11) of 1992, The UAE Civil Procedure Code

⁵⁴ DIAC website, <http://www.diac.ae/idias/aboutus/>

Second: The DIFC-LCIA Arbitration Centre, which is a joint venture between the Dubai International Financial Centre ('DIFC')⁵⁵ and the London Court of International Arbitration ('LCIA'). The DIFC has a modern, UNCITRAL-based arbitration law different from the arbitration law applicable in the UAE mainland.

Third: The Abu Dhabi Commercial Conciliation and Arbitration Centre ('ADCCAC'), which is part of the Abu Dhabi Chamber of Commerce on January 3rd, 1993 to be the first center in the GCC to solve national and international commercial disputes.

Parties choosing a seat outside the UAE may enforce arbitral awards in the UAE within the scope of the 'New York Convention'), which enables enforcement of an award in any of its 159 Contracting States.

Parties choosing the UAE as the seat of arbitration, in fact, have two possible alternative seats within the UAE for arbitration: (i) to select any of the Emirates (UAE mainland) which applies the UAE Civil Procedures Code; or (ii) to specify the 'DIFC' which applies the DIFC arbitration law (iii) to specify Abu Dhabi Global Market (ADGM), which is a financial free zone in the United Arab Emirates, which was established in 2013. The ADGM enacted new arbitration regulations based on the UNCITRAL Model Law in December 2015. However, the arbitration center at ADGM opened its doors on October 2018.

The UAE court system is the regular forum for dispute resolution, and arbitration is considered the exceptional dispute resolution mechanism.

For that reason, under UAE law, an agreement to arbitrate amounts to an effective waiver of a fundamental right to approach the UAE Courts when seeking the resolution of a dispute. It is for this reason that UAE law requires such a waiver to be given by a person with express and specific authority to do so.

In general, if the litigant parties agree on arbitration, a case concerning the dispute may not be brought before the courts. However, if one of the litigants files a case with no objection made by the other litigant before any other plea on the merits of the case, the courts may then consider the case and find the arbitration clause to be waived.⁵⁶

However, if an objection (based on any alleged existence of a valid arbitration clause) is raised by the other party before any other plea on the merits of the case, the courts shall find the case inadmissible due to the existence of the arbitration agreement.

⁵⁵ The DIFC is a financial free zone in the UAE with its own civil and commercial laws,

⁵⁶ Article 213.5 of the UAE CPC, which is consistent with Article 8.1 of the new Federal Arbitration Law. However, as per the Federal Arbitration Law, the plea that the court does not have jurisdiction (since the parties agreed to arbitration) must be raised "*before submitting any request or plea on the merits*" rather than before the first hearing. And DCC Case number 167 of 2002 issued on 2 June 2002

The 'first session' where an objection to the court's jurisdiction must be raised due to the existence of an arbitration agreement is the session where the Respondent or its representative appears for the first time before the Court.⁵⁷

As set out above, in the Middle East generally, arbitration was perceived as a western process that is neither cohesively nor naturally connected to the traditional judicial system that was rooted in the Middle East's more developed countries in the 1950s and 1960s, such as Egypt and Iraq.

Having this negative perception in mind, and following the globalization of international trade opening channels between the Middle East and the western world, Middle East countries were forced to accept that arbitration has been increasingly accepted worldwide to resolve domestic and international commercial and investment disputes.

Further, many Arab countries adopted a modern arbitration law based on the UNCITEAL Model Law.

Moreover, several modern arbitration centers have been established in the Middle East, Cairo International Arbitration Center handled hundreds of cases, the same in several other countries.

In the UAE, three main arbitration institutions most commonly used are the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC), the Dubai International Financial Centre/London Court of International Arbitration Centre (DIFC-LCIA Arbitration Centre) and the Dubai International Arbitration Centre (DIAC).

The following represents the number of cases prosecuted before DIAC, which is considered the largest institutional arbitration center in the UAE:

Number of Cases issued under the DIAC and CIAC

Year	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
DIAC	38	39	77	100	292	431	440	379	316	174	177
CIAC					51	66	66	78	72	74	54

The financial downturn that occurred in 2008 has, however, left a legacy of arbitration disputes as marked in the above curve. In particular, disputes involved companies in the construction sector, as falling values of real estate and tight liquidity put real estate developers and contractors under extreme pressure and more litigious environment.

⁵⁷ Case laws in this regard includes DCC 39/2005 dated 25 September 2005 and DCC 237/2004 dated 3 April 2005, DCC 575/2003 dated 20 June 2004, DCC 112 for 2001 civil dated 16 June 2001

During ten months in 2008, the Dubai International Arbitration Centre (DIAC), 80% of which are reported to be construction-related, handled claims totaling in the region of USD 5 billion (AED18.4 billion).⁵⁸

The financial crisis in the real estate sector also affected the average value per claim in Dubai; while the average value per disputes around the world decreased, the Middle East acted against the trend, with disputes having an average value of USD 112.5 million in 2011 per case, compared to USD 56.25 million in 2010.

However, despite the increasing number of cases and the arbitration centers, still the old perception that arbitration is a western dispute resolution mechanism and an exceptional forum to resolve disputes is still in the back of the minds of many judges and it is not uncommon to see court judgments that do not recognize arbitration and look for the slightest reasons to annul arbitral awards.

This old perception of arbitration is still having a considerable effect on the recognition of the UAE courts to arbitral awards.

A very good example of this proposition is a landmark case law in Dubai of *International Bechtel Co. Ltd. v. Department of Civil Aviation of the Government*.⁵⁹ This case is well-known in the arbitration community in the UAE since it affected the reputation of the UAE as a jurisdiction that is supportive of arbitration. As such, it is important to study this case in more detail.

In *Bechtel*, the Dubai Court of Cassation set aside an arbitral award seated in Dubai, and the UNCITRAL Rules are applicable to the procedures in so far as it does not violate any applicable laws in the Emirate of Dubai.

The Dubai Court of Cassation determined that the witnesses summoned during the arbitral proceedings did not swear an oath at all since the court concluded from reading the evidence that the arbitrator informed the witness that “I have to inform you as a witness that you are under the obligation to say the truth, failing so, you might have serious consequences as a result. Are you aware of that?” The witness confirmed.⁶⁰

The mutual acceptance of the parties to accept the oath formula or the argument that such oath formula is acceptable under the UNCITRAL Rules does not preclude any of the parties to claim nullity subsequently based on Article 216.2 of the UAE CPC which states “an action to set aside shall not be barred by a party has waived his right thereto before the issue of the award of the arbitrators”⁶¹.

Further, the absence of administering an oath for witnesses is contrary to Article 216.1(c) of the UAE CPC, which states, “*The parties may apply for the award of the arbitrators to be nullified when the court considers whether*

⁵⁸ [A time for Dubai's arbitration centres to shine](#) by Henry Quinlan of Norton Rose Middle East

⁵⁹ Bechtel was the prevailing party to this arbitration and was successful awarded to an award for USD 25 million.

⁶⁰ Dubai Cassation Petition 503/2003 issued on 15 May 2004, *International Bechtel Co. Ltd. v. Department of Civil Aviation of the Government of Dubai* [Exhibit 24]

⁶¹ Article 216.2 of the Repealed Arbitration Chapter of the UAE CPC, which is the same wording in Article 54.5 of the Federal Arbitration Law

*it should be ratified, in the following circumstances (c) "If there is a nullity in the award or a nullity in the proceedings having an effect on the award."*⁶²

The UAE CPC further states that "the arbitrators should administer an oath on the witnesses and everyone who shall perjure before the arbitrators are considered a committee of the crime of perjury."⁶³

The Dubai Supreme Court determined that in situations where parties agree to apply the UNCITRAL rules, those rules should be applied to the extent to which they are not in conflict with the mandatory provisions applicable to local arbitration proceedings. The Court held that the arbitrator's failure to request the witnesses to administer an oath was an infringement of the mandatory provisions of Article 211 of the Code of Civil Procedure (Article 33.7 of the Federal Arbitration Law). The arbitral awards were accordingly void.

Bechtel initiated simultaneously two actions before the French and the US courts to appeals to the Dubai Court of Cassations' decision to annul the award.

In the US, Bechtel obtained confirmation and enforcement of the arbitral award in Bechtel's favor that had been annulled by the Dubai Court of Cassation.⁶⁴

The Paris Court of Appeal upheld and enforced the award in favor of Bechtel; the court set aside the Dubai Court of Cassation's decision and dismissed the petition of the Department of Civil Aviation to dismiss Bechtel's action. The Paris Court held that the arbitral award satisfied the entire requirement under the mutual enforcement treaty concluded on between France and the UAE.⁶⁵

This case is well-known in the arbitration community in the UAE; it was and remains a landmark case where the UAE, starting from this case in 2003, started to be labeled as anti-arbitration, which in turn affected the credibility and reliability of enforcing arbitral awards in the UAE.

This, in turn, affected international companies' acceptability of the UAE as a seat for their arbitration due to the unpredictability of the attitude of the UAE courts towards arbitration.

Therefore, the old history of the UAE and the Middle East in general, toward arbitration as well as the recent history until 2005 is providing evidence that the UAE is facing profound issue regarding the enforcement of arbitral awards.

⁶² Article 216.1(C) of the Repealed Arbitration Chapter of the UAE CPC, which is the same wording in Article 53.1(g) of the Federal Arbitration Law

⁶³ Article 211 of the repealed UAE CPC which corresponds to Article 33.7 of the Federal Arbitration Law which states that "Unless otherwise agreed by the Parties, the hearing of witnesses, including experts, shall be conducted under the laws of the State"

⁶⁴ *International Bechtel Co., Ltd. v. Dep't of Civil Aviation of the Govt. of Dubai*, 360 F.Supp.2d 136 (D.D.C.2005)

⁶⁵ Bechtel enforcement proceedings in France (Paris Court of Appeal, Chamber 1C, September 27, 2005)

Before analyzing this issue in detail, it is important to understand the structure of the courts' competence to recognize or set aside arbitral awards in the UAE.

Section 1 the Competence of Courts to Recognize Arbitral awards in the UAE

The procedure to enforce arbitral awards in the UAE differs according to the seat of the arbitral award being enforced; the main classifications are as follows:

- A. Arbitral awards seated or being enforced in DIFC or ADGM (the UAE's financial free zones).
- B. Arbitral awards seated or being enforced in the UAE's mainland.
- C. Arbitral awards seated outside the UAE (foreign arbitral awards) and being enforced in the UAE mainland or DIFC/ADGM.

§ 1 Enforcement Arbitral awards through DIFC Courts

The DIFC was launched following the UAE Federal Decree No. 35 of 2004 as a part of Dubai's initiative to diversify its economy and attract foreign direct investment, especially from countries that are more familiar with the common law principles. It is a Financial Free Zone established under the Federal Law No. 8 of 2004. DIFC is an independent jurisdiction within the UAE; DIFC is empowered to create its own legal and regulatory framework for all civil and commercial matters.⁶⁶

Articles 42 and 24 of the DIFC Arbitration Law establish that the DIFC Courts have jurisdiction and ought to recognize and enforce arbitral awards irrespective of the jurisdiction they were made.

Article 42.1 of DIFC Arbitration Law states *"An arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognized as binding within the DIFC and, upon application in writing to the DIFC Court, shall be enforced subject to the provisions of this Article and of Articles 43 and 44."*⁶⁷

Article 24 of DIFC Court law, provides:

*"(1) Pursuant to Article 7(4) of the Judicial Authority Law, the Court of First Instance has jurisdiction to ratify any judgment, order or award of any recognized: (a) Foreign court; (b) Courts of Dubai or the United Arab Emirates; (c) Arbitral Award; (d) Foreign Arbitral Award; or (e) orders for the purposes of any subsequent application for enforcement in the courts of Dubai"*⁶⁸ [Emphasis added]

⁶⁶ DIFC website <https://www.difc.ae/laws-regulations>

⁶⁷ Article 42.1 of DIFC Law No. 1 of 2008 (the DIFC Arbitration Law)

⁶⁸ Article 24 of DIFC Law No. 10 of 2004 (DIFC Court Law)

By Article 7 of the Judicial Authority Law, the DIFC and Dubai Courts are obliged to enforce one another's judgments⁶⁹.

As such, the DIFC Court has been used by parties and law firms in creative tactics to enforce domestic and foreign arbitral awards. This issue created jurisdictional conflict between Dubai mainland Courts and DIFC Courts; this conflict will be discussed later in this thesis.

Upon the completion of the recognition process of an award by the DIFC Courts, an order of enforcement will be issued by the DIFC Court, which can be executed through the Dubai Courts. This enforcement mechanism was reinforced by a formal "protocol of enforcement" between the Dubai and DIFC Courts in 2009 and, thereafter, by Dubai Law No.16 of 2011 (which amended Dubai Law No.12 of 2004) which establishes, the jurisdiction of the DIFC Courts and their relationship with the wider Dubai Courts⁷⁰.

The Dubai law provides that the Executive Judge at the Dubai Courts has no jurisdiction to review the merits of a DIFC Courts' judgment or order prior to its enforcement. Once the DIFC judgment is enforced, it will have the same status as an order of the Dubai Courts and can be enforced in the execution courts of other Emirates under the Civil Procedure Code and in the courts of countries that are parties to the Riyadh Convention.⁷¹

§ 2 Enforcement of Awards in the Abu Dhabi Global Market

The ADGM is a newly born jurisdiction established in Abu Dhabi Free Zone established in 2013. The ADGM adopted a common law jurisdiction with an independent court system and judicial authority that are separate from the UAE Federal laws as well as the Abu Dhabi laws.

The ADGM has adopted the English common law holistically together with selected English statutes. There are some carve-outs and modifications of provisions of the English statutes that are not applicable to the ADGM.

This adoption of the laws of England particularly differentiating the ADGM from the DIFC Courts, which does not adopt holistically the English Laws but has its own laws that are based on the English laws.

⁶⁹ Article 7 of the DIFC Judicial Authority Law, Law No.12 of 2004 in respect of The Judicial Authority at Dubai International Financial Centre as amended provides *"(2) Where the subject matter of execution is situated outside the DIFC, the judgments, decisions and orders rendered by the Courts and the Arbitral Awards ratified by the Courts shall be executed by the competent entity having jurisdiction outside DIFC in accordance with the procedure and rules adopted by such entities in this regard, as well as with any agreements or memoranda of understanding between the Courts and these entities....."*

⁷⁰ Arbitration in Dubai and the UAE by Craig Shepherd, Stuart Paterson, Caroline Kehoe and Mike McClure of Herbert Smith Freehills LLP, <https://www.lexology.com/library/detail.aspx?g=282586e4-d098-42eb-9dc1-55cf8de121fe>

⁷¹ [Enforcement of arbitral awards: Moving in the right direction](#), by Mark Beswetherick and Keith Hutchison of Clyde and Co.

The ADGM adopts a modern arbitration law enacted by the Board of Directors of the Abu Dhabi Global Market; in exercise of its powers under Article 6 (1) of Law No. 4 of 2013, concerning the Abu Dhabi Global Market issued by His Highness the Ruler of the Emirate of Abu Dhabi.

Article 55 of the ADGM arbitration law sets forth the jurisdiction of ADGM courts in recognizing arbitral awards, which “applies to:

- (1) Awards made in arbitrations where the seat of the arbitration is the Abu Dhabi Global Market;*
- (2) New York Convention Awards; and*
- (3) All other arbitral awards which are sought to be recognized and enforced in the Abu Dhabi Global Market, irrespective of the State or jurisdiction in which they are made”⁷²*

Article 57 of the ADGM arbitration law sets out the grounds on which the recognition or enforcement of an arbitral award “may be refused on if:

- (1) A party to the arbitration c to it, under some incapacity;*
- (2) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;*
- (3) The party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;*
- (4) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;*
- (5) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or*
- (6) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*
- (7) If the court finds that the subject-matter of the difference is not capable of settlement in arbitration under the laws of the Abu Dhabi Global Market; or*
- (8) If the court finds that the recognition or enforcement of the award would be contrary to the public policy of the UAE.”⁷³*

⁷² Article 55 of the ADGM arbitration Regulations of 2015, available online:

http://adgm.complinet.com/net_file_store/new_rulebooks/a/r/Arbitration_Regulations_2015.pdf

⁷³ Article 57 of the ADGM arbitration Regulations of 2015, available online:

http://adgm.complinet.com/net_file_store/new_rulebooks/a/r/Arbitration_Regulations_2015.pdf

§ 3 Enforcement of Awards in the UAE's Mainland

For arbitral awards seated within the UAE mainland, the award must be recognized and enforced in the UAE national courts before execution.

As set out later, the jurisdiction of DIFC to recognize domestic and foreign awards sought to be enforced in the UAE mainland has been regularized to provide default jurisdiction to Dubai mainland courts unless sufficient connection is established to DIFC Courts. , A similar position is expected to be adopted by ADGM (albeit not tested yet). Therefore, recognizing domestic awards sought to be enforced in the UAE mainland via national UAE courts is perceived to be the only venue to enforce domestic awards.

In assessing whether to ratify or annul an award by national courts, the UAE Federal Arbitration Law (as well as the Repealed Arbitration Chapter) does not permit the courts to reconsider the merits of the tribunal's findings but rather to make a decision on procedural grounds. The bases for nullifying an award are set out in Article 53.1 of the Federal Arbitration Law (Article 216.1 of the Repealed Arbitration Chapter). These exist under "*any of the following circumstance*

- a. *That no Arbitration Agreement exists or such agreement is void or has lapsed under the law to which the Parties have subjected it or, failing any indication thereon, under this Law.*
- b. *That a party, at the time of conclusion of the Arbitration Agreement, was incompetent or under some incapacity under the law governing his capacity.*
- c. *That a person does not have the legal capacity to dispose of the disputed right under the law governing his capacity, as provided for in Article 4 of this Law.*
- d. *That a party to the Arbitration fails to present its case because it was not given proper notice of the appointment of an Arbitrator or of the arbitral proceedings or because the Arbitral Tribunal breached due process or for any other reason beyond his control.*
- e. *That the arbitral award excludes the application of the Parties' choice of law for the dispute.*
- f. *That the composition of the Arbitral Tribunal or appointment of any Arbitrator was not in accordance with this Law or the agreement of the Parties.*
- g. *That the arbitral proceedings were marred by irregularities that affected the award or the arbitral award was not issued within the specified time-limit.*
- h. *That the award contains decisions on matters not falling within the terms of the submission to arbitration or beyond its scope, provided that, if the decisions on matters submitted to Arbitration can be separated*

from those not so submitted, only that part of the award which contains decisions on matters not submitted to Arbitration may be set aside.”⁷⁴

Section 2 Enforcing Foreign Awards and Judgments in the UAE

For arbitral awards seated outside the UAE and sought to be enforced inside the UAE, foreign arbitral awards must be recognized and enforced in the UAE national courts before execution.

DIFC Courts upheld jurisdiction to recognize domestic and foreign arbitral awards sought to be enforced in the UAE mainland, the laws of DIFC courts permit recognizing arbitral awards “*irrespective of the State or jurisdiction in which it was made*.”⁷⁵

However, the DIFC Courts’ jurisdiction to hear the judicial review of arbitral awards without sufficient connection to the DIFC or assets to be enforced therein has been stopped by the Joint Judicial Committee, as set out in Part 2, title 1, Chapter 3, Section 1 of this thesis.

Since the UAE joined the New York Convention in 2006, the enforcement of foreign arbitral awards in the UAE is regulated by the provisions of the New York Convention of 1958⁷⁶. This is applicable in both the mainland and the free zones in the UAE.

If, however, a foreign arbitral award was rendered in a state that is not a signatory to an international convention (mainly the New York Convention) or a treaty entered by the UAE, the court of enforcement in the UAE must ascertain that the conditions set forth in Article 235 have been met.

Articles 235 and 236 of the UAE Civil Procedure Code, which are not repealed by the introduction of the Federal Arbitration Law, deal with the enforcement of foreign judgments and arbitral awards in the UAE.

In addition, Article 238 of the UAE Civil Procedure Code ensures that applicability of international conventions to the UAE law once the UAE ratifies and accedes to such convention. It states that:

⁷⁴ UAE Federal Law No. 6 of 2018 on Arbitration in Commercial Disputes; available online <https://www.tamimi.com/crm-media-uploader/fileupload/server/php/files/UAE%20Arbitration%20Law%20-%20Federal%20Law%20No%20%206%20of%202018.pdf>

⁷⁵ Article 42.1 of DIFC Law No. 1 of 2008 (the DIFC Arbitration Law)

⁷⁶ Enforcement of Foreign Arbitral Awards in The UAE: Changing Perceptions, 9 February 2016, Article by Andrew MacCuish and Sai Dandekar, of Kennedys ; available online:

<http://www.mondaq.com/x/464832/Arbitration+Dispute+Resolution/Enforcement+Of+Foreign+Arbitral+Awards+In+The+UAE+Changing+Perceptions>

<http://www.mondaq.com/x/464832/Arbitration+Dispute+Resolution/Enforcement+Of+Foreign+Arbitral+Awards+In+The+UAE+Changing+Perceptions>

“The rules laid down in the foregoing articles shall be without prejudice to the provisions of conventions between the UAE and other countries in this regard.”⁷⁷

Article 235 addresses enforcement of foreign court judgments in the UAE in the absence of bilateral enforcement treaty or convention. Article 236⁷⁸ provides that the provisions of Article 235 of the CPC are also applicable to foreign arbitral awards.

As per Article 235 of the Civil Procedure Code, orders for the enforcement in the UAE of judgments and orders made in a foreign country may be made on the same conditions laid down in the law of that country for the execution of judgments and orders issued in the UAE. Therefore, the reciprocity approach applies for enforcement of judgments; general executing foreign judgments and arbitral awards in the UAE requires a treaty for enforcement and mutual recognition either unilaterally or multilaterally.

As a general rule, in the absence of an international treaty or bilateral between the UAE and another country for the mutual recognition and enforcement of court judgments, the UAE courts invariably should refuse to enforce foreign court judgments and awards.⁷⁹

Furthermore, according to Articles 235.2 and 236 of the UAE Civil Procedure Code, the following requirements must be met in arbitral awards and foreign judgments in general in order to be enforceable in the UAE:

a - that the courts of the UAE had no jurisdiction to try the dispute in which the order or judgment was made, and that the foreign courts which issued it did have jurisdiction over the dispute in accordance with the rules governing international judicial jurisdiction laid down in their law,

b- That the judgment or order was issued by a court having jurisdiction in accordance with the law of the country in which it was issued,

c - That the parties to the action in which the foreign judgment was issued were summoned to attend, and were validly represented,

d - That the judgment or order has acquired the force of res judicata in accordance with the law of the court that issued it, and

⁷⁷ Article 238 of the UAE CPC

⁷⁸ Article 236 of the UAE CPC provides “The terms of the preceding clause shall be applied on the arbitrators' decisions delivered in a foreign country and the arbitrators' decision should be delivered in a matter in which it shall be possible to arbitrate according to the law of the state and should be liable to the execution in the country which has delivered it”

⁷⁹ Enforcement of foreign judgments in the UAE - A new dawn, by Henry Quinlan, Adam Vause, Charlotte Leith and Sam Stevens of DLA Piper; <https://www.dlapiper.com/en/uk/insights/publications/2016/03/foreign-judgments-in-the-uae/>

e - That it does not conflict with a judgment or order already made by a court in the UAE, and contains nothing that conflicts with morals or public order in the UAE

Accordingly, foreign arbitral awards should be enforced by using the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958,⁸⁰ multilateral judicial treaties (including Riyadh Convention and GCC Convention), and bilateral judicial treaties (including those with France, Egypt, India, Morocco, and Pakistan).⁸¹ Notable exceptions from bilateral treaties include the USA, England, Germany, and Russia.

However, in practice, the New York Convention covers most of the countries where bilaterally treaties do not exist. The UAE joined New York Convention by issuing Federal Decree No. 43 for the Year 2006.

In order for a party to enforce a foreign arbitral award in the UAE under the New York Convention, a foreign arbitral award must be rendered in a country that is also a signatory to the New York Convention.

§ 1 Procedure for enforcing foreign arbitral awards in the UAE

Article IV of the New York Convention prescribes the documents that should be included in an application to enforce a foreign arbitral award in the UAE, it reads:

“1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in Article II⁸² or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.”⁸³

⁸⁰ The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (“the New York Convention”)

⁸¹ Enforcing International Arbitral Awards in the UAE by Simon Roderick and Yacine Francis of Allen & Overy, available online <http://www.allenoverly.com/locations/middle-east/ME-Litigation/Documents/Enforcing-International-Arbitral-Awards-in-the-UAE-and-the-DIFC-Courts.pdf>

⁸² Article II of the New York Convention provides “The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”

⁸³ The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (“the New York Convention”)

Practically, in order to enforce a foreign arbitral award in the UAE, the original award (or a duly certified copy) should be notarized by the Ministry of Foreign Affairs of the country where the award was issued and legalized by the UAE Embassy in that country.

Upon receipt of the notarized and legalized award in the UAE, the award should be authenticated by the UAE Ministry of Foreign Affairs and have an official translation to Arabic by a translator licensed by the UAE Ministry of Justice.

Once these requirements are met, a civil or commercial case is instituted in the relevant Court of First Instance in the UAE seeking ratification of the award (under the new Federal Arbitration Law, this case is filed before the Court of Appeal).

There have been cases where this procedure has not been followed (in relation to court judgments given in a Riyadh Convention state), where the application was made direct to the court of execution (without first applying for ratification to the Court of First Instance), and the court of execution permitted enforcement.⁸⁴

Under DIFC Laws, the DIFC Courts are required to recognize and enforce foreign court judgments regardless of whether the UAE has a treaty in place with the country whose court issued the judgment or not. Most of the foreign judgments can be enforced in DIFC courts and accordingly can be enforced in Dubai Courts by the mutual enforcement protocol between the two courts⁸⁵.

However, as set out in the jurisdictional challenges part, the jurisdiction of DIFC to enforced foreign judgments with the intention to enforce such judgments in Dubai mainland is curbed, examples include:

- Joint Judicial Committee Cassation 1/2017, where DIFC Courts ratified an arbitral award passed by London International Maritime Arbitrators Association, an action of annulment was commenced by the award debtor before Dubai Courts. The Joint Judicial Committee did not give any regard to the first seized court and ruled that the Dubai Courts are competent to adjudicate this dispute. This decision was dissented by Justices Michael Hwang, Omar Al Muhairi and Sir David Steel who are the judges nominated by the DIFC Courts to the Joint Judicial Committee, and
- Joint Judicial Committee Cassation 3/2017, a conflict of jurisdiction between DIFC and Dubai Courts for the recognition of a DIAC arbitral award, the Joint Judicial Committee ruled in favor of Dubai Courts since it has the default jurisdiction. Again, this decision was dissented by Justices Michael Hwang, Omar Al Muhairi and Sir David Steel who are the judges nominated by the DIFC Courts to the Joint Judicial Committee.

Similarly, the ADGM Courts recognize arbitral awards regardless of their origin. Article 171 of ADGM laws provide:

⁸⁴ Litigation and enforcement in the United Arab Emirates: overview, by Bashir Ahmed, Chatura Randeniya and Mevan Kiriella Bandara, Afridi & Angell, 1 November 2018.

⁸⁵ Enforcement of foreign judgments in the UAE - A new dawn, by Henry Quinlan, Adam Vause, Charlotte Leith and Sam Stevens of DLA Piper; <https://www.dlapiper.com/en/uk/insights/publications/2016/03/foreign-judgments-in-the-uae/>

“(1) If, in the case of any foreign country which is not a party to an applicable treaty, the Chief Justice is satisfied that substantial reciprocity of treatment will be assured as regards the recognition and enforcement in that foreign country of the judgments of the Courts, the Chief Justice, after consulting the Chairman of the Board, may by order direct that the courts of that foreign country be recognized foreign courts.

(2) The Courts shall recognize and enforce judgments for the payment of a sum of money rendered by a recognized foreign court in accordance with this Chapter, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty.”⁸⁶

Enforcing foreign judgments through National Legal Orders

Article 238 of the UAE Civil Procedure Code confirms that unilateral and/or bilateral treaties, including international conventions, ratified by the UAE can be used to enforce foreign judgments and arbitral awards in the UAE as part of the UAE laws.

Federal Decree Number 43/2006, which was⁸⁷ ratified the UAE's accession to the New York Convention.

For enforcing foreign arbitral awards, the UAE courts' supervision was limited to ensuring that arbitral awards were not issued in contradiction with Federal Decree No. 43 of 2006 (under which the UAE acceded to the New York Convention). Therefore, any request to set aside an award pursuant to Articles 53 of the Federal Arbitration Law⁸⁸ shall be rejected.

DCC Petition No.132 of 2012 issued on 22 February 2012

In this case, two awards were issued based on an arbitration where the agreement between the parties, which provided for arbitration was seated in London under the DIFC-LCIA rules. The petitioner in Cassation challenged the award creditor's motion for ratification and asserted that the arbitration the included the arbitration clause was signed by a person who did not possess the capacity to bind the company to arbitration in addition to other allegations.

The Dubai Court of First Instance ratified the two awards; the decision was upheld by the Court of Appeal.

In its application for the New York Convention, the Dubai Court of Cassation upheld the decisions of the lower courts and ratified the two awards based on the following grounds:

⁸⁶ Article 171 of [ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015](#)

⁸⁷ Published in the Official Gazette on 28 June 2006

⁸⁸ Which sets forth the grounds to set aside an arbitral award, this is replaces Article 216 of the Repealed Arbitration Chapter of the UAE CPC

1. Article 5 of the New York Convention places the burden of proof on the party claiming the annulment of the award, which in this case is the Petitioner in Cassation, which failed to prove that the signatory of the arbitration agreement lacked authority.
2. The Petitioner is precluded from claiming that the contract, containing the arbitration clause, is void because it was not signed by the company manager, since it did not introduce this defense before the trial court. Furthermore, the petitioner in cassation failed to prove that the arbitrator's failure to take an oath for the witness contravened the law of the country where it was issued (which was England in this case), that the award was in violation of the arbitration agreement or that the composition of the arbitral tribunal was contrary to the agreement of the parties.

ADCC Petition No. 679 of 2010 issued on 16 June 2011 – Commercial [Exhibit 49]

In this case, the Abu Dhabi Court of First Instance set aside a foreign arbitral award and found that the conditions set forth in Articles 235 and 236 of the UAE CPC are not met. The award debtor challenged this judgment before the Abu Dhabi Court of Cassation, and the challenge was predicated upon the court disregard to Article 3 of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. The New York Convention applies “the pro-enforcement bias means that the New York Convention supersedes less favorable national legislation. Courts may not apply stricter requirements under their national law for the validity of the arbitration agreement.”⁸⁹ Therefore, member states should refrain from applying stricter rules for ratifying foreign awards than those applicable in the convention, and the UAE already has this provision in Article 238 of the CPC.

The Abu Dhabi Court of Cassation overturned the lower court’s judgment and determined that Articles 235, 236 and 238⁹⁰ of the CPC require national courts to comply with the provisions of bilateral and multilateral treaties and international conventions entered or ratified by the UAE.

However, in the event a foreign arbitral award was rendered in a foreign state, which is not a member of a treaty, or an international convention to which the UAE is a member, the UAE national courts should assess whether to enforce the foreign award under the conditions laid down in Article 235 of the CPC.

Since the UAE ratified and became a member state to the New York Convention in 2006, its provisions have become part of the laws of the UAE, even when the provisions of the convention contradict with the any of the national laws.

The Abu Dhabi Court of Cassation found that the Court of Appeal referred only to Article 235 of the Civil Procedure Code instead of the New York Convention and refused to ratify the award on the ground that one

⁸⁹ ICCA’S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES, https://www.arbitration-icca.org/media/0/13365477041670/judges_guide_english_composite_final_revised_may_2012.pdf

⁹⁰ Article 238 of the CPC states “the rules laid down in the foregoing articles shall be without prejudice to the provisions of conventions between the UAE and other countries in this regard”

of the conditions of Article 235 was not satisfied. The Court of Appeal has therefore misapplied the law⁹¹, which requires applying the provisions of the New York Convention in this case.

The UAE in relation to the New York convention

In order for a party to enforce a foreign arbitral award in the UAE under the New York Convention, the said award must be rendered in a country that is also a signatory to the New York Convention.

Unfortunately, Decree 43 for the Year 2006, adopting the New York Convention, made no reference to Articles 235 and 236 of the Civil Procedure Code (which refer to the conditions of enforcing foreign arbitral awards in the UAE) nor did it reference the Civil Procedure Code at all. The Civil Procedure Code, for these provisions, has not been amended since the UAE joined the New York Convention. Such absence of an express incorporation or acknowledgment of terms has led to inconsistent and unpredictable results.⁹²

In this regard, it appears that there is a controversy on whether the national courts, while ratifying foreign arbitral awards, should apply Articles 235 and 236 of the UAE CPC on one hand or the New York Convention Article V on the other hand which was adopted by the UAE Federal Decree No. 43 for the Year 2006.

Article V of the New York Convention prescribes the limited grounds that an award debtor may rely on to oppose the enforcement of a foreign arbitral award. These grounds are normally procedural or jurisdictional and not related to the merits of the dispute, it states that:

“1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

*(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is **not valid** under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*

*(b) The party against whom the award is invoked was not given proper **notice** of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or*

*(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters **beyond the scope of the submission to arbitration**, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contain decisions on matters submitted to arbitration may be recognized and enforced; or*

⁹¹ Abu Dhabi Court of Cassation judgment number 679 for the year 2010 issued on 16 June 2011 – Commercial [Exhibit 49]

⁹² Enforcement of Foreign Arbitral awards in the United Arab Emirates by Gregory Mayew and Mark Morris

(d) The composition of the arbitral authority or the arbitral procedure was **not in accordance with the agreement of the parties**, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been **set aside** or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is **not capable of settlement in 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.”⁹³

Given this controversy on whether to apply Articles 235/236 of the UAE CPC or Article (V) of the New York Convention, arbitration practitioners expected that Decree 43 endorsing New York Convention would guide the courts on matters of enforcement rather than Article 235 of the CPC. The Decree was more recent and there is support under the Civil Procedure Code itself for recognizing the New York Convention: Article 238 of the Civil Procedure Code provides “*The rules stipulated in the preceding clauses shall be without prejudice of the rules of the agreements between the state and the other countries in this respect.*”⁹⁴

This rule was actually implemented in DCC number 613 for 2015 issued on 18 September 2016 (set out in the following paragraphs of this section).

§ 2 Case Laws on Applying the New York Convention to Enforce Awards in the UAE:

Case Law 1:

In 2013, the Dubai Court of Cassation refused to enforce an ICC arbitral award issued in Paris against the Ministry of Irrigation of the Republic of Sudan.⁹⁵

The Court determined that the Dubai Courts have no jurisdiction to enforce the award because the Sudanese Ministry of Irrigation did not have a domicile or place of residence in the UAE, neither was the arbitration related to any obligation carried out in the UAE.⁹⁶

⁹³ Article 5 of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (“the New York Convention”)

⁹⁴ Article 238 of the UAE Federal Law No. (11) of 1992, The UAE Civil Procedure Code (the Civil Procedures Code)

⁹⁵ Dubai Court of Cassation Number 156 of 2013 – Civil appeal

⁹⁶ Enforcement of foreign arbitral awards in the UAE, Litigation Update 31 December 2013, by Henry Quinlan, Sam Stevens and Alan Kaminsk of DLA Piper;

In doing so, the Court focused on the UAE law, including an analysis of jurisdiction of UAE courts generally under Article 21 of the Civil Procedure Code⁹⁷, and disregarded the principle of the New York Convention whereby an award is could be enforced in any State that is a signatory to the Convention.

In 2010, the Abu Dhabi Court of Cassation followed the criteria set out in the New York Convention and reversed a decision of the Court of Appeals, which refused to enforce a foreign arbitral award (an ICC award rendered in Paris) relying on provisions of the Civil Procedure Code.⁹⁸

In contrast to the common law doctrine of public policy, which is generally construed relatively narrowly, the public order or morals doctrine may be construed subjectively and broadly in the UAE since it could include the general Islamic Shari'a principles that are not commonly known among arbitration practitioners.

Case Law 2:

In a judgment issued on 18 September 2012, the Dubai Court of Cassation confirmed to the international community its determination and commitment to strictly complying with the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.⁹⁹

The court held that the only grounds for refusing to recognize foreign arbitral award are those set out in Decree 43 (confirming the UAE ratification to the New York Convention).

The court determined that it should only review the satisfaction of the limited grounds to set aside the award laid down in the New York Convention. The court found that none of these grounds was found in this case and, therefore, decided to enforce the arbitral award.

In this case, the award debtor argued that the agreement between the parties was invalid for two grounds. First, because it was allegedly not signed by the manager of the company who is the authorized signatory to

⁹⁷ Article 21 of the UAE CPC provides:

"The courts shall have jurisdiction to examine the actions against the foreigner who has no residence or domicile in the state in the following cases....:

2- If the action is related to real estates in the state, a citizen's heritage, or an open estate therein.

3- If the action is concerned with an obligation concluded, executed, or its execution was conditioned in the state or related with a contract required to be authenticated therein or with an incident occurred therein or bankruptcy declared at one of its courts...."

⁹⁸ In ADCC 679 of 2010 [Exhibit 49], the Court of Appeal refused to enforce a foreign award based on Article 235.e of the CPC, which provides, that an award should not be enforced if it conflicts with a decision or an order issued by a court in the UAE and therefore refused enforcement. The Court of Cassation reversed this decision and applied the provisions of the New York Convention.

⁹⁹ DUBAI CASSATION COURT EMPHASISES ITS STRICT COMPLIANCE TO THE NEW YORK CONVENTION, by Hassan Arab & Marwa El Mahdy of Al Tamimi and Company; <https://www.tamimi.com/law-update-articles/dubai-cassation-court-emphasises-its-strict-compliance-to-the-new-york-convention/>

arbitrate on behalf of the company and second, because during proceedings before the lower court, the Respondent requested that the Claimant produces original agreement (the latter however failed to produce the original and only submitted a faxed copy alleging that the agreement was concluded via fax).

The Court of Cassation rejected the argument that the agreement between the parties was invalid.

The court determined that Article 5 of the New York Convention of 1958 placed the burden of proof on the party claiming nullity of an arbitral award on the party who denied the arbitration clause.

The Court concluded that national courts have the jurisdiction to hear enforcement procedures for arbitral awards that were issued outside the UAE by applying rules concerning arbitral awards issued in a foreign state.¹⁰⁰

The two arbitral awards subject to dispute were issued in London, therefore, in accordance with New York Convention and Article 238 of the UAE CPC (which upholds applying conventions that the UAE is part of), the jurisdiction of UAE court with respect to enforcing foreign arbitral awards is limited to reviewing the procedural matters laid down in articles 4 and 5 of the New York Convention. The Court of Cassation confirmed that the two arbitral awards satisfied these requirements¹⁰¹.

It is worth noting that the court rejected the award debtor's argument that the arbitral award involved usurious interests which is against Sharia principles and therefore against the UAE public order. The court established that the prohibition on agreeing to usurious interest in any form of civil or commercial transaction under Article 409 of the Penal Law and Article 714 of the UAE Civil Transactions Law is limited to transactions between individuals, however, with regards to business to business transactions, or business to individual transactions, parties may agree on conventional, simple interest. As per the documents, the parties to the agreement are corporate business entities; therefore, any interest awarded is permissible¹⁰².

Case Law 3:

In 2016, the DCC issued decision number 613/2015 where the court annulled an arbitral award issued in the LCIA where the award creditor sought to enforce an arbitral award in Dubai based on the New York Convention of 1958.¹⁰³

¹⁰⁰ Article 5 of the New York Convention refers to nullity according to the "law of the country where the arbitration took place"

¹⁰¹ DUBAI CASSATION COURT EMPHASISES ITS STRICT COMPLIANCE TO THE NEW YORK CONVENTION, by Hassan Arab & Marwa El Mahdy of Al Tamimi and Company; <https://www.tamimi.com/law-update-articles/dubai-cassation-court-emphasises-its-strict-compliance-to-the-new-york-convention/>

¹⁰² ;

¹⁰³ Dubai Court of Cassation decision number 613 for the year 2015 commercial issued on 18 September 2016

The court rejected ratifying and enforcing the award based on Article 5.1.A of the New York Convention which states that *“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*

*(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”*¹⁰⁴

The following grounds were considered by the court:

- The Repealed Arbitration Chapter of the UAE Civil Procedure Law provides *“An agreement to arbitrate shall not be valid unless it was made by a person having the legal capacity for making a relinquishment over litigated right.”*¹⁰⁵
- The UAE Commercial Companies’ Law provides *“Unless the powers of the manger are fixed in the company Memorandum of Association, the company manager shall have full powers to carry out management affairs of the company, and his actions shall be binding on the company, provided that they are substantiated by the capacity under which he acts.”*¹⁰⁶
- The agreement to arbitrate may be made only by a party having the capacity and competence to dispose of the disputed right and not just the capacity, it is further established that the manager of an LLC is the person having the authority to enter a company into an arbitration agreement.
- The court then held that *“the judgment’s departure from the document which annul an arbitral award are the subject matter court’s departure from the evidence proved in the documents (which is a positive act) or disregarding the evidence in the document (negative act).”*¹⁰⁷
- The Dubai Court of Cassation overturned the decision of the Court of Appeal and found that the burden of proof, under these circumstances, lies with the party pleading the invalidity of the arbitration agreement, such claim is contrary to the default position, being the validity of the arbitration agreement. As such, the court established here that the arbitration agreement is invalid

¹⁰⁴ 5.1.A of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (“the New York Convention”)

¹⁰⁵ Article 203.4 of the Repealed Arbitration Chapter of the UAE CPC, which is consistent with Article 4.1 of the UAE Federal Arbitration Law which states that:

“An Arbitration Agreement may only be concluded, on pain of nullity, by a natural person having the legal capacity to dispose of his rights or on behalf of a juridical person by a representative with specific authority to arbitrate”

¹⁰⁶ Article 237 of the UAE companies’ law number 8 for 1984 which is consistent with Article 83 of the UAE Commercial Companies’ Law number 2 for 2015 provides

¹⁰⁷ Dubai Court of Cassation decision number 613 for the year 2015 commercial issued on 18 September 2016

once the objecting party proves that the signatory to the agreement (which includes the arbitration clause) was not the manager of the LLC Company at the time of the contract formation. In fact, this contradicts with previous decisions issued in this regard, it will be discussed in detail in the jurisdictional challenges part of this thesis¹⁰⁸.

- The court accepted the following evidence introduced by the award debtor to prove that the arbitration agreement was null and void:
 - 1) a copy (certified as original) of the articles of association of the LLC company which indicates that the names of the managers of the company are listed there, not including the signatory of the agreement in question which contains the arbitration agreement.
 - 2) A copy of the passports of the managers listed above where the signatures in the passports are dissimilar from the signature in the agreement containing the arbitration agreement.

The above judgment, as well as other judgments in this context (set out in Part 2, title 1, Chapter 1, Section 3, § 3 of this thesis) is a return to the old traditional approach by the DCC, which, it would seem, is an entirely anti-arbitration approach. More details on this decision and other contradicting decisions will be discussed later in this thesis in Part 2, title 3, Chapter 3, and Section 1 of this thesis.

§ 3 UAE Membership of International Conventions

Washington Convention 1965

The UAE joined the Washington Convention on 22 January 1982.¹⁰⁹

“Washington Convention” is also called *“the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States”* establishing the International Centre for Settlement of Investment Disputes (the ICSID).

The Convention was made to create investor confidence and promote investment into developing countries.

¹⁰⁸ Important Judgment on Contractual Preconditions to Arbitration in the UAE by Hassan Arab of Al Tamimi and Co., https://www.lexismiddleeast.com/eJournal/2016-03-10_15/

¹⁰⁹ ICSID/8 CONTRACTING STATES AND MEASURES TAKEN BY THEM FOR THE PURPOSE OF THE CONVENTION, available online:

<https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%208-Contracting%20States%20and%20Measures%20Taken%20by%20Them%20for%20the%20Purpose%20of%20the%20Convention.pdf>

The objective of the convention is to give guarantees especially in the countries where investment conditions are uncertain against issues such as nationalization or change of power that will bring new rules against the investors.

The convention was written by the World Bank, the seat of the ICSID is in Washington DC. Washington DC is not, however, is not the seat of all arbitrations but it is seat and place of the Center.

The Convention is about investment arbitration; the term “investment” therefore needs to be defined. However, the cases are rather open-minded and provide a wide definition for the investment.

The description of the procedure is divided into Conciliation and Arbitration.

This means that parties have an agreement of conciliation by having amicable discussions within a time-limit; if there is no resolution eventually at the end of the amicable discussions, the dispute is referred to arbitration under the rules of the institution.

The Jurisdiction of ICSID

The use of ICSID conciliation and arbitration is voluntary. Parties have to consent to arbitrate a dispute under the Convention, but once they have consented to arbitration, they cannot unilaterally withdraw their consent.

The Preamble of the Convention reads that ...“no Contracting State shall by the mere fact of its ratification, acceptance, or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.”¹¹⁰

Article 25 of the Convention requires four elements in order to have the ICSID jurisdiction over a case:

- First: a written consent of the parties to the jurisdiction of the Centre.
- Second, the dispute must arise out of an investment.
- Third, the dispute in question needs to be a legal dispute.
- Fourth, related to the parties, one party must be a "Contracting State" (or one of its constituent subdivisions or agencies), and the other party must be a foreign "National of another Contracting State."

ICSID does not have jurisdiction over disputes between states. One of the parties must be a natural or juridical person of another Contracting State.¹¹¹

¹¹⁰ ICSID Convention <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf>

¹¹¹ Article 25 of the Washington Convention of 1965 sets out the limits of the jurisdiction of the ICSID, it reads:

“(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”

UAE Cases under the Washington Convention

The UAE was part of an arbitration proceeding under the International Center for Settlement of Investment Disputes' Rules in Washington DC; the case was between Hussein Nuaman Soufraki, Claimant and the United Arab Emirates, Respondent, ICSID Case No. ARB/02/7.¹¹²

The award was rendered in a case commenced by filing a request for arbitration against the United Arab Emirates by Mr. Soufraki, a natural person claiming to be an Italian national and invoking his rights as such to submit his claims under the ICSID Convention and the bilateral investment treaty (BIT) between the Italy and the UAE.

The dispute concerned a concession agreement between the Dubai Department of Ports and Customs and the claimant.

The claimant asserted that he had the concession to build, manage, and operate the port of Dubai for thirty years.

Subsequently, a dispute arose regarding the termination of the concession by the respondent. The claimant submitted the dispute to an ICSID tribunal, claiming that the UAE had committed a violation of the bilateral investment treaty and claimed damages for USD 580 million and USD 2.5 billion.

The UAE raised objections to the claimant's standing to invoke, as an Italian, the Italy-UAE investment treaty because of the discrepancy between the nationality asserted by Mr. Soufraki in the Concession Contract (Canadian nationality) and the nationality claimed in order to avail himself of the Italy-UAE treaty and access of ICSID arbitration.

Under Article 41(1) of the ICSID Convention, the arbitral tribunal is competent to decide on its own jurisdiction.

The UAE was successful in this arbitration.

The basis for the decision is that the competence of the tribunal is determined by Article 25(2) (a) of the ICSID Convention, which refers to 'a national of a Contracting State' and Article 1(3) of the BIT, which defines an 'investor of the other Contracting State' as a *"natural person holding the nationality of that State in accordance with its law."*¹¹³

¹¹² [INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT](https://www.italaw.com/sites/default/files/case-documents/ita0799.pdf) Disputes, the case was between HUSSEIN NUAMAN SOUFRAKI, Claimant and THE UNITED ARAB EMIRATES, Respondent ICSID Case No. ARB/02/7; <https://www.italaw.com/sites/default/files/case-documents/ita0799.pdf>

¹¹³ [INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT](https://www.italaw.com/sites/default/files/case-documents/ita0799.pdf) Disputes, the case was between HUSSEIN NUAMAN SOUFRAKI, Claimant and THE UNITED ARAB EMIRATES, Respondent ICSID Case No. ARB/02/7; <https://www.italaw.com/sites/default/files/case-documents/ita0799.pdf>

In other words, under the ICSID Convention and the Italian-UAE BIT, the arbitral tribunal had jurisdiction to adjudicate the dispute only if the Claimant was on the pertinent dates an Italian national. The arbitral tribunal found that

“Although the claimant previously had Italian nationality, he lost it in 1991, when he acquired Canadian nationality. The Claimant failed to submit any document to prove that it reacquired the Italian nationality. Consequently, the arbitral tribunal lacked jurisdiction”.¹¹⁴

Riyadh Convention of 1983:

The UAE has been a party to the Arab Agreement for Judicial Cooperation (“the Riyadh Convention” 1983); since the year 1999¹¹⁵.

The Riyadh Convention has provisions relating to, among other things, the recognition and enforcement of judgments rendered in member states.

The New York Convention was ratified by many other countries, including the UAE Egypt, Saudi Arabia, Jordan, Qatar, Oman, and Syria

Helpfully, the Riyadh Convention was ratified by a number of countries that did not ratify the New York Convention, thereby easing enforcement in these countries, such as Iraq, Libya, Sudan, Somalia, and Yemen.

Therefore, commentators advise that:

*“Where enforcement of an arbitral award may be required in one of these countries, there may be advantages to seating an arbitration in another Riyadh Convention member state, such as the UAE. However, it is worth bearing in mind that the Riyadh Convention does not apply to awards against a government. In addition, it requires a party attempting to enforce in the jurisdiction where assets are located to obtain a certificate from a judicial authority where the award was granted confirming that the award is enforceable.”*¹¹⁶

In relation to a judgment from a Riyadh Convention member state or a state with which the UAE has a treaty, the jurisdiction of the court of origin is generally not reviewed (subject to particular exceptions that may be provided in the relevant treaty).

¹¹⁴ *Ibid*

¹¹⁵ The United Arab Emirates Shipping Law 2018, by Mohamed EL Hawawy and Sheridan Striger of Ince and Co. Middle East LLP; <https://iclg.com/practice-areas/shipping-laws-and-regulations/united-arab-emirates>

¹¹⁶ Arbitrating in the Middle East – trends, tips and traps, International Arbitration Update 7 February 2017, by Dyfan Owen and Faisal Baassiri, available online <https://www.ashurst.com/en/news-and-insights/legal-updates/arbitrating-in-the-middle-east/>

GCC convention of 1996

The UAE is a party to the GCC Convention since the year 1987.

Article 1.A of the GCC convention of 1996 provides *“Each of the GCC countries shall execute the final judgments issued by the courts of any member state in civil, commercial and administrative cases and the personal affairs cases in accordance with the procedures as provided under this agreement, provided that the court that issued the judgment has the jurisdiction in accordance with the international jurisdiction as applicable in the member state where the judgment is required to be executed or has the jurisdiction in accordance with the provisions of this agreement.”*¹¹⁷

According to Article 238 of the UAE Civil Procedure Law, the courts of the UAE must enforce decisions by courts and arbitral tribunals where the unilateral or bilateral agreements provide more favorable conditions than those laid down in Articles 235 and 236 of the CPC, these conventions include the GCC Convention, Riyadh Convention, and New York Convention.

Pursuant to Article 1 of the GCC Convention, UAE Courts, including DIFC and ADGM, should enforce GCC judgments and orders. The DIFC Courts are bound to comply with the terms of bilateral and multilateral treaties for the mutual enforcement of judgments, pursuant to Article 24(2) of the DIFC Courts Law.¹¹⁸

Section 3: Main Rules applicable to Arbitration in the UAE

Arbitrators and parties’ representatives choosing the UAE as the seat for their arbitration should be aware of the principles applicable to arbitration in the UAE or at least should systematically search through them during the proceedings should any circumstance arise that would raise potential procedural flaws in the proceedings.

The above is easier said than done since the majority of arbitrators and counsels serving in the UAE are non-Arabic speakers while the national courts, setting the rules applicable to arbitration, issue decisions in Arabic.

As articulated above, there is always a considerable risk under the UAE for annulment of arbitral awards by national courts even if the parties agreed for these procedures. Under UAE law, the doctrine of procedural estoppel is not recognized and, as a consequence, parties can still invoke procedural irregularities before judiciary as a ground for annulment even if the same party did not contest these procedures before the arbitral tribunal.

In contrast, the French law reduced the annulment risk by applying the doctrine of ‘procedural estoppel’ whereby a party which knowingly refrains from making a claim or raising an objection on an irregularity in the

¹¹⁷ Article 1.A of the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications (GCC convention of 1996), http://www.arbitrationlaw.com/files/free_pdfs/GCC%20Convention.pdf

¹¹⁸ Enforcing foreign judgments in Dubai by Tarek Shrayh, Al Tamimi and Co. <https://www.tamimi.com/law-update-articles/enforcing-foreign-judgments-in-dubai/>

proceedings before an arbitral tribunal of an irregularity in arbitral proceedings is precluded from raising such objection before judiciary and is therefore deemed to have accepted and waived its right.¹¹⁹

This principle was codified in 2011 by the introduction of Article 1466 to the latest amendments in the French Code of Civil Procedure, which states that:

*“A party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity.”*¹²⁰

The following are the most important doctrines applicable to arbitration in the UAE:

§ 1 Severability of an Arbitration Clause and Competent-Competent Doctrine

This concept is also known in some systems of law as the autonomy of the arbitration clause (*l'autonomie de la clause compromissoire*).

Executive Summary:

1. All the UAE major institutional arbitration rules recognize the doctrine of separability of arbitration clause including DIAC, DIFC, and ADCCAC.
2. The DCC (Dubai Court of Cassation) and ADCC (Abu Dhabi Court of Cassation) have contradicting views with regards to the survival of the arbitration clause in case the agreement that contains the arbitration clause was void.
3. The DCC provides full recognition to the separability and independence of the arbitration agreement, therefore, the invalidity, rescission, or termination of the original contract containing the arbitration clause shall not affect the arbitration clause, which shall survive. Conversely, in case the main

¹¹⁹ Cass civ 1, January 26 2016, *Fibre Excellence SAS v Tembec SAS*, case number 15-12.363; Paris Court of Appeal, April 12 2016, *Société J&P Avax SA v Société Tecnimont SPA*, case number 14/14884; and D Thomson, "Jarvin award upheld in Paris", *Global Arbitration Review*, April 14 2016 ; Paris Court of Appeal, June 2 1989, *Sociétés TAI, ESW et IEC v sociétés SIAPE, Engrais de Gabès et autres*, case number 88/8256, Rev Arb 87, *Engrais de Gabès et autres*, case number 88/8256, Rev Arb 87; Paris Court of Appeal, May 16 2002, *STPIF v SB Ballestrero*, case number 2000/20742, Rev Arb 1231; Cass civ 1, July 6 2005, *Golshani v Gouvernement de la République Islamique d'Iran*, case number 01-15.912, Rev Arb 993; Paris Court of Appeal, October 28 2010, Rev Arb 691; Cass civ 1, French Court of Cassation; civ 1st, Liquidateurs of Sté Jean Lion v. Sté International Company for Commercial Exchange Income, May 6 2009, case number 08-10.281, JCP Edition Gen. 2009, see <https://www.mayerbrown.com/en/perspectives-events/publications/2010/07/coexistence-between-bankruptcy-and-arbitration-law>

¹²⁰ Cass civ 1, January 31 2006, *Intercafcio v Dafci*, case number 03-19.054; French Court of Cassation; civ 1st, Liquidateurs of Sté Jean Lion v. Sté International Company for Commercial Exchange Income, May 6 2009, case number 08-10.281, JCP Edition Gen. 2009, see <https://www.mayerbrown.com/en/perspectives-events/publications/2010/07/coexistence-between-bankruptcy-and-arbitration-law>

agreement is valid, the arbitration clause included therein must not take its validity from the validity of the main agreement. However, one case law (cited below) departs from this rule¹²¹.

4. The ADCC and USC, however, recognize this doctrine of separability of the arbitration clause and survival of such clause only in case the main agreement is terminated, however, the invalidity/rescission of the original contract containing the arbitration clause renders the arbitration clause null and void.
5. The new Federal Arbitration Law supports the severability; however, the implications of it are yet to be seen in the UAE courts.

UAE Institutional Rules

The UAE, like many international jurisdictions, recognize the doctrine of 'separability of arbitration agreements'.

Article 23.1 of the DIFC-LCIA Arbitration Centre Rules provides *"The Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity, or effectiveness of the Arbitration Agreement. For that purpose, an arbitration clause, which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail ipso jure (by the operation of law) the non-existence, invalidity or ineffectiveness of the arbitration clause."*¹²²

Articles 6.1 of the DIAC Rules states *"Unless otherwise agreed by the parties, an Arbitration Agreement which forms or was intended to form part of another agreement shall not be regarded as invalid, non-existence or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and the Arbitration Agreement shall for that purpose be treated as a distinct agreement."*¹²³

Article 7 of ADCCAC provides *"Effect of Arbitration Agreement: The arbitration clause shall be deemed to be an agreement independent from the other terms and conditions of the contract, unless the parties have agreed otherwise. If the arbitration clause is valid per se, the annulment, revocation, or termination of the contract, which included the said arbitration clause, shall not affect its validity. The Panel shall remain competent to adjudicate upon the parties' demands even if the contract is considered or declared annulled, revoked, or terminated."*¹²⁴

¹²¹ DCC 122/2008

¹²² Article 23.1 of the DIFC-LCIA Arbitration Centre Rules of the year 2016

¹²³ DIAC Arbitration Rules of 2007, issued by Decree No. 11 for the year 2007 by H.H. the Ruler of Dubai on the 6th of May 2007

¹²⁴ ADCCAC Arbitration Rules of 2013, effective from 1st September 2013

Article 14 of ADGM Arbitration Law of 2015 provides *“Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and the arbitration agreement shall for that purpose be treated as a distinct agreement.”*¹²⁵

Decisions against Separability

The following case laws do not support the separability doctrines:

ADCC 58 for 2007, dated 30 October 2007: established a concept that contradicts with most of the UAE institutional rules as set out above and contradicts with DCC decisions.

The decision established that the nullity of the original contract that includes an arbitration clause as a dispute resolution mechanism implies, as a consequence, the nullity of the arbitration clause. As such, the jurisdiction for this matter shall be the judiciary.

Contrary to all other case laws in Dubai, DCC 122/2008 established the opposite principles established by judgments DCC 242 for 2008, 164/2008 Civil, DCC Petition No.108 of 2009 [set out below] and all the other institutional rules. The judgment established that the nullity of the main contract (rather than the nullity of the arbitration clause itself) establishes that the arbitration clauses thereto are invalid and therefore the national courts have jurisdiction on the disputes rather than arbitral tribunals.

Decisions Supporting Separability

The following case laws support the separability doctrine:

- DCC 242 for 2008 establishes an opposite approach for ADCC 58 for 2007, dated 30 October 2007. The court upheld the survival of the arbitration clause even if the main contract is null and void; the court determined that *“it is established that the nullity of the main contract which includes an arbitration clause or rescindment of such contract or terminating it does not stop the arbitration clause from being valid and effective unless the nullity is related to the arbitration clause itself, in this case it shall be void. Since the arbitration clause entails independence and severability.”*¹²⁶
- Similarly, DCC 164/2008 – Civil dated 12 October 2008 establishes that the invalidity of the original contract which includes the arbitration clause or its ending or termination. This does not prevent the continuation of the arbitration clause and its effect since the voidance did not include the arbitration clause itself. The reason behind that is that the arbitration clause is independent of the underlying agreement. The validity of the underlying contract or its execution has no connection and does not

¹²⁵ Article 14 of the ADGM Arbitration Regulations of 2015 issued by The Board of Directors of the Abu Dhabi Global Market, in exercise of its powers under Article 6 (1) of Law No. 4 of 2013, effective from 17 December 2015

¹²⁶ DCC 242 for 2008 dated 8 February 2009

imply the validity of the arbitration clause if it was proved that it was agreed by those unauthorized to decide in the right under the arbitration.

Similarly, when executing the main contract by any of the litigant parties or both, such validity does not extend to the arbitration clause.

The DCC Petition No.108/2009 concluded that *“It is established that the invalidity, rescission, or termination of the original contract containing the arbitration clause shall not affect the arbitration clause, which shall remain in full force and effect so long as the arbitration clause itself was valid. While the contract is deemed void, the arbitration clause is not void and removes the dispute from the jurisdiction of the courts to the jurisdiction of the arbitral tribunal.”*¹²⁷

Federal Arbitration Law improvement on Severability

The Severability of an arbitration clause is now coded in Article (6) of the new Federal Arbitration Law, which states that:

*“(1) an arbitration clause shall be treated as an agreement independent from the other terms of the contract. The nullity, rescission, or termination of the contract shall not affect the arbitration clause if it is valid per se, unless the matter relates to incapacity among the Parties. (2) A plea that a contract containing an arbitration clause is null or has been rescinded or terminated shall not stay the arbitration proceedings and the Arbitral Tribunal may rule on the validity of such contract.”*¹²⁸

The UAE courts’ interpretation of the new Federal Arbitration Law is yet to be evaluated.

However, the Federal Arbitration Law established that the doctrine of severability of an arbitration clause should not apply in case of incapacity of the party entering into an arbitration agreement. Therefore, if the signatory to an arbitration agreement does not have the capacity to sign the arbitration clause, the arbitration clause shall not survive and, as a consequence, national courts shall be competent to adjudicate the dispute.

This issue is substantial since, as will be demonstrated in the jurisdictional challenges part of this thesis, the incapacity of a signatory to an arbitration agreement is the most important challenge raised to annul arbitral awards in the UAE. Therefore, the same challenge could be used to challenge the jurisdiction of arbitral tribunals and seek national courts to seize the dispute.

This exception to *“the matter relates to incapacity among the Parties”* does not exist in the UNCITRAL Model Law, which states that *“an arbitration clause which forms part of a contract shall be treated as an agreement*

¹²⁷ DCC Case number108 of 2009 issued on 12 March 2009

¹²⁸ Federal Law No. 6 of 2018 on Arbitration in Commercial Disputes

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.”¹²⁹

Conclusions: Separability Doctrine: is recognized under UAE law (through institutional rules) and jurisprudence. However, the Dubai Court of Cassation recognizes this doctrine in case of invalidity, rescission, or termination of the main agreement (only one exception from Dubai case laws in this regard). However, Abu Dhabi Court recognizes this doctrine only in case of termination of the main agreement not in case of invalidity or rescission.

§ 2 Competent – Competent Doctrine

Under UAE law, the body determining a challenge to jurisdiction is the arbitral tribunal under all major institutional rules. The relevant provisions from the UAE laws are as follows:

The competent-competent doctrine was codified in the new UAE Federal Arbitration Law introduced in June 2018. Article 19 of the said law states that:

“(1) The Arbitral Tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the Arbitration Agreement or its inclusion of the subject-matter of the dispute. The Arbitral Tribunal shall rule on the plea either as a preliminary question or in a final arbitral award on the merits. (2) If the Arbitral Tribunal rules as a preliminary question that it has jurisdiction, a party may, within fifteen days after receiving notice of that ruling, request the Court to decide that matter. The Court shall then decide the request with thirty days of being filed with the Court and its decision shall be subject to no appeal; while such a request is pending, the arbitral proceedings shall be stayed unless the Arbitral Tribunal decides to continue the arbitral proceedings at the request of a party.”

However, this doctrine is not newly introduced to UAE law; it was part of the established UAE jurisprudence and institutional arbitration rules for many years.

Article 6.2 of the DIAC Rules states:

“If any party raises one or more pleas concerning the existence, validity, scope or applicability of the arbitration agreement, then the Executive Committee may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement may exist under the Rules. In such a case, any decision as to the jurisdiction of the Tribunal shall be taken by the Tribunal itself.”¹³⁰

A similar provision exists in Article 23.1 of the DIFC Arbitration Rules, which states that:

¹²⁹ Article 16 of the UNCITRAL Model Law of the UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006, available online http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

¹³⁰ DIAC Arbitration Rules of 2007, issued by Decree No. 11 for the year 2007 by H.H. the Ruler of Dubai on the 6th of May 2007

“The Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness, or scope of the Arbitration Agreement.”¹³¹

Article 22.1 of the ADCCAC Rules provides:

“The Panel shall decide upon pleas relating to its competence, including those objections based upon the non-existence of an arbitration agreement, its extinction, nullity, or its non-inclusion of the dispute under consideration.”

Article 24 of the ADGM Arbitration Regulation of 2015 provides:

“(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement (2) Any such ruling may be challenged by any available arbitral process of appeal or review that the parties may have agreed, or in accordance with the provisions of this Part.”

However, UAE law, DIFC law and ADGM laws, like many other jurisdictions, provide the national courts the authority to review the determinations of arbitral tribunals seated in the UAE with regards to their decisions on their jurisdiction.

Historically, the UAE courts’ review for the jurisdiction of arbitral tribunals was a ground of annulment of arbitral awards, examples include:

- USC decision 297 for Judicial Year 20th Judicial Year¹³²: Whilst the arbitral tribunal decided that, it has jurisdiction to award interest, the court refused to award interest that is not agreed to be referred to arbitration where the scope of the arbitration agreement was limited narrowly to a certain part of the dispute.
- DCC Petition No. 10 of 1995¹³³: Despite the tribunal upheld jurisdiction, the Court of Cassation annulled the award and determined that in case the arbitrators exceed the scope of the arbitration agreement in part of the award then that the entire award shall be annulled as long as both parts are indivisibly related.

§ 2 Applicability of the UAE Procedural Law and Evidence law to arbitration

The leading view under common law jurisdictions is that the procedural law of the seat necessarily governs the arbitration agreement directly even if the parties do not have a choice of law agreement. Similarly, the law of

¹³¹ Article 23.1 of DIFC Rules of 2016, effective from 1 October 2016, available online <http://www.difc-lcia.org/arbitration-rules-2016.aspx>

¹³² Union Supreme Court decision number 297 for judicial year 20 issued on 14 May 2000

¹³³ Dubai Court of Cassation Decision number 10 for the year 1995 issued on 8 October 1995

the seat of the arbitration governs the constitution of the arbitral tribunal and the procedures of the arbitration. Further, the courts at the seat oversee the procedural aspects of the arbitration and have jurisdiction to ratify or set aside the award.

This approach was put forward in a famous article by F.A. Mann: 'Lex Facit Arbitrum'. He argued that:

*"Just as, notwithstanding its notoriously misleading name, every system of private international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law. The lex arbitri cannot be the law of any country other than that of the arbitral tribunal's seat. No act of the parties can have any legal effect except as the result of the sanction given to it by a legal system. Hence, it is unavoidable to ascertain such system before the act of the parties can be upheld. When we say in the conflict of laws: 'contracts are governed by the law chosen by the parties,' we do so, and can do so, only by reason of the fact that the rule is part of the law of a specific legal system"*¹³⁴

Arbitrators who follow this theory ordinarily submit the procedures of the arbitration to the law of the seat as the *lex fori* (the law of the jurisdiction within which a case is instituted and governs all procedural matters).

The judgment of Hamblen J.; laid down first the principle from *Sulamérica* and determined that *"The proper law is to be determined by undertaking a three-stage inquiry into (i) express choice, (ii) implied choice and (iii) the system of law with which the arbitration agreement has the closest and most real connection."*¹³⁵

Hamblen J. further observed, *inter alia*, that:

*"Where the matrix contract contains an express choice of law, this is a strong indication or pointer in relation to the parties' intention as to the governing law of the agreement to arbitrate, in the absence of any indication to the contrary. The choice of a different country for the seat of the arbitration is a factor pointing the other way. However, it may not in itself be sufficient to displace the indication of choice implicit in the express of choice of law to govern the matrix. Where there are sufficient factors pointing the other way to negate the implied choice derived from the express choice of law in the matrix contract, the arbitration agreement will be governed by the law with which it has the closest and most real connection. That is likely to be the law of the country of the seat, being the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure the procedure is effective."*¹³⁶

Therefore, under common law jurisdictions, two types of cases exist for award debtors to oppose the enforcement of arbitral awards before judiciary:

¹³⁴ F.A. Mann, "Lex Facit Arbitrum," in *International Arbitration: Liber Amicorum for Martin Domke* 157 (Pieter Sanders Edition, 1967), reprinted in, 2 *Arb. Int'l* 241, 251 (1986)

¹³⁵ English Court of Appeal in *Sulamérica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others*, [2012] EWCA Civ 638

¹³⁶ The English Commercial Court in *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v. VSC Steel Company Ltd* [2013] EWHC 4071 (Comm.) (*Habas*)

First: enforcement proceedings where an action is brought for enforcing arbitral award by an award creditor in the country of the seat of arbitration, while the award debtor chooses not to comply voluntarily with the award and successfully resists the enforcement proceedings.

Second: Annulment proceeding: where an action is brought affirmatively for annulling an arbitral award by the award debtor in the country of the seat of arbitration, where this action, is successful.

In the first type above, where the award debtor succeeds to oppose enforcement, the prevailing party is likely to be in a position to try enforcing the award in a different jurisdiction.

However, in the second type where the award debtor succeeds to win an action to set aside the award in the same country of the arbitration seat, it would become increasingly difficult to enforce the award in a different jurisdiction.

As such, in common law jurisdictions, the decision regarding the choice of the seat of an arbitration must be mindfully taken to choose a jurisdiction that is pro-enforcement, predictable, and efficient and arbitration-friendly.

In contrast, in civil law countries, including France, Egypt, and the UAE, the seat of arbitration is chosen for little more than the sake of convenience. Arbitral tribunals are not necessarily empowered by or operate like the national courts of a particular state simply because they have their seat there. Therefore, arbitration in most civil law countries does not apply the procedural laws of the seat except the particular arbitration laws.

According to the French system:

*"Arbitrators do not derive their powers from the state in which they have their seat but rather from the sum of all the legal orders that recognize, under certain conditions, the validity of the arbitration agreement and the award. This is why it is often said that arbitrators have no forum"*¹³⁷

In this regard, the French Court of Cassation held that:

*"The award rendered in Switzerland was an international award that was not integrated into the legal order of that state, such that its existence continued despite its nullification."*¹³⁸

¹³⁷ The Enforcement of Awards Set Aside in the Country of Origin by Emmanuel Gaillard; available online:

<https://www.shearman.com/~media/Files/NewsInsights/Publications/1999/01/The-Enforcement-of-Awards-Set-Aside-in-the-Country-of-Origin-by-Emmanuel-Gaillard.pdf>

¹³⁸ French Court of Cassation dated 23 March 1994 / Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV), case number 92-15.137; summary available online

http://newyorkconvention1958.org/index.php?lvl=notice_display&id=140

Under French law, parties are free to decide their own procedural rules, however, they cannot derogate from the following mandatory provisions:

- Severability of the arbitration agreement (Article 1447 of the CCP).
- The tribunal's competence to rule on its own jurisdiction (Articles 1448 and 1465 of the CCP).
- Conducting the arbitration in good faith and diligently (Article 1464 of the CCP).
- The due process and equal treatment to the parties (Article 1510 of the CCP).
- The reasoning of the award and reference to the parties' submissions (Article 1482).¹³⁹

Based on the contrast set out above between common law and civil law jurisdictions in the significance of the seat of arbitration, arbitrators in the UAE are not bound to apply the procedural rules in force in the state of the seat of the arbitration. Panels seated in the UAE are not bound by the pleading procedures in the CPC.¹⁴⁰

According to the UAE CPC: *"The arbitrator shall issue the arbitral award without being bound by the procedural rules save as is provided for in this Chapter [the Repealed Arbitration Chapter of the UAE CPC] and the procedures relating to the summoning of the parties, the hearing of their arguments, and enabling them to*

¹³⁹ Arbitration In France, by Eduardo Silva Romero, Audrey Caminades and Xavier Nyssen of Dechert LLP <https://www.lexology.com/library/detail.aspx?g=5c211581-8870-4b8b-b8d6-364c2b93a03f>

¹⁴⁰ DCC decision number 21 for 2003 annulled an arbitral award on the ground of absence of the right of defense before the arbitrator states that "the meaning of calling the litigant parties to attend is not their actual presence before the arbitrator since their failure to attend does not negate the principle of confrontation between the litigant parties. Since respecting, the principle of confrontation between the litigant parties is indeed related to the right of defense.

Therefore, failure to observe this principle is a ground for nullity in the arbitral award and this nullity is part of the cases to annul the arbitrators' decision stipulated in Article 216 of the CPC (which is replaced by Articles 53 of the Federal Arbitration Law) which allows nullifying an award in case there are nullity in the procedures that affected the award"

DCC Judgment number 32 for 2009 established that the ultimate purpose of such procedure is to submit their pleadings and request; therefore, it is not permitted to annul an arbitral award to claim absence of calling the litigant parties before the arbitrator. Rather, the defect in this procedure should lead to a defect in the ultimate purpose of it (which is enabling parties to submit their pleadings and seek relief).

The court went on and stated that "the ultimate purpose of the principle that mandate the confrontation between the litigant parties has been achieved by allowing the litigant parties to submit their written pleadings the included their requests and pleadings.... The documents did not prove that the arbitrator prevented the litigant parties from submitting any documents or pleadings"

*submit their documents, but nevertheless it shall be permissible for the parties to agree on specific procedures for the arbitrator to follow.”*¹⁴¹

Under UAE law, arbitrators are exempt from the following laws while issuing their award and during their proceedings:

- The UAE Civil Procedures Code¹⁴²
- The Evidence Law¹⁴³, and
- The Evidence Rules in the Civil Transactions Code or any other law¹⁴⁴.

These principles reflect the known principle that arbitration should have more flexible procedural rules than judiciary and should not have the same nature or extent of formalistic requirements, this flexibility frequently leads to enhanced efficiency of the proceedings.

Further, these principles establish that the arbitrator can be a non-lawyer and he/she must not be aware of the formalistic requirements in the CPC or Evidence law.

Therefore, the lawmaker established certain arbitration rules that are easy to understand and implement by arbitrators having no legal background such as finance and engineering professionals.

The following case laws from the UAE establish that arbitrators are not bound by the CPC:

DCC decisions number 156 for 2009 [Exhibit 45] and 173 for 2010 established that, the provisions set forth in Article 212 of the CPC (Article 23.2 of the Federal Arbitration Law) establish that arbitrators are not bound by the provisions of the Civil Procedures Code on this law with the exception of the **Repealed Arbitration Chapter of the CPC** (now the Federal Arbitration Law).

Similarly, DCC 547/2015 [Exhibit 15] Real Estate established that arbitrators are not bound to follow the rules of reasoning of the judiciary as long as the arbitrator does not contravene the public order. This exemption

¹⁴¹ Article 212.1 of the Repealed Arbitration Chapter of the UAE CPC, which is consistent with Articles 23.2 and 53.1(d) of the UAE Federal Arbitration Law

¹⁴² DCC decision number 21 for 2003, ADCC Petition No. 353/2011, the Abu Dhabi Court of Cassation Petition No. 873/2009, DCC 547/2015, DCC 88 for 2004, DCC decisions number 156 for 2009 [Exhibit 45] and 173 for 2010

¹⁴³ Article 33.8 of the Federal Arbitration Law states that:

“The Arbitral Tribunal is afforded discretion to determine the rules of evidence to be followed and the admissibility, relevance or weight of evidence adduced by any of the Parties in relation to facts or expert opinion. The Arbitral Tribunal may also specify a time-limit, method, and form for the exchange of such evidence between the Parties and a method for its submission to the Arbitral Tribunal.”

¹⁴⁴ *Ibid*

applies to the rules of evidence, whether contained in the Civil Procedure Code, the Civil Transactions Code or any independent law.

The decision further established that arbitrators are not bound to follow the procedures applicable to lawsuits heard by the national courts. Arbitrators are required to comply with the procedures prescribed under the Repealed Arbitration Chapter of the Civil Procedure Code (now the Federal Arbitration Law) as well as any other procedures agreed upon by the parties, including the observance of the right of defense to enable each litigant to submit its requests and defenses and enable each litigant party to submit its pleadings and refute the pleadings submitted by the adversary.

In the Abu Dhabi Courts, the Abu Dhabi Court of Cassation Petition No. 873/2009¹⁴⁵ established that arbitrators are not bound to comply with the procedures applicable to the court of law. Rather, they are bound to observe the procedures applicable to arbitration, assure the rights of defense and of equal treatment and follow any procedures agreed to by the parties.

In the Union Supreme Court's jurisprudence, the same was confirmed by USC decision number 515/19 [Exhibit 25].¹⁴⁶

In ADCC Petition No. 353/2011, the court established that *"when conducting the arbitration proceedings, arbitrators are only bound by the procedural rules that are provided for in the Repealed Arbitration Chapter of the Civil Procedure Code [now the Federal Arbitration Law]. Furthermore, arbitrators shall rule in accordance with the law unless authorized by the parties for amiable compositeur, in which case they are not bound by the law except for matters relating to public order. In addition, the legislator has limited the conditions in which the parties can request the setting aside an arbitral award. The Petitioner's arguments are not included in the conditions provided for in the law and therefore should be rejected."*¹⁴⁷

The non-applicability of the CPC should not derogate the principle of contradiction between the Parties, the DCC established that the principle of confrontation between the parties indicated in Article 212 of the CPC does not mean necessarily calling the parties to attend physically before the arbitrator neither does it mean that the parties must submit their pleadings, rather, the arbitrator should enable the parties to submit their pleadings.¹⁴⁸

Similarly, the DCC decision number 21 for 2003 stated that:

"The provisions set forth in sub-Articles 1 and 2 of Article 212.1 of the CPC (Article 23.2 of the Federal Arbitration Law) that, as per the jurisprudence of this court, unless the parties to an arbitration agree for certain procedures to the proceedings, the arbitrator needs before issuing the arbitral award to follow the procedures stipulated in the CPC related to calling the litigant parties to attend before him and hearing their arguments and defenses

¹⁴⁵ Abu Dhabi Court of Cassation Case number 873 of 2009 issued on 22 October 2009

¹⁴⁶ Dated 27 June 1999

¹⁴⁷ Abu Dhabi Court of Cassation judgment number 353 for the year 2011 issued on 24 August 2011

¹⁴⁸ DCC 17/2016 Real Estate dispute dated 23 March 2016

and enabling them to submit their pleadings and documents, whether the arbitrator was obliged to rule of law or authorized for amiable compositeur”¹⁴⁹.

Confirmation by the new Federal Arbitration Law

The new Federal Arbitration Law confirmed that the UAE evidence law is not applicable to arbitration even if the parties refer to the UAE law as the choice of law; this choice is deemed to be the choice of the substantive law.

Article 33.8 of the Federal Arbitration Law states that:

*“The Arbitral Tribunal shall have a discretionary power to determine the applicable rules of evidence, and the extent of admissibility, relation or evaluation of the evidence submitted by any party on an incident or expertise; moreover, it may determine the time, method and form in which said evidence is exchanged between the Parties, and the method of its provision to the Tribunal.”*¹⁵⁰

Furthermore, the Federal Arbitration Law continued the same approach of the Repealed Arbitration Chapter of the CPC where the applicable procedural law to arbitration is the one agreed by the parties, failing which, any procedures the arbitral tribunal finds appropriate without being bound by the civil procedures code; it should only be bound by the Federal Arbitration Law (or previously the Arbitration Chapter of the CPC). This approach is consistent with the French law perspective set out above.

In this regard, Article (23).2 of the Federal Arbitration Law states that *“If there is no agreement to follow certain procedures, the Arbitral Tribunal may determine the procedures that it may deem appropriate subject to the provisions of the present Law, in compliance with the basic principles in litigation and international agreements to which the State is a party.”*¹⁵¹

§ 3 Arbitration is an Exceptional Dispute Resolution Mechanism

The UAE court system is the default forum for dispute resolution, it’s a fundamental right granted to parties, therefore, arbitration is an exceptional dispute resolution mechanism that must be clearly and explicitly agreed upon between the parties.

Under UAE law, an agreement to arbitrate amounts to an effective waiver of a fundamental right to approach the UAE Courts when seeking the resolution of a dispute. It is for this reason that UAE law requires such a waiver to be given by a person with express and specific authority to do so.

¹⁴⁹ Dubai Court of Cassation decision number 21 for the year 2003 Civil, issued on 13 April 2003

¹⁵⁰ UAE Federal Law No. 6 of 2018 on Arbitration in Commercial Disputes

¹⁵¹ UAE Federal Law No. 6 of 2018 on Arbitration in Commercial Disputes

The following case laws establish the exceptionality of arbitration in the UAE and the specific requirements needed to enter into arbitration agreements:

- DCC 263 for 2015 - Real Estate
- DCC 382 for 2015 – Real Estate
- DCC 532 for 2013 - commercial

For that reason, parties choosing the UAE as the seat of their arbitration as well as arbitrators in general in the UAE seats must be very mindful while deciding for the scope of their jurisdiction and to make sure not to exceed the scope that has been clearly and explicitly agreed to be submitted to arbitration.

The USC decision number 605 for 2000 established that “the dispute referred to arbitration must be specified in the arbitration agreement unless the arbitrator was authorized for amiable compositeur, failing which, the arbitration shall be null and void.”¹⁵²

As part of the exceptionality of arbitration, the UAE jurisprudence establishes the consensual nature of arbitration and provides that arbitration cannot be compulsory as any agreement to enter into arbitration must be pursuant to the free will of the parties to the arbitration agreement.

USC decision number 640 for the Judicial Year 29 dated 28 July 2009 [Exhibit 46] established that arbitration is the exceptional forum of dispute resolution mechanism; arbitration is a consensual forum in nature and the jurisdiction of the arbitrators stems from the parties’ agreement to enter into arbitration. The court further established that the natural judge has the default jurisdiction, which is a constitutional right; any special forum departing from that should be exceptional by the law and should have a narrow interpretation and effect and further subject to the agreement of the parties.

The court overturned the lower court’s decision, which upheld the validity of arbitration as a compulsory dispute resolution mechanism that is not subject to the will and consent of the parties per Article 2 of the securities market regulation¹⁵³, which states that:

¹⁵² Union Supreme Court decision number 605 for judicial year 21 issued on 24 May 2000

¹⁵³ Legal Study on Arbitration before the Securities Authority, by Mohammed Jamil AK BIK, October – November 2011, available online:

<https://www.tamimi.com/law-update-articles/legal-study-on-arbitration-before-the-securities-authority/>

“Disputes arising from the application of the Law (1) between parties involved in the securities and commodities industry shall be resolved solely through arbitration. The provisions of this Regulation shall apply in this regard.”¹⁵⁴

ADCC decision number 554 for 2008 dated 25 December 2008 upheld the same principle established by USC decision number 640 for the Judicial Year 29 dated 28 July 2009 [Exhibit 46]: the judgment annulled an arbitral award and found that the Abu Dhabi Securities Market’s regulations should not mandate arbitration as a compulsory dispute resolution forum, which contradicts with arbitration being a consensual process whereby the parties need to enter into it by their free will.

The Same rules set out above have been held by DCC 76/2008 dated 27 May 2008 and DCC 72/2008 dated 20 May 2008.

DCC 88/2004, however, provided an exception from the exceptionality rule where it determined that *“it shall be permitted to raise all matters that are related or attached or linked with it or included in the dispute concerning the arbitration condition.”¹⁵⁵*

ADCC 174/2014 & DCC 192 /2007

For the reason of exceptionality of arbitration as a dispute resolution forum, the ADCC established that if an arbitral award is either annulled or ratified the court shall have jurisdiction for other disputes related to what has been agreed to be referred to arbitration; this amounts to a restoration of the jurisdiction of the court which has been exceptionally moved from the court to the arbitration.¹⁵⁶

Similarly, DCC 502 for 2002 dated 22 March 2003, established the same rule as above.

However, the USC 449/2001 rejected the argument that the dispute to be referred to arbitration should be very specific to a particular area of difference. The simple rule is when the parties agree to refer all disputes to arbitration, any dispute related to the same relationship shall be referred to arbitration, and the courts shall not have jurisdiction to hear the claim. Therefore, the court here interprets the intention of the parties at the time of entering into an arbitration agreement.

Moreover, by referring a dispute to arbitration, the judicial system shall not exclude their jurisdiction automatically in the case of the dispute being referred to the court; the court shall wait for an objection from the defendant, and if the defendant does not object in the first hearing (or before any other plea or request under the Federal Arbitration Law), the court shall deny any further challenge of their jurisdiction from any of

¹⁵⁴ Article 2 of the Resolution No. 1 of 2001 concerning the regulation on the arbitration of disputes arising from securities and commodities transactions, issued pursuant to the Federal Law No. 4 of 2000 concerning the Emirates Securities & Commodities Authority.

¹⁵⁵ Dubai Court of Cassation 88 for the year 2004

¹⁵⁶ This principle is no longer valid under the Federal Arbitration Law

the litigant parties based on the parties implied acceptance to waive the arbitration agreement. As such, the court will adjudicate the dispute and shall disregard the arbitration agreement.

The UAE Arbitration Chapter of the CPC states:

“If the parties agree to arbitrate the dispute it shall not be permissible to bring an action in respect thereof before the courts but nevertheless if one of the parties does have recourse to litigation without regard to the arbitration clause and the other party does not object at the first hearing [or before any other plea or request under the Federal Arbitration Law] the action must be tried and the arbitration clause shall be deemed to be canceled.”¹⁵⁷

DCC Petition No. 167 of 2002 issued on 2 June 2002 established that if litigant parties have a valid arbitration agreement but one of them institutes a lawsuit before the court and the other party does not object he jurisdiction of the court in the first hearing; agree on settling a dispute by arbitration, a case concerning the substance of the dispute may not be brought before the courts. If one of the litigants files a case with no objection made by the other litigant at the first hearing [or before any other plea or request under the Federal Arbitration Law], the courts may then consider the case and find the arbitration clause to be null and void.

This rule continued, in a slightly different wording under the Federal Arbitration Law. Article 8.1 of the said law states that:

“The court before which a dispute is brought that is subject to an Arbitration Agreement shall decline to entertain the action if the defendant has so pleaded before submitting any request or plea on the merits of the case, unless the court is satisfied that the Arbitration Agreement is void or incapable of being performed.”¹⁵⁸

However, if an objection (based on any alleged existence of an arbitration clause) is raised by the other party before any other request or plea, the courts shall find the case inadmissible due to the existence of the arbitration agreement.

Similarly, in USC Petition 491/24th Judicial Year,¹⁵⁹ the Court confirmed that a party insisting on an arbitration clause should take affirmative action by objecting at the first session (before any other request or plea under the Federal Arbitration Law). If the said party makes no such objection, the action may be adjudicated before the judiciary.

¹⁵⁷ Article 213.5 of the UAE CPC, which is consistent with Article 8.1 of the new Federal Arbitration Law. However, the as per the Federal Arbitration Law, the plea that the court does not have jurisdiction (since the parties agreed to arbitration) must be raised *“before submitting any request or plea on the merits”* rather than before the first hearing.

¹⁵⁸ Article 8.1 of the UAE Federal Law number 6 of the year 2018 (the Federal Arbitration Law)

¹⁵⁹ USC Case number 491 of the 24th Judicial Year issued on 28 November 2004

The court defined the “first session” as the session where the respondent or its representative appears for the first time before the Court.¹⁶⁰

§ 4 Rules Applicable to Arbitral Proceedings in the UAE

The arbitration rules in the UAE were not codified until the issuance of the Federal Arbitration Law. Before the introduction of the law, the rules application to arbitration were set out in the Repealed Arbitration Chapter of the CPC and the case laws, following are the most important rules applicable to arbitration in the UAE:

Representation of litigant parties in arbitration

Under UAE law, parties may represent themselves and attend the arbitral proceedings and the hearing sessions. They may also seek counsel representation to act on their behalf. Counsels in arbitration need not necessarily be attorneys at law.

The reason behind that is, predominantly, Article 212.1 of the Repealed Arbitration Chapter of the CPC (Article 23.2 of the Federal Arbitration Law) which provides that arbitrators are not required to follow the procedures applicable to lawsuits filed with the courts of law. Arbitrators are required to comply with the procedures prescribed under the Federal Arbitration Law (formerly the Repealed Arbitration Chapter of the Civil Procedure Code) as well as any other procedures agreed upon by the parties, including the observance of the right of defense.

In DCC decision number 305/2007,¹⁶¹ the court established that, under UAE law, the parties may attend the arbitral sessions and may authorize external counsels to represent them. The external counsels acting on behalf of parties in arbitration need not necessarily be attorneys at law or authorized under an official power of attorney. Rather, the authorization may be made implicitly, and shall be subject to the discretion of the court hearing the merits of the dispute.

Action for nullity of a contract that includes an arbitration agreement

Under UAE law, national courts do not have jurisdiction to hear a dispute where the parties have agreed to submit their disputes to arbitration. The courts are therefore precluded from determining the jurisdiction of the arbitral tribunal before the latter adjudicate the dispute.

Article 8.1 of the new Federal Arbitration Law states that:

¹⁶⁰ Case laws in this regard includes DCC 39/2005 dated 25 September 2005 and DCC 237/2004 dated 3 April 2005, DCC 575/2003 dated 20 June 2004, DCC 112 for 2001 civil dated 16 June 2001

¹⁶¹ DCC Case number 305 of 2007 issued on 25 February 2008 - Commercial

“The court before which a dispute is brought that is subject to an Arbitration Agreement shall decline to entertain the action if the defendant has so pleaded before submitting any request or plea on the merits of the case, unless the court is satisfied that the Arbitration Agreement is void or incapable of being performed.”

However, the action for nullity by any of the parties, including the action for nullity of the arbitral award is the question here.

In a case in this regard, the ADCC dismissed an action of nullity of a contract containing an arbitration agreement.¹⁶²

The petitioner in this case initiated an action before the Court of First Instance requesting the annulment of the agreement and the arbitration clause thereto.

The Court of Appeal accepted this argument; however, the Court of Cassation dismissed it and established that only the arbitral tribunal has the power to adjudicate the dispute, therefore, the courts are precluded from determining the jurisdiction of the arbitral tribunal before the latter makes its own determination.

Partial nullity of the award and effect on the entire award

Generally, the nullity of a part of the award for being beyond the limits defined in the arbitration document would inevitably entail the nullity of the remainder of the award, but only if both parts of the award are indivisibly related. However, if the nullified part of the award is not related to the remaining parts of the award, the nullity of part of an award shall not affect the remaining parts. The UAE jurisprudence confirmed that the question of whether there is an indivisible connection between the parts of the award is a matter of fact subject to the discretionary determination of the Court of Appeal.

This was confirmed by the DCC decision No. 10/ 1995 which determined that: *“It is established that nullity of a part of the award for being beyond the limits defined in the arbitration document inevitably entails the nullity of the remainder of the award, because both parts of the award are indivisibly related.”*¹⁶³

This was confirmed by Article 54.3 of the Federal Arbitration Law, which states that:

“A decision to set aside an arbitral award shall extinguish the award in whole or in part depending on whether the award is to be wholly or partially set aside. An interpretation given for the affected part of the award which was set aside shall be accordingly extinguished.”

Arbitrator’s Jurisdiction for Interim or Conservatory measures

The ADCC confirmed that in the event the parties failing to agree within the arbitration agreement or arbitration clause that the arbitrator shall have jurisdiction to decide on provisional, precautionary, and summary matters,

¹⁶² ADCC Case number 458 of 2009 issued on 26 July 2009

¹⁶³ Dubai Court of Cassation Decision number 10 for the year 1995 issued on 8 October 1995

the jurisdiction on these matters would be conferred on the competent judicial body having jurisdiction over such matters. However, this does not entail a waiver of the arbitration clause, which remains confined to the substantive matters of the dispute.¹⁶⁴

The dispute in this case was about a lease contract, which included an arbitration clause. Lease contracts in the UAE have exclusive jurisdiction to the lease committee of each Emirate rather than national courts.

In Abu Dhabi, Articles 2, 24 and 25 of Law No. 20 of 2006 concerning the lease of premises and regulation of the landlord-tenant relationship in the Emirate of Abu Dhabi provides that the Rent Dispute Resolution Committee shall have exclusive jurisdiction over rent disputes, in both substantive and summary respects.

The dispute was about a summary action whereby a property owner sought to evict the respondent from its property due to the termination of the lease and the issue of whether the Respondent can extend the lease. As such, the matter is a rent dispute over which the Rent Dispute Resolution Committee has jurisdiction to determine whether the lease has been terminated or will be extended. The Committee's jurisdiction would be exercised to dispose of the matter summarily, including the request for provisional relief under Article 25 of that law.

The generally worded arbitration clause appearing in the lease does not preclude the petitioner from filing a summary action before the Committee. This would not be considered a waiver of the arbitration clause, which was limited to the substantive aspects of the dispute.

DCC 204/2005¹⁶⁵ established that if the parties failed to agree within the arbitration agreement or arbitration clause that the arbitrator shall have jurisdiction to decide on provisional, precautionary, and summary matters, jurisdiction for the provisional, and conservatory measures shall be conferred on the competent judicial body having jurisdiction over such matters.

The same principle above was further established by DCC 214 for 1998 dated 3 January 1999.

The same principles have been confirmed by the Federal Arbitration Law, Article 18 of the said law states that:

“The chief justice of the Court may, at the request of a party, or at the request of the Arbitral Tribunal, order such interim or conservatory measures as he may consider necessary to be taken in respect of existing or potential arbitral proceedings, whether before the commencement or the arbitral proceedings or during their course.”

Further, Article 21.1 of the same law states that:

¹⁶⁴ ADCC Case number 136 of 2009 issued on 31 March 2009

¹⁶⁵ DCC 204/2005 commercial dated 2 July 2005

“Subject to the provisions of Article 18 of this Law, and unless otherwise agreed by the Parties, the Arbitral Tribunal may, at the request of a party or on its own motion, order any party to take such interim or conservatory measure as the Arbitral Tribunal may consider necessary given the nature of the dispute.”

Estimating Arbitrator’s fees

The Repealed Arbitration Chapter of the UAE Civil Procedure Code provides:

“The arbitrators shall be allowed to estimate their fees and the arbitration expenditures, and they may inflict all or part of them on the award debtor, and the court, on the basis of the request of one of the litigant parties, may amend that valuation with what shall be adequate to the effort done and the litigation nature.”¹⁶⁶

Article 46 of the Federal Arbitration Law provides:

“(1) Unless otherwise provided by the agreement of the Parties, the Arbitral Tribunal shall assess the costs of arbitration which shall include: the fees and expenses incurred by any member of the Arbitral Tribunal in the exercise of his duties and the costs for experts appointed by the Arbitral Tribunal (2) The Arbitral Tribunal may order that any or all of the costs referred to in paragraph 1 of this article be borne by one of the Parties. The Court may, at the request of a party, adjust the arbitrators’ estimate of their fees or expenses commensurate with their efforts, the nature of the dispute, and the arbitrator’s experience.”

Therefore, the estimation of the arbitrators' fees is within the power of the arbitrators themselves. The overestimation of fees does not nullify the award. A reduction in arbitrators’ fees can only be achieved by filing a grievance with the court. The Court's judgment will have absolute authority in this regard, as long as the court clarifies the reasons upon which its judgment is based. The estimation of fees shall fall under the jurisdiction of the trial court.¹⁶⁷

Presumption and *Res Judicata*

The UAE Federal Arbitration Law states that:

*“An arbitral award made in accordance with this Law shall be binding on the Parties, shall constitute *res judicata*, and shall be as enforceable as a judicial ruling, although to be enforced, a decision confirming the award must be obtained from the Court.”¹⁶⁸*

The DCC states that:

*“An arbitral award acquires the evidential status of (*res judicata*) immediately after it is rendered, although the execution of such award is subject to ratification by the judiciary. In the course of ratification, none of the litigant parties may prosecute the same action before the judiciary. However, an action can be instituted to set aside*

¹⁶⁶ Article 218 of the UAE Civil Procedure Code (which corresponds to Article 46.2 of the Federal Arbitration Law)

¹⁶⁷ Case number 403 of 2003 issued on 13 March 2004 and DCC 537 for 1999

¹⁶⁸ Article 52 of the UAE Federal Arbitration Law

an award if the requirements of nullity are present.”¹⁶⁹

Unclear Arbitration Clauses

The DCC set aside an arbitral award and established that if the arbitration clause is indicated in the bill of lading in a small font, which cannot be typically read by a reasonable person, it shall be invalid. This fact shall not be changed if both companies are working in marine transport, which typically or frequently refers to arbitration as a dispute resolution mechanism.¹⁷⁰

As such, parties are advised to make sure to refer to arbitration agreements clearly in their agreements and to make sure to write it in clear provisions in the main agreements (rather than the bill of lading or similar documents) in order to make sure that the intention of the parties is clearly demonstrated as agreeing to arbitration.

Commercial agency agreements disputes cannot be resolved in arbitration

The ADDC confirmed that disputes related to Commercial agency agreements could not be resolved in arbitration.¹⁷¹

The parties to that dispute entered into an agency agreement pursuant to which the respondent would market and sell the petitioner's products within the UAE. The parties' commercial agency agreement had been registered in the Commercial Agencies Register.

The agreement between the parties contained an arbitration clause pursuant to which the parties agreed to refer any disputes arising out of the agreement to arbitration.

A dispute arose and was submitted to arbitration. An award was rendered on 1 July 2010.

The award creditor filed a case before the Abu Dhabi Court of First Instance requesting the enforcement of an arbitral award.

The Court of First Instance issued a judgment ratifying the award. The award debtor then submitted an appeal against the Court of First Instance's judgment, which was dismissed. Thereafter, the award debtor filed a challenge before the Court of Cassation.

The Court of Cassation set aside the award and held that the intent of the legislator when enacting Articles 3 and 6 of Federal Law No. 18, as amended by Federal Law No. 14 of 1988, was that the UAE courts retain jurisdiction to hear disputes arising from the performance of commercial agency agreements. Equally, the UAE courts have jurisdiction to annul any agreement to the contrary, such as an arbitration agreement, as long as the commercial agency agreement is registered in the Commercial Agencies Register.

¹⁶⁹ Dubai Court of Cassation decision number 225 for the year 2005 issued on 12 December 2005 [Exhibit 55], and Dubai Court of Cassation Decision number 265 for the year 2007 issued on 3 February 2008

¹⁷⁰ DCC 87 for 2003 – Civil dated 10 May 2003

¹⁷¹ ADCC Case number 814 of 2011 issued on 21 December 2011 - Commercial

The reasoning of the arbitral award

The natural judge is required to provide reasons for its decisions in a formalistic way. Any insufficient reasoning, which does not respond to important defenses of the losing party, may result in the overturning of the natural judge's decision in Cassation.

The natural judge should not discuss and refute each of the defenses; rather, it should discuss and respond to each of the "determinative defenses" raised by award debtor to the case.

"Determinative defenses" under UAE law are those that, if valid, would change the decision concluded by the judge. Therefore, not addressing these defenses is a defect in the decision.

In case the Court of Cassation identified a "determinative defense" that is not addressed or responded to by the lower court, it would be likely to annul the decision and return it back to the lower court to establish the proper reasoning.

The requirements for the natural judge's reasoning are established in DCC 278/2008, which states, *"the judge in the subject matter court should set forth in its judgment the evidence that it confronted all the elements of the case and all determinative defenses. In case it did not indicate that or disregarded it and did not respond to it sufficiently after proper investigation and understanding its decision shall have erred by having insufficient reasoning."*¹⁷²

Whilst arbitral awards should state the reasons for the award, the arbitrator's reasoning in the arbitral award does not have the same strict and formalistic requirements of the natural judge. In particular, the arbitral award should not include all the determinative defenses and response; rather, the arbitral award should only include the reasons for rendering the award.

In other words, the arbitrator is not under the obligation (albeit could) respond to each defense that in the judge's eyes could change the decision. However, the arbitrator should include a summary of the defenses, statements, documents, and request of the parties.

Article 41.4 of the Federal Arbitration Law states:

"The award shall state the reasons upon which it is based, unless the Parties have agreed otherwise, or the law applicable to the arbitral proceedings does not require reasons to be given."

DCC 88 for 2004 established that whilst the arbitral award should state the reasons for the award, it shall not be necessary to apply the same reasoning of the judge, it shall be sufficient to state a summary of the litigant party's submissions, documents, and the reasons that lead to the decisions and without violation of the public order. Such exception shall further apply to the evidence procedures whether in the CPC, the CTC, or any independent law.

¹⁷² Dubai Court of Cassation Decision number 278 for the year 2008 issued on 14 April 2009

Further, DCC 277 for 2002 determined that whilst it is established that DIAC Rules (which were applicable in this case) provided that the arbitral award should include the requests, defences of the litigant parties and the reasons for granting or dismissing any request, the DIAC Rules did not, however, establish nullity for not including such issues in the award and left that to the general grounds for nullity set out in Article 216¹⁷³ of the CPC.

DCC 145 for 2012 commercial dated 21 November 2012 established that the arbitrator's reasoning is not as strict as the court's reasoning since the arbitrator does not need to respond to each of the defenses or legal arguments raised by the parties. However, the arbitrator should have sufficient reasoning on the conclusions reached in its decision.

Notwithstanding the foregoing, arbitrators should write down in the award the requests and relief sought for each of the litigant parties and reasons for the award. However, if the arbitrator fails to comply with such requirements, the award may not be annulled as established in DCC 277 for 2002 and may be annulled as set out in other case laws. Therefore, in conclusion, providing reasons for an award is important under UAE law.

This is consistent with the French Law perspective, which provides that an award should refer to the submissions of the parties, and state its reasons (Article 1482 of the French CCP).

Renouncing an arbitration clause

Under UAE law, renouncing an arbitration clause whether explicitly or implicitly is permissible, and it can be done by any act or procedure that clearly declares the renouncement where there is no doubt that the intention of the parties was to renounce that clause.

In a case brought before the Dubai Court of Cassation, the claimant argued that the respondent renounced the arbitration agreement since the claimant appointed an arbitrator and left 5 days for the respondent to appoint an arbitrator and indicated to the respondent that in case they fail to appoint an arbitrator, the claimant shall consider that an implied renouncement of the arbitration clause.

The court rejected the claimant's argument and established that if a party refuses to appoint an arbitrator, the adversary may request that the court have jurisdiction over the original dispute to appoint an arbitrator. This fact shall not be considered an implied waiver for the arbitration clause.¹⁷⁴

Exhaustion of arbitrators' jurisdiction

In common law jurisdictions, when an arbitral award is set aside, it is unenforceable in the country in which it was made, and it will usually be unenforceable elsewhere. In this situation, the party who prevailed in arbitration, but lost the jurisdictional challenge, is in an unenviable position. If, for example, the award has been set aside completely on the basis that the arbitration agreement was invalid, a further resort to arbitration (based on the void agreement) would

¹⁷³ Which includes grounds to set aside an arbitral award, this is replaced by Articles 53 of the Federal Arbitration Law

¹⁷⁴ Dubai Court of Cassation on 24 November 2008 in challenge No. 185 / 2008 Commercial Challenge

make little sense. Prosecuting an action before judiciary might be considered.

If, however, an award has been set aside for procedural defects (for example lack of due process), award creditor who lost the enforcement challenge, will have to resubmit the dispute to arbitration. This is a troubling, excessively costly, and time consuming for claimants.¹⁷⁵

The following case demonstrates that when an award is annulled, resorting to national courts shall be necessary:

ADCC 174/2014 & DCC 192 /2007

For the reason of exceptionality of arbitration as a forum in the dispute resolution mechanism, the ADCC established that if an arbitral award is either annulled or ratified the court shall have jurisdiction for other disputes related to what has been agreed to be referred to arbitration. This amounts to a restoration of the jurisdiction of the court, which has been exceptionally moved from the court to the arbitration.

DCC decision 236/2007 held that

“The issuing of an arbitral award will be considered to lead to the loss of the arbitrator's competence over the disputed matters which have been decided on. The issuing of an arbitral award will be considered to lead to the inadmissibility of the dispute being referred for a second time to the same arbitrator or to another arbitrator, unless by virtue of a new agreement between the disputing parties. In case of disagreement, the disputing parties may refer the dispute to the courts”¹⁷⁶

Similarly, DCC 502 for 2002 dated 22 March 2003, established the same rule above.

Improvement in the new Federal Arbitration Law

The new Federal Arbitration Law established that the arbitration agreement survives even if an arbitral award, invoking such clause, was set aside. This should correct the old approach by the Court of Cassations in the UAE, which implies the exhaustion of the arbitration agreements.

In this regard, Article (54) 4 of the Federal Arbitration Law states that:

“Unless otherwise agreed by the Parties, the Arbitration Agreement shall remain in force according to this Law after the arbitral award is set aside unless the setting aside is based on an Arbitration Agreement that does not exist or has lapsed, or is void or incapable of being performed.”¹⁷⁷

¹⁷⁵ Redfern and Hunter on International Arbitration, Sixth Edition, Oxford University Press, Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, 2015 page 610, para 10.91

¹⁷⁶ DCC decision 236/2007 dated 3 Feb 2008, translated by Lexis Middle East

¹⁷⁷ UAE Federal Law No. 6 of 2018 on Arbitration in Commercial Disputes

The next section shall discuss in detail each of the grounds for annulment of arbitral awards under UAE law and the methodologies by which each of these grounds was used.

Further discussions shall address the techniques that arbitrators and parties' representatives should adopt in order to avoid such nullity, which is a considerable loss of time and effort by award creditors.

Chapter 2 the New UAE Federal Arbitration Law

In one of the most significant legislative reforms in the UAE, the UAE President HH Sheikh Khalifa bin Zayed Al Nahyan issued Federal Law No. 6 of 2018 on Arbitration in Commercial Disputes ("the Federal Arbitration Law") on 3 May 2018. The law was published in the Official Gazette issue no. 630 dated 15 May 2018 and came in effect on 16 June 2018.

The Federal Arbitration Law Repeals the arbitration chapter of the UAE CPC applicable to arbitration since the year 1992 including Articles 203 until 218 of the CPC ("the Repealed Arbitration Chapter").

The Federal Arbitration Law and is broadly based on the UNCITRAL Model Law, which has been adopted in 111 jurisdictions across the 80 Model Law States that are commonly perceived to be arbitration-friendly jurisdictions. Exceptions to the UNCITRAL Model Law are set out later in this document.

This Chapter illustrates the changes brought by the Federal Arbitration Law as compared with the Repealed Arbitration Chapter, issues that remain unchanged, improvements introduced and whether further improvements are still needed following the introduction of the law.

Section 1 Improvements in the Federal Arbitration Law:

For the sake of proper presentation, the improvements introduced by the Federal Arbitration Law will be listed by order of importance. It must be noted that many of the arbitration laws in other jurisdictions took time to be improved (for example the latest legislative reform in France was as late as 2011). Therefore, this legislative reform in the UAE is not final but is a start for further improvements.

§ 1 Enforcement of Arbitral awards:

Having regards to the facts that:

- (1) The practice indicates that most of the arbitration cases in the UAE are related to institutional arbitration, which is regulated by institutional rules that contain, in most cases, similar provisions to the Federal Arbitration Law, and
- (2) The grounds to annul an arbitral award under the Federal Arbitration Law are mostly consistent with the Repealed Arbitration Chapter as set out below.

Therefore, this thesis is of the view that the main legislative improvement in the Federal Arbitration Law is that part related to the execution of arbitral awards. In particular, the Federal Arbitration Law provides the following improvements:

- (1) The action to enforce an arbitral award should be initiated before the competent Court of Appeal, rather than the Court of First Instance (Article 55.1).¹⁷⁸ Similarly, the action to set aside an award shall be initiated before the relevant Court of Appeal (Article 53.1).¹⁷⁹
- (2) The decisions of the Court of Appeal to enforce arbitral awards can only be challenged by filing a grievance before the Court of Appeal itself (Article 54.1).¹⁸⁰
- (3) By contrast, the decisions of the Court of Appeal in actions for annulment can only be challenged before the Court of Cassation (Article 57),¹⁸¹ this is likely to be a pro-arbitration approach to limit awards debtors' ability to challenge a court decision ratifying an arbitral award.
- (4) The judge should order enforcement within 60 days unless a ground to set aside an award was identified (Article 55.2).¹⁸²
- (5) An application to set aside an arbitral award does not stay its enforcement; however, the judge may order staying enforcement within 15 days of the first session of an action to set aside an award (Article 56.2)¹⁸³ based on a reasoned application by one of the parties, only on serious grounds.

¹⁷⁸ Article 55.1 of the Federal Arbitration Law states that "a party looking to enforce an arbitral award shall submit a request for its confirmation and enforcement with the chief justice of the Court." The Court is defined in Article 1 of the law as "The federal or local Court of Appeals agreed upon by the parties or in whose jurisdiction the arbitration is conducted"

¹⁷⁹ Article 53.1 of the Federal Arbitration Law states that "An arbitral award can only be challenged by either an action for setting aside before the Court or during the pendency of an application to ratify the award"

¹⁸⁰ Article 54.1 of the Federal Arbitration Law states that "The decision of the Court in an action to set aside is final and can only be appealed in Cassation"

¹⁸¹ Article 57 of the Federal Arbitration Law states that "A grievance may be filed against the Court's decision to grant or deny enforcement of an arbitral award before the competent Court of Appeal within thirty days from the date following notification"

¹⁸² Article 55.2 of the Federal Arbitration Law states that "The chief justice of the Court or whoever he delegates from among its judges shall order the arbitral award confirmed and enforced within sixty days of submission of the request for its confirmation and enforcement, unless it finds one or more of the grounds for setting aside the award under section 1 of Article 53 of this Law"

¹⁸³ Article 56 of the Federal Arbitration Law states that:

- "1. An action to set aside an arbitral award does not stay its enforcement. Nevertheless, the Court seized of the action to set aside the award may order a stay of enforcement if so requested by a Party showing good cause.
2. The Court shall decide the request for a stay of enforcement within fifteen days after the date of the first scheduled hearing"

(6) The action to set aside an arbitral award should be initiated within 30 days from communicating the arbitral awards to the parties (Article 54.2)¹⁸⁴.

(7) In a welcomed pro-arbitration approach, the Federal Arbitration Law permits the court ratifying an award, under certain circumstances, to suspend the proceedings for 60 days in order to allow the tribunal to amend the arbitral award (Article 54.6).¹⁸⁵

New rules for recusal of an arbitrator: Article 15 of the new Federal Arbitration Law establishes a new rule, where the decision of the Concerned Body, (which is defined in the law as the ‘the body authorized to administer arbitration or the Court’ i.e. the arbitral institution) regarding the recusal of an arbitrator should be taken within 10 days of the date of the challenge being raised to it. In practice, institutions like DIAC used to consume several weeks and likely several months to make a decision in this regard¹⁸⁶.

In addition, the challenge to an arbitrator should not stop the arbitral proceedings, until it is decided for by the Concerned Body. This is correcting the approach taken by case law number 75/2008¹⁸⁷ where an arbitral award was set aside since the arbitral tribunal continued the proceedings despite the challenge to one of the arbitrators.

In this regard, Article (15).2 of the Federal Arbitration Law states that:

“The Parties are free to agree on a procedure for challenging an Arbitrator; failing which the following procedure shall apply....:

If the challenged arbitrator does not withdraw or the other party does not agree to the challenge within fifteen days from the date of the notice of challenge given to the Arbitrator in accordance with Article 24 of this Law,

3. If a stay is ordered, it may require the party seeking the stay to provide a given security or monetary guarantee. The Court then has sixty days from the date of the stay order to decide the action to set aside”

¹⁸⁴ Article 54.2 of the Federal Arbitration Law states that “An action to set aside an arbitral award shall be time barred after 30 days from the date of notification of the award by the party seeking to set it aside.” It’s worth noting that the day 30 time-limit for actions of annulment is likely to be a positive change for award creditors as compared with Repealed Arbitration Chapter of the CPC, however, it does not seem that this time-limit applies for defenses to enforcement of arbitral awards.”

¹⁸⁵ Article 54.6 of the Federal Arbitration Law states that “The Court, when asked to set aside an arbitral award may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time of up to sixty days in order to give the Arbitral Tribunal an opportunity to take any action or make any amendment to the form of the award as will eliminate the grounds for setting aside without affecting the substance of the award”

¹⁸⁶ An example I have seen in DIAC Case 11/2016, where one of the arbitrators was challenged by one of the parties and ultimately recused from his position, the appointment by the DIAC to the replacement arbitrator nominated by the claimant consumed almost three months

¹⁸⁷ Dubai Court of Cassation judgment number 75 for the year 2008 – commercial – dated 19 January 2009 [Exhibit 35]

the challenging party may present it to the Concerned Body within fifteen days after the first fifteen-day period. The Concerned Body then has ten days to decide the challenge and its decision shall be subject to no appeal.”

§ 2 Remaining Improvements in the Federal Arbitration Law

Adverse inference

The Federal Arbitration Law provides the power to an arbitral tribunal to draw adverse inferences when one of the parties rejects to produce documents or comply with the tribunal’s orders.

Article 32.3 of the Federal Arbitration Law states that:

“If any party fails to appear at a hearing or to produce documentary evidence or carry out any procedure, without an acceptable excuse, the Arbitral Tribunal may continue the proceedings, drawing appropriate conclusions based on the actions and default of the party in question, as justified by the circumstances of the arbitration case, and proceed to make the award on the evidence before it.”

Arbitration Agreement in case an award is annulled:

The arbitration agreement survives even if the relevant award was set aside. This corrects the old approach by the Court of Cassations in the UAE (as in case laws ADCC 174/2014 & DCC 192 /2007) which implies the exhaustion of the arbitration agreements.

In this regard, Article (54) 4 of the Federal Arbitration Law states that *“unless otherwise agreed by the Parties, the Arbitration Agreement shall remain in force according to this Law after the arbitral award is set aside unless the setting aside is based on an Arbitration Agreement that does not exist or has lapsed, or is void or incapable of being performed.”*

Severability of an arbitration clause

As set out in Part 1, Title 1, Chapter 1, Section 3, § 1 of this thesis, there has been a contradiction between Dubai on the one hand and Abu Dhabi courts on the other hand regarding the application of the severability of the arbitration clause and whether if a contract is null or void the arbitration clause survives (as per Dubai Courts) or is rendered null (as per the Abu Dhabi Courts).

Severability is now coded in Article (6) of the new Federal Arbitration Law, which states that:

“(1) an arbitration clause shall be treated as an agreement independent from the other terms of the contract. The nullity, rescission, or termination of the contract shall not affect the arbitration clause if it is valid per se, unless the matter relates to an incapacity among the Parties. (2) A plea that a contract containing an arbitration clause is null or has been rescinded or terminated shall not stay the arbitration proceedings and the Arbitral Tribunal may rule on the validity of such contract.”

Procedural Estoppel

The Federal Arbitration Law codified the procedural estoppel, where if any violation of the procedures in this law or the procedures agreed by the parties that are not contested within 7 days within the respective party's knowledge of such violation (or within the time-limit agreed upon), this shall be deemed an implied acceptance and waiver of subsequent right to object it, as long as such violation can be agreed to be deviated from by the parties.

In this regard Article 25 of the Federal Arbitration Law states that *"A party who knows that any provision of this Law from which the Parties may derogate or any requirement under the Arbitration Agreement has not been complied with and yet does not state its objection to such non-compliance within the time-limit agreed upon, or within seven days of becoming aware of the non-compliance in the absence of such agreement, shall be deemed to have waived its right to object."*

However, the application and interpretation of this Article by the UAE national courts may face challenges, as set out in a separate Chapter related to the improvements to the UAE law.

Place of signature of the award

The Repealed Arbitration Chapter provides that arbitral awards should be issued (and signed) in the UAE, failing which; it shall be considered a foreign arbitral award. Realistically, I have seen arbitrators residing outside the UAE disregard this provision as it is not practical to travel for many hours only to sign the award. The new arbitration law corrected this approach by making clear that irrespective of the place of signature of an award, the award shall be deemed to be signed in the place of the arbitration (Article 42.6).¹⁸⁸

This is a good and clear departure from the Repealed Arbitration Chapter of the CPC where Article 212.4 of the Repealed Arbitration Chapter of the CPC states that: *"The award of the arbitrator shall be issued in the United Arab Emirates, failing which, the rules laid down in respect of awards of arbitrators issued in a foreign country shall apply."*

Section 2 Issues that remain mostly unchanged under the old arbitration chapter of the CPC

There are significant issues that remain unchanged under the Federal Arbitration Law as compared with the Repealed Arbitration Chapter and the rules of the arbitral institutions in the UAE.

¹⁸⁸ Article 41.6 of the Federal Arbitration Law states that "Unless otherwise agreed by the Parties, the arbitral award shall be deemed issued at the place of arbitration as determined in accordance with Article 28 of this Law, notwithstanding that it may have been signed by the members of the Arbitral Tribunal outside the place of arbitration, and irrespective of how the award was signed, whether by all the members of the Arbitral Tribunal at one sitting or separately by each member to whom the award was forwarded for signature, or by electronic means"

Joinder and Consolidation: The tribunal's power and discretion to allow the joinder of a third party is now codified in Article 22 of the Federal Arbitration Law. This discretion is conditional upon (a) the third party is being a signatory to the arbitration agreement, and (b) the tribunal allowing all parties to provide their submissions on the proposed joinder.

This could not be considered a significant change under the Federal Arbitration Law since any arbitral tribunal will not typically uphold jurisdiction where a party is joined to the proceedings without being a party to the arbitration agreement invoked.

The Federal Arbitration Law, however, remains silent as to the consolidation of proceedings.

Competent-competent doctrine: is now coded under the new law, Article 19.1 of the Federal Arbitration Law provides:

“The Arbitral Tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the Arbitration Agreement or its inclusion of the subject-matter of the dispute. The Arbitral Tribunal shall rule on the plea either as a preliminary question or in a final arbitral award on the merits.”

Res judicata effect of arbitral awards: is now coded in Article 52 of the Federal Arbitration Law states that “An arbitral award made in accordance with this Law shall be binding on the Parties, shall constitute res judicata, and shall be as enforceable as a judicial ruling, although to be enforced, a decision.”

Reference to the arbitration agreement: as set out in Part 2, Title 1, Chapter 3, Section 2, § 5 of this thesis, there were issues regarding the UAE courts’ recognition to an arbitration clause where it was incorporated in a contract by a reference to or from another document. A prominent example of that is the regular reference to FIDIC Rules by many construction contracts.

Article 5.3 of the new Federal Arbitration Law codifies the permission to establish an arbitration clause by reference to another document. It states that:

“A reference in a contract or any other document containing an arbitration clause constitutes an Arbitration Agreement, if the reference is such as to make that clause part of the contract”

Also, Article 7.2 of the Federal Arbitration Law

“An Arbitration Agreement shall be deemed to be in writing if: (a) it is contained in a document signed by the Parties or in an exchange of correspondence or other written means of communication or in the form of an electronic message in accordance with the applicable rules of the State concerning electronic transactions. (b) There is a reference in a written contract to any model contract, international agreement, or any other document containing an arbitration clause and the reference is such as to make that clause part of the contract.”

Interim and Conservatory Measures: whilst the Repealed Arbitration Chapter of the UAE CPC does not refer to interim or conservatory measures, most of the institutional rules provide for that. The new Federal Arbitration Law provides jurisdiction to the national courts whenever the national courts are referred to inside the Federal Arbitration Law, to order interim or conservatory measures.

Article 18.2 of the Federal Arbitration Law states that:

“The chief justice of the Court may, at the request of a party, or at the request of the Arbitral Tribunal, order such interim or conservatory measures as he may consider necessary to be taken in respect of existing or potential arbitral proceedings, whether before the commencement or the arbitral proceedings or during their course.”

This should not be conflated with the jurisdiction of the arbitral tribunal to order interim and conservatory measures as stipulated in Article 21 of the Federal Arbitration Law. The law provides ample authority to arbitral tribunals in this regards to *“Order any party to take such interim or conservatory measure as the Arbitral Tribunal may consider necessary given the nature of the dispute.”*

The law specifies the situations where interim measures could be granted, which are set out in Article 21 including: preservation of evidence, keeping of goods, preservation of assets, maintain the *status quo* pending the determination of the dispute, or preventing imminent harm to the arbitral process itself.

This is generally consistent with the arbitration practice which provides that interim and conservatory measures should only be granted in situations of necessity and urgency in order to protect rights that could, absent such measures, be definitively lost (i.e. to avoid irreparable harm).

In this regard, Article 17 (A) of the UNCITRAL Model Law states that:

“(1) The party requesting an interim measure under article 17(2) (a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination”

In this connection, Redfern and Hunter confirm that *“Whilst most arbitration rules and laws of arbitration permit interim measures to be granted at the tribunal's discretion, they provide little guidance as to how that discretion should be exercised. Traditionally, arbitrators have looked to concepts common to most legal systems in the granting of such measures—such as the need to establish a prima facie case on the merits and the risk of serious and irreparable harm if the measure is not granted.”*¹⁸⁹

The above implies that the party seeking interim or conservatory measures should reasonably prove the following:

(a) The risk of substantial irreparable harm to the respondent, in the absence of the protection;

¹⁸⁹ Redfern and Hunter on International Arbitration, Sixth Edition, Oxford University Press, Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, 2015, page 362 para 5.31

- (b) The respondent's harm, if the order is not granted, will be greater than the claimant's harm if it is granted; and
- (c) Whether the respondent has a reasonable chance of success on the merits (that is, a *prima facie* case).

Disclosure required by an arbitrator: The new Federal Arbitration Law established an old rule that was stipulated in most institutional arbitration rules where an arbitrator is under the obligation to disclose any circumstances that are likely, in the eyes of the parties, to cause doubts as to its impartiality and independence.

Article 10.4 of the Federal Arbitration Law states that:

"When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing anything likely to give rise to doubts as to his impartiality or independence. An Arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the Parties and all the arbitrators unless they have already been informed of them by him."

Arbitration is void for matters not subject to conciliation (public order):

Article 4.2 of the new Federal Arbitration Law states that *"Arbitration is not permitted in matters which do not permit conciliation."*

This is consistent with Article 203.4 of the Repealed Arbitration Chapter of the CPC which states that *"It shall not be permissible to arbitrate matters in which conciliation is not permissible. An agreement to arbitrate shall not be valid unless made by persons having the legal capacity to make a disposition over the right the subject matter of the dispute."*

The arbitration agreement should be in writing:

Article 7.1 of the new Federal Arbitration Law states that *"An Arbitration Agreement shall be in writing; failing which, it shall be void."*

This is consistent with Article 203.2 of the Repealed Arbitration Chapter of the CPC states that *"An arbitration agreement may be proved only by writing."*

Court jurisdiction where an agreement to arbitrate exists: The new Federal Arbitration Law confirmed a similar approach of the Repealed Arbitration Chapter of the CPC with regards to the exclusion of national courts' jurisdiction where an arbitration clause exists, unless both parties do not object the court's jurisdiction before any other plea.

Article 8.1 of the new Federal Arbitration Law states that *"The court before which a dispute is brought that is subject to an Arbitration Agreement shall decline to entertain the action if the defendant has so pleaded before submitting any request or plea on the merits of the case, unless the court is satisfied that the Arbitration Agreement is void or incapable of being performed."*

The Repealed Arbitration Chapter of the CPC states that *"if the parties agree to arbitrate the dispute it shall not be permissible to bring an action in respect thereof before the courts but nevertheless if one of the parties does*

have recourse to litigation without regard to the arbitration clause and the other party does not object at the first hearing the action must be tried and the arbitration clause shall be deemed to be canceled.”¹⁹⁰

Arbitrators’ qualifications: Article 10.1 of the new Federal Arbitration Law states that:

“In addition to the qualifications agreed upon by the Parties, the Arbitrator shall be a natural person who is not a minor or under court interdiction order or without civil rights by reason of bankruptcy; unless he has been discharged, or due to a felony or misdemeanor conviction for a crime involving moral turpitude or breach of trust; even if he has been rehabilitated.”

This provision is consistent with Article 206.1 of the Repealed Arbitration Chapter of the CPC, which states that:

“It shall not be permissible for a minor or a person under a legal disability or a person deprived of his civil rights by reason of a criminal penalty or an un-rehabilitated bankrupt to be an arbitrator.”

Applicable law to Procedures: The Federal Arbitration Law continues the same approach of the Repealed Arbitration Chapter of the CPC where the applicable procedural law is the one agreed by the parties, failing which, any procedures the arbitral tribunal finds appropriate, without being bound by the civil procedures code, it should only be bound by the Federal Arbitration Law (or previously the Arbitration Chapter of the CPC).

Article (23).2 of the Federal Arbitration Law states that *“where there is no agreement to follow specific procedures, the Arbitral Tribunal may adopt the procedures it considers appropriate, subject to the provisions of this Law and the absence of conflict with the fundamental principles of litigation and international agreements to which the State is party.”*

This article confirms the approach of the Repealed Arbitration Chapter; specifically Article 212.1 of the Repealed Arbitration Chapter of the CPC states that:

“the arbitrator shall issue the arbitral award without being bound by the procedural rules save as is provided for in this Chapter and the procedures relating to the summoning of the parties, the hearing of their arguments, and enabling them to submit their documents, but nevertheless it shall be permissible for the parties to agree on specific procedures for the arbitrator to follow.”¹⁹¹

¹⁹⁰ Article 213.5 of the UAE CPC, which is consistent with Article 8.1 of the new Federal Arbitration Law. However, the as per the Federal Arbitration Law, the plea that the court does not have jurisdiction (since the parties agreed to arbitration) must be raised *“before submitting any request or plea on the merits”* rather than before the first hearing.

¹⁹¹ Article 212.1 of the Repealed Arbitration Chapter of the UAE CPC, which is consistent with Articles 23.2 and 53.1(d) of the UAE Federal Arbitration Law which states that:

“where there is no agreement to follow specific procedures, the Arbitral Tribunal may adopt the procedures it considers appropriate, subject to the provisions of this Law and the absence of conflict with the fundamental principles of litigation and international agreements to which the State is party”

Applicability of the evidence law: the UAE evidence law is not applicable to arbitration even if the parties refer to the UAE law as the choice of law. This choice is deemed to be the choice of the substantive law.

Article 33.8 of the Federal Arbitration Law states that:

“The Arbitral Tribunal is afforded discretion to determine the rules of evidence to be followed and the admissibility, relevance or weight of evidence adduced by any of the Parties in relation to facts or expert opinion. The Arbitral Tribunal may also specify a time-limit, method, and form for the exchange of such evidence between the Parties and a method for its submission to the Arbitral Tribunal.”

This is consistent with the Cassation decisions issued in this regard including DCC 156 for 2009 [Exhibit 45] and DCC 173 for 2010, DCC 88 for 2004, DCC 547/2015 [Exhibit 15], ADCC. 873/2009 [Exhibit 21] issued under the Repealed Arbitration Chapter and consistent with most of the rules arbitration for arbitral institutions in the UAE.

Applicable substantive law to arbitration: it is common ground between the Repealed Arbitration Chapter and the Federal Arbitration Law that the applicable substantive law to arbitral proceedings is the law chosen by the parties. However, the Repealed Arbitration Chapter does not address specifically the applicable law in the absence of choice, and a number of institutional arbitration rules do specify the applicable substantive law in this case. The Federal Arbitration Law, however, establishes that the applicable substantive law in the absence of choice by the parties is the law that is most closely connected to the dispute. This doctrine is yet to be developed by the practice of the UAE courts (Article 38.1);¹⁹² however, the place of performing the underlying contractual obligations is expected to be an essential parameter in this determination.

Amiable compositeur: an arbitral tribunal may not rule on amiable compositeur unless specifically authorized to do so by the parties. This is a continuation of the old approach of the Repealed Arbitration Chapter of the Civil Procedures Code.

Article 38.3 of the Federal Arbitration Law reads:

“The Arbitral Tribunal may, if it has expressly been authorized to do so or to act as an amiable compositor by agreement of the Parties, decide ex aequo et bono rather than on the basis of law.”

Article 212.2 of the Repealed Arbitration Chapter of the CPC states that *“The award of the arbitrator shall follow the rules of law unless he is authorized for conciliation (amiable compositeur), in which event he shall not be bound by such rules save in so far as they relate to public order.”*

The reasoning of an award: as set out in Cassation decisions number DCC 88 for 2004, DCC 277 for 2002, DCC 145 for 2012, the general rule is the arbitral award should state the reasons upon which it is based.

¹⁹² Article 38.1 of the Federal Arbitration Law states that “Failing designation by the Parties of the legal rules applicable to the substance of the dispute, the Arbitral Tribunal shall apply the substantive rules of the law it deems most closely connected to the dispute”

The Federal Arbitration Law establishes a similar provision (Article 41.4).¹⁹³

This is consistent with Article 212.5 of the Repealed Arbitration Chapter of the CPC states that:

“The award of the arbitrators shall be issued by a majority; it must be in writing, with the dissenting view, and it must in particular include a copy of the arbitration agreement, a summary of the statements and documents of the parties, the reasons for the award and the order made, the date of issue, the place at which it was issued, and the signatures of the arbitrators, and if one or more of the arbitrators has refused to sign the award such fact shall be stated, and the award shall be valid if signed by a majority of the arbitrators.”¹⁹⁴

§ 1 Effect of the UAE Arbitration Law on the Grounds to set aside an award:

The grounds to annul an arbitral award under the new Federal Arbitration Law are very similar to the grounds in the Repealed Arbitration Chapter in the CPC; the following summarizes the similarities between the two provisions of law.

The first ground to set aside an award in the UAE is the defects in the underlying arbitration agreement. Article (53) 1(a) of the Federal Arbitration Law states that:

“An arbitral award can only be challenged by an action for setting aside before the Court or during the pendency of an application to confirm the award. The party seeking to set aside the award must establish any of the following circumstances: .. (a) that no Arbitration Agreement exists or such agreement is void or has lapsed under the law to which the Parties have subjected it or, failing any indication thereon, under this Law.”

This is very similar to Article 216.1(a) of the Repealed Arbitration Chapter, which states that:

“The parties may apply for the award of the arbitrators to be nullified when the court considers whether it should be ratified, in the following circumstances... (a) if it was issued otherwise than with an arbitration instrument or on the basis of an instrument which is invalid or has lapsed by effluxion of time, or if the arbitrator acted outside the scope of the instrument.”

The second ground to set aside an award in the UAE is the defects in the capacity of the person signing the arbitration agreement. Article 53.1(b) of the Federal Arbitration Law provides as a ground to set aside or oppose enforcement of an arbitral award that *“a party, at the time of conclusion of the Arbitration Agreement, was incompetent or under some incapacity under the law governing his capacity.”*

¹⁹³ Article 41.4 of the Federal Arbitration Law states that “The award shall state the reasons upon which it is based, unless the Parties have agreed otherwise, or the law applicable to the arbitral proceedings does not require reasons to be given”

¹⁹⁴ Article 212.5 of the Repealed Arbitration Chapter of the UAE CPC, which is consistent with Article 12 and 41.5 of the Federal Arbitration Law

Further, Article 53.1(c) of the Federal Arbitration Law provides as a ground to set aside or oppose enforcement of an arbitral award that “a person does not have the legal capacity to dispose of the disputed right under the law governing his capacity, as provided for in Article 4 of this Law.”

Both Articles 53.1(b) and 53.1(c) of the Federal Arbitration Law are relevant and similar to Article 216.1.b of the Repealed Arbitration Chapter of the CPC, which states that:

“If the award was made by arbitrators appointed otherwise than in accordance with the law, or was issued by some of them without their being authorized to make an award in the absence of the others or if it was issued on the basis of an arbitration instrument that does not specify the subject matter of the dispute or was issued by a person not having capacity to make an arbitration agreement or an arbitrator not satisfying the requirements of the law.”

The third ground to set aside an award in the UAE is the violation of the due process Article 53.1(d) of the Federal Arbitration Law, which provides as a ground to set aside or oppose enforcement of an arbitral award:

“That a party to the Arbitration fails to present its case because it was not given proper notice of the appointment of an Arbitrator or of the arbitral proceedings or because the Arbitral Tribunal breached due process or for any other reason beyond his control.”

This is consistent with Article 212.1 of the Repealed Arbitration Chapter of the CPC states that:

“the arbitrator shall issue the arbitral award without being bound by the procedural rules save as is provided for in this Chapter and the procedures relating to the summoning of the parties, the hearing of their arguments, and enabling them to submit their documents, but nevertheless it shall be permissible for the parties to agree on specific procedures for the arbitrator to follow.”

The fourth ground is the failure to apply the law chosen by the Parties. Article 53.1(e) of the Federal Arbitration Law provides as a ground to set aside or oppose enforcement of an arbitral award that “that the arbitral award excludes the application of the Parties’ choice of law for the dispute.”

This is relevant to Article 212.2 of the Repealed Arbitration Chapter of the CPC, which states that

“The award of the arbitrator shall follow the rules of law...”

The fifth ground is the defects in the reasons related to the constitution and choice of the arbitral tribunal. Article 53.1(f) of the Federal Arbitration Law provides as a ground to set aside or oppose enforcement of an arbitral award “that the composition of the Arbitral Tribunal or appointment of any Arbitrator was not in accordance with this Law or the agreement of the Parties.”

This is relevant to Article 216.1(b) of the Repealed Arbitration Chapter of the CPC, which provides as a ground to set aside an award that “if the award was made by arbitrators appointed otherwise than in accordance with the law.”

The sixth ground is the general issues related to arbitral procedures. Article 53.1(g) of the Federal Arbitration Law provides as a ground to set aside or oppose enforcement of an arbitral award that *“if there is a nullity in the award or a nullity in the proceedings having an effect on the award.”*¹⁹⁵

This is the same wording of Article 216.1.c of the Repealed Arbitration Chapter of the UAE CPC.

The seventh ground is exceeding the scope of the substantive jurisdiction of the arbitral tribunal or deciding on matters outside those agreed upon to be submitted to arbitration. Article 53.1(h) of the Federal Arbitration Law provides as a ground to set aside or oppose enforcement of an arbitral award that *“the award contains decisions on matters not falling within the terms of the submission to arbitration or beyond its scope.”*

This is relevant to Article 216.1(a) of the Repealed Arbitration Chapter of the CPC, which provides as a ground to set aside or oppose enforcement of an arbitral award that *“if the arbitrator acted outside the scope of the instrument.”*

The eighth ground is the time-limit for an award, exceeding the time-limit for rendering an award remains a ground to set aside an award under the Federal Arbitration Law. The Federal Arbitration Law appears to require an improvement regarding the time to start the arbitral proceedings, while the law provides that the arbitral proceedings shall commence on the date following the date of the constitution of the tribunal (Article 27.1);¹⁹⁶ the time-limit of an award is six months from the date of the first hearing taking place after the commencement of the proceedings (Article 42.1)¹⁹⁷. It would have been more consistent that the date of the commencement of the proceedings to be the same date of calculating the time-limit for an award. That being said, still the provisions of law can be implemented “as is” with no ambiguity.

Under the Federal Arbitration Law, the arbitral tribunal has the right on its own motion to extend this initial six months to an additional six months, however, following this period, the Federal Arbitration Law provides that

¹⁹⁵ Article 216.1(C) of the Repealed Arbitration Chapter of the UAE CPC, which is the same wording in Article 53.1(g) of the Federal Arbitration Law

¹⁹⁶ 27. 1 of the Federal Arbitration Law states that “Unless otherwise agreed by the Parties, the arbitral proceedings commence on the day following the date when the composition of the Arbitral Tribunal is completed”

¹⁹⁷ Article 42.1 of the Federal Arbitration Law states that

“The Arbitral Tribunal shall issue a final award within the timeframe agreed by the Parties. Failing agreement on a specific time-limit or method of its determination, the award shall be issued within six months from the date of the first hearing of the Arbitration. The Arbitral Tribunal may extend the time for up to six additional months, unless the Parties agree to a longer extension.”

This is consistent with Article 210.1 of the Repealed Arbitration Chapter of the CPC which states that:

“If in the arbitration agreement the parties have not stipulated a time-limit for the judgment the arbitrator must pass judgment within six months from the date of the first hearing in the arbitration failing which it shall be permissible to any party to so wishes to bring the dispute before the courts or to continue with it before the courts if it has already been brought”

the parties should seek further extension from the Court of Appeal having jurisdiction, rather than from the arbitral institution (Article 42.2).¹⁹⁸

The new Federal Arbitration Law is silent regarding the right of the arbitral institutions to extend the time-limit of an award. It could be argued that the rules of the arbitral institutions can be deemed as an agreement by the parties for a specific time-limit of an award. However, this interpretation is yet to be tested by the UAE courts.

The time-limit as a ground to set aside an award under the Federal Arbitration Law is consistent with Article 210.1 of the Repealed Arbitration Chapter of the CPC, which states that:

“If in the arbitration agreement the parties have not stipulated a time-limit for the judgment the arbitrator must pass judgment within six months from the date of the first hearing in the arbitration failing which it shall be permissible to any party to so wishes to bring the dispute before the courts or to continue with it before the courts if it has already been brought.”

§ 2 Effect of the UAE Arbitration Law on Capacity to enter into arbitration agreements¹⁹⁹

The requirement that the signatory to an arbitration agreement should have express and specific authority to bind a company to arbitration is laid down in Article 58(2) of the CPC, which provides that *“No admission or waiver of a right alleged or settlement or submission to arbitration ... or any other disposition in respect of which the law requires special authorization may be made without special authority.”*

Article 58 (2) is not repealed by the Federal Arbitration Law.

As such, the same problem set out in Part 2, Title 1, Chapter 1 of this thesis still exists under the new UAE arbitration law. As set out in Part 1, Title 2 Chapter 2 of this thesis, this jurisdictional challenge represents the most significant threat to arbitral awards in the UAE having regards to the substantial number of awards that were annulled on this ground.

Furthermore, Article 4.1 of the UAE Federal Arbitration Law has no noticeable difference to Article 203.4 of the Repealed Arbitration Chapter. Article 4.1 of the UAE Federal Arbitration Law provides that:

“An Arbitration Agreement may only be concluded, on pain of nullity, by a natural person having the legal capacity to dispose of his rights or on behalf of a juridical person by a representative with specific authority to arbitrate.”

¹⁹⁸ Article 42.2 of the Federal Arbitration Law states that “The Arbitral Tribunal and either Party may, if no arbitral award is issued within the time period provided for in paragraph 1 of this article, request the Court to issue a decision extending the time period for issuing the arbitral award or terminating the arbitral proceedings, as necessary. The Arbitral Tribunal may extend such period under such conditions as it shall deem appropriate and its decision in this regard shall be final, unless otherwise agreed by the Parties”

¹⁹⁹ See The good, the (not) bad and uncertain : the impact of the UAE’s new Federal Arbitration Law by Pinsent Masons, https://www.pinsentmasons.com/Global/UAE_Arbitration_law_update.pdf <https://www.lexis.ae/2018/06/17/the-good-the-not-bad-and-the-uncertain-the-impact-of-the-uaes-new-federal-arbitration-law-pinsent-masons/>

Article 154 of the UAE Commercial Companies law states:

“The Board of Directors shall have all the required powers to do such acts as required for the object of the company, other than as reserved by this Law or the Articles of Association of the company to the General Assembly. However, the Board of Directors may not make conciliation or agree on arbitration, unless such acts are authorized under the Articles of Association of the company or are within the object of the company by nature. In other than these two events, such acts require to issue a special decision by the General Assembly.”²⁰⁰

Article 203.4 of the CPC, which is now repealed states that “An agreement to arbitrate shall not be valid unless made by persons having the legal capacity to make a disposition over the right the subject matter of the dispute.”

§ 3 Summary of Grounds to Set-aside Arbitral awards under UAE law

Under UAE law, the parties to a dispute may, at the time of the judicial review of the arbitral award, request nullity of the award in the following events:

1. Defects in the underlying arbitration agreement
2. Defects in the capacity of the person signing the arbitration agreement
3. The violation of the due process
4. Failure to apply the law chosen by the parties
5. Failure to constitute the arbitral tribunal in accordance with the law or the choice of the contracting parties
6. The general issues related to the arbitral procedures²⁰¹
7. Exceeding the scope of the substantive jurisdiction of the arbitral tribunal or the matters that have been submitted to arbitration in accordance with the arbitration agreement
8. Failure to comply with the time-limit for an award

Additional Grounds for Nullity of arbitral awards from the Case Law

²⁰⁰ Article number 154 of the UAE Federal Commercial Companies Law number 2 of 2015

²⁰¹ USC 64 for judicial year 20 interpreted that nullity in the judgment of the award or the procedures that affected the award in violation for Article 212 of the same law (Article 12 of the Federal Arbitration Law) which necessitates that the award should be issued by majority of votes and the award must be written including the descending opinion. The arbitrator should notify the parties of the hearing session to review the pleadings and enabling them to plead all the arguments and defenses and submit all their documents and taking steps to prove their rights

Article 216.1(c) of the Repealed Arbitration Chapter of the CPC provides that a ground for nullity of arbitral awards *“if there is a nullity in the award or a nullity in the proceedings having an effect on the award.”*²⁰²

This Article provides a vague and ambiguous ground with regards to the nullity of the arbitral award since it is related to any and all misapplications of procedures which affect an award, which is a judgmental matter and could cause the setting aside of an award. Indeed, this Article was historically used to set aside awards.

Therefore, it is crucial to analyze the UAE jurisprudence in order to understand and establish rules to the methodology and behavior by which the UAE courts interpreted and implemented Article 216.1(c) of the UAE CPC (Article 53.1(g) of the Federal Arbitration Law) in setting aside arbitral awards.

The specific application of this Article will be discussed in Part 1, Title 2, Chapter 1, and Section 2 of this thesis. However, for the purpose of satisfying this part of the thesis which provides only for the grounds of annulment of awards, set out below the following grounds that were used by previous case laws to annul awards in the UAE judiciary using Article 216.1(c) of the UAE CPC [Article 53.1(g) of the Federal Arbitration Law]:

1. Violating the procedures agreed between the parties;
2. Failure to enable the litigant parties to submit their requests and defenses;
3. Failure to enable the litigant parties to plead their position where they can admit, deny or refute the adversary's legal arguments;
4. Absence of the confrontation between the litigant parties in the dispute;
5. Failure to establish equality between the litigant parties and violating the procedures agreed upon;
6. If the arbitrator violates the public order;
7. Failure to notify the parties of the hearing session;
8. Failure to render the award after deliberations, which requires all the arbitrators to be aware of the opinion of the other arbitrators and having discussions between them in this regard; and
9. Failure to provide reasons for the award.

The USC issued Decision number 831/2004, which established that this article is limited to the procedures that the arbitrators are, bound to follow, which are specifically included in Article 212 of the CPC.

The court listed, among the grounds to nullify awards, “the award of the arbitrators becomes void or invalidity in the proceedings that affected the award in violation for Article 212 of the same law.”²⁰³

²⁰² Article 216.1(C) of the Repealed Arbitration Chapter of the UAE CPC, which is the same wording in Article 53.1(g) of the Federal Arbitration Law

²⁰³ Union Supreme Court decision number 831 of the 25th Judicial Year issued on 23 May 2004

Following are the most important case laws that defined the above grounds for annulment:

DCC decision number 173 for 2010 states that:

*“an arbitrator shall issue the arbitral award without being bound by the pleading procedures in the litigations before judiciary, however, it shall be bound by the procedures agreed between the parties and right for issuing defenses and **enabling the litigant parties to submit their requests and defenses and enabling the parties to submit its pleadings and refute the legal arguments and submissions by the adversary and confronting the parties to one another in the dispute.** The determinative factor in the nullity of the arbitral award is the violation of the basic procedural rules for litigations that **establish equality between the litigant parties and violating the procedures agreed upon** between them in this regard. It is established as per Article 216²⁰⁴ of the CPC and the principles established in the jurisprudence of this court that the nullity of arbitral award should be confined to the arbitral award as a legal procedure and is limited to the errors in the procedures not the error in the judgment. The issues that can be pleaded by a litigant party to nullify an arbitral award were indicated in the former Article and cannot be extended to others and they are related to the agreement to enter to arbitration or the arbitration proceedings. These issues are related to the arbitration agreement and that can cause the nullity of the arbitral award including rendering the award without an arbitration agreement or based on the null arbitration agreement or the arbitration agreement was expired by passing the time-limit or **if the arbitrator exceeded the substantive jurisdiction of the arbitration agreement or if he violates the public order.***

The court held further that:

*“With regards to the arbitration proceedings that can cause nullity in the arbitral award, they were indicated in the mentioned Article which are: if the award was issued by arbitrators who were not appointed in accordance with the law, or by only a number of the arbitrators who were not authorized to render the award in the absence of the others, or the **absence of the contradiction between the litigant parties** and the rights of defense **in the dispute** or breaching the right for defense **or the award was null and void or nullity in the procedures that affected the award.** As such, any other argument raised by a litigant party to nullify the award which is not related to the former procedures and would be related to the evidence rules or the judgment of the arbitrator or denying any substantive rules or insufficient reasoning for the arbitral award shall not be accepted.”²⁰⁵*

USC decision number 64 for Judicial Year 20 added to DCC decision number 173 for 2010 the following:

“Or the award was issued based on arbitration agreement that did not specify the subject of the dispute or the arbitration agreement was issued by the person who does not have the competency to enter into arbitration agreements or nullity in the judgment of the award or the procedures that affected the award in violation for Article 212 of the same law which necessitates that the award should be issued by majority of votes and the award must be written including the descending opinion.

²⁰⁴ Which includes grounds to set aside an arbitral award, this is replaced by Articles 53 of the Federal Arbitration Law

²⁰⁵ Dubai Court of Cassation Decision number 173 for the year 2010, rights, issued on 3 October 2010, The same meaning is reflected by DCC 156 for 2009 [Exhibit 45]

The arbitrator should notify the parties of the hearing session to review the pleadings and enable them to plead all the arguments and defences and submit all their documents and taking steps to prove their rights. As such it is not allowed to decide on the dispute without notifying the parties and enabling each litigant party to view the documents and papers submitted by the other litigant party and provide the parties the sufficient time prepare their defences and respond to the pleadings and documents and rendering the award after deliberations which requires all the arbitrators to be aware of the opinion of the other arbitrators and having discussions between them in this regard”²⁰⁶.

The following case laws were carefully studied in order to summarize the grounds for nullity of arbitral awards under UAE law. They confirm the same grounds listed in Dubai Court of Cassation Decision number 173 for 2010 set out above:

- Dubai Court of Cassation Decision number 156 for 2009 [Exhibit 45]
- Dubai Court of Cassation Decision number 351 for 2005
- Dubai Court of Cassation Decision number 573 for 1999
- Abu Dhabi Court of Cassation Decision number 107 for 2014
- Abu Dhabi Court of Cassation Decision number 353 for 2011
- Abu Dhabi Court of Cassation Decision number 447 for 2010
- Abu Dhabi Court of Cassation Decision number 834 for 2010 [Exhibit 28]
- Union Supreme Court Decision number 831 for 2004
- Dubai Court of Cassation decision number 271 for 2000 – Rights

§ 4 Summary of Grounds to refuse Recognition or enforcement of an arbitral award under DIFC and ADGM Arbitration Laws

Article 44 of the DIFC Arbitration Law sets out the grounds on which the Recognition or enforcement of an arbitral award may be refused by the Court. The court may refuse to enforce an award, including:

- (1) Incapacity of the signatory to the agreement to arbitrate; or the arbitration agreement was invalid;
- (2) The award debtor was not given proper notice of the appointment of an arbitrator;
- (3) Exceeding the scope of the submission to arbitration;
- (4) Issued regarding the composition of the Tribunal;
- (5) the award is not binding or set aside by the country of origin; or

²⁰⁶ Union Supreme Court decision number 64 for judicial year 20 issued on 26 January 1999

(6) public order matters

Article 57 of the ADGM arbitration law sets out the grounds on which the Recognition or enforcement of an arbitral award, they are very similar to the grounds set out in the DIFC Arbitration Law, including:

- (1) Incapacity of the signatory to the agreement to arbitrate; or the arbitration agreement was invalid;
- (2) Invalidity of the arbitration agreement
- (3) The award debtor was not given proper notice of the appointment of an arbitrator;
- (4) Exceeding the scope of the submission to arbitration;
- (5) Issued regarding the composition of the Tribunal;
- (6) the award is not binding or set aside by the country of origin; or
- (7) public order matters

Enforceability of arbitral awards under the DIFC and ADGM arbitration laws is not the main subject of this dissertation since it was not a concern over the past period.

DIFC Courts have been historically supportive of arbitration and the ADGM is expected to follow the same pattern, albeit this has not been tested or evaluated yet.

The process for enforcing arbitral awards in the UAE is lengthy and may involve several actions that may take under certain circumstances several years to be completed.

Moreover, the process for enforcement of arbitral awards in the UAE involves a certain degree of risk. This risk can be managed if the arbitrators and parties' representatives have the UAE as the seat for their arbitrations and/or intend to enforce arbitral awards in the UAE. They must be mindful to avoid annulment of awards, which is a considerable waste of money and resources.

This part will analyze more than 130 case laws confirming setting aside arbitral awards by the UAE courts; this may be a cause for concern or rather frightening for parties and law firms enforcing awards in the UAE. However, this risk can be managed once arbitrators and parties are aware of the causes of annulment.

Further, this dissertation emphasizes the need for legislative reform to the UAE arbitration law and a change in the UAE Courts' interpretation and behavior towards arbitral awards in order to favor this process as more developed jurisdictions do.

Each of the following sections shall discuss one of the grounds for annulment of arbitral awards, set out the case laws that finally decided to annul arbitral awards and summarize the procedures that need to be considered by parties and legal representatives in order to avoid the same destiny faced by the arbitral awards that were annulled.

TITLE 2: NULLITY OF ARBITRAL AWARDS IN THE UAE

Nullity of arbitral awards by the UAE national courts has been a concern for parties and law firms. This dissertation addresses over a hundred case laws that confirm setting aside arbitral awards by the UAE courts, this number does not include provisions for (i) case laws setting aside arbitral awards not identified by this thesis, and (ii) arbitral awards set aside by lower courts but these decisions were overturned by the Supreme Courts in the UAE.

Furthermore, the problematic nature of setting aside arbitral awards is not only the conclusion of this dissertation; rather, it is part of the open discussions in many of the arbitration conferences in the UAE.²⁰⁷

As addressed above, frequent incidents and case laws setting aside arbitral awards are causing a considerable problem in the UAE legal system affecting the confidence of contracting parties when they agree to arbitration since, after spending considerable time and money in arbitration, the entire arbitral process can be in vain. Therefore, it is not particularly desirable to conduct an arbitral process knowing of the existence of this fundamental issue.

This part shall address more than 130 case laws handed down by the UAE courts that confirmed the nullity of arbitral awards.

Chapter 2 of this title will demonstrate a summary of the Cassation decisions that confirmed the nullity of the awards and grounds for each decision.

This title is of particular importance for arbitration practitioners having the UAE (or any of the jurisdictions in the UAE) as the seat for their arbitration or intending to enforce an award within the UAE.

Chapter 1: Studying Case laws upholding annulment of Arbitral Awards in the UAE

Section 1: Nullity Related to Exceeding the Time–Limit for Rendering an Award

The first of the most common grounds for setting aside arbitral awards in the UAE is the lack of requisite authority to enter into arbitration agreements. However, this particular ground shall be discussed later in the jurisdictional challenges part of this thesis. Therefore, this chapter will start with the second most common ground for nullity of awards in the UAE, which is the expiry of the time-limit for issuing an arbitral award.

Unlike the UNCITRAL Model Law, both the UAE Repealed Arbitration Chapter and the Federal Arbitration Law provide that the expiry of the time-limit of rendering an award is a ground to set aside arbitral awards.

²⁰⁷ By way of example, Dr. Habib Al Mulla, Chairman of the Dubai International Arbitration Center, in a conference in DIFC, indicated that *“the enforcement of arbitral awards in the Dubai Courts is a major concern.”* In the GAR event in the DIFC, Essam Al Tamimi indicated that *“national courts sometimes set aside arbitral awards for silly reasons.”*

Article 210.1 of the CPC provides:

“If in the arbitration agreement the parties have not stipulated a time-limit for the judgment the arbitrator must pass judgment within six months from the date of the first hearing in the arbitration failing which it shall be permissible to any party to so wishes to bring the dispute before the courts or to continue with it before the courts if it has already been brought.”

Article 42.1 of the Federal Arbitration Law states that:

“The Arbitral Tribunal shall issue a final award within the timeframe agreed by the Parties. Failing agreement on a specific time-limit or method of its determination, the award shall be issued within six months from the date of the first hearing of the Arbitration. The Arbitral Tribunal may extend the time for up to six additional months, unless the Parties agree to a longer extension”.

On the surface, UAE law is liberal with regards to the nullity of arbitral awards due to the expiry of the arbitration time-limit as it provides the judge ample authority to conclude whether the parties’ agreement explicitly or impliedly extends the time-limit, therefore making it easier to avoid setting aside awards.

The DCC established that:

“Pursuant to Article 210 of the Civil Procedure Code (Article 42.1 of the Federal Arbitration Law), the period for the issuance of the award may be extended by the parties, delegating this extension to the arbitrator or by a courts order; provided that the extended duration is uninterruptedly linked to the previously set period, failing which, such extension will not be effective. The extension of the period to render an award cannot occur after the expiry of the previously set period.”²⁰⁸

However, in practice, the typical approach of the UAE courts with regards to exceeding time-limit for rendering an award is articulated in the provisions of Articles 203 of the Repealed Arbitration Chapter of the CPC, Articles 4.1 of the UAE Federal Arbitration and 210 of the Repealed Arbitration Chapter of the CPC (*Article 42.1 of the Federal Arbitration Law*) which entail that, if the parties agree, in writing, to refer any dispute arising out of a given contract to arbitration and such proceedings are to be conducted within a specified period, then the arbitral award must abide by the expiry of such a time period, failing which, a strong argument exists to be set aside the eventual award.

However, in the absence of an affirmative agreement between the parties as to the time-limit for the rendering of the award, arbitrators shall render the award within six months of the date of the first arbitration session. Following the expiry of such time-limit the parties may refer the dispute to the Court.

Article 216 of the Civil Procedure Code²⁰⁹ confirms that the expiry of the time-limit for rendering an award is not a public order matter; therefore, the court may not annul, on its own initiative, an arbitral award based on

²⁰⁸ Dubai Court of Cassation Decision number 9 for the year 1996 issued on 13 July 1996 [Exhibit 41]

²⁰⁹ Which includes grounds to set aside an arbitral award, this is replaced by Articles 53 of the Federal Arbitration Law

time-limit grounds. Instead, the party seeking to set aside the award needs to plead the invalidity on time-limit expiry before the judiciary.

Notwithstanding the foregoing, parties may explicitly or implicitly agree to extend the time-limit for the rendering of an award. Furthermore, the Court may, upon the request of the arbitrator or either party, extend the time-limit to such a period, as it deems sufficient for the settlement of the dispute.²¹⁰ The arbitrator, however, may not extend such period without the express consent of the parties.

However, the time-limit for rendering an award is argued in the dispute typically at a late stage of the proceedings and possibly nearby the end of pleadings. At this stage, each party is likely to be aware of its position in the arbitration and most likely, the substantive hearing sessions for oral argument should have been already convened. Therefore, the party that perceives its position as most likely losing the arbitration is likely to object for any extension of the time-limit and, as a consequence, would give itself a ground to set aside the award, in case it was not in its favor.

It is not uncommon though to see each of the parties to a particular dispute objecting for the extension of the time-limit for tactical reasons providing itself a ground, under all circumstances, to plead nullity of the eventual award before courts in case such ground is needed.

Arbitrators on the other hand, especially those not well-versed with the UAE law, could fail to consider these tactics adopted by party representatives or underestimate their significance and try to take all the time to render the award in the most precise manner.²¹¹

The study of UAE jurisprudence that confirmed nullity of arbitral awards on the ground of exceeding the time-limit also revealed another factor contributing to this problem. In fact, there is a contradiction between the case laws, the Federal Arbitration Law and the Repealed Arbitration Chapter on the one hand and the DIAC and ADCCAC Rules on the other.

²¹⁰ Abu Dhabi Court of Cassation decision number 187 for 2014 established that when one of the litigant parties is opposing the arbitration proceedings, the court shall have jurisdiction to extend the time-limit for rendering the award as long as the request for such extension is filed before the expiry of the existing time-limit.

The judgment established that the legislator provided the right to any of the parties to bring an action before the court to extend the time-limit even if this would be misused by any of the parties to delay the proceedings.

²¹¹ Part of this delay could be caused by arbitrators' getting over occupied with cases. However, smart arbitrators do not get over occupied, especially where that act as a chairman of a tribunal, it is well-know that the chairman of the tribunal assumes additional duties than co-arbitrators

It is not recommended for any arbitrator to accept cases when he is over occupied, however, in case absolutely necessary and the arbitrator does that, he need not to accept a chair position to a tribunal, rather, he may act as a co-arbitrator. Again, this is if necessary to take the role.

The start of the time-limit under the Federal Arbitration Law is the first hearing session, which is typically the procedural hearing. However, the start of the time-limit under DIAC and ADCCAC is the receiving of the case file by the sole arbitrator or, in case of panels, by the chairperson of the tribunal.

Article 42.1 of the Federal Arbitration Law states that:

"The Arbitral Tribunal shall issue a final award within the timeframe agreed by the Parties. If the parties fail to agree to a specific time limit or method of its determination, the award shall be issued within six months from the date of the first hearing of the Arbitration. The Arbitral Tribunal may extend the time for up to six additional months, unless the Parties agree to a longer extension".

In contrast, Article 36.2 of the DIAC Rules state *"The time limit within which the Tribunal must render its final Award is six months from the date the sole arbitrator (or the Chairman in the case of three arbitrators) receives the file."*²¹²

Further, most of the other proceedings similarly commence from receiving the file. Article 22 of the DIAC Rules provide *"Within thirty days from the date of the transmission of the file to the Tribunal, as provided in Article 18, the Tribunal shall, notify the parties of the date of a preliminary meeting with them and the venue thereof. The Tribunal shall fix a timetable for the submission of documents, statements, and pleadings as hereinafter provided."*²¹³

Under ADCCAC Rules, Article 27.1 sets out the start of the time-limit for rendering Arbitral awards, it states:

*"Unless otherwise agreed: The Panel shall issue the final arbitral award within a maximum period of six months from the date on which the file was received by the sole arbitrator or the president of the Arbitration Panel."*²¹⁴

The DIFC Arbitration Law and the DIFC-LCIA Arbitration Rules do not prescribe a time-limit for the issuing of the final award. Rather, the parties are free to determine and agree on a time-limit for rendering the final award.

Similarly, ADGM Arbitration Regulations of 2015 contain no provisions on time-limits for rendering awards.

DCC decision 317 for 2009 Civil established that the arbitration proceedings should start at what the judgment named in English as "Commencement of arbitral proceedings" when the litigant parties attend before the tribunal (typically the procedural hearing) or as soon as they were notified that the dispute is being reviewed by the tribunal.²¹⁵

²¹² DIAC Arbitration Rules of 2007, issued by Decree No. 11 for the year 2007 by H.H. the Ruler of Dubai on the 6th of May 2007

²¹³ DIAC Arbitration Rules of 2007, issued by Decree No. 11 for the year 2007 by H.H. the Ruler of Dubai on the 6th of May 2007

²¹⁴ ADCCAC Arbitration Rules of 2013, effective from 1st September 2013

²¹⁵ Same was determined by DCC decision number 317 for 2009 and DCC decision number 157 for 2009 [Exhibit 44]

Similarly, the ADCC confirmed that the time-limit for rendering an arbitral award should be decided ideally by the agreement of the parties, failing which, it shall be within six months of the first hearing session whether by requesting the parties to submit documents or statements.²¹⁶

§ 1: Case Laws that Nullified Arbitral Awards Due to Exceeding Time Limit

The following substantial number of Cassation decision issued by the Abu Dhabi Court of Cassation, Dubai Court of Cassation and Union Supreme Court set-aside arbitral awards for reasons related exceeding the time-limit for issuing awards:

- DCC 9 for 1996 dated 13 July 1996 [Exhibit 41],
- DCC Petition No. 141 of 2006 issued on 10 October 2006
- DCC decision 278 for 2008
- DCC decision 128 for 2010
- DCC decision 3 for 2010
- DCC decision 573 for 2003
- DCC decision 400 for 2001
- DCC decision 157 for 2009 [Exhibit 44]
- USC decision 640 for 2002
- USC decision 43 for 2003
- Union Supreme Court Decision number 71 for the Judicial Year 20
- USC 301 for Judicial Year 20
- DCC decision 128 for 2010
- DCC decision 148 for 2008

Below, we set out the most important rules established by the UAE Cassation decisions with regards to the time-limit for arbitration:

The UAE established jurisprudence confirmed that:

“The expiry of the time limit for an arbitration agreed upon between the parties does not negate the fact that the litigant parties to arbitration may agree on extending the time limit for rendering an award explicitly or implicitly as long as the period is connected. For the period to be connected and therefore the arbitration time limit is extended by establishing that the parties attended the arbitration and none of the parties pleaded the expiry of the time limit.”²¹⁷

²¹⁶ ADCC 293 for 2013 and ADCC 313 for 2013

²¹⁷ DCC decision 102 for 2010 – Civil, DCC decision 128 for 2010 – Civil, DCC decision 403 for 2003 – Civil, DCC decision 148 for 2008 dated commercial 16 September 2008, Civil, DCC decision 317 for 2009 Civil

The DCC set aside an award for exceeding the time-limit, Case Law (1)

The Dubai Court of Cassation decision number 157 for 2009 [Exhibit 44] annulled an arbitral award on the ground of exceeding the six months' time-limit starting from the date of the first hearing which, in turn, should start within 30 days of their appointment of the arbitrators.

The court held that:

*"The Court of Cassation found that the arbitral tribunal had set up 11-9-2007 as the first arbitration session which was confirmed by the minutes of the session held on 15-8-2007-. However, the fact that the first session had been postponed for the absence of the representative of the Respondent and the non-payment of the fees of the arbitrators shall not preclude the arbitral tribunal from opening the arbitral proceedings. Therefore, the issue of the arbitrators' judgment on 25-3-2008 was made after the period of six-month, which the parties did not request to extend it. On this basis, the Court of Cassation confirmed the ruling and reasoning of the contested judgment and rejected the appeal"*²¹⁸

Further, the court established that this principle should apply whether or not any of the parties attended the hearing as long as the tribunal provided them the opportunity to attend and they failed to be present.

The DCC set aside an award for exceeding the time-limit, Case Law (2)

The DCC set aside an arbitral award for exceeding the time-limit for rendering the award. The court held that although the arbitration time-limit set in the arbitration agreement was extended more than once by agreement of the litigant parties in some instances and by a decision of the court in other instances, such extensions ended on a specific date. The documents of the case provide no evidence for further extension, whether by implicit or explicit agreement of the parties or by a decision rendered by the court, from the date when the previous extensions expired. Further, at this date the Respondent expressly contested the validity of the arbitration with regards to exceeding the time-limit before the arbitrate tribunal.²¹⁹

The DCC set aside an award for exceeding the time-limit, Case Law (3)

The DCC annulled an arbitral award since the time-limit was extended by mutual agreement. However, when the arbitral tribunal attempted to extend the third time-limit, one of the litigant parties (who subsequently lost the arbitration) opposed the extension.²²⁰

This judgment established a rule regarding the parties' freedom to choose the time-limit in days or in months. It further held that based on Articles 210.1 (Article 42.1 of the Federal Arbitration Law) and 216(a) of the Repealed Arbitration Chapter of the CPC (Article (53) 1(a) of the Federal Arbitration Law), the arbitration time-limit is left to the liberty of the parties, therefore, the parties may count the time-limit for rendering the award

²¹⁸ Dubai Court of Cassation decision number 157 for the year 2009 issued on 27 September 2009 [Exhibit 44]

²¹⁹ Dubai Court of Cassation Decision number 9 for the year 1996 issued on 13 July 1996 [Exhibit 41]

²²⁰ Dubai Court of Cassation Decision number 141 for 2006 issued on 10 October 2006

either in months or in days. In case the time-limit agreed upon is stated in terms of days, any extensions shall also be stated in days. Similarly, in case the time-limit agreed upon is stated in months, any extensions shall also be stated in months.

The DCC set aside an award for failure to establish a date for the award, Case Law (4)

§ 2: the DCC Annulled an arbitral award since it was not dated and as such the judge was unable to verify the time-limit²²¹

The court reasoned that decision by referring to Articles 212 and 213 of the UAE CPC, which, according to the court, necessitate including the date of issuance of an arbitral award as part of the award. In particular, the said articles stipulate short time periods to conduct the arbitration proceedings, which should be observed and supervised by the court. The court found that the arbitrator's failure to indicate the date of the award disables the court from reviewing compliance with these provisions.

In the view of this thesis, eliminating the date in an arbitral award is a substantial mistake; the approach of the court could be interpreted as unreasonable and anti-arbitration. The arbitrators are in certain occasions non-lawyers and could not be fully aware of the procedural aspects of arbitration.

Again, it would have been possible for the judge here to use Article 214 of the CPC, which allows the judge while ratifying the award to return it to the arbitrators to clarify the date. The UAE CPC states *"It shall be permissible for the court in the course of considering an application for ratification of the award of the arbitrators to remit it to them to consider any issue in the arbitration on which they have omitted to make a determination or to clarify the award if it is insufficiently specific for it to be capable of enforcement and the arbitrators must in each case issue their decision within three months from the date of service on them of the decision [of the court] unless the court has ruled otherwise."*²²²

The DCC set aside an award for Failure to mention the date of the first hearing in the award, Case Law (4)

The DCC decision number 344 for 2009²²³ annulled an arbitral award after ratifying the award by the Courts of First Instance and Court of Appeal since the date of the first hearing was not indicated in the award date, which does not make it clear for the court whether the award was issued within the six months' time-limit.

²²¹ Dubai Court of Cassation decision number 400 for the year 2001 Civil issued on 16 February 2002

²²² Article 214 of the UAE CPC which may corresponds, with some modifications, to Article 54.6 of the Federal Arbitration Law

²²³ Dubai Court of Cassation decision number 344 for the year 2009 – Civil, issued on 28 March 2010

The court concluded that “in the absence of the information regarding the date of the first hearing session, the court shall not be able to verify the time limit for the award and therefore, the arbitral award shall be annulled in case one of the party’s pleas so.”²²⁴

It is questionable why the court did not use the relevant provisions of the Repealed Arbitration Chapter applicable at the time to correct or clarify this ambiguity.

The Repealed Arbitration Chapter of the UAE CPC allows the court seized to ratify an award to return the award to the arbitral tribunal to clarify ambiguity or include missing issues.

Article 214 of the Repealed Arbitration Chapter states that:

“If the arbitrator omits to resolve any of the issues agreed upon in the arbitration clause, or if the award is ambiguous to an extent preventing its execution, the ratifying court may decide to return such award to the arbitrator to consider any omitted issues or to clarify the award, if it was not definite in a way that makes it impossible to execute, and the arbitrators should, in both cases, deliver their decision within three months from the date of their notification with the decision unless the law decides otherwise.”²²⁵

The DCC refuse to set aside an award for exceeding the time-limit, Case Law (5)

On the contrary, the Dubai Court of Cassation law dismissed a claim for nullity of an arbitral award and determined that since award debtor (seeking to set aside the award) had dealt with the arbitrator throughout a period exceeding two years following the date of the first session, the award debtor therefore implicitly agreed to extend the first six-month period specified under Article 210 of the Repealed Arbitration Chapter of the CPC (Article 42.1 of the Federal Arbitration Law).²²⁶

The court determined that in cases where the litigants do not agree on a specific date for such an extension, their consent as to the said extension shall be deemed an agreement to resume the arbitration with no definite date set.

The court finally established that the time-limit for rendering an award might be repeatedly extended for an additional six-month period until one of the litigant parties object or opposes any further renewal or turns to the courts to settle the action upon the expiry of the previously set arbitration time-limit.

²²⁴ Dubai Court of Cassation decision number 344 for the year 2009 – Civil, issued on 28 March 2010

²²⁵ Article 214 of the UAE CPC, which corresponds, with some modifications, to Article 54.6 of the Federal Arbitration Law states that “The Court, when asked to set aside an arbitral award may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time of up to sixty days in order to give the Arbitral Tribunal an opportunity to take any action or make any amendment to the form of the award as will eliminate the grounds for setting aside without affecting the substance of the award”

²²⁶ Dubai Court of Cassation Decision number 178 for the year 1996 issued on 25 January 1997 [Exhibit 3]

Position of ADCC regarding time-limit for rendering an award

This ADCC established the same principles established above., it is vital to list case laws from Abu Dhabi Courts here since case laws from Abu Dhabi Court of Cassation has more persuasive effect to the lower courts of Abu Dhabi (and probably before the arbitral tribunals seated in Abu Dhabi) than the decisions by the Dubai Court of Cassation²²⁷.

The Abu Dhabi Court of Cassation determined that in the absence of an affirmative agreement between the parties on a particular time-limit, the arbitrator should render the final award within six months from the date of the first hearing of the arbitration, failing which, it will be permissible for any of the parties to litigate the dispute before the courts.²²⁸

The court held further that it is also open to the court, upon the application of the arbitrator or one of the parties to extend the time-limit as it deems appropriate for the determination of the dispute. The parties' agreement to extend the time-limit may be implied by the attendance of the parties at an arbitration hearing and the discussion of the subject matter of the dispute after the time-limit has elapsed. This matter should be left to the consideration and assessment of the lower court and is not subject to review by the Court of Cassation, provided that its judgment is based on sound grounds supported by the papers.

Conclusions on time-limit for rendering an award

In principle, UAE law respects the parties' liberty to agree to a specific time-limit for the rendering of an arbitral award; they need to adhere to this time-limit, however, if there is no agreement between the parties the arbitrators need to render the award in six months.

The UAE jurisprudence demonstrates that any extension of the time-limit for rendering the final arbitral award must take place in one of the following forms:

- Either written agreement between the parties to extend the time-limit,
- One of the parties has to obtain a court judgment that the time-limit is extended. In such a case, the action must be brought before the court before the expiry of the old timeframe, or
- In case the written agreement is not available, the agreement of the parties to extend the time-limit may be implied by the attendance of the party of arbitration hearings or submissions after the expiry of the time-limit or submissions on costs, which typically happen at the end of the proceedings, therefore, it could be frequently used as evidence for an implied acceptance for the new time-limit. As a condition to that, the proceedings need to be extended without any disconnection in the proceedings in terms of any time gap, save

²²⁷ The United Arab Emirates Court of Cassation Judgments 1998 - 2003 (Arab & Islamic Laws) by Richard Price and Al Tamimi, Essam; published by Brill; 1st Edition, December 3, 2004

²²⁸ ADCC Case number 873 of 2009 issued on 22 October 2009

for any suspension of the procedures for a reason related to the recusal of an arbitrator or any other ground for suspension of the proceedings.

- The mere silence of one of the parties to the extension of the proceedings shall not mean an implied acceptance since silence is not an acceptance under UAE law.
- At the expiry of the arbitration agreement, the parties can take any of the following actions:
 - a) Either to go to national courts and claim the expiry of the arbitration agreement and bring a court action instead, or
 - b) Wait until the award is issued (given that it needs to raise its objection to the extension of the time-limit agreement during the proceedings) and then the award debtor can bring an action to claim nullity of the arbitral award.

Section 2: Nullity Due to Article 216.1 (c) of the UAE Civil Procedures Code (Article 53.1.g of the Federal Arbitration Law)

Setting aside arbitral awards on grounds related to Article 216.1(C)²²⁹ of the Repealed Arbitration Chapter of the CPC is a common cause of annulment in the UAE. This article permits annulling an award based on the provision that stipulates:

“If there is a nullity in the award or a nullity in the proceedings having an effect on the award.”²³⁰

This article appears to provide a vague, ambiguous and broad ground for setting aside an arbitral award since it relates to all misapplications of procedures that affect the award. This is typically a subjective matter. However, analyzing the case laws that used this Article and its reasoning, one can conclude that the following procedures are more likely to be used to annul awards based on this provision:

1. Violating the procedures agreed between the parties
2. Failure to enable the litigant parties to submit their requests and defenses
3. Failure to enable the parties to submit pleadings and refute legal arguments and submissions by the adversary
4. Absence of confrontation between the litigant parties in the dispute and the rights of defense
5. Failure to establish equality between the litigant parties and violating the procedures agreed upon
6. Violation of public order by the arbitrator
7. Failure to notify the parties of the session to hear the pleadings, which enables them to plead arguments and defenses and submit documents to prove their rights

²²⁹ Article 216.1(C) of the Repealed Arbitration Chapter of the UAE CPC, which is the same wording in Article 53.1(g) of the Federal Arbitration Law

²³⁰ Article 216.1(C) of the Repealed Arbitration Chapter of the UAE CPC, which is the same wording in Article 53.1(g) of the Federal Arbitration Law

8. Failure to notify any of the litigant parties of the dispute or failure to enabling each litigant party to view the documents and papers submitted by the adversary
9. Failure to provide the parties the sufficient time prepare their defenses and respond to the pleadings and documents, and
10. Failure to render the award after deliberations, which requires all the arbitrators to be aware of the opinion of the other arbitrators and have discussions with them in this regard.

We shall illustrate here below how Article 216.1(c) (Article 53.1(g) of the Federal Arbitration Law) has been used to annul arbitral awards that could have been otherwise ratified should this Article not be articulated in the generic ambiguous manner that it is currently.

§ 1: Arbitrators' Failure to take an oath for witnesses

The DCC determined that arbitrators must require witnesses to take the oath before testifying before the arbitral tribunal, regardless of whether such a procedure is accepted or agreed upon by the litigant parties. In case this procedure is violated, according to Article 211 of the Repealed Arbitration Chapter of the CPC (Article 33.7 of the Federal Arbitration Law), the resulting arbitral award shall be set aside. This applies without regards to procedural estoppel, even if the interested party waives its right before and after the award is rendered.

The following two case laws demonstrate the attitude of the DCC in this regard.

Bechtel Case

In a landmark case, the Dubai Court of Cassation annulled an arbitral award based on a pure technicality in administering the oath for one of the witnesses²³¹.

The arbitration was seated in Dubai in accordance with the procedures stipulated under the UNCITRAL Arbitration Rules. The arbitration agreement provided that the provisions of the applicable law should prevail in the event that the UNCITRAL Rules contradict such law. Therefore, the UAE procedural laws were also applicable to this arbitration and would prevail if they contradict with the UNCITRAL Rules.

Bechtel was the prevailing party to this arbitration and was successfully granted an award for USD 25 million.

The arbitral award was set aside by the Dubai Court of Cassation on the following grounds:

The UAE Civil Procedures Code is applicable to this dispute by the agreement of the parties.

Article 216.1(C) of the UAE CPC (Article 53.1(g) of the Federal Arbitration Law) states, *"The parties may apply for the award of the arbitrators to be nullified when the court considers whether it should be ratified, in the*

²³¹ Dubai Cassation Petition 503/2003 issued on 15 May 2004, International Bechtel Co. Ltd. v. Department of Civil Aviation of the Government of Dubai [Exhibit 24]

following circumstances if there is a nullity in the award or a nullity in the proceedings having an effect on the award”

Article 211 of the UAE CPC states that *“The arbitrators must administer the oath to the witnesses and any person who gives false testimony before the arbitrators shall be treated as being guilty of the offense of perjury”*²³²

The court reiterated that the witnesses did not swear an oath at all since the court concluded from the evidence that the arbitrator stated to the witness *“I have to inform you as a witness that you are under the obligation to say the truth, failing so; you might have serious consequences as a result. Are you aware of that? The witness stated ‘confirmed’”*

The mutual acceptance of the parties to accept the oath formula or the argument that such oath formula is acceptable under the UNCITRAL Rules does not preclude any of the parties from raising a subsequent nullity claim based on Article 216.2 of the UAE CPC, which states that:

*“An action to set aside shall not be barred by a party having waived his right thereto before the issue of the award of the arbitrators.”*²³³

The above fact becomes more relevant since the arbitration agreement invoked by the parties in this case stipulates that the arbitral proceedings shall be conducted in accordance with procedures agreed upon by the parties, as far as such procedures and matters do not contradict with any laws or procedures prevailing in the Emirate of Dubai and the UAE.

Article 40 of the DIAC Rules provides *“Testimony may be provided verbally or otherwise, without taking the oath, through a written acknowledgment signed by the relevant witness and duly notarized. By way of exception from the aforementioned text, the testimony must be made along with the taking of the oath in case the oath is obligatory in accordance with the law applicable to arbitration procedures. In all cases, the arbitration panel may summon the witness for discussion.”*²³⁴

Pursuant to this provision, if the law applicable to the arbitral proceedings requires the administration of an oath for witnesses before testifying, then the arbitrator must seek any such witness to take the oath.

The court established that, according to Article 41.2 of the Evidence Law, the wording of the oath the witnesses are required to take an oath as follows:

²³² which corresponds to Article 33.7 of the Federal Arbitration Law which states that *“Unless otherwise agreed by the Parties, the hearing of witnesses, including experts, shall be conducted under the laws of the State”*

²³³ Dubai Cassation Petition 503/2003 issued on 15 May 2004, International Bechtel Co. Ltd. v. Department of Civil Aviation of the Government of Dubai

²³⁴ DIAC Arbitration Rules of 2007, issued by Decree No. 11 for the year 2007 by H.H. the Ruler of Dubai on the 6th of May 2007

*"I swear to speak the whole truth and nothing but the truth"*²³⁵.

Where applicable, the administration of the oath shall be made in accordance with the religion of the witness. This means, according to the court, that any other formula not including the above-mentioned formula shall not be deemed a valid oath under UAE law.

Specifically, the wording of the court provides that:

"Arbitrators must administer oath before witnesses testify. This provision was included as a mandatory provision in the Civil Procedure Code (now the Repealed Arbitration Chapter) to ensure the truthfulness and authenticity of witness testimonies, which have significant value.

This provision is also aimed at deterring anyone from committing offenses and assuring litigant parties that the testimony of witnesses is truthful and accurate. As such, the law considers a person providing false testimony to have committed the offense of perjury laid down in Article 252 of the Penal Code.

*By virtue of the law, any person committing perjury before a panel hearing the testimony of witnesses shall be penalized. Hence, arbitrators may not waive or neglect this procedure, even if the litigants raise no objection to its violation during the hearing of witnesses. If any such violation has taken place, the arbitral award shall be deemed null and void. Even if the disputing parties waive their right to claim such nullity before the award is passed, the award shall still remain invalid pursuant to Article 216.2 of the Repealed Arbitration Chapter of the CPC, which provides: (An action to set aside shall not be barred by a party having waived his right thereto before the issue of the award of the arbitrators)²³⁶"*²³⁷

The Dubai Supreme Court the application of the UNCITRAL rules in arbitration proceedings should be limited within the boundaries of the local mandatory provisions applicable to local arbitration proceedings. The Court determined that the arbitral tribunal's failure to administer the oath for witnesses is contrary to Article 211 of the Code of Civil Procedure (Article 33.7 of the Federal Arbitration Law), which renders the arbitral award invalid. In both Cassation Petitions 503 of 2003 [Exhibit 24] and 322 of 2004 dated 11 April 2005, it was held that even a waiver by the other party prior to issuing the arbitral award would not absolve any of the parties of their right to claim nullity before the judiciary following the issuance of the award.²³⁸

²³⁵ The UAE Evidence law number 10 of 1992.

²³⁶ Article 216.2 of the Repealed Arbitration Chapter of the UAE CPC, which is the same wording in Article 54.5 of the Federal Arbitration Law

²³⁷ Dubai Cassation Petition 503/2003 issued on 15 May 2004, International Bechtel Co. Ltd. v. Department of Civil Aviation of the Government of Dubai [Exhibit 24]

²³⁸ Omer Eltom, The Emirates Law in Practice, p. 386, see Construction Management Guide Project Management and Claims Consultancy Services, available online <http://www.cmguide.org/archives/3088>

DCC 322 for 2004

In this case, once again, the court referred to the provisions set forth Article 211 of the CPC that reads:

“The arbitrators should administer an oath to the witnesses and everyone who shall perjure before the arbitrators shall be considered a committee of the crime of perjury.”²³⁹

The court established that the arbitrators must administer an oath to witnesses before their testimony, failing which, the award that is based on such witness statement shall be null.

This annulment is only based upon the failure of the witness to swear an oath before testifying rather than any particular formula of administering the oath.

The court further referred to Article 41/2 of the evidence law, which states that:

“The witness shall swear an oath by saying I swear to God to say the truth and nothing but the truth.”²⁴⁰

However, the court held that it is not a prerequisite in all cases to swear to God. It is agreed by Islamic Sharia scholars, jurists that the witness oath based on “I swear” reflects the meaning of the oath, and it is sufficient for the witness to say I swear since it entails the oath impliedly. Therefore, it is permitted to swear an oath according to the situations related to the religion of each witness.

It is also sufficient to administer an oath according to a formula that the arbitral tribunal tells a witness to administer it, as long as it does not include any breach of the public policy such as swearing to otherwise rather than God. Further, it shall not be a requirement that the witness should put his hand on the Quran or Bible while administering an oath since the law does not require that.

DCC 322 for 2004 in Comparison with Bechtel Case

DCC 322/2004 departs from the Bechtel judgment in a number of important respects, including:

- The annulment is only based upon the failure of the witness to swear an oath, in its entirety, before testifying rather than a specific formula for administering the oath.
- It is sufficient to administer oath with the formula that the arbitral tribunal tells the witness to administer as long as it does not include any breach of the public policy such as swearing to otherwise rather than God.

²³⁹ Article 211 of the repealed UAE CPC which corresponds to Article 33.7 of the Federal Arbitration Law which states that “Unless otherwise agreed by the Parties, the hearing of witnesses, including experts, shall be conducted under the laws of the State”

²⁴⁰ Article 41.2 of the UAE Evidence Law

As such, the above general Rules provide that the Dubai Court of Cassation's position in this case was increasingly pro-arbitration as the court started to accept other formulas for administering the oath for witnesses.

In conclusion, the administering of an oath for witnesses before arbitral tribunals is mandatory under UAE law when witnesses are summoned by any of the parties or by the arbitral tribunal and this should include any expert witnesses. Moreover, the oath must be taken by the witness not by the tribunal, and

The witness should not violate any public policy rules by swearing otherwise to God. Therefore, the witness should say either "I swear" or "I swear to God."

The DCC decision number 10 of 1995 issued on 8 October 1995

The Dubai Court denied the challenge that the oath that was taken by a party's witness in the arbitration was invalid because it was administered in the absence of the adversary and based on an amended wording²⁴¹.

The court gave three reasons for this decision:

1. The general rule is that arbitrators are not required to follow the procedures applicable to lawsuits filed before courts of law. Rather, the arbitrators are required to observe the procedures stipulated under the Repealed Arbitration Chapter of the CPC as well as any other procedures agreed upon between the parties.
2. The petitioner was aware of the date of the session scheduled for taking the oath but failed to attend it, therefore, the arbitrator shall be deemed to have observed the principles of litigation with respect to the summons of the disputing parties.
3. Further, the court concluded from reading the case file that the petitioner accepted administering the oath alone by the adversary.

§ 2: Nullity related to Absence of Deliberations between the Tribunal Members

Case laws establish that the deliberations amongst an arbitral tribunal are mandatory in order to have the resulting arbitral award enforceable.

Deliberations under UAE law refers to the arbitral tribunal's discussions and exchange of views after hearing all the claims, requests, defences, legal arguments, and seeing all documents and all other submissions by the litigant parties. Such an exchange of views should ideally be the final procedure preceding the issuance of the award.

If an arbitral award was issued without deliberation or otherwise in the event that the deliberations took place without one of the arbitrators who heard the dispute, the award may be annulled under UAE law.

²⁴¹ Dubai Court of Cassation Decision number 10 for the year 1995 issued on 8 October 1995

Case laws differ regarding whether the burden of proof for deliberations, as follows:

- (1) Arbitrators' deliberation needs to be proved within the award itself (this is the position of the USC),
- (2) Arbitrators' deliberation would be presumed when the arbitrators that issued the award are the same arbitrators heard the pleadings (this is the position of the ADCC); and
- (3) Arbitrators' deliberation would be presumed by virtue of the signature of the award since it is presumed that arbitral proceedings are valid (this is the position of the DCC).

On balance, arbitrators having the seat of arbitration in Sharjah, Um El Qiwān and Ajman (where the Union Supreme Court has jurisdiction for their disputes) must be mindful while submitting written documents and evidence on the deliberations of their arbitral awards.

USC set aside an arbitral award because one arbitrator deliberated by e-mail

The USC annulled an arbitral award on the ground that one of the arbitrators departed from the UAE and did not attend the last hearing session²⁴². The arbitrator was away from the country but nonetheless deliberated with the remaining tribunal members by e-mail.

The court established that the deliberation process is a condition for the validity of the arbitral award and its relation to public order. Furthermore, as a condition of the validity of deliberations, it should be done in confidence between all the arbitrators together as per Article 128/1 of the CPC and shall not be permitted to be done unless it is between all the arbitrators who heard the pleadings, failing which, the award shall be annulled.

This decision is unclear as it indicates that the last hearing session that was not attended by the arbitrator was conducted by an exchange of documents and that the Court of Appeal considered that the arbitrator who departed from the country was, in truth, part of the last session by sharing the documents with him by e-mail. However, the USC surprisingly considered that the e-mail is not sufficient to consider that the arbitrator attended the hearing session despite having the documents by e-mail and the parties agreed to that.

In practice, almost all documents are exchanged by parties by e-mail, therefore, it is also a good practice to include in the preliminary procedural hearing that e-mails are acceptable for all exchange of documents in the arbitration.

The judgment states that:

"The deliberation shall only be valid if made in confidence and in the presence of all arbitrators in accordance with Article 128.1 of the Code, because the award is attributed to the entire arbitration panel, whether it is given

²⁴² Union Supreme Court decision number 556 for judicial year 24 issued on 19 April 2005

*unanimously or by the majority. Only arbitrators who have heard the pleading may participate in the deliberation; failing which, the award shall be invalid*²⁴³.

USC set aside an arbitral award for since arbitrators did not deliberate

USC 64 for 1999 set aside an arbitral award due *inter alia* absence of documents proving deliberation of the arbitrators.

The award was annulled by the USC due to several grounds including that:

- 1) The document did not prove the hearing sessions and notifications to each party to submit their pleadings
- 2) There is no document proving that a deliberation session for the tribunal members took place, rather, each one provided his opinion remotely
- 3) There is no summary statement of the parties' statements and documents
- 4) when the award deposited in the court, there is no supporting documents of minutes of meetings and other documents to enable the court to review the procedures, and
- 5) The descending opinion did not include any supporting documents²⁴⁴.

The contradiction between USC's decisions with both ADCC & DCC

Whilst USC decision number 64 for 1999 (as well as USC 556/2005) in the foregoing paragraphs annulled an arbitral award for several reasons including that there is no evidence that deliberations between the tribunal took place, which is considered an error in the procedures. However, the following decisions by DCC and ADCC determined the contrary by upholding that deliberation is presumed until proven otherwise.

ADCC established that deliberation of arbitrators is presumed

ADCC decision number 486 for 2008 rejected this argument and found that the arbitrators' deliberations are presumed to have occurred in the proper order unless the objecting party proves otherwise²⁴⁵. In this decision, the court established a more liberal approach when it established that it is sufficient to prove deliberation to have the following:

The court reasoned the decision by stating that the award by itself is evidence that the arbitrators have deliberated before the award, the burden of proof to the contrary lies with the party claiming otherwise.

²⁴³ Union Supreme Court decision number 556 for judicial year 24 issued on 19 April 2005

²⁴⁴ Union Supreme Court decision number 64 for judicial year 20 issued on 26 January 1999

²⁴⁵ Abu Dhabi Court of Cassation decision number 486 for the year 2008 issued on 30 October 2008

Moreover, it is presumed that deliberations validly took place and the award was issued by the arbitral award, which is a formal document, and therefore it is a piece of evidence by itself. It is presumed that the arbitral award was issued validly; therefore, the burden of proof lies on the party claiming otherwise. As a result, since the award indicates that the arbitral tribunal that issued the award is the same one that heard the pleadings of the litigants and that it deliberated and took part in exchanging the opinions and then signed the award, this is sufficient to prove that the procedures were valid until proved otherwise²⁴⁶

DCC establish that arbitrators' signature is evidence that they participated in the deliberations

In DCC decision number 403/2003, the court held that *"the arbitral award shall not be nullified if one of the members of the tribunal was abroad at the time the award was passed, as long as it is proved that the arbitrator in question attended the pleadings, participated in the rendering of the award and signed the original copy of the award submitted to the Court of First Instance."*²⁴⁷

The DCC decisions 148 for 2008 dated 16 September 2008 adopted the same liberal approach of the previous decisions and held that the signature of the tribunal who heard the dispute on the award is evidence that the deliberations took place without the need to present any document, unless evidence is presented to prove otherwise.

Both DCC 403 for 2003 and DCC decision 148 for 2008 established an even more liberal approach by indicating that the arbitrators' signature by itself reflects the presumption that they participated in the deliberations. However, the judgment established that the arbitrators need to assemble and deliberate the legal arguments, and they can authorize one of them to write the award after deliberations.

The court established that *"the deliberations in the decision of the tribunal can take place at any time following the end of the hearings and before such decision and that is with the assembling of the arbitrators who heard the hearings and pleadings in once place to discuss the evidence and legal arguments. The signature of the arbitrators on the award reflects that it was issued by them and the presumption of the arbitration proceedings that they were valid, and there is no need to indicate that explicitly in the reasoning or the decision itself"*²⁴⁸.

In DCC 403 for 2003, the court established that:

"Where there are multiple arbitrators, one arbitrator may schedule a hearing to render the award upon the express or implied authorization of the tribunal. Deliberation can be undertaken by arbitrators at any time after the end of pleadings and before rendering the award. The signature of the arbitrators on the award indicates that it has been rendered by those arbitrators and that the deliberation has been undertaken by those arbitrators. The award shall not be nullified if one of the members of the tribunal was abroad at the time the

²⁴⁶ Abu Dhabi Court of Cassation decision number 486 for the year 2008 issued on 30 October 2008

²⁴⁷ Dubai Court of Cassation Decision number 403 for the year 2003 issued on 13 March 2004

²⁴⁸ Dubai Court of Cassation decision number 148 for the year 2008 commercial issued on 16 September 2008

*award was passed; as long as it is proved that the arbitrator in question attended the pleadings, participated in the rendering of the award, and signed the original copy of the award submitted to the Court of First Instance.”*²⁴⁹

The court also established that, should there be more than one arbitrator, it is not necessary for all the tribunal members to be present together to draft the award: they can authorize any of them to draft it. As a result, the court rejected the annulment action because one of the tribunal members was outside the UAE at the time of the award.

However, it should be noted that it is important to make sure that the tribunal members who attended the hearing sessions and were part of the proceedings are the same members who issued the award, failing which, the procedures can be contested for irregularity. As such, if any of the tribunal members change, it may be necessary to re-open the pleadings in order for the new member to hear the dispute and for the dispute to be litigated before the tribunal that issued the award.

§ 3: Remaining Procedural Flaws including Article 216.1.c (Article 53.1(g) of the Federal Arbitration Law)

DCC set aside an arbitral award due to arbitrator’s failure to set forth the first hearing date in the award

DCC decision number 344 for 2009 annulled an arbitral award after ratifying the award by the Dubai Courts of First Instance and Court of Appeal since the date of the first hearing was not stated in the award, which does not make it clear for the court whether the award was issued within the time-limit agreed by the parties or failing which the time-limit established by the law, being 6 months from the date of the first hearing (Article 210.1 of the CPC and Article 42.1 of the Federal Arbitration Law)

This contradicts the presumption that arbitral awards are valid and the burden of proof lies with the party claiming otherwise.

The court went on and determined that “the arbitral award must include information on the date and place of issues, the objective of determination of the date of the first hearing and notifying the parties with such date and place is to enable the party to submit their pleadings, defenses and requests and further to provide the basis for court to review and verify that the arbitral award was issued as per law before ratifying it and making sure that the award was issued in the time-limit established for rendering the award”²⁵⁰.

This approach could obviously be described as anti-arbitration. It would have been possible for the judge to use Article 214 of the CPC, which allows the judge while ratifying the award to return it to the arbitrators to clarify the date²⁵¹.

²⁴⁹ Dubai Court of Cassation Decision number 403 for the year 2003 issued on 13 March 2004

²⁵⁰ Dubai Court of Cassation decision number 344 for the year 2009 – Civil, issued on 28 March 2010

²⁵¹ Article 214 of the CPC, which may correspond, with some modifications, to Article 54.6 of the Federal Arbitration Law.

It should be noted that the annulment in this decision was also due to the court's inability to verify the time-limit.

ADCC set aside a supplemental arbitral award due to arbitrators' Failure to set forth the full name of the parties and date in the supplemental award.

The Abu Dhabi Court of Cassation annulled an arbitral award because the supplementary award that interprets the original award did not satisfy the formal requirements including the pleading sessions, names of the parties, and so on.²⁵²

ADCC set aside an award after ten separate court actions to enforce the award

The following is an example from the Abu Dhabi courts where an arbitral award that consumed considerable time and procedures to be ratified and may – ultimately – be annulled²⁵³.

This example further demonstrates the risk of running lengthy enforcement proceedings an award creditor is going into while attempting to enforce an award in the UAE.

Despite the fact that the original arbitral award was ratified by the Abu Dhabi Court of First Instance, the Court of Appeal and the Court of Cassation, the supplemental arbitral award issued upon the request of the Execution judge (who does not have the jurisdiction in the first place to request a supplemental award) was annulled as the court regarded it as is part of the arbitral award that must comply with the requirements thereto.

The summary of the proceedings in this case is as follows:

- 1) An arbitration action was brought by the claimant; it took considerable time, where the claimant was successful.
- 2) An action before the Court of First Instance by the claimant to ratify the award, where the claimant was successful.
- 3) An action before the Court of Appeal by the respondent, where the claimant was successful.
- 4) An action before the Court of Cassation by the respondent, where the claimant was successful.
- 5) An action before the Court of First Instance by the claimant to enforce the award, where the execution judge requested a clarification to the award.
- 6) A supplementary action before the arbitrators to issue a supplementary award to clarify the award that was unclear to the execution judge, and as a result, a supplemental award was issued.
- 7) A new action before the Court of First Instance brought by the respondent to annul the new supplementary award, where the claimant was successful.
- 8) An action before the Court of Appeal by the respondent to annul the decision by the Court of First Instance, which refused the action for nullity of the supplemental award and ratified it.

²⁵² ADCC Case number 296 of 2009 issued on 27 May 2009

²⁵³ ADCC Case number 296 of 2009 issued on 27 May 2009

9) An action before the Court of Cassation by the respondent to annul the decision by the Court of Appeal, which ratified the supplementary award, where the respondent was successful.

The court determined that this supplementary award must be issued in the form prescribed for court decisions, stating the issuing court, the date and place of issue and the names of the participating judges. The decision must be issued in writing and signed and must state the first names of the parties, address, and a summary of the parties' requests and the relief sought.

The arbitrators did not consider all the former requirements in the supplementary award; they just included a letter explaining that the execution judge needed to enforce the award without opening the pleading sessions or putting the exact names of the parties since it was sufficient, in their view, to include a reference to the award itself rather than the parties thereto.

These circumstances consumed almost five years of extensive litigation with no final resolution of the dispute. In no circumstance could the above scenario be possible before the natural judge rather than arbitral tribunals in a case with similar facts and circumstances.

Further, this Cassation decision, which annulled all actions instituted by the claimant over five years of litigation and costs including expensive arbitration fees in ADCCAC, the Court of Cassation annulled the decision for relatively insignificant reasons. These reasons included requesting the supplementary award to satisfy all formalistic requirements, which are required by arbitral awards (and equally applicable to courts' decisions) including the need to allow the parties to submit their defenses and pleadings and review and respond to documents, and documents submitted by the adversary in accordance with the principle of confrontation and the rights of defense.

At first glance, these requirements are presumed to be satisfied in the original proceedings and may not be required to be repeated in the supplemental award, which merely interprets the original award.

In particular, where an arbitral award includes an ambiguity, which needs clarification, there is no need to open the pleadings to clarify the ambiguity. Rather, clarification can be issued directly; assuming that the original award was issued after mindful consideration to the due process, confrontation, and equality between the parties.

The pitfalls in the recognition of arbitral awards are not only a result of the arbitration law, but also a result of the need to improve the understanding of the international standards applicable to arbitration in national courts. The application of these standards should close the gap between the expectations of the parties to a contract agreeing to arbitration seated in the UAE as opposed to other developed jurisdictions. Such parties usually compare their experience in recognizing awards in the UAE to other jurisdictions where the recognition is only an administrative procedure, rather than consuming nine different court actions as set out in the above example that remain not final and subject to further challenge.

As this decision was issued in 2009, which is relatively recent, the attitude and recognition of the UAE national courts when dealing with arbitral awards should be studied and reconsidered, especially as arbitration is inherently a flexible process where the process is not bound by the formal requirements of the natural judge.

Yet, it seems judges implement their own understanding since the present laws provide ample authority to the judge to recognize arbitral awards.

As such, in Dubai, where relatively pro-arbitration courts are found as compared with Abu Dhabi or the courts under the federal system, we see decisions that are entirely contradicting with other courts under the same federal system and applying the same laws.

Whilst the legal system and the applicable laws for recognizing arbitral awards is the same, each of the UAE courts interprets and applies such laws differently depending on each judge's acceptability of arbitration as a dispute resolution mechanism. Furthermore, it should be noted that, in general terms, the Abu Dhabi Court of Cassation decisions do not have the same persuasive effect before the Dubai Courts as Dubai Court of Cassation decision decisions and vice versa.

DCC set aside an award due to the arbitrator's failure to suspend the proceedings when one of the arbitrator's fitness to serve was being challenged.

The Dubai Court of Cassation decision 75/2008²⁵⁴ annulled an arbitral award under the DIAC Rules since the challenged arbitrator continued to take part of the proceedings despite having a challenge against him by one of the parties, who was the award debtor.

The award creditor filed a case in the Dubai Courts to ratify and recognize the DIAC award. Subsequently, the award debtor brought an action before the Court of First Instance that the arbitral awards should be nullified claiming that the award debtor had, during the arbitration processes, filed a challenge in the court and contended that the arbitral tribunal failed to suspend the arbitration proceedings during the period when the challenge of one of the arbitrators was raised by the award debtor.

The Court of Cassation referred to Article 216.1(c) of the CPC, which provides:

*"The litigant parties may request the nullity of the arbitrators' decision when the court examines its authentication and that shall be in the following circumstances(c) If a nullity in the decision or a nullity in the procedures which has affected the decision has occurred."*²⁵⁵

The court determined that the recusal request of an arbitrator is one of the legal instances, which should cause the arbitration proceedings to be suspended until the concerned authority issues its decision in relation to the recusal motion.

The court confirmed that:

"The arbitrator must not insist on proceeding with the arbitral proceedings, even if the reasons raised for the challenge are groundless, as the arbitrator does not have the power to decide upon the seriousness of the motion. The question of whether or not the recusal motion is being used as a tactic to prolong the litigation is not relevant. Arbitral proceedings must be suspended until the recusal motion is concluded, regardless of whether the recusal motion is a method of prolonging the litigation. If the arbitrator insists on proceeding with

²⁵⁴ Dubai Court of Cassation judgment number 75 for the year 2008 – commercial – dated 19 January 2009 [Exhibit 35]

²⁵⁵ Article 216.1 (c) of the CPC, which has the same wording of Article 53.1(g) of the Federal Arbitration Law

the action despite being aware of the recusal motion, resulting arbitral award will be invalid under Article 216 of the Civil Procedure Code²⁵⁶”²⁵⁷

In practice, recusal requests for arbitrators are one of the common tactics that parties use in the UAE in order to obstruct the proceedings. Most of the arbitrators do not stop the proceedings for this reason and do not provide the obstructive party the benefit of its own behavior.

Improvement in the new Federal Arbitration Law

The Federal Arbitration Law improved in this area and established that the challenge to an arbitrator should not stay the arbitral proceedings, until it is decided for by the Concerned Body (the arbitral institution or the Court of Appeal).

Article 15 of the new Federal Arbitration Law establishes a new rule, where the decision of the Concerned Body, (which is defined in the law as the ‘the body authorized to administer arbitration i.e. the arbitral institution or the Court’) regarding the recusal of an arbitrator should be taken with 10 days of the date of the challenge being raised to it. Historically, institutions like DIAC used to consume several weeks and likely several months to make a decision in this regard.

Further, during this relatively short period, the arbitral proceedings shall not be suspended, Article 15.3 of the said law states that:

“Notification of the challenge to the Arbitrator or its presentation to the Concerned Body shall not stay the arbitration proceedings and the Arbitral Tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an arbitral award, even if the Concerned Body has not made a determination on the challenge.”

Therefore, whilst this particular issue could be resolved by the introduction of Article 15.3 of the Federal Arbitration Law, the continuation of Article 216.1.c of the Repealed Arbitration Chapter by virtue of Article 53.1(g) of the Federal Arbitration Law could be misused to raise similar grounds to challenge awards.

DCC set aside an arbitral award due to piercing the Corporate Veil

The DCC decision 277 for 2002 annulled a DIAC arbitral award for USD 13.5 M. The court found that the arbitral tribunal lacked jurisdiction since the award was issued against the holding company that was held liable for the acts of its subsidiary.

The facts of the case are related to an agreement between the claimant (which turned to be the award creditor) and the respondent (a holding company), the agreement contained provisions that preclude the respondent from competing with the claimant. However, the respondent’s subsidiary did compete with the claimant.

²⁵⁶ Which includes grounds to set aside an arbitral award, this is replaced by Articles 53 of the Federal Arbitration Law

²⁵⁷ Dubai Court of Cassation judgment number 75 for the year 2008 – commercial – dated 19 January 2009 [Exhibit 35]

Therefore, the arbitral tribunal determined that the holding company was in breach of its contract with the claimant since the subsidiary is related to it.

However, the court found that the acts of the subsidiary are distinctly separable from the acts of the holding company, whereby the subsidiary is not a party to the arbitration agreement. Therefore, the Court of Cassation found that the arbitral tribunal exceeded its jurisdiction by rendering an award against the holding company based on the acts of its subsidiary that is not a party to the arbitration agreement.

In equity, and in a critical view to the decision, it appears that the arbitral tribunal may have adopted a logical approach, where it held that the holding company is responsible for establishing its subsidiary to compete with the claimant and therefore that it unduly contravened the underlying agreement that is subject to the arbitration clause being invoked. However, the court applied a conservative approach when it separated the holding company's acts and the acts of its subsidiary, thus finding that the acts of the subsidiary against the claimant were the decision of the subsidiary itself, rather than those of the holding company.

This case law does not address the matter of piercing the corporate veil directly. However, this decision provides a clear indication that the boundaries between a subsidiary and its holding company must be maintained. Importantly, this case law confirms that the power conferred upon an arbitral tribunal to uphold jurisdiction on an entity that is not the actual party to the arbitration agreement may cause a serious jurisdictional challenge during the enforcement of the eventual award.

DCC set aside an award for granting more than the relief sought by the prevailing party

In DCC decision No. 307 / 2002; the court annulled an award partially since the arbitrators awarded an interest that was not requested by the award creditor as part of his relief sought.

The court referred to Article 216.1 (c)²⁵⁸ of the CPC, the court determined interpreted this Article by stating:

"This Article indicates that the court should review the award in order to ascertain that no issues the cause nullity exist in the award by ascertaining that the award was within the dispute referred to arbitration and within the requests of the parties. This implies that in case the arbitrator awards a party more than its requests then the award shall be annulled in this specific regard unless the defected part of the award is inseparable from the remaining parts of the award, in such incidents, the award shall be null in its entirety."²⁵⁹

USC set aside an award due to granting compound rather than simple interest

The USC annulled an arbitral award partially due to granting compound interest rather than simple interest²⁶⁰.

²⁵⁸ Article 216.1 (c) of the CPC, which has the same wording of Article 53.1(g) of the Federal Arbitration Law

²⁵⁹ Dubai Court of Cassation Decision number 307 for the year 2002 issued on 30 November 2002

²⁶⁰ USC decision number 11 for the judicial year 23, decision dated 19 May 2002

Simple interest is calculated on the principal amount of the award while compound interest is calculated based on the principal amount and also on the accumulated interest of previous periods and can thus be regarded as ‘interest on interest.’

The court determined that awarding compound interest is contrary to Islamic Sharia principles.

USC and DCC set aside arbitral awards based on exceeding the substantive jurisdiction

Arbitral tribunals should act within their limited jurisdiction and deal only with the matters validly submitted to arbitration. National laws of most jurisdictions, including France and the UAE, emphasize the principle that an arbitral tribunal should not exceed its jurisdiction.

The UAE law does not deviate from this rule, the UAE Federal Arbitration Law provides as a ground to set aside or oppose enforcement of an arbitral award that *“the award contains decisions on matters not falling within the terms of the submission to arbitration or beyond its scope.”*²⁶¹

This is relevant to Article 216.1(a) of the Repealed Arbitration Chapter of the CPC, which provides as a ground to set aside or oppose enforcement of an arbitral award that *“if the arbitrator acted outside the scope of the instrument.”*²⁶²

The following decisions issued by the UAE Supreme Court confirm the annulment of arbitral awards for reasons of exceeding its jurisdiction:

In 2000, the USC refused to ratify an arbitral tribunal’s award on interest claim that was not agreed to be referred to arbitration where the scope of the arbitration agreement was very limited to a specific part of the dispute²⁶³.

During 1995, the DCC set aside an entire award and found that the Court of Appeal’s determination that part of the award was invalid, as it was beyond the scope of the arbitration agreement, necessitates the annulment of the entire award²⁶⁴. The court determined that in case the arbitrators exceed the scope of an arbitration agreement in part of the award then the entire award shall be annulled as long as both parts are *indivisibly related*. The court determined that *“It is established that setting aside of a part of the award for being beyond the limits defined in the arbitration document inevitably entails the nullity of the remainder of the award, because both parts of the award are indivisibly related.”*²⁶⁵

²⁶¹ Article 53.1(h) of the UAE Federal Arbitration Law

²⁶² Which is consistent with Article (53) 1(a) of the Federal Arbitration Law

²⁶³ USC decision 297 for judicial year 20 dated 14 May 2000

²⁶⁴ DCC Case number 10 of 1995 issued on 8 October 1995

²⁶⁵ Dubai Court of Cassation Decision number 10 for the year 1995 issued on 8 October 1995

DCC Petition No. 91 of 1993 issued on 23 October 1993

The articles of association of a company contained an arbitration agreement to resolve any dispute out of or in relation to the interpretation, performance, or application of the company's articles of association. However, under UAE law, this does not prejudice the right of a party to prosecute a summary court to avert a present or imminent risk through the taking of interim proceedings.

The Court of Cassation held that the motion to impose receivership on the company by one of the shareholders and to set aside the decision appointing the general manager based on an agreement to arbitrate in the articles of association of a company is beyond the scope of the arbitration clause because these decisions are interim in nature and therefore shall be heard by the courts rather than arbitral tribunals.

Accordingly, the arbitral award was set aside and the case was transmitted to the summary courts pursuant to Articles 28 and 29 of the CPC.

The USC set aside an award due to failure to submit Arabic translation and exceeding the time-limit

During 1999, the USC annulled an arbitral award due to unavailability of the Arabic translation of the award, and further the arbitral award was annulled due to exceeding the time-limit²⁶⁶.

It is not uncommon to see the award annulled due to time-limit issues, however, issues related to translation is an odd ground for setting aside arbitral awards and when the court reasoned its decision on such basis, it appeared not to be fully justified.

DCC set aside an award due to undue exercise to the right to appeal awards

The DCC refused to enforce an arbitral award due to the Court of Appeal's judgment that decided that the ratification of the award issued by the Court of First Instance was not subject to appeal by the agreement of the parties. However, the Court of Cassation differentiated between the parties' agreement to waive the right of appeal to enforce the award and the nature of the arbitral awards where the awards are final are not subject to appeal as per Article 217.3 of the UAE CPC²⁶⁷. The court determined that, in order for parties to waive the right of appeal to actions seeking to enforce awards, the wording for such agreement has to be unambiguously clear that such exact right is excluded²⁶⁸.

According to the DCC, the Court of Appeal erred in determining that the judgment of the Court of First Instance that ratified the arbitral award cannot be appealed since the parties agreed in the arbitration agreement that

²⁶⁶ USC decision number 20 for judicial year 20 dated 12 December 1999,

²⁶⁷ Which is consistent with Articles 52 and 53.1 of the Federal Arbitration Law, with the distinction that the enforcement under the Federal Arbitration Law takes place before the Court of Appeal and can be challenged either by filing a grievance before the Court of Appeal or by filing a challenge before the Court of Cassation.

²⁶⁸ DCC Case number 186 of 1996 issued on 5 January 1997

the arbitrator's decision is final and not subject to appeal.

The parties' agreement as such is broadly interpreted by the DCC as a repetition of Article 217 of the Repealed Arbitration Chapter of the CPC²⁶⁹ that provides that arbitral awards are final and not subject to appeal and are binding. However, this agreement for waiving the right to appeal an award should be differentiated from the right to appeal a judgment ratifying or nullifying an arbitral award, which can be appealed, save when the parties have expressly waived this right or if the amount of the dispute does not exceed AED 10,000.

The waiver of the right to appeal mentioned in Article 217.3 of the CPC²⁷⁰ must be an explicit waiver of the right to appeal the court proceedings to recognize or nullify the award rather than the waiver of the right to appeal the arbitral award itself, as the arbitral award by default is not be subject to appeal.

Following the introduction of the Federal Arbitration Law, the competent court in the UAE to review disputes related to arbitral awards is the Court of Appeal directly, therefore, the waiver for the right to appeal in this case could be interpreted as related to any challenge for the Court of Appeal's decision to enforce or set aside an award before the Court of Cassation. However, case laws are yet to interpret this part.

DCC set aside two arbitral awards due to the arbitral tribunal's' failure to sign all pages of the award

The Dubai Court of Cassation set aside an award due to the arbitral tribunal's failure to sign both the dispositive part as well as the reasoning part of the award.²⁷¹

The Court of First Instance annulled the arbitral award since the award was not signed by the arbitrators on the pages containing the grounds of the award. The arbitrators signed only the last page of the award, which only included the dispositive part of the award.

The award creditor appealed the decision and presented another copy of the arbitral award with the arbitrators' signatures attached to the grounds. The Court of Appeal upheld the decision of the Court of First Instance. The Petitioners filed a challenge with the DCC.

The DCC upheld the decision issued by the Court of Appeal and annulled the arbitral award.

The court held that unless an award is signed by all of the arbitrators, the award is invalid. The exception to this rule is where an arbitrator refuses to sign the award. In such cases, the award will be valid only if majorities of the other arbitrators sign the award, while the fact that one of the arbitrators refused to sign the award must be noted in the wording of the award.

²⁶⁹ Which is consistent with Articles 52 and 53.1 of the Federal Arbitration Law, with the distinction that the enforcement under the Federal Arbitration Law takes place before the Court of Appeal and can be challenged either by filing a grievance before the Court of Appeal or by filing a challenge before the Court of Cassation.

²⁷⁰ *Ibid*

²⁷¹ Dubai Court of Cassation Decision number 233 for the year 2007 - Civil - issued on 13 January 2008

The court held further that the arbitral award must be signed and include both the grounds and a dispositive part. Both parts of the award must be signed by all of the arbitrators.

The court cited Article 212.5 of the Repealed Arbitration Chapter of the CPC²⁷², which states:

*"The arbitrators' decision shall be delivered with a majority of opinions and it should be written together with the contradictory opinion, and it should particularly include a copy of the arbitration agreement and a resume of the litigant parties' statements, their documents, the decision's reason and its pronouncement, its delivery date, its delivery place, the arbitrators' signatures, and if one or more of the arbitrators has refused to sign the decision that should be mentioned therein, and the decision shall be valid if the majority of the arbitrators have signed it"*²⁷³.

The court concluded that:

*"The Court considers that even if the award had been signed by all the arbitrators, the fact that the dispositive part was separate from the pages including the grounds of the award necessitated that the arbitrators sign all the pages containing the grounds, in addition to the last page containing the dispositive part."*²⁷⁴

The same principle was confirmed by DCC 391 for the year 2010 dated 26 October 2011, which confirmed setting aside the arbitral award dated 6 December 2009 due to the arbitrators' failure to sign both the dispositive part and the reasoning of the award.

UAE jurisprudence necessitates that all arbitrators that participated in the relevant proceedings (including any descending arbitrator) sign all pages of an arbitral award.

There are few exceptions below, however, to the rule that all arbitrators taking their seat inside the UAE or seeking to enforce awards in the UAE should sign all pages of an award not only the last page and all arbitrators need to sign without exception.

²⁷² which corresponds to Article 12 and 41.5 of the Federal Arbitration Law

²⁷³ The court established that *"This wording indicates that one of the essential pieces of information that should be included in an arbitral award is the signature of the arbitrators, as this is the only evidence that the award legally exists. The absence of this will render the award subject to annulment. The Court considers that the sole viable exception to this is when the grounds, or part thereof, are attached to the page where the dispositive part is recorded and has been signed by all of the arbitrators. The exception works by effectively extending the effect of the signatures so that they include the grounds of the award. This fulfills the statutory requirement for all of the arbitrators to sign the award. Where the grounds of the award are issued in pages separate from the dispositive part of the award, all the pages of the award must be signed by all the arbitrators, in addition to the last page including the dispositive part. Failing this procedure, the award shall be invalid. Where one or more arbitrators decline to sign the award this shall be mentioned in the award, and in that case the award shall be valid with no omission or default, as long as it has been signed by the majority of the arbitrators."*

²⁷⁴ Dubai Court of Cassation Decision number 233 for the year 2007 - Civil - issued on 13 January 2008

The above rule is imperative in order to keep awards safe from annulment, as the case was in several awards issued where only the last page of the award was signed.

This issue may not seem necessary for arbitrators having no legal background (such as finance and engineering professionals). However, the below case laws demonstrate why this is necessary under UAE law.

The DCC 156 for 2009²⁷⁵ [Exhibit 45] established that, as per Article 216.1.c of the CPC²⁷⁶, the signature of an arbitral award is an essential requirement since the signature is an essential evidence that the arbitrators were seized for the prosecuted dispute from a legal standpoint and since, in the absence of the signature, the award cannot be related or traced to the arbitral tribunal.

The arbitral award that needs to be signed is both the dispositive part of the decision as well as the reasoning of the award, failing which; the UAE courts are likely to set aside the award.

However, DCC 145 for 2012 established that an arbitrator's reasoning is not as strict as the court reasoning and need not respond to each of the defenses raised by the parties. That said; it should have sufficient reasoning on the conclusions reached by the arbitrator in its decision²⁷⁷.

The exception to this rule is where the reasoning or part of it is on the same page where the decision part of the award exists, which is signed by all the arbitrators. In this case, the signature effect shall be taken to apply to the reasoning as well. Conversely, if the award reasoning is in separate pages than the decision, the arbitrators must sign all the papers from all arbitrators in addition the last page, which should include the decision, failing which, the decision shall be null. This nullity is related to the public order and can be invoked for the first time before the Court of Cassation.

Therefore, it may not be necessary to sign to all the pages of the award, as long as the arbitral tribunal's signature exists on the dispositive part of the award as well as the part containing the reason.

In DCC 88 for 2001, the Court of Cassation overturned the Court of Appeal's judgment and found that the presence of the signatures of all arbitrators on the arbitration minutes is not a prerequisite for the validity of the award.²⁷⁸

Similarly, DCC 268 for 2007 [Exhibit 40] confirmed the same rule and held that *"the signature of the Petitioner's attorney on the minutes of the hearing is not precisely a prerequisite which, in its absence, does not constitute an indication of forgery"*²⁷⁹

²⁷⁵ Dubai Court of Cassation Decision number 156 for the year 2009, Civil issued on 27 October 2009

²⁷⁶ Article 216.1(C) of the Repealed Arbitration Chapter of the UAE CPC, which is the same wording in Article 53.1(g) of the Federal Arbitration Law

²⁷⁷ DCC 145 for 2012 commercial dated 21 November 2012

²⁷⁸ Dubai Court of Cassation Decision number 88 for the year 2001 issued on 29 April 2001 - Civil

²⁷⁹ Dubai Court of Cassation decision number 268 for the year 2007 issued on 19 February 2008 [Exhibit 40]

The same principle was confirmed by the DCC 218/2006²⁸⁰.

In DCC Petition No. 403 of 2003 issued on 13 March 2004, the court held that the signature of the arbitrators on the award has a further effect; such signature indicates that it has been rendered by those arbitrators and that the deliberation has been undertaken by those arbitrators.

DCC set aside an arbitral award due to the arbitral tribunal's' failure to exhibit a copy of the agreement to arbitrate

In DCC 173 for 1996²⁸¹, the court annulled an arbitral award due to the arbitrator's failure to exhibit a copy of the arbitration agreement even when a copy of the arbitration agreement was submitted separately to the court with the motion to ratify the award. The court reasoned that the arbitral award should include, in itself, all the documents related to it.

The court relied upon Article 212.5 of the Repealed Arbitration Chapter of the CPC, which states that:

*"The award of the arbitrators shall be issued by a majority; it must be in writing, with the dissenting view, and it must in particular include a copy of the arbitration agreement, a summary of the statements and documents of the parties, the reasons for the award and the order made, the date of issue, the place at which it was issued, and the signatures of the arbitrators, and if one or more of the arbitrators has refused to sign the award such fact shall be stated, and the award shall be valid if signed by a majority of the arbitrators."*²⁸²

Section 3: Nullity Related to other Procedural Irregularities

§ 1 Nullity Related to the incompetence of an Arbitrator to adjudicate the dispute

Under UAE law, when an arbitral tribunal is chosen by the parties, none of the parties can refer to the court to appoint a replacement arbitrator unless one or more of the former arbitrators has resigned, recused, ruled to be dismissed, or is otherwise prevented from working.²⁸³

The incompetence of an arbitrator to adjudicate a particular dispute is one of the grounds to set aside arbitral awards prescribed in Article 216 of the Repealed Arbitration Chapter of the CPC²⁸⁴ allowing the involved litigants to request the invalidity of the arbitral award.

²⁸⁰ DCC 218/2006 dated 17 October 2006

²⁸¹ Dubai Court of Cassation Decision number 173 for the year 1996 issued on 16 March 1997

²⁸² Article 212.5 of the Repealed Arbitration Chapter of the UAE CPC, which is consistent with Articles 12 and 41.5 of the Federal Arbitration Law

²⁸³ Dubai Court of Cassation Decision number 167 for the year 1994 issued on 13 November 1994

²⁸⁴ Which includes grounds to set aside an arbitral award, this is replaced by Articles 53 of the Federal Arbitration Law

However, in the meantime, the challenge for recusal of an arbitrator can be, and has actually been, used as a delay tactic for proceedings.

ADCC case number 980 of 2010²⁸⁵ is an example that demonstrates how a party can introduce, after an award has been issued, a defense that it was unaware of the circumstances that provide doubt as to the arbitrator's impartiality or independence and then claim that the award is null under this ground. This claim can be genuine but can, in certain instances, be abusive since a party can be actually aware of such circumstances and decide to bring them only if the final award is not in its favor. Therefore, under UAE the UAE law, arbitrators are strongly urged to make full disclosure of all possible grounds of recusal.

Article 207.3 of the Repealed Arbitration Chapter of the CPC provides that *"an arbitrator may be dismissed by the court in the case of proving that the arbitrator has intentionally neglected the work according to the agreement of the arbitrators in spite of drawing his attention, in writing."*

Also, 207.3 of the Repealed Arbitration Chapter of the CPC provides that the recusal of an arbitrator is applied for the same reasons that a judge may be recused or by virtue of which he is unfit to issue an award.

Under the Federal Arbitration Law, Article 14 provides a more generic perspective for grounds for challenging an arbitrator. It provides that *"An Arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence or if he does not possess the qualifications agreed to by the Parties or stipulated by this Law."*

ADCC set aside an award since an arbitrator was employed by one of the parties' legal representatives

In this case, the award creditor initiated an action before the Abu Dhabi Court of First Instance requesting the ratification of an arbitral award, and the Court ratified the award.

The decision was upheld by the Abu Dhabi Court of Appeal, which dismissed the award debtor's argument that the arbitrator appointed by the award creditor was employed by its legal representative, and that this circumstance affected its impartiality. The Court of Appeal ruled that this defense should have been introduced during the arbitration proceedings and that under Article 216 of the Repealed Arbitration Chapter of the CPC²⁸⁶ it is not permissible to request setting aside an award based on the impartiality of arbitrators.

The Abu Dhabi Court of Cassation overturned this decision²⁸⁷ and held that this claim was admissible. The court reasoned that Article 114 of the Civil Procedure Code lays down the under which a judge is deemed unfit to serve in. One of these circumstances is when the judge is an agent of one of the litigant parties in his private business. Under such circumstances, a judge must be recused if he had a prior relationship with one of the

²⁸⁵ ADCC Case number 980 of 2010 issued on 23 February 2011

²⁸⁶ Which includes grounds to set aside an arbitral award, this is replaced by Articles 53 of the Federal Arbitration Law

²⁸⁷ ADCC Petition No. 980 of 2010 issued on 23 February 2011

parties without either party having to issue a formal challenge. Any agreement to the contrary shall contravene public order rules.

The court referred to Paragraphs (b) and (c) of Article 216 of the CPC²⁸⁸ which provide that it is permissible for the parties to request setting aside an arbitral award during the judicial review of the award for ratification if the award was issued by arbitrators not fulfilling the legal requisites or if there is a nullity that affected the award. A relationship or connection between one of the arbitrators and either party to the dispute renders that arbitrator “unfit to serve” the dispute as said relationship or connection affects its impartiality²⁸⁹.

On the impartiality and independence of an arbitrator, the court determined that having a relationship between the arbitrator and one of the litigant parties causes nullity of an award based on public policy, the latter allowing the judge to adhere to it without even invoking the argument by one of the parties.

UAE Case laws denied recusal of arbitrators

In a decision by the DCC, the court confirmed that the Court of First Instance’s decisions to appoint arbitrators are final. In this case, the Court of First Instance appointed an arbitrator who set a motion of arbitral proceedings. The decision for appointment of the arbitrator was challenged before the Court of Appeal, which accepted the motion in form and appointed the same arbitrator, which was appointed by the Court of First Instance. The Dubai Court of Cassation overturned the Court of Appeal’s decision, as it should have dismissed the action since the decision to appoint an arbitrator is not subject to appeal²⁹⁰.

The Court of Cassation held that the Court of First Instance had jurisdiction over the appointment of arbitrators not the Court of Appeal. According to the Court, the exception to this rule would be if the Court of First Instance had decided on a matter that fell within the ambit of the jurisdiction of the arbitrator. The Court held that in the present case the Court of First Instance had only issued a ruling on the arbitrator's appointment and had never been asked to ratify the eventual award. The Court of Appeal had therefore erred in ratifying the award because it was the Court of First Instance that had jurisdiction to do so.

Under Article 15.3 of the Federal Arbitration Law, the recusal of an arbitrator falls under the jurisdiction of the Court of Appeal rather than the Court of First Instance. However, the same rule above shall apply, as this decision is final and not subject to appeal.

The jurisdiction of the Court of Appeal shall arise in cases of non-institutional arbitration. In institutional arbitration, the decision shall be referred to the relevant body within the institution.

In DCC decision 108 / 2009, the parties' agreement included an arbitration clause, but the respondent in that case refused to appoint its party-nominated co-arbitrator. In response, the claimant obtained from the Court of First Instance a judgment appointing an arbitrator. The respondent filed an appeal on the decision of the Court

²⁸⁸ Which includes grounds to set aside an arbitral award, this is replaced by Articles 53 of the Federal Arbitration Law

²⁸⁹ ADCC Petition No. 980 of 2010 issued on 23 February 2011

²⁹⁰ Petition No. 150 of 2007 issued on 16 October 2007

of First Instance. The Court of Appeal reversed the decision of the Court of First Instance.

Thereafter, the Petitioner filed a challenge before the Court of Cassation, which concluded that in case any of the parties fail to appoint an arbitrator as per the agreement, the injured party may bring an action before the court to appoint an arbitrator; in this case, the decision of the Court of First Instance shall not be subject to appeal²⁹¹.

In other decisions:

USC decision 627 for 2013: The USC established that the arbitrator's judgment in a former case that is connected to or forms part of the arbitration proceedings he is taking part of shall not be a ground to his recusal unless such proceedings are between the same litigant parties, which entails that his decision in it shall be the same decision regarding the documents and arguments of the other case.

DCC 204/2005: The DCC established that dismissal of an arbitrator is permissible when all the adversaries agree on it after his appointment whether it was by an agreement or through the court. Proving the arbitrator's negligence in such case is unnecessary.

USC 118 / 23rd Judicial Year [Exhibit 23]: The USC established that an arbitrator should not have a certain level of education. The petitioner in that case argued that the educational level of the arbitrator was equivalent to the sixth grade of elementary school, whereas the award needed to be issued by a legal or accounting expert. The court dismissed this argument²⁹².

USC and DCC set aside arbitral awards due to misapplication of rules related to a party's failure to appoint an arbitrator

In an attempt to obstruct proceedings, a party (typically the respondent) may decline to appoint its nominated arbitrator in case of three arbitrators or alternatively he may not agree with its adversary on the sole arbitrator.

This behavior would be taken by a party who knows that it is acting in breach of its contractual obligations and that the chances of having a favorable result in arbitration are unlikely.

Under these circumstances, the general rule under UAE law is laid down in Article 204.1 of the Repealed Arbitration Chapter of the UAE CPC and Article 13 of the Federal Arbitration Law

Article 204.1 of the Repealed Arbitration Chapter provides that the arbitral institution under which the proceedings set a motion or, failing which, the court initially having jurisdiction to adjudicate the dispute (in case the underlying arbitration clause did exist) shall have the jurisdiction to appoint the arbitrator, which the parties failed to appoint. Article 204.1 provides

²⁹¹ DCC Petition No.108 of 2009 issued on 12 March 2009

²⁹² USC Petition No. 118 of the 23rd Judicial Year issued on 21 January 2004 [Exhibit 23]

"If the litigation has occurred and the litigant parties haven't agreed to the arbitrators... the court, which is principally authorized to examine that litigation, shall appoint whoever shall be needed of the arbitrators and that on the grounds of a request from one of the litigant parties, through the usual procedures of the action prosecution. The number of those appointed by the court should be equal to the number agreed upon between the litigant parties or completing thereto."

Similarly, Article 13 of the Federal Arbitration Law states that:

"If a party violates the agreed procedure for selection of arbitrators, the Parties fail to agree, or the two appointed arbitrators have not agreed on a matter requiring their agreement, or if the third party, including the Authorized Party, fails to perform a function entrusted to it under such procedure, then the Court shall, at the request of a party, carry out the required measure unless the agreement provides other means for securing the appointment. The decision on the matter shall not be subject to appeal"

However, parties should be mindful since the parties' choice to have an institutional arbitration may not be upheld under the USC judgments. USC Petition No. 206 of the 27th Judicial Year issued on 27 December 2005 annulled an arbitral award issued by ADCCAC since the Center decided on the choice of an arbitrator rather than the court having jurisdiction to adjudicate the original, despite the fact that an arbitration clause did not exist.

The USC has a different interpretation for the application of the institutional arbitration rules in this case, with the USC holding that:

"Referring to Article 12 of the ADCCAC Arbitration and Conciliation Rules, the Court of Cassation held that the appointment by the ADCCAC of the third arbitrator failed to comply with that article, since it was made without the required consultation of the parties.

Accordingly, the Court of Appeal's judgment annulling the ADCCAC decision appointing the third arbitrator was appropriate. Either party therefore had the right to prosecute an action before the court of the original jurisdiction to request the appointment of the third arbitrator."²⁹³

In an approach contrary to the USC, the DCC dismissed a claim for nullity for an arbitral award issued under the ICC Rules. The court rejected the argument that the arbitration agreement, which specified three-party arbitrators to adjudicate the dispute, was not complied with by the petitioner since the latter failed to nominate its party-appointed arbitrator. The petitioner argued that the Dubai Courts, rather than the ICC, was competent to appoint the arbitrator under Article 204.1 of the CPC (Article 13 of the Federal Arbitration Law), however the ICC did appoint the arbitrator, which is against UAE law and thus the award should be annulled. The Court of Cassation respected the parties' agreement to refer such choice to the ICC and refused to set aside the award²⁹⁴.

Further, the decision of the court having jurisdiction if the arbitration clause did not exist should consider carefully the jurisdictional rules under UAE law. In this context, DCC Petition No. 175 of 1993 issued on 12 December 1993 annulled an arbitral award since the arbitrator was selected by a court that does not have

²⁹³ USC Case number 206 of the 27th Judicial Year issued on 27 December 2005

²⁹⁴ Case No. 272 of 2008 issued on 25 January 2009

jurisdiction to adjudicate the original dispute, should an arbitration clause would not exist.

The DCC determined that the principle, which is originated from Article 204.1 of the CPC (Article 13 of the Federal Arbitration Law), applies even if the contract was concluded outside the UAE.

The court dismissed the petitioner's argument that the contract was concluded in London since the contract involved obligations performed in the UAE and there was no choice of court agreement in the contract that provides London courts an exclusive jurisdiction on disputes between parties. Therefore, the courts of the UAE, rather than the English courts, should have been seized for the choice of the arbitrator in this case.

§ 2: Nullity Related to Public Order

During 2012, Clyde and Co. reported that the Dubai Court of Cassation had nullified three DIAC arbitral awards on the basis that those awards were contrary to public policy.²⁹⁵

In essence, the UAE courts are not permitted to challenge arbitral awards from the substantive legal points or from the perspective of conformity with the law unless any of the parties challenge the award. However, any violation of UAE public order principles is an exception from this rule. In such a case, the UAE courts must scrutinize the public order violations in the light of what is required by those rules in the UAE laws without the need for any of the parties to plead such grievances.

DCC 146 for 2008 established that the UAE courts shall under all circumstances consider public order when issuing a decision even in the event it was based on a foreign decision. The court found that:

"The arbitral award ruling on matters contrary to the public policy is subject to annulment based on public order matters in the country of enforcement even if it was valid and executable under the rules of the country of the seat due to the compatibility of the public policy there."

In principle, the only provisions in the UAE law that define issues related to the public order are:

First, Article 3 of the UAE Civil Transactions Code, which states that:

"Public order shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to sovereignty, freedom of trade, the circulation of wealth, rules of private ownership and the other rules and foundations upon which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Shari'ah"

Second, Article 409 of the Federal Penal Code, which provides:

²⁹⁵ Clyde & Co Succeeded in Nullifying DIAC Arbitral Awards Relating to Article 3 Of Law 13 Of 2008 Nassif BouMalhab and Susie Abdel-Nabi of Clyde and Co. Dubai, available online

<http://www.mondaq.com/x/173664/Property+Litigation/Clyde+Co+Succeeded+In+Nullifying+DIAC+Arbitral+Awards+Relating+To+Article+3+Of+Law+13+Of+2008>

“Any natural person who deals in usury with another natural person in any civil or commercial transaction shall be punished with imprisonment for no less than three months and with a fine of no less than 2,000 Dirhams. This shall include any terms or conditions implying any express or implicit interest, commission or benefit of any form by the creditor, when it is established that such interest, commission or benefit does not correspond to any lawful benefit or service rendered by the creditor. Such implicit debt or interest may be established by any means.”²⁹⁶

Issues related to freedom of trade, circulation of wealth and ownership are not clear from the text of the law, yet were argued before the local UAE courts on many occasions to set aside arbitral awards related to real estate disputes. As such, it is important to understand the public order rules under UAE law.

To interpret that, and provide more clarity on matters related to public policy, it is necessary to refer to case laws that defined the public policy issues related to arbitration cases by the following:

- independence and impartiality of arbitrators is a public policy matter, ADCC 980 for 2010
- deliberations are a public policy, USC decision number 556 for 2005
- Signature to all pages of an arbitral award by all arbitrators is a public policy matter²⁹⁷, DCC 156 for 2009 [Exhibit 45].
- An arbitral award that enforces or annuls of a real estate agreement due to failure to register such real estate asset in the registrar, ADCC 55 for 2014, ADCC 806 for 2013
- having an odd number of arbitrators is a matter related to the public policy and cannot be derogated from by the parties, ADCC 186 for 2008
- The UAE jurisprudence is settled that failure of an arbitrator to issue an award within the prescribed time-limit is not a matter of public policy,²⁹⁸

ADCC refusal to set aside two awards on public order grounds

In two judgments by the ADCC, the court refused to set aside two arbitral awards. The court dismissed arguments on public policy grounds related to the registration in Abu Dhabi real estate register.²⁹⁹

The court referred to Article 3 of the UAE Civil Transactions Code referred to above and determined that the arbitral award that enforces or annuls of a real estate agreement due to a party's failure to register the relevant real estate asset in the registrar of the Emirate of Abu Dhabi is not an issue that is subject to arbitration since it cannot be settled consensually between the parties and therefore is not subject to arbitration.

²⁹⁶ Article 409 of the Federal Law No. 7 of 2016 (“the UAE Penal Code”)

²⁹⁷ With the exception of where the arbitral award in both the decision and reasoning (or part of it) exist in the same page, which is signed by all the arbitrators. This is extremely unlikely DCC 156 for 2009

²⁹⁸ DCC decision 102 for 2010 – Civil, DCC decision 128 for 2010 – Civil, DCC decision 403 for 2003 – Civil, DCC decision 148 for 2008 dated commercial 16 September 2008, DCC decision 362 for 2011 Civil and 273 for 2006

²⁹⁹ ADCC 55 for 2014 and ADCC 806 for 2013

However, if such award enforces or annuls an agreement due to delay in execution or failure to execute (rather than the failure to register the agreement) it is not a public policy issue and shall be subject to arbitration.

As such, the Court of Cassation enforced the arbitral award and overturned the Court of Appeal's decision.

ADCC 186 for 2008

The ADCC established that having an odd number of arbitrators is a matter related to the public policy and cannot be derogated from by the parties even if all parties to a dispute did not object on during the proceedings, the court relied upon Article 216.2 of the CPC which states that *"An action to set aside shall not be barred by a party having waived his right thereto before the issue of the award of the arbitrators."*³⁰⁰

USC 831 of the 25th Judicial Year

In this decision, the USC established that all kinds of interest, whether compound or simple, are forbidden as a matter of principle according to the Sharia law since they are regarded as usury or financial interest, which is forbidden as per the Islamic Sharia.

However, according to the judgment of the Union Supreme Court in decision No. 14 of the 19th Judicial Year, interest related to bank transactions is permitted, with certain limits, should the need for such interest arises. Such transactions shall cease when there is no need for such dealings. The court also found that interest on overdue payments counts as compensation to creditors for unjust delays caused by debtors and, therefore, it might not be contradictory to Sharia.

DCC Petition No.146 of 2008 issued on 9 November 2008

The court established that pursuant to Article 216 of the Civil Procedure³⁰¹ Code, the litigants may set a motion to set aside arbitral award when its recognition is being prosecuted before the court in the cases listed in said article, which relate to procedural irregularities and compliance with the arbitration agreement. The court held that, in principle, the court should not rule, on its own motion, on the merits of the case to set aside an award and on its conformity to the law. However, by way of exception, in the event that an arbitral award was issued contrary to the UAE public policy, in such cases, the court shall review and verify the compliance with the public policy applicable in the UAE. Although the violation of public policy is not included in the cases listed in Article 216 of the CPC (Articles 53 of the Federal Arbitration Law), this does not mean that public policy should not be considered as a ground for setting aside an award, given that public order is a fundamental essence of the law.

Hence, an arbitral award that is contrary to public policy principles in the country where the action to set aside or execute the award is instituted before its courts shall be subject to invalidation or non-execution in such country even if the award is valid or applicable in the country of the seat of the arbitration.

³⁰⁰ Article 216.2 of the Repealed Arbitration Chapter of the UAE CPC, which is the same wording in Article 54.5 of the Federal Arbitration Law

³⁰¹ Which includes grounds to set aside an arbitral award, this is replaced by Articles 53 of the Federal Arbitration Law

The Court overturned the decision issued by the Court of Appeal and, consequently, enforced the arbitral award that was previously set aside by the Court of Appeal. In particular, the DCC determined that the appeal judgment made no mention of the basis for finding that the arbitral award was contrary to the principles of the Islamic Sharia (regarding inheritance rules) and against public order in the UAE (regarding the interest awarded) because it relied upon a decree issued by the Lebanese Sunni Endowments Department as evidence rather than the relevant provisions under UAE law. Therefore, it had not been established that the arbitral award was contrary to the principles of Islamic Sharia regarding inheritance rules.

The DCC set aside two arbitral awards based on public policy violations (1)

The Dubai Court of Cassation refused to enforce two domestic arbitral awards on public policy grounds.^{302 303}

Whilst the Court of First Instance ratified the awards and the Court of Appeal upheld this decision, the Dubai Court of Cassation set aside the awards.

The court found that the awards annulled a sale and purchase agreement due to the petitioner's failure to register the unit within the period prescribed by Article 3.2 of Law No. 13 of 2008 regulating the Interim Real Estate Register in the Emirate of Dubai. The court determined that the arbitral awards' decision on this matter is a ruling on a public policy matter that is outside the scope of the arbitral tribunal.

Under Dubai laws, matters relating to the sale of off-plan units have been regulated by the legislator in Article 3 of Law No.13 of 2008 (the Dubai Law on Interim Real Estate Register Law), failure to register off-plan properties as prescribed in the said law shall render the related contract null and void. Matters relating to registration of off-plan units in the Interim Real Estate Register may not be the subject matter of arbitration, as this is considered, by the UAE jurisprudence, a public policy matter.

The DCC set aside two arbitral awards based on public policy violations (2)

Similarly, the Dubai Court of Cassation set aside an award issued under the DIAC Rules. The subject award annulled a sale and purchase agreement since the subject property was not registered in the Interim Real Estate Register in compliance with Interim Register Law Number 13 for the year 2008, which is considered by the court as a public policy matter that is outside the scope of arbitral tribunals³⁰⁴.

The court referred to Article 3 of the UAE Civil Transactions Code, which provides that:

“Public order shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to sovereignty, freedom of trade, the circulation of wealth, rules of private

³⁰² Dubai Court of Cassation Decisions Case No. 180 of 2011 and Dubai Court of Cassation Petition No. 16 of 2012

³⁰³ Enforcement of Foreign Arbitral awards in the United Arab Emirates, By Mayew, Gregory J; Morris, Mark

³⁰⁴ DCC Petition No. 14 of 2012 issued on 16 September 2012

ownership and the other rules and foundations upon which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Shari'ah."

The court found that the registration of off-plan properties in Dubai Interim Real Estate Register is among the public order matters, where any dispute regarding them is not arbitrable.

In this case, a real estate developer, entered into a sale and purchase agreement for a property with the claimant. As the respondent defaulted in its obligation under the agreement, the claimant initiated arbitration action under the auspices of the DIAC arbitration rules.

The arbitrator decided that the agreement was invalid since the property was not registered in the Real Estate Interim Register, the court DCC annulled the award on public order grounds.

Monetary interest in arbitral awards is not a ground for public policy violations

In this decision, the DCC held that there is no basis for the assertion that jurisdiction over an action lies with the DIFC Courts and that an arbitral award is contrary to Islamic Sharia and public policy rules in the UAE because it awards included usurious interest³⁰⁵.

The DCC confirmed that the prohibition on agreeing to usury or interest is limited to dealings between individuals and does not extend to dealings between corporate entities, which can agree with other corporate entities or individuals to charge interest.

The DCC set aside three arbitral awards based on public policy grounds (3)

This judgment handed down by the Dubai Court of Cassation in 2012 nullified three DIAC arbitral awards on the ground of public order³⁰⁶.

The facts of the case started when Dynasty purchased an off-plan building on the Dubai Waterfront from Baiti [Exhibit 37].

In considering the validity of the three sale and purchase agreements that are subject to the dispute, the arbitrator applied Article 3 of Law No. 13 of 2008 and concluded that the SPAs were void.

Article 3 of the said law states that *"any sale or other disposition that transfers or restricts title will be void if not recorded on the Interim Real Estate Register of the Dubai Department of Lands and Properties, which is used to record all sales of off-plan real estate units."*

³⁰⁵ DCC Petition No.132 of 2012 issued on 22 February 2012

³⁰⁶ Baiti Real Estate Development v Dynasty Zarooni Inc. (Decision number 14/2012, Real Estate Cassation) dated 16 September 2012 [Exhibit 37]

In reasoning at its decision to set aside the awards, the Court of Cassation relied on Article 3 of the UAE Civil Transactions Code, which provides that:

"Public order shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to sovereignty, freedom of trade, the circulation of wealth, rules of private ownership and the other rules and foundations upon which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Shari'ah"

The Court of Cassation concluded that the application of Article 3 of Law No. 13 of 2008 is a matter of public order, with such matters falling within the exclusive jurisdiction of the Dubai Courts.

§ 3: Summary of remaining Procedural Irregularities

This subsection illustrates the remaining procedural irregularities, other than from the irregularities listed above, that could cause the arbitration award to be annulled,

Nullity for breach of the arbitration agreement with respect to pre-arbitration procedures

It is common in contracts in the UAE to find arbitration clauses where, as a pre-condition to institute an arbitration, the parties should consult or mediate in order to reach an amicable solution (sometimes called med-arbitration).

In the particular cases of real estate companies, it is frequent to see that a third party to the dispute needs to be referred to before commencing arbitration; it is not uncommon that this third party is the project consultant.

Many of the arbitration clauses taking this approach provide that the project consultant's decision is non-binding on any of the parties. Therefore, the consultant still needs to decide but if any of the parties is not satisfied with the decision, it can commence an arbitration.

It is not a secret in the UAE real estate domain that the project consultant is not always independent; rather, commonly the project consultant is biased to its client, being the real estate developer rather than the main contractor or the subcontractors that the project consultant is exercising the supervisory role upon them³⁰⁷.

It often transpires that a party commencing an arbitration has not satisfied the pre-conditions in the underlying contract that must be satisfied before commencing an arbitration. In one study, this situation occurred in four out of ten claims referred to arbitration³⁰⁸. Consequently, the respondent may claim that the arbitral tribunal has no jurisdiction to hear these claims.

³⁰⁷ In technical terms, project consultants' have two major functions to the real estate developer 1) design or the building 2) the supervision on the main contractor and subcontractors

³⁰⁸ Doctrines in Support of Jurisdiction: An Overview - Al Tamimi & Company <https://shar.es/18kz9Y>

Questions arise as to whether an arbitral tribunal has jurisdiction over a dispute where one of the parties breaches fully or partially the pre-arbitration procedures (whether to get a third party consultant, mediator or otherwise).

Further, if the arbitrator, being competent to decide its own jurisdiction, upholds jurisdiction, what will be the potential attitude of the UAE courts in treating the eventual award?

When one of the parties breaches the arbitration agreement including the pre-arbitration procedures therein, the resulting breach can be argued to be a breach of the fundamental nature of arbitration - a consensual process that is always subject to the parties' liberty.

In general, the UAE law does not uphold commencing an arbitration if the contract includes clearly prior conditions before commencing the arbitration, whereas if any of these prior conditions is not satisfied, then the request to commence an arbitration shall not be accepted since the contract is the law of the parties to it.

However, a few exceptions are provided by the UAE jurisprudence including the following:

First) If the arbitration clause is not very clear on the specific procedures preceding the commencement of the arbitration or any form of amicable settlement procedures (such as mediation or a consultant to decide on the matter), the courts are likely not to recognize this condition due to the probable ambiguity in it.

Second) If one of the parties commences an arbitration in breach of pre-arbitration procedures and the other litigant party did not raise an objection relating to the breach of the arbitration agreement, this shall be considered as an implied waiver for his right to raise this objection and shall be deemed an implied acceptance for such procedure. In such cases, it shall not be permitted for the non-breaching party to raise the breach of the pre-arbitration procedures before the judiciary.

Third) A number of jurisprudence establishes a more flexible approach with regard to such breach when arbitral awards that have been issued as the courts do not wish the parties to lose their time and effort in proceedings and then face nullity related to grounds of objections that were known to the parties but not contested by them (. However, the UAE courts demonstrated a less flexible approach when asked to appoint an arbitrator and rejected such appointment when asked by one of the parties in cases where the pre-arbitration proceedings are not satisfied.

In summary, the UAE Cassation decisions establish the following:

If the pre-arbitration procedures are specified and explicitly defined in the underlying agreement and, where a party commences an arbitration in breach of such procedures and the adversary objects for such procedure, in these events, the arbitral award is at serious risk of being set aside by the UAE national courts.

Whilst this reason may not be one of the explicit grounds for annulment of arbitral awards under UAE laws, it could be argued that this breach of contract represents an irregularity under Article 216.1(c) of the CPC³⁰⁹ which

³⁰⁹ Which includes grounds to set aside an arbitral award, this is replaced by Articles 53 of the Federal Arbitration Law

states as a ground for nullity of arbitral awards *“if there is a nullity in the award or a nullity in the proceedings having an effect on the award.”*

Moreover, in particular views, the arbitration was commenced against the consent of one of the litigant parties. In particular, the express consent of the parties to enter into arbitration was subject to procedures, mediation, or amicable settlement negotiations preceding the commencement of the arbitration. This creates a situation where the arbitration proceedings are contrary to the consensual nature of arbitration that is based primarily on the agreement of the parties to enter into arbitration agreements. Such consensual nature of arbitration is well established by frequent Cassation decisions in the UAE. Acting against the arbitration agreement entered between the parties can produce grounds that the arbitration was contrary to the intent and consent of the litigant parties to arbitrate.

The DCC refuse to appoint an arbitrator due to violations in the pre-arbitration proceedings

The Dubai Court of Cassation determined that an arbitration agreement, like any typical contract, may include any clause the parties deem appropriate provided that such clause does not violate public order. The parties may, by way of example, include pre-conditions preceding the commencement of an arbitration. The burden of proof for the satisfaction of such pre-conditions lies with the party initiating the arbitral proceedings, being the party that should comply with these proceedings before commencing the arbitration³¹⁰.

In this case, before the Court of Cassation, the parties agreed that any dispute between them should be referred to the project consultant (the engineer) for amicable settlement before any party commences an arbitration. The claimant demanded the court to appoint the party-nominated arbitrator on behalf of the respondent to adjudicate the dispute. However, the Dubai Court of First Instance dismissed the action on the grounds of premature and inappropriate commencement of the action as the claimant had failed to prove that it satisfied the pre-conditions required before commencing the arbitration by consulting the engineer. The claimant submitted challenged the decision before the Dubai Court of Appeal, which dismissed the action and upheld the decision of the Court of First Instance.

The Court of Cassation held that the claimant failed to request the project consultant (the engineer) to seek or propose an amicable settlement and, as a consequence, the claimant's action for requesting the court to appoint an arbitrator or commence an arbitration was premature and therefore denied.

DCC set aside an award due to failure to satisfy pre-arbitration procedures

In 2012, the Dubai Court of Cassation held that an arbitral award issued under the auspices of DIAC should be set aside for failure to satisfy pre-arbitration requisites^{311 312}.

³¹⁰ DCC decision number 53 for the year 2011 dated 7 December 2011

³¹¹ DCC decision 188 for the year 2012 dated 9 October 2012

³¹² Recent Rulings on Arbitration by Dubai Courts, by Hassan Arab, Al Tamimi & Co., available online

The Court of Cassation found that the arbitration was commenced before the compliance with the specific procedures that must be satisfied prior to commencing the arbitration.

The Court of Cassation found the following as part of the reasoning:

- The contract is the law of the contracting parties, and parties to a contract are entitled to include any clauses they deem appropriate, provided they do not violate the public order.
- Parties' agreement to arbitrate may include pre-arbitration procedures that have to be satisfied before any of the parties commence an arbitration. The burden of proof for the satisfaction of such pre-arbitration procedures lies with the party who commenced the arbitration.

ADCC's stance on pre-arbitration procedures

The ADCC decision number 173/2014 was confronted by the same question regarding the pre-arbitration procedures. The court decided that any med-arbitration clauses or pre-arbitration procedures are established in the underlying contract, and that such pre-arbitration procedures, including any amicable settlement negotiations, should precede the arbitration proceedings as articulated in the agreement between the parties.

However, such pre-arbitration procedures are not mandatory for an arbitration to commence if such procedures are not precise enough. The court found that generally, should such violation be found, the Court of Cassation may consider this question as a substantive question that may threaten the enforceability of an arbitral award.

Therefore, parties to a dispute are advised to consider such pre-arbitration procedures mindfully.

Therefore, litigant parties and arbitrators taking the UAE as the seat for their arbitration and seeking to enforce awards in the UAE may consider any challenge based on such ground and should note that the misapplication of this procedure may influence enforceability.

Arbitral tribunals and parties may consider, as a solution, suspending the proceedings for a period of time and ordering the parties to enter into the pre-arbitration procedures. That said, it could be argued by the objecting party that the arbitration already commenced. However, arbitrators taking this approach are likely reducing the possibility of having the arbitral award annulled for reasons related to this procedural ground.

Unclear dispute resolution mechanisms are not enforceable

In ADCC 173 for 2014, the court established a more precise rule that pre-arbitration procedures must be satisfied before any of the parties commences an arbitration. However, if the clause does not specify the means for an amicable settlement, such as mediation or other specific procedures, then any of the parties can invoke the arbitration clause and commence an arbitration without considering the pre-arbitration provisions.

The court determined that:

<https://www.tamimi.com/law-update-articles/recent-rulings-on-arbitration-by-the-dubai-courts/>

“It is established that, as per the general rules applicable to contracts, that the arbitration clause, as a contract between the parties can include any condition the parties deem appropriate without violation to the public order.

As such, any prior conditions, before commencing an arbitration where in case any of these prior conditions is not achieved then the request to commence an arbitration shall not be accepted since the contract is the law of the contracting parties.

However, it is proved in the documents in this case that the contract stated that (in case of dispute or difference arises between the parties in the interpretation of this contract or application, it has to be referred to amicable settlement before commencing an arbitration.

However, the parties did not specify in the contract the means for this amicable settlement such as mediating a person to narrow the difference and reach a settlement. As such, the content of this clause intends to induce the parties to try for amicable settlement together before the arbitration without getting a third party to mediate between them, therefore, any of the parties can bring arbitration proceedings directly without considering the amicable settlement clause included in the clause”³¹³.

Similarly, Dubai Court of Cassation Case Number 75/ 2015, dated 12 August 2015 established that:

“The sale and purchase agreement provides no guidance as to what such amicable settlement entails and contains no material facts to enable the Court of First Instance to determine whether or not the settlement was pursued. Moreover, the parties proceeded with the arbitration without the Respondent ever pointing out before the arbitral tribunal that the Appellant had proceeded to arbitration directly without first attempting to reach an amicable settlement and use best endeavors to settle any dispute between the parties, as required by the sale and purchase agreement. This would indicate that the parties failed to resolve their dispute amicably. The Court of Appeal failed to take this approach and its decision is thus flawed and will be quashed.”³¹⁴

Contrary to the above decision, in DCC 140 for 2007, the Dispute Resolution Mechanism provision was articulated clear enough to pose enforceability. In this case, the court rejected appointing an arbitrator since the pre-arbitration procedures that included appointing a project consultant (an Engineer) to attempt resolving the dispute amicably were not satisfied. This provision included appointing the engineer whether the dispute was during the performance of the contract or after the completion or following termination or rescission of the contract. It further granted 90 days’ period for the engineer to conclude this procedure, otherwise the parties are free to prosecute an action in arbitration.

³¹³ Abu Dhabi Court of Cassation decision number 173 for the year 2014 issued on 24 June 2014

³¹⁴ Important Judgment on Contractual Preconditions to Arbitration in the UAE by Hassan Arab of Al Tamimi and Co., https://www.lexismiddleeast.com/eJournal/2016-03-10_15/. Dubai Court of Cassation Case Number 75 for the year 2015 issued on 12 August 2015; also see the same article on:

<https://www.lexology.com/library/detail.aspx?g=b3d28445-9d19-4cba-a3d7-6f462f0da64b>

The court found that this provision was clear enough and that the documents submitted in the case did not contain anything to prove that the party that commenced the arbitration had satisfied the provision.

In addition, in DCC 53/ 2011, the court found that:

“If the parties have agreed that the dispute should be referred to a consulting engineer for assistance with amicably resolving the dispute before the commencement of arbitration, then neither party may commence arbitration before bringing the dispute before the consulting engineer. The burden of proving the fulfillment of such pre-conditions lies with the party requesting arbitration.”³¹⁵

Pre-arbitration procedures and procedural estoppel

In 2011, the DCC confirmed the general rule whereby it is not acceptable to commence an arbitration where a contract includes prior conditions before commencing an arbitration, therefore, if any of these prior conditions are not achieved then the request to commence to arbitration shall not be accepted since the contract is the law of the parties to it. However, the court established that this rule does not preclude the parties subsequently or at any time to agree explicitly or impliedly to amend any of these conditions since the nature of the agreement to arbitrate is not related to the public order. The parties agreed in the contract to refer any dispute to the project engineer to decide on before commencing arbitration proceedings, the respondent in the arbitral proceedings did not object for the commencement of the arbitration at the time when claimant submitted the request for arbitration in the DIAC, and there were no objections raised on the claimant’s failure to satisfy the pre-arbitration proceedings. Therefore, the respondent had impliedly waived such pre-arbitration procedures and the respondent’s objection before the court was not be accepted³¹⁶.

In DCC 204 for 2008 [Exhibit 29], the court granted the claimant’s request to appoint an arbitrator and rejected the defendant’s argument that the pre-arbitration proceedings were not satisfied. The court investigated the factual matter and found from the communications and correspondences that the pre-arbitration proceedings were satisfied; this indicates that this argument could be valid where the factual and documentary evidence proves the contrary.

The same facts have been found in DCC 124 for 2008.

In summary, the UAE Cassation decisions establish that if the pre-arbitration procedures are specific and clear and in case a party commences an arbitration is in breach of such procedures and the other litigant party objects for such procedure, in these events, the arbitral award is at serious risk of being annulled by the UAE national courts. If the parties fail to satisfy these procedures, it is safer for the final award that arbitral tribunals suspend the proceedings and order the parties to enter into these procedures.

³¹⁵ *Ibid*

³¹⁶ DCC 252 for 2010 Civil dated 13 March 2011

Parties' agreement not to appeal an award

Under UAE law, arbitral awards are final and not subject to any appeal, even if the parties did not agree on that explicitly as per Article 217 of the CPC³¹⁷. However, the enforcement of awards in the judiciary is subject to a separate action of enforcement before the Court of Appeal having jurisdiction.

The exceptions from this rule involve two issues (i) when the parties expressly waived their right to appeal the decision for ratification of the award (or raise a grievance before the Court of Appeal under the Federal Arbitration Law); or (ii) when the arbitrator is authorized for amiable compositeur.

Article 52 of the Federal Arbitration Law provides "An arbitral award made in accordance with this Law shall be binding on the Parties, shall constitute *res judicata*, and shall be as enforceable as a judicial ruling, although to be enforced, a decision confirming the award must be obtained from the Court"

Similarly, Article 37.2 of the DIAC Rules provides "and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made."

Under the UAE Federal Arbitration Law, the action to enforce an arbitral award should be initiated before the competent Court of Appeal, rather than the Court of First Instance (Article 55.1)³¹⁸. Similarly, the action to set aside an award shall be initiated before the relevant Court of Appeal (Article 53.1)³¹⁹

The decisions of the Court of Appeal to enforce arbitral awards can only be challenged by filing a grievance before the Court of Appeal itself (Article 54.1)³²⁰. By contrast, the decisions of the Court of Appeal in actions for annulment can only be challenged before the Court of Cassation (Article 57)³²¹. This is likely to be a pro-arbitration approach to limit awards debtors' ability to challenge a court decision ratifying an arbitral award.

In DCC 186 for 1996, the court differentiated between the parties' agreement not to appeal the arbitral award on one hand and the agreement not to appeal the decision issued by the Court of First Instance to ratify or

³¹⁷ Which is consistent with Articles 52 and 53.1 of the Federal Arbitration Law

³¹⁸ Article 55.1 of the Federal Arbitration Law states that "a party looking to enforce an arbitral award shall submit a request for its confirmation and enforcement with the chief justice of the Court." The Court is defined in Article 1 of the law as "The federal or local Court of Appeals agreed upon by the parties or in whose jurisdiction the arbitration is conducted"

³¹⁹ Article 53.1 of the Federal Arbitration Law states that "An arbitral award can only be challenged by either an action for setting aside before the Court or during the pendency of an application to ratify the award"

³²⁰ Article 54.1 of the Federal Arbitration Law states that "The decision of the Court in an action to set aside is final and can only be appealed in Cassation"

³²¹ Article 57 of the Federal Arbitration Law states that "A grievance may be filed against the Court's decision to grant or deny enforcement of an arbitral award before the competent Court of Appeal within thirty days from the date following notification"

nullify an arbitral award (which could mean the Court of Cassation if the award was set aside and the grievance before the Court of Appeal in case the award was enforced).

In this case, the parties agreed in the arbitration deed that the arbitrator's decision is final and not subject to appeal as long as the award was issued by the arbitrator within the scope of the duties assigned by the arbitration deed.

As a result, the Court of Appeal found that the parties waived their right to appeal the Court of First Instance's decision to ratify the award.

The award debtor then filed a challenge before the Court of Cassation requesting the judgment of the Court of Appeal to be overturned. The Court of Cassation held that Article 217 of the Repealed Arbitration Chapter of the CPC provides³²² that arbitral awards are not subject to any means of appeal and are binding, however, the court reiterated that judgments ratifying or nullifying an arbitral award duly issued by an arbitrator could be appealed, save when the parties have expressly waived the right to appeal or if the amount of the dispute does not exceed AED 10,000.

Similarly, DCC 178 for 1996 [Exhibit 3] established that an arbitrator tribunal's authorization for amiable compositeur by the parties is conditional on the clarity of the litigant parties to this authorization whether expressly or impliedly in the arbitration agreement or the terms of reference to make the arbitral award decisive and final and to release the arbitrator from complying to the provisions of Civil Procedures Law.

DCC 167 for 2002 established that the litigation facts must be specified in the arbitration document (which may include the terms of reference (ToR) or other documents established at the beginning of the arbitration). The judgment repeated Article 203.3 of the Repealed Arbitration Chapter of the CPC, which refers to the scope of the arbitration clause and states "The subject matter of the dispute must be defined in the arbitration instrument or during the trial of the action even if the arbitrators are empowered to effect a conciliation, failing which the arbitration shall be void"³²³.

DCC 268 for 2007³²⁴ [Exhibit 40] established that authorizing the arbitral tribunal in the arbitration agreement to make amiable compositeur does not provide an obligation on the tribunal to do the actual amiable compositeur (whether to start conciliation before the commencement of the arbitration proceedings or before ending such proceedings and rendering the award) unless the arbitration agreement provides an obligation on the tribunal to make conciliation.

Rather, the arbitral tribunal that is authorized for amiable compositeur may elect to proceed without amiable compositeur and conduct regular arbitration proceedings unless it has an obligation to make conciliation as per the parties' agreement.

³²² Which is consistent with Articles 52 and 53.1 of the Federal Arbitration Law

³²³ Article 203.3 of the Repealed Arbitration Chapter, which is not replaced by any Article in the Federal Arbitration Law

³²⁴ Dubai Court of Cassation decision number 268 for the year 2007 issued on 19 February 2008

ADCC Petition No. 561 of 2011 issued on 16 June 2011

In this case, the Abu Dhabi Court of First Instance ratified the award in question. The Abu Dhabi Court of Appeal found that the decision is not subject to appeal by virtue of Article 217 of the Repealed Arbitration Chapter of the CPC³²⁵.

The Court of Cassation overturned the decision of the Court of Appeal; the court found that the ratification of the Court of First Instance was not subject to appeal. The court reasoned that Article 217 of the Repealed Arbitration Chapter of the CPC³²⁶ provides that arbitral awards are not subject to appeal. However, the courts' decisions ratifying or annulling arbitral awards are subject to appeal by either party, with the exception of decisions ratifying or annulling an award that was issued by an arbitrator who was explicitly authorized by the parties for amiable compositeur or where the parties expressly waived their right to appeal and decisions or alternatively where the awarded amount does not exceed AED 10,000.

Amiable compositeur should be distinguished from mediation, which is not a binding dispute resolution mechanism, although these two terms are very close in Arabic.

The powers conferred upon an arbitrator are distinctly separate from a mediator's powers; the latter is not entitled to render a binding decision. A mediator can only recommend methods to settle disputes to the parties, and if the parties reach a settlement, the mediator's mandate expires. His or her recommendations are not binding, and the parties may choose to disregard mediator's decisions.

Nullity for arbitrators' failure to refer to the arbitration agreement in the award

The Repealed Arbitration Chapter of the UAE Civil Procedure Code states that:

*"The award of the arbitrators shall be issued by a majority; it must be in writing, with the dissenting view, and it must in particular include a copy of the arbitration agreement, a summary of the statements and documents of the parties, the reasons for the award and the order made, the date of issue, the place at which it was issued, and the signatures of the arbitrators, and if one or more of the arbitrators has refused to sign the award such fact shall be stated, and the award shall be valid if signed by a majority of the arbitrators."*³²⁷.

The prima facie reading of the Article does not provide an accurate description of how a copy of an arbitral award can be included in an arbitral award.

The literal interpretation could mean that the arbitral award should refer to the arbitration agreement or clause

³²⁵ Which is consistent with Articles 52 and 53.1 of the Federal Arbitration Law, with the distinction that the enforcement under the Federal Arbitration Law takes place before the Court of Appeal and can be challenged either by filing a grievance before the Court of Appeal or by filing a challenge before the Court of Cassation.

³²⁶ *Ibid*

³²⁷ Article 212.5 of the Repealed Arbitration Chapter of the UAE CPC, which is consistent with Articles 12 and 41.5 of the Federal Arbitration Law

in the award itself and attach a copy of the arbitration agreement or clause as an annex to the award.

However, this is not the actual intent reflected by the jurisprudence; the case laws interpret Article 212.5 of the CPC³²⁸ to refer to the arbitrator's obligation to re-write the arbitration clause itself into the award.

Further, case laws establish that it shall not be sufficient for the validity of the award to submit a copy of the arbitration agreement during the proceedings.

Article 41.5 of the Federal Arbitration Law confirmed that writing the text of the arbitration agreement into the award should be sufficient for the completeness of the award. It states that:

"The arbitral award shall include the names and addresses of the Parties, the names of the arbitrators, their nationalities and addresses, the text of the Arbitration Agreement, a summary of the Parties' claims, statements and documents, the order made and the reasons on which the award is based, if required to be stated, and the date and place of issue of the award."

The DCC 547/2015 [Exhibit 15] Real Estate established that it is settled in the jurisprudence of this court that according to the provisions of Article 212.5 of Civil Procedures Code (Article 41.5 of the Federal Arbitration Law), that:

*"The arbitral award must include a copy of the arbitration agreement. The basic purpose of this condition is to verify that the award is issued within the limits of the arbitrators' competence and authority extracted from the arbitration agreement, in this regard, it is not necessary to mention the provisions of the arbitration agreement in the award; the purport thereof shall be sufficient, yet without any alteration to its meaning. Whereas the purpose of including such agreement in the award is achieved by such statement because it is sufficient to enable the court seized to ratify the Award to investigate it's the content once the court reads the award."*³²⁹

Further, the UAE jurisprudence establishes that it is not necessary to mention the literal text of the arbitration agreement into the award; rather, shall be sufficient to mention the important provisions within the agreement without alteration to literal, written content of the clause or agreement.

As such, and for the safe procedures of the eventual award, the text of the arbitration agreement should ideally be re-written within the award and that the arbitration clause to be articulated in full in the beginning of the arbitral award in order to demonstrate to the judge ratifying the award that the arbitrator is aware of the scope and limits of the arbitration agreement and accordingly the award is issued within arbitrator's jurisdiction and scope provided in the agreement. This is one of the essential requirements the judge is considering when deciding to ratify and enforce an arbitral award.

³²⁸ which corresponds to Article 12 and 41.5 of the Federal Arbitration Law

³²⁹ Decision by the Dubai Court of Cassation number 547/2015 (Real Estate Dispute) dated 27 April 2016 [Exhibit 15]

For the sake of understanding the method of applying this provision in the UAE courts, set out below are two Cassation decisions that annulled arbitral awards for this ground.

The DCC set aside an award due to arbitrator's failure to include the text of the arbitration agreement into the award

The DCC annulled an arbitral award since a copy of the arbitration agreement is not referred to in the award. The court found it insufficient that the award referred to the arbitration agreement in the pleadings submitted by one of the litigant parties and further considered it insufficient to find that the arbitration agreement was submitted at the beginning of the proceedings³³⁰.

The court referred to Article 44.3 of the DIAC Rules of 1994 (which was applicable to this dispute) which provided that a copy of the arbitration agreement must be included in the final award.

The court held that:

"Including a copy of the agreement to arbitrate within an arbitral award is an essential requirement that the lawmaker intended to stipulate in order to ascertain that the arbitral award was issued within the ambit of the jurisdiction of the tribunal that is based upon the agreement to arbitrate. It is, therefore, an essential requirement for the validity of the arbitral award; the absence of this requirement should render the award null whether the award was issued in an institutional or ad-hoc arbitration."

The court further concluded that:

*"It is insufficient to submit a certificate issued by the arbitral tribunal reflecting that the arbitration agreement was submitted to it since the beaming of the proceedings, since the arbitral award should be inclusive, by itself, to the conditions required for its completeness in a way that it shall not be accepted to complete the missing essential information in the award in any the way or document that is separate from the award or to refer to the reasoning of the award to a copy of the arbitration agreement without articulating the arbitration agreement in the award itself"*³³¹

The court established another principle whereby the inclusion of a copy of the agreement to arbitrate within the arbitral award does not mean the exact terms of the agreement. Rather, it is sufficient to indicate the substance thereof, without any alteration to its meaning in a manner that enables the court to exercise its supervisory role on it once the court reviews it.

³³⁰ DCC 328 for 2002

³³¹ Dubai Court of Cassation 328 for the year 2002 for the year 2015 – civil issued on 23 November 2002

USC set aside an award due to arbitrator's failure to include the text of the arbitration agreement into the award

In 2006, the USC repeated the same principles above and the necessity to have a copy of the arbitration agreement articulated in the award itself and it is sufficient to bring the content of the arbitration agreement rather than the full text of it³³².

In this case, the Court of Appeal rejected the award debtor's argument that the arbitration agreement was not attached to the arbitral award. The court found that the award debtor has attached a copy of the arbitration agreement within his submissions to the court.

However, the Court of Cassation overturned the Court of Appeal's judgment and stipulated that the argument raised by the objecting party is not his awareness of the arbitration agreement; rather, it is the nullity of the award due to the failure of the arbitral tribunal to include the copy of the agreement to arbitrate within the award. Therefore, the Court of Cassation considered that the Court of Appeal had invalid inference and misunderstanding of the case and therefore annulled their decision.

DCC refuse to set aside an award based on failure to state the full text of the agreement to arbitrate in the award

In this decision, the DCC established that according to paragraphs (1) and (5) of Article 212 of the Repealed Arbitration Chapter of the CPC³³³, and as established in the jurisprudence of the DCC, the lawmaker did not prescribe that the award should include all information and provisions that must be included in court rulings³³⁴. Rather, the lawmaker has stipulated that the provisions related to arbitration and specified in Chapter 3 of the Civil Procedure Code must be satisfied, including the above-mentioned paragraph (5) of Article 212³³⁵.

The court determined that:

*"According to this article, the award must include a copy of the arbitration agreement. The basic purpose of this condition is to verify that the award was issued within the limits of the arbitrators' competence and power extracted from the arbitration agreement. The award shall include a copy of this agreement, even if a copy of the agreement or the original thereof is submitted to the Court during the motion to ratify the award. It is not necessary to mention the exact text of the arbitration agreement, but rather it shall be sufficient to mention the substance thereof so long as no alteration is made to its meaning."*³³⁶

³³² Union Supreme Court decision number 510 for the judicial year 27 issued on 28 January 2006

³³³ Which are consistent with Articles 23.2 and 12 of the Federal Arbitration Law

³³⁴ Dubai Court of Cassation Petition No. 88 of 2001

³³⁵ Replaced by Article 12 of the Federal Arbitration Law

³³⁶ Dubai Court of Cassation Decision number 88 for the year 2001 issued on 29 April 2001 - Civil

The court went on and held that:

“It is established from the award, which forms the subject matter of the present dispute that it included a summary of the arbitration clause referred to therein. Hence, the award is deemed to have satisfied the condition prescribed into Article 212.5 of the Civil Procedure Code³³⁷.”

The court found that the Court of Appeal’s judgment was issued in contradiction of the above since it concluded that the said award did not include a copy of the arbitration agreement.

Nullity related to failure to comply with the *principe de la contradiction* and due process

Article 212.1 of the Repealed Arbitration Chapter of the UAE CPC provides:

“The arbitrator shall issue his award without being bound by the procedural rules save as is provided for in this Chapter and the procedures relating to the summoning of the parties, the hearing of their arguments, and enabling them to submit their documents, but nevertheless it shall be permissible for the parties to agree on specific procedures for the arbitrator to follow”³³⁸.

The above article provides that the arbitral tribunal should call the litigant parties to attend before it in order to confront each other and hear their defenses, thus enabling them to submit their documents and arguments.

However, the DCC Judgment number 32 for 2009 established that the ultimate purpose of calling the litigant parties to appear before the tribunal is to achieve the “due process,” which is to enable the litigant parties to submit their pleadings and request. Therefore, it is not permitted to annul an arbitral award on the ground of procedural irregularities related to the absence of calling the litigant parties before the arbitrator unless the defect in this procedure is related to a defect in the due process and the “*principe de la contradiction*.”

Therefore, the Federal Arbitration Law was more specific in this regard, deleted the reference to calling the litigant parties, and included the reference to the “due process” of the arbitral proceedings. This provision is well established in Article 53 of the Federal Arbitration Law, which states that:

“An arbitral award can only be challenged by an action for setting aside before the Court or during the pendency of an application to confirm the award. The party seeking to set aside the award must establish any of the following circumstances...(d) that a party to the Arbitration fails to present its case because it was not given proper notice of the appointment of an Arbitrator or of the arbitral proceedings or because the Arbitral Tribunal breached due process or for any other reason beyond his control.”

Article 26 of the Federal Arbitration Law states that:

³³⁷ Which corresponds to Article 12 and 41.5 of the Federal Arbitration Law

³³⁸ Article 212.1 of the Repealed Arbitration Chapter of the UAE CPC, which is consistent with Articles 23.2 and 53.1(d) of the UAE Federal Arbitration Law

“The Parties shall be treated with equality and each party shall be given a full opportunity to present its case”

Article 23.2 of the Federal Arbitration Law states that:

“Where there is no agreement to follow specific procedures, the Arbitral Tribunal may adopt the procedures it considers appropriate, subject to the provisions of this Law and the absence of conflict with the fundamental principles of litigation and international agreements to which the State is a party”

The DCC further found that the nullity related to absence of the arbitrators call to the litigant parties to be present their respective cases before it is a “relative nullity” and not related to the public order and is established to the benefit of the litigant party who was not invited before the arbitral tribunal and the default rule is to have the arbitration procedures valid and correct unless the contrary is proven³³⁹.

The court went on and stated that:

“The ultimate purpose of the principe de la contradiction that and the rights to defense is to allow the litigant parties to submit their pleadings, requests and pleadings”

The court then concluded that “the documents did not prove that the arbitrator precluded the litigant parties from submitting any documents or pleadings; the arbitrator did not exceed to its powers conferred upon it in the arbitration agreement, understood the case and the requests submitted by the litigant parties and issued the arbitral award regarding each of these requests separately and did not breach any of the mandatory public order rules and the award did not have any of the defects set out in Article 216 of the CPC³⁴⁰, therefore, the award shall be safe from any claim for nullity”³⁴¹.

The DCC set aside two arbitral awards due to failure to satisfy the due process.

In 2009, the DCC overturned the Court of Appeal’s decision to ratify an arbitral award³⁴²; the grounds for the decision is the insufficient reasoning by the Court of Appeal since the Court of Appeal ratified an arbitral award based on a general statement which did not confront properly the claim for nullity invoked by the award debtor. More specifically, the judgment did not respond to the defense invoked by the award debtor, which was related to not providing them the equal opportunity to defend their case by accepting documents from the award creditor in the absence of their counsel and without providing a copy to their counsel.

³³⁹ DCC Judgment number 32 for 2009

³⁴⁰ Which includes grounds to set aside an arbitral award, this is replaced by Articles 53 of the Federal Arbitration Law

³⁴¹ Dubai Court of Cassation decision number 32 for the year 2009 Civil issued on 29 March 2009

³⁴² Dubai Court of Cassation Decision number 156 for the year 2009, Civil issued on 27 October 2009

In 2005, the DCC annulled an arbitration award due to the arbitrator's failure to provide an equal opportunity to the parties to submit their pleadings and defenses³⁴³. The court held that the principle of confrontation between the parties indicated in Article 212 of the CPC³⁴⁴ does not mean necessarily calling the parties to attend physically before the arbitrator, and neither does it mean that the parties must submit their pleadings. Rather, the arbitrator should enable the parties to submit their pleadings.

Similarly, DCC decision number 448 for 2003 annulled an arbitral award since the arbitrators did not have the required deliberations and confrontations between the litigant parties.

Further DCC 161 for 2003 [Exhibit 47] annulled an arbitration award since the arbitral award was issued based upon a document the arbitrator received from one of the litigant parties without submitting these documents to the other litigant party, therefore the court found that the disputed was not pleaded between the litigant parties and annulled the award.

Further, the following case laws establish that taking the hearing Minutes does not constitute a breach of due process:

1. DCC Petition No. 32 / 2009³⁴⁵ established that the arbitrator was not required to take minutes of the arbitration hearings unless he was obliged to do so at the request of the parties or under the rules of institutional arbitration³⁴⁶.
2. DCC 88 for 2001, Court of Cassation declined to overturn the Court of Appeal's judgment, the court found that the presence of the signatures of all arbitrators on the arbitration minutes is not a prerequisite for the validity of the award³⁴⁷.

Nullity related to parties' failure to refer specifically to the agreement to arbitrate

Typically, construction contracts work based on the tendering process, whereby the contractor or the developers issue the tender documents for the bidders to adhere to them in a systematic way that allows the developer to make a fair comparison between bidders. The bidder chosen, as a result of the tendering process, issues an acceptance letter or signs the tender documents. This is a common way of offer and acceptance in this industry, where many technical drawings and supporting exhibits are annexed to contracts.

In many of these cases, the tender documents refer to FIDIC conditions, which have a standard arbitration clause as a dispute resolution mechanism.

³⁴³ DCC 133 for 2004 dated 27 March 2005

³⁴⁴ Article 23.2 of the Federal Arbitration Law

³⁴⁵ Dubai Court of Cassation decision number 32 for the year 2009 issued on 29 March 2009

³⁴⁶ Same rule held by the Dubai Court of Cassation decision number 268 for the year 2007 issued on 19 February 2008

³⁴⁷ Dubai Court of Cassation Decision number 88 for the year 2001 issued on 29 April 2001 - Civil

The following case laws demonstrate that the UAE courts accepted the challenge to the respective arbitral tribunals' jurisdiction and rejected refused to recognize the respective arbitration clause based on acceptance letters of the tender documents issued by contractors, which do not specify the explicit acceptance for of the arbitration clause in the tender documents:

- ADCC 214 for 2014 commercial;
- DCC 261 and 264 for 2009 – commercial; and
- DCC 174 /2005 commercial dated 19 December 2005

The Supreme Courts in the above cases confirmed that in case if that reference to the tender documents is mere general reference without specifying the arbitration clause to prove the parties' specific knowledge of the arbitration clause included in this agreement, in such a case, the reference does not extend to the arbitration clause. As such, the arbitration clause shall not be considered as agreed upon consensually between the parties.

Therefore, the reference to an arbitration clause is not achieved unless such reference includes specificity to the arbitration clause in the document where the reference is made.

Importantly, the Supreme Courts in the above cases further confirmed that if that reference to the tender documents is a general reference without specifying the arbitration clause to prove the parties' specific knowledge of the arbitration clause included in the agreement, the reference does not extend to the arbitration clause and the arbitration shall not be considered to be agreed upon between the parties.

As such, the arbitration clause in these cases is null and void and the arbitral tribunal in these cases should not have jurisdiction, which makes the competent forum to prosecute such disputes is the national courts having jurisdiction of the matter, applying the jurisdictional rules in the absence of explicit choice by the parties.

Further discussion on this topic and the new principles set forth in the UAE Federal Arbitration Law shall be illustrated in Part 2, Title 1, Chapter 3, Section 2, § 5 of this thesis regarding the jurisdictional challenges of arbitral tribunals.

The necessity to sign terms of reference

For reasons of the exceptionality of arbitration as a dispute resolution forum, parties to an arbitration and the dispute referred to arbitration must be clear in order for an arbitral tribunal to understand and act upon the limits of their jurisdiction and power. This, in turn, enables the court, when ratifying the final award, to understand the agreement to arbitrate between the parties and in turn supervise and review the limits of the jurisdiction of the arbitral tribunal.

However, the discussion here is related to whether the agreement setting these boundaries should be drawn as a separate document, typically referred to as the Terms of Reference (ToR).

A further discussion could be raised concerning the circumstances where one of the parties has a jurisdictional challenge and decides not to sign the ToR.

As indicated before, the arbitral award must include the main content of the arbitration agreement in the arbitral award. Preferably, the UAE courts would prefer to see the full clauses of the contract related to arbitration inside the award.

The ToR could be prepared and filed by the litigant parties as a matter of practicability and convenience, even if the institutional rules do not provide for the signature of the ToR.

Article 203.3 of the UAE CPC states that:

*“The subject matter of the dispute must be defined in the arbitration instrument or during the trial of the action even if the arbitrators are empowered to effect a conciliation, failing which the arbitration shall be void.”*³⁴⁸

Article 215 of the same law provides:

*“The arbitrators' decision shall not be executed except if the court in which clerk's office the decision was deposited, has authenticated it, and that after looking into the decision and the arbitration document and verifying that there is no prohibition to execute it, and such court shall be authorized to amend the material errors in the arbitrators' decision according to the request of the concerned persons through the proceedings set for amending the arbitrations”*³⁴⁹.

Article 216 of the same law provides:

*“The litigant parties may request the nullity of the arbitrators' decision when the court examines its authentication and that shall be in the following circumstances: (a) If it has been delivered without an arbitration document or delivered according to a void arbitration document or a document that has been extinguished by the failure to observe the date or if the arbitrator has gone beyond the document's limits”*³⁵⁰.

The above articles mandate the existence of the “arbitration document”; this phrase in Arabic is unclear as to whether it means the ToR or any agreement to enter into arbitration whether it is part of an agreement or a standalone agreement.

As to the law, Article 203 and 215 of the UAE Code of Civil Procedure does not refer to terms of reference and the reference to and meaning of “arbitration instrument” remains unsettled under the UAE jurisprudence. In any event, Article 203 provides that, if the subject matter of the dispute is not defined in the arbitration

³⁴⁸ Article 203.3 of the Repealed Arbitration Chapter, which is not replaced by any Article in the Federal Arbitration Law

³⁴⁹ Article 215 of the UAE CPC (Article 52 of the Federal Arbitration Law)

³⁵⁰ Article 216.1(A) of the Repealed Arbitration Chapter of the UAE CPC, which is consistent with Article (53) 1(a) of the Federal Arbitration Law which provides as a ground for setting aside an award that “no Arbitration Agreement exists or such agreement is void or has lapsed under the law to which the Parties have subjected it or, failing any indication thereon, under this Law”

instrument, it may be defined during the course of the arbitration, which will occur by way of the exchange of pleadings, witness evidence and in the final award.

In frequent cases where a party intends to file one or more jurisdictional challenges, signing the terms of reference will risk of waiving their rights to file such challenges in the subsequent stages of the arbitration.

As to the applicable UAE law, it appears, prima facie, Article 203(3) refers to the Arabic term "Wathikat Attahkim" which, literally, can be indeed translated as "terms of reference."

However, Article 203(3) and 215 of the UAE Code of Civil Procedure is unclear as to the exact meaning of this term, but also as to its scope. Indeed, not only is this term legally undefined, but, more importantly, the underlying concept, as seemingly required by the lawmaker, may also not necessarily mean a formal document that would be labeled "terms of reference" as it is understood for instance under some other specific settings or institutional frameworks (such as the ICC).

Under the Federal Arbitration Law, the reference to "Wathikat Attahkim" has been eliminated and therefore, this confusion should not exist wherever the Federal Arbitration Law is applicable.

§ 1 Case laws on Terms of Reference

Dubai Court of Cassation decision number 40 for 2004 – commercial established that the “arbitration document” as referred to in Article 203 of the CPC is either the arbitration agreement or the arbitration clause that is part of an agreement. Therefore, this indicates that the arbitration document referred to in Article 203.3 of the CPC (which is the same reference made in Articles 215 and 216 of the same law) is not necessary to be signed as a standalone document or “terms of reference” - it can be substituted by the agreement to arbitrate in the agreement. This implies further, albeit not expressly stated in the jurisprudence, that any agreement to arbitrate even if outside the agreement and not the terms of reference can be sufficient to satisfy the “arbitration document” requirement under Articles 203, 215 and 216 of the CPC.

The judgment established that *“the description of the dispute that must be identified in the arbitration agreement or arbitration clause in the contract, failing which the arbitral award shall be annulled as per Article 203 for the CPC is the legal relationship which the dispute around it is subject to arbitration. Identifying such relationship shall be sufficient by itself to consider the arbitration agreement or arbitration clause in the contract valid even if it did not include the substance of the dispute which arose between the parties, which is subject to arbitration”*³⁵¹

As such, in a construction contract, it is sufficient to satisfy the requirements of Article 203.3 of the CPC to indicate in the arbitration agreement the names and addresses of the adversaries and indicate that the litigant parties entered into a contract for a sale of a property on a particular date, price to be paid, completion date of the property, general obligations and rights of the parties, and the specific disagreements arose between the parties with regards to the agreement.

³⁵¹ Dubai Court of Cassation Decision number 40 for the year 2004 commercial issued on 26 September 2004

DCC decision number 156 / 2009 [Exhibit 45] is more precise in this regard, it established that “it is established that it is permitted to agree to enter into arbitration agreements whether in the same document which includes the transaction that is subject to the dispute or in an independent document or in an arbitration agreement or a separate agreement. As long as the arbitration clause is incorporated in agreement, the arbitration deed or a separate arbitration agreement shall not be required for the validity of the arbitration proceedings”³⁵²

In a relatively recent decision, the ADCC decision number 467 for 2013 dated 10 March 2014 was the most evident decision in this regard, the decision differentiated between the following four terms:

First) The Arbitration clause: which is part of the main underlying contract, which is the basis for the dispute.

Second) The Arbitration agreement as in Article 203.3 of the CPC, (in Arabic musharatat al tahkeem): which is a subsequent agreement to a contract to refer a particular dispute to arbitration

Third) The Arbitration deed (in Arabic watheekat al tahkeem): which is simply either the arbitration clause or the arbitration agreement referred to above.

Fourth) Terms of Reference (in Arabic sak el tahkim), which the decision named it in English to avoid confusion: which is being written by the arbitrator in order to document the parties’ agreement, positions, relationship and other procedural matters before proceeding with the arbitration.

The judgment then discussed the need for the ToR as the judgment cited this term in English as well as in Arabic. The judgment discussed a common practice by lawyers trying to frustrate the proceedings by refusing to sign the ToR and then relying on the same issue when ratifying the award.

In typical circumstances, this argument should not succeed in the judiciary, it is clear as per Article 70 of the CTC that “who endeavors to deny what he did, his endeavor will turn against him.”³⁵³ However, this issue used to be discussed before the arbitral tribunals since the parties intend to be mindful on grounds for nullity under UAE law.

The judgment established clearly that the ToR should ideally be signed by both parties. However, if one of the parties refused to sign it then this act cannot cause any nullity that could be based on Article 216.1(a) of the CPC³⁵⁴, which only established nullity for rendering the award without an arbitration deed (which is by definition either the arbitration clause or the arbitration agreement, not the terms of reference).

Nevertheless, signing such an additional and formal document, to specify the procedures time-limit, applicable laws, language and so on, contributes to an efficient resolution of the cases, albeit not required by law.

³⁵² Dubai Court of Cassation Decision number 156 for the year 2009, Civil issued on 27 October 2009

³⁵³ Article 70 of the UAE CTC

³⁵⁴ Which is compatible with Article (53) 1(a) of the Federal Arbitration Law

Chapter 2: Summary of the Case Laws Confirming Setting Aside Arbitral awards in the UAE

After demonstrating the grounds to annul arbitral awards above, this chapter shall provide a summary of the most critical case laws that confirmed setting aside arbitral awards in the UAE. Each case law will be briefed with more emphasis on the specific ground found by the respective Supreme Court to set aside the award.

This chapter is intended to be a summary of the case laws rather than setting out the cases in detail. In case more details are required, additional details on the particular ground for nullity of arbitral awards in the UAE are included in the previous chapters.

Section 1 Case Laws Annulled Awards due to Lack of Capacity to Enter into Arbitration Agreements

The traditional approach adopted by the UAE Supreme Courts for the authority to enter into arbitration agreements is that if the General Manager of an LLC company does not enter into an arbitration agreement itself, then the authority to enter into an arbitration agreement on behalf of an LLC must be given expressly and specifically to the individual who signed the agreement to arbitrate; and this authority cannot, under the applicable laws, be deemed or assumed.

Where a signatory to an arbitration agreement does not have the requisite authority [Express authority] to sign the arbitration agreement in compliance with Article 203(4)³⁵⁵ of the UAE Civil Procedure Law, any such agreement purportedly reached is invalid. Any arbitral award rendered pursuant to such an invalid agreement would be at risk of annulment in accordance with Article 216 (1) (b)³⁵⁶ of the UAE Civil Procedure Law.

Article 203(4) of the UAE Civil Procedure Law provides:

“An agreement to arbitrate shall not be valid unless when made by the persons having the competency to the right for relinquishment of the litigated right”

In a consistent approach, Article 4.1 of the UAE Federal Arbitration Law, which states that:

³⁵⁵ Article 203(4) of the UAE Civil Procedure Law provides: *“An agreement to arbitrate shall not be valid unless when made by the persons having the competency to the right for relinquishment of the litigated right”*, which is consistent with Article 4.1 of the UAE Federal Arbitration Law which states that:

“An Arbitration Agreement may only be concluded, on pain of nullity, by a natural person having the legal capacity to dispose of his rights or on behalf of a juridical person by a representative with specific authority to arbitrate”

³⁵⁶ Which is relevant to Article 53.1(f) of the Federal Arbitration Law

"An Arbitration Agreement may only be concluded, on pain of nullity, by a natural person having the legal capacity to dispose of his rights or on behalf of a juridical person by a representative with specific authority to arbitrate"

The UAE law provides as a ground to annul arbitral awards defects in the capacity of the person signing the arbitration agreement. Article 53.1(b) of the Federal Arbitration Law provides as a ground to set aside or oppose enforcement of an arbitral award that:

"A party, at the time of conclusion of the Arbitration Agreement, was incompetent or under some incapacity under the law governing his capacity."

Further, Article 53.1(c) of the Federal Arbitration Law provides as a ground to set aside or oppose enforcement of an arbitral award that:

"A person does not have the legal capacity to dispose of the disputed right under the law governing his capacity, as provided for in Article 4 of this Law"

Both Articles 53.1(b) and 53.1(c) of the Federal Arbitration Law are relevant and similar to Article 216.1.b of the Repealed Arbitration Chapter of the CPC, which provides the following ground to annul arbitral awards:

"If the award was made by arbitrators appointed otherwise than in accordance with the law, or was issued by some of them without their being authorized to make an award in the absence of the others or if it was issued on the basis of an arbitration instrument that does not specify the subject matter of the dispute or was issued by a person not having capacity to make an arbitration agreement or an arbitrator not satisfying the requirements of the law"

If there is no capacity or authority, then any arbitration agreement is invalid and any award pursuant to such an invalid arbitration agreement cannot be ratified (Article 216.1 (b) of the UAE Civil Procedure Law)³⁵⁷.

Further, Article 4.1 of the Federal Arbitration Law defines *"the legal capacity to dispose of the disputed right"* referred to within Article 53.1(c) of the Federal Arbitration Law:

"An Arbitration Agreement may only be concluded, on pain of nullity, by a natural person having the legal capacity to dispose of his rights or on behalf of a juridical person by a representative with specific authority to arbitrate"

Furthermore, Article 58.2 of the UAE Civil Procedures Code states "It is not valid, without special authorization, the declaration of the right prosecuted, disclaiming it, conciliation or arbitration therein."

³⁵⁷ Which is consistent with Articles 53.1(b) and 53.1(c) of the Federal Arbitration Law

Setting aside arbitral awards based on grounds related to the incapacity of a party to enter into an arbitration agreement on behalf of the principal is the most significant ground to annul arbitral awards in the UAE.

This particular jurisdictional challenge shall be studied in more details in Part 2, Title 1 of this thesis.

Based on the above provisions, the following substantial number of case laws issued by the Abu Dhabi Court of Cassation and Dubai Court of Cassation and Union Supreme Court annulled arbitral awards for reasons related to the capacity to enter into arbitration agreements:

1. Capacity to agree to arbitrate: Abu Dhabi Court of Cassation issued decision number 465/2012 and annulled an arbitration clause in an agreement because the manager of a single proprietorship issued a general delegation that did not provide a specific delegation to enter into arbitration agreement, and as such, the arbitration clause was invalid and the arbitral process was stopped.
2. Capacity to agree to arbitrate: In a relatively recent decision, on 18 September 2016, the DCC issued decision number 613 for 2015, where the court annulled an arbitral award issued under the LCIA rules where the award creditor sought to enforce the arbitral award in Dubai based on the New York Convention of 1958. The court accepted the action for nullity brought by the award debtor and found that the signature to the contract that included the arbitration agreement differs from the signature of the managers of the LLC Company on their passports.
3. Capacity to agree to arbitrate: In DCC_Petition No. 51 of 2005³⁵⁸, [Exhibit 42], the judgment annulled an arbitral award and held that the general POA for a single proprietorship that does not specify the delegation to arbitrate could not delegate an agent to sign an agreement to arbitrate.

The court determined that:

“the contested judgment concluded that is empowered by the owner of the appellant foundation to manage the foundation therefore has the full authority of management including arbitration agreements; nevertheless managing a sole foundation does not vest the director thereof the competence to make arbitration agreements without authorization in this regard by the owner thereof or approval of this disposal; accordingly, the judgment misapplied the law, lacked causality which gives rise to cassation thereof without considering the remaining aspects of the present cassation”³⁵⁹

4. Capacity to agree to arbitration: ADCC decision number 351/2014³⁶⁰ annulled an arbitral award issued by the Abu Dhabi Commercial Conciliation and Arbitration Center (ADCCAC), the court relied on Article 58.2 of the UAE Civil Procedures Code which states:

“It is not valid, without special authorization, the declaration of the right prosecuted, disclaiming it, conciliation or arbitration therein.”

³⁵⁸ DCC Petition No. 51 of 2005 issued on 28 May 2005 [Exhibit 42].

³⁵⁹ *Ibid*

³⁶⁰ Abu Dhabi Court of Cassation decision number 351 for the year 2014 issued on 26 June 2014

The court determined that the arbitral award was issued against a public joint-stock company, where (as the court determined) even the Board of Directors does not possess the power to enter into arbitration agreements except where the Board is expressly authorized to do so or arbitration is part of the company objectives (which is almost an impossible case).

5. Capacity to agree to arbitration: the DCC decision number 603/2016 dated 9 April 2017 confirmed setting aside arbitral award number 1/2012 issued by Dubai International Arbitration Center (DIAC) on 15 September 2014 for AED 55 million. The court held that the signatory to the arbitration agreement is not competent to enter the company to arbitration since he was not the manager of the company nor authorized by the manager to enter into agreements to arbitrate.

6. Capacity to agree to arbitration: the DCC decision number 116/2016 dated 22 May 2016 set aside an arbitral award with respect to one of the two respondents since the signatory to the arbitration agreement was not the Chairman of the Board of Directors of the respondent, which was a private joint-stock company. In addition, the underlying agreement was not signed by two of the Board members jointly, as mandated by the memorandum of association of the company. The court relied upon Article 155 of the Commercial Companies Law, which reads:

“The Chairman of the company shall be the legal representative of the company before the Courts and in its relationships with third parties, unless the Articles of Association of the company provides that its General Manager shall be the representative of the company before the Courts and in its relationships with third parties”

7. Capacity to agree to arbitration: In DCC_Petition No. 51 of 2005³⁶¹, [Exhibit 42], the judgment annulled an arbitral award and held that the general POA for a single proprietorship that does not specify the delegation to arbitrate could not delegate an agent to sign an agreement to arbitrate.

The UAE Supreme Courts had taken the same position and set aside arbitral awards for reasons related to the capacity to agree to arbitrate; this position was confirmed by the following case laws:

8. Dubai Court of Cassation decision number 325 for 1993.
9. Dubai Court of Cassation decision number 460 for 1998
10. Dubai Court of Cassation decision number 91 for 1998
11. Union Supreme Court decision number 25 for 2001
12. Dubai Court of Cassation decision number 577 for 2003 dated 12 June 2004
13. Dubai Court of Cassation decision number 51/ 2003 Rights
14. Dubai Court of Cassation decision number 462/2002, judgment dated 02/03/2003
15. Dubai Court of Cassation decision number 230/ 2004 Commercial
16. Dubai Court of Cassation decision number 256 / 2004 Commercial

³⁶¹ DCC Petition No. 51 of 2005 issued on 28 May 2005 [Exhibit 42].

17. Dubai Court of Cassation decision number 209 for 2004, the court confirmed that the general POA is insufficient to enter into arbitration agreements, [Exhibit 43], the court held that:

“The contested judgment violated such provisions based on that the power of attorney issued to the first appellant by his father is a general power of attorney. Such power of attorney does not give the first appellant the right to arbitration as it is free of any special authorization concerning agreeing to arbitration, and the court finds no provisions set forth in such power of attorney regarding such private authorization that was mentioned in article 58/2 of the Civil Procedures Law. As the respondents do not issue the power of attorney, so they are not entitled to insist on the invalidity of arbitrator's award based on that the power of attorney does not give the first appellant the power to enter into the arbitration agreement. Therefore, the judgment misapplied the law and shall be rejected for such reason without the need to consider the remaining aspects of cassation”³⁶²

18. Dubai Court of Cassation decision number 51 for 2005, the court confirmed that the general POA is insufficient to enter into arbitration agreements

19. Dubai Court of Cassation Judgments number 164 for the year 2008 issued on 12 October 2008 [Exhibit 16]

20. Dubai Court of Cassation decision number 14 / 2008 Civil

21. Dubai Court of Cassation decision number 191 for 2009

22. Dubai Court of Cassation decision number 252 / 2010 Civil

23. Dubai Court of Cassation decision number 19 / 2010 Real Estate

24. Dubai Court of Cassation decision number 275 / 2010 Commercial

25. Dubai Court of Cassation decision number 102 / 2010 Real Estate

26. Dubai Court of Cassation decision number 190/2010 Civil

27. Union Supreme Court number 308 for 2011

28. Union Supreme Court decision number 179 for 2011

29. Abu Dhabi Court of Cassation decision number 465 for 2012

30. Dubai Court of Cassation decision number 532/2013 commercial

31. Abu Dhabi Court of Cassation decision number 352 for 2014

32. Dubai Court of Cassation decision number 263/2015 real estate

33. Dubai Court of Cassation decision number 382/2015 commercial

34. Dubai Court of Cassation decision number 613 for the year 2015 commercial issued on 18 September 2016

35. Dubai Court of Cassation decision number 137 for the year 2015 issued on 24 Feb 2016 Award (1) [Exhibit 39]

³⁶² Dubai Court of Cassation decision number 209 for the year 2004 issued on 20 March 2005 [Exhibit 43]

36. Dubai Court of Cassation decision number 137 for the year 2015 issued on 24 Feb 2016 Award (2) [Exhibit 39]

37. Dubai Court of Appeal in Case No. 371/203³⁶³ (decision was final and not challenged in Cassation), the court set aside the arbitral award on the following grounds *“(1) The lack of authority of one of the contract signatories to bind a public joint-stock company to arbitration, (2) the tribunal’s failure to sign both the reasoning and the dispositive sections of the award; and (3) the dissenting arbitrator’s refusal to sign the award”*³⁶⁴

Section 2 Case Laws Annulled Awards due to Exceeding Time limit

Unlike the UNCITRAL Model Law, both the UAE Repealed Arbitration Chapter and the Federal Arbitration Law provide that the expiry of the time-limit of rendering an award is a ground to set aside arbitral awards.

Article 210.1 of the CPC provides:

“If in the arbitration agreement the parties have not stipulated a time-limit for the judgment the arbitrator must pass judgment within six months from the date of the first hearing in the arbitration failing which it shall be permissible to any party to so wishes to bring the dispute before the courts or to continue with it before the courts if it has already been brought”

Article 42.1 of the Federal Arbitration Law states that:

“The Arbitral Tribunal shall issue a final award within the timeframe agreed by the Parties. If the parties fail to agree on a specific time-limit or method on rendering the final award, the award shall be issued within six months from the date of the first hearing of the Arbitration. The Arbitral Tribunal may extend the time for up to six additional months, unless the Parties agree to a longer extension ”

Despite none of the above provisions specifically providing for setting aside awards as a result of exceeding the time-limit, the UAE courts systematically treated exceeding the time-limit for rendering the final award as a ground for nullity on the basis of violation to the agreement between the parties, which impliedly includes the agreement to render the final award within the time-limit provided by the institutional rules, failing which the applicable procedural law.

The following case laws annulled arbitral awards on this ground.

³⁶³ Issued on 14 May 2014

³⁶⁴ UAE Court Annuls Award and Stresses Strict Compliance with Law Hassan Arab and Dalal Al Houti of Al Tamimi & Company, May 13, 2015, available online http://arbitrationblog.kluwerarbitration.com/2015/05/13/uae-court-annuls-award-and-stresses-strict-compliance-with-law/#_ftnref1

38. The Dubai Court of Cassation decision number 157 for 2009 [Exhibit 44] annulled an arbitral award that exceeded the six months' time-limit prescribed in the UAE Repealed Arbitration Chapter (as well as the Federal Arbitration Law). The award was issued after six months commenced from the date of the first hearing that the arbitrators need to call for within 30 days from their appointment. This shall apply regardless of whether any of the parties attended the hearing as long as the tribunal provided the parties the opportunity to attend and any of them fail to be present.

39. Union Supreme Court Decision number 71 for the Judicial Year 20 dated 12 December 1999

40. The Dubai Court of Cassation decision number 141 for 2006³⁶⁵ annulled an arbitral award due to exceeding time-limit for rendering the final award. Whilst the time-limit prescribed in the UAE CPC was extended by mutual agreement of the parties in two occasions, when the tribunal attempted to extend the third time-limit, one of the litigant parties (who subsequently was the non-prevailing party in the arbitration) opposed the extension. The court found that the third extension of the time-limit for rendering the award is a ground to set aside the award.

41. DCC 216 for 2005 dated 26 June 2006, annulled an arbitral award due to exceeding time-limit for rendering the final award; the award creditor argued that the award debtor did not pay his share of arbitrator's costs; however, the court found that this is not a valid ground for passing the time-limit and the award was nullified.

42. The DCC decision number 344 for 2009 annulled an arbitral award after ratifying the award by the Court of First Instance and Court of Appeal since the date of the first hearing was not indicated in the award. The court held that this error does not make it possible for the court to review whether the award was issued within the 6 months' time-limit or not.

43. DCC 400 for 2001, dated 16 February 2002, the DCC Annulled an arbitral award since it was not dated and, as such, the judge was unable to verify the time-limit.

The following substantial number of Cassation decision issued by the Abu Dhabi Court of Cassation and Dubai Court of Cassation and Union Supreme Court annulled arbitral awards for reasons related exceeding the time-limit for rendering the award:

44. DCC 9 for 1996 dated 13 July 1996, [Exhibit 41], the court found that:

"In this claim, the defendants had challenged the power of the arbitrator after the expiration of the time period. However, arbitration proceedings continued and there was no evidence the defendants had agreed to withdraw their argument that arbitration should be suspended as the time limit had expired. The extension was granted by the court after the initial period had ended, so this extension was not legitimate. The arbitral award was therefore null and void and the claimants were to bear costs and expenses"

³⁶⁵ Judgment dated 10 October 2006

45. DCC 141 for 2006 issued on 10 October 2006
46. DCC 263 for 2007 issued on 3 February 2008 [Exhibit
47. DCC decision 278 for 2008
48. Dubai Court of Cassation decision number 207 for the year 2009
49. DCC decision 128 for 2010
50. DCC decision 3 for 2010
51. DCC decision 573 for 2003
52. DCC decision 157 for 2009 [Exhibit 44]
53. DCC 216 for 2005 dated 26 June 2006
54. USC decision 640 for 2002
55. USC decision 43 for 2003
56. USC 301 for Judicial Year 20 dated 13 December 1998
57. DCC decision 128 for 2010
58. DCC decision 148 for 2008 dated commercial 16 September 2008

Section 3 Case Laws Annulled Awards for Other Grounds

§ 1 Jurisdictional grounds to set aside arbitral awards

In addition to the jurisdictional challenges to an arbitral tribunal due to the incapacity of a person to bind a company to arbitration set out in Section 1 of this Chapter, set out below are the most important case laws related to the remaining jurisdictional matters that caused nullity to arbitral awards in the UAE.

Recall from earlier chapters that the UAE court system is the regular and default forum for dispute resolution, and arbitration is considered the exceptional dispute resolution mechanism.

As per the UAE law, an agreement to arbitrate amounts to an effective waiver of a fundamental right to approach the UAE Courts when seeking the resolution of a dispute.

For that reason, parties choosing the UAE as the seat of their arbitration as well as arbitrators in general in the UAE seats must be mindful while deciding for the scope of their jurisdiction and to ensure not to exceed the scope that has been clearly and expressly agreed to be referred to arbitration.

Article 53.1(h) of the Federal Arbitration Law provides as a ground to set aside or oppose enforcement of an arbitral award any ruling by the arbitral tribunal beyond its jurisdiction and power. It states that “the award contains decisions on matters not falling within the terms of the submission to arbitration or beyond its scope.”

This is consistent with Article 216.1(a) of the Repealed Arbitration Chapter of the CPC, which provides as a ground to set aside or oppose enforcement of an arbitral award that “if the arbitrator exceeded the scope of the arbitration agreement.”³⁶⁶

The following are examples of the UAE Supreme Courts’ judgments with regards to arbitrational awards that were set aside due to reasons related to jurisdictional issues of arbitral tribunals.

Arbitration clause concluded by reference to a different document

Generally, the reference to an arbitration clause included in another document (such as tender documents or FIDIC conditions) shall not be enforceable under UAE law.

In broad terms and with few exceptions, any arbitration clause included in an exhibit to a contract where such exhibits are not signed by the parties shall not be enforceable under UAE law since it does not provide certainty of knowledge of the arbitration clause.

Parties having the above conditions are running a risk that their arbitration clause or any resulting arbitral award may not be enforceable.

The following three judgments refused to recognize arbitration clauses based on the acceptance letter of the tender documents issued by contractors, which do not specify the arbitration clause.

59. ADCC 214 for 2014 commercial &

60. DCC 261 and 264 for 2009 – commercial &

61. DCC 174 /2005 commercial dated 19 December 2005

62. The arbitration agreement in unsigned contract exhibits: In ADCC 20 for 2013, the court found that exhibits to the contract that included the arbitration clause were not signed by the parties and therefore the arbitral award was nullified. The court confirmed that “In case there are exhibits or schedules to an agreement, it is not necessary, as per the general rules, that both parties should sign them since it is sufficient that the agreement indicates that such exhibits and schedules are part of the agreement signed by both parties since these exhibits and schedules are merely detailed information for the conditions that were agreed upon between the parties. However, if the exhibits include an additional clause as the arbitration clause, this clause shall not be valid between the parties unless these exhibits are signed.”³⁶⁷

³⁶⁶ Which is compatible with Article (53) 1(a) of the Federal Arbitration Law

³⁶⁷ Abu Dhabi Court of Cassation judgment number 20 for the year 2013 commercial issued on 22 July 2013

63. The arbitration agreement in the bill of lading: DCC 87 for 2003³⁶⁸ annulled an arbitral award and established that in case the arbitration clause is indicated in the bill of lading in a small font which cannot be typically read by a reasonable person shall be invalid. This fact shall not be changed in case both companies are working into the marine transport, which frequently takes arbitration as a dispute resolution mechanism.

64. ADCC 718 for 2012 annulled an arbitral award, as the reference to the tender documents that include the arbitration clause did not specify the agreement to arbitrate.

Remaining Jurisdictional Issues

In addition to jurisdictional matters to an arbitral tribunal due to the incapacity of a person to bind a company to arbitration and jurisdictional matters related to the arbitration clause concluded by reference to another document or agreement, set out below are case laws on other jurisdictional matters that were used as grounds to set aside arbitral awards.

65. Piercing the corporate veil: DCC 277 for 2002 annulled an arbitral award since the award was issued against the holding company that was not a party to the arbitration agreement; the court found that the arbitral tribunal did not have jurisdiction with respect to the holding company.

66. Exceeding the scope of the arbitration agreement or the matters that have been submitted to arbitration in accordance with the arbitration agreement: USC decision 297 for Judicial Year 20³⁶⁹, whilst the arbitral tribunal in this case decided that it has jurisdiction to award interest, the court refused to award interest that was not agreed to be referred to arbitration. The court found that the scope of the arbitration agreement was limited to a specific part of the dispute and therefore the arbitral tribunal did not have jurisdiction with respect to the awarding interest.

67. Exceeding jurisdiction: DCC Petition No. 10 of 1995³⁷⁰: despite the tribunal upheld jurisdiction to the entire dispute, the Court of Cassation annulled the award since the arbitral tribunal exceeded its jurisdiction in part of the award. The court determined that if the arbitrators exceed the scope of the arbitration agreement in part of the award then the entire award shall be annulled as long as both parts are indivisibly related.

68. Exceeding the scope of the arbitration agreement: in ADCC decision 404/18 [Exhibit 52], the court partially set aside an award due to exceeding substantive jurisdiction by the arbitral tribunal with regards to the delay penalty. The court found that the delay penalty was not requested by the award creditor during the arbitral procedures and was not part of the submission to arbitration.

³⁶⁸ Judgment dated 10 May 2003 – Civil

³⁶⁹ Union Supreme Court decision number 297 for judicial year 20 issued on 14 May 2000

³⁷⁰ Dubai Court of Cassation Decision number 10 for the year 1995 issued on 8 October 1995

69. Referring the dispute to a wrong arbitration institution: In Dubai Court of Cassation decision number 138 for 2014³⁷¹, the court was reviewing a motion to ratify the arbitral award. The court dismissed the enforcement action and annulled the award, concluding that the agreement refers to the FIDIC Rules, which refers the arbitration to the ICC rules rather than DIAC arbitration. Therefore, the court determined that the arbitral tribunal constituted and prosecuted the arbitration pursuant to DIAC rules did not have jurisdiction to adjudicate the dispute.

70. Referring the dispute to a wrong arbitration institution: Similarly, the DCC 134/2018 dated 16 January 2018 confirmed setting aside DIAC award number 151/2009 since the arbitration center in the agreement was the ICC rather than the DIAC, this decision was confirmed by DCC 26 and 27/2015.

71. Reference to arbitration under the rules of the Dubai Chamber of Commerce: it is generally known that the Dubai International Arbitration Center (DIAC) is the arbitration body related to the Dubai Chamber of Commerce since the function of the Dubai Chamber of Commerce as an arbitration center stopped and replaced by DIAC. That said, certain parties continue to refer to the arbitration under the Dubai Chamber of Commerce. The Dubai Court of Cassation held that such clauses are invalid since the function of the Dubai Chamber of Commerce as an arbitration center is stopped. In this recent case law, DCC decision number 806 /2017 dated 11 October 2017, the court set aside an arbitral award due to the nullity of the arbitration clause that referred to the Dubai Chamber of Commerce rather than the DIAC.

72. No domicile in the UAE (Award 1): The DCC 156/2013 (Construction Company International (CCI) v Republic of Sudan) decided that the aware creditor, a French company, could not enforce a foreign award in the UAE against the Republic of Sudan as neither party was domiciled in the UAE, which is a requirement as per the UAE CPC³⁷². Commentators argue that *“this decision, like a number of other cases that preceded it, shows that even though the UAE has ratified the New York Convention the enforcement of foreign awards remains a risky business.”*³⁷³

73. No domicile in the UAE (Award 2): The DCC 156/2013 decided that the aware creditor, a French company, could not enforce a foreign award in the UAE against a Sudanese company as neither party was domiciled in the UAE.

³⁷¹ Judgment dated 9 July 2014 – Commercial

³⁷² Global Arbitration Review - Arbitration News, Features, and Reviews. The European, Middle Eastern and African Arbitration Review 2016 by Ian Clarke, Anna Gee, Charles Lilley and Polly Lockhart of Berwin Leighton Paisner LLP, 19 October 2015, <https://globalarbitrationreview.com/insight/the-european-middle-eastern-and-african-arbitration-review-2016/1036963/united-arab-emirates>

³⁷³ Enforcement of Arbitral Awards in The UAE Courts by Sanjay Patel, available online:

<https://www.adjudication.org/resources/articles/enforcement-arbitral-awards-uae-courts>

74. Pre-arbitration procedures: DCC decision number 53 for the year 2011³⁷⁴ annulled DIAC award due to failure of the claimant to comply with pre-arbitration requirements and consult with the project consultant (the engineer), therefore, the court found that the arbitral tribunal violated the arbitration agreement by prosecuting the action against the explicit agreement of the parties. The court determined that the jurisdiction of the arbitral tribunal shall be established after the satisfaction of the pre-arbitration procedures.

75. Pre-arbitration procedures: in a similar decision to DCC 53 for the year 2011³⁷⁵, in DCC decision 188 for the year 2012³⁷⁶, the DCC held that an arbitral award issued under the auspices of DIAC should be set aside for failure to satisfy pre-arbitration requisites.³⁷⁷

76. In DCC decision 188 for the year 2012³⁷⁸, the Dubai Court of Cassation held that an arbitral award issued under the auspices of DIAC should be set aside for failure to satisfy pre-arbitration requisites³⁷⁹

77. Commercial agency Disputes: ADCC Petition No. 814 of 2011³⁸⁰ set aside an arbitral award and confirmed that commercial agency agreements disputes cannot be resolved in arbitration and that arbitral tribunals are not competent to adjudicate such disputes.

78. No domicile for the Defendant: DCC Number of 2013 – Civil appeal: The Dubai Court of Cassation refused to enforce an ICC award seated in Paris. The Court held that the Dubai Courts did not have jurisdiction to hear this motion because the Sudanese Ministry of Irrigation (the award debtor) did not have a domicile or place of residence in the UAE, and neither was the arbitration related to any obligation carried out in the UAE.

79. Unsigned arbitration clause within standard documents: in a case from 2014, the DCC considered a signed contract included unsigned standard terms and conditions document that incorporated an agreement to

³⁷⁴ Judgment dated 7 December 2011

³⁷⁵ Judgment dated 7 December 2011

³⁷⁶ Judgment dated 9 October 2012

³⁷⁷ Recent Rulings on Arbitration by Dubai Courts, by Hassan Arab, Al Tamimi & Co., available online <https://www.tamimi.com/law-update-articles/recent-rulings-on-arbitration-by-the-dubai-courts/>

³⁷⁸ Judgment dated 9 October 2012

³⁷⁹ Recent Rulings on Arbitration by Dubai Courts, by Hassan Arab, Al Tamimi & Co., available online <https://www.tamimi.com/law-update-articles/recent-rulings-on-arbitration-by-the-dubai-courts/>

³⁸⁰ issued on 21 December 2011 – Commercial

arbitrate. The court held that the validity was established by the parties' signatures – initialing documents was not sufficient³⁸¹.

80. In DCC decision number 364 for the year 2017³⁸², the court annulled an arbitral award partially due to the awarding of legal fees for legal counseling. The court held that the DIAC rules do not provide for awarding counsel fees and such costs should not be awarded unless expressly agreed between the parties to do so. The counsel fees should be distinguished from the arbitration center fees and the costs related to experts appointed by the tribunal, which can be awarded in the absence of agreement between the parties, as decided by the court.

81. In DCC 282/2012, the Dubai Court of Cassation annulled a costs award made by a DIAC arbitral tribunal, the grounds for annulment was that the DIAC arbitration rules did not grant tribunals the jurisdiction to award legal costs. The court held that the awards on costs made by arbitral tribunals under the auspices of the Dubai International Arbitration Center would not be enforceable unless the parties expressly agreed to that, failing which, the award on cost shall be null and void.³⁸³

82. Also, in DCC 608 for the year 2016 dated 26 February 2017, the DCC set aside partially an arbitral award due to the awarding of counsel fees (the court called it in English “legal costs”) since the DIAC arbitration rules do not permit granting such costs. The parties did not agree to award, meanwhile, the parties did not agree for awarding counsel fees in the agreement to arbitrate.

83. In ADCC 193/1999 dated 25 April 1999 [Exhibit 38], the court set aside an arbitral award since the arbitrator exceeded his substantive jurisdiction. While the arbitrator had jurisdiction to appoint a liquidator, the arbitrator upheld jurisdiction on ceasing the liquidator's work, which was a matter outside the arbitrator's jurisdiction. The court held that:

“The appointment of a liquidator did fall within the jurisdiction of an arbitrator; however, an arbitrator did not have the jurisdiction to suspend the work of the liquidator as this was a matter only for the court to decide. The arbitrator's jurisdiction had ceased at the point the award was delivered, therefore, any objection relating to the award had become the jurisdiction of the court and not the arbitrator.”³⁸⁴

³⁸¹ The European, Middle Eastern and African Arbitration Review 2016 by Ian Clarke, Anna Gee, Charles Lilley and Polly Lockhart of Berwin Leighton Paisner LLP, 19 October 2015, <https://globalarbitrationreview.com/insight/the-european-middle-eastern-and-african-arbitration-review-2016/1036963/united-arab-emirates>

³⁸² Commercial dispute dated 20 August 2017

³⁸³ Enforcement of Arbitral Awards in The UAE Courts by Sanjay Patel, available online <https://www.adjudication.org/resources/articles/enforcement-arbitral-awards-uae-courts>

³⁸⁴ Abu Dhabi Court of Cassation decision number 193 for the year 1999 issued on 25 April 1999, translated by Lexis Middle East

84. In DCC 17/2001 [Exhibit 50], the court set aside a foreign arbitral award before the UAE ratifies the New York Convention in 2006, the court found that:

“The UAE did not have an agreement in place with the UK regarding the enforcement of foreign awards; the court had to return to Article 235 and its provisions regarding similarities between the UK and UAE in enforcing foreign awards. The claimant did not submit any evidence to show that conditions of enforcement of the UAE judgments in the UK were similar to those in the UAE in this respect. The lower courts were therefore correct in their judgments and the claimant's claim was rejected.”³⁸⁵

The court therefore rejected to enforce the award based on Article 235 (1) of the CPC, which provides that:

“An order may be made for the enforcement in the UAE of judgments and orders made in a foreign country on the same conditions laid down in the law of that country for the execution of judgments and orders issued in the UAE”

85. In a similar judgment, the USC decision number 764/2005 [Exhibit 51] set aside a foreign arbitral award, again before the UAE accedes to the New York Convention. the court found that the subject award was not enforceable and incontestable in the country of origin (which was France), this position was contrary to the mutual treaty between the UAE and France applicable at that time, the court held that:

“Said papers did not provide any evidence proving that the arbitral award is enforceable and incontestable in the country of origin; thus, the lawsuit of the appellant on the recognition of the arbitral award, which aims at the ratification thereof shall be rejected for the non-fulfillment thereby of the conditions imposed by the agreement on Judicial Cooperation, Recognition and Enforcement of Judgments ... between the government of the UAE State and the government of the Republic of France mentioned above. Whereas the contested judgment adjudicated the rejection of the lawsuit of the appellant, thus it shall be deemed as having reached a valid conclusion - regardless of the error thereof in relying on the provisions of Articles 235 and 236 of Federal Law No. 11/1992, hence the objection thereto shall be deemed invalid and therefore rejected”

§ 2 Arbitral awards annulled due to issues violations of the *principe de la contradiction*, right of defense and due process

Due process, *principe de la contradiction*, equality between the parties, giving each party a reasonable opportunity to state its views are important procedural matters related to the fairness and integrity of the arbitration process. Set out below are the case laws that set aside arbitral awards for reasons related to violations of these principles.

86. DCC 156 for 2009 [Exhibit 45]: the DCC overturned the Court of Appeal's decision to ratify an arbitral award due to the Court of Appeal's failure to respond to the defense advanced by the award debtor relating to the arbitral tribunal's failure to provide such party an equal opportunity to defend its case by accepting

³⁸⁵ Dubai Court of Cassation decision number 17 for the year 2001 issued on 10 March 2001 [Exhibit 50]

documents from the award creditor in the absence of the award debtor's counsel and without providing a copy to its counsel.

87. DCC 133 for 2004³⁸⁶ annulled an arbitral award due to the arbitrator's failure to provide an equal opportunity to the parties to submit their pleadings and defenses. The court confirmed that the *principe de la contradiction* indicated in Article 212 of the CPC³⁸⁷ does not mean necessarily calling the parties to attend before in person before the arbitral tribunal and neither does it mean that the parties must submit their pleadings. Rather, the arbitrator should enable the parties to submit their pleadings and defenses and provide the parties with an equal opportunity to do so.

88. DCC decision number 448 for 2003 annulled an arbitral award since the arbitrators did not have the required deliberations and confrontations between the litigant parties.

89. DCC 161 for 2003 [Exhibit 47] annulled an arbitral award due to the reason that the arbitral award was issued based upon a document that was received from one of the litigant parties without presenting this document to the other litigant party and providing it an equal right to defense. Therefore, the court found that the arbitral tribunal violated due process and the principle of granting the parties the right to be heard. As such, the award was annulled. The court determined that:

"It was proven by the said session minutes that the respondent did not submit any document and the document in which the plaintiff requests the arbitrator to grant him the said amount was included in the documents attached to the arbitrator's award and it was written therein that such document was surrendered on 18/10/2001 and the plaintiff did not advance the document as an argument until the arbitrator facsimiled on 26/11/2001 after one month from the issue of the award as shown in the fax message send by the arbitrator and included in the plaintiff's document folder, i.e. after the issue of the arbitrator's award on 26/11/2001.

*The document included a request from the original plaintiff (the appellant) to compensate it of the claimed amount for being ejected from the field. The original defendant- counter claimant (the respondent) did not know about the said request until the issue of the arbitrator's award in a date subsequent to the award. The arbitrator has based its award on the said document included the requests which the counterparty did not confront; which makes the arbitrator's award in question erred by violating the principle of confrontation and render it null and void"*³⁸⁸

90. The Dubai Court of Appeal (by a final decision not challenged before Cassation) set aside an arbitral award because the arbitrator failed to observe the adversarial principle ("principe du contradictoire"). The court found that the arbitrator should have given the award debtor the opportunity to present its case, which was

³⁸⁶ Dated 27 March 2005

³⁸⁷ Which is consistent with Article 23.2 of the Federal Arbitration Law

³⁸⁸ Dubai Court of Cassation decision number 161 for the year 2003 civil issued on 16 April 2003 [Exhibit 47]

not the case since the date on which the award debtor was officially notified of the proceedings was on 27 December 2011 while the award was issued on 6 January 2012 (i.e. within 10 days' period)³⁸⁹

91. DCC decision number 21 for 2003 annulled an arbitral award on grounds related to the absence of the right of defense for one of the parties before the arbitral tribunal. The court determined that "The provisions set forth in sub-Articles 1 and 2 of Article 212.1 of the CPC (Article 23.2 of the Federal Arbitration Law) that, unless the parties to an arbitration agree for certain procedures to the proceedings, the arbitrator needs before issuing the arbitral award to follow the procedures stipulated in the CPC related to calling the litigant parties to attend before him and hearing their arguments and defenses and enabling them to submit their pleadings and documents, whether the arbitrator was obliged to the rule of law or authorized for amiable compositeur" ³⁹⁰

92. In DCC 472/2014 (Real Estate), an arbitral award was set aside based on the arbitrator failed to allow the Defendant to submit documents relating directly to its defense at a hearing, despite the proceedings being ongoing. By failing to adhere to a procedural requirement that each party shall have the opportunity while the proceedings are ongoing (before closing proceedings to issue the Final Award), the arbitral award was subject to nullification³⁹¹.

93. Arbitrators' deliberation: USC decision number 64 for 1999 annulled an arbitral award for several reasons including that there is no evidence that deliberations between the arbitral tribunal members took place, which is an error in the procedures as the court determined.

94. Arbitrators' Deliberation: USC 556/2005 annulled an arbitral award for several reasons including that there is no evidence that deliberations between the tribunal took place, which is an error in procedure. The court established that deliberations are a condition for the validity of the arbitral award and its relation to public order and as a condition of validity of deliberations. The court held that deliberation between the tribunal members should be conducted in confidence between all the arbitral tribunal and deliberations shall not be permitted unless they are between the arbitrators who heard the pleadings, failing which, the award shall be void.

§ 3 Annulment related to public order considerations

The only Articles in the UAE law that define issues related to the public order are the following:

³⁸⁹ Dubai Court of Appeal overrules First instance Court's ratification of a DIAC award for a fundamental breach of due process by Motei & Associates, <https://www.motei.com/success-stories/dubai-court-of-appeal-overrules-a-decision-rendered-by-the-first-instance-court/>

³⁹⁰ Dubai Court of Cassation decision number 21 for the year 2003 Civil, issued on 13 April 2003

³⁹¹ Challenging an Arbitral award by Dr. Reyadh Al Kabban, *managing director of Al Kabban & Associates*; https://www.lexismiddleeast.com/magazine/TheOath/2015_September_28/

First, Article 3 of the UAE Civil Transactions Code, which states that:

"Public order shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to sovereignty, freedom of trade, the circulation of wealth, rules of private ownership and the other rules and foundations upon which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Shari'ah"

Second, Article 409 of the Federal Penal Code, which provides:

"Any natural person who deals in usury with another natural person in any civil or commercial transaction shall be punished with imprisonment for no less than three months and with a fine of no less than 2,000 Dirhams.

This shall include any terms or conditions implying any express or implicit interest, commission or benefit of any form by the creditor, when it is established that such interest, commission or benefit does not correspond to any lawful benefit or service rendered by the creditor. Such implicit debt or interest may be established by any means."³⁹²

Public order rules are not limited to these provisions of law, but also related to the rulings of the Supreme Courts, which define public order matters.

The following case laws confirmed setting aside arbitral awards based on public policy grounds:

95. During 2012, Clyde and Co. reported that the Dubai Court of Cassation had nullified three DIAC arbitral awards on the basis that those awards were contrary to public policy (Award 1).³⁹³

96. During 2012, Clyde and Co. reported that the Dubai Court of Cassation had nullified three DIAC arbitral awards on the basis that those awards were contrary to public policy (Award 2).³⁹⁴

97. During 2012, Clyde and Co. reported that the Dubai Court of Cassation had nullified three DIAC arbitral awards on the basis that those awards were contrary to public policy (Award 3).³⁹⁵

³⁹² Article 409 of the Federal Law No. 7 of 2016 ("the UAE Penal Code")

³⁹³ Clyde & Co Succeeded in Nullifying DIAC Arbitral Awards Relating to Article 3 Of Law 13 Of 2008 Nassif BouMalhab and Susie Abdel-Nabi of Clyde and Co. Dubai, available online:

<http://www.mondaq.com/x/173664/Property+Litigation/Clyde+Co+Succeeded+In+Nullifying+DIAC+Arbitral+Awards+Relating+To+Article+3+Of+Law+13+Of+2008>

³⁹⁴ *Ibid*

³⁹⁵ *Ibid*

98. In DCC 72/2007 Civil dated 10 June 2007, the DCC annulled an arbitral award and found that the securities market regulations should not mandate arbitration as a compulsory dispute resolution forum, which contradicts with the arbitration as a consensual process where the parties need to enter into it by their free will.

99. In ADCC 554 for 2008, the judgment annulled an arbitral award since it was based on the Abu Dhabi securities market regulations that mandate the arbitration as a dispute resolution, which contradicts with the arbitration as a consensual process where the parties need to enter into it by their free will.

100. The same rule above was applied in USC 640 for 2009 [Exhibit 46].

101. In USC 676/2009 dated 28 October 2009 [Exhibit 40], the court set aside an arbitral award and found that:

*“The Securities' Commissioner Decision referred to above was illegitimate and in violation of the legislative processes and hierarchies; noting that the essence of arbitration was the parties' autonomy and their voluntary intent to proceed with their disputes to arbitration; so any mechanism that compels those parties to arbitrate their disputes against their will is in violation of the law. As such, the Court affirmed the appeal; noting that arbitration should always arise from a written agreement as required by Article 216 of Federal Law No. 11/1992”*³⁹⁶

As such, the Court of Cassation found the Court of First Instance's decision not to uphold the Respondent's petition was correct.

102. Dubai Court of Cassation decision number 14/2012, Real Estate, Baiti Real Estate Development v. Dynasty Zarooni Inc., Award 1, Interim registration law [Exhibit 37]

103. Dubai Court of Cassation decision number 14/2012, Real Estate, Baiti Real Estate Development v. Dynasty Zarooni Inc., Award 2

104. Dubai Court of Cassation decision number 14/2012, Real Estate, Baiti Real Estate Development v. Dynasty Zarooni Inc., Award 3

In DCC Petition No. 14 of 2012 issued on 16 September 2012, the court determined that the rules pertaining to the registration of property in the Interim Real Estate Register in the Emirate of Dubai are related to public order. As such, any dispute related to this matter is not arbitrable and is subject to the jurisdiction of the national courts.

³⁹⁶ Union Supreme Court decision number 676 for the year 2009 issued on 28 October 2009 [Exhibit 40]

105. In DCC 190/2011, the court set aside an arbitral award and determined that the rules pertaining to the registration of property in the Interim Real Estate Register in the Emirate of Dubai are public order matters and could not be litigated within the jurisdiction of arbitral tribunals.³⁹⁷

106. In DCC 320/2014, the court annulled the entire award rather than just that section in which the Tribunal had exceeded its jurisdiction since the tribunal dealt with an issue concerning registration of properties under Article 3 of Dubai Law 13 of 2008, which is an issue of public policy not capable of being settled in arbitration.³⁹⁸

107. In Dubai Court of Cassation Decisions in Case No. 180 of 2011³⁹⁹, the court annulled the award on public policy ground. The court found that an arbitral award annulling the sale and purchase agreement due to a party's failure to register the property in the Interim Register unit as required by the Interim Registration Law in Dubai, in particular, Article 3.2 of Law No. 13 of 2008 is null and void.

108. In Dubai Court of Cassation Petition No. 16 of 2012, the court annulled the award, finding that an arbitral award annulling a property sale agreement due to a party's failure to register the property within the time frame prescribed by Article 3.2 of Law No. 13 of 2008 regulating the Interim Real Estate Register in Dubai should be annulled on the grounds that it concerned a matter related to public policy.

§ 4 Annulment related to Procedural Irregularities

Arbitral tribunals seated in the UAE should not follow the UAE CPC but instead follow the agreement of the parties, failing which, the procedures the tribunal considers appropriate, subject to the provisions of the Repealed Arbitration Chapter or the Federal Arbitration Law, as applicable.

According to the UAE CPC *"The arbitrator shall issue the arbitral award without being bound by the procedural rules save as is provided for in this Chapter and the procedures relating to the summoning of the parties, the hearing of their arguments, and enabling them to submit their documents, but nevertheless it shall be permissible for the parties to agree on specific procedures for the arbitrator to follow"*⁴⁰⁰.

Article 23.2 of the Federal Arbitration Law provides:

³⁹⁷ Arbitral awards vs Public Order by James O Wilson published on December 2017, available online <https://www.stalawfirm.com/en/blogs/view/arbitration-award-vs-public-order.html>

³⁹⁸ Dubai Court Judgment Concerning Severability and Public Policy in Arbitral Awards by Dr. Hassan Arab - Partner, Dispute Resolution in Al Tamimi and Co, available online <https://www.tamimi.com/law-update-articles/dubai-court-judgment-concerning-severability-and-public-policy-in-arbitral-awards/>

³⁹⁹ issued on 12 February 2012

⁴⁰⁰ Article 212.1 of the Repealed Arbitration Chapter of the UAE CPC, which is consistent with Articles 23.2 and 53.1(d) of the UAE Federal Arbitration Law

“Where there is no agreement to follow specific procedures, the Arbitral Tribunal may adopt the procedures it considers appropriate, subject to the provisions of this Law and the absence of conflict with the fundamental principles of litigation and international agreements to which the State is a party”

Set out below are the most important case laws that annulled arbitral awards due to procedural irregularities, whether such procedures are contrary to the agreement of the parties or contrary to the provisions of the Repealed Arbitration Chapter.

109. Oath Formula: In decision number 503 of 2003, (Bechtel) [Exhibit 24], the Dubai Court of Cassation set aside an arbitral since arbitral tribunal failed to adopt the formula of oath prescribed in the UAE law. The Court determined that witnesses summoned during the arbitral proceedings did not swear an oath at all since the arbitrator informed the witness “I have to inform you as a witness that you are under the obligation to say the truth, failing so; you might have serious consequences as a result. Are you aware of that? The witness confirmed.”⁴⁰¹

110. Taking an oath: Petition to Cassation No. 322/2004, dated 11 April 2005, the court found that the witness did not swear an oath at all and decided to set aside the award.

111. Copy (content) of the arbitration agreement: in DCC 173 for 1996⁴⁰², the court annulled an arbitral award due to the arbitrator’s failure to exhibit a copy of the arbitration agreement even when a copy of the arbitration agreement was submitted separately to the court with the motion to ratify the award. The court reasoned that the arbitral award should include, in itself, all the documents related to it.

112. Copy (content) of the agreement to arbitrate: in USC 510 the court annulled an arbitral award since a copy of the arbitration agreement (or its content) was not referred to in the award, even if the award refers to the arbitration agreement in the pleadings submitted by one of the litigant parties and even if the arbitration agreement was submitted at the beginning of the proceedings.

113. Copy (content) of the agreement to arbitrate: similarly, ADCC 578/2011 dated 15 May 2012 confirmed the setting aside of an arbitral award since the content of the arbitration agreement was not referred to in the award. The challenge before Cassation was rejected since the decision of the Court of First Instance cannot be appealed as the arbitrator was authorized as amiable compositeur.

114. Failure to sign all pages of the award: The Dubai Court of Cassation Decision number 233 for the year 2007 confirmed setting aside an award due to the arbitral tribunal’s failure to sign both the dispositive part as well as the reasoning part of the award. The court concluded that *“The Court considers that even if the award had been signed by all the arbitrators, the fact that the dispositive part was separate from the pages including the grounds*

⁴⁰¹ Dubai Cassation Petition 503/2003 issued on 15 May 2004, International Bechtel Co. Ltd. v. Department of Civil Aviation of the Government of Dubai [Exhibit 24]

⁴⁰² Dubai Court of Cassation Decision number 173 for the year 1996 issued on 16 March 1997

of the award necessitated that the arbitrators sign all the pages containing the grounds, in addition to the last page containing the dispositive part."⁴⁰³

115. Failure to sign all pages of the award: The same principle was confirmed by DCC 391 for the year 2010 dated 26 October 2011, which confirmed the setting aside of the arbitral award dated 6 December 2009 due to the arbitrators' failure to sign both the dispositive part and the reasoning of the award.

116. Copy (content) of the agreement to arbitrate: in DCC 328 for 2002, the court annulled an arbitral award because a copy of the arbitration agreement (or its content) was not referred to in the award even though the award refers to the arbitration agreement in the pleadings submitted by one of the litigant parties and even though the arbitration agreement was submitted at the beginning of the proceedings.

117. Impartiality of an arbitrator: in ADCC 980 for 2010, the ADCC annulled an arbitral award issued by non-institutional arbitration, where the award debtor claimed that the prevailing party had nominated an arbitrator that was employed by the prevailing party's counsel's office. The award debtor claimed that it came to know this fact after the issuance of the final award on the case. The court granted this request, annulled the award, and determined that the independence and impartiality of arbitrators is a public policy matter that can cause the setting aside of the award, even if none of the parties invoked or claimed nullity of the award.

118. Failure of the arbitral tribunal to notify the party: in a recent decision, the Dubai Court of Cassation decision number 84/2016 dated 25 December 2016 set aside an arbitral award since one of the parties failed to participate in the arbitration but the arbitral tribunal failed to notify this party of the commencement of the arbitral proceedings. It appears that the arbitral tribunal assumed such knowledge and did not proceed with the formalistic procedures of notification. Therefore, the award was set aside by the DCC.

119. Relying on the witness testimony of a party's director: DLA Pipers referred to a decision by the Dubai Court of First Instance, which set aside an arbitral award due to the arbitral tribunal's reliance on the witness testimony issued by the award creditor's director. The court found that the arbitral tribunal's acceptance and reliance on this testimony a serious irregularity. The Dubai Court of Cassation agreed with this finding but overturned the decision since it was premature for the award debtor to raise an action for annulment. The court found that the award debtor should have waited until the award creditor raises an enforcement action in order to resist it by claiming nullity⁴⁰⁴.

120. Appointment of an arbitrator: USC Petition No. 206, of the 27th Judicial Year issued on 27 December 2005 annulled an arbitral award issued by ADCCAC since the Center decided on the choice of an arbitrator rather than

⁴⁰³ Dubai Court of Cassation Decision number 233 for the year 2007 - Civil - issued on 13 January 2008

⁴⁰⁴ Court of Cassation confirms proceedings to set aside Dubai-seated awards cannot be commenced by the debtor, by Charlotte Leith, Sam Stevens and Henry Quinlan of DLA Pipers, available online <https://www.dlapiper.com/en/dubai/insights/publications/2017/04/dubai-awards-cannot-be-commenced/>

the court having jurisdiction to adjudicate the original, despite the fact that an arbitration clause did not exist. There is an apparent contradiction here between the approach of the DCC and the USC⁴⁰⁵.

121. Appointment of an arbitrator: DCC Petition No. 175 of 1993 annulled an arbitral award since the arbitrator was selected by the court that does not have jurisdiction to adjudicate the original dispute, in the absence of an arbitration agreement in accordance with Article 204.1 of the CPC (Article 13 of the Federal Arbitration Law). In this case, the English courts appointed the arbitral tribunal while the agreement did not specify any mechanism for the choice of the arbitrators, the DCC found that it should have been seized with the appointment of the arbitrators (rather than the English Courts) since the contract was substantially performed in Dubai.

122. Failure to suspend the proceedings: the DCC 75/2008⁴⁰⁶ annulled an arbitral award under the DIAC Rules since the arbitrator continued to take part of the proceedings despite having a challenge against him by the award debtor.

The judgment established that the arbitrator has an obligation to suspend proceedings until a judgment dismissing the recusal motion is issued, even if the recusal motion is submitted after the expiry of the relevant period for rendering an award. This rule is now modified by Article 15.3 of the Federal Arbitration Law.

123. Union Supreme Court decision number 556 for Judicial Year 24 annulled an arbitral award based on the ground that one of the arbitrators departed from the UAE and did not attend the last hearing session⁴⁰⁷.

124. Formal requirements of decisions interpreting an award: In ADCC Petition No. 296 of 2009⁴⁰⁸, the Abu Dhabi Court of Cassation annulled an arbitral award, as the supplementary award that interprets the original award did not satisfy the formal requirements including the pleading sessions, names of the parties and so on. Despite the original arbitral award being ratified by the Abu Dhabi Court of First Instance, Court of Appeal and the Court of Cassation, the supplemental arbitral award issued upon the request of the Execution judge (who does not have the jurisdiction in the first place to request a supplemental award) was annulled since the court regarded it as is part of the arbitral award and therefore it must comply with the requirements thereto. The court determined that this supplementary award must be issued in the statutory form prescribed for arbitral awards, stating the issuing tribunal, the date and place of issue and the names of the participating panel of arbitrators. The decision must be issued in writing, signed and must state the first names of the litigant parties, their address, and a summary of the parties' requests and the relief sought.

⁴⁰⁵ Position of USC: USC Petition No. 206 of the 27th Judicial Year issued on 27 December 2005

⁴⁰⁶ Dubai Court of Cassation judgment number 75 for the year 2008 – commercial – dated 19 January 2009 [Exhibit 35]

⁴⁰⁷ Union Supreme Court decision number 556 for judicial year 24 issued on 19 April 2005

⁴⁰⁸ issued on 27 May 2009

125. Translation: USC decision number 20 for Judicial Year 20 dated 12 December 1999, the court annulled an arbitral award due to unavailability of the Arabic translation of the award, and further the arbitral award was annulled due to exceeding the time-limit.

126. Right of appeal: DCC Petition No. 186 of 1996⁴⁰⁹ refused to enforce an arbitral award due to the Court of Appeal's judgment that decided that the ratification of the award issued by the Court of First Instance was not subject to appeal by the agreement of the parties. However, the Court of Cassation differentiated between the parties' agreement to waive the right of appeal to enforce the award and the nature of the arbitral awards where they are not subject to appeal as per Article 217.3 of the UAE CPC⁴¹⁰. The court determined that, in order for parties to waive the right of appeal to actions seeking to enforce awards, the wording for such agreement has to be unambiguously clear that such exact right is excluded.

127. Right of appeal: in ADCC Petition No. 561 of 2011⁴¹¹, the ADCC refused to ratify an award and returned the judgment to the Court of Appeal. The ADCC overturned the Court of Appeal's decision that arbitral awards are not subject to appeal based on Article 217 of the Repealed Arbitration Chapter of the CPC⁴¹². The court re-established that the courts' decisions ratifying or annulling arbitral awards are subject to challenge by either party, with the exception of decisions ratifying or annulling an award that was issued by an arbitrator who was explicitly authorized by the parties for amiable compositeur.

128. Failure to comply with the arbitration agreement: In Dubai Court of Cassation decision number 318 for the year 2016⁴¹³, the court set aside an award since the parties agreed to refer any dispute arising in connection to the contract to arbitration. This referral was conditional on commencing the arbitration within 20 working days from the date any of the parties notifies the other party with the claim. However, one of the parties commenced an arbitration after 20 working days from the notification. Therefore, the court decided to set aside the award since the arbitral tribunal violated the procedures agreed upon by the parties.

129. In addition to the above, DCC decision number 3 for the year 2008 dated 24 February 2008 referred to setting aside arbitral award number 13/2001 issued on 29 November 2003, the reason for annulment is not indicated since the decision is only confirming that the decision of the Court of First Instance is not subject to

⁴⁰⁹ issued on 5 January 1997

⁴¹⁰ Which is consistent with Articles 52 and 53.1 of the Federal Arbitration Law, with the distinction that the enforcement under the Federal Arbitration Law takes place before the Court of Appeal and can be challenged either by filing a grievance before the Court of Appeal or by filing a challenge before the Court of Cassation.

⁴¹¹ issued on 16 June 2011

⁴¹² Which is consistent with Articles 52 and 53.1 of the Federal Arbitration Law, with the distinction that the enforcement under the Federal Arbitration Law takes place before the Court of Appeal and can be challenged either by filing a grievance before the Court of Appeal or by filing a challenge before the Court of Cassation.

⁴¹³ Real Estate dispute dated 7 June 2017

appeal since the decision by the DCC confirmed that the decision became final as issued by Ras Al Khaimah Court of Cassation.

130. The same rule was applied by DCC 489/2016 dated 21 May 2017, which confirmed setting aside arbitral award number 58/2008 before the center of dispute resolution in Dubai, the subsequent case brought before the Dubai Courts was dismissed due to the statutory time bar.

131. The same principle was applied by DCC 867 and 883/2017 dated 11 June 2017 for arbitral award number 14/2005 issued by Dubai International Arbitration Center. Again, the subsequent case prosecuted before the Dubai Courts was dismissed due to the statutory time bar.

132. Similarly, DCC 139/2016 dated 26 October 2016 confirmed that the arbitral award dated 18 October 2010 was set aside. Again, the ground for setting aside the award is unknown since the decision only confirmed that the statute of limitation for claims is not interrupted by the arbitral award that was set aside since it is null, void and virtually non-existent, therefore, the subsequent prosecution of the claim in this case was time-barred.

133. Application of the New York Convention: In Union Supreme Court decision 384/ 2016 [Exhibit 48] the court of the First Instance and the Court of Appeal set aside an ICC foreign award. The USC decided that both courts misapplied the law since both courts applied the provisions of Article 235 and 236 of the CPC, the court found that the UK and the UAE are signatories to the convention, therefore, Article 238 of the CPC should have mandated to apply the convention adopted by 43 Decree 43 for the Year 2006 adopting the New York Convention, the second decision by the Court of Appeal is unknown, however, the search reveals that the award is still set aside.

Part 2 Jurisdictional Challenges in Arbitration Disputes in the UAE and Enforcement of Awards

A constant concern of any arbitral tribunal seated in the UAE is the extent and scope of its substantive jurisdiction. Arbitration, under UAE law, is an exceptional dispute resolution mechanism and the jurisdiction of arbitrators must be limited to matters consensually referred to such an exceptional forum.

As elaborated in Part 1 of this thesis, the UAE court system is the regular forum for dispute resolution, and arbitration is an exceptional dispute resolution mechanism.

In addition, Part 1 above demonstrated twenty-seven case laws confirming setting aside arbitral awards for reasons relating to arbitral tribunals dealing with matters or differences not consensually submitted to arbitration by the parties.

Exceeding the substantive jurisdiction for an arbitral tribunal is clearly one of the most important ground to set aside arbitral awards under UAE law, the French Law and indeed under the UNCITRAL Model law.

Further, as per the UAE law, an agreement to arbitrate amounts to an effective waiver of a fundamental right to approach the UAE Courts when seeking the resolution of a dispute.

For that reason, parties choosing the UAE as the seat of their arbitration as well as arbitrators in general in the UAE seats must be mindful while deciding for the scope of their substantive jurisdiction and to ensure not to exceed the scope that has been explicitly agreed to be referred to arbitration.

It is essential for arbitral tribunals to act within their limited jurisdiction and deal only with the matters validly submitted to arbitration. National laws of most jurisdictions, including France and the UAE, emphasize the principle that an arbitral tribunal should not exceed its jurisdiction.

In French law, an arbitral award may be challenged where *“the arbitral tribunal wrongly upheld or declined jurisdiction.”*⁴¹⁴

The UAE law does not deviate from this rule, the UAE Federal Arbitration Law provides as a ground to set aside or oppose enforcement of an arbitral award that *“the award contains decisions on matters not falling within the terms of the submission to arbitration or beyond its scope.”*⁴¹⁵

Internationally, the New York Convention provides that recognition of an arbitral award may be refused when the award deals with matters beyond the scope of the submission to arbitration. Article V of the Convention states that:

⁴¹⁴ Articles 1492 and 1520 of the French CCP

⁴¹⁵ Article 53.1(h) of the UAE Federal Arbitration Law

“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that.... The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.”

Therefore, a careful consideration of an arbitral tribunal’s jurisdiction is critical for the validity of the eventual arbitral award.

The primary categories of the jurisdictional challenges that regularly raised by the parties include:

- (1) Challenges related to the existence, validity, or enforceability of the arbitration agreement; and
- (2) The Scope of the arbitration agreement.

The majority of national laws and rules of arbitration by arbitral institution provide that a party who wishes to challenge the arbitrator’s jurisdiction should raise the challenge at the beginning of the arbitration proceedings, or as soon as the objecting party becomes aware of the grounds for the challenge, failing which, the party’s right to object jurisdiction shall be waived. However, jurisdictional challenges may be raised to national courts even after an award is rendered. Some of the jurisdictional challenges are genuine, but many others are used for purely tactical reasons; as a result, it is good practice for arbitrators to confirm with the parties that they do not have jurisdictional objections to deciding the dispute.

Under UAE law, the body determining a challenge to jurisdiction is the arbitral tribunal itself, as follows:

Article 19.1 of the UAE Federal Arbitration 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 or its inclusion of the subject-matter of the dispute. The Arbitral Tribunal shall rule on the plea either as a preliminary question or in a final arbitral award on the merits”

Further, Under UAE law, the body determining a challenge to jurisdiction is the arbitral tribunal under all major institutional rules, as follows:

Article 6.2 of the DIAC Rules states that:

“If any party raises one or more pleas concerning the existence, validity, scope or applicability of the arbitration agreement, then the Executive Committee may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement may exist under the Rules. In such a case, any decision as to the jurisdiction of the Tribunal shall be taken by the Tribunal itself”⁴¹⁶

Similar provisions exist under Article 23.1 of the DIFC Arbitration Rules, which provides:

⁴¹⁶ DIAC Arbitration Rules of 2007, issued by Decree No. 11 for the year 2007 by H.H. the Ruler of Dubai on the 6th of May 2007

“The Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness, or scope of the Arbitration Agreement”⁴¹⁷

Article 22.1 of ADCCAC Rule provides:

“The Panel shall decide upon pleas relating to its competence, including those objections based upon the non-existence of an arbitration agreement, its extinction, nullity, or its non-inclusion of the dispute under consideration”

Article 24 of ADGM Arbitration Regulation of 2015 provides that:

“(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement (2) Any such ruling may be challenged by any available arbitral process of appeal or review that the parties may have agreed, or in accordance with the provisions of this Part.”

However, the UAE law, the DIFC law, and the ADGM law; like many other jurisdictions; provide that these courts have the authority to review the decisions of arbitral tribunals seated in the UAE on their own jurisdictions.

In this regard, Article 19.2 of the UAE Federal Arbitration Law states that:

“If the Arbitral Tribunal rules as a preliminary question that it has jurisdiction, a party may, within fifteen days after receiving notice of that ruling, request the Court to decide that matter. The Court shall then decide the request with thirty days of being filed with the Court and its decision shall be subject to no appeal; while such a request is pending, the arbitral proceedings shall be stayed unless the Arbitral Tribunal decides to continue the arbitral proceedings at the request of a party”⁴¹⁸

The UAE jurisprudence establishing the consensual nature of arbitration provides that arbitration cannot be compulsory under any law. This effectively means that any agreement to enter into arbitration must be pursuant to the free will and explicit consent of the parties to the arbitration agreement.

By way of example, USC decision number 640 for the Judicial Year 29 dated 28 July 2009 [Exhibit 46] established that arbitration is the exceptional forum for dispute resolution mechanism, arbitration is inherently a consensual process and the jurisdiction of the arbitrators stems from the parties' agreement to enter into an agreement to arbitrate. The court further established that the natural judge has the default jurisdiction, which is a constitution right, any forum departing from the natural judge's jurisdiction should be exceptional and has a narrow effect.

⁴¹⁷ Article 23.1 of DIFC Rules of 2016, effective from 1 October 2016, available online <http://www.difc-lcia.org/arbitration-rules-2016.aspx>

⁴¹⁸ - Article 19.2 of the UAE Federal Arbitration Law, translated by Al Tamimi and Co. <https://www.tamimi.com/crm-media-uploader/fileupload/server/php/files/UAE%20Arbitration%20Law%20-%20Federal%20Law%20No%20%206%20of%202018.pdf>

Historically, the UAE courts' review for the jurisdiction of arbitral tribunals was a common and serious ground of annulment of arbitral awards.

Therefore, it is essential to address the most important issues limiting the jurisdiction of arbitrators in the UAE

TITLE 1: THE JURISDICTIONAL CHALLENGE DUE TO LACK OF REQUISITE AUTHORITY TO AGREE TO ARBITRATION

Following the Global Financial Crisis that hit the UAE strongly during the last quarter in 2008 and continued until 2012, a substantial number of projects was delayed, stopped, or canceled, such projects worth billions of dollars.

As a consequence, a considerable number of real estate developers in the UAE faced breach of contract claims, which lead many institutional and non-institutional investors to bring actions against real-estate developers.

Many contentious contracts that were invoked during the global financial crisis contained a jurisdiction clause that refers to arbitration as a dispute resolution mechanism. As a result, the number of arbitration disputes increased dramatically in the UAE following the global financial crisis in 2008.

Substantively, it is common to see real estate developers having venerable legal positions against investors since simply they were not ready to face the financial crisis that hit the UAE market at the peak of the economic progress by end of 2007. Therefore, real estate developers focused on having obstructive defenses in an attempt to frustrate the administration of justice for claimants. Moreover, they attempted to increase time and costs of arbitration proceedings in order to set examples to other investors that those investors bringing cases will lose considerable costs in claims, which should in turn deter other claimants from perusing their cases.

Therefore, many real estate developers defended their cases in arbitration by raising a jurisdictional challenge that the arbitration is not the competent jurisdiction to prosecute actions due to the incapacity of the person who signed the agreement containing the arbitration agreement to binding the company to arbitration since the UAE law required explicit and specific authorization to do so.

This defense achieved reasonable success whereby a considerable number of arbitral awards could not be enforced by the UAE courts because of issues of jurisdiction of arbitral tribunals.

This caused the UAE to be labeled, in many conferences and websites, as being anti-arbitration friendly jurisdiction.

The purpose of this title is to address this problematic issue facing arbitration practitioners, claimants, and law firms in the UAE.

The NYC as well as the Model Law, where applicable, require parties to an arbitration agreement to have the capacity to enter into that agreement '*under the law applicable to them*'.

Under UAE law, generally, for contractual obligations to be binding, they must be executed by either the corporate entity's authorized representative or a person that has at least apparent authority to do so.

The position differs when entering into arbitration agreements. This is because, as per the UAE law, an agreement to arbitrate amounts to an effective waiver of a fundamental right to approach the UAE courts when seeking the resolution of a dispute. It is for this reason that UAE law requires such a waiver to be given by a

person with express and specific authority to do so. This is the consistent approach of the UAE Civil Procedure Law, Companies Law, and Court of Cassation decisions.

The main concern facing claimants in arbitration cases seated in the UAE is whether the arbitration agreement being invoked is valid in order to avoid nullifying the resulting arbitral award.

Indeed, and after studying statistically arbitral awards annulled in the UAE, one can reasonably confirm that lack of requisite authority needed to bind a company or a party in general to arbitration is the most significant and frequently used jurisdictional challenge facing parties to arbitration in the UAE.

In practice, verifying that real estate developers comply with these formalistic requirements by a natural person contracting party is rare. Investors having no specialized law knowledge and even certain categories of legal professionals are unaware of the complicated requirements by the UAE to enter into arbitration agreements.

Having studied the behavior of law firms operating in the UAE concerning the capacity to enter into arbitration agreements; it is frequently the case that those law firms warn their clients for the risk they are running into by failing to verify the capacity of the person signing the agreement to arbitrate. Following are some examples:

Al Tamimi and Co. confirms that:

“We always bring to the attention of our clients that the signatories to an arbitration agreement should have explicit authority allowing them to arbitrate. In many events, we find that the signatories of an agreement having an arbitration clause do not have a special authority evidenced in their delegation/power of attorney authorizing them to sign arbitration agreements. In light of the above, the arbitration clause could be declared null and void or even allowing for a situation where any arbitral award rendered based on said clause could be annulled by the national courts while ratifying it”⁴¹⁹

Similarly, Fenwick Elliott confirms that:

“When the arbitration agreement relates to a company, it can only be concluded by an authorized representative who has authority to arbitrate. This is important because one of the grounds for challenging an arbitral award, set out in Article 53(c) [of the Federal Arbitration Law], is that the party to the arbitration does not have the legal capacity to enter into the arbitration. For a UAE LLC, this usually means being either the General Manager or a person having the authority to act on behalf of the General Manager.”⁴²⁰

In another Article, Al Tamimi and Co. suggests to its clients that:

“We draw the attention of parties wishing to enter into an arbitration agreement to the requisite capacity requirements provided for under the relevant laws of the UAE, which remain unaffected by the introduction of

⁴¹⁹ So you think you can arbitrate, by Omar Khodeir. Al Tamimi and Partners, <https://www.tamimi.com/law-update-articles/so-you-think-you-can-arbitrate-1/>

⁴²⁰ Arbitration in the UAE by Jeremy Glover and Ahmed Ibrahim of Fenwick Elliott, available online <https://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/arbitration-in-uae>

the New Arbitration Law. For a UAE incorporated limited liability company, it is recommended that the company's constituting documents are reviewed prior to the execution of an arbitration agreement in order to verify that authority to enter into arbitration agreements, granted by default to the company's manager, has not been explicitly withdrawn"⁴²¹

Hadef and Partners also provide that:

*"Only natural persons or the representative of a juristic person duly authorized to dispose of the rights of such a juristic person are eligible to enter into an arbitration agreement. Therefore, it will still be necessary to consider whether or not a person has the capacity/authority to bind a company to an arbitration agreement and this issue will continue to cause delay and expense"*⁴²²

In addition, Hadef and Partners magnified the importance of these jurisdictional matters by confirming that:

*"This once-grey area has prevented many from pursuing arbitration proceedings. Many viewed the risk of having an arbitral award annulled for lack of authority of the opposing side to be too great a risk"*⁴²³

Eversheds Sutherland International was analyzing Article 4 of the Federal Arbitration Law and confirmed that:

*"The person entering into an arbitration agreement has the requisite capacity to do so remains of fundamental importance in arbitration proceedings. The consequence of not having capacity can include a challenge to the agreement's validity under article 8 and/or a defunct arbitral award"*⁴²⁴

The above views by local and international law firms operating in the UAE confirm the importance of verifying the capacity of the counterparty to a contract to bind a company to arbitration. These views further confirm the importance of this matter as one of the essential grounds that can be (and is) used to contest an arbitral tribunal's jurisdiction and/or set aside the resulting arbitral award in case the arbitral tribunal upholds jurisdiction.

⁴²¹ Commentary on the UAE's New Arbitration Law - Litigation, Mediation, Article by Essam Al Tamimi and Sara Koleilat-Aranjo, available online <http://www.mondaq.com/x/726276/Arbitration+Dispute+Resolution/Commentary+On+The+UAEs+New+Arbitration+Law>

⁴²² [The New Arbitration Law - Hadef & Partners](http://www.hadefpartners.com/News/335/The-New-Arbitration-Law) by: Adrian Chadwick and Wesley Wood, available online <http://www.hadefpartners.com/News/335/The-New-Arbitration-Law>

⁴²³ Hadef in Courts – A New Approach on Authority to Bind Companies to Arbitration in the UAE, available online <http://www.hadefpartners.com/News/278/Hadef-in-the-Courts---A-New-Approach-on-Authority-to-Bind-Companies-to-Arbitration-in-the-UAE->

⁴²⁴ The UAE Federal Arbitration Law, 2018- Publications – Eversheds Sutherland International, available online <https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/global/MiddleEast/united-arab-emirates/the-uae-federal-arbitration-law-2018>

Another report by Baker & McKenzie provides that:

“Capacity to Enter into an Arbitration Agreement: Capacity concerns the ability of a person to conclude and to be a party to an arbitration agreement. Where a person lacks such capacity, an arbitral award rendered in a matter involving a party lacking capacity might be annulled”⁴²⁵

Similarly, CVML Law confirms that:

“Law firms in Dubai advise their client to ensure before commencing arbitrations that the person who signed the arbitration clause possesses a notarized power of attorney specifically authorizing him to sign the arbitration agreement.”⁴²⁶

Al Tamimi & Co. states that:

“When it comes to resisting the enforcement of an award in the UAE, a common defense is that the Defendant was not a party to the arbitration agreement because the person who signed on its behalf did not have the required authority to bind the company to arbitration”⁴²⁷

Berwin Leighton Paisner LLP states that:

“A reoccurring theme in enforcement proceedings in the local courts is the effect of a signature; parties and arbitrators must ensure that contracts, powers of attorney, arbitration deeds, and awards are executed properly to ensure that arbitration agreements and awards do not fail as a result of an avoidable procedural flaw”⁴²⁸

The above are only examples of the considerable number of reports, dissertations, and articles addressing this vital issue, which affects the entire validity and viability of arbitration as a dispute resolution forum in the UAE.

⁴²⁵ Laws of the UAE and Islamic Finance | Page 175 - UAE Laws and Challenging an Arbitral award in the UAE Courts by Karim Nassif, a former Partner at Baker & McKenzie Dubai

⁴²⁶ United Arab Emirates: International Arbitration 2011 by Dr. Gordon Blanke, a partner Baker & McKenzie Dubai and Karim Nassif a partner at CVML Law, available online:

<http://www.mondaq.com/x/173316/International+Law/International+Arbitration+Middle+East+And+Africa+Overview+173088>.

⁴²⁷ Helpful Dubai Court of Cassation Judgment on Capacity and Foreign Arbitral Awards by Omar N. Omar Al Tamimi & Co. Dubai, available online <https://www.tamimi.com/law-update-articles/helpful-dubai-court-of-cassation-judgment-on-capacity-and-foreign-arbitral-awards/>

⁴²⁸ The European, Middle Eastern and African Arbitration Review 2016, United Arab Emirates, by Ian Clarke, Anna Gee, Charles Lilley and Polly Lockhart of Berwin Leighton Paisner LLP, available online <https://globalarbitrationreview.com/insight/the-european-middle-eastern-and-african-arbitration-review-2016/1036963/united-arab-emirates>

Chapter 1: The UAE Law Stance in Relation to Authority to Arbitrate

This Chapter will characterize this problematic issue in the UAE laws during the arbitration proceedings and after the issuance of awards when recognizing the capacity to enter into arbitration agreements by the UAE national courts.

In particular, the requirements of the UAE law to have agreements to arbitrate, which have a high threshold of proof since the agreement to arbitrate, under UAE law, amounts to a waiver for the right to prosecute actions before the court system, to be provided by persons having express and specific authority to bind companies to this agreement.

Section 1: Difficulties in the UAE law dealing with authority to arbitrate

The starting point in these analyses is to diagnose the status of Limited Liability Companies (LLC's) since they are the most common form of legal entities in the UAE, this will be followed by Private and Public Joint Stock Companies. All other forms of legal entities shall be demonstrated thereafter.

§ 1 Traditional Approach with regards to the authority to arbitrate

Authority to arbitrate for LLC companies

As discussed below, the traditional approach adopted by the UAE Supreme Courts for the authority to enter into arbitration agreements is that if the 'General Manager' of a UAE LLC does not enter into an arbitration agreement himself, then the authority to enter into an arbitration agreement on behalf of an LLC must be given **expressly** to the individual who signed the agreement to arbitrate and this authority cannot, under the applicable laws, be deemed, assumed or apparent.

Where a signatory to an arbitration agreement does not have the requisite authority [which is an Express and specific authority] to sign the arbitration agreement in compliance with Article 203(4)⁴²⁹ and Article 58 of the UAE Civil Procedure Law, any such agreement purportedly reached is invalid. Any arbitral award rendered pursuant to such an invalid agreement would be at risk of annulment in accordance with Article 216 (1) (b) of the UAE Civil Procedure Law⁴³⁰.

⁴²⁹ Article 203(4) of the UAE Civil Procedure Law provides: *"An agreement to arbitrate shall not be valid unless when made by the persons having the competency to the right for relinquishment of the litigated right"*, which is consistent with Article 4.1 of the UAE Federal Arbitration Law which states that:

"An Arbitration Agreement may only be concluded, on pain of nullity, by a natural person having the legal capacity to dispose of his rights or on behalf of a juridical person by a representative with specific authority to arbitrate"

⁴³⁰ Which is relevant to Article 53.1(f) of the Federal Arbitration Law

This matter was considered by the Dubai Court of Cassation in relation to the authority of an LLC company to enter into an arbitration agreement where it was held that:

“The provisions of Article 203 of the Civil Procedure Code (Article 4.1 of the UAE Federal Arbitration) and Article 235 of the Commercial Companies Law⁴³¹ together demonstrate that an arbitration agreement shall not be valid unless signed by a person having the power and competence to make a relinquishment over the litigated right. The director of a limited liability company is the person having full authority in the management thereof, and he is the person who has the competence to make relinquishments over the rights relating to its activities, including an agreement to arbitrate, in contracts made between it and third parties, unless the articles of association of the company restrict his authority by prohibiting him from making certain relinquishments or by expressly prohibiting him from agreeing to arbitration.”⁴³²

Further, LLC companies’ legal capacity to agree to arbitrate is governed by (amongst other provisions) Article 154 of the Companies Law, which provides:

“The Board of Directors shall assume all the powers necessary to carry out the businesses required in satisfaction of the company's objectives, save such powers as may be vested by the law or the company's Articles of Association, in the General Assembly.

However, the Board of Directors is not allowed to enter into loan agreements which terms exceed three years, to dispose of the company's real property or place of business, to mortgage the same, release company debtors from their commitments, enter into settlement or arbitration agreements unless the same is expressly granted by the company's Articles of Association or embodied by nature in the company's objectives. In other than these two instances, the performance of such acts must be sanctioned by the approval of the General Assembly”⁴³³
[Emphasis added]

Therefore, traditionally, the UAE courts held that an individual (other than the LLC’s General Manager, at the time) could only legally bind the LLC to agree to arbitration when:

- (a) It is permitted in the LLC’s Memorandum of Association [which is indeed a rare situation];
- (b) When entering into arbitration agreements is included in the LLC’s objectives [which is again a further rare situation]; or
- (c) The General Manager of the LLC has approved the individual to enter into the arbitration agreement.

Differently stated, the UAE law stipulates that:

⁴³¹ Which is consistent with Article number 154 of the UAE Federal Commercial Companies Law number 2 of 2015

⁴³² Dubai Court of Cassation Judgments number 164 for the year 2008 issued on 12 October 2008 [Exhibit 16]

⁴³³ Article number 154 of the UAE Federal Commercial Companies Law number 2 of 2015

- (a) The decision to enter into an arbitration agreement by an LLC can only be taken by the General Manager or persons authorized by him;
- (b) if the General Manager does not enter into an arbitration agreement, and has not approved anyone else to enter into an arbitration agreement on the LLC's behalf, then any representative of an LLC has no capacity or authority to enter into the arbitration agreement as required by Article 203.4 of the UAE Civil Procedure Law (Article 4.1 of the UAE Federal Arbitration); and
- (c) If there is no capacity or authority, then any arbitration agreement is invalid and any award pursuant to such an invalid arbitration agreement cannot be ratified by the UAE courts (Article 216.1 (b) of the UAE Civil Procedure Law)⁴³⁴.

Traditional Approach with regards to the authority to arbitrate for Joint Stock Companies

The situation for PJSC (both private and public joint stock companies) is not significantly different from the characterization above for the LLC companies; this is consistent with Article 104 of the Commercial Companies Law, which provides that:

*"Unless otherwise provided by this Law, the provisions of this law concerning the Joint Stock Companies shall apply to the Limited Liability Company."*⁴³⁵

However, for the sake of completeness set out below the position PJSC companies with regard to capacity to arbitrate:

The capacity of the Private and Public Joint Stock Companies (PJSC companies) to agree to enter into arbitration agreements is governed by Article 154 of the Companies Law, which provides that:

"The Board of Directors shall assume all the powers necessary to carry out the businesses required in satisfaction of the company's objectives, save such powers as may be vested by the law or the company's Articles of Association, in the General Assembly."

*However, the Board of Directors is not allowed to enter into loan agreements which terms exceed three years, to dispose of the company's real property or place of business, to mortgage the same, release company debtors from their commitments, enter into settlement or arbitration agreements unless the same is expressly granted by the company's Articles of Association or embodied by nature in the company's objectives. In other than these two instances, the performance of such acts must be sanctioned by the approval of the General Assembly"*⁴³⁶
[Emphasis added]

⁴³⁴ Which is consistent with Articles 53.1(b) and 53.1(c) of the Federal Arbitration Law

⁴³⁵ Article 2 of the UAE Commercial Companies Law number 2 of 2015

⁴³⁶ Article number 154 of the UAE Federal Commercial Companies Law number 2 of 2015

The authority to enter into an arbitration agreement on behalf of a UAE private or public joint-stock company must be given expressly and specifically to the individual who signed the agreement to arbitrate.

In summary, UAE law stipulates that:

- (i) The decision to enter into an arbitration agreement by a PJSC can only be for the General Assembly as per the Articles of Association;
- (ii) If there is no decision by the General Assembly, then a PJSC representative has no capacity to enter into the arbitration agreement as required by Article 203(4) (Article 4.1 of the UAE Federal Arbitration) of the UAE Civil Procedure Law; and
- (iii) If there is no capacity or authority, then any arbitration agreement is invalid and any award made pursuant to such an invalid arbitration agreement cannot be ratified (Article 216(1)(b) of the UAE Civil Procedure Law)⁴³⁷.

Traditional Approach with regards to the authority to arbitrate for Remaining Legal Entities

The remaining legal entities prescribed by the UAE law are:

Joint Liability Companies established pursuant to Article 39 of the Commercial Companies Law, which provides:

“Definition of the Company A Joint Liability Company is a company which consists of two or more partners who are natural persons, to be jointly responsible in all their monies for the obligations of the company”⁴³⁸

Simple Commandite Companies, established pursuant to Article 62 of the Commercial Companies Law, which provides:

“A Simple Commandite Company is a company which consists of one or more joint partners liable, severally and jointly, for the obligations of the company and having the capacity of traders, and one or more silent partners not liable for the obligations of the company other than to the extent of their respective shares in the capital. Silent Partners shall not have the capacity of a trader”⁴³⁹

With regards to Simple Commandite Companies, the authority to arbitrate applying the principles set out above shall be with the Joint Partners, this is supported by Article 66 of the Commercial Companies Law, which provides:

“Management of the Company The management of the company shall be limited to the Joint Partners. Decisions shall be unanimously passed by the Joint Partners, unless the Memorandum of Association of the company

⁴³⁷ Which is consistent with Articles 53.1(b) and 53.1(c) of the Federal Arbitration Law

⁴³⁸ Article 39 of the UAE Federal Companies Law Number 2 of 2015

⁴³⁹ Article 62 of the UAE Federal Companies Law Number 2 of 2015

*provides for the majority. No variation of the nature of the business of the company or amendment to its Memorandum of Association shall be valid without the consent of all the Acting and Silent Partners”*⁴⁴⁰

In application for this principle, Simple Commandite Companies, the DCC issued decision Number 51 of 2005 issued on 28 May 2005, [Exhibit 42], where the court annulled an arbitral award and held that the general POA for a single proprietorship company (and accordingly Simple Commandite Companies by implication) that does not specify the delegation to arbitrate could not delegate the agent to sign an agreement to arbitrate.

The facts of the case demonstrate that the documents submitted by the parties establish that the contract and, in particular, the arbitration agreement was signed by the manager of the company that was later the award debtor. The latter is an establishment license states that:

“It is an establishment and that the relevant signatory of the arbitration agreements is its manager. The authorization issued to the relevant manager by the owner of the company states that the relevant manager is authorized to sign official and semi-official documents relating to the municipalities in the UAE, as well as contracts with companies and individuals.”

Based on this general POA to sign contracts, the Dubai Court of Appeal found that the manager was authorized by the company to manage it and had the necessary powers to do so, including the power to sign the arbitration agreement without the need for special authorization from the company.

The Dubai Court of Cassation overturned the Court of Appeal’s decision and held that, as per Article 216.1(b) of the Repealed Arbitration Chapter of the CPC⁴⁴¹, the valid capacity and authority required for a party to bind a company to arbitration is the authority to extinguish rights on the company behalf. The Court held that the manager of an establishment is a representative of the company but is not entitled to extinguish or act upon the establishment's rights without prior authorization from the owner. Therefore, this representative cannot bind an establishment to arbitration.

In conclusion, it is the case the entering into arbitration agreements is problematic for almost all types of legal entities in the UAE. It appears to be an infrequent case where the manager of an LLC company signs agreements to arbitrate and further it is infrequent (or could be rare) to have the general assembly of public joint-stock companies to sign agreements.

Even if there is a proper delegation by these authorities, it remains problematic and contentious as to whether the authority given to those individuals representing the company were specific and express to arbitration, where the general power of attorney shall not be sufficient to delegate a person to arbitration.

⁴⁴⁰ Article 66 of the UAE Federal Companies Law Number 2 of 2015

⁴⁴¹ Which is consistent with Articles 53.1(b) and 53.1(c) of the Federal Arbitration Law

§ 2 Case Laws Supporting Annulment of Awards due to lack of Requisite Authority to Bind Companies to Arbitration

Based on the formalistic requirements laid down in the UAE laws as demonstrated in the foregoing subsection, the following substantial number of case laws issued by the UAE Supreme Courts annulled arbitral awards for reasons related to the capacity to enter into arbitration agreements:

1. Dubai Court of Cassation decision number 325 for 1993.
2. Dubai Court of Cassation decision number 460 for 1998.
3. Dubai Court of Cassation decision number 91 for 1998.
4. Union Supreme Court decision number 25 for 2001.
5. Dubai Court of Cassation decision number 577 for 2003.⁴⁴²
6. Dubai Court of Cassation decision number 51/ 2003.
7. Dubai Court of Cassation decision number 230/ 2004.
8. Dubai Court of Cassation decision number 256 / 2004.
9. Dubai Court of Cassation decision number 209 for 2004 [Exhibit 43].⁴⁴³
10. Dubai Court of Cassation decision number 51 for 2005 [Exhibit 42].⁴⁴⁴
11. Dubai Court of Cassation Judgments number 164 for the year 2008⁴⁴⁵ [Exhibit 16].
12. Dubai Court of Cassation decision number 14 / 2008.
13. Dubai Court of Cassation decision number 191 for 2009.
14. Dubai Court of Cassation decision number 252 / 2010.
15. Dubai Court of Cassation decision number 19 / 2010.
16. Dubai Court of Cassation decision number 275 / 2010.
17. Dubai Court of Cassation decision number 102 / 2010.
18. Dubai Court of Cassation decision number 190/2010.
19. USC decision number 308 for 2011.
20. Union Supreme Court decision number 179 for 2011.
21. Abu Dhabi Court of Cassation decision number 465 for 2012.
22. Dubai Court of Cassation decision number 532/2013.
23. Abu Dhabi Court of Cassation decision number 352 for 2014.
24. Abu Dhabi Court of Cassation decision number 351/ 2014.
25. Dubai Court of Cassation decision number 263/2015.
26. Dubai Court of Cassation decision number 382/2015.
27. Dubai Court of Cassation decision number 613 for the year 2015.⁴⁴⁶

⁴⁴² The decision is dated 12 June 2004

⁴⁴³ The court held that the general POA is insufficient to enter into arbitration agreements

⁴⁴⁴ The court held that the general POA is insufficient to enter into arbitration agreements

⁴⁴⁵ Judgment issued on 12 October 2008

⁴⁴⁶ Judgment issued on 18 September 2016

28. Dubai Court of Cassation decision number 416 for the year 2015.⁴⁴⁷
29. Abu Dhabi Court of Cassation decision number 465 for the year 2012⁴⁴⁸
30. Dubai Court of Cassation decision number 116 for the year 2016⁴⁴⁹
31. Dubai Court of Cassation decision number 603 for the year 2016.⁴⁵⁰

Among the above case laws is ADCC 351/2014, which will now be studied in more details since it is a relatively recent decision by the Abu Dhabi Court of Cassation.

The decision annulled an arbitral award issued by the Abu Dhabi Commercial Conciliation and Arbitration Center (ADCCAC). The court determined that the arbitral award was issued against a public joint-stock company, where (as the court determined) even the Board of Directors does not possess the power to enter into arbitration agreements except where the Board is expressly authorized to do so or arbitration is part of the company objectives.

The court reasoning on annulling the arbitral award was as follows:

“Article 58.2 of the Civil Procedures Code states ‘It is not valid, without special authorization, the declaration of the right prosecuted, disclaiming it, conciliation or arbitration therein’⁴⁵¹. In addition, as per Article 216 of the same law⁴⁵², it is allowed to request annulment of an arbitral award when the court is seized to ratify the award in the event of the arbitration agreement was issued by a person not competent to enter into arbitration agreements.

Further, Articles 203 from the same law (which is consistent with Article 4.1 of the UAE Federal Arbitration Law) as well as Articles 95, 103, 104 of the Commercial Companies Law⁴⁵³ provide that an agreement to arbitrate shall not be valid unless issued by the person having the competency for disposition of the disputed right, and the Board of the Directors of the Joint Stock companies is authorized to manage the activities that achieve the stated objective of the company. Further, the Board of Directors is not allowed to enter into arbitration agreements

⁴⁴⁷ Judgment issued on 6 July 2015

⁴⁴⁸ Judgment issued on 21 March 2013

⁴⁴⁹ Judgment issued on 22 May 2016

⁴⁵⁰ Judgment issued on 9 April 2017

⁴⁵¹ The literal text of Article 58.2 of the CPC states “No admission or waiver of a right alleged or settlement or submission to arbitration or acceptance of or requisition for the oath or refusal thereof or abandonment of the proceedings or waiver of the judgment in whole or in part or of any avenue of appeal against it or the lifting of an attachment or abandonment of securities while a debt remains unpaid or allegation of forgery or recusal or acceptance of a judge or expert or true tender or any other disposition in respect of which the law requires special authorization may be made without special authority”

⁴⁵² Which includes grounds to set aside an arbitral award, this is replaced by Articles 53 of the Federal Arbitration Law

⁴⁵³ Which are consistent with Article number 154 of the UAE Federal Commercial Companies Law number 2 of 2015

*unless this authority was expressly granted in the company's Articles of Association or is part of the stated objective of the company... , failing which, the Board must obtain the General Assembly's approval"*⁴⁵⁴.

Applying this principle is a risky matter and affects the safety and confidence in commercial transactions in general.

In particular, in case a party enters into a contract with a joint stock company, it shall be mandatory, considering the above principles, for this party to ensure that the general assembly of the joint-stock company has approved this transaction and this contract. This is utterly impractical as contracting parties should have confidence in the representation of their counterparties in contracts and should not doubt or question the internal authorizations within the parties representing their organizations.

Similarity, in a relatively recent decision, on 18 September 2016, the DCC issued decision number 613 for 2015, where the court annulled an arbitral award issued under the LCIA rules where the award creditor sought to enforce the arbitral award in Dubai based on New York Convention of 1958. The court accepted the action for nullity brought by the award debtor; the court found that the signature to the contract that included the arbitration agreement differs from the signature of the managers of the LLC Company on their passports.

Further, in substance this contradicts with other judgments issued in this regard in a number of cases, in particular with the as follows:

Dubai Court of Cassation decision number 17/2016 dated 23 March 2016 where the DCC states *that*:

*"It shall not be permitted as stipulated by Article 14/2⁴⁵⁵ of the CPC and it is not permitted for the party who caused such nullity, which is not related to public order, to adhere to it whether this nullity is caused intentionally or negligently or was caused by the party themselves or the persons working for it. As such, it shall not be permitted for a party in an arbitration to claim nullity before the court ratifying an arbitral award seeking to nullify an award for causes or defects related to the arbitration agreement or arbitration procedures that were concluded by his own acts"*⁴⁵⁶

Article 25 of Companies Law, which states Article 25 of the newly issued Federal Law number 2 for 2015 "the Companies Law," which is recently applicable starting from 1 July 2015, provides:

"The company may not claim non liability to the person dealing with it, on the ground that the authorized managing department was not duly appointed in accordance with the provisions of this Law or the Articles of Association of the company, so long as the acts of such managing department is within the usual limits in respect of persons in the same position in companies that conduct the same type of activity

⁴⁵⁴ Abu Dhabi Court of Cassation decision number 351 for the year 2014 issued on 26 June 2014

⁴⁵⁵ Article 14/2 of UAE Civil Procedures Code provides *"With the exception of the cases where the nullity is related to the public order: (1) it is not allowed to anyone to adhere to the nullity except the one for whom it was legislated. (2) And it is not permitted that the party, who caused such nullity, adhere to it"* [emphasis added].

⁴⁵⁶ Dubai Court of Cassation decision number 17 for the year 2016 real estate issued on 23 March 2016

as the company. To protect a person dealing with the company, he shall be a bona fide party. A person shall not be deemed as acting in good faith if he actually knows or could have known, based on his relationship with the company, of the aspects of deficiency in the act or thing proposed to be held thereto against the company”

§ 3 Sever Criticisms to the UAE Courts for not being an arbitration-friendly jurisdiction

The UAE Courts received sever and repeated criticisms in many local and international conferences on being anti-arbitration friendly by issuing contradicting judgments. The formal position for an extended period has been rejecting arbitration clauses due to the assumption that such clauses are not valid for reasons that are far beyond the reasonable expectations of contracting parties, or even professionals with reasonable sophistication.

The number of judgments rejecting arbitration clauses was too considerable to ignore. As set out above, this thesis identified almost 31 case laws confirming setting aside arbitral awards starting from 1993 and continued until 2017.

Considerable number of Cassation decisions including decisions number 164/2008 and 577/2003 (which were published in books translated in English), confirm clearly that the UAE Courts have traditionally taken an abnormally strict approach by requesting that an agent’s authority to bind a party into arbitration agreements must be evidenced by a specific written authority from a principal. In this regard, the general power of attorney allowing the agent to act on all matters on behalf of the principal is not sufficient to cover authority to arbitrate.

This position confirmed, among other decisions, by the Dubai Court of Cassation decision number 164/2008, which established that an agreement to arbitrate should not be valid unless it was made by a person having the legal capacity for making a relinquishment over litigated right. That judgment further established that the manager of an LLC is the only person having the authority to enter an LLC company into arbitration agreements.

A more developed and modernized approach was adopted starting from the year 2015 in a number of decisions in Dubai Courts only, where the authority to arbitrate could exist even if not express or specific. However, a relapse from this view emerged in particular jurisprudence in the Dubai Court of Cassation.

Therefore, the development that took place after 2015 is not in all courts in the UAE (only in Dubai Courts) and even decisions of the Dubai Courts are inconsistent in this regard since the most recent decisions are still contradictory in this subject.

This Chapter studies the contradicting decisions issued by the UAE Supreme Courts in Abu Dhabi and Dubai. The study includes studying the modern view of the UAE courts and the continuous relapse in the UAE jurisprudence from this modern view to the traditional view. Afterwards, this Chapter illustrates the most important views related to jurisdictional matters that are likely to be raised in a typical arbitration dispute.

Finally, this Chapter shall demonstrate the recent improvements in the new Companies Law applicable starting 1 July 2015 and the adequate methodology to interpret this law in a manner that supports fair arbitration practices and help to improve the UAE’s general acceptability of arbitral awards. These issues should reflect on improving the general atmosphere of arbitration and transparency in the UAE and therefore attracting foreign direct investment into the country.

Section 2: Doctrines in the UAE Law Supporting Recognizing Arbitration

Jurisdiction

Having studied to the problematic issue set out above related to provisions included in the UAE law opposing the recognition of the jurisdiction of arbitral tribunals for dispute resolution by taking a strict approach with regards to the authority to agree to arbitration by contracting parties. This section identifies the relevant doctrines in the UAE law, with specific emphasis on the agency-related provisions, which are supporting the authority to enter into contracts in general and the authority to enter into agreements to arbitrate in particular.

The section also addresses the corresponding provisions in the UAE law for each of the doctrines applied in other jurisdictions, including the French law, and will suggest equally applying these doctrines by the UAE courts' decisions since many of these doctrines are already incorporated in the UAE law.

This process should reduce or contribute to eliminate abnormalities or departures in the UAE courts' decisions from the internationally recognized standards, including France as a role model for arbitration friendly jurisdictions. As such, the acceptance of the UAE courts to these doctrines should match the expectations of reasonable parties and allow investors to see the same standards applicable internationally in the UAE courts.

As outlined above, this will be achieved through the following phases:

First: Comparing the UAE law with other jurisdictions that are dealing with the issue of authority to bind a party to enter into arbitration agreements; and

Second: Identifying in the UAE statutes and the UAE case laws the particular provisions that can achieve the same purpose of the other jurisdictions with regards to the authority to enter into arbitration agreements.

ISSUES RELATED TO LAW OF AGENCY

- Estoppel Legal Framework in English Law
- Estoppel Legal Framework in the UAE Law
- English Law Precludes a Party from Recovering a benefit for his own wrongdoings
- The UAE Law Precludes a Party Who Caused nullity to Adhere to it
- EU Regulations of Jurisdiction in contracts involving a weaker party
- Consumer Protection Laws in the UAE & The New UAE Companies' law
- Apparent Authority Principle in English, French and German laws
- Apparent Authority Principle in the UAE law
- Applicability of the Apparent Authority Principle for Arbitration Agreements under UAE law
- Applicable Rules with regard to the timing of a plea to the jurisdiction
- Reserving the Right to Challenge Jurisdiction at Difference Stages of Proceedings
- Unlawful exercise of rights under UAE law

- Willful blindness Under the US Law
- Willful Blindness Under UAE law with Regard to Authority to Arbitrate
- Evolution of Cassation judgments on Authority to Arbitrate
- The Modern view of Cassation Judgments

§1: THE Jurisdictional Rules for Protecting Weaker Parties

The EU Regulations of Jurisdiction in contracts involving a weaker party

The EU regulations protect weaker parties to contracts including employment, consumer, and insurance contracts. Article 17 of Brussels regulation provides special jurisdictional rules, which apply to consumers in the ordinary course of business from the abusive acts of professionals.

A consumer is the one who concludes a contract outside his trade or profession. Under these special jurisdictional rules, the professional can only sue the consumer in the consumer's domicile (not the place of performance as per the general rule); however, the consumer can sue the professional in the professional's domicile, or in the consumer's own domicile, whichever the consumer prefers. The more important fact is that, the jurisdiction clause within the agreement does not apply except where both of the professional and the consumer have the same domicile.

In this regard, Article 17 of the Brussels regulation states that:

"In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, the jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:

- (a) it is a contract for the sale of goods on installment credit terms;*
- (b) it is a contract for a loan repayable by installments, or for any other form of credit, made to finance the sale of goods; or*
- (c) In all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile, by any means, directs such activities to that Member State, or to several States including that Member State, and the contract falls within the scope of such activities. 2. Where a consumer enters into a contract with a party who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State"*⁴⁵⁷

⁴⁵⁷ Article 17 of REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation)

Whilst nothing in this jurisdictional rule applies to arbitration, however, the purpose here is to establish a general background that consumers in the ordinary course of business, and probably weaker parties in general, could entertain certain jurisdictional rules to protect them from any abusive or adhesive behavior of other stronger contracting parties and professionals.

Consumer Protection Rules Applicable to Jurisdictional Matters in the UAE

The UAE Commercial Companies' Law introduced relatively recently and effective from 1 July 2015, which provides a protection to consumers dealing with companies in good faith from jurisdictional objections.

Article 25 of the UAE Companies Law states that:

*"The company may not claim non liability to the person dealing with it, on the ground that the authorized managing department was not duly appointed in accordance with the provisions of this Law or the Articles of Association of the company, so long as the acts of such managing department is within the usual limits in respect of persons in the same position in companies that conduct the same type of activity as the company. To protect a person dealing with the company, he shall be a bona fide party. A person shall not be deemed as acting in good faith if he actually knows or could have known, based on his relationship with the company, of the aspects of deficiency in the act or thing proposed to be held thereto against the company"*⁴⁵⁸.

It appears to be the case that a consumer in typical real estate arbitration disputes is the party dealing in good faith as requested by the above provision.

In order to comply with this Article and get the benefit of this protection newly introduced in the UAE Companies Law, consumers should ideally establish that the company denying the validity of the decisions of its organs to enter into arbitration agreements did sign several arbitration agreements. Therefore, entering into the arbitration agreement by those organs of the company is an act within their ordinary course of business.

In case this provision is used, a reliable protection can be defined for consumers and probably by businesses for the protection of any claim of nullity of arbitration agreements.

On the other hand, the party claiming invalidity of an arbitration agreement may defend its position by claiming that this provision in Article 25 of the Companies Law is not applicable for agreements entered into prior to the effective date of the law, being 1 July 2015. This is pursuant to Article 112 of the UAE Constitution, which provides that:

*"No laws may be applied except from the date they become in force and no retrospective effect shall result in such laws. The law may, however, stipulate the contrary in matters other than criminal matters, if necessity so requires"*⁴⁵⁹

⁴⁵⁸ UAE Federal Law No. 2 of 2015 (the UAE Companies Law)

⁴⁵⁹ Article 112 of the Constitution of the UAE of 1971, as amended.

Applying this constitutional provision implies that laws will not have retrospective effect and the effect thereof will not cover past events or things that happened prior to then as this would be contrary to the principles of justice and legality and the need to protect acquired rights⁴⁶⁰. As a consequence, applying Article 25 of the Companies Law for contracts entered into prior to 1 July 2015 may not be compliant with the UAE constitution.

On balance, the general constitutional rule articulated above is valid; however, the claim for nullity of an arbitration agreement is happening on the date the nullity is invoked rather than on the date when the underlying agreement was entered into. Therefore, it could be substantiated that the Article 25 of the UAE Companies Law is applicable to contracts formed before the effective date of the law as long as the claim for nullity is introduced in a date subsequent to the effective date of the law.

§ 2: Timing for Jurisdiction Challenges

Applicable Institutional Arbitration Rules in English and the UAE with regard to any plea to the jurisdiction in Arbitration Disputes

The UAE Law, the ICC Rules, and the DIAC Rules necessitate submitting any plea to jurisdiction at the beginning of the proceedings, failing which, the objecting party will lose its right to raise such objection. The following demonstrates the relevant provisions:

Article 20 of the UAE Federal Arbitration Law provides:

“A plea to the jurisdiction of the Arbitral Tribunal shall be raised not later than the submission of the respondent’s statement of defense under Article 30 of this Law. A plea that issues raised by the other party during the proceedings are beyond the scope of the Arbitration Agreement shall be raised not later than the next hearing following the hearing at which the plea was raised, otherwise the right to such plea shall be waived. The Arbitral Tribunal may, in either case, admit a later plea if it considers the delay justified”

Similarly, Article 5.3 of the DIAC Rules States:

“A plea that the Tribunal does not have jurisdiction shall be raised not later than in the Statement of Defense or, with respect to a counterclaim, in any reply to the counterclaim”⁴⁶¹

Further, Article 5.3 of the DIAC Rules States:

⁴⁶⁰ UAE; Application of the law with regard to time and public policy, by Hassan Arab of Al Tamimi and Co. <https://www.tamimi.com/law-update-articles/uae-application-of-the-law-with-regard-to-time-and-public-policy/>

⁴⁶¹ DIAC Arbitration Rules of 2007, issued by Decree No. 11 for the year 2007 by H.H. the Ruler of Dubai on the 6th of May 2007

“Within 30 days of receipt of the request from the Centre, the Respondent shall submit to the Centre an Answer to the Request (“the Answer”) which shall include the following.... (d) Any objection concerning the validity or applicability of the Arbitration Agreement” [Emphasis added]”⁴⁶².

These provisions are consistent with Article 40 of the ICC Rules, which reads:

“A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object”⁴⁶³.

As such, the UAE Law necessitates that any jurisdictional challenge should be raised prior to any other defense in the case, failing which, the right of such challenge shall be waived.

In applying this principle, the UAE USC dismissed a jurisdictional challenge and determined that:

“the defendant has discussed the merits of the case, which renders its right to plead to jurisdiction extinguished, the defendant therefore impliedly agreed to waive its right to contest jurisdiction by the fact that it discussed the merits of the case”⁴⁶⁴.

Therefore, in case a jurisdictional challenge is introduced at a later stage of an arbitration, a presumption could be drawn that this challenge is abusive and could be meant to sabotage the arbitration and exploit the proceedings. It is not uncommon to see an abusive party keeps silent on a jurisdictional challenge until its adversary incurs costs, appoints lawyers, and pays the relevant arbitration center’s fees. This behavior should be deterred by applying this rule.

Reserving the Right to Challenge Jurisdiction at Different Stages of Proceedings

In an attempt to use jurisdictional challenges for tactical reasons, the party pleading invalidity of an arbitration agreement may reserve the right to plead the jurisdictional challenge, related to the capacity to enter into an arbitration agreement, at subsequent stages of the arbitration. Such right cannot be reserved since it is explicitly contradicting with the purpose and intent of the UAE law and the Rules.

Article 5.3 (d) of DIAC Rules provides that:

⁴⁶² DIAC Arbitration Rules of 2007, issued by Decree No. 11 for the year 2007 by H.H. the Ruler of Dubai on the 6th of May 2007

⁴⁶³ The 2017 ICC Rules of Arbitration

⁴⁶⁴ Union Supreme Court Judgment number 225 for the year 23 dated 3 June 2003 [Exhibit 30]

*"('The Answer') shall include any objection concerning the validity or applicability of the Arbitration Agreement"*⁴⁶⁵.

In opposition, the party seeking to rely on the arbitration agreement must establish clearly that the reservation of such alleged right is invalid for the following reasons:

The objecting party's reservation of the right to challenge the validity of the arbitration agreement effectively means that it is not presently challenging the validity of the arbitration agreement. That represents, by itself, the exact opposite of the UAE law provisions and the arbitration rules set out above.

In order for the right to be reserved, such right must be recognized, protected, and conferred by law. The right of a party is not an "unrestricted liberty." 'Right' is defined as *"interest or privilege recognized and protected by law, freedom to exercise any power conferred by law"*⁴⁶⁶. In fact, reserving the right to act contrary to the applicable law or the institutional rules the arbitration proceedings are subject to is a clear violation of the sequential order of the arbitral proceedings and is not a 'right' by definition and therefore cannot be reserved.

The Unlawful exercise of the right under UAE law.

Frequently, a party claiming invalidity of an arbitration agreement based on incapacity of the signatory to bind a company to arbitration is raising this objection, after the claimant pays the arbitration fees and fully engaged into the arbitration proceedings. It is not uncommon for parties to use this tactic to frustrate the arbitration proceedings and make it increasingly difficult for claimants to prosecute actions. This procedural tactic may represent an unlawful exercise of right under UAE law.

The unlawful exercise of right is defined under Article 106 of the UAE CPC, which states that:

"1- Indemnification is a must for whoever unlawfully exercises his right. 2- Exercise of a right is unlawful when:

- a) There is an intention to trespass;*
- b)*
- c) The expected benefits are not commensurate with the prejudice sustained by other persons;*
- d) It exceeds what is usually accepted by custom and usage."*

The Dubai Court of Cassation jurisprudence interpreted the first condition by *determining that "the use of a right is intended to prejudice others and this intention may be revealed by the fact that the concerned person has no interest in knowingly using this right in such a way as to cause prejudice to others."*⁴⁶⁷

⁴⁶⁵ DIAC Arbitration Rules of 2007, issued by Decree No. 11 for the year 2007 by H.H. the Ruler of Dubai on the 6th of May 2007

⁴⁶⁶ Oxford Dictionary of Law, Fourth Edition, Ninth Edition, edited by Jonathan Law, published 21 June 2018

⁴⁶⁷ Dubai Court of Cassation 43 for the year 2005; Dubai Court of Cassation 50 for the year 2005, and Dubai Court of Cassation 6 for the year 1999

Dubai Court of Cassation further added that:

“It is a must, in exercising these rights, to achieve a specific lawful and serious purpose. Consequently, it is considered an abuse of right the total absence of any interest or of a serious one or if this interest is illegal”⁴⁶⁸

As such, delaying the jurisdictional challenge after the payment of the arbitration fees, appointment of lawyers, and engaging into the dispute can be found as an unlawful exercise of the right that should not be permitted under UAE law, having regards that:

- There is no clear benefit for such an act by the objecting party except to detriment the claimant by leading it to pay costs.
- At the minimum, the benefit for the objecting party, if it exists at all, does not commensurate with the prejudice sustained by the claimant.

This doctrine is consistent with the rulings of the Dubai Court of Cassation set out below that this abuse of right is contrary to the principle of ‘good faith’

§ 3: Subsequent Ratification for Arbitration Agreements

Where an agent lacks an explicit authority to agree on behalf of its principal, the principal shall still be bound by the acts of the agent in case the principal subsequently concurs or acquiesces in the agent's action, or fails promptly to disavow the unauthorized conduct after disclosure of material facts

Ratification Framework under UAE law

Article 930 of the UAE Civil Transaction Code states that:

“The subsequent ratification of the act shall be considered as a prior mandate.”

The party seeking to rely on an arbitration agreement, that is being claimed to be void by the other contracting party, may support its position by demonstrating the objecting party's full knowledge and ratification of the underlying arbitration agreement.

In frequent situations, the arbitration clause is part of the objecting party's standard contract template, which is initially introduced by the objecting party itself at the inception of the contract, further; this standard contract template was possibly used for several other agreements for several years without any challenge from the objecting party on the validity of such clause.

In addition, in certain situations, the agreement which includes the contentious arbitration clause was already performed, which reflects the objecting party's acceptance of the entire contract, including the arbitration clause included therein. For example, in case of a construction contract includes an arbitration clause and the

⁴⁶⁸ Dubai Court of Cassation 193 for the year 1993; Dubai Court of Cassation 217 for the year 2005

property is constructed, the party who constructed the property and performed the underlying contract obligations should not be able to challenge the arbitration clause, even having regards to the separability principle.

Once the party seeking to enforce the arbitration agreement establishes the above, it may be evident that subsequent objection of the adversary is obstructive. In fact, the legal framework established under UAE law should be applied so as to maintain the integrity of arbitration, and to deter obstructive behavior.

Arbitrators and parties should bear in mind that the separability doctrine supports the survival of an arbitration clause in case a contract is void or terminated, this should be taken into consideration when a party is claiming the invalidity of the arbitration clause when the main contract is valid, which a party is seeking to achieve by raising its jurisdictional challenge.

It is vital for any party to a dispute facing similar jurisdictional objections in arbitrations to understand the arbitrators' mentality and concerns. Arbitrators are always foreseeing and envisaging any possibility or risk for annulling their award by judiciary while recognizing the award. Therefore, even if a party's case appears logical and in order, however, this is not sufficient as the arbitrator must assess the powers conferred upon and since its jurisdictional powers are limited (as contrasted with the natural judge), further, arbitrators frequently make procedural decisions based on the enforceability of these decisions before national courts.

The Ratification of arbitration agreements has been considered by case laws in the UAE to rule on jurisdictional challenges to arbitral tribunals, as follows:

Dubai Court of Cassation judgment number 204/2008, in which the court dismissed the award debtor's jurisdictional challenge regarding the invalidity of the arbitration agreement due to the lack of requisite authority of the signatory to bind the company to arbitration. The court determined that:

"Ratification of a binding contract is done by any act or word expressing the ratification whether expressly or impliedly as per Articles 215 and 217 of the UAE Civil Transactions Code. In arbitration, whenever the principal ratifies the authority, the Principal must abide by this condition and acts of the agent. The subject matter court has complete competence and authority to conclude this condition from the documents and evidence submitted in the case and the surrounding facts and circumstances using its authority to interpret documents issued by parties which represent their will" ⁴⁶⁹

As such, a claimant facing similar jurisdictional challenges should, when applicable, analyze the surrounding facts and circumstances of the case and substantiates the will and intention of the party objecting the validity of the arbitration agreement.

National courts should, when applicable, analyze the objecting party's knowledge of material facts, including the arbitration agreement, and whether the objecting party purposely or negligently ignored means of information within its own possession and control, and ratified the act deliberately.

⁴⁶⁹ Dubai Court of Cassation decision number 204 for the year 2008 issued on 21 October 2008 [Exhibit 29]

Willful Blindness

Willful Blindness (or **willful ignorance**) describes a situation in which a person seeks to avoid liability for a breach of contract by deliberately keeping itself pretending to be unaware of facts that would render it liable, where this party is aware or ought to be aware of these facts.

It refers to the state of mind where a person ‘willfully shuts his eyes contrary to his or her ‘constructive knowledge’⁴⁷⁰

Under the US Laws, in some instances, arbitral tribunals can deem that a party has knowledge of a fact if the tribunal is satisfied that this party deliberately closed its eyes to what would otherwise have been evident to it. Differently stated, knowledge of facts can be inferred if the defendant *deliberately blinded himself to the existence of a fact*⁴⁷¹.

Willful blindness is a more common doctrine in the U.S, however, it may be useful, in the present context, to use this doctrine in other civil law jurisdictions.

Under the US law, a famous example of such a defense being denied occurred in *re Aimster Copyright Litigation*⁴⁷².

In 2006, in the *US Government v Enron* case, the court instructed the jurors to take into consideration the doctrine of willful blindness as they reached their verdict about whether the chief executives of the energy corporation were guilty. It was not sufficient for the defendants to claim that they were unaware of the facts taking place on the ground. The court found that if they failed to observe the corruption that was unfolding before their very eyes; failure to know what they ought to know was not a defense⁴⁷³.

Under UAE laws, once parties enter into an arbitration agreement, the respective arbitral tribunal is *prima facie* competent to prosecute the action. Article 203.5 of the UAE CPC precludes parties, while having an arbitration agreement, from prosecuting an action before the judiciary⁴⁷⁴. This fact becomes more relevant when the party objecting the arbitral tribunal’s jurisdiction does not take any position to deny the validity of the relevant arbitration agreement before or at the start of the proceedings. Rather, in certain occasions, the objecting party

⁴⁷⁰ ‘Model Penal Code Section 2.02(7) and Willful Blindness’, Jonathan L. Marcus, Yale Law Journal, Vol. 102, No. 8, Symposium: Economic Competitiveness and the Law (June 1993), pp. 2231–57.

⁴⁷¹ United States Court of Appeals, United States of America v Kenneth L. Lay in the United States District Court for the Southern District of Texas, Houston Division, May 2006.

⁴⁷² *Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003)

⁴⁷³ Willful Blindness: Why We Ignore the Obvious at Our Peril by Margaret Heffernan, 2011 Edition, Published March 1st 2011 by Walker Books

⁴⁷⁴ It provides that “if the parties agree to arbitrate the dispute it shall not be permissible to bring an action in respect thereof before the courts” (it is consistent with Article 8.1 of the new Federal Arbitration Law)

performs particular acts that provide evidence that it was aware of the existence of the arbitration agreement and these acts could, when interpreted collectively, evidence the objecting party's knowledge and ratification for the arbitration agreements. Under these circumstances, the jurisdictional objection and denial of the arbitration agreement could be construed as 'willful blindness'

In some instances, the objecting party is ought to be aware of the arbitration agreement. However, it disregards means of information within its possession and does not seek to rectify the situation, which expresses its confirmation of the arbitration agreement and makes it difficult for an arbitral tribunal to accept its subsequent objection. The relevant provision under UAE law to support this position is Article 930 of the UAE Civil Transactions Law, which states that:

"The subsequent ratification of the act shall be considered as a prior mandate."

From the case laws studied, one case law almost applied this doctrine by precluding a party that performed a contract (completed the construction works) from denying the arbitration clause included in it, which was part of the performed contract submitted by its own consultant, despite the contract was never signed by the party pleading the invalidity of the arbitration agreement.

In particular, in DCC judgment issued decision number 127 / 2012⁴⁷⁵, the Dubai Court of Cassation allowed surrounding circumstances to signing the arbitration agreement to evidence the knowledge of and therefore the ratification for the arbitration agreement by the objecting party to an arbitration agreement. The court did not give regards to the fact that the entire agreement that includes the arbitration agreement was not signed by the authorized signatory.

In this case, the arbitration agreement was signed by the project consultant (the Engineer), which do not have an explicit authority to agree to arbitrate on the defendant's behalf. The Court decided that because the tender documents (which contained an arbitration Clause) were received by the objecting party and it was undoubtedly aware of it and had subsequently performed the obligations under the contract and requested the issuance of a bank guarantee from the claimant, it was bound by the arbitration clause and could not seek to annul the arbitral award due to lack of authority to arbitrate.

The judgment held further that *"the court decided that the genuine will of parties in the contractual relationship is to arbitrate"*⁴⁷⁶ and therefore the denial of the arbitration could be interpreted as wilful blindness.

Deliberate Silence

In certain situations, the party invoking and relying upon the arbitration agreement serves notifications to the party objecting arbitration jurisdiction, while the latter ignores these communications or remain silent and fails to timeously contest the validity of the arbitration agreement. This silence can be interpreted, in some

⁴⁷⁵ Dubai Court of Cassation Decision number 127 for the year 2012 issued on 6 February 2013 [Exhibit 27]

⁴⁷⁶ *Ibid*

situations, as a sign of acceptance of the arbitration agreement, which precludes the same party from subsequently contesting the arbitration agreement.

In this regard, Article 215.2 of the UAE Civil Transaction Code provides that:

“Silence shall be considered approval if customarily indicating consent.”

This issue is more relevant when the party objecting the validity of the arbitration agreement is a large corporate entity, which has a dedicated and qualified legal department that should, in the ordinary course of things, respond to these communications.

Chapter 2: Estoppel and Apparent Authority Doctrines to recognize Authority to Arbitrate

Section 1: Agency by Equitable Estoppel

§ 1 Estoppel Legal Framework in English Law

Under the doctrine of estoppel, a party is not allowed to take a position that contradicts its previous conduct in the event a third party has relied on this previous conduct. An agency by estoppel will be created when it would be unfair to a third party to deny the agent’s authority, because the principal has allowed the third party to believe there was an agency relationship⁴⁷⁷.

Estoppel is a doctrine by which a party can be precluded from denying that another person is its agent. The doctrine typically applies when:

- (1) A third party has reasonable basis to believe that an agency relationship existed, whether through intentional conduct of the principal or negligence to correct the mistaken belief by the third party;
- (2) The third-party reasonably relied on the belief that an agency relationship exists,
- (3) The third-party suffers a detriment, and
- (4) The principal attempts subsequently to deny the agency relationship.

Under these circumstances, the principal shall be precluded (estopped) from denying this relationship it contributed to establish whether willfully or negligently for the detriment of third parties.

⁴⁷⁷ Washington Real Estate Fundamentals by Kathryn J. Haupt, Rockwell Publishing, 2006 Edition, Real Estate Business

The doctrine of estoppel “precludes a party from claiming the benefit of a contract while simultaneously attempting to avoid the burdens that a contract imposes.”⁴⁷⁸ . This is meant to prevent acts contrary to good conscience and fair dealing.

In English law, estoppel is defined by commentators as:

*“Where one person (‘the representor’) has made a representation of fact to another person (‘the representee’) in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive) and with the result of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in proper manner, objects thereto.”*⁴⁷⁹

A close principle relevant to this issue is the contractual estoppel, whereby parties to a contract should be precluded to claim matters contrary to the agreed explicit terms of the contract. The principles relating to contractual estoppel was summarized in *Peekay Intermark* case which held that:

*“There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it is the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel”*⁴⁸⁰

§ 2 Estoppel Legal Framework in the UAE Law

The closest provision under UAE law to the Estoppel by representation is Article 70 of the CTC, which provides that:

“Who endeavors to deny what he did, his endeavor will turn against him”

The Dubai Court of Cassation determined that:

⁴⁷⁸ [Comer v. Micor, Inc., 436 F.3d 1098, 1101](#) (9th Cir. 2006) (quoting *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 267(5th Cir. 2004); see *Comer v. Micor Inc. US Court of Appeal 9th circuit 1 February 2006*; available online <https://www.casemine.com/judgment/us/5914b595add7b049347738fb#p1101>

⁴⁷⁹ *Bower, Spencer* (2004). *The Law relating to Estoppel by Representation* (4th Edition). Para. 1.2.2; see https://en.wikipedia.org/wiki/Estoppel_in_English_law

⁴⁸⁰ *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386]

“As per articles 63 ⁴⁸¹ and 70 of the UAE Civil Transactions Code, a person is bound by his representation and who endeavors to deny what he did, his endeavor will turn against him. The representation is conclusive evidence on such trueness of facts being represented. The person made such representation loses the right to request his litigant the burden of evidence. Such an act provides that the compliance with such representation does not need any proof. Therefore, the representation is a source of obligation. Such representation should be true without stating the reason for being so, since it is by itself an acknowledgment of the legal right to third parties and revealing it rather than proving it”⁴⁸².

In typical arbitration disputes in the UAE, the following elements could be invoked against the party claiming invalidity of the arbitration agreement based on incapacity of a party to bind a company to arbitration. In particular:

- (i) Where the arbitration agreement is drafted by the same party claiming the invalidity of the arbitration agreement, in this case submitting a dispute to arbitration is obviously the objecting party’s own will and intent. Therefore, the objecting party should be estopped from disavowing the arbitration agreement originated, introduced, articulated and drafted by it.
- (ii) Where the party claiming the invalidity of the arbitration agreement, whether purposely or negligently, allowed its own employees to sign, and stamp the agreement that includes an arbitration agreement.
- (iii) Where the party claiming the invalidity of the arbitration agreement performed the obligations included in the agreement that includes the arbitration agreement, this might be used as a basis for precluding the same party from denying the arbitration agreement.

§ 3 Parties are precluded from causing nullity while claiming it

English Law Precludes a Party from Recovering a Benefit for his own Wrongdoings

It is an essence of law, that no person should be allowed take advantage or recover a benefit from its own wrongdoings; this is a fundamental principle closely connected to the ‘good faith’ and fair dealings. This principle is fully recognized in English courts of law and, with more force, in equity.⁴⁸³ This principle was applied in *Drinkwater v Caddyack Pty Ltd.*⁴⁸⁴

⁴⁸¹ Which states that “a person is bound by his acknowledgment”

⁴⁸² Dubai Court of Cassation Judgment number 409 for the year 2001

⁴⁸³ Kersley, R.H., M.A., LL.M./ Broom, Herbert, LL.D., A Selection of Legal Maxims, 10th Edition London, 1939

⁴⁸⁴ Delay and Disruption in Construction Contracts - Andrew Burr 5th edition, 2016, published by Informa Law from Routledge; 5th edition (April 11, 2016)

This is related to the doctrine of ‘illegality defense’ doctrine (also called *Ex turpi causa non oritur actio*), which provides that a person will be unable to pursue a legal remedy if it arises in connection with its own illegal act.⁴⁸⁵.

For example, the Supreme Court of New Jersey in *Neiman v. Hurff* provides:

*"To permit the murderer to retain title to the property acquired by his crime as permitted in some states is abhorrent to even the most rudimentary sense of justice. It violates the policy of the common law that no one shall be allowed to profit by his own wrong"*⁴⁸⁶

The UAE Law Precludes a Party Who Caused nullity to Adhere to it

As set out above, Article 70 of the CTC which provides:

"Who endeavors to deny what he did, his endeavor will turn against him"

This provision is an application for the general principles set out above that a person cannot profit from its own wrongdoing, which reflects ethical and social standards in order to deter such behavior and not to deviate from the substance and essence of good faith and honesty, which should exist in all dealings, transactions and procedures.

For the sake of clarity, let us assume that a party intends to orchestrate and misuse a jurisdictional challenge by assigning willfully or negligently an un-authorized representative to sign agreements on behalf of a company. Meanwhile, this party keeps internally this unauthorized signature matter as a hidden defense and an exit strategy to avoid contractual obligations resulting from its breach of contract. Such defense shall only be raised in case a legal action is brought against this party.

In equity, this tactic reflects an intention to twist facts, misrepresent evidence, and abuse judicial proceedings. In addition, this practice involves lack of good faith, honesty in facts and lacks observance of reasonable commercial standards of fair dealing.

Most Jurisdictions, including the UAE law, preclude litigant parties from using their own mistakes to take a legal advantage; whether these mistakes were committed purposely or negligently.

An important provision in this regard is articulated in Articles 14.1 and 14.2 of the UAE Civil Procedures Code provides, which provides:

⁴⁸⁵ Ex turpi causa non oritur action, see https://en.wikipedia.org/wiki/Ex_turpi_causa_non_oritur_actio

⁴⁸⁶ The Supreme Court of New Jersey in Duhaime, Lloyd, Legal Definition of Crimen Omnia Ex Se Nata Vitiat; *Neiman v. Hurff*, 93 A. 2d 345 (1952), available online https://scholar.google.ca/scholar_case?case=2949506212201730356&q=93+A.+2d+345&hl=en&as_sdt=2,5

“With the exception of the cases where the nullity is related to the public order: (1) it is not allowed to anyone to adhere to the nullity except the one for whom it was legislated. (2) And it is not permitted that the party, who caused such nullity, adhere to it” [Emphasis added].

In the above example, any purported claim for nullity of an arbitration agreement (even if exists) cannot be claimed by the party that did not validly sign the arbitration agreement, since it caused such purported nullity by letting an unauthorized person sign the arbitration agreement on its behalf. As a consequence, this party should be precluded from recovering a benefit out of its own wrongdoings. This issue becomes more relevant if any of the following circumstances exist:

If the party pleading the invalidity of the arbitration agreement drafted or offered the agreement containing the arbitration agreement and such agreement was made on the objecting party’s own standard template.

When the underlying agreement was signed by a person that was employed by the party pleading the invalidity of the arbitration agreement, especially if this employee was employed in a managerial level, and within the objecting party’s own offices

When the underlying agreement was signed as one of several other agreements containing the same arbitration clause, which demonstrates that the contested agreement is not an individual case of exceeding authority, but rather an organized process led and supervised by the objecting party and before its very own eyes.

Article 246 of the UAE Civil Transactions Code states that:

“Contracts must be performed in accordance with their content and in a manner consistent with the requirements of good faith.”

It could be established and construed that using the objecting party’s own employees’ acts of exceeding authority to claim nullity annul an arbitration agreement and inserting an invalid arbitration agreement into the agreement is contrary and cannot be a true reflection of good faith.

DCC Judgment No. 202 for the year 2007 [Exhibit 31] demonstrates that the objecting party cannot claim nullity whether such nullity that was caused by the objecting party or by its own employees. The judgment dismissed the same challenge related to the invalidity of an agreement when the defendant claimed that the power of attorney of the award creditor was invalid since it was issued by a person who does not have the capacity to represent the defendant. The court reasoning for the dismissal of this argument was as follows:

Article 14/1 of the Civil Procedures Code provides that it shall not be permitted that the party who caused the nullity to adhere to it, whether he caused such nullity willfully or negligently and whether such nullity was caused by the same person himself or someone who is employed by it.

The institution was validly represented in the case and the defendant cannot claim that its general manager does not represent it since it cannot recover a benefit or take an advantage from its own mistakes or negligence.

In addition, Union Supreme Court (USC) judgment number 433 - for 24th judicial year⁴⁸⁷ [Exhibit 32] dismissed a similar defense when a party claimed the invalidity of the expert's report since the same party did not sign such report and did not deliver to the expert the needed document. The court, obviously, dismissed this defense, which is contrary to good faith on the basis of Articles 13 and 14/2 of the UAE CPC

In a relatively recent Case law issued on 23 March 2016, the Dubai Court of Cassation decision number 17/2016, accepted this defense to deny the request of a party to set aside an arbitral award based on the invalidity of the arbitration agreement. The court determined that:

*"It shall not be permitted pursuant to Article 14/2 of the CPC for the party who caused such nullity, which is not related to public order, to adhere to it whether this nullity is caused intentionally or negligently or was caused by the party itself or the persons working for it. As such, it shall not be permitted for a party in an arbitration to claim nullity before the court ratifying such arbitral award seeking to nullify an award for causes or defects related to the arbitration agreement or arbitration procedures that were concluded by his own acts"*⁴⁸⁸.

Section 2: Apparent Authority Doctrine

§ 1 Apparent Authority Doctrine in French and English laws as compared with the UAE law

Apparent Authority doctrine, in an agency relationship, refers to a situation created by the principal to present its agent as such, where any reasonable third party would believe that an agency relationship exists and that the agent is authorized to act on the principal's behalf. In effect, the principal shall be bound by the acts of the agent and is, as a consequence, precluded from subsequently claiming that the agency relationship is non-existent or invalid even if the agent had no actual authority whether express or implied, it is also called 'Ostensible Authority'.⁴⁸⁹

Apparent authority refers to the attitude of the principal who allows another person, including its employees, to act, negotiate, enter into a contract and agree to arbitrate in the principal's name⁴⁹⁰.

This vital principle, as expressed by Article 25 of the new UAE Companies Law, must not be undermined by the limitations in the company's constitutional documents, including memorandum or articles of association or any

⁴⁸⁷ Union Supreme Court Petition Number 433 - for the year 24th judicial year dated 1 October 2004

⁴⁸⁸ Dubai Court of Cassation decision number 17 for the year 2016 issued on 23 March 2016

⁴⁸⁹ See Apparent Authority, <https://enacademic.com/dic.nsf/enwiki/1036634>

⁴⁹⁰ English Court of Appeal Hely-Hutchinson v Brayhead Ltd [1967] 1 QB 549, see Apparent Authority, https://en.wikipedia.org/wiki/Apparent_authority

other internal documents⁴⁹¹.

The distinction between estoppel, apparent authority should be clear, the former prevents contradiction between conducts (such as offering the arbitration agreement and then denying it), while the later implies appearance permitted by the principal to the agent. One could argue that apparent authority is a branch of estoppel, which could be a sensible assertion.

In general, third parties cannot rely upon the apparent authority in circumstances where it was aware of the lack of the actual authority or the limitations to the agent to act authority⁴⁹².

The origin of this principle is the broader principle, which provides that *reasonable expectations of honest men must be protected*, which applies as a molding force to the expectations of parties under the law of contracts.⁴⁹³

The apparent authority doctrine does not enable a third party to hold the company to an unauthorized transaction per se. Rather, it allows a third party to assume that a transaction that is authorized by the company, but it requires the third party to establish the fact of authority, actual or presumptive, in the first place.⁴⁹⁴

Importantly, the principal or someone with actual authority should have contributed to the appearance of the agent as having authority, the agent cannot hold himself out as having authority for this purpose.⁴⁹⁵

In determining whether the principal had presented its agent as having such authority, the court has to consider the principal's conduct and contribution to present the agent as such.⁴⁹⁶

In the English Law, this doctrine has been consistently recognized. In *Freeman and Properties*⁴⁹⁷, the court identified the apparent authority to exist and to bind the principal by the acts of the presumed agent:

1. A representation or appearance that the agent had an authority to act on behalf of the principal;
2. such a representation was being made by the principal or by a person having an actual authority to manage the business of the principal; and

⁴⁹¹ United Kingdom, section 35A of the Companies Act 1985; Canada, see section 18 of the Canada Business Corporations Act, see Apparent Authority, https://en.wikipedia.org/wiki/Apparent_authority

⁴⁹² A L Underwood v Bank of Liverpool [1924] 1 KB 775, see Apparent Authority, Wikipedia https://en.wikipedia.org/wiki/Apparent_authority

⁴⁹³ [1993] 2 Lloyd's Rep. 194 at 196

⁴⁹⁴ Royal British Bank v Turquand

⁴⁹⁵ England's Court of Appeal in *Armagas Ltd v Mudogas SA* [1986] AC 717

⁴⁹⁶ *Egyptian International Foreign Trade Co v Soplex Wholesale* [1985] BCLC 404 at 411

⁴⁹⁷ English Court of Appeal in *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd Ltd* [1964]

3. under its constitutional documents of the company, the company was not deprived of the capacity to act or to delegate authority to enter into a contract of that kind to an agent⁴⁹⁸

The French law provides for a provision that is close to the apparent authority doctrine where the principal's behavior or statements (appearance) support the third parties' legitimate belief that the agent is acting on behalf of the principal.

Article 1156 of the French Civil Code states:

*"An act made by a representative without authority or beyond his authority cannot be set up against the person whom he represents, unless the third-party with whom he contracts legitimately believed that he had that person's authority, notably by reason of the latter's behavior or statements"*⁴⁹⁹

Apparent Authority Doctrine under UAE law

The UAE law is not materially different from the principles laid down in other jurisdictions set out above. However, the applicability of the apparent authority doctrine regarding authority to enter into arbitration agreements has been a matter of controversy under UAE law. A number of views and jurisprudence establish that the apparent authority doctrine does not grant capacity to a person to enter into arbitration agreements under UAE law and other jurists and case laws confirm the contrary.

Indeed, the decisions issued by the Dubai Court of Cassation and the Abu Dhabi Court of Cassation reflect a certain degree of contradiction. As such, many arbitration practitioners are not able to assess the correct stance of the UAE law on this matter.

For the sake of identifying the principles of the UAE law that relate to the apparent authority doctrine, I will demonstrate first the case laws on apparent authority in general and then the specific cases of apparent authority within the context of agreements to arbitrate.

§ 2 Case laws on Apparent Authority in the UAE law

This subsection will study briefly the facts and evidence accepted by the Dubai Court of Cassation and the Abu Dhabi Court of Cassation to support the finding that the signatory to an agreement had an 'apparent authority' to bind the party that intended to deny the agreement. Despite the lack of explicit, written authority to that agent, the principal contributed by its actions positively or negatively to provide the appearance and the presentation to the agent to act as a person acting on the principal's behalf and therefore any third party is excused to believe the existence of a valid agency relationship.

The purpose here is to provide a clear demonstration on the attitude and consistency of UAE Supreme Courts in the application of the apparent authority doctrine.

⁴⁹⁸ *Ibid*

⁴⁹⁹ French Civil Code 2016, https://www.trans-lex.org/601101/mark_914000/french-civil-code-2016/

Abu Dhabi Court of Cassation Judgment 1379 for the year 2009

Evidence of apparent authority: in this case, the claimant was successful in proving apparent authority when it introduced into the evidence that:

- (i) the invoice issued by the agent carried the respondent's name and stamp
- (ii) the agreement was printed on a white paper showing the signatory of the Agent for the principal, and
- (iii) The agent used the premises of the principal and his employees to operate.

Dubai Court of Cassation Judgment number 403 for the year 2001

Evidence of apparent authority: in this case, the claimant was permitted to establish an agency relationship when it proved that the documents in dispute were printed on the letterhead of the respondent (the principal) and included its name, telephone number, fax number, trademark, and stamp. The principal failed to take any action to prevent such use.

Dubai Court of Cassation Judgment 379 for 1997

Evidence of apparent authority: in this case law, the claimant was successful in proving apparent authority when it introduced into evidence that the agreement was signed in the principal's offices. Further, the claimant in this case received a receipt voucher for money paid that was stamped by the principal.

Abu Dhabi Court of Cassation case number 145 for 1993

Evidence of apparent authority: in this case, the claimant was successful in proving apparent authority when it introduced into the evidence that it was using the offices of the principal and its letterhead.

Union Supreme Court Decision 62 for 2004

Evidence of apparent authority: in this case, the claimant was successful in proving apparent authority when it introduced into evidence that the agent was an employee for the principal; it was habitual for the agent to sign such contracts, the principal was aware of the agent's acts, the agent had a contract template which includes the principal's name, telephone and fax numbers, and stamp.

The Following are additional 19 judgments rendered by the UAE Supreme Courts where these decisions have applied the Apparent Authority doctrine to prove the Agency relationship.

- 1- Judgment number 144 / 1993 issued by Abu Dhabi Court of Cassation
- 2- Judgment number 268 / 2000 issued by Abu Dhabi Court of Cassation
- 3- Judgment number 281 / 1994 issued by Abu Dhabi Court of Cassation
- 4- Judgment number 180 / 1998 issued by Abu Dhabi Court of Cassation

- 5- Judgment number 247 & 258 / 2008 by Abu Dhabi Court of Cassation
- 6- Judgment number 210 / 1994 issued by Abu Dhabi Court of Cassation
- 7- Judgment number 345 / 1996 issued by Abu Dhabi Court of Cassation
- 8- Judgment number 191 / 1995 issued by Dubai Court of Cassation
- 9- Judgment number 126 / 1998 issued by Abu Dhabi Court of Cassation
- 10- Judgment number 262 / 1998 issued by Abu Dhabi Court of Cassation
- 11- Judgment number 518 / 1999 issued by Abu Dhabi Court of Cassation
- 12- Judgment number 394 / 1999 issued by Abu Dhabi Court of Cassation
- 13- Judgment number 89 / 2005 issued by Dubai Court of Cassation
- 14- Judgment number 401 / 2003 issued by Dubai Court of Cassation
- 15- Judgment number 437 / 2003 issued by Abu Dhabi Court of Cassation
- 16- Judgment number 600 / 2004 issued by Abu Dhabi Court of Cassation
- 17- Judgment number 359 / 2004 issued by Dubai Court of Cassation
- 18- Judgment number 260 / 2005 issued by Dubai Court of Cassation
- 19- Judgment number 352 / 2006 issued by Abu Dhabi Court of Cassation.

This considerable number of case laws demonstrates the consistency of the UAE Supreme Courts in applying the apparent authority doctrine.

Conditions to Apply Apparent Authority in the UAE law

Before addressing the contentious matter of the applicability of the apparent authority to authority doctrine to capacity to enter into arbitration agreements, it is vital to demonstrate, from studying the above case laws, the methodology that the UAE Supreme Courts applied for recognizing the apparent authority doctrine in the contractual disputes generally. This is without specific regard to the authority to arbitrate, which will be discussed separately in this section.

In fact, the UAE jurisprudence attaches more importance to the effective powers of companies' employees than to organizational rules, since the latter is an internal matter within the organization but the former is the actual effective power the employee has in the eyes of the general public. An important element would be the degree of contribution of the company itself in presenting its employees as an agent that has the capacity to have the authority to act on behalf of the company before the public.

Despite the doctrine of 'apparent authority' not being part of the UAE Civil code, but rather a doctrine established and consistently applied by the Dubai Court of Cassation and Abu Dhabi Court of Cassation, the application of this principle expanded from UAE Supreme Courts' judgments from 1993 to date.

This principle, under UAE law, entails that the capacity given by the principal to the agent does not have to be given explicitly written if three conditions apply altogether. These conditions are taken from the following Cassation decisions:

This principle, under UAE law entails that the Capacity given by the principal to the agent does not have to be given explicitly written if three conditions apply altogether, these conditions are taken from the following Cassation decisions:

Abu Dhabi Court of Cassation Judgment 1379 / 2009, Dubai Court of Cassation Judgment 403 / 2001, Dubai Court of Cassation Judgment 379 / 1997, and Union Supreme Court decision number 62 / 2004.

Condition 1: The Agent is representing the principal without explicit authority.

Condition 2: An external appearance created by the principal reflecting the existence of an agency relationship between the principal and the agent in which the principal contributed to such appearance whether positively (by providing it) or negatively (by permitting it to exist).

Set out below is, an example to illustrate the some of the evidence that can be relied upon by a party seeking to rely on an arbitration agreement which is being claimed null and void by the adversary:

- (1) The signatory to the underlying agreement, on behalf of the objecting party, is using the premises of the principal to operate.
- (2) The signatory to the underlying agreement, on behalf of the objecting party, was an employee at a managerial level with the principal when the agreement was signed.
- (3) The Signatory to the underlying agreement, on behalf of the objecting party, habitually signed agreements, the principal's team and the procedures impose taking agreements to the agent to sign the agreement as part of the formal process of the principal.
- (4) The Signatory to the underlying agreement, on behalf of the objecting party, habitually signed agreements, where the principal's team and the procedures impose taking agreements to the agent to sign the agreement as part of the formal process of the principal.
- (5) The arbitration clause was written and drafted carefully and introduced by the party denying it, which demonstrates that this arbitration clause has been reviewed and verified by the employees, potentially the solicitors, and possibly different levels of authority within the principal's organizations before being incorporated into the agreement.

Condition 3: The third parties dealing with the agent should be acting in good faith regardless of the good faith of the agent.

In the event that the party seeking to rely on the arbitration agreement enters into an agreement that was drafted by the party that is subsequently attempting to deny it, the party seeking to rely on the agreement may have a solid basis to claim that the arbitration agreement is the objecting parties' own proposition. Under these circumstances, the *prima facie* presumption would be that the third party is acting in good faith.

It is important to remember that the third party has to act in good faith under this doctrine. Therefore, if the third party in this case was aware or ought to be aware of the lack of actual authority, it might not be excused under these circumstances to rely on apparent authority. One example could be if the third party is a lawyer him or herself and faced the same challenge by the same principal before.

§ 3 Applicability of the Apparent Authority Doctrine regarding Arbitration Agreements under UAE law:

As discussed before, the UAE Cassation decisions reflect a certain degree of contradiction with regards to the applicability of the apparent authority doctrine granting a capacity of a party to enter into arbitration agreements.

The following judgment handed down by the Dubai Court of Cassation clearly confirms that the ‘apparent position’ cannot be used to prove the validity of arbitration agreements:

Dubai Court of Cassation Decision number 220/2004 [Exhibit 53]

The judgment provides that (“the theory of *prima facie*”) or in Arabic “the apparent position” does not apply with regard to arbitration agreements.

The court was clear that when the arbitration clause is being signed, each contracting party must review and verify the authority of its counterparty to enter into arbitration and this authority must be clear, explicit and specific.

The Court determined that:

“Agreements to arbitrate, whether in the form of a condition or submission, shall not be valid unless it has been executed by those who have the capacity to dispose of the disputed right and there is no place for the theory of prima facie in arbitration agreements. As each one of the parties to an arbitration shall verify the authenticity and capacity of the other party to agree on arbitration, because the agreement to arbitrate means waiver of its right to file the lawsuit before the courts which could put the right at risk”⁵⁰⁰.

The court started with a liberal approach when it established that:

“It is not compulsory for the parties' agreement to arbitration to be established within one document signed by both parties. It is permissible for one party's offer to refer their dispute to arbitration to be established in a document and for the other party's acceptance to be established in another document, provided that the offer confirms the acceptance and both are identical”⁵⁰¹.

The court went on with this liberal approach and established that:

“The parties' agreement to refer their dispute to arbitration could be proved either by means of a written document signed by both parties or by a letter or any other means of written communication exchanged between parties, as long as such communications are signed by the sender or their transmission is proved to be made from the machine of the sender.”

⁵⁰⁰ Dubai Court of Cassation decision number 220 for the year 2004 issued on 17 January 2005 [Exhibit 53]

⁵⁰¹ *Ibid*

However, the court established strict requirements for agreements to arbitrate and provided that:

“Each party should verify the title and capacity of the other party, because an agreement to arbitrate involves the waiver of the inherent right to file an action in courts, which is a departure from the regular terms of business that are based on good faith, apparent authority and estoppel”

Finally, the court established that the manager of a limited liability company is the only person authorized to bind it to agreements to arbitrate. It held that:

“The manager is solely entitled to agree to arbitration in the name of the company, unless he empowers another person by virtue of a special power of attorney to act on his behalf with respect to agreeing to arbitrate certain disputes.”

This judgment has been used frequently by lower courts as a basis to conclude that the apparent authority doctrine does not apply to the authority to arbitrate. The decision is clear that each party to arbitration should verify the authenticity and capacity of the other party to agree on arbitration. That effectively eliminates the possibility of applying the apparent authority doctrine and puts the burden of proof on the party who claims the validity of the arbitration agreement since such party is under the obligation to check and verify the authority of the party claiming otherwise.

On the other hand, the following judgments handed down by the Dubai Court of Cassation and Abu Dhabi Court of Cassation held that the apparent authority doctrine is applicable to arbitration agreements:

Abu Dhabi Court of Cassation Judgment number 873 for 2009 [Exhibit 21]

In this Abu Dhabi Case law, during the courts’ review of the enforcement of an arbitral award, the court dismissed a jurisdictional challenge due to lack of capacity for the signatory to enter into an arbitration agreement and established that the authority to enter into arbitration agreements could be explicit, implied or apparent.

The court first established the traditional rule under Article 203.4 of the Repealed Arbitration Chapter of the CPC (Article 4.1 of the UAE Federal Arbitration) that only a person who has the capacity to dispose of a right in a dispute may validly agree to arbitration. That is because an agreement to arbitrate involves a waiver of the right to bring an action before the courts of the UAE and of the guarantees that such action affords to the litigants.

However, the court established a new rule that:

“Only the person who has the capacity to make relinquishments over the rights in dispute may validly make an agreement to arbitrate... the authority granted to an Agent could be express, implied or Apparent (ostensible). The authority will be express if it is expressed in words, whether spoken or written. The authority will be implied if it is to be deduced from the facts of the case, and everything that has been said or written and the ordinary

mode of dealing, all of which may be regarded as part of the surrounding facts⁵⁰².

Dubai Court of Cassation Judgment number 273 for the year 2006 [Exhibit 20]

In this is Dubai Case law, during the courts' review of enforcement of an arbitral award, the court dismissed a jurisdictional challenge due to lack of capacity for the signatory to enter into an arbitration agreement. The petitioner in this case initialed an action before the Dubai Court of Cassation requesting annulment of an arbitral award. The court dismissed this claim and determined that:

*"Only persons having the capacity to make relinquishments over the rights in disputes may validly enter into agreements to arbitrate..... the authority given to an agent may be express, implied or apparent (ostensible)"*⁵⁰³.

That decision is clear that apparent authority doctrine in delegations to arbitrate is accepted by the Dubai Court of Cassation.

The court further determined that:

*"According to the provisions of Article 203.4 of the Repealed Arbitration Chapter of the CPC (Article 4.1 of the UAE Federal Arbitration), as well as the established in the jurisprudence of this Court, the agreement arbitrate may only be made by the party having capacity to dispose of the disputed right and not by those who have the capacity to agree to litigation. This is because the arbitration agreement implies a waiver of the right to file a lawsuit before the courts of the state, including all guarantees prescribed for litigants. Nonetheless, the attorney's capacity could be explicit, implicit or apparent. The authorization shall be deemed explicit if it is provided verbally or in writing, while the same shall be deemed implicit if it is implied by the status quo, verbal or written agreements and ordinary business practice"*⁵⁰⁴

Section 3: The Modern view of Cassation Judgments in Dubai as opposed to Abu Dhabi

The evolvement of the UAE jurisprudence must be bound by the provisions of law. The principles established by the UAE Supreme Courts must be in line with the established provisions of law.

The provisions of UAE federal laws establish strict requirements for agreements to arbitrate, including:

Article 58(2) of the CPC, which provides that:

⁵⁰² Abu Dhabi Court of Cassation judgment number 873 for the judicial year 3 dated 22 October 2009

⁵⁰³ Dubai Court of Cassation decision number 273 for the year 2006 issued on 5 March 2007 [Exhibit 20]

⁵⁰⁴ *Ibid*

“No admission or waiver of a right alleged or settlement or submission to arbitration ... or any other disposition in respect of which the law requires special authorization may be made without special authority.”

Article 4.1 of the UAE Federal Arbitration Law provides that:

“An Arbitration Agreement may only be concluded, on pain of nullity, by a natural person having the legal capacity to dispose of his rights or on behalf of a juridical person by a representative with specific authority to arbitrate.”

Article 154 of the UAE Commercial Companies law states:

“The Board of Directors shall have all the required powers to do such acts as required for the object of the company, other than as reserved by this Law or the Articles of Association of the company to the General Assembly. However, the Board of Directors may not make conciliation or agree on arbitration, unless such acts are authorized under the Articles of Association of the company or are within the object of the company by nature. In other than these two events, such acts require to issue a special decision by the General Assembly”⁵⁰⁵.

Therefore, over the years from 1993 until 2015, the UAE jurisprudence provided conflicting views with regard to authority to enter into arbitration agreements.

By way of example, the DCC judgment number 220 for the year 2004 [Exhibit 53]⁵⁰⁶ is against the applicability of the apparent authority doctrine regarding arbitration and that authority to arbitrate should be explicit. Further, the decision determined that each contracting party must verify the authority of the counterparty.

Furthermore, almost 27 case laws in the UAE confirmed setting aside arbitral awards for reasons related to the lack of requisite authority to enter into arbitration agreements.

The UAE courts’ approach developed into a more modernized, pro-arbitration approach. The analysis of the jurisprudence for the period from 1993 until 2018 reflects two waves of improvements developed in the UAE jurisprudence:

§ 1 First wave of improvement (from 2007 to 2013) in Dubai and Abu Dhabi

During 2007, the DCC decision number 273/2006, held that the authority to bind a party to an arbitration agreement could be express, implied or ostensible. This judgment softened the strict approach that customarily requested parties to verify the actual authority granted to agents to arbitrate rather than relying on apparent authority. The court in this case allowed “implied” and “apparent” authority to evidence the delegation to enter into arbitration agreements.

In Dubai Court of Cassation Judgment number 273 for the year 2006 [Exhibit 20] determined that:

⁵⁰⁵ Article number 154 of the UAE Federal Commercial Companies Law number 2 of 2015

⁵⁰⁶ Dubai Court of Cassation decision number 220 for the year 2004 issued on 17 January 2005 [Exhibit 53]

“Only persons having the capacity to make relinquishments over the rights in disputes may validly enter into agreements to arbitrate..... the authority given to an agent may be express, implied or apparent (ostensible)”⁵⁰⁷.

In 2008, the Dubai Supreme Court established that in the event the court finds out from the facts and circumstances of the case that the party pleading invalidity of an arbitration agreement was aware of the arbitration agreement and did not contest it, then the principal could be bound by it even if the agent did not have any express, special or even any written authority to arbitrate. Further, the UAE Supreme Courts established that authority to arbitrate can be explicit, implied or ostensible.

The knowledge of the existence of the arbitration agreement that is not associated by any objection of it before the start of the proceedings could be interpreted as ratification of act as per Article 930 of the UAE Civil Transactions Law which states that:

“The subsequent ratification of the act shall be considered as a prior mandate.”

In this regard, the DCC judgment number 204 for 2008 [Exhibit 29] dismissed this jurisdictional challenge related to the incapacity of an agent to bind the company to arbitrate. The court decided that:

“Since the documents in the litigation, despite the lack of the special power of attorney to the agent which authorizes him to arbitrate as per the company article of association dated 2 March 2003, however, the judgment of the Court of Appeal concluded that the subsequent ratification of the defendant has been proven to the arbitration clause of this contract”⁵⁰⁸.

The court held further with regards to arbitration agreements that:

“Whenever the principal ratifies the delegation, the principal must abide by this condition. The subject matter court has complete competence and authority to conclude this condition from the documents and evidence submitted in the case and the surrounding circumstances using its authority to interpret documents issued by parties which represent their will.”

In 2009, the ADCC judgment number 873 / 2009 [Exhibit 21] established and reaffirmed the same principle. The court determined that:

“Only the person who has the capacity to make relinquishments over the rights in dispute may validly make an agreement to arbitrate..... the authority granted to an Agent could be express, implied or Apparent (ostensible). The authority will be express if it is expressed in words, whether spoken or written. The authority will be implied if it is to be deduced from the facts of the case, and everything that has been said or written and the ordinary mode of dealing, all of which may be regarded as part of the surrounding facts”⁵⁰⁹

⁵⁰⁷ Dubai Court of Cassation decision number 273 for the year 2006 issued on 5 March 2007 [Exhibit 20]

⁵⁰⁸ Dubai Court of Cassation Decision number DCC 204 for the year 2010 [Exhibit 36]

⁵⁰⁹ Abu Dhabi Court of Cassation judgment number 873 for the judicial year 3 dated 22 October 2009

In 2010, the DCC Judgment issued decision number 127 / 2012⁵¹⁰. The Dubai Court of Cassation allowed surrounding circumstances to signing the arbitration agreement to evidence the knowledge of and therefore the ratification for the arbitration agreement by the objecting party to an arbitration agreement, even in an instance where the entire agreement that includes the arbitration agreement was not signed by the authorized signatory.

In this case, the arbitration agreement was signed by the project consultant (the engineer), which does not have an explicit authority to agree to arbitrate on the defendant's behalf. The Court determined that since the arbitration clause was included within the tender documents sent by the consultant to the objecting party and the latter was undoubtedly aware of it and had subsequently performed the obligations under the contract and requested an issuance of a bank guarantee from the claimant, it was bound by the arbitration clause and could not seek to annul the arbitral award due to lack of authority to arbitrate⁵¹¹.

The judgment held further that *"the court decided that the genuine will of parties in the contractual relationship is to arbitrate"*⁵¹².

As such, the formalistic approach of the UAE Supreme Courts that used to demand a specific and express authority to arbitrate started to diminish gradually starting from the year 2007 until 2009.

The DCC Judgment number 204/2008 issued in 2009 and USC 834/2010 issued in 2011 [Exhibit 28] and DCC 127/2012 issued in 2013 represent a slightly more modernized view, where the Dubai Court of Cassation established the following:

If it can be proved from the facts and circumstances of the case that the party pleading invalidity of an arbitration agreement was aware of it and did not contest it when he knew this fact, then it might be bound by such agreement.

Authority to arbitrate should not only be express. Instead, it could, be implied or ostensible.

Under UAE law, the legal capacity and authority to arbitrate includes the following forms as per the Abu Dhabi Court of Cassation judgment number 873 for the year 2009 [Exhibit 21], and held by the Dubai Court of Cassation Judgment number 273 for the year 2006 [Exhibit 20]:

Express Written authority: *the authority to arbitrate will be express if it is expressed in words, whether spoken or written - ADCC 873/2009 and DCC decision number 273/2006*

⁵¹⁰ issued on 6 February 2013

⁵¹¹ See UAE: RATIFICATION OF A DOMESTIC ARBITRAL AWARD AND THE ISSUE OF ARBITRATION CLAUSES INCORPORATED BY REFERENCE by 2015 Al Tamimi & Company, available online <https://www.thefreelibrary.com/UAE:+RATIFICATION+OF+A+DOMESTIC+ARBITRAL+AWARD+AND+THE+ISSUE+OF...-a0414336974>

⁵¹² Dubai Court of Cassation Decision number 127 for the year 2012 issued on 6 February 2013 [Exhibit 27]

Express spoken authority: *the authority to arbitrate will be express if it is expressed in words, whether spoken or written - ADCC 873/2009 and DCC decision number 273/2006*

Ratification: *“In arbitration, whenever the Principal ratifies the delegation, the Principal must abide by this condition”⁵¹³*

Implied authority: *“the authority to arbitrate would be implied if it is to be deduced, concluded or inferred from the facts and circumstances surrounding the case and everything that has been said or written and the usual mode of dealing could be regarded as part of the surrounding circumstances”⁵¹⁴.*

Ostensible authority: *“the authority granted to an Agent to enter into arbitration agreement could be express, implied or apparent” - ADCC 873/2009 and DCC decision number 273/2006.*

§ 2 Second Phase of Improvement (from 2015 to 2018) in Dubai

Starting from 2015, the UAE Supreme Court of Dubai has issued important judgments that depart from their former approach with regards to authority to enter into arbitration agreements.

These judgments do not represent the consistent decisions of the UAE Supreme Courts since some conflicting decisions keep deciding to the contrary. However, since this paper supports the arbitration jurisdiction when validly agreed to it, these judgments upholding the arbitration jurisdiction represent the modern approach of the UAE courts in recognizing and enforcing agreements to arbitrate.

These judgments support a broad principle: in case a company does include the name of its authorized signatories on its behalf inside the agreement and the signature of that person in the agreement is readable (which enables third parties to verify signature), then only under these circumstances may a company validly contest that the signatory is not authorized to enter into arbitration agreements. If any of the former conditions do not exist, then the company is bound by the arbitration agreement.

This recent positive movement with regards acceptance of arbitration jurisdiction is only in the Emirate of Dubai. On the other hand, the situation is quite different in Abu Dhabi and the remaining emirates (except Ras Al Khaimah) under the Union Supreme Court jurisdiction, mostly still follow the first wave of improvement set out above.

Furthermore, following the issuance of these decisions by the Dubai Court of Cassation, when parties proceed to ratify arbitral awards before the Dubai Courts and rely on these recent Cassation decisions before the lower courts in Dubai, still certain lower courts’ do not take the same reasoning the conclusions of the Dubai Court of Cassation’s modern approach.

⁵¹³ Dubai Court of Cassation decision number 204 for the year 2008 issued on 21 October 2008 [Exhibit 29]

⁵¹⁴ Abu Dhabi Court of Cassation judgment number 873 for the judicial year 3 dated 22 October 2009 and Dubai Court of Cassation decision number 273 for the year 2006 issued on 5 March 2007 [Exhibit 20]

This contradiction increased the unpredictability of the UAE courts' acceptability of arbitral awards and provides arbitration practitioners with substantial doubts that their decisions may not be recognized or enforced. As mentioned before, the enforceability of awards is one of the main concerns of arbitrators.

In order to provide a comprehensive view of the UAE courts' decisions on the acceptability of arbitral awards, set out below are the most recent case laws, which will be useful for arbitrators and parties enforcing arbitral awards in the UAE as arguments related to capacity to enter into arbitration agreements are raised in almost all arbitral awards being enforced in the UAE courts.

DCC decision number 386/2015 [Exhibit 17]: the background of this case concerns a consumer in the ordinary course of business who purchased a property from a reputed developer. The consumer, being the weaker party, accepted the terms imposed by the real estate developer in the sale and purchase agreement including a jurisdiction clause, which refers all disputes between the parties to arbitration under DIAC rules. When the developer breached the contract, the consumer brought an arbitration case and successfully obtained an award in its favor. Subsequently, when the consumer applied for recognition of the award before the Dubai Courts, as is typical with cases in the UAE, the developer that introduced and drafted the arbitration agreement in the first place claimed nullity of the arbitration clause within the agreement. In particular, the developer claimed that the signatory to the sale and purchase agreement did not have the requisite authority to bind the developer to arbitration agreements.

Not surprisingly, the developer's argument was accepted by both the Dubai Court of First Instance and Court of Appeal, which granted the developer's request to set aside the arbitral award.

The Dubai Court of Cassation overturned the Court of Appeal's decision. The court first stated:

*"It is established in the jurisprudence of this Court that if the name of certain company is mentioned in an agreement and another person signed such agreement on the company's behalf, this shall constitute a legal pretext affirming that the person who signed it did so for and on behalf of the company irrespective of the connection between his name and the company's name. Hence, the effects of such an agreement shall be added to the company's rights and obligations"*⁵¹⁵.

Further, the court established an important rule. In summary, in the event that the party claiming nullity of the arbitration agreement discloses the name of its legal representative in the agreement and then the signature to the agreement is clearly readable, it shall be clear that the signatory to the sale and purchase agreement is different from the objecting party's representative and, in such case, the objecting party may claim invalidity of the arbitration agreement. Conversely, in the event that the name of the legal representative is not indicated in the sale and purchase agreement or the signature is not readable then the objecting party cannot claim nullity.

The Court of Cassation further established that the objecting party's argument is counter to the "good faith" principle and allows a party to recover benefits from his own wrongdoings.

⁵¹⁵ Dubai Court of Cassation decision number 386 for the year 2015 - Real Estate Dispute [Exhibit 17]

Since this judgment is critical for studying the issue of arbitration jurisdiction in the UAE, set out below are the most important paragraphs of the court decision. The court held that:

“If the name of the legal person is mentioned together with the name of its legal representative, and the agreement is legibly (readably) signed by another person and includes the arbitration clause, in such case, the legal person may claim to the invalidity of the arbitration clause as it was signed by a person who is not the legal representative having the competency to agree to arbitration.”

The court further added that:

“If the name of the legal person is only mentioned in the agreement without the name and without the capacity of its legal representatives, and the agreement is illegibly (readably) signed and if such agreement includes the arbitration clause, this shall constitute a crucial pretext affirming that the natural person who signed the agreement is the representative of such legal person and has the competence to act and agree to arbitration. In such a case, no challenge can be submitted by such legal person may be accepted. it cannot allege that such signature is not attributed to the legal representative having the competency to agree to arbitration, as the execution of agreements requires good faith and shall be made in compliance with the principles set forth in article 70 of the UAE Civil Transactions Law stipulating that: 'No person may resile from what he has (conclusively) performed from his end'. As such, no litigant party may create and evidence and use the same against its adversary.”⁵¹⁶

The second decision issued by the Dubai Court of Cassation in 2016 leans towards the second wave of the modern view of recognizing arbitration jurisdiction.

The DCC decision number 547/2015 shifts the burden of proof to the objecting party claiming invalidity of the arbitration agreement where the objecting party's signature and stamp was incorporated into the underlying agreement, which establishes primarily the validity of the arbitration clause and puts the burden of proof to the contrary on the party claiming otherwise.

Further, the denial of such evidence should be supported by claiming forgery that such signatory abused or exceeded its authority or someone faked that authorized signatory's signature.

Again, and since this judgment has significant implications in this discussion, set out below an extract for the most important paragraphs of it. The court found that:

“It is established in the jurisprudence of this court that in case the name of a certain company is indicated in the preamble or in the context of an agreement, and such agreement was signed by another person at the bottom of this agreement, then this position provides a legal evidence that the person who has signed the agreement has signed it in the name and on behalf of the company. Hence, the effects of such an agreement shall be related to the rights and obligations of such company, as the agent in this case represents the principal. It is also established that the authentication with seal or signature or fingerprint on the customary document, shall be the sole source to give authenticity thereon.”

⁵¹⁶ *Ibid*

The court further held that:

*“Since it has been confirmed from the contract, the subject of the lawsuit that is in English, that it is annotated with the company seal, the petitioner, and with a signature attributed to its representative. **Therefore, this contract is binding, takes effect on the company and the annotated signature shall be presumed to be attributed to the company representative until evidence to the contrary is submitted.**”*

The judgment went on and found that:

“there shall be no consideration of what the petitioner’s challenged to the signature to the contract, being different from that of the signature format of its manager on the contract date as long as it did not challenge nor contested the signature for forgery. Hence, the subject matter court shall not be obligated to attract the attention of litigant parties to the requirements of their rebuttal, and therefore the challenge is dismissed”⁵¹⁷.

The third judgment in this context is DCC Judgment No. 293/2015 [Exhibit 33], the judgment established two essential principles:

First, the court found that the phrase “authorized signatory” that is affixed to the signature to an agreement reflects that the person who signed the agreement is, in law, a signatory authorized to sign the arbitration clause included therein.

Second, the court determined that whilst the party pleading that the signatory of the agreement including the arbitration agreement was not the manager of the LLC company and therefore incapacitated to bind it to arbitration, the court decided that the objecting party did not prove that the signatory was not authorized by the manager of the LLC company to sign the arbitration clause.

The judgment states that:

“The cross Claimant did not submit any proof affirming that the other person who signed the agreement was not the director-general or another person not authorized to agree to arbitration. It is established in the original sale and purchase agreement and the translation thereof, subject of the arbitral claim (the subject of the arbitral award), that the person who signed the agreement was authorized by the seller company and recorded in the space of signature a phrase reading (signature of the authorized seller). Accordingly, the Court concluded that the person who signed the agreement, including the arbitration clause, was authorized to do so. The petitioner did not submit evidence contradicting the content of the agreement and only stated that the company’s manager did not authorize the person.”⁵¹⁸

The judgment went on and found that:

“It is also established to the honorable court upon reviewing the arbitral award, subject of the claim, that the petitioner raises any objection on this matter before the arbitral tribunal, as it alleged that the agreement to

⁵¹⁷ Decision by the Dubai Court of Cassation number 547/2015 (Real Estate Dispute) dated 27 April 2016 [Exhibit 15]

⁵¹⁸ Dubai Court of Cassation decision number 293 for the year 2015 (Real Estate) issued on 27 February 2016 [Exhibit 33]

arbitrate was not entered into by the respondent through the person having the competence to agree to arbitration as set forth in the agreement executed between the litigants so, there would be an implied authorization for arbitration (the authorization enabling the attorney to arbitrate in the arbitral claim in which the arbitral award is issued), subject of the present Claim. Accordingly, the challenge related to the argument that no affirmative agreement to arbitration was made by the defendant/Respondent/petitioner through the person having the competence to arbitrate as set forth in the agreement executed between the litigants on 25/8/2006 – subject of the arbitral award – is invalid and factually and lawfully groundless, and ought to be rejected.”

Following the above three decisions, this modern view of recognizing the arbitration jurisdiction was further confirmed by DCC decisions number 137/2015⁵¹⁹ Real Estate and 336/2015⁵²⁰ Real Estate.

The same was held by DCC decision number 17 for 2016 real estate but the court relied upon Article 14.2 of the UAE Civil Procedures Code, which provides that no one can cause nullity and claim the benefit of it. The judgment determined that:

“pursuant to Article 14.2 of the UAE Civil Procedures Code that, with the exception of nullity related to public order, it is not permitted that the party, who caused nullity to adhere to it, whether such nullity was caused purposely or negligently and whether the person who caused nullity is the person himself claiming nullity or any of its employees, which necessitates that it is not allowed for a party in an arbitration case to claim nullity before the court seized to ratify the arbitral award in order to claim nullity for causes related to agreement to arbitrate or arbitration procedures that are caused by the person himself”⁵²¹.

With regard to foreign awards, the DCC determined that capacity issues should be dealt with according to the applicable law of the seat rather than the laws of the UAE. In 2016, the Dubai Court of Cassation issued decision number 693/2015 dated 10 April 2016, overturning the Court of Appeal judgments and ratifying a foreign arbitral award issued in London.

The court referred to Article V of the New York Convention, which states that:

“(1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c)etc..”

⁵¹⁹ Dubai Court of Cassation decisions number 137 for the year 2015 (Real Estate)

⁵²⁰ 336 for the year 2015 real estate

⁵²¹ Dubai Court of Cassation decision number 17 for the year 2016 issued on 23 March 2016

The court found that, pursuant to the said article, an arbitral award shall not be set aside for capacity-related issues unless it is proved that the award debtor was under incapacity pursuant to the law where the arbitral award was issued rather than under the capacity issues under the laws of the UAE⁵²².

In another decision, the Dubai Court of Cassation determined that the issue of capacity of a signatory to bind a company to arbitration may be assessed by reference to the law of the country of the seat rather than to the law of incorporation of the company, the court dismissed an action of annulment brought by the award debtor in the UAE to oppose enforcement of a foreign arbitral award⁵²³

§ 3 Relapse to the Old Traditional Approach

Despite the modern view adopted by the Dubai Court of Cassation with regards to the capacity to enter into arbitration agreements, DCC decisions number 263/2015 real estate and 382/2015 commercial as well as DCC 532/2013 commercial, again adopted the traditional view on the capacity to enter into arbitration agreements.

On 21 March 2013, the Abu Dhabi Court of Cassation issued decision number 465/2012 and annulled an arbitration clause included within an agreement since the owner of a single proprietorship issued a general delegation that did not provide a specific delegation to enter into arbitration agreements. As such, the arbitration clause was invalid, and the arbitral process was stopped.

Similarly, DCC 416 for 2015⁵²⁴ represents a further relapse to the old customarily strict approach. In this case, there was no arbitration proceeding; rather, the Court of Appeal denied jurisdiction on the dispute based on the existence of an arbitration clause. However, the Court of Cassation upheld the court's jurisdiction as one of the parties pleaded that the arbitration clause was invalid for reasons related to the incapacity of the person who signed the agreement to enter into arbitration agreements. The court relied on Article 58.2 of the UAE Civil Procedure Code.

Further, and in continuation of the Abu Dhabi courts' dismissive approach to accepting arbitral awards on the basis of issues of capacity, the Abu Dhabi courts maintained reliance on the traditional approach for authority to arbitrate.

⁵²² Helpful Dubai Court of Cassation Judgment on Capacity and Foreign Arbitral Awards by Omar N. Omar Al Tamimi & Co. Dubai, available online <https://www.tamimi.com/law-update-articles/helpful-dubai-court-of-cassation-judgment-on-capacity-and-foreign-arbitral-awards/>

⁵²³ Case No.693/2015, 10 April 2016, Dubai Court of Cassation, reported in Al Tamimi Law Update, issue 293, October 2016, see the Enforcement of International Commercial and Investment Arbitral awards in the MENA Region by Gordon Blanke and Soraya Corm-Bakhos; <https://www.ciarb.org/media/1415/the-enforcement-of-international-commercial-and-investment-arbitration-awards.pdf>

⁵²⁴ Dubai Court of Cassation decision number 416 for the year 2015 judgment issued on 6 July 2015

More recently, on 18 September 2016, the DCC issued decision number 613/2015, where the court annulled an arbitral award issued in the LCIA where the award creditor sought to enforce the arbitral award in Dubai based on New York Convention of 1958.

Once again, the court rejected ratifying the award on the basis of Article 5.1(A) of the New York Convention, which states:

“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.” [Emphasis added]

The following grounds were further considered by the court:

The Repealed Arbitration Chapter of the UAE Civil Procedure Law provides that

“An agreement to arbitrate shall not be valid unless it was made by a person having the legal capacity for making a relinquishment over litigated right.”⁵²⁵

The court also considered the UAE Companies’ Law provides:

“Unless the powers of the manger are fixed in the company Memorandum of Association, the company manager shall have full powers to carry out management affairs of the company, and his actions shall be binding on the company, provided that they are substantiated by the capacity under which he acts”⁵²⁶.

The court held that the agreement to arbitrate may be made only by a party having the capacity and competence to dispose of the disputed right. It is further established that the manager of an LLC is the person having the authority to enter a company into an arbitration agreement.

Therefore, The Dubai Court of Cassation disagreed with the Court of Appeal’s conclusion that the burden of proof on the incapacity of the signatory to the arbitration agreement lies with the party pleading the invalidity of the arbitration agreement, as they are claiming a matter contrary to the established position in the agreement, which presumes the validity of the arbitration agreement. As such, the Court of Cassation

⁵²⁵ Article 203.4 of the Repealed Arbitration Chapter of the UAE CPC, which is consistent with Article 4.1 of the UAE Federal Arbitration Law which states that:

“An Arbitration Agreement may only be concluded, on pain of nullity, by a natural person having the legal capacity to dispose of his rights or on behalf of a juridical person by a representative with specific authority to arbitrate”

⁵²⁶ Article 237 of the UAE Companies’ Law number 8 for 1984 which is consistent with Article 83 of the UAE Commercial Companies’ Law number 2 for 2015 provides

established that the arbitration agreement is invalid once the objecting party proves that the signatory to the agreement, within which the arbitration clause was included, was not the manager of the LLC Company at the time of the contract formation. In fact, this contradicts with previous decisions issued in this regard.

Importantly, the court accepted the evidence introduced by the party claiming the invalidity that the arbitration agreement was a copy (certified as original) of the articles of association of the LLC company. These articles indicate that the names of the managers of the company are listed there, not including the signatory to the agreement in question, which included the arbitration agreement based on which the award was issued.

The court also accepted the evidence introduced by the award debtor, which was a copy of the passports of the managers listed in the articles of association, where the signature in the passport departs from the signature in the agreement containing the arbitration agreement⁵²⁷.

Another recent decision in 2016 represents a further relapse to the traditional approach. In DCC decision number, 116/2016 dated 22 May 2016, the court set aside an arbitral award with respect to one of the two respondents since the signatory to the arbitration agreement was not the Chairman of the Board of Directors of the respondent, which was a private joint-stock company. The court relied upon Article 155 of the Commercial Companies Law, which reads that:

“The Chairman of the company shall be the legal representative of the company before the Courts and in its relationships with third parties, unless the Articles of Association of the company provides that its General Manager shall be the representative of the company before the Courts and in its relationships with third parties.”

In addition, the underlying agreement was not signed by two of the Board of Directors members jointly, as mandated by the memorandum of association of the company.

The most recent decision in this regard is the DCC decision number 603/2016 dated 9 April 2017 which confirmed setting aside arbitral award number 1/2012 issued by Dubai International Arbitration Center (DIAC) on 15 September 2014 for AED 55 million. The court adopted once again the traditional approach set out above and held that the signatory to the arbitration agreement is not competent to enter the company into arbitration since he was not the manager of the company nor authorized by the manager to enter into agreements to arbitrate.

The court held further that this nullity could not be rectified by the subsequent ratification during the arbitration proceedings since the ratification should be made before the commencement of the arbitration.

In conclusion, the improvements in the UAE courts’ recognition of capacity of a party to bind a company to arbitration was related to jurisprudence in Dubai; there were no improvements found in the jurisprudence in Abu Dhabi courts.

⁵²⁷ Dubai Court of Cassation decision number 613 for the year 2015 commercial issued on 18 September 2016

Further, the attitude of the Dubai Courts has improved regarding the issue of capacity to bind a party to arbitration. However, judgment number 613/2015 and other judgments set out above represent a return to the traditional approach by the DCC, which could be labeled as an anti-arbitration approach.

In support for this inference, in a relatively recent decision, the Abu Dhabi Court of Cassation confirmed its unchanged embracement of the traditional approach.

On 21 March 2013, the Abu Dhabi Court of Cassation issued decision number 465/2012 and annulled an arbitration clause in an agreement where the manager of the single proprietorship issued a general delegation that did not provide a specific delegation to the signatory of the contract to enter into arbitration agreements. As such, the arbitration clause was invalid, and the arbitral process was stopped.

The second relatively recent decision that confirmed the stance of Abu Dhabi Court of Cassation was ADCC decision number 351/2014; the judgment annulled an arbitral award issued by the Abu Dhabi Commercial Conciliation and Arbitration Center (ADCCAC).

The court determined that the arbitral award was issued against a public joint-stock company, where even the Board of Directors does not possess the requisite authority to enter into arbitration agreements on the company's behalf, except where the Board of Directors of the company is expressly authorized to do so by the articles of association of the company or where arbitration, as a dispute resolution mechanism, is part of the company objectives (which is almost an impossible case).

The court reasoning on annulling the arbitral award was as follows:

*"Article 58.2 of the Civil Procedures Code states (No admission or waiver of a right alleged or settlement or submission to arbitration may be made without special authority) and as per Article 216 of the same law⁵²⁸. Accordingly, it is allowed to request annulment of an arbitral award when the court is seized to ratify the award in the event of the arbitration agreement was issued by a person not competent to enter into arbitration agreements. Further, Articles 203 of the CPC (which is consistent with Article 4.1 of the UAE Federal Arbitration Law) as well as Articles 95, 103, 104 of the Commercial Companies Law⁵²⁹ provide that an agreement to arbitrate shall not be valid unless issued by the person having the competence for disposition of the disputed right. As such, the Board of the Directors of the Joint Stock companies is authorized to manage its activities that achieve the stated objective of the company, further, the Board of Directors is not allowed to enter into arbitration agreements unless the same are expressly granted by the company's Articles of Association or is part of the stated objective of the company... failing which, the Board must obtain the General Assembly's approval."*⁵³⁰

⁵²⁸ Which includes grounds to set aside an arbitral award, this is replaced by Articles 53 of the Federal Arbitration Law

⁵²⁹ Which are consistent with Article number 154 of the UAE Federal Commercial Companies Law number 2 of 2015

⁵³⁰ Abu Dhabi Court of Cassation decision number 351 for the year 2014 issued on 26 June 2014

DCC 137/2015 [Exhibit 39]

The background of this case is as follows:

"An agreement was concluded between the claimant and defendant involving a subcontract which included an arbitration clause. The basis of two arbitral awards was challenged as invalid because the signatory was the Director and CEO of the company. The Articles of Association of the company stated the board of directors could ... conciliate, or agree to arbitration. The Articles of Association did not state that any entity other than the board of directors was entitled to conclude or agree to arbitration. The documents lacked anything that indicated that there was an authorization by the board of directors to the Plaintiff, which has the right to agree to arbitration according to the Articles of Association of the Company, to its CEO to sign an arbitration clause when signing an agreement, or that there was a subsequent resolution by the board of directors which approved an arbitration clause signed by its CEO. In fact, the Company had maintained that the person who signed the agreement did not have the capacity to agree to arbitration. It raised this argument before the arbitral tribunal from the early hearings, and maintained this argument until the end."⁵³¹

The court decided that:

"The arbitration clause set out in the agreement was invalid because it was signed by a person who did not have the capacity or the competence to agree thereto. This is not undermined by the fact that the person who signed the contract that included the arbitration clause, had capacity as a director in the Company and is its CEO, because this mere capacity was insufficient to grant him the right to sign the arbitration clause without special authorization by the board of directors which had the sole right in this regard."

§ 4 Summary provisions Supporting and opposing Arbitration Jurisdiction

Arguments supporting arbitration jurisdiction	Arguments supporting national courts' jurisdiction
1- Articles 14.1 and 14.2 of CPC The objecting party is precluded from contesting the validity of the arbitration agreement under Articles 14.1 and 14.2 of the UAE Civil Procedures Code which provides it is not permitted that the party, <i>which caused nullity to adhere to it</i>	A person who has been instrumental in a nullity may not rely on it
	The type of nullities referred to are procedural steps
	Article 212(1) of the UAE Civil Procedure Law (Article 23.2 of the Federal Arbitration Law) makes clear that Article 14(2) of the UAE Civil Procedure Law does not apply to arbitrations

⁵³¹ Dubai Court of Cassation decision number 137 for the year 2015 issued on 24 Feb 2016 [Exhibit 39]. translated by Lexis Middle East

<p>2- Article 25 of Companies Law</p>	<p>Article 112 of the UAE Constitution provides that <i>“No laws may be applied except from the date they become in force”</i></p>
<p>The party facing such jurisdiction challenge is acting in good faith, Article 25(2) of the Companies Law goes on to provide: <i>“To protect a person dealing with the company, he shall be a bona fide party.”</i></p>	<p>The litigant party is an educated businessman. The claimant was capable and could easily have verified the authority of the signatory to the agreement to enter into the arbitration agreement but did not do so.</p>
<p>3- Apparent Authority: Cassation Decisions provide <i>the authority granted to an Agent to enter a party into</i> arbitration agreement may be express, implied or apparent. Decisions include the Dubai Court of Cassation decisions 273 for the year 2006 [Exhibit 20] and one from the ADCC 873 for 2009 [Exhibit 21].</p>	<p>Case 220/2004 [Exhibit 53] confirms that <i>“the theory of prima facie”</i> does not apply to agreeing to arbitration.</p>
<p>4- The formalistic approach of the Dubai Court of Cassation that used to demand a specific / express authority to arbitrate is no longer the modern approach of the Cassation Court after the year 2009. DCC 204/2008 USC 834/2010 and DCC 127/2012 represent the modern view of Cassation decisions.</p>	<p>The objecting party does not dispute the existence of the underlying agreement. However, it argues that the arbitration agreement is invalid.</p>
<p>The most recent case laws after the year 2015 by the Dubai Court of Cassation confirmed the validity of the arbitration jurisdiction when a party contests the capacity of a signatory to bind a company to arbitration, examples include the following case laws:</p> <p>Dubai Court of Cassation 386 for the year 2015 [Exhibit 17]</p> <p>Dubai Court of Cassation 293 for the year 2015 [Exhibit 33]</p> <p>Dubai Court of Cassation 547 for the year 2015 dated 27 April 2016</p> <p>Dubai Court of Cassation 137 for the year 2015</p> <p>Dubai Court of Cassation 336 for the year 2015</p> <p>Dubai Court of Cassation 17 for the year 2016</p>	<p>Dubai Court of Cassation case laws after the year 2015 in this regard are contradicting, examples include:</p> <p>Dubai Court of Cassation 263 for the year 2015</p> <p>Dubai Court of Cassation 382 for the year 2015</p> <p>Dubai Court of Cassation 532 for the year 2013</p> <p>Abu Dhabi Court of Cassation did not issue any case laws in this regard that upheld arbitration jurisdiction rather than national courts’ jurisdiction for reasons related to incapacity of signatories to bind companies to arbitration agreements. Examples include:</p> <p>ADCC 465 for the year 2012 dated 21 March 2013.</p> <p>Further, the Dubai Courts continue to relapse from supporting arbitration jurisdiction. Examples include the following case laws:</p>

	DCC 416 for the year 2015 dated 6 July 2015
	DCC 613 for the year 2015 dated 18 September 2016

Chapter 3: Remaining Jurisdictional Challenges for Arbitrations in the UAE

The main jurisdictional challenge facing arbitral tribunals seated in the UAE relates to the capacity to enter into arbitration agreements studied in the previous chapter. This conclusion is due to the following:

- (i) the considerable number of arbitral awards that were set aside due to this jurisdictional matter; and
- (ii) The frequency that parties used and continue to use this jurisdictional challenge both before arbitral tribunals and before national courts, as analyzed in the case laws studied in the previous chapter.

However, apart from this jurisdictional matter, there are other jurisdictional objections that have been used in practice to contest the power of an arbitral tribunal to decide a particular dispute.

Other jurisdictional matters are related to the power of financial free zone courts to prosecute claims for ratifying or setting aside arbitral awards.

This chapter deals with some of these objections.

Section 1 Jurisdiction of DIFC Court to hear a Claim for Judicial Review of Arbitral awards

DIFC Courts confirmed that they have jurisdiction to hear claims for ratifying and enforcing arbitral awards even in the event that the award debtor has no assets in DIFC.

Further, according to Article 7 of the DIFC Judicial Authority Law, the DIFC and Dubai mainland Courts are obliged to enforce one another's judgments including ratified arbitral awards in accordance with rules of jurisdiction as established by the Joint Judicial Committee between the two courts.⁵³²

As such, the DIFC Court has been used by **parties and law firms in a creative way to enforce domestic and foreign arbitral awards**. The DIFC Court has emphasized that, in enforcing arbitral awards in this way, the DIFC Court is not appropriating from the Dubai Courts any right to supervise the awards.

Moreover, the DIFC Court has confirmed that it is legitimate to use the Court as a "conduit" to the enforcement of a foreign judgment or an arbitral award in Dubai, outside the DIFC.

⁵³² A Curb on the Jurisdiction of the DIFC Courts? 4 August 2016 XXIV Barristers' Chambers, <https://xxiv.co.uk/a-curb-on-the-jurisdiction-of-the-difc-courts/>

However, as set out below, certain restrictions were imposed to curb the jurisdiction of the DIFC Courts in recognizing arbitral awards.

Articles 42 and 24 of the DIFC Arbitration Law establish that the DIFC Courts have jurisdiction and ought to recognize and enforce arbitral awards irrespective of the jurisdiction in which were made.

Article 42.1 of DIFC Arbitration Law states:

“An arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognized as binding within the DIFC and, upon application in writing to the DIFC Court, shall be enforced subject to the provisions of this Article and of Articles 43 and 44”⁵³³.

Article 42.4 of DIFC Arbitration Law reads:

“Awards recognized by the DIFC Court may be enforced outside the DIFC in accordance with the Judicial Authority Law and recognition under this Law includes ratification for the purposes of Article 7 of the Judicial Authority Law.”⁵³⁴

Article 24 of DIFC Arbitration Law, Provides:

“(1) Pursuant to Article 7(4) of the Judicial Authority Law, the Court of First Instance has jurisdiction to ratify any judgment, order or award of any recognized: (a) Foreign court; (b) Courts of Dubai or the United Arab Emirates; (c) Arbitral Award; (d) Foreign Arbitral Award; or (e) orders for the purposes of any subsequent application for enforcement in the courts of Dubai”⁵³⁵ [Emphasis added]

Upon recognition of an award by the DIFC Court, an order will be issued to that effect by the DIFC Court, which can then be enforced through the Dubai Courts under Dubai law. This enforcement mechanism was reinforced by a formal “protocol of enforcement” between the Dubai and DIFC Courts in 2009 and, thereafter, by Dubai Law No.16 of 2011 (which amended Dubai Law No.12 of 2004) which establishes, the jurisdiction of the DIFC Courts and their relationship with the wider Dubai Courts.

According to these provisions, the DIFC Court of Appeal judgment in *Banyan Tree Corporate PTE Ltd v Meydan Group LLC* ARB003/2013 confirmed the DIFC Courts’ jurisdiction to hear claims to ratify and enforce arbitral awards even in the event that the award debtor has no assets in DIFC.

The judgment states:

“It is right to say that there is no evidence that Meydan has assets within the DIFC (or otherwise within the jurisdiction of the DIFC Courts). But there is no basis for asserting that the application for enforcement within

⁵³³ Article 42.1 of DIFC Law No. 1 of 2008 (the DIFC Arbitration Law)

⁵³⁴ Article 42.4 of DIFC Law No. 1 of 2008 (the DIFC Arbitration Law)

⁵³⁵ Article 24 of DIFC Law No. 10 of 2004 (DIFC Court Law)

the DIFC has no independent purpose. I do not understand it to be accepted that no such assets exist or alternatively that no such assets (whether they currently exist or not) may come within the jurisdiction following an order for enforcement. In any event, an order for enforcement would enable Banyan to engage the court's machinery (in the form of say a freezing order or an oral examination) for obtaining details of any assets that are or become available."⁵³⁶

The *Meydan* case also confirmed that the arbitral award ratified by the DIFC Courts could then be referred for execution to the Dubai Courts under Article 7(2) of the Judicial Authority Law⁵³⁷.

This case was taken to the USC, which defined in decision number 2/2015⁵³⁸, the issue of "conflict of jurisdiction" between Dubai mainland Courts and DIFC Courts. In this case, the award debtor applied to set aside the DIAC Award dated 2 October 2013, the award creditor brought an action before the USC and sought the court to resolve the positive conflict of jurisdiction between the DIFC courts' assumption of jurisdiction regarding the application to enforce the award versus the Dubai Courts' consideration for the action to set aside the award.

The award creditor contended that the award debtor's action "should be dismissed as there was no conflict of jurisdiction given that at that time; a final ruling issued had been issued by the DIFC Courts in relation the ratification of the DIAC Award. No ruling had been made by the Dubai State Courts in the action to set aside the same"⁵³⁹.

The USC concluded that there was no positive conflict of jurisdiction (where two courts are claiming affirmatively jurisdiction on the same matter) in this case as the DIFC Courts had made a final ruling on the action by ratifying the DIAC award before the award debtor brought their action for annulment before the Dubai Courts.

In the DIFC Court judgment in *Fran v Faimida* ARB002/2014, the DIFC Court confirmed that authority exists within DIFC jurisdiction to enforce arbitral awards within the DIFC. The judgment states:

*"I of course agree that the Court can only order recognition and enforcement within the DIFC. But the DIFC Court has exclusive jurisdiction and no other forum is available to obtain such an order. Likewise, the Dubai Courts can only order recognition within Dubai. But no question of forum shopping arises. Applications can be made to both courts"*⁵⁴⁰.

⁵³⁶ *Meydan Group LLC v Banyan Tree Corporate Pte Ltd* [2014] DIFC CA 005

⁵³⁷ [Clifford Chance | Enforcing foreign court judgments in Dubai – one avenue less? See online \[https://www.cliffordchance.com/briefings/2015/07/enforcing_foreigncourtjudgmentsindubaion.html\]\(https://www.cliffordchance.com/briefings/2015/07/enforcing_foreigncourtjudgmentsindubaion.html\)](https://www.cliffordchance.com/briefings/2015/07/enforcing_foreigncourtjudgmentsindubaion.html)

⁵³⁸ *In Meydan City Corporation and Meydan Group LLC ("Claimants") v Banyan Tree Corporate Pte Ltd. ("Defendant")*

⁵³⁹ Conflicts of jurisdiction - a definition by the UAE Federal Supreme Court, by Sarah Malik and Ilham Kabbouri of Taylor Wessing UAE; <https://united-arab-emirates.taylorwessing.com/en/conflicts-of-jurisdiction-a-definition-by-the-uae-federal-supreme-court>

⁵⁴⁰ *Fran v Faimida* - DIFC Courts ARB 002/2014

More clearly, in *Egan v Eava*⁵⁴¹, Justice Sir John Chadwick confirmed that the DIFC Court had jurisdiction to enforce a foreign award, whether or not the defendant had any assets in the DIFC and whether or not there was any other connection with the DIFC. This conclusion was applied and further extended in *Meydan Group v Banyan Tree*⁵⁴², where the DIFC Court of Appeal found that the same principle holds true even where the seat of the arbitration was non-DIFC Dubai.

Unsurprisingly, this situation created a risk of *Lis Pendence* where two courts having jurisdiction are seized with the same case and in some other situations the same position created a conflict of jurisdiction where two courts within the Emirate of Dubai are upholding jurisdiction on the same dispute.

Under Art 151 of the UAE Constitution, in cases of serious juridical conflict between jurisdictions or laws in the UAE that is not resolved by the UAE lower courts, the dispute should be referred to the USC.

§ 1 Execution of foreign judgments through DIFC Courts, enforcement within Dubai

Unlike the UAE courts, under the DIFC Law, the DIFC Courts are required to recognize and enforce final and binding foreign court judgments regardless of whether the UAE has a treaty in place with the relevant country. In particular, once a foreign court judgment or arbitral awards (with certain limitations by the Joint Judicial Committee) has been enforced by the DIFC Court, it becomes enforceable in the mainland of Dubai⁵⁴³ based on the reciprocal recognition provisions⁵⁴⁴, even where there is no link between the judgment and the DIFC as a financial free zone⁵⁴⁵.

This would effectively be using the DIFC Courts as a conduit to enforce foreign judgments into the rest of Dubai.

The enforcement of a foreign judgment is also possible through the DIFC Courts according to the following provisions:

Article 7(6) of the DIFC Judicial Authority Law which provides:

⁵⁴¹ (1) *Egan* (2) *Eggert v* (1) *Eava* (2) *Efa* [2013] DIFC ARB 002, available online <https://www.difccourts.ae/2015/07/29/xx-1-x1-2-x2-v-1-y1-2-y2/>

⁵⁴² *Meydan Group LLC v Banyan Tree Corporate Pte Ltd* [2014] DIFC CA 005, available online <https://www.difccourts.ae/2014/11/03/claim-ca-005-2014-meydan-group-llc-v-banyan-tree-corporate-pte-ltd/>

⁵⁴³ Enforcement Guidelines, DIFC Courts website <http://difccourts.ae/enforcing-difc-court-judgments-and-orders-outside-the-difc1/>

⁵⁴⁴ Under the Judicial Authority Law No. 12 of 2004

⁵⁴⁵ Also see Enforcement of foreign judgments in the UAE - A new dawn?, by Henry Quinlan, Adam Vause, and Charlotte Leith of DLA Piper, available online <https://www.dlapiper.com/en/uk/insights/publications/2016/03/foreign-judgments-in-the-uae/>

“The judgments, decisions, orders and ratified Arbitral Awards rendered outside DIFC by any court other than Dubai Courts shall be executed within DIFC in accordance with the procedure prescribed in the Rules of the Courts”⁵⁴⁶.

In an application to the above, the DIFC Court has found that it is also legitimate to use the DIFC Court as a “conduit” for the enforcement of foreign judgments in Dubai Courts. A case precedent to this effect is *DNB Bank v Gulf Eyadah*⁵⁴⁷ where the DIFC Court of Appeal confirmed that it was legitimate to seek recognition and enforcement of a foreign judgment in the DIFC Court, with a view to taking that judgment on to the Dubai Courts for execution.

Following the issuance of this decision, many law firms in the UAE contemplated that its impact would be potentially very significant and may alter the enforcement landscape in the UAE⁵⁴⁸.

Law firms predicted that if the Dubai Courts follow this principle, the result may be that some judgments, which the Dubai Courts may not have enforced directly would now be capable of enforcement in Dubai using this route.

These developments led to the creation of the joint judicial committee as demonstrated below.

§ 2 The Dubai Judicial Committee to Resolve Conflict of Jurisdiction

In conclusion to the above, the DIFC Courts were being used as a conduit to enforce arbitral awards and foreign court judgments on the Dubai mainland. Parties and law firms expected to use this conduit to overcome the considerably problematic issue set out in Part 1 of this thesis regarding the unpredictability of the Dubai mainland courts in enforcing arbitral awards and the considerable number of awards which were set aside by the Dubai Courts. It is well known in the UAE that the DIFC Courts are more favorable to both domestic and foreign arbitral awards than Dubai mainland courts.

This situation has created a conflict of jurisdictions between the courts on the Dubai mainland and the DIFC Court. Such conflict has been, in some instances, escalated to the Union Supreme Court; this process consumed lengthy and sophisticated procedures until this conflict of jurisdiction was resolved.

In order to avoid that lengthy process and establish clear rules on this matter, on 9 June 2016, the Ruler of Dubai issued Dubai Decree No. 19 of 2016 “*Concerning the establishment of a Judicial Tribunal for the Dubai Courts and DIFC Courts (‘or the Joint Judicial Committee’)*.”

⁵⁴⁶ Article 7(6) of DIFC Law No.12 of 2004 (The Judicial Authority Law)

⁵⁴⁷ [DNB Bank ASA v \(1\) Gulf Eyadah Corporation \(2\) Gulf Navigation Holdings PJSC \[2015\] DIFC CA 007](#)

⁵⁴⁸ DLA Piper Enforcement of foreign judgments in the UAE - A new dawn
<https://www.dlapiper.com/en/uk/insights/publications/2016/03/foreign-judgments-in-the-uae/>

This decree established the Joint Judicial Committee is to resolve conflicts of jurisdiction within Dubai and in particular conflicts of jurisdiction between the Dubai mainland courts and the DIFC Courts.

The emphasis of this process was on speed in order to avoid the long route through the USC; the committee is obliged to reach a decision within 30 working days from the submission of any application. There is no appeal on the committee decisions.

Article 1 of Decree No. 19 of 2016 established that the committee would provide the composition of the committee members, with the majority of votes relating to the judges of the Dubai Court. “The Committee comprised of:

1. The President of the Dubai Court of Cassation as Chairman;
2. The Chief Justice of the DIFC Courts;
3. The Secretary-General of the Dubai Judicial Council;
4. The President of the Dubai Court of Appeal;
5. A judge of the DIFC Court of Appeal;
6. The President of the Dubai Court of First Instance;
7. A judge of the DIFC Court of First Instance.”⁵⁴⁹

As such, the committee comprised of four members from judicial members of the Dubai Courts’ mainland and three members from the DIFC Courts.

Decisions of the Committee are made by a majority, with the Head of the Dubai Court of Cassation having a casting vote.

Article 2 of Decree No. 19 of 2016 provides *“the Committee with the following powers:*

1. *To determine which is the competent court to hear a claim or application in respect of which there may arise a conflict as to whether the Dubai Courts or the DIFC Courts have jurisdiction;*
2. *To determine which judgment should be enforced in the case of conflicting judgments issued by the Dubai Courts and the DIFC Courts in relation to the same parties and the same subject matter;*
3. *To propose the rules and regulations necessary to avoid any conflicts as to jurisdiction, whether positive or negative, between the Dubai Courts and the DIFC Courts or between the execution departments of those Courts;*

⁵⁴⁹ A Curb on the Jurisdiction of the DIFC Courts? 4 August 2016 XXIV Barristers’ Chambers; <https://xxiv.co.uk/a-curb-on-the-jurisdiction-of-the-difc-courts/>

4. To give opinions in matters relating to cooperation and coordination between the Dubai Courts and the DIFC Courts;
5. Any other matters as may be the subject of a request by the Judicial Council or the Ruler.⁵⁵⁰

According to Article 4 of Decree No. 19 of 2016, applications may be submitted to the committee by any of the parties to the jurisdictional conflict.

Once an application is submitted to the committee by any of the parties, the proceedings before all courts seized for the jurisdictional dispute has to be stayed pending the decision by the committee.

Likewise, in the event that conflicting judgments have been issued by two courts for the same dispute and application was submitted to the committee for a determination on the competent jurisdiction, there will be a stay of execution for both decisions pending the determination of the Committee.

§ 3 Decisions on Jurisdictional Conflict by the Judicial Committee

The first decision by the Judicial Committee (Joint Judicial Committee Cassation 1/2016) was in *Daman Real Estate Capital Partners Company LLC v Oger Dubai LLC*.^{551 552}

In this case, *Oger* award creditor in a DIAC arbitration. It sought to enforce the award in DIFC courts while the award creditor attempted to set aside the award before the Dubai Courts.

At the same time, *Daman* applied to stay of proceedings in DIFC Courts and permission to appeal in the DIFC Courts. Its application failed on both requests.

In parallel to the proceedings in DIFC Court of Appeal, the Dubai Courts dismissed *Daman*'s case to set aside the arbitral award. While the Judicial Committee was considering *Daman*'s application, the application for annulment of the award was pending at the Dubai Court of Cassation.⁵⁵³

Under these circumstances, *Daman* applied to the Judicial Committee, claiming that there was a jurisdictional conflict as to which of the Dubai Courts and the DIFC Courts upheld jurisdiction on the same dispute. The Judicial Committee confirmed that a conflict did exist as the *Daman* (the award debtor) had filed a case for

⁵⁵⁰ A Curb on the Jurisdiction of the DIFC Courts? 4 August 2016 XXIV Barristers' Chambers; <https://xxiv.co.uk/a-curb-on-the-jurisdiction-of-the-difc-courts/>

⁵⁵¹ *Daman Real Estate Capital Partners Company LLC v Oger Dubai LLC*, Joint Judicial Committee Cassation No. 1/2016 (JT)

⁵⁵² DIFC Court decision *Oger Dubai LLC v Daman Real Estate Capital Partners Limited* [CFI 013/2016] (6 July 2016); *Standard Chartered Bank v Investment Group Private Limited* [CFI 026/2014], (28 July 2016), available online <https://www.difccourts.ae/2016/07/28/cfi-0132016-3/>

⁵⁵³ Dubai's new Judicial Tribunal calls into question DIFC courts' "conduit jurisdiction" by Farida Sadiq of Bryan Cave Leighton Paisner; <https://www.bclplaw.com/en-US/thought-leadership/dubai-s-new-judicial-tribunal-calls-into-question-difc-courts-conduit-jurisdiction.html>

annulment in the Dubai Courts and was awaiting a decision by the Dubai Court of Cassation and Oger (the award creditor) had another enforcement case before the DIFC Courts. As such, Daman was within its rights to bring the case to the Judicial Committee.

The Judicial Committee confirmed that if the substantive claim had not been related to an arbitration then the DIFC Court would have had jurisdiction because the asset in dispute was located in the DIFC and the defendant was a DIFC registered entity.

However, the case here is different since the seat of the arbitration was Dubai and, therefore, unquestionably Dubai Courts were competent to review the annulment action. However, the committee found that allowing the DIFC Court to enforce the award based on the asset residing in DIFC would create a conflict of jurisdiction that the committee should prevent.

The majority decision states that:

“According to the general principles of law embodied in the procedural laws / the Dubai Courts are the competent courts to entertain this case.”⁵⁵⁴

The Joint Judicial Committee ordered to prosecute the case before the Dubai Courts and ordered the DIFC Courts to cease entertaining the case.⁵⁵⁵

In a dissenting opinion, the three DIFC members of the committee agreed to the competence of the Dubai Courts to hear the annulment application since the arbitration was seated on the Dubai mainland. However, the dissenting members were of the view that the DIFC Courts should not cease to entertain the enforcement case since the enforcement within the assets residing within the DIFC should be within the DIFC Court’s own jurisdiction.⁵⁵⁶

In Joint Judicial Committee Cassation 2/2016, a DIAC award seated in Dubai was submitted to the DIFC Courts for enforcement and to Dubai Courts for annulment; the Joint Judicial Committee decided that there is no sufficient connection to the DIFC Courts and ruled that Dubai Courts are competent to adjudicate this dispute since it has the default jurisdiction⁵⁵⁷.

⁵⁵⁴ *Daman Real Estate Capital Partners Company LLC v Oger Dubai LLC, Joint Judicial Committee Cassation No. 1/2016 (JT)*

⁵⁵⁵ Dubai’s new Judicial Tribunal calls into question DIFC courts’ “conduit jurisdiction” by Farida Sadiq of Bryan Cave Leighton Paisner; <https://www.bclplaw.com/en-US/thought-leadership/dubai-s-new-judicial-tribunal-calls-into-question-difc-courts-conduit-jurisdiction.html>

⁵⁵⁶ See Joint Judicial Committee decision 1/2016, available online <https://www.difccourts.ae/judgments-and-orders/joint-judicial-committee-decisions/>

⁵⁵⁷ See Joint Judicial Committee decision 2/2016, available online <https://www.difccourts.ae/judgments-and-orders/joint-judicial-committee-decisions/>

In Joint Judicial Committee Cassation 3/2016, the claimant successfully obtained an arbitral award from London and applied to enforce it in DIFC Courts. The respondent failed to file an annulment action before the Dubai Courts but rather submitted a counterclaim for annulment before DIFC Courts; the JJC rejected the petition as there was no conflict of jurisdiction between Dubai Courts and DIFC Courts.

In Joint Judicial Committee Cassation 4/2016, a branch of Standard Chartered Bank in DIFC prosecuted an action before DIFC Court to refund USD 129 M.

The defendant argued that the transaction involved a different branch of the bank (rather than the DIFC branch) but submitted that it accepted that DIFC had jurisdiction on the dispute. However, the defendant added that the courts of Sharjah is the convenient forum.

The Joint Judicial Committee ruled that the DIFC Court is the competent court to adjudicate the dispute since the defendant accepted its jurisdiction in the first place and could not retract later from this submission.

In Joint Judicial Committee Cassation 5/2016, the DIFC Courts recognized a foreign court judgment issued by the Commercial Court in London. The defendant sought from the Joint Judicial Committee to rule that DIFC Courts lack jurisdiction.

The Joint Judicial Committee rejected this application based on Section 4 of Decree 19/2016 since this is not a situation where (i) neither of the Dubai Courts and DIFC Courts abandoned jurisdiction for adjudicating the case, (ii) both courts upheld jurisdiction, or (iii) if both issued conflicting decisions.

In Joint Judicial Committee Cassation 1/2017, the DIFC Courts ratified an arbitral award passed by London International Maritime Arbitrators Association. An action of annulment was commenced by the award debtor before the Dubai Courts. The Joint Judicial Committee did not give any regard to the first seized court (being DIFC Courts), ruled that the Dubai Courts are competent to adjudicate this dispute, and ordered DIFC Courts to cease from entertaining this dispute.

This decision by the Joint Judicial Committee, once again, was dissented by Justices Michael Hwang, Omar Al Muhairi and Sir David Steel, who are the judges nominated by the DIFC Courts to the committee

In Joint Judicial Committee Cassation 3/2017, a conflict of jurisdiction between DIFC and Dubai Courts for the recognition of a DIAC arbitral award, the Joint Judicial Committee ruled in favor of Dubai Courts since it has the default jurisdiction. Again, this decision was dissented to by Justices Michael Hwang, Omar Al Muhairi and Sir David Steel, who are the judges nominated by the DIFC Courts to the Joint Judicial Committee.

In Joint Judicial Committee Cassation 5/2017, the facts of this case are similar to the facts of Joint Judicial Committee 5/2016 set out above. In this case, the DIFC recognized two foreign judgments handed down by the London court; these judgments ratify two arbitral awards issued in London. The JJC dismissed this case since the objecting party failed to bring an action before the Dubai Courts, therefore, there is no conflict of jurisdiction as defined by Article 4 of Decree 19 of 2016.

In Joint Judicial Committee Cassation 6/2017, a DIFC company was successful in a DIFC seated arbitration. The DIFC Courts recognized the awards; the execution was carried out by both DIFC and Dubai Courts; the award debtor argued that the execution in the two courts creates conflict, and the Joint Judicial Committee dismissed the argument and held that:

“Any award creditor is entitled to peruse the award debtor for execution on the award in whatever jurisdiction that the award is recognized for enforcement.”

The committee further found the enforcement of the award (which could take place over any assets in any jurisdiction including both DIFC and Dubai Courts) should be distinguished from the action to set aside the award (which can take place only in the seat of the Dubai arbitration, whether DIFC or Dubai mainland courts), the court decided that:

“This is not a question of conflict of jurisdiction because each set of execution proceedings is carried out in respect of different assets. The award (unless it is set aside) will have equal force in all other states where it is recognized in the seat of the arbitration.”

In Joint Judicial Committee Cassation 7/2017, following Cassation 4/2016 set out above, the award debtor (the respondent) prosecuted a counterclaim before the DIFC Courts.

The DIFC Courts accepted the counterclaim based on two conditions: (1) to pay the counterclaim costs, and (2) to abandon its petition before the Union Supreme Court. The Joint Judicial Committee dismissed this application since, based on Article 4 Decree 19 of 2016, the Joint Judicial Committee’s has jurisdiction to determine the competent court if both courts proceed with hearing the case, both of them abandoned the case, or both of them issued conflicting decisions. It is inappropriate for the Judicial Tribunal to rule on internal matters related to DIFC the courts themselves; there is no conflict in the present case. Further, the committee reiterated that Cassation decision 4/2016 is final based on Article 7 of the same decree, therefore, the present petition was dismissed.

In Joint Judicial Committee Cassation 8/2017, the defendant was a company registered in Jebel Ali Free Zone [in Dubai mainland] and the claimant is a Cayman Island Company. The dispute was related to the defendant’s termination of a contract for managing a hotel in the Palm Jumeirah project which is owned by the claimant [all facts are outside DIFC]. The parties had an arbitration agreement, the claimant applied to DIFC Court and obtained an injunction relief against the defendant. The defendant argued that the arbitration clause is invalid (as discussed in this thesis earlier) and prosecuted an action before the Dubai Courts seeking to terminate the management agreement, and then argued that this situation constitutes a conflict of jurisdiction.

The Joint Judicial Committee refused to intervene in this dispute since the injunction issued by DIFC Courts was an interim relief, therefore, the case before the Dubai Courts can continue and further any arbitration proceedings may commence. Further, the DIFC Courts is a temporary measure and shall survive since it aimed at maintaining the status quo until the determination of the dispute.

In Joint Judicial Committee Cassation 1/2018, a DIFC arbitral award was issued, an action for ratification was raised before the DIFC Courts and another annulment action was raised before the Dubai Courts. The committee refused to cease the jurisdiction of the DIFC Courts to review the action of ratification for a DIFC-LCIA arbitral award since the arbitration was seated in DIFC.

In Joint Judicial Committee Cassation 2/2018, the committee decided that there was no conflict of jurisdiction as the two cases raised before DIFC and Dubai Courts are not related to the same dispute (despite the result of the case before the Dubai Courts may depend on upon the conclusions in the case before the DIFC Court)⁵⁵⁸.

In Joint Judicial Committee Cassation 3/2018, the dispute was regarding a court decision by the English courts regarding a divorce settlement between two Russian nationals with no connection to the DIFC Courts. The divorce settlement was for £453,579,152. The committee ordered DIFC Courts to cease entertaining the dispute and ordered that Dubai Courts should only be seized with the dispute. Again, DIFC judges issued a memorandum and elaborated that *“the Tribunal (the joint judicial committee) might want to consider whether its processes have been abused by the applicant.”*

In Joint Judicial Committee Cassation 4/2018, the committee decided that there is no conflict of jurisdiction as the two cases raised before DIFC and Dubai Courts are not related to the same dispute.

Conclusions

Putting more emphasis on the decisions where the DIFC Judges members of the Joint Judicial Committee dissented the decisions, it can be concluded that generally the Joint Judicial Committee ruled in favor of the Dubai Courts whenever any conflict of jurisdiction exists unless the dispute has a specific connection to the DIFC financial free zone. The committee reasoned that by holding that the Dubai Courts have the ‘general jurisdiction’. In particular, the following conflicts of jurisdiction must be observed.

First, Joint Judicial Committee Cassation decisions number 1/2016 and 3/2017 held that DIAC arbitration, awards which are seated in Dubai mainland should only be enforced through the Dubai Courts and DIFC Courts should not entertain these cases. It should be noted that DIAC opened a new office in DIFC, in case the seat was DIFC, the conclusion of the committee may be different. In my view, DIFC Courts would have in this case sufficient connection to entertain the dispute.

Second, Joint Judicial Committee Cassation decisions number 1/2017 held that foreign arbitral award should be enforced in Dubai Courts over the DIFC Courts. This decision could also be interpreted within the context of the award debtor not having assets or sufficient connection to the DIFC Courts. If the award debtor is a DIFC entity, there are reasons to believe that the finding of the committee could have been different.

Therefore, it appears that all UAE seated arbitrations should be enforced by national courts rather than by DIFC (and potentially ADGM courts, in case the Abu Dhabi courts adopt the same model).

Further, unless a close connection is established between foreign arbitral awards and DIFC seated companies, all foreign arbitral awards should be enforced in the UAE courts rather than DIFC (and potentially ADGM) courts.

As a result, the future use of the DIFC Courts as a conduit jurisdiction to enforce “onshore” arbitration is now curbed by the Joint Judicial Committee.

⁵⁵⁸ See DIFC Courts’ update: the Conduit Jurisdiction Dilemma by Diego Carmona of Al Tamimi and Co; September 2018; <https://www.tamimi.com/law-update-articles/difc-courts-update-the-conduit-jurisdiction-dilemma/>

It appears that a close connection must be established in order for DIFC Courts to entertain enforcement of awards. In particular, the connection could be related to award debtor being incorporated in the DIFC, or the property which is the subject matter of the dispute is situated in it.

The report by BLP Middle East confirms this view and states that:

“Whilst it remains to be seen whether future decisions of the Joint Judicial Committee follow a similar approach, the use of the DIFC as a conduit jurisdiction to side-step the examination of onshore awards by the Dubai Courts looks to no longer be the attractive strategy it once was”⁵⁵⁹.

Section 2: Other Jurisdictional Challenges in the UAE

§ 1 Enforcement of Awards in the Abu Dhabi Global Market

The ADGM is a common law jurisdiction established in 2013 in Abu Dhabi Free Zone. The ADGM is an independent court system and judicial authority that are separate from the UAE Federal laws as well as the Abu Dhabi laws.

The ADGM has adopted the entirety of the English common law together with selected English statutes that are complementary to ADGM laws.

Unlike the ADGM, the DIFC Courts do not adopt holistically the English Laws but instead have their own laws that are based on the English laws.

The ADGM adopts a modern arbitration law enacted by the Board of Directors of the Abu Dhabi Global Market; in exercise of its powers under Article 6(1) of Law No. 4 of 2013 concerning the Abu Dhabi Global Market issued by His Highness the Ruler of the Emirate of Abu Dhabi.

Article 55 of the ADGM arbitration law sets forth the jurisdiction of ADGM courts in recognizing arbitral awards, which includes:

- (1) Arbitral Awards where the seat of the arbitration is the ADGM;
- (2) Arbitral Awards the New York Convention; and
- (3) All other arbitral awards, irrespective of the state or jurisdiction in which they are made.

On 11 February 2018, the Abu Dhabi Global Market Courts (ADGM courts) entered into a memorandum of understanding with the Abu Dhabi Judicial Department, allowing for the reciprocal enforcement of judgments, decisions, orders and ratified or recognized arbitral awards between the ADGM Courts and the Abu Dhabi courts.

⁵⁵⁹ Report by BLP Middle East <http://www.blplaw.com/expert-legal-insights/articles/dubais-new-judicial-tribunal-calls-into-question-difc-courts-conduit-jurisdiction>

According to this MoU, judgments, decisions, orders and ratified arbitral awards by either of ADGM or Abu Dhabi onshore courts are enforceable in the other court by a simple administrative process rather than the need to re-examine the merits of the case.

Commentators argued that this MoU represents:

“A direct route of enforcement for ADGM Court judgments and/or ADGM arbitral awards in the onshore Abu Dhabi Courts is a significant advantage when compared with the potentially lengthy and complex onshore recognition and enforcement. The same proceedings would apply to foreign court judgments and foreign arbitral awards”⁵⁶⁰.

This MoU could potentially be used to enforce foreign court judgments and/or foreign arbitral awards in the onshore Abu Dhabi Courts, using the ADGM Courts as a “conduit jurisdiction.”

Whilst Article 55 of the ADGM arbitration law provides jurisdiction to ADGM courts to enforce arbitral awards “irrespective of the State or jurisdiction in which they are made”, the question as to whether the ADGM Courts will follow the same route of the DIFC Courts in providing a conduit jurisdiction for enforcement of arbitral awards in Abu Dhabi mainland is not clear now.

As confirmed above, the use of the DIFC Courts as a conduit jurisdiction to enforce arbitral awards and foreign judgments in Dubai mainland has proved controversial after the Joint Judicial Tribunal was formed to resolve issues of competing jurisdictions where conflict of jurisdiction exists between the DIFC and onshore Dubai Courts.

Applying the same principle, the use of ADGM as a conduit jurisdiction for enforcement of arbitral awards in Abu Dhabi mainland will depend upon the interpretation and application of ADGM’s laws in cases which will probably consume extensive practice and time before there is a firm position on the question. Further, the intervention of the USC into jurisdictional disputes between ADGM Courts and Abu Dhabi onshore courts may take considerable time to be resolved and the outcome of which cannot be predicted.

§ 2: The jurisdiction when the underlying contract is terminated or invalid under UAE law

The competence-competence legal doctrine has several applications in practice. Under this theory, issues as to the validity of an arbitration agreement can be determined by an arbitral tribunal, subject to subsequent supervision of the national courts while ratifying the resulting award.

The doctrine of separability, however, allows an arbitration clause within a contract to be considered entirely separate from the underlying agreement in which it is contained. Under this doctrine, an arbitration clause

⁵⁶⁰ Legal and regulatory risks for the finance sector, Easier enforcement of judgments and arbitral awards in onshore Abu Dhabi, by Yacine Francis of Allen & Overy; available online <http://www.allenoverly.com/publications/en-gb/lrrfs/middleeastandafrika/Pages/Easier-enforcement-of-judgments-and-arbitral-awards-in-onshore-Abu-Dhabi.aspx>

survives, becomes effective and enforceable where the underlying contract is void, terminated, unenforceable or incapable of being performed.

It is important to observe the difference between competence-competence and separability. The former allows the arbitral tribunal to determine its jurisdiction. The separability doctrine has an impact on the outcome of that determination of the competence-competence doctrine.

Without separability, a tribunal employing competence-competence to determine its own jurisdiction may be required to deny the jurisdiction on the substantive merits, because the arbitration clause could potentially be affected by the invalidity of the main contract.

The doctrines of separability and competence-competence have developed to reinforce and strengthen the jurisdiction of a tribunal. Both concepts are recognized under UAE laws.

A distinction must be made between whether the issue at hand relates to the validity of the main contract or the validity of the arbitration agreement within that main contract, or both.

Whilst DIAC, DIFC, ADCCAC and DIFC arbitration rules recognize the doctrine of severability, the positions of DCC and ADCC have a different interpretation of the law with respect to the recognition of this doctrine.

The DCC recognizes the separability and independence of the arbitration agreement. Therefore, the invalidity, rescission or termination of the original contract containing the arbitration clause shall not affect the arbitration clause, which shall survive. Conversely, in case the main agreement is valid, the arbitration clause included therein must not take its validity from the validity of the underlying agreement.

However, ADCC recognizes this doctrine of separability of the arbitration clause and survival of such clause only in case the main agreement is terminated. However, the invalidity, rescission of the original contract containing the arbitration clause renders the arbitration clause null and void.

As per the UAE's most common arbitration institutional rules, the determination as to the validity or nullity of the main contract (which contains an arbitration clause) is usually within the ambit of the jurisdiction of an arbitral tribunal. Accordingly, regardless of the validity of the main contract, including whether the main agreement has been terminated or was void from its very beginning, the arbitration clause within that main agreement is to be treated independently.

Article 23.1 of the DIFC-LCIA Arbitration Centre Rules provides:

"The Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement. For that purpose, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail ipso jure the non-existence, invalidity or ineffectiveness of the arbitration clause."

Articles 6.1 of the DIAC Rules states:

“Unless otherwise agreed by the parties, an Arbitration Agreement which forms or was intended to form part of another agreement shall not be regarded as invalid, non-existence or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and the Arbitration Agreement shall for that purpose be treated as a distinct agreement.”

Article 7 of ADCCAC arbitration rules provides:

“Effect of Arbitration Agreement 1: the arbitration clause shall be deemed to be an agreement independent from the other terms and conditions of the contract, unless the parties have agreed otherwise. If the arbitration clause is valid per se, the annulment, revocation or termination of the contract which included the said arbitration clause shall not affect its validity. The Panel shall remain competent to adjudicate upon the parties’ demands even if the contract is considered or declared annulled, revoked or terminated”⁵⁶¹.

Article 14 of ADGM Arbitration Law of 2015 provides:

“Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and the arbitration agreement shall for that purpose be treated as a distinct agreement”⁵⁶².

Therefore, most of the institutional rules for major arbitration centers in the UAE confirm the separability doctrine.

The contradiction between ADCC and DCC and further between DCC’s own decisions

The below two case laws by the Abu Dhabi Court of Cassation and Dubai Court of Cassation demonstrate that the UAE jurisprudence is contrary to each other when they deal with the question of separability of arbitration agreements.

The Dubai Courts, with certain exceptions, support separability while Abu Dhabi Courts, with no exceptions, deny giving effect to this doctrine in certain instances.

As such, an arbitrator seeking to enforce its award in Abu Dhabi should consider mindfully applying this doctrine in the light of the below decision from Abu Dhabi Court of Cassation, which contradicts not only with decisions from Dubai Court of Cassation but also with the institutional rules set out above.

The main reason behind this controversy is the very established and rooted principle of exceptionality of arbitration as a dispute resolution mechanism in ADCC as discussed in detail in this thesis, whereby giving jurisdiction to an arbitral tribunal should be unambiguously clear.

⁵⁶¹ ADCCAC Arbitration Rules of 2013, effective from 1st September 2013

⁵⁶² Article 14 of the ADGM Arbitration Regulations of 2015 issued by The Board of Directors of the Abu Dhabi Global Market, in exercise of its powers under Article 6 (1) of Law No. 4 of 2013, effective from 17 December 2015

ADCC 58 for 2007, nullity of contract does cause nullity of the arbitration clause

In this case, the court established that the nullity of the original contract that includes an arbitration clause as a dispute resolution mechanism implies, therefore, the nullity of the arbitration clause. As such, the jurisdiction for a dispute resulting from an agreement that is null and void shall be to national courts even if this agreement contains an arbitration clause.

In this decision, the Abu Dhabi Court of Cassation overturned the Abu Dhabi Court of Appeal's decision, which recognized the competence-competence principle. The court justified that by deciding that:

"Since the claimant argued before the Court of First Instance and the Court of Appeal that the original contract, which included an arbitration clause, was invalid. Therefore, the contested judgment erroneously referred the jurisdiction on this matter to the arbitral tribunal, which is in fact a case that is outside the jurisdiction of the tribunal. Therefore the judgment erred and is overturned"⁵⁶³.

ADCC 208 for 2009, the termination of a contract does not terminate the arbitration clause

In this case, however, the ADCC held that termination of the agreement that includes an arbitration clause does not terminate the arbitration clause and such clause should survive. Therefore, the court decided in favor of the survival of the arbitration agreement that is part of a terminated contract.

This case started when the defendant refused to nominate an arbitrator based on the argument that it terminated the contract. Consequently, the claimant brought an action before the national courts to appoint an arbitrator on behalf of the respondent. Accordingly, the Court of First Instance appointed an arbitrator, the Court of Appeal upheld the Court of First Instance's decision.

The Court of Cassation refused the petition by the respondent, which claimed that the arbitration clause was terminated with the main agreement. The court held that the termination of the agreement does not terminate the arbitration clause that should survive as a dispute resolution mechanism the agreement if terminated.

ADCC Petition No. 353 of 2011 issued on 24 August 2011, the termination of a contract does not terminate the arbitration clause

In this case, an arbitral award was issued based on an arbitration clause included in an agreement that was terminated based on the mutual agreement of the parties. The award debtor contended that the arbitration agreement was terminated together with the agreement thereto.

The award was ratified by the Abu Dhabi Court of First Instance. The award debtor filed an appeal, the Abu Dhabi Court of Appeal overturned the judgment of the Court of First Instance and annulled the award, and the court found that the arbitration agreement contained in the agreement was terminated when the overall agreement was terminated by mutual consent.

⁵⁶³ Abu Dhabi Court of Cassation Decision number 58 for the year 2007, issued on 30 October 2007

Thereafter, the award creditor filed a challenge before the Court of Cassation before the Abu Dhabi Court of Cassation, which overturned the Court of Appeal's decision and returned the case to the Court of Appeal. The second decision of the Court of Appeal found that the termination of the agreement by the parties did not terminate the arbitration agreement and ratified the award. Thereafter, the award debtor filed another petition to Cassation, which agreed with the second decision of the Court of Appeal.

DCC 242 for 2008, DCC 164/2008 and DCC Petition No.108 of 2009

In contrast, in Dubai, the DCC 242 for 2008 dated 8 February 2009 is the complete opposite to ADCC 58 for 2007 [which terminated the arbitration clause by association with the nullity of the underlying agreement]. The court upheld the survival of the arbitration clause even if the main contract is invalid. The court decided that:

"It is established that the nullity of the main contract which includes an arbitration clause or rescinds of such contract or terminating it does not stop the arbitration clause from being valid and effective unless the nullity is related to the arbitration clause itself, in this case it shall be void. Since the arbitration clause has an independent identity from the underlying contract."

Similarly, DCC 164/2008 – Civil dated 12 October 2008 established that the invalidity of the original contract which includes the arbitration clause or its ending or termination does not prevent the continuation of the arbitration clause and its effect since the invalidity did not include the arbitration clause itself.

In this decision, the DCC determined that if the nullity is extended to the arbitration clause itself, it should be invalid, therefore the clause is invalid.

Similarly, DCC Petition No.108 of 2009 issued on 12 March 2009 concluded that:

*"It is established that the invalidity, rescission or termination of the original contract containing the arbitration clause shall not affect the arbitration clause, which shall remain in full force and effect so long as the arbitration clause itself was valid. While the contract is deemed void, the arbitration clause is not void and removes the dispute from the jurisdiction of the courts to the jurisdiction of the arbitral tribunal"*⁵⁶⁴.

On the contrary, DCC 122/2008 Civil, established the opposite principles established by judgments DCC 242 for 2008; 164/2008 Civil, DCC Petition No.108 of 2009 and all the other institutional rules. The judgment established that the nullity of the main contract (rather than the nullity of the arbitration clause itself) establishes that the arbitration clause thereto is invalid and therefore the court has jurisdiction on the dispute rather than the arbitral tribunal.

There are no exceptional circumstances in that decision to justify this judgment, which departs from most of the previous case laws.

⁵⁶⁴ Dubai Court of Cassation decision number 108 for the year 2009 issued on 12 March 2009

Conclusions on the Jurisdiction in Case the Underlying Agreement is terminated or invalid

The DCC and ADCC have contradicting views concerning the survival of the arbitration clause in case the agreement that contains the arbitration clause was void.

Whilst both Supreme Courts in Abu Dhabi and Dubai recognize the survival of the arbitration clause where the contract was terminated. However, in the event that a contract is void or rescinded, the DCC upholds the survival of the clause, while ADCC considers the arbitration clause invalid.

Therefore, in this regard, it appears that the DCC is more pro-arbitration in this case.

However, DCC 122/2008, established the opposite principles established by judgments DCC 242 for 2008; 164/2008 Civil, DCC Petition No.108 of 2009 and all the other institutional rules. The judgment established that the nullity of the main contract (rather than the nullity of the arbitration clause itself) establishes that the arbitration clause thereto is invalid and therefore the court has jurisdiction on the dispute rather than the arbitral tribunal.

The Federal Arbitration Law View on the Jurisdiction in Case the Underlying Agreement is terminated or invalid under

The Severability of an arbitration clause is now coded in Article (6) of the new Federal Arbitration Law, which states that:

“1. An arbitration clause shall be treated as an agreement independent from the other terms of the contract. The nullity, rescission or termination of the contract shall not affect the arbitration clause if it is valid per se, unless the matter relates to an incapacity among the Parties. 2. A plea that a contract containing an arbitration clause is null or has been rescinded or terminated shall not stay the arbitration proceedings and the Arbitral Tribunal may rule on the validity of such contract.”

We are yet to evaluate the UAE courts’ interpretation of the new Federal Arbitration Law.

However, the Federal Arbitration Law established that the doctrine of severability of an arbitration clause should not apply in case of incapacity of the party entering into an arbitration agreement. Therefore, in the event that the signatory to an arbitration agreement is not capacitated to sign the arbitration clause, the arbitration clause shall not survive and, as a consequence, national courts shall be competent to adjudicate the dispute.

This exception of capacity from the separability doctrine is substantial since, as set out in the jurisdictional challenges part of this thesis, the incapacity of a signatory to an arbitration agreement is the most important challenge raised to annul arbitral awards. Therefore, the same challenge could be used to challenge the jurisdiction of arbitral tribunals and seek national courts to seize the dispute.

§ 3: Arbitrability of the Escrow Law

One of the important criteria in determining the reasonable care standard for real estate developers in determining whether they breached the relevant contracts is the compliance with the relevant escrow account law issued in the UAE for the protection of investors’ payments into real estate.

In essence, many real estate developers failed to comply with the Dubai law Number 8 for the year 2007 issued by HH Sheikh Mohamed Bin Rashid Al Maktoum.

Article 7 of the said law states:

“The trust account shall be created under a written agreement between the developer and the trustee. Under the said agreement, the amounts paid by buyers of off-plan units or received from the financiers shall be deposited in a special account to be opened in the name of the real estate project.”

Article 10 of the said law states:

“A trust account shall be opened in the name of the project and shall be used only for the purposes of developing the real estate project. The amounts deposited in the said account may not be attached in favor.

Escrow Account law is an important piece of legislation for arbitral tribunals acting on real estate disputes under the UAE and Dubai substantive laws. The law was enacted to prevent real estate developers’ potential misuse of investors’ monies and therefore to prevent the consequences of a similar financial crisis to the credit crunch that hit the world market by the last quarter of the year 2008 and affected the UAE severely.

There were considerable discussions inside arbitral tribunals and between the commentators on the UAE law as to whether the Escrow Account law is a matter of public order or not.

This distinction is of particular importance since it is well established as per the UAE CPC that matters related to public order are not arbitrable.

This discussion is based on the decision of the Dubai Court of Cassation number 14/2012 (“Baiti case”) [Exhibit 37]. This decision is not related to law 8/2007 but related to law 13/2008 (which is property registration law) but is frequently used by law firms in the UAE to argue that laws related to the Dubai Land Department like Escrow Account law are public policy matters and are, therefore, not arbitrable under UAE law.

Similarly, in Dubai Court of Cassation decision number 180 of 2011 and Dubai Court of Cassation Decision number 16 of 2012, the court refused to enforce two domestic arbitral awards on public policy grounds⁵⁶⁵.

In each of these judgments, the Dubai Court of Cassation annulled the respective arbitral award. The court found that arbitral awards annulling sale and purchase agreements due to the award debtor’s failure to register the disputed off plan property in the Dubai interim register as required by Article 3.2 of Law No. 13 of 2008, should be set aside on the grounds that they are related to a public order matter that cannot be subject to arbitration.

The court first defined public policy matters under UAE law as:

“Individual property rules shall be from the rules and the bases on which the community shall be based on. The interference of the legislator in declaring a legal rule to regulate the terms and conditions of the circulation of such fortunes and the individual proprietorships inside the State in the terms of possessing it and what may be

⁵⁶⁵ Enforcement of Foreign Arbitral awards in the United Arab Emirates, By Mayew, Gregory J; Morris, Mark

acquired of rights in rem, the nature of these rights, the scope of each of them and the methods of acquiring and terminating it, and the regulations and rules relating to the registration thereof in the Real Estate Register in the Emirate of Dubai shall be included among them, and shall be considered all from the provisions related to the money order in the State and which shall be considered by its”⁵⁶⁶

The court held further that:

“Nullifying the contract on the ground that it was not registered in the interim real estate register as per the provisions of Law No. 13 of 2008 as amended, and of requiring the Appellant (the "Seller") to refund the amounts received from the purchaser (the "Appellant") on the account of the sale price which shall not nullify the award of the arbitrator taking into consideration that the dispute falls within the powers of the arbitrator and is not relating to the public order while the conclusion this judgment and the conclusion of the arbitrator award of nullifying the Sale Agreement entered into between the two parties on the ground of not registering thereof with the Interim Real Estate Register according to the provisions of the Law No. 13 of 2008, as amended by Law No. 9 of 2009 regulating the Interim Real Estate Register in the Emirate of Dubai is a form of disputes relating to the public order because it is related to the rules of the individual property and the fortunes circulations as set out hereinabove in the legal rules at the beginning of this judgment. As such, the conclusion of the arbitrator in this dispute, in spite of being out of his jurisdiction, may nullify the arbitral award because it is violated and erred in the application of the law.”

Some commentators on the UAE law consider that the Escrow Account Law is a public policy matter (and therefore not arbitrable) by implication of the Baiti decision, which held that the interim registration law is a public policy matter. The basis for this view is that all laws related to the Dubai Land Department come from the same source and have the same nature, therefore, arbitral tribunals do not take the risk and arbitrate on the Escrow Account Law with the uncertainty that their award may be annulled.

Indeed, an arbitral tribunal in DIAC case number 63/2016 decided that the Escrow Account Law is a public policy matter.

However, on the other hand, there is no statute or case law establishing any connection between the Escrow Account Law and public order matters. Therefore, the proposition that the Escrow Account Law is a public policy matter can arguably be established as a speculative proposition.

In fact, accepting this proposition without a clear case law to this end implies that any other law could have the same effect, which leaves an arbitral tribunal with no applicable laws to this arbitration.

Moreover, an arbitral tribunal should issue the arbitral award in accordance with the UAE law, when chosen by the contracting parties. An arbitral tribunal should not ideally depart from this obligation based on a proposition that a particular law is not arbitrable.

In support of this proposition, Article 11 of the Interim Registration Law as amended clearly provides that the provisions of this law are public policy matters, it states that:

⁵⁶⁶ Dubai Court of Cassation decision number 14 for the year 2012 issued on 16 September 2012.

“The rules and procedures stipulated in this Article shall be considered public policy, any violation thereto shall render the obligation null”⁵⁶⁷.

Therefore, it is clear that the Interim Registration Law itself provides that nullity of contracts in accordance with this law is a public order matter. No such provision exists in Escrow Account Law.

In fact, the Interim Registration Law is related to public policy since it regulates the registration of properties in the public registry, which is closely connected the circulation of wealth established in Article 3 of the UAE Civil Transactions Code. This was the interpretation by the Dubai Court of Cassation which determined that:

“nullifying the Sale Agreement entered into between the two parties on the ground of not registering thereof with the Interim Real Estate Register according to the provisions of the Law No. 13 of 2008...is a form of disputes relating to the public order because it is related to the rules of the individual property and the fortunes circulations”⁵⁶⁸ [Exhibit 37].

In ADCC 55/2014, the court found that:

“It was held that arbitration is not permitted for dispositions of property involving existing rights or the creation of new rights if a registration obligation concerning the property cannot be complied with. This scenario would be contrary to public policy. Consequently, this case did not concern an issue of public policy. The Court of Cassation decided that the arbitral award was issued to order the termination of a sale and purchase agreement and compensation by the respondent. Although all dispositions of property must be registered with the relevant authorities and therefore dispositions themselves primarily remain governed by public policy, if disputes involve breach of contract and claims for money owed from that breach, such matters will be eligible for arbitration as they are outside the remit of Article 3 of the Civil Code”⁵⁶⁹

This should not apply with equal force to the Escrow Account Law since the application of this law is not connected to individual property and/or the fortunes circulations.

In support of the above view, the Escrow Account Law enables individual investors (not state officials) to supervise the operation of the law and ensure that investors’ rights are preserved in accordance with the law. In this regard, Article 12 of the Escrow Account law states that:

“Depositors or their representatives may examine their own accounting records and request copies thereof. The representative of the official authorities may also examine the records as well as obtain copies thereof.”

⁵⁶⁷ Law No. (13) of 2008 Regulating the Interim Real Estate Register in the emirate of Dubai

⁵⁶⁸ Dubai Court of Cassation decision number 14 for the year 2012 issued on 16 September 2012

⁵⁶⁹ The European, Middle Eastern and African Arbitration Review 2016 by Ian Clarke, Anna Gee, Charles Lilley and Polly Lockhart of Berwin Leighton Paisner LLP, 19 October 2015, <https://globalarbitrationreview.com/insight/the-european-middle-eastern-and-african-arbitration-review-2016/1036963/united-arab-emirates>. This is the extract from the Article rather than the wording of the court.

As such, the Escrow Account Law is enacted for the protection of the interest of the individuals and not only state-related issues and therefore is arbitrable.

On balance, each argument regarding the arbitrability of the Escrow Account Law has its own merits. However, the non-arbitrability of this law under the pressure of the risk of the enforceability of the resulting award may deprive investors' appropriate protection under the applicable laws.

§ 4 The jurisdictional Challenges on Assets Assigned under Finance Agreements

Islamic Sharia, as Christianity and Judaism, forbids taking usury or interest, which is a fixed amount of charge on loans. For that reason, Islamic banks in the UAE and all over the world, purchase assets being financed and resells these assets to their real investors and other asset purchasers on installment basis with a premium to make profits to replace interest (this is called in accounting 'sale lease-back arrangement' when the bank purchases assets from the debtor).

As part of the financing process, the person seeking Islamic financing to fund its real estate or other asset investments signs an 'asset assignment agreement'. By this agreement, the investor assigns all its rights and obligations under the sale and purchase agreement to the bank, furthermore, the bank replaces the real estate purchaser in all clauses in the agreement where the real investor's identity is indicated. As such, the bank becomes the legal owner of the real estate property.

Thereafter, the bank leases back the real estate property to the actual investor (the real purchaser) on lease to own arrangement, whereby the purchaser leases the property for a period typically between 15 to 25 years ending with ownership. Frequently, the investor does not have the option to stop the lease agreement; rather, the lease is an obligation and has a penalty if the lease period is not completed or prematurely ceased.

Many of the accounting books, International Accounting Standards (IAS) and International Financial Reporting Standards (IFRS), which are the main scientifically recognized accounting standards, classify this lease to own transaction as installment sale rather than a regular lease. This classification makes sense from a legal standpoint since the lessor does not typically have the option to terminate the lease (as in the operating lease) but rather the lease is an obligation, as is the installment sale.

However, despite Islamic financing is very common in the UAE, the UAE does not yet have a lease to own law which organizes this process.

As such, when a claimant having an Islamic financing brings an action against a real estate developer or any other asset owner, it is common to see that the respondent (the real estate property developer) raises a jurisdictional challenge that the claimant is not entitled to prosecute its claim since the property title deed is in the name of the Islamic banks and the claimant is only a lessee.

Indeed, the typical practice of the Dubai and Abu Dhabi Land Departments, which are the government agencies responsible for registering properties, in these cases is to name both the bank and the investor in the title deed of the property, whereby the bank is the owner and the investor as a lessee.

This situation is a typical financing agreement whereby the property is merely collateral for the bank's debt. However, this controversy arises out of the compliance with Islamic Sharia law, which requires actual ownership of the asset being financed by the bank. This process implies two further problematic issues including:

- (i) Assignment of rights to assets being financed by the investor to the Islamic bank, and
- (ii) The title deed of the property being registered in the name of the financier rather than the real investor, being the debtor to the bank.

These two issues create the possibility of a jurisdictional challenge that the investor is not entitled to commence an arbitration against the real estate property or asset sellers in general.

Legal Analysis on Assignment of Rights

The purchaser of the property is the party to the SPA, the Bank is not a party in the SPA

In fact, the principal activity of banks operating in the UAE, as per article 78 of law number 10 of 1980, is receiving money from the public and granting loans rather than acquiring assets.

Under Article 90 of the same law, banks operating in the UAE cannot acquire real properties unless an investor is in default, it states that:

“Commercial banks shall not engage in non-banking operations. In particular, no bank shall ...b) acquire an immovable property of its own, except in... conduct of the banks business ...settlement of debt”⁵⁷⁰.

Therefore, the true meaning of assignment of rights agreements for Islamic banks would be only as a security to the relevant bank.

The UAE Financial lease law is yet to be issued. Yet Looking at similar jurisdictions, the Egyptian Financial Lease Law allows the lessee to seek remedy directly from the real estate developer, supplier or contractor. Article 13 of the said law states:

“The lessee may have remedy directly over the supplier or contractor in all court actions which are held for the lessor in respect of the contract concluded between him and the supplier or contractor”⁵⁷¹

This jurisdictional challenge, in substance, misconceives the principles of the lease to own agreement and does not see through the real differences between ‘lease to own’ agreements and traditional lease, the following explains the matter:

The lease to own arrangement (or called by banks Ijarah), which is an agreement between an investor an Islamic bank is, in substance, a sale transaction. Under the lease to own agreements, the investor cannot terminate the lease agreement and must occupy the property for the entire lease period. Further, the investor is entitled to own the property by the end of the lease period. The assignor’s failure to satisfy this lease commitment will entitle the assignee bank to sue the assignor by all other guarantees including guarantee checks and otherwise

⁵⁷⁰ law number 10 of 1980 concerning the monetary system and organization of banking

⁵⁷¹ Egyptian Financial Lease Law number 95 for the year 1995

collaterals. This situation has distinctive features from the conventional lease agreement where the lessee can terminate the agreement by a simple notice and where the lessee does not own the underlying asset.

For that reason, any breach of contract made by the real estate developers or asset owners causes damages and consequences to the assignor (the investor) rather than the bank (the legal owner). Typical Ijarah agreements indicate the phrase that:

“The Lessee shall bear the consequences of delays and defaults by the developer, as he has selected the developer.”

This principle was confirmed by USC judgment number 526/2012 [Exhibit 19], which held that the lease to own contracts are sale not a lease contract and decided that:

“This contract, as per its clear terms, is in substance and truth a sale contract, by which the claimant provided the first defendant a credit facility to own the property after the claimant’s purchase for the property, the first defendant shall be under the obligation to pay the monthly installments in terms of monthly lease payments, which end with ownership”⁵⁷².

The court concluded that, the assignor is the person with an inherent interest in the property and dismissed the jurisdictional challenge that the assignor was not entitled to prosecute this claim.

A similar ruling to the DCC was found by the DIFC Court of First Instance, where it found that the assignment of rights to the bank does not deprive the investor of its entitlement to commence an action where the assignment precedes the underlying purchase agreement. The court found that the assignment agreement in that dispute was dated 24 April 2008, while the sale and purchase agreement that was assigned was dated 30 March 2008. The court concluded that the assignment was a mere formality and cannot be related to the agreement that was subsequent in date. The court decided that once it is accepted that:

“The sale and purchase agreement had not been entered into on 30 March 2008 when the Assignment Agreement was executed, the effect must be to prevent that assignment agreement having the effect of divesting the Assignor of his right to enforce the agreement”⁵⁷³.

Assignment Conditions under UAE law

There are three conditions under UAE law for an assignment of right to be valid:

First, the assigned right must not be a future asset that is unknown on the assignment date.

Second, it must not be an asset that is not particularized in type and value; and

⁵⁷² Union Supreme Court judgment number 526 for the year 2012 commercial issued on 6 March 2012 [Exhibit 19]

⁵⁷³ [Ahmed Zaki Beydoun v \(1\) Daman Real Estate Capital Partners Limited](#) (2) Asteco Property Management LLC [2012] DIFC. DIFC judgment number CFI 032 /2012 issued on 10 July 2014

Third, assets being assigned should be a debt of known value.

In support of the first condition, being that the asset should be completed and not futuristic, the Dubai Court of Cassation Judgment No. 188/2006 held that:

“In order for an assignment to be valid the requirement of Article 1113 of the UAE Civil Transactions Code should be met”⁵⁷⁴.

Article 1113 of the UAE Civil Transactions Code provides:

“The following conditions must also be satisfied in order for an assignment to be valid: (a). It [the assigned right] must be completed”

In support of the second condition, being the particularization of the assigned right in terms of type and value, the Dubai Court of Cassation 188/2006 held further that:

“In order for an assignment of right to be valid, the subject matter of the right should be specified as to type and amount... the subject matter of the assignment, which is the property assigned, must be particularized as to type and amount..., failing to do so will render the assignment void.”

As regards to the third condition, being that the assigned asset should be a debt of a known value, Article 1113 (d) of the UAE Civil Transactions Code states *“The property transferred must be a **known** debt which is capable of being substituted.”*

Some commentators argued that assignment of rights to assets, which is being studied in this part, could be invalid since it is not a debt. However, the definition of debt in Article 1113(d) of the UAE Civil Transaction Code should not be restricted to financial debts but it could be a certain asset that is due to be received from a property developer (i.e. it is a debt on the property developer to deliver this property or asset).

Under the above conditions, it is likely under UAE law that assignment of rights to assets in financing deals especially for Islamic banks to be valid.

The Absolute vs. Relative Assignment under UAE law.

According to the theory set out below, assignment of rights to properties or assets in general in financing transactions should not restrict the assignor from prosecuting its claim against real estate developers and any jurisdictional challenge in this regard, according to this interpretation, could be misplaced.

This theory differentiates between the restricted and unrestricted assignment.

The restricted assignment (assignment without recourse) means that the right of the transferee (the bank in this case) to satisfy its debt from the transferor (the investor) is restricted to the assigned assets itself (the

⁵⁷⁴ Dubai Court of Cassation Judgment No. 188/2006 issued on 13 March 2007

property) and the transferee cannot recourse upon the transferor to satisfy its debt or any part of it in the event that the assigned right does not or is insufficient to satisfy the debt.

The unrestricted assignment (assignment with recourse) means that the transferee (the bank) is permitted to pursue and demand satisfaction of a debt from the transferor (the investor) if the transferred right cannot satisfy the debt (the financing amount) whether fully or partially.

Under UAE law, the UAE Civil Transactions Code, the restricted assignment (assignment without recourse) is defined in Article 1108 (2) in the UAE Civil Transactions Code and the unrestricted assignment (assignment with recourse) is defined in Article 1108 (3) of the UAE Civil Transactions Code.

Article 1108 of the UAE Civil Transactions Code states that:

“(1) an assignment shall be restricted or unrestricted.

(2) A restricted assignment is one the execution of which is restricted to a (particular) debt owed by the transferor to the responsibility of the transferee or (liability in respect of) particular property in his possession by way of trust or guarantee.

(3) An unrestricted assignment is one, which is not restricted to any of the foregoing, even though such (debt or property) may be in existence”

As such, in a restricted assignment, the assignee can only recover its debts via the assigned right or asset, and therefore, the transferor is no longer liable to the transferee. In contrast, in the unrestricted assignment, the transferee has the right to recourse on the transferor.

According to the above, and in order to differentiate the type of the assignment in an agreement, in a restricted assignment, the assignment agreement should clearly state that the assignment is the full and final settlement of the transferor's debts. This is not the case in typical assignment agreements with banks, where banks frequently incorporate provisions enabling them to pursue the satisfaction of debts under any other collateral and, in many occasions, banks receive guarantee checks from debtors to enforce them upon default.

Therefore, the assignment of right being discussed in this part should correctly be classified as un-restricted assignment (assignment with recourse), which entitles the bank to continue prosecuting the debt from the investor and should in turn enable the debtor (the investor) to prosecute claims from the seller of the underlying asset.

The UAE law recognized, in case of unrestricted assignment, the continued liability of the investor to the bank and therefore allowed the transferor to claim its rights from the obligator (the real estate developer) since the obligator's default will render the investor liable to the bank for the original debt or any part of it.

As per Article 1121 of the UAE Civil Transactions Code, *“The transferor may claim from the obligator the debt or the property that he owes him, if the transfer is not restricted to any of these.”*

Reference to an arbitration clause under the Federal Arbitration Law:

The UAE law in this regard is in line with Article 7.2 of the UNCITRAL Model Law which provides that:

“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”⁵⁷⁵

Therefore, certain views are of the opinion that the assignment of an agreement, as a document, should include a specific reference to the arbitration clause otherwise it could not be valid. However, another view could consider the assignment not as a reference but as a new agreement replacing all the provisions of a previous agreement, including the arbitration clause.

On balance, the use of Article 5.3 of the Federal Arbitration Law to defend the jurisdiction of an arbitral tribunal is a strong argument in this context.

Case Laws on Assignment of Rights:

The Dubai Court of Cassation – Civil Judgments – Appeal No. 40 / 2004⁵⁷⁶ decided that in the event that an arbitration clause is part of a contract, the novation or assignment of such contract, based on the acceptance by the assignor and the assignee then the arbitration clause shall be binding to the transferee.

In a relatively recent decision dated 16 December 2015, the Dubai Court of Cassation issued the first case law addressing directly this jurisdictional challenge. The court’s decision number 155/2015⁵⁷⁷ [Exhibit 5] reviewed a dispute where a jurisdictional challenge was raised by one of the parties, which contended that the case should be dismissed since it was raised by an unrelated party to the dispute. In particular, the defendant argued that the Court of Appeal misconstrued the relationship between the parties since the claimant does not own the property, which was assigned to a bank.

The defendant further argued that the Court of Appeal received a letter from the Dubai Land Department, which confirms that the title deed of the property, subject to the dispute, is registered to the owner, which is an Islamic bank and the claimant is only a lessee as per a “lease to own” arrangement.

As such, the defendant submitted a jurisdictional challenge and demanded to dismiss the case since the claimant is not a party to the contract (it is only a lessee to a lease to own relationship with the defendant). Therefore, the defendant argued that the claimant has no entitlement or legal capacity to bring the action unless the claimant settles all obligations towards the bank.

The Dubai Court of Cassation dismissed this challenge, the court cited the Court of Appeal’s judgment which found that:

“As per the documentary evidence and the contract for sale being in dispute, the bank purchased the property, the subject of the dispute, to the benefit of the first claimant, therefore, all rights related to the sold

⁵⁷⁵ Article 5.3 of the UAE Federal Arbitration Law

⁵⁷⁶ Dubai Court of Cassation Decision number 40 for the year 2004 commercial issued on 26 September 2004

⁵⁷⁷ Dubai Court of Cassation decision number 155 for the year 2015 issued on 16 December 2015 [Exhibit 5]

property and the litigations related to it are transferred to the claimant. ...and the claimant has the legal entitlement to prosecute this action”⁵⁷⁸ [Emphasis added].

The Dubai Court of Cassation agreed with the Court of Appeal’s reasoning above and dismissed the challenge.

The above case law should provide guidance on this jurisdictional challenge, where even the rights of an investor purchasing a property from a property developer was assigned to a bank, the investor remains entitled to overcome this hurdle and prosecute a claim action against the developer for breach of the assigned contract.

The Dubai Court of Cassation looked through the facts and found that the bank has acquired the title of this property as a security for its financing to the investor, therefore, the bank purchased this asset for the benefit of the investor.

Accordingly, the jurisdictional challenge raised by the property developer against the investor was dismissed.

A similar finding to the above was found in one of the DIAC arbitral awards issued in 2016⁵⁷⁹.

A further issue to this jurisdictional challenge can be raised in arbitration cases. Typically, the assignment of right by the investor to the bank does not specify the arbitration clause. As set out in this chapter, in the event that a party does not specify an arbitration clause while assigning its rights to an agreement, this assignment shall not be valid for the arbitration clause unless the assignor specifies the assignment of the arbitration clause itself.

§ 5: The jurisdictional challenges Related to Failure to Assign Specifically the Agreement to Arbitrate

Frequently, the formation of construction contracts takes a complex process, including a tendering process, where the contractor or the developer issues the tender documents to the shortlisted main contractors being considered for the tender. Following the completion of the commercial and technical analysis and choosing the contractor that the developer will work with, this selected contractor issues an acceptance letter and signs the tender documents that were previously sent by the developer to the contractors. This is a common way of offer and acceptance in this industry, where many technical drawings are exhibited to contracts and standardized tender documents need to be in place to make sure the tendering process is standardized.

In many of these cases, the tender documents refer to FIDIC conditions (which are prepared by the Fédération Internationale des Ingénieurs-Conseils or the international federation of consulting engineers); the FIDIC conditions have a standard arbitration clause as a dispute resolution mechanism.

Two issues were faced frequently by case laws in the UAE where this process of reference to arbitration agreements has been problematic with regard to the jurisdiction of an arbitral tribunal:

⁵⁷⁸ Dubai Court of Cassation decision number 155/2015 dated 16 December 2015 [Exhibit 5]

⁵⁷⁹ DIAC Case 14/2016

First) Where the arbitration clause is included in the tender documents based on which the acceptance letter for the tender documents is issued by the contractor as a general acceptance that is not specifying the arbitration clause; and

Second) The reference to the arbitration clause is made by reference to the DIFIC conditions, which are in turn referred to in the tender documents. In this case, again, the acceptance letter for the tender documents is a general acceptance letter not specifying the arbitration clause.

The case laws in Abu Dhabi are consistently against giving jurisdiction to arbitral tribunals under the above circumstances; accordingly, arbitral awards involving any of the above two issues were being annulled.

In contracts, the Dubai Courts until 2009 were consistent in rejecting the jurisdiction of arbitral tribunals in the event any of the above two cases occurs.

However, in 2010, the Dubai Court of Cassation started to accept this reference and transformed to be more pro-arbitration.

The following illustrates the case laws supporting the above conclusions:

- ADCC 214 for 2014 commercial &
- DCC 261 and 264 for 2009 – commercial &
- DCC 174 /2005 commercial dated 19 December 2005

The three judgments above accepted the challenge to the arbitral tribunal's jurisdiction and rejected refused to recognize the respective arbitration clause based on acceptance letters of the tender documents issued by contractors, which do not specify the explicit acceptance for of the arbitration clause in the tender documents.

Importantly, the Supreme Courts in the above cases further confirmed that in case if that reference to the tender documents is mere general reference without specifying the arbitration clause to prove the parties' specific knowledge of the arbitration clause included in this agreement, in such a case, the reference does not extend to the arbitration clause. As such, the arbitration clause shall not be considered as agreed upon consensually between the parties.

Accordingly, as a matter of principle under UAE law, the reference to an arbitration clause is not achieved unless such reference includes specificity to the arbitration clause, which is included in the document that is being incorporated by reference to another document.

Therefore, the arbitration clause in these cases is null and void and the jurisdiction of the arbitral tribunal in these cases would be incorrect, which makes the competent forum to prosecute any dispute is the national courts having jurisdiction, applying the jurisdictional rules in the absence of explicit choice by the parties.

ADCC 20 for 2013 commercial stated the same principle above. The court further found that the exhibits to the contract that included an arbitration clause were not signed by the parties and therefore the arbitral tribunal could not uphold jurisdiction.

The court confirmed that:

“In case an agreement includes exhibits or schedules, it is not necessary, as per the general rules, that the contracting parties should sign them since it is sufficient that the agreement prescribes that such exhibits and schedules are part of the agreement entered into by the parties. These exhibits and schedules are merely detailed information for the conditions that were agreed upon between the parties. However, if the exhibits include an additional clause as the arbitration clause, this clause shall not be valid between the parties unless these exhibits are signed”⁵⁸⁰.

Similarly, the ADCC 718 for 2012 annulled an arbitral award since the reference in the agreement to the tender documents that included the arbitration clause did not specify the agreement to arbitrate.

The judgment states that:

“It is evidenced by the documents that the subcontract agreements did not include an arbitration clause, since these contracts referred to the general conditions for contracts issued by the claimant and include in a document separate document from the subcontract agreements. However, this reference did not include a specific reference to the arbitration clause. Therefore, the defendant could be unaware of the arbitration clause as an exceptional condition included in the general conditions of the contract and was not able to take a position or free consent towards this condition whether with acceptance or rejection”⁵⁸¹.

In a deviation from the case laws set out above, the DCC 73 for 2010 accepted the arbitral tribunal’s jurisdiction and found that the party objecting the arbitral tribunal’s jurisdiction discussed the arbitration agreement, was certainly aware of it and did not contest it. The court used these surrounding circumstances to as supporting grounds to deny an award debtor’s request to set aside an arbitral award.

This case law is unique in this context, therefore, set out below is a summary of the facts of the case:

- The tender documents issued by the contractor included an arbitration clause; the tender documents were not signed by any of the parties.
- The acceptance letter was issued by the subcontractor and included a general acceptance to the tender documents, without specifying the acceptance of the arbitration clause.
- The finally signed agreement did not include any arbitration clause; it just included a general reference to the unsigned tender documents, which included the arbitration clause.
- The contractor initiated an arbitration action against the subcontractor and was successful in being granted an award.
- Later, the subcontractor sought to annul the award and claimed that the arbitral tribunal does not have jurisdiction. The subcontractor’s case was predicated upon the general rule that was set forth in ADCC 214 for

⁵⁸⁰ Abu Dhabi Court of Cassation judgment number 20 for the year 2013 commercial issued on 22 July 2013

⁵⁸¹ Abu Dhabi Court of Cassation judgment number 718 for the year 2012 issued on 8 April 2013

2014 commercial, DCC 261 and 264 for 2009 commercial and ADCC 20 for 2013 commercial and ADCC 718 for 2012.

- The subcontractor, being the award debtor, was successful in this jurisdictional challenge in the Courts of First Instance and the Court of Appeal. Accordingly, the arbitral award was set aside.
- The Dubai Court of Cassation overturned the Court of Appeal's decision, ratified the award and upheld the arbitral tribunal's jurisdiction.

In doing so, the Dubai Court of Cassation considered that the arbitration agreement is a typical agreement that contains an offer and acceptance, therefore the main contractor offered the arbitration agreement [in the form of the tender documents] to the subcontractor [the objecting party]. The form of the offer was the tender documents and the subcontractor accepted that offer by issuing the acceptance letter.

- It is not necessary for a party to sign an arbitration agreement as long as it is aware of it, did not deny it, negotiated and accepted it and did not contend that such acts were true.
- The subcontractor [the party claiming invalidity of the arbitration agreement] is not allowed to accept part of the tender documents [being the execution of the contract] while rejecting the other part being the arbitration agreement.
- The acceptance letter implies acceptance to all conditions in the tender documents, including the arbitration clause.

In the court's wording:

"The acceptance letter is a written evidence, in addition to the other documents, that expresses the common will and intention of the parties to arbitrate as stated in clause 3-67 of the tender documents, which is an integral part of the main agreement. It's not necessary to have the defendant's signature on these conditions [which included the arbitration clause] since the defendant discussed these conditions and did not argue that these conditions were issued to it and that the content was correct and was included in the invitation to tender and the contract documents, which referred to these conditions. This effectively provides the same effect of the written signed document. The defendant cannot and is not permitted to accept the content of the document and exclude the arbitration clause and accordingly and the challenged judgment erred in the application of law and the documentary evidence and deficiency is reasoning and therefore should be overturned"⁵⁸² [Emphasis added]

As such, the court did not put a general rule that the general reference to the tender documents is an acceptance to the jurisdiction of an arbitral tribunal. Rather, the court resorted to other means to prove that the party contesting the enforceability of the jurisdiction of an arbitral tribunal did discuss the conditions of the arbitration clause and was aware of it.

⁵⁸² Dubai Court of Cassation decision number 73 for the year 2010 – Civil, issued on 9 May 2010

Similarly, the DCC 100/2004 established that the reference to FIDIC rules (the judgment referred to specifically to FIDIC rules), which provide for arbitration as the competent jurisdiction, is sufficient to prove the parties' agreement to arbitrate without the need to repeat the same clause in the contract documents.

Conclusions:

Parties should be mindful when incorporating an arbitration clause by reference to another document and must ensure that the arbitration clause is specifically referred to in the acceptance letter and the other document that is being referred to and that the arbitration clause is signed by all parties. Failing to comply with this procedure may expose a contracting party to a subsequent jurisdictional challenge.

Generally, the reference to an arbitration clause included in another document (such as tender documents or FIDIC conditions) shall not be enforceable under UAE law.

In broad terms, an arbitration clause included in an exhibit to a contract, where such exhibits are not signed by the parties shall not be enforceable under UAE law since it does not provide certainty of knowledge and consent of a party to enter into arbitration.

In actions to enforce the arbitration jurisdiction, parties and law firms having this problematic condition may rely on the surrounding facts and circumstances forming offer and acceptance to prove that the relevant arbitration clause is valid; such evidence may include actual knowledge, wilful blindness, and estoppel.

However, it should be noted that such evidence is more likely to be accepted in Dubai Courts than Abu Dhabi Courts or the Union Supreme Court.

The new Federal Arbitration Law

Considering the controversy set out above, the new Federal Arbitration Law establishes that reference to an external agreement having an arbitration clause shall be a valid reference and the arbitration clause will therefore be enforceable. However, this reference needs to be specific to the arbitration clause.

This approach bears no material difference from the principles laid down in the above jurisprudence.

Article 5.3 of the new Federal Arbitration Law states that:

"A reference in a contract or any other document containing an arbitration clause constitutes an Arbitration Agreement, if the reference is such as to make that clause part of the contract"

Also, Article 7.2 of the Federal Arbitration Law provides that

"An Arbitration Agreement shall be deemed to be in writing if: (a) it is contained in a document signed by the Parties or in an exchange of correspondence or other written means of communication or in the form of an electronic message in accordance with the applicable rules of the State concerning electronic transactions. (b) There is a reference in a written contract to any model contract, international agreement, or any other document containing an arbitration clause and the reference is such as to make that clause part of the contract"

We are yet to assess the UAE courts' interpretation and application of this Article. However, it appears that there is no substantial improvement in this regard since the Federal Arbitration Law appears to confirm that the general reference to an agreement containing an arbitration clause shall not be enforceable unless that reference is specific to the arbitration clause itself. In this regard, the law states that "and the reference is such as to make that clause part of the contract"⁵⁸³.

Therefore, the problematic issue set out above remains following the introduction of the Federal Arbitration Law.

§ 6: The jurisdictional Challenges on Piercing the Corporate Veil in the UAE Law

The general rule of Limited Liabilities Companies is that the shareholders of the company are not liable for the liabilities of the Limited Liabilities Company.

Article 72 of the UAE Commercial Companies Law defines Limited Liabilities Companies as follows:

"A Limited Liability Company shall have a name derived from its objective or from the name (s) of one or more partners, provided that name of the company shall be followed by the expression 'Limited Liability Company' or in short 'LLC'. In the event of a sole proprietorship, the name of the company shall be accompanied with the name of its owner and followed by the expression "sole proprietorship with limited liability"⁵⁸⁴.

Union Supreme Court, 745/Judicial Year 27 [Exhibit 6] state that:

"It is settled under the jurisprudence of this court that a company has separate finances and an independent legal personality, and that those independent finances and legal personality are independent of the finances and personalities of the shareholders to it. The fact that the shareholders of the company are themselves shareholders in another company does not make those two companies one company, nor does it render either of those two companies liable for the debts or obligations of the other arising out of the business of either of them"⁵⁸⁵

Therefore, in principle, the shareholders of an LLC company are not liable to the acts of their subsidiaries; however, the corporate veil in these circumstances is pierced, based on an established assumption of responsibility by the shareholders of a limited liabilities company.

Therefore, one of the limited exceptions to the limited liability of shareholders that could provide an arbitrator a safe ground for piercing the corporate veil is when the holding company or shareholders explicitly assume the liabilities of the subsidiary or the explicitly assume the responsibility on the subsidiary's acts or contracts.

⁵⁸³ Article 7.2 of the Federal Arbitration Law

⁵⁸⁴ Article 72 of the UAE Commercial Companies Law number 2 for the year 2015

⁵⁸⁵ Union Supreme Court decision number 745/Judicial Year 27 dated 28 March 2007 [Exhibit 6], the same is reflected by 457 for the judicial year 22 issued on 24 April 2002 [Exhibit 26]

Piercing the corporate veil is the legal doctrine used to describe an action pursued against a company that ultimately leads to personal liability of the shareholders wherein the corporate structure limiting liability is disregarded. This personal liability opens shareholders' bank accounts, property interests, and other assets to risk.

Piercing the corporate veil under certain circumstance could be related to the high degree to which the parent company has relevance and superior knowledge of the industry, coupled with knowledge of the subsidiary's system, and that it is foreseeable that the subsidiary or its employees would rely on the parent's superior knowledge.

Arbitrators and parties taking the UAE as the seat of their arbitration must always keep in mind that arbitration is an exceptional dispute resolution mechanism and therefore an arbitral tribunal's jurisdiction is limited only to the scope of the arbitration agreements as per the express consent of contracting parties.

In particular, the jurisdiction of an arbitral tribunal should be limited to the parties to the underlying agreement only and not any other parties. This presumption should be the basis of an arbitral tribunal's jurisdiction unless other rules exist under the applicable procedural law, which confers special power upon the arbitral tribunal to join a party that is not a contracting party.

Since an arbitral tribunal's jurisdiction is primarily derived from the parties' express agreement, when piercing a corporate veil due to reasons that could be related to the high degree of dependence of a subsidiary on its holding company, the holding company could have strong argument that it did not consent to be a party to the arbitration agreement. Therefore, the holding company may, and frequently does, raise a jurisdictional challenge that the arbitral tribunal does not have jurisdiction over the dispute, while in the same dispute, the arbitral tribunal might validly have jurisdiction with respect to the subsidiary.

Therefore, whilst piercing the corporate veil is common under certain circumstances, in national courts' practice; piercing the corporate veil in the arbitration is a complicated matter due to the limited jurisdiction of arbitral tribunals and the inherited and rooted principle of the exceptionality of the arbitration as a dispute resolution mechanism.

Case Laws for Piercing the Corporate Veil in Arbitration

In the event that a Limited Liabilities subsidiary is a litigant party in an arbitration, a party may request to include the holding company as a party to the arbitration for different reasons that may be related to the involvement of the holding company in the execution of the contract. However, this may be inadequate under UAE law and may lead to a jurisdictional challenge whereby the holding company may claim that it did not agree to arbitration and was not a party to the underlying agreement being invoked in the arbitration.

The insistence on including the holding company as a party to arbitration and acceptance by an arbitral tribunal to this inclusion may eventually lead to setting aside the arbitral award based on Article 216.1(c) of the CPC⁵⁸⁶.

⁵⁸⁶ Article 216.1(C) of the Repealed Arbitration Chapter of the UAE CPC, which is the same wording in Article 53.1(g) of the Federal Arbitration Law

The UAE national courts are generally conservative in piercing the corporate veil. However, in the event that any prejudice caused by the shareholders of a limited liabilities company to third parties was because of the corporate veil, involving fraud, deceit or gross negligence; this could lead to piercing the corporate veil in the judiciary.

In arbitration, as will be discussed in the following paragraphs, arbitral tribunals must recognize that arbitration is an exceptional forum for dispute resolution and the jurisdiction of an arbitral tribunal is subject to matters explicitly agreed to be referred to arbitration by the party. For that reason, arbitrators must be conservative when including a non-contracting party in an existing set of arbitral proceedings, including the holding company, which is the subject of this discussion.

The main jurisdictional challenge here is about consent. Arbitration is by definition a consensual process. Therefore, if the shareholders of an LLC company did not enter into an arbitration agreement, it becomes increasingly difficult for arbitral tribunals to uphold jurisdiction on the holding company or shareholders of a limited liability company.

Position of Dubai Courts on Piercing Corporate Veil in Arbitration

With few exceptions, the general rule, as the UAE jurisprudence confirms, is that if a Limited Liabilities subsidiary is a party to an arbitration, the inclusion of the holding company in the arbitration as a co-respondent is generally inappropriate under UAE law. In particular, if the holding company objects to the jurisdiction of the arbitral tribunal, this could lead to setting aside the resulting arbitral award based on Article 216.1(c)⁵⁸⁷ of the CPC.

In support of this position, DCC decision 277 for 2002 annulled a DIAC arbitral award for USD 13.5 M. The court found that the arbitral tribunal lacked jurisdiction since the award was issued against the holding company that was held liable for the acts of its subsidiary.

The facts of the case are related to an agreement between the claimant (which turned to be the award creditor) and the respondent (a holding company). The agreement contained provisions that preclude the respondent from competing with the claimant. However, the respondent's subsidiary did compete with the claimant. Therefore, the arbitral tribunal determined that the holding company is in breach of its contract with the claimant since the subsidiary is related to it.

However, the court found that the acts of the subsidiary are distinctly separable from the acts of the holding company, whereby the subsidiary is not a party to the arbitration agreement. Therefore, the Court of Cassation found that the arbitral tribunal exceeded its jurisdiction by rendering an award against the holding company based on the acts of its subsidiary that is not a party to the arbitration agreement.

In equity, and in a critical view to the decision, it appears that the arbitral tribunal may have reached a sensible decision, where it held that the holding company is responsible for establishing its subsidiary to compete with

⁵⁸⁷ Article 216.1(C) of the Repealed Arbitration Chapter of the UAE CPC, which is the same wording in Article 53.1(g) of the Federal Arbitration Law

the claimant and therefore unduly contravened the underlying agreement that is subject to the arbitration clause being invoked. However, the court applied a conservative approach and separated between the holding company's acts and the acts of its subsidiary. The court found that the acts of the subsidiary against the claimant are based on the decision of the subsidiary itself rather than the holding company.

The court reasoned that arbitration is an exceptional dispute resolution mechanism and, therefore, the arbitral tribunal's jurisdiction should be limited only to the scope of the arbitration agreements as per the agreement of the contracting parties and between the same parties to the arbitration agreement only.

The court further relied upon Article 276 of Commercial Companies law⁵⁸⁸ and concluded that merger is the disappearance of one or more of the companies into one of these companies or the disappearance of one or more companies and the establishment of another company, which takes over the rights and obligations of such companies. As such, it shall not be a merger getting a company (as a separate entity) under the umbrella of another company, even if the acquiring companies owned most of the shares of the subsidiary and accordingly the holding company controlled the management of the subsidiary.

The court determined that *"the holding company has a separate legal personality than the subsidiary and each of them has its own identity, therefore, each company shall not be responsible for the liabilities or the litigations of the other"*⁵⁸⁹.

Whilst this case law does not address the matter of piercing the corporate veil directly, it nonetheless provides a clear indication that the boundaries between a subsidiary and its holding company must be maintained. Importantly, the case law confirms that the power conferred upon an arbitral tribunal to uphold jurisdiction on an entity that is not the actual party to the arbitration agreement may cause a serious jurisdictional challenge during the enforcement of the eventual award.

DCC No. 65 for 2012: In DCC in this decision, the award creditor sought to ratify the award before the Dubai Court of First Instance. The award debtor brought a counter case seeking to annul the award on the ground that the award included a party that is not a contracting party to the arbitration agreement.

⁵⁸⁸ Article 276 of the Companies Law states that *"Even if under liquidation, a company may be amalgamated with another company of the same or of different kind. Amalgamation shall be by either of the following methods:*

By merger, i.e. say by the dissolution of two or more concerns and transfer of their liabilities to an existing concern.

By consolidation; i.e. by the dissolution of two or more concerns and the incorporation of a new concern where to all the liabilities of the dissolved concerns are transferred.

An amalgamation resolution shall be adopted by mutual agreement between desirous parties of the same in accordance with the established status concerning the amendment of the company Memorandum or Articles of Association. The amalgamation resolution shall be effective only after the obtainment of approval of the concerned local authorities as defined herein in conformity with the form to which the company was transferred."

⁵⁸⁹ Dubai Court of Cassation decision number 277 for the year 2002 issued on 13 October 2002

The Dubai Court of First Instance ratified the award, the Court of Appeal upheld the Court of First Instance's decision, however, the court retroactively excluded the party that was included in the arbitral award and was not a party in the arbitration agreement.

The award creditor filed a challenge in Cassation and argued that the Court of Appeal's exclusion of a party from the arbitration was an invalid exercise of its supervisory authority given the *res judicata* of the arbitral award, which should prohibit the court's review of arbitral awards substantively.

The DCC dismissed the award creditor's argument, upheld the Court of Appeal's decision, and confirmed that the award should have been issued against the contracting party that was a party to the arbitration agreement alone.

Again, this decision is not related directly to piercing the corporate veil, but the decision confirms the general rule that the UAE courts are adopting a conservative approach concerning the inclusion of a party in the arbitral award, where such party is not clearly a party to the arbitration agreement.

As such, parties and arbitrators may need to balance the following factors:

First, the degree to which the enforcement possibilities that would be improved by including the holding company in the award by virtue of piercing the corporate veil. This entails that, in case the possibilities for the enforcement of the award are less likely to be improved by including the holding company in the award or in case the subsidiary that is the true party to the arbitration agreement is known of having assets and not leaving its judgments unsatisfied. Under these circumstances, in order to avoid jurisdictional challenges before the judiciary, litigant parties and arbitral tribunals may consider disregarding the inclusion of the holding company or the shareholders as a party to an arbitration.

However, if the inclusion of the holding company enhances the opportunities for enforcement, a risk-reward analysis should be made by the arbitral tribunal and the party seeking the joinder, considering the following matters:

First, the degree to which the holding company actually intervened and had an active role in the underlying agreement and whether such grounds to include the holding company as a party to arbitration are sound; and

Second, the existence of fraud by the holding company to conceal or reduce the subsidiaries' assets in an attempt to avoid enforcement of the arbitral award.

Third, the possibility of opposing the award in its entirety before the judiciary and whether the holding company could be able to challenge the validity of the entire award by relying on the notion that the arbitral procedures were shaded with irregularity, as per Article 216.1(c) of the CPC⁵⁹⁰.

⁵⁹⁰ Article 216.1(C) of the Repealed Arbitration Chapter of the UAE CPC, which is the same wording in Article 53.1(g) of the Federal Arbitration Law

In general, having studied the UAE law on this topic, it may be well found that, generally, the more conservative and safe approach is to exclude the holding company from the arbitration that it may otherwise be a party to under the notion of piercing the corporate veil.

Attempts to Hide Assets by the Holding Company

If a holding company tries to hide assets of the LLC subsidiary to the detriment of creditors, this could be a valid ground for piercing the corporate veil under UAE law. However, the threshold to prove hiding assets could be high.

This notion is supported by the following case laws:

In DCC judgment number 75 / 2008 [Exhibit 35], the court established that hiding inventory from a limited liability company's book of accounts that does physically exist as per the expert's report in order to prejudice creditors of the company represents willful misconduct. The judgment also indicated that it is illogical that the company would have been in this position [deteriorated financial position] without an agreement and arrangement between the director of the company and the partners. Therefore, both the director and partners of the limited liability company were personally liable for such debts.

The judgment states that:

"It is established as per the jurisprudence of this court that each shareholder in a limited liability company shall be liable only to the extent of his share in the capital. However, as an exception of this principle is what the law established to set aside this principle when the shareholder has used this principle for as a means or cover for his actions and the actions he took contrary to the company's Article of Association. This entails prejudice to the other shareholders or creditors as long as these actions involve fraud, deceit or gross negligence. In this case, the principle of limiting the responsibility of the shareholders within the limits of their stake in the capital is not applicable; the shareholders will be liable in his personal capacity for such acts so that the impact of such acts extends to his own money:

The court finally concluded that:

"Since the expert report proved (which is undisputed by the petitioners) that the petitioners' company achieve net profits for the period from 2003 till 2006 for AED 13.7 million dirhams and the balance sheet of the company as of 30/12/2006 which showed that the most important asset is the inventory which amounted to AED 6 million dirhams. While that inventory does not exist in the company and the value of liabilities on the company is a million dirhams. Thus, the outcome of the expert's report clearly reveals a serious mistake committed by the Director of the company for computers and endorsed by the shareholders in the company, which amounted to willful misconduct meant to prejudice creditors of the company, including the claimants. That misconduct is represented by hiding the company's funds and whether the company achieved earnings or its owned assets, which represent a guarantee to creditors without clarifying these funds or assets in the financial statement of the company and its documents. This shows the violations of the director of the

*company and shareholders to the Companies' law. It is illogic that the company would have been in this position without an agreement and arrangement between the director of the company and shareholders"*⁵⁹¹

The Dubai Court of Cassation decision number 402 for 2001 (Rights), and Dubai Court of Cassation decision number 33 for 2003 adopted the same approach.

As per the Abu Dhabi Court of Cassation decision number 439 / 24, the Court refused the joint and several liability of the holding company since the stamp of such holding company is not available. This may reflect that the stamp is a reasonably persuasive evidence for joint liability under UAE law.

The principle above was repeated by the Dubai Court of Cassation judgment 55 for 2007 [Exhibit 34], where the court confirmed that:

"It's established as per the *jurisprudence* of this court that each shareholder in a limited liability company shall be liable only to the extent of his share in the capital. However, as an exception of this principle is what the law established to set aside this principle when the shareholder has used this principle for as a means or cover for his actions and the actions he took contrary to the company's Article of Association, which entail prejudice to the other shareholders or creditors as long as these actions involve fraud, deceit or gross negligence. In this case, the principle of limiting the responsibility of the shareholders within the limits of their stake in the capital is not applicable; the shareholders will be liable in his personal capacity for such acts so that the impact of such acts extends to his own money."⁵⁹²

Practical Case Study on Piercing the Corporate Veil

I was acting, as a counsel, in an arbitration case on behalf of a claimant. Piercing the corporate veil was obvious, in my view, for the following reasons:

- All the receipts for the purchase price in the agreement were received by the holding company with its stamp, letterhead and signature to all the receipts.
- All progress reports on the project were issued by the holding company, which demonstrates that any reasonable person would reasonably conceive that the holding company is responsible for the execution of the agreement.
- All media reports on the project were issued by the officers of the holding company in the public newspapers and its official websites.

However, despite the claim being successful with respect to the subsidiary, the arbitral tribunal denied piercing the corporate veil on the holding company and issued the award against the LLC subsidiary alone. Luckily, the

⁵⁹¹ Dubai Court of Cassation judgment number 75 for the year 2008 – commercial – dated 19 January 2009 [Exhibit 35]

⁵⁹² Dubai Court of Cassation Decision number 55 for the year 2007 dated 7 May 2007 [Exhibit 34]

subsidiary was capable of satisfying the award. However, in other circumstances, piercing the corporate veil could be necessary to ensure that claimants obtained the full satisfaction of their arbitral awards.

On the other hand, an identical arbitration case with the same facts and circumstances I acted on as a counsel did pierce the corporate veil. This decision was ratified by the Dubai Court of Appeal decision number 150/2017, the case is now being litigated before the Dubai Court of Cassation. I am waiting, with interest, for the results.

Partial versus Entire Annulment of Awards

Let us assume, for the sake of analysis, that an arbitral tribunal is prosecuting a case where the subsidiary company is a party to an agreement while the facts and circumstances of the case demonstrate that the subsidiary company, that is the contracting party, has a high degree of dependence on the holding company and that the holding company demonstrated to the claimant it has a high degree of relevance to the obligations being performed under the underlying agreement that included the arbitration agreement being invoked in this arbitration.

Assuming that the arbitral tribunal is convinced of the holding company's involvement in the case and decides accordingly to pierce the corporate veil and uphold jurisdiction on both the subsidiary and the holding companies as respondents in arbitration and issues an award against both of companies jointly and severally in order to increase the claimant's chances to enforce the award.

Assuming, further, that the UAE courts, for reasons set out above, is not satisfied with piercing the corporate veil.

In this case, will the UAE courts annul the entire award or alternatively will the UAE courts ratify the award against the subsidiary while only nullifying the award with respect to the holding company?

There is no case law found that could answer this question directly. However, the UAE courts showed a certain degree of flexibility with respect to the partial nullity of awards as determined in DCC 307 for 2002⁵⁹³ when the DCC annulled an award partially with respect to interest and kept the remaining elements of the award valid.

However, the following defense can be argued to annul the entire arbitral award based on this jurisdictional challenge:

Under 216.1.C of the CPC⁵⁹⁴, the award debtor can argue, with some reasonable grounds, that the arbitral tribunal exceeded its jurisdiction by including a party in the arbitration proceedings that is not truly a party to the arbitration agreement. This position could lead the award debtor to argue that the entire arbitral

⁵⁹³ Dubai Court of Cassation Decision number 307 for the year 2002 issued on 30 November 2002

⁵⁹⁴ Article 216.1(a) of the Repealed Arbitration Chapter of the CPC states "*The parties may apply for the award of the arbitrators to be nullified when the court considers whether it should be ratified, in the following circumstances (a) is given without an agreement to arbitrate or is based on an invalid agreement to arbitrate, or if it is void because a time-limit has been exceeded, or if the arbitrators have exceeded the limits of the agreement to arbitrate*" [Emphasis added]. This is consistent with Article (53) 1(a) of the Federal Arbitration Law

proceedings were shaded with irregularity and nullity, where such improper inclusion of the holding company into an arbitration could arguably involve numerous procedures, documents, requests, oral arguments, witnesses and submissions, which are not related to the jurisdiction of the arbitrators.

Therefore, the ground for nullity in 216.1.c of the CPC which states “*if there is a nullity in the award or a nullity in the proceedings having an effect on the award*”⁵⁹⁵ may (and probably likely) to apply under these circumstances.

Conclusions on Piercing Corporate Veil

Whilst piercing the corporate veil is not uncommon before national courts, piercing the corporate veil in arbitration includes considerable risks due to the inherently limited jurisdiction of arbitral tribunals and the rooted principle of the exceptionality of arbitration as a dispute resolution mechanism under UAE law.

Under the UAE arbitration seats, parties to arbitration and law firms acting on their behalf as well as arbitrators may consider avoiding this jurisdictional risk unless a mindful consideration of the following conditions is made:

First, the basis for piercing the corporate veil should not only be the high degree of involvement of the holding company or certain acts or articles in the newspapers. Rather, the reasons for piercing the corporate veil should be a clear assumption of obligations from the holding company on behalf of its subsidiary. Alternatively, there should be a clear, proven act of fraud whereby the holding company is attempting to avoid liability by taking the subsidiary only as a shield to hide its assets or where the assets of the subsidiary are unduly taken by the holding company.

Second, parties and arbitrators should consider the benefit of taking the risk of this jurisdictional matter before national courts, which may set aside the eventual award on this ground. Further, parties should consider whether the inclusion of the holding company could realistically increase the chances of enforcement. This can be the case where the holding company owns substantially more assets as compared with the subsidiary.

⁵⁹⁵ Article 216.1 (c) of the CPC, which has the same wording of Article 53.1(g) of the Federal Arbitration Law

TITLE 2: THE JURISDICTION FOR COMPLEX ARBITRATIONS IN THE UAE

International disputes often involve multiple contracts. Multi-contract disputes represent a difficult question for the international arbitral process, most frequently arising in the form of issues of consolidation, intervention and joinder in case of multi-parties. This chapter studies the narrow issue of cases when two or more different arbitrations arising out of different contracts may be consolidated into a single arbitral proceeding. The study addresses the treatment of consolidation by institutional arbitration rules and the national courts in the UAE.

This is a more focused study on the sources of an arbitral tribunal's power to decide on consolidation including the institutional rules, the intent of the parties to consolidate and the legal framework addressing consolidation in the absence of explicit provisions supporting consolidations. The case laws in this regard shall include the UAE as compared with France, England, and the US, in addition to decisions by arbitral tribunals under ICSID arbitration.

The rules regarding consolidation, joinder and intervention in cases before national courts are intended to foster efficient proceedings and to avoid the possibility of inconsistent results.

However, this approach is not entirely applicable to arbitration, which is inherently a consensual process; therefore, an arbitral tribunal should identify the powers conferred upon it to order non-consensual consolidation.

Where any of the parties have not consented to consolidation (most frequently for obstructive reasons), and where national legislation does not provide explicit provisions permitting consolidation, many arbitral tribunals do not find themselves having the power and jurisdiction to order non-consensual consolidation, which is contrary to the fair administration of justice, and promotes significant inefficiencies and conflicting results.

This argument supporting fragmentation of arbitrations has been frequently abused by parties to oppose the proceedings and make it increasingly difficult for claimants to prosecute their claims.

Many international arbitration conventions (and the major institutions in the UAE) do not address expressly the subject of consolidation of arbitral proceedings.

However, consolidation of multi-contract arbitration could also have disadvantages, which may outweigh their perceived benefits. This may, in particular cases, favor one party at the expense of a counter-party where, for example, the parties intended to have separate agreements and contemplated that a dispute under each agreement should not be conflated with other agreement.

Another problematic issue in consolidating multi-contract arbitrations is the question as to which arbitration agreement will be invoked by the party demanding consolidation and whether the arbitral tribunal can bring the remaining arbitration agreements under the different contracts underneath that arbitration agreement being invoked.

For example, assume two parties concluded tens of contracts that are related to the same economic transaction. Assume that one party sought to consolidate the disputes in all contracts; it may have two routes to do so:

The first alternative, the party seeking consolidation may rely on one arbitration agreement. In this case, the arbitral tribunal may not have jurisdiction to bring the remaining arbitration agreements underneath this arbitration clause since, in this case, it will be exceeding its substantive jurisdiction, which is a ground to set aside awards in the UNCITRAL Model Law and, therefore, in many jurisdictions.

The second alternative, assume, in the same example that the arbitral tribunal decided to activate the entire arbitration agreements. Can the arbitral tribunal do that despite that objecting party's entitlement to appoint different tribunal members for each case as per the literal interpretation of each arbitration agreement?

This has several practical implications. In an arbitration case in which I represented the claimant, the respondent demanded to create thirty-three different arbitral tribunals (which is ninety-nine different arbitrators since each tribunal is a three-party panel) to prosecute the action that is related to thirty-three interrelated contracts between the same parties. When the arbitral tribunal decided in my client's favor after extensive pleadings, the respondent decided to challenge the tribunal before the administrative authority of the arbitral institution. In particular, the respondent demanded to recuse the arbitral tribunal since it was allegedly unfit to serve. Further, the respondent raised a case before national courts against the panel members since they were allegedly negligent in performing their obligations.

As explained later in this dissertation, it is the case that most national legislatures, courts and tribunals have resolved questions of consolidation by reference to the parties' arbitration agreements providing for consolidation where contemplated or specifically agreed.

The fair administration of justice in multi-contract arbitration situation is well expressed by the following quote by Professor Bernard Hanotiau in his book *Multiparty, Multi-contract, Multi-issue and Class Actions* where he posed that:

"Arbitral institutions and arbitrators therefore have a correlative obligation to make sure that the duty of good faith is respected by the parties. Consequently, they should, by all means within the limits of their rules or prerogatives, make it impossible for a party to jeopardize another party's case by abusing its rights and unduly opposing the conduct of a single arbitration or joinder of parallel proceedings"⁵⁹⁶.

Indeed, while objecting consolidation may be for genuine reasons, in many other cases the objecting party to consolidation is somehow abusing the institutional rules. This challenge is commonly driven by an intention to sabotage the proceedings by an obstructive behavior, and this attitude should be confronted by arbitral tribunals. However, while doing so, the tribunal should consider carefully its powers in order to attain an award that is enforceable at law.

In this case, the main factor will be the enforceability at law of the award, which is frequently one of the main factors affecting tribunals' analysis and conclusions.

Objections for consolidating compatible contracts in a single set of arbitral proceeding, will cause the commencement of parallel proceedings involving the same issues and possibly the same parties, which in turn

⁵⁹⁶ Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions Professor Bernard Hanotiau, Kluwer Law International B.V., 1 Jan 2005, 2005 Edition, P. 140 and 141 [Exhibit 75]

would lead to conflicting results, significant duplications and unnecessary additional costs.

CIArb Practice Guideline 15 provides *“Consolidation involves turning or combining all the related disputes into a single arbitration. It may result in the arbitral tribunal having the right to issue a single award determining all the issues which have arisen between the different parties involved”*⁵⁹⁷.

Contracting parties in a construction project, for example, may agree to consolidate all claims in a single arbitration proceeding as a means for reaching a holistic resolution of disputes, which are frequently connected. For example, a construction project may involve various separate contracts among the owner, the contractor, subcontractors, engineers (design consultants) and project managers.

Despite the contracting parties' option to demand separate proceedings, they may choose to join all disputes in one proceeding in order to pool and share their defense resources, materials and related facts. Furthermore, consolidation prevents inefficiencies and preclusion problems caused by multiple awards or judgments on the same facts and issues.⁵⁹⁸

This chapter will focus on consolidation in case the following conditions exist:

- The underlying agreements being consolidated are closely related,
- The agreements are between the same parties,
- The arbitration agreements are compatible, and
- The legal questions and the relief sought under the agreements are of similar nature.

Sources of an Arbitral Tribunal's Power

Once the contracting parties validly agree to arbitration, the sources of powers conferred upon an arbitral tribunal can be summarized as follows:

- The power conferred upon an arbitral tribunal by applicable procedural law
- The power conferred upon an arbitral tribunal by the institutional rules
- The power conferred upon an arbitral tribunal by the parties' agreement
- Case laws in the UAE, jurisprudence from other jurisdictions, and decisions by arbitral tribunals regarding the consolidation of claims in the absence of legislative direction to permit it.
- Views of Scholars on consolidation.

⁵⁹⁷ Practice Guideline 15: Guidelines for Arbitrators on how to approach issues relating to Multi-Party Arbitrations, available online <https://www.ciarb.org/media/4220/2011-multi-party-arbitrations.pdf>

⁵⁹⁸ CONSIDERATION OF "CONTRACTING CULTURE" IN ENFORCING ARBITRATION PROVISIONS by Amy J Schmitz

Chapter 1: The power conferred upon an arbitral tribunal by the operation of the UAE law to support upholding jurisdiction on multi-contract arbitrations

This chapter will discuss the views and doctrines supporting an arbitral tribunal's decision to consolidate, in a single set of arbitral proceedings, multi-contract arbitration where certain provisions exist such as compatible arbitration clauses being included in each contract and that all contracts are related to the same economic transaction.

This does not mean that this dissertation is favoring consolidation as a matter of principle that should be applied consistently for all decisions or under all circumstances. On the contrary, consolidation in certain cases is indeed inappropriate.

However, this Chapter shall study the supporting views to consolidation, while Chapter 3 of this Title shall discuss the opposing views to consolidation.

In determining an arbitral tribunal's procedural powers for arbitration cases seated in the UAE mainland, it may not be sufficient to refer the arbitration agreement or the institutional rules. Rather, the UAE Federal Arbitration Law, which is the procedural law governing the arbitration by the choice of the parties and the *lex arbitri* must be taken into consideration as an essential power conferred upon an arbitral tribunal.

Section 1 Consolidation of Arbitration under UAE law

In exercising its jurisdiction under UAE law, an arbitral tribunal is not bound by any procedures except the provisions stipulated in the Repealed Arbitration Chapter of the CPC (or now the Federal Arbitration Law). Therefore, it is fair to say that the UAE law conferred on arbitral tribunals the powers to determine generally procedural matters within the limits established by Article 216 of the CPC. To that effect, Article 212.1 of the CPC⁵⁹⁹ states that:

*“The arbitrator shall issue his award without being bound by the procedural rules save as is provided for in this Chapter and the procedures relating to the summoning of the parties, the hearing of their arguments, and enabling them to submit their documents. Nevertheless it shall be permissible for the parties to agree on specific procedures for the arbitrator to follow”*⁶⁰⁰.

The Repealed Arbitration Chapter of the UAE CPC provides limited cases where it does not recognize the general procedural powers conferred on an arbitral tribunal in the foregoing paragraph. These cases are provided exclusively in Article 216.1(a)⁶⁰¹ of the CPC, which provides *“an award is issued without a valid arbitration*

⁵⁹⁹ Which is consistent with Article 23.2 of the Federal Arbitration Law

⁶⁰⁰ Article 216 of the CPC, which includes grounds to set aside an arbitral award, this is replaced by Articles 53 of the Federal Arbitration Law

⁶⁰¹ Which is consistent with Article (53) 1(a) of the Federal Arbitration Law states

document or or in instances where the arbitrator acts beyond his scope of the arbitration agreement.”

Exceeding the scope of substantive jurisdiction by an arbitral tribunal, as an exception from the general procedural powers conferred upon an arbitral tribunal, should ideally not extrapolate to consolidation in multi-contract or multi-party arbitrations. Instead, it should typically mean upholding jurisdiction by an arbitral tribunal for a dispute that is not agreed between the concerned parties to be referred to arbitration, which consequently makes the UAE courts or another arbitral forum competent to adjudicate the dispute.

Indeed, in multi-contract arbitration situations, the party objecting consolidation does not typically deny its valid submission to arbitration. More specifically, the party objecting consolidation in multi-contract arbitration position typically does not deny that each of the arbitration agreements being considered for consolidation were concededly submitted to arbitration; none of the parties was forced to arbitration and moreover none of the parties expected the dispute to be heard by the national courts or any other arbitration forum.

Therefore, the consent element required under Articles 212 and 216 of the Repealed Arbitration Chapter of the CPC (Articles 23.2 and 53 of the Federal Arbitration Law) to attain an award enforceable under UAE law should ideally be met in case an arbitral tribunal upholds jurisdiction in multi-contract arbitrations.

In other words, in the multi-contract arbitration situation, the party objecting consolidation does not question consent to arbitration. Instead, it argues the number of arbitral tribunals that should adjudicate the dispute. Such challenge is likely to be considered inconsistent with Articles 212 and 216 of the Repealed Arbitration Chapter of the CPC (Articles 23.2 and 53 of the Federal Arbitration Law), which essentially prohibits referring a dispute to arbitration where there is no valid consent for arbitration.

Therefore, the issue of consolidation should ideally be considered as a procedural matter. The UAE law conferred upon arbitral tribunals the authority to decide on the procedural matter as long as the respective arbitral tribunal does not infringe the parties' right to validly consent the jurisdiction of an arbitral tribunal and do not act beyond the scope of the matters that were consensually submitted to arbitration by the parties.

Separately, the fact is there is no provision in the Repealed Arbitration Chapter of the UAE Civil Procedures Code or the Federal Arbitration Law that limits an arbitral tribunal's power to consolidate the claims under multi-contract situation or specifies a separate tribunal to each of arbitration agreements. Hence, consolidation of arbitration should be considered as a decision of the arbitral tribunal since it is not bound by any procedures except the Repealed Arbitration Chapter of the CPC (or the Federal Arbitration Law), both of which do not prohibit consolidation of multi-contract arbitrations.

Based on the above analysis, the DCC decision number 547/2015 [Exhibit 15] determined that the consolidation of related arbitrations is a procedural matter that is left to arbitral tribunals. This decision will be discussed further in this dissertation.

This decision by the DCC is consistent with the finding of the US Supreme Court in *Howsam* [Exhibit 61], which differentiated between the “arbitration procedures” and the ‘question of arbitrability’. The ‘arbitrability’ question has a limited scope and should not be exceeded by the arbitral tribunal when none of the parties are likely to have expected a court (rather than an arbitral tribunal) to have decided on this dispute.

In the same context, the decision by the US Supreme Court in *Green Tree* decided that consolidation of multi-contract arbitrations is a procedural matter that is under the power of the arbitral tribunal to decide. The court determined that:

*“We are faced at the outset with a problem concerning the contracts’ silence. Are the contracts in fact silent, or do they forbid class arbitration as petitioner Green Tree Financial Corp. contends? But we cannot do so, not simply because it is a matter of state law, **but also because it is a matter for the arbitrator to decide**”⁶⁰²*

Further, as per the UAE law, exceeding substantive jurisdiction by exceeding the scope of an arbitration agreement or the matters that have been submitted to arbitration in accordance with the arbitration agreement (as a ground for setting aside an arbitral award as per Article 216.1(a) of the CPC⁶⁰³) does not include by any reference consolidation of disputes consensually referred to arbitration. Rather, it means referring to an arbitral tribunal a particular dispute that is not agreed upon between the parties to be referred to arbitration, which as a consequence, makes the UAE courts competent to adjudicate the dispute.

The jurisprudence of the UAE Courts is settled that arbitration should be limited to matters agreed to be referred to arbitration:

- DCC decision 148 for 2008 commercial dated 16 September 2008
- DCC decision number 40 for 2004, Civil issued on 26 September 2004⁶⁰⁴
- DCC 403 / 2003⁶⁰⁵
- USC decision 449 for 2001 for Judicial Year 21 issued on 11 April 2001

All the above decisions repeat the same principle and provide that arbitration is an exceptional forum to resolve disputes and fundamentally based on exiting the natural judiciary and all the guarantees provided by the natural judge and is limited to the issues that the will and intent of the parties to is clearly to agree to arbitration rather than the national courts.

⁶⁰² Decision by the US Supreme Court in *Green Tree Financial Corp. vs. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402 (2003) [2009] EWCA Civ 585 [Exhibit 70]

⁶⁰³ Which states “*The parties may apply for the award of the arbitrators to be nullified when the court considers whether it should be ratified, in the following circumstances given without an agreement to arbitrate or is based on an invalid agreement to arbitrate, or if it is void because a time-limit has been exceeded, or if the arbitrators have exceeded the limits of the agreement to arbitrate*”, which is consistent with Article (53) 1(a) of the Federal Arbitration Law

⁶⁰⁴ Dubai Court of Cassation Decision number 40 for the year 2004 commercial issued on 26 September 2004

⁶⁰⁵ Dubai Court of Cassation Decision number 403 for the year 2003 issued on 13 March 2004

More clearly, DCC decision number 73 for 2010 – Civil- interpreted Article 216.1(a) of the Repealed Arbitration Chapter of the CPC⁶⁰⁶ and provided the following:

“The provisions set forth in Article 216 of the CPC⁶⁰⁷ provides that the litigant parties may request the nullity of the arbitrators' decision when the court reviews the ratification of the award and that shall be in based on the circumstances where arbitration is performed without a valid agreement to arbitrate or is based on an invalid agreement to arbitrate, or if it was void because a time-limit that has been exceeded, or if the arbitrators have exceeded the limits of the agreement to arbitrate.

This implies that arbitration is based on the free choice of litigant parties to choose an independent third party to hear their dispute without instituting an action before the judiciary. Therefore, it should be based on a contract to stipulate within its terms the arbitration clause and is based on the agreement of the litigant parties to refer to arbitration. This agreement to refer to arbitration is the fundamental basis for the arbitrator uphold jurisdiction on the dispute rather than the judiciary, therefore, the legislator stipulated rules guarantees to such reference such as it must be written and the arbitrator cannot render an award without such agreement and within its limits”⁶⁰⁸ [Emphasis added]

As such, this decision is clear that the arbitral tribunal’s jurisdiction should primarily be based on the free will and intent of the parties to enter into an arbitration agreement, which is an issue that the party objecting the consolidation does not and should not deny.

As such, an arbitral tribunal cannot be said to have exceeded its substantive jurisdiction by upholding jurisdiction on multiple contracts that are validly referred to arbitration under the compatible arbitration agreements.

The same substance is reflected in the DCC decision number 173 for 2010⁶⁰⁹, which states that:

..”the issues related to the agreement to enter to the arbitration agreement and that can cause the nullity of the arbitral award are rendering the award without an arbitration agreement or based on the null arbitration agreement or the arbitration agreement was expired by the expiry of the time-limit or if the arbitrator exceeded the substantive jurisdiction of the arbitration agreement or if he violates the public order”^{610 611}.

⁶⁰⁶ Which is compatible with Article (53) 1(a) of the Federal Arbitration Law

⁶⁰⁷ Which includes grounds to set aside an arbitral award, this is replaced by Articles 53 of the Federal Arbitration Law

⁶⁰⁸ Dubai Court of Cassation decision number 73 for the year 2010 – Civil, issued on 9 May 2010

⁶⁰⁹ The same was reflected by Dubai Court of Cassation Decision number 156 for the year 2009, Civil issued on 27 October 2009 [Exhibit 45]

⁶¹⁰ Dubai Court of Cassation Decision number 173 for the year 2010, rights, issued on 3 October 2010

⁶¹¹ The same meaning is indicated in the following decisions:

- USC decision number 64 for 1999,

Importantly, the Dubai Court of Cassation decided that if the institutional rules, under which the arbitration is conducted, do not provide for a certain matter, the arbitral tribunal needs to decide on the procedures to be followed without violating mandatory rules in the applicable laws to the arbitration. Therefore, it can be said that consolidation is not a violation of the UAE law mandatory provisions or public order (as confirmed by case laws set out below). Therefore, it is left to the arbitral tribunal's discretion.

In DCC Petition to Cassation No. 503 of 2003 (Becktel), the court established that:

“The procedural rules applicable to disputes under the DIAC are the rules prescribed in their system, in the event the DIAC rules are silent on the procedure to be followed, the applicable procedures should be those agreed by the parties. In the event the parties fail to agree, the arbitral tribunal needs to decide on the procedures to be followed without violating mandatory rules in the applicable laws of the Emirate of Dubai”⁶¹².

The same view above was adopted by USC decision number 449 for Judicial Year 21 dated 11 April 2001.

As such, an arbitral tribunal could have the power to order consolidation where the parties fail to agree on the procedure to be followed and where one of the parties seeks consolidation and the other party opposes it.

§ 1 Dubai Court of Cassation Case Law on Consolidation of Arbitration Claims and Case laws

In a relatively recent case law, the DCC decision number 547/2015 – (Real Estate Dispute) dated 27 April 2016 [Exhibit 15] addresses clearly the issue of consolidation of related arbitration. In summary, the court found that consolidating related arbitrations is generally permitted under UAE law and further it could foster the fair administration of justice. This decision is important and is the only case law identified that addressed the question of consolidation of arbitrations; as such, this case law will be discussed in some depth.

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- Dubai Court of Cassation Decision number 156 for 2009 [Exhibit 45],
 - Dubai Court of Cassation Decision number 351 for 2005,
 - Dubai Court of Cassation Decision number 573 for 1999,
 - Abu Dhabi Court of Cassation Decision number 107 for 2014,
 - Abu Dhabi Court of Cassation Decision number 353 for 2011,
 - Abu Dhabi Court of Cassation Decision number 447 for 2010,
 - Abu Dhabi Court of Cassation Decision number 834 for 2010 [Exhibit 28],
 - Union Supreme Court Decision number 831 for 2004

⁶¹² Dubai Court of Cassation Decision number 503 of the year 2003, Rights, issued on 15 May 2004 (Becktel) [Exhibit 24]

In construction, the Dubai Supreme Court held that: *“in the absence of any legal doctrine that opposes appointing a single arbitrator to hear a dispute regarding twelve separate sale agreements, the consolidation of such claims under the same award is a requirement for the fair administration of justice.”*

The facts of the case included that:

“The petitioner had contracted the defendant on 5/10/2007 to purchase (12) residential units under (12) sale and purchase agreements, one agreement for each of the units which are all located at (Tameer Towers/ 1) Reem Island, Abu Dhabi. The parties have agreed pursuant to the Clause (14/6) of such agreements to refer any dispute what would arise between them to arbitration”⁶¹³.

The judgment went on to describe the challenge for nullity by the award debtor and stated that:

“The petitioner’s legal representatives, however, filed a counter case to annul the mentioned award and dismiss the ratification case brought by the petitioner based on the invalidity of the arbitral award for being issued from arbitrators not appointed in accordance with to the law. More specifically, by referring all the (12) cases to a single arbitrator rather than appointing (12) different arbitrators for each of the 12 agreements being litigated.”

The Court held further that:

“The Court of Appeal’s judgment based its decision upon the notion of the absence of legal principle that opposes appointing a single arbitrator to hear and try a dispute regarding twelve separate sale agreements that were the subject of the arbitral award. These agreements are related to units in the same real property, the foregoing procedure is the natural and logical consequence for the proper and fair administration of justice” [Emphasis added]

The court then determined that the validity of an arbitral award is dependent on the formal procedural issues that are not related to the consolidating of multi-contract arbitrations. The court held that:

“Further, the award included the reasons for the decision, submissions and documents of the litigant parties and copy of the arbitration agreement. The arbitrator has allowed the defendant time to provide the witnesses and required expert reports. The award was compliant with the reasoning procedures required, further, the Award was issued in the dispute relating to the execution of the contractual obligations between the parties and not to a matter related to the public order.”

Therefore, in the foregoing decision, the Dubai Court of Cassation did not only dismiss the action for nullity of the arbitral award based on the consolidation of related arbitrations, the court went further and held that *consolidating related arbitrations is a requirement for the fair administration of justice*, which impliedly and indirectly urges parties and tribunals to take that approach.

As set out above, the judgment of the DCC is also consistent with the determination of the US Supreme Court in *Green Tree*, where it found that:

⁶¹³ Decision by the Dubai Court of Cassation number 547/2015 (Real Estate Dispute) dated 27 April 2016 [Exhibit 15]

“There is no legislative direction that prohibits class-wide arbitration”

The court further held that:

“Repeat players should not be able to preclude class action arbitrations in their contracts in order not to obstruct proceedings”⁶¹⁴.

The DCC’s decision is further consistent with the US Supreme Court decision in *Howsam*, as explained in Chapter 2, Section 3, § 1 under this Title.

Both case laws confirm the general principle that **"Everything which is not forbidden is allowed"** which is a constitutional principle of English law and has been quoted in several Cassation decisions in the UAE and other jurisdictions⁶¹⁵, including Dubai Court of Cassation number 127/19 and 432 / 2009 – Civil Dispute.

In clarifying the *fair administration of justice* in multi-contract arbitration situation as DCC 547/2015 prescribed, and knowing that under the UAE award creditors law will need to prosecute a separate ratification (and later enforcement) actions before the national courts. In case an arbitral tribunal decides to fragment this dispute. There is no disagreement that the administration of justice will not be served by any decision to fragment the multi-contract arbitrations where the cost and time can multiply tenfold in the case of fragmenting the disputes rather than consolidating them.

Further, the fair administration of justice has been rooted in the UAE judicial system, albeit this reference was related to the judiciary, which is not necessarily applicable to arbitral tribunals that derive their power from the express consent of the parties. However, the DCC 547/2015 [Exhibit 15] extended the application of this principle to arbitration.

The following decisions issued by the UAE Supreme Courts referred to and relied upon the fair administration of justice principle in judiciary:

- DCC 11 for 2002 dated 4 May 2002,
- DCC 213 for 2004 dated 15 May 2005,
- DCC 210 for 2005 dated 12 June 2016,
- ADCC 23 and 24 for 2010 dated 14 April 2010,
- USC 292 for 22 Judicial Year dated 21 November 2000, and
- USC 625 for 2013 dated 16 April 2014.

⁶¹⁴ Decision by the US Supreme Court in *Green Tree Financial Corp. vs. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402 (2003) [2009] EWCA Civ 585 [Exhibit 70]

⁶¹⁵ (الأصل في الأمور هو الإباحة) (in Arabic)

Conclusion

The UAE CPC conferred general procedural powers on arbitral tribunals with the exception of certain powers under Article 216⁶¹⁶ thereto, which do not include any limitations to an arbitral tribunal's power to the consolidation of claims under multi-contract arbitrations.

The UAE CPC (now the Federal Arbitration Law) neither provides for nor prohibits consolidation of arbitration. As such, the UAE Supreme Courts' decisions interpreted this position as a permission for consolidation rather than a prohibition of it for the sake of good administration of justice.

DCC Decision 547/2015 [Exhibit 15] held that since the consolidation of claims is not forbidden under UAE law, it should be allowed. The court further impliedly urged parties and tribunals to adopt this approach by determining that such consolidation fosters the fair administration of justice.

Exceeding the limit of substantive jurisdiction as a ground to oppose consolidation per 216.1(a) of the UAE CPC⁶¹⁷ is predominantly about instituting an arbitration case contrary to the agreement of the parties to litigate their disputes before national courts or where the arbitral tribunal does not have jurisdiction from the parties' explicit agreement to arbitrate.

In the consolidation scenario, an arbitral tribunal has jurisdiction, and consolidation is a procedural matter related to the decision of the tribunal itself as it is not bound by any procedures in the CPC except Repealed Arbitration Chapter of the CPC (now the Federal Arbitration Law). Nothing in the Repealed Arbitration Chapter of the CPC (or the Federal Arbitration Law) prohibits consolidation.

§ 2 UAE Cassation Decision with regards to Consolidation of Cases in Judiciary

Despite the courts' jurisdiction being different from arbitral tribunals' jurisdiction since arbitration is inherently a consensual process, this section clarifies the methodology adopted by the UAE jurisprudence in defining and dealing with cases that are closely connected for the sake of 'good administration of justice', which was the basis for the DCC Decision 547/2015 [Exhibit 15] to consolidate multi-contract arbitrations.

Dubai Court of Cassation, Civil Judgments, Challenge No.234/2006 – Dated 26-12-2006

The court determined that the general rule in filing cases before the Dubai Courts is to have every case filed separately. However, certain lawsuits may be filed under one statement of claim, provided the statement of claim shall include all details required for every case pursuant to Article 42 of the Civil Procedures Law; especially litigants' names, subject, grounds, and claims. This statement is very important for identifying the competent court empowered to consider every case, specifying the fees of every request, and stating whether the judgment rendered on every case is challengeable.

⁶¹⁶ Which includes grounds to set aside an arbitral award, this is replaced by Articles 53 of the Federal Arbitration Law

⁶¹⁷ Which includes grounds to set aside an arbitral award, this is replaced by Articles 53 of the Federal Arbitration Law

Union Supreme Court, Civil and Commercial Judgments, Decision No. 311 of 22 Judicial Year – Dated 21-11-2000

The court determined that the UAE CPC does not prevent filing a case under a single statement of claim by more than one plaintiff against one defendant, provided their requests are so correlative that they shall be, for the proper administration of justice, and considered altogether as a single case. It was settled that the holding company and its subsidiaries may file one case against their adversary, requesting for a debt owed to them by such litigant whatever its maturity date.

The same ruling was found in USC Civil and Commercial Judgments – Challenge No. 292 – 22nd Judicial Year – Dated 21-11-2000

Dubai Court of Cassation Case No.102/2010 Real Estate Dispute

In this case, the Dubai Court of Cassation was confronted with a situation where multiple plaintiffs brought a claim against one respondent. One of those plaintiffs agreed for arbitration but its claim was closely connected from the commercial perspective with the other claims being adjudicated by the court. The court decided that the Dubai Courts have jurisdiction on the entire dispute, include the agreement embodying the arbitration clause since national courts have the default jurisdiction and it is for the fair administration of justice to review disputes altogether⁶¹⁸.

§ 3 Powers Conferred upon an arbitral tribunal by the Institutional Arbitration Rules

The DIFC-LCIA rules are the only major institutional rules in the UAE that explicitly provide for consolidation of arbitrations.

Article 22.1 of the DIFC Arbitration Rules states:

“The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub-paragraphs (viii), (ix) and (x) below) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:

[.....]

(x) to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations subject to the DIFC-LCIA Rules commenced under the same arbitration agreement or any compatible arbitration agreement(s) between the same disputing parties, provided that no arbitral tribunal has yet been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such tribunal(s) is (are) composed of the same arbitrators”⁶¹⁹

⁶¹⁸ Dubai Court of Cassation Decision number 102 for the year 2010 – Civil, issued on 26 December 2010

⁶¹⁹ Article 22.1 of DIFC Rules of 2016, effective from 1 October 2016, available online <http://www.difc-lcia.org/arbitration-rules-2016.aspx>

However, neither the DIAC nor ADCCAC Rules provide for consolidation, therefore, the DIAC and ADCCAC Rules, as the UAE law, do not contain provisions prohibiting or permitting the consolidation or joinder of multi-contract arbitrations to be heard by arbitral tribunals.

Article 35 of ADGM Arbitration Regulations addresses only consensual consolidation. It states that:

“(1) The parties are free to agree (a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or (b) that concurrent hearings shall be held, on such terms as may be agreed. (2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings. (3) Any consolidation order made under subsection (1) shall be without prejudice to the date on which any claim or defense was raised for the purpose of applying any limitation periods or similar rule or provision of law”⁶²⁰.

As set out above, the Dubai Court of Cassation, as well as several case laws in other jurisdictions as will be detailed further in Section 1, § 1 of Chapter 1 of this Title, found that absence of provisions forbidding consolidation is an argument favoring the fair administration of justice that is best served by consolidation.

The same construction could be inferred to be applicable to the DIAC, ADCCAC and ADGM arbitration rules, where there is no provision prohibiting or allowing consolidation.

Separately, Article 43 of the DIAC rules provides:

“In all matters not expressly provided for in these Rules, the Centre, an arbitral tribunal, and the parties shall act in the spirit of these Rules and shall make reasonable efforts to attain the Award is enforceable at law”⁶²¹.

A similar rule under ADCCAC, albeit does not specifically refer for the ‘spirit of the rules’ mentioned in the DIAC Rules. Article 15 of ADCCAC rules states:

“The procedure followed by the Panel shall be subject to rules agreed upon by the parties; and in the absence of such rules in relation to a given issue, the procedure shall be governed by the provisions of the Rules and the Regulations. In the absence of any such rules or rule, the Panel shall determine which rule shall be followed”⁶²²

Further, Article 17 of the DIAC rules provides:

⁶²⁰ Article 35 of ADGM Arbitration Regulations of 2005, in exercise of its powers under Article 6(1) of Law No. 4 of 2013 concerning the Abu Dhabi Global Market issued by His Highness the Ruler of the Emirate of Abu Dhabi, available online http://adgm.complinet.com/net_file_store/new_rulebooks/a/r/Arbitration_Regulations_2015.pdf

⁶²¹ DIAC Arbitration Rules of 2007, issued by Decree No. 11 for the year 2007 by H.H. the Ruler of Dubai on the 6th of May 2007

⁶²² ADCCAC Arbitration Rules of 2013, effective from 1st September 2013

“The proceedings before an arbitral tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, an arbitral tribunal may determine”⁶²³.

Therefore, in the absence of a specific provision in the institutional rules permitting consolidation, an arbitral tribunal should act in the spirit of the institutional rules, which should be a common ground between the parties that consolidation of related disputes enables and fosters efficient proceedings and prevents the possibility of inconsistent decisions.

Section 2 Powers Conferred upon an arbitral tribunal by the parties

The terms of an arbitral tribunal's jurisdiction and powers, while addressing the consolidation question in multi-contract arbitration, depend, among other things, on the proper construction of the arbitration agreements. An arbitral tribunal must consider the consolidation in question and then elicit from the arbitration agreements whether or not the parties intended, contemplated or reasonably expected to consolidate their disputes or otherwise contemplated the fragmentation of the arbitrations.

In deciding its power, an arbitral tribunal should regard and give effect to the true intent and the reasonable commercial expectations of the parties regarding the disputes they intended to be decided in arbitration when they entered into their agreements.

The English case law in *Fiona Trust* established a presumption on the intent and reasonable expectations of the contracting parties in multi-contract situations. In summary, to interpret the intention of the parties to consolidate arbitrations, the court decided that it is fair to say that parties to a multi-contract arbitration, as prudent and rational businessmen, could not have intended in structuring their multi-contracts that all refer to arbitration to resolve their disputes by appointing several arbitrators, perhaps tens of arbitrators, where it is possible to agree to appoint a single panel of arbitrator(s), bearing all the burdens, risks and costs that this would entail, where this can practically be avoided.

On the contrary, it can be inferred that the parties to multi-contract arbitration situation, especially where similar, consistent or compatible arbitration agreements exist, presumably by virtue of such consistency of the wording of the arbitration agreements, could demonstrate that they took special steps to avoid fragmentation.

Therefore, it could be inferred that the parties purposely drafted identical, similar or compatible choice of jurisdiction, which should mean that the parties to multi-contract arbitration situation presumably have intended to have such claims heard altogether.

Furthermore, the question whether the parties intended to consolidate their disputes at the time of concluding the underlying agreements is increasingly difficult since it is considerably remote for contracting parties to contemplate this consolidation of fragmentation of disputes at the time of conclusion of contracts. Therefore,

⁶²³ DIAC Arbitration Rules of 2007, issued by Decree No. 11 for the year 2007 by H.H. the Ruler of Dubai on the 6th of May 2007

the arbitrator may consider at parties' contemplation or reasonable expectations of consolidation versus fragmentation, when they drafted the agreements to interpret and clarify their intention.

Three broad principles need to be taken care of by an arbitral tribunal deciding on the parties' intent to consolidate arbitration. First is the true interpretation of the intention of the parties to consolidate disputes, second is whether consolidation was contemplated by the parties, and third is the reasonable expectations by the parties.

§ 1 First: Parties' intention to have a single transaction

The history of the negotiations and drafting of multi-contracts may, under certain circumstances, support the inference on whether the parties saw all the agreements being considered for consolidation as part of one unified transaction.

This understanding may lead an arbitral tribunal to believe that there was a single transaction articulated through separate but interrelated agreements, or the agreements being considered for consolidation under one arbitral proceeding were drafted and executed as an interrelated set of obligations, and were meant to be construed, and prosecuted altogether in a single set of proceedings.

The above inference was found by the DCC 547/2015 [Exhibit 15], where the court interpreted the intention of the parties that the separate agreements related to the same project are interpreted and, in truth, one single agreement. The court found that:

*"These agreements are related to units in the same real property... the foregoing procedure is the natural and logical consequence for the proper and fair administration of justice"*⁶²⁴.

The unity transaction contemplated in multi-contract arbitration situations was found in "*Cambodia Power*" award on jurisdiction under the ICSID Rules [Exhibit 62], where the tribunal found that:

*"Separate arbitration clauses in separate agreements might be interpreted as, in truth, one single arbitration agreement"*⁶²⁵

This is despite the fact that the clauses were concluded separately, at different times, between different (albeit connected) parties, each as a self-contained agreement and the clauses were not identical and did not refer to each other.

The same determination regarding the unity transaction was found in *UBS Securities LLC v HSH Nordbank AG*, where the English Court of Appeal held that:

⁶²⁴ Decision by the Dubai Court of Cassation number 547/2015 (Real Estate Dispute) dated 27 April 2016 [Exhibit 15]

⁶²⁵ Decision by arbitral tribunal under ICSID Rules in "*Cambodia Power*," Cambodia Power Company v. Kingdom of Cambodia (ICSID Case No. ARB/09/18), Decision on Jurisdiction (March 22, 2011) [Exhibit 62]

*“The agreements were all connected and part of **one package** and it seems to me plain that the result for which UBS contends would be a wholly un-commercial result and one that sensible business people cannot have intended”*⁶²⁶

Accordingly, the parties in a multi-contract situation may have truthfully intended to enter into a single transaction that was documented into several inter-related agreements, whether entered into contemporaneously or over a period.

The following illustrates an example of the possible interconnections between the underlying agreements being considered for consolidation. It is not uncommon to identify such connections in typical disputes. This may support the inference that the agreements represent an overall single economic transaction and can be resolved before a single arbitral tribunal and in a single set of proceedings.

- The identical, similar or compatible articulation of the arbitration agreements being consolidated.
- The subject, content and economic event of the agreements that incorporated the arbitration agreements are related.
- The legal question being raised in the arbitration and is the same or similar in all the agreements being considered for consolidation.

The above becomes more relevant when the party seeking consolidation is the weaker party to the agreements, which in turn, allows the party objecting consolidation to mandate its adhesive conditions, which impose one agreement for each of the properties, asset or subject matter purchased.

This should be strengthened by the principles favoring expeditious and equitable case disposition absent demonstrated prejudice to the drafter of the adhesive agreements.

The drafting of the arbitration agreements

As part of an arbitral tribunal’s duty to understand the parties’ intent in the underlying agreements to consolidate their potential disputes, the tribunal should ideally review the wording of the arbitration clauses being invoked and identify whether there might be any intention reflected in the wording of the arbitration clauses.

The connexity and relationship between the agreements are important to establish whether the parties intended to continue their business transaction through and across the different agreements.

The following could be investigated and considered in order to determine interconnection between the underlying agreements being considered for consolidation in multi-contract arbitration:

The scope of each of the arbitration agreements could have a formulation which allows for a broad scope, and the reference to *“in relation to”* or *“in connection with”* the contract could reflect a wide scope than *“out of”*

⁶²⁶ Decision by the English Court of Appeal in UBS Securities LLC v HSH Nordbank AG, [2009] EWCA Civ 585

the contract. The latter also could have a wider scope than the reference to “under” the contract. Each of these expressions could be used to interpret the intention of the parties to allow consolidating related disputes. The following case laws from the English courts support this inference:

- The dispute “out of” an agreement: The English House of Lords in *Heyman v Darwins Ltd* [1942] AC 356, 399 Lord Porter said that disputes arising “out of” of an agreement, as in multi-contract arbitration situation, has a wider meaning than the disputes “under the agreement.”
- The dispute “relating to” an agreement: The English House of Lords in *Overseas Union Insurance* provided that disputes arising “in relation to” an agreement has a wider meaning than the disputes “under” the agreement. More specifically, the court held that:

*“There was a broad distinction between clauses which referred “only those disputes which may arise regarding the rights and obligations which are created by the contract itself” and those which “show an intention to refer some wider class or classes of disputes.” The former may be said to arise “under” the contract while the latter would arise “in relation to” or “in connection with” the contract”*⁶²⁷

The timing for entering into the arbitration agreements being consolidated

Article 130 of the UAE Civil Transactions Code states:

“A contract is formed by the meeting of an offer with an acceptance, with due observance of any special conditions provided for in the law for its formation.” Therefore, if the multiple contracts being considered for consolidation were entered concurrently, this may demonstrate that one offer and acceptance was concluded. As a consequence, contracts were formed at the same time when such offer and acceptance was met regardless of the matter of signing the contract.

In support of this point, in interpreting the intention of parties to enter into an arbitration agreement, the Dubai Court of Cassation decision number 73 for the year 2010 provided that:

*“the contract is formed by the meeting of an offer with an acceptance, however, writing the contract on a later date to its formation is distinctly separated from the contract formation, further, whether the contract is written or not has relation whatsoever to the contract formation and the contractual relationship. Therefore, writing the contract is a way of evidence and does not need to match the date of contract formation”*⁶²⁸.

Further, if this synchronization of timing is not identified, it could be understood that the later introduction of identical or similar arbitration clauses may infer that the parties brought all agreements into line in order to

⁶²⁷ The English House of Lords in *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep 63, 67; see Opinion of the Lords of Appeal for *premium Nafta* judgment; available online <https://www.tradewindsnews.com/incoming/article265140.ece5/binary/Premium%20Nafta%20Products%20v%20Fili%20Shipping%20-%20Lords%20appeal%20-%20Oct%20%202007>

⁶²⁸ Dubai Court of Cassation decision number 73 for the year 2010 – Civil, issued on 9 May 2010

harmonize their provisions and have a unity of agreements, thereby allowing disputes to be heard in a single proceeding.

The foregoing doctrine could support the inference that an implied consent to have the pending disputes arising from the same overall economic transaction resolved in the same arbitration⁶²⁹.

§ 2 Second: parties' Contemplation

If the arbitration agreements being considered for consolidation are compatible, the party seeking consolidation (frequently the claimant) has a basis to argue that the parties intentionally brought all the arbitration agreements into consistent drafting in order to allow any dispute related to them to be heard together since the agreements are related to the same economic transaction.

However, if an arbitral tribunal finds that the parties' intentions to consolidate were unclear at the time they entered into the agreement, it will be far more difficult for an arbitral tribunal to find that contracting parties contemplated fragmenting the dispute by appointing different arbitrators (in one case I have seen it was ninety-nine arbitrators). This contemplation involves spending several years in litigation, which could in certain cases lead to the impossibility of pursuing tens of different arbitrations separately to resolve the same dispute.

Therefore, sensible business people could not have contemplated the fragmentation of the dispute as this result would be wholly un-commercial and one that sensible business people could not have intended.

§ 3 Third: parties' reasonable expectations

Commentators have recognized that notions of contracting parties' "intent" as to consolidation are somewhat artificial. While drafting and entering into an arbitration agreement, parties do not ordinarily give conscious and precise thought or contemplations to whether their future arbitrations can or should be consolidated. As a result, determining the parties' intentions with regard to consolidation often turns on presumptions regarding their reasonable expectations

Gary Born argues validly that:

*"notions of party 'intent' as to consolidation are somewhat artificial, in making an arbitration agreement, parties do not ordinarily give conscious thought to whether their future arbitrations can or should be consolidated, or whether additional parties can be joined, and if so when. They agree to arbitration in order to obtain a neutral, enforceable and speedy decision, and procedural details on the level of consolidation are usually not considered. As a result, determining parties' intentions with regard to consolidation, joinder and intervention often turn on presumptions regarding their **expectations**"*⁶³⁰.

⁶²⁹ This is the same conclusion of *Noble Energy Inc. and Machalapower Cia. Ltda. v The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/5/12, Decision on Jurisdiction (5 March 2008) ("Noble Energy") [Exhibit 63]

⁶³⁰ Gary B. Born, *International Commercial Arbitration* (2009), at pages 2067 to 2076 [Exhibit 77]

In this paragraph, Gary Born confirms that parties ordinarily choose arbitration because they expect a speedy dispute resolution; such reasonable expectation will obviously be served by consolidation rather than fragmentation of arbitrations.

In this regard, Redfern and Hunter further confirmed arbitration agreements could be applied when consent is deemed or implied, he confirmed that:

“Once there is a valid agreement to arbitrate, the scope of any resulting arbitration may be enlarged, e.g. to cover so-called non-signatories, whose consent to arbitrate is a 'deemed' or 'implied' consent, rather than a real agreement. The issues of non-signatories, consolidation of arbitrations, and third-party involvement (where any 'consent' may be largely fictional)”⁶³¹

This concept can be related to the judgments and case laws in different jurisdictions that supported consolidation as articulated in other parts of this dissertation. By way of example, in case an arbitral tribunal determines that party's reasonable expectations to have a speedy dispute resolution is best served by consolidation rather than fragmentation of disputes, this decision will be in conformity with the following determinations:

1. The English House of Lords where it interpreted the intention of the parties in “*Fiona Trust*” and ‘*Premium Nafta*’, where the court found that there is a presumption of one-stop arbitration where:

“Rational businessmen are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal”⁶³².

This understanding of the intention of the contracting parties should be equally applicable to the multi-contract arbitration situation.

2. The above inference was found by the DCC 547/2015 [Exhibit 15], where the court interpreted the intention of the parties that the separate agreements related to the same project can be interpreted as, in truth, one single agreement, the court found that:

“These agreements are related to units in the same real property... the foregoing procedure is the natural and logical consequence for the proper and fair administration of justice”⁶³³.

⁶³¹ Redfern and Hunter on International Arbitration, Sixth Edition, Oxford University Press, Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, 2015, page 132 [Exhibit 58]

⁶³² Decision by English House of Lords in “*Premium Nafta; Premium Nafta Products Ltd and others v Fili Shipping Co Ltd and others* [2007] UKHL [Exhibit 64]

⁶³³ Decision by the Dubai Court of Cassation number 547/2015 (Real Estate Dispute) dated 27 April 2016 [Exhibit 15]

3. The unity transaction contemplated in multi-contract consolidation question of law was the same conclusion reached in “Cambodia Power” arbitral award on jurisdiction under the ICSID Rules, where the tribunal found that:

“Separate arbitration clauses in separate agreements might be interpreted as, in truth, one single arbitration agreement”⁶³⁴

4. A similar construction of the intention of contracting parties in UBS Securities LLC v HSH Nordbank AG, where the English Court of Appeal held that:

*“Sensible business people would not have intended that a dispute of this kind would have been within the scope of two inconsistent jurisdiction agreements. The agreements were all connected and part of one package and it seems to me plain that the result for which UBS contends would be a wholly un-commercial result and one that sensible business people cannot have intended”*⁶³⁵

Section 3 Views of Scholars Supporting Consolidation

Set out below, the most important views of scholars supporting consolidation, Chapter 3 of this Title shall discuss opposing views to consolidation.

There are two factors that could remotely affect the decision to consolidate multi-contract arbitrations:

First: the arbitral tribunal should broadly take a pro-efficiency approach, which is the *Fiona Trust* presumption of one-stop arbitration and order consolidation unless strong evidence and ground for fragmentation are established, where the business transactions have distinctive features.

Second: the tribunal deciding on consolidation should be mindful of the statutory powers conferred upon it and should not order consolidation (even when it is convinced that it best serves the administration of justice), where the tribunal is having a reasonably high risk of not obtaining a decision enforceable at law. This potential invalidity could be on the ground of exceeding substantive jurisdiction of the arbitration agreement being invoked.

Redfren, Hunter and King in their famous book on International Arbitration argued that arbitrators are likely to consider all disputes between the parties in the same set of proceedings; they confirmed that:

*“In general terms, arbitrators are likely to take a **less restrictive approach than the courts**. This is understandable. An arbitrator is likely to consider that, because there are disputes between the parties, it would be sensible to try, as far as possible, to resolve them all in the same set of proceedings. A national*

⁶³⁴ Decision by arbitral tribunal under ICSID Rules in “Cambodia Power”; Cambodia Power Company v. Kingdom of Cambodia (ICSID Case No. ARB/09/18), Decision on Jurisdiction (March 22, 2011) [Exhibit 62]

⁶³⁵ Decision by the English Court of Appeal in UBS Securities LLC v HSH Nordbank AG [2009] EWCA Civ 585

*court would no doubt be sympathetic to this approach but it would nevertheless have it in mind that, unlike an arbitral award, its judgment might set a precedent for the future*⁶³⁶.

As such; Redfern and Hunter identified in the foregoing paragraph that arbitrators' approach with regards to considering Multi-contract arbitration is likely to be less restrictive than national courts. This supports the inference that, under UAE law, where the Dubai Court of Cassation was favorable to multi-contract arbitration, an arbitral tribunal is not expected to have a more restrictive approach than the national courts.

Professor Bernard Hanotiau, who authored a famous specialized book in multi-contract/multi-party arbitration situations, collected the most known multi-contract arbitration cases and then concluded that most arbitrators would take the circumstances of multi-contract arbitration situation as an argument favoring consolidation. He argued that:

*"As will be seen from an analysis of the below cases, arbitral tribunals that have jurisdiction under an arbitration clause contained in an agreement concluded between two or more parties will generally extend their jurisdiction to disputes arising under or closely connected agreement between the same parties that does not contain an arbitration clause, at least as the second agreement does not contain a clause giving jurisdiction to ordinary courts"*⁶³⁷

Professor Bernard listed in his book several cases that reach to this end⁶³⁸.

Chapter 2 International Practice Supporting Consolidating Multi-Contract Arbitration

The international arbitration practice in other jurisdictions than the UAE supports consolidation. The study and analysis below shall be limited to jurisdictions where the procedural laws or the arbitration rules binding such arbitrations do not provide for consolidation of related arbitrations. These positions are very relevant to multi-contract arbitration situations for arbitral tribunals seated in the UAE or any other country where the procedural laws do not provide for consolidation.

Section 1 Position of ICSID Arbitrations

In "Noble Energy" arbitration under the ICSID Rules [Exhibit 63], the Decision on Jurisdiction by the tribunal dated 5 March 2008, the tribunal found that it had jurisdiction over disputes arising out of multiple agreements where there was:

⁶³⁶ Redfern and Hunter on International Arbitration, Sixth Edition, Oxford University Press, Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, 2015, pages 94, [Exhibit 59]

⁶³⁷ Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions Professor Bernard Hanotiau, Kluwer Law International B.V., 1 Jan 2005, 2005 Edition, P. 140 and 141 [Exhibit 75]

⁶³⁸ *Ibid*

*“An implied consent to have the pending disputes arising from the same overall economic transaction resolved in one and the same arbitration”*⁶³⁹.

The tribunal relied upon the facts that:

(1) The disputes were closely related and arose out of the same investment project, and the same overall economic transaction, and

(2) The two agreements were closely linked.

In “*Cambodia Power*” arbitration, the tribunal found that:

*“In particular, parties may agree that disputes arising out of multiple contracts are all to be brought within the scope of one particular arbitration agreement in one of the contracts. Alternatively, separate arbitration clauses in separate agreements might be interpreted as, in truth, one single arbitration agreement”*⁶⁴⁰.

In this case, the three arbitration agreements were concluded separately, at different times, between different (albeit connected) parties, each as a self-contained agreement and the three clauses were not identical and did not refer to each other.

Despite that, the tribunal concluded that each of the arbitration clauses in the distinct agreements, in truth, constitute (as a matter of fact and law) a single arbitration agreement between the parties and an implied consent to the consolidation can be inferred because all the arbitration clauses are similar, compatible or otherwise interconnected. Further, the tribunal found that the arbitration agreements were included in contracts, which are themselves interrelated and arising out of a single project, this construction is very close to the inference of DCC 547/2015 [Exhibit 15].

In “*Klöckner*” case⁶⁴¹, the tribunal decided that it had jurisdiction to hear disputes arising under two agreements in a single proceeding. Although there was no cross-referred dispute settlement clause, each of the separate agreements had a dispute resolution clause that refers to ICSID arbitration.

Section 2 Position of the English Courts

Whilst the English Arbitration Act of 1996 does not provide for consolidating arbitrations pursuant to Section 35 thereto, it was the consistent practice of the English courts to search for the agreement “at the commercial center of transaction” to determine which jurisdiction clause should cover the entire dispute even if such clauses are incompatible.

⁶³⁹ In Noble Energy arbitration under the ICSID Rules, Noble Energy Inc. and Machalapower Cia. Ltda. v The Republic of Ecuador and Consejo Nacional de Electricidad, ICSID Case No. ARB/5/12; [Exhibit 63]

⁶⁴⁰ *Cambodia Power Company v. Kingdom of Cambodia* (ICSID Case No. ARB/09/18), *Decision on Jurisdiction* (March 22, 2011) [Exhibit 62]

⁶⁴¹ *Klöckner Industrie-Anlagen GmbH, Klöckner Belge SA and Klöckner Handelsmaatschappij BV v United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, *Award* (21 Oct. 1983)

Section 35 of the English Arbitration Act 1996 provides that:

“The parties are free to agree (a) That the arbitral proceedings shall be consolidated with other arbitral proceedings, or (b) That concurrent hearings shall be held”

This is not certainly not completely applicable to arbitration, but it is important to refer to the practice of the national courts before analyzing the practice of arbitral tribunals.

In an attempt to deter obstructive behaviors, institutional rules such as in the LCIA forces a party to take part in the consolidation process where it did not agree for consolidation⁶⁴². LCIA arbitration rules provide that, where the arbitration agreements are compatible and the question of law is the same, the conceivable reason for the party objecting consolidation is to deter the good administration of justice, therefore, the institutional rules intend to deter this behavior.

Therefore, The English law found a presumption that the parties, as rational businessmen, intended their disputes to be heard in a single arbitration forum. The following four cases by English courts support this broad principle.

1. In “UBS AG”, the English Court of Appeal held that sensible business people would not have intended that a dispute of this kind would have been within the scope of two inconsistent jurisdiction agreements. The dispute in this case involved a series of separate but interrelated agreements, which contained conflicting jurisdiction clauses. In that case, the Court of Appeal looked to the agreement which was “*at the commercial center of the transaction*”⁶⁴³ to determine which jurisdiction clause should cover the dispute.

The court concluded that there is a “*presumption in favour of one-stop adjudication.*” This presumption that the parties’ intent to resolve their disputes in one forum will only be displaced by clear wording to the contrary.

The Court of Appeal further established an important principle, as follows:

“Sensible business people would not have intended that a dispute of this kind would have been within the scope of two inconsistent jurisdiction agreements. The agreements were all connected and part of one package and it seems to me plain that the result for which UBS contends would be a wholly un-commercial result and one that sensible business people cannot have intended”

2. In ‘Premium Nafta’ [Exhibit 64], the English House of Lords held that there was a presumption that an arbitration clause in the main contract also governed claims regarding the validity or enforceability of an underlying contract “unless the language makes it clear that certain questions were intended to be excluded

⁶⁴² See Article 22 of the LCIA Rules of 2014

⁶⁴³ Decision by the English Court of Appeal in UBS Securities LLC v HSH Nordbank AG; UBS AG v HAS Nordbank AG, [2009] EWCA Civ 585 [Exhibit 69]

from the arbitrator's jurisdiction."⁶⁴⁴

3. In the famous '*Fiona Trust*', the English House of Lords held that:

*"the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered... to be decided by the same tribunal"*⁶⁴⁵.

In this case, the court presumed a "one-stop-shop" for all disputes arising out of an arbitration agreement and dismissed the argument that the question of whether the contracts were procured by bribery was not a dispute arising under the contract.

The court held that the question whether the contract was entered into by bribery was not a decision under the contract, however, sensible business- persons would not have intended to bring *dispute of this kind would have been within the scope of two inconsistent jurisdiction agreements*.

Further, the court in *Fiona Trust* held that, unless the language of an arbitration clause made it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction, it was to be assumed that *"the parties as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered... to be decided by the same tribunal"*⁶⁴⁶, including disputes over the validity of their agreement itself, to be decided by the arbitrator rather than by a court. Such an approach was now part of the law of international commerce and must be accepted as part of English law too

In this case, there were multiple contracts; each contained an arbitration clause referring to disputes "arising under" the contract. One of the parties sought to rescind the contracts and claimed that the contracts were procured by bribery. It argued that the arbitration clause was not applicable to this dispute because the question of whether the contracts were procured by bribery was not a dispute "arising under" the contract; and was therefore no longer in force.

The court dismissed this argument and determined that:

*"the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered... to be decided by the same tribunal"*⁶⁴⁷.

The court held further that:

"Taken overall, the wording indicates that arbitration may be chosen as a one-stop method of adjudication for

⁶⁴⁴ Decision by English House of Lords in '*Premium Nafta*'; *Premium Nafta Products Ltd and others v Fili Shipping Co Ltd and others* [2007] UKHL; [Exhibit 64]

⁶⁴⁵ *Fiona Trust & Holdings v. Privalov & others* [2007] Bus LR 1917 [2008] 1 Lloyd's Rep 254

⁶⁴⁶ *ibid*

⁶⁴⁷ *ibid*

the determination of all disputes"

Based on the *Fiona Trust* case, several cases relied on it while answering the question of multi-contract arbitrations⁶⁴⁸.

4. The *Fiona Trust* approach (*even when applied differently from the facts of that case*) is applicable in the multi-contract arbitration situation since the court's interpretation of the intention of parties when they entered into agreements is applicable in the multi-contract arbitration situation.

5. Subsequently, the *Fiona Trust* presumption of one-stop arbitration was applied by the English courts in multi-contract situation, which is similar to the multi-contract arbitration situation. In *Case C v D1* and others, the case concerned an application to set aside an arbitral award on the grounds that it was related to two agreements containing two different arbitration clauses that were consolidated without the parties' consent, the first agreement is called '*product sharing contract*' and provided for arbitration in Paris which was entered into in 2005. The second was entered into in 2011, the agreement is called '*sale and purchase agreement*' which provided for English-seated arbitration. Despite these differences, the arbitral tribunal accepted the consolidation of both contracts in a single proceeding.

Following the insurance of the award, the award debtor submitted an application to set aside an arbitral award claiming that the tribunal had no substantive jurisdiction and that serious irregularity during the proceedings had caused injustice (Sections 67 and 68 of the Arbitration Act 1996).

The English Commercial Court rejected the application, upholding the tribunal's own finding of jurisdiction, and considered that although *Fiona Trust* involved the scope of a single arbitration clause, the *Fiona Trust* 'one-stop' / 'one jurisdiction' presumption may apply even where there are multiple related agreements between the parties. If there are inconsistent arbitration agreements, it may be necessary to identify where the 'center of gravity' of the dispute lies and which agreement lies at the commercial center of the transaction to bring the remaining agreements under its scope.

In construction, in considering whether the arbitration clause in the first agreement (the sale and purchase agreement) conferred powers on the tribunal to consider disputes arising from the second agreement (product sharing contract), the court held that:

"The *Fiona Trust* presumption may apply in contractual arrangements between two parties which contain two or more choices of jurisdiction in different agreements"⁶⁴⁹.

6. Further, the English Commercial Court has found that an arbitration clause in the first agreement was superseded by a jurisdiction clause in the later settlement agreement. The court emphasized the 'presumption in favor of one-stop adjudication', and that, given the sequence in which the agreements were entered into, the

⁶⁴⁸ Searching for gravity: High Court applies *Fiona Trust* presumption in a multi-contract situation February 18 2016 Contributed by Clifford Chance LLP by Marie Berard and Anna Kirkpatrick, available online:

https://www.cliffordchance.com/briefings/2016/02/searching_for_gravityhighcourtappliesfion.html

⁶⁴⁹ Decision by the English Court of Appeal in *Case C v D1* and others; [2015] EWHC 2126 (Comm) [Exhibit 68]

parties intended that the jurisdiction clause would replace the earlier agreement to arbitrate^{650 651}.

In light of all these cases, in case there is no express language that could contradict the principle of consolidation or concurrent proceedings, where arbitration agreements are consistent, it could be inferred that parties are less likely to have intended to create a situation that makes it increasingly harder for them to prosecute an action. Therefore, an arbitral tribunal could take this situation as a source of its power to have the claims under the related agreements be heard in a single proceeding before the same tribunal. This may or may not be sufficient source of a tribunal's power, depending on the tribunal's interpretation of the facts and circumstances of the case and connection that must be established.

As will be discussed later in the opposing views to consolidation, in a departure from Fiona Trust presumption of "one-stop forum" in case of *AmTrust* case, the court held that, in case of conflicting jurisdiction clauses, the correct approach was not to start with the *Fiona Trust* one-stop adjudication presumption, but instead to apply a careful and commercially-minded construction of the contracts. This has to be read in understood too in connection to this part of the research.

Section 3 Position of French Courts

As set out below, the French jurisprudence generally supports that in case an arbitral tribunal does exceed its jurisdiction or a clear wording to the contrary is agreed by the parties; then an arbitral tribunal may have the power to consolidate multi-contract arbitrations under compatible arbitration clauses.

Consolidation of related arbitrations was introduced in the ICC rules, which were effective from 1 January 2012.

Whilst before that date the ICC arbitration rules did not provide for consolidation, however, under the auspices of the ICC rules, where appropriate, arbitral tribunals upheld jurisdiction on multi-contract arbitrations where a dispute arises between the same parties, where arbitration clauses are compatible, and there is no express agreement against consolidation.

The following cases demonstrate the French Courts' approach in recognizing ICC awards that upheld jurisdiction in multi-contract arbitrations before introducing the consolidation provisions in the ICC rules in 2012:

1. On 29 March 1990, the Commercial Court of Bobigny decided that the arbitral tribunal is competent and has jurisdiction to prosecute actions related to contracts that do not contain a specific choice of jurisdiction but were concluded in the frame of two other agreements that contained an agreement to arbitrate.

The parties first entered into two distinct contracts one for preparing tender documents and the second for the exploitation of a mine, both contracts contained an ICC arbitration clause.

650 *Monde Petroleum SA v Western Zagros Ltd* [2016] EWHC 1472 (Comm) (28 June 2016), see online; <https://www.casemine.com/judgment/uk/5b2897da2c94e06b9e19c501>

651 *Inconsistent dispute resolution clauses – English court emphasizes presumption that parties' intention must be for "one-stop adjudication"*

The parties subsequently entered into agreements that did not contain any choice of jurisdiction.

A dispute arose regarding work performed beyond the scope of the two agreements and related to the contracts that included no choice of jurisdiction.

The court found that the arbitration clauses included in the first two contracts are equally applicable on the agreements that did not contain an express choice of jurisdiction since the later contracts were concluded “*in the frame of the two original agreements*”⁶⁵².

2. On 14 May 1996, the French Court of Cassation upheld the jurisdiction of an arbitral tribunal regarding a dispute containing two agreements between the same parties, one contains an arbitration clause and the other did not have any choice of jurisdiction. The French Court of Cassation held that the breach in the second agreement fell within the scope of the first agreement which contained the arbitration clause⁶⁵³ [Exhibit 72]

The case involved an exclusive distribution agreement that had been concluded by two companies and contained an arbitration clause. A dispute had arisen and the parties had concluded an additional agreement providing for the payment of commissions to the distributor for sales performed outside the scope of the distribution agreement. This second agreement did not contain any choice of jurisdiction. The Court of Appeal upheld its jurisdiction rather than the arbitral tribunal considering the second agreement was not a necessary of the first one since the two agreements concerned different types of transaction. The French Court of Cassation reversed the judgment and decided that the second agreement fell within the scope of the arbitration clause contained in the first agreement as the two disputes are closely connected⁶⁵⁴.

3. A similar set of facts occurred on 5 March 1991, the French Court of Cassation held that “*the force obligatoire of the arbitration clause included in one agreement extended to the other agreement since the two agreements form one transaction.*”⁶⁵⁵

⁶⁵² 1992 Rev. Arb. 66 and note by L. Aynes., see Decision by the French Commercial Court of Bobigny on 29 March 1990 Commercial Chamber 1992 Rev. Arb. 66 and note by L. Aynes, case referred to in No. 321 see Professor Bernard Hanotiau book on Multicontract/ multi-party arbitration situations named Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions, Kluwer Law International B.V., 1 Jan 2005 [Exhibit 74]

⁶⁵³ Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions Professor Bernard Hanotiau, 2005 Edition, P. 140 and 141, Kluwer Law International B.V., 1 Jan 2005, [Exhibit 75]

⁶⁵⁴ Decision by the French Supreme Court on 14 May 1996, First Civil Chamber, 1997 Rev. Arb. 535, see Professor Bernard Hanotiau book on Multicontract/ multi-party arbitration situations named Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions, by Prof. By Bernard Hanotiau 2005 Edition [Exhibit 72]

⁶⁵⁵ Decision of the French Supreme Court Kaeuffer v. Bastuck and others, 2nd Civ. Ch. 30 March 2000, 18 ASA Bull 381 (2000), see Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions, Prof. By Bernard Hanotiau 2005 Edition, P. 134

4. In 2006 in *ETECSA*⁶⁵⁶, a contracting party brought a claim before an arbitral tribunal constituted under the ICC Rules under a loan agreement, which was one of several loan agreements. The first loan agreement did not specify the seat of the arbitration but Paris was agreed by the parties.

The arbitration clause for the second loan agreement was clear and provided for ICC arbitration seated in Madrid, the respondent raised its claim under this term of the agreement. However, the respondent in the first loan agreement decided to bring its counterclaim under the first loan agreement together with its claim in the second agreement.

The claimant objected this position and noted that the counterclaim was incompatible with the arbitration in light of the different seat.

The arbitral tribunal in the first agreement proceeded to review the claim under the second agreement (together with the first arbitration), on the basis that the two loans were connected commercially.

The award debtor successfully set aside the award before the Paris Court of Appeal based on a lack of jurisdiction over the second loan agreement in light of the lack of consent of the claimant.

It can therefore be seen that in case an arbitral tribunal does exceed its jurisdiction; then an arbitral tribunal may generally have the power to consolidate multi-contract arbitrations under compatible arbitration clauses.

Although the issue of contention was mainly about the jurisdiction in relation to the second loan agreement, the Paris Court of Appeal was unable to sever the part related to the original loan agreement and consequently the entire award was set aside.

In conclusion, it can be inferred that French courts generally support the consolidation of compatible arbitration agreements as long as one of the agreement fall within the scope of another agreement⁶⁵⁷ or in case *the force obligatoire of the arbitration clause included in one agreement extended to the other agreement since the two agreements form one transaction*⁶⁵⁸.

However, the French Courts did not refer to the presumption of one-stop forum adopted by the English courts, which implies that:

⁶⁵⁶ Paris Court of Appeal, Ch. Iere, *Societe Empresa de Telecomunicaciones de Cuba SA (ETECSA) v Telefonica Antillana SA and SNC Banco Nacional de Comercio Exterior*, Paris Court of Appeal, Ch. Iere, section C, Decision of 16 November 2006.

⁶⁵⁷ Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions, Prof. By Bernard Hanotiau 2005 Edition, P. 140 and 141 [Exhibit 75]

⁶⁵⁸ Decision of the French Supreme Court Kaeuffer v. Bastuck and others, 2nd Civ. Ch. 30 March 2000, 18 ASA Bull 381 (2000), see Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions, Prof. By Bernard Hanotiau 2005 Edition, P. 134

*“the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered... to be decided by the same tribunal”*⁶⁵⁹

In addition, the French courts did not seem to consider the same view of the English Courts, which emphasized on the commercial viability of fragmentation, which sensible business people could not have intended⁶⁶⁰.

Therefore, it is useful to contrast the French decisions with other jurisdictions, which focused on the commercial result of consolidation versus fragmentation of multi-contract arbitrations.

§ 1 Determining the Commercial Viability of Consolidation (View from the U.S Courts compared with French Courts)

Unlike the French Courts, the US courts concluded a commercial result that national courts should consider that repeat players being large corporations (typically the drafter of the agreement) should not be able to preclude class action arbitrations in their contracts in order not to obstruct proceedings. This is important since it provides a general presumption against the party who drafted the arbitration agreement but objects consolidation clearly for tactical reasons related to sabotaging and exploiting the proceedings.

Before the application of the Revised Uniform Arbitration Act (RUAA) in 1 July 2006, there was no federal statute in the United States authorizing an arbitrator or a court to consolidate related arbitrations or to join a third party in an arbitration proceeding, same as the situation presently under the France law and the UAE law.

Until the former date, The Federal Arbitration Act makes no mention of these procedures. Therefore, analyzing U.S courts’ decisions before 1 July 2006 that have taken the consolidation of arbitrations approach is relevant to this present analysis where consolidation is not provided for nor prohibited under UAE law.

In *Green Tree Financial Corp. vs. Bazzle*⁶⁶¹, Different claimants proceeded with class arbitration based on different contracts between different parties with Green Tree; each of the contracts for each of the claimants contains an arbitration clause. Green Tree sought from the court to revoke and stop the class arbitration based on the U.S Federal Arbitration Act, which it argued that it did not permit class-wide arbitration. In response, the Supreme Court of the United States dismissed this claim, ruling that unless specifically banned in the contract, class-wide arbitration could be permitted by the courts.⁶⁶²

⁶⁵⁹ *Fiona Trust & Holdings v. Privalov & others* [2007] Bus LR 1917 [2008] 1 Lloyd’s Rep 254

⁶⁶⁰ Decision by the English Court of Appeal in *UBS Securities LLC v HSH Nordbank AG*, [2009] EWCA Civ 585, which decided that *“it seems to me plain that the result for which UBS contends would be a wholly un-commercial result and one that sensible business people cannot have intended”*

⁶⁶¹ Decision by the US Supreme Court in *Green Tree Financial Corp. vs. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402 (2003) [2009] EWCA Civ 585 [Exhibit 70]

⁶⁶² *Green Tree Financial Corp. v. Bazzle*; available online Oyez, www.oyez.org/cases/2002/02-634. Accessed 20 Aug. 2019.

The issue in this case was whether a court or an arbitrator should decide whether an arbitration agreement could permit an arbitration of a class action, where the agreement was silent on the issue.

This case is related to “contracts between a commercial lender and its customers, each of which contains a clause providing for arbitration of all contract-related disputes”⁶⁶³.

The Supreme Court ratified the arbitral awards, for three reasons: 1) the ambiguous contract should be construed against Green Tree, the drafter 2) there is no legislative direction that prohibits class-wide arbitration, and 3) repeat players such as Green Tree should not be able to preclude class action arbitrations in their contracts in order not to obstruct proceedings.

The three grounds set out by the court are important since they provide a general presumption against the party who drafted the arbitration agreement but subsequently objected consolidation should be estopped from this presumably abusive behavior.

The Supreme Court of United States held that (i) that the arbitration clauses are silent as to whether arbitration might take the form of class arbitration, and (ii) that, in that circumstance, the law should interpret the contracts as permitting class arbitration.

The court held that:

*“In certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of clear and unmistakable” evidence to the contrary). These limited instances typically involve matters of a kind that “contracting parties would likely have expected a court to decide”*⁶⁶⁴

In *Howsam vs. Dean Witter Reynolds Inc.*, the U.S Supreme Court clarified the distinction between arbitrability and procedural questions, emphasizing the broad scope of the latter. The court rejected the argument that the consolidation of arbitration is not a “question of arbitrability” as neither of the parties was forced into arbitration and none of the parties expected the arbitrators (as opposed to the court) to have jurisdiction.

The court held further that only two types of disputes are proper for the court to consider, where its ruling could be different from the arbitrate tribunal or could be decided by the national courts rather than the arbitral tribunal:

“1) A dispute regarding whether the parties are bound by a given arbitration clause; and

⁶⁶³ Decision by the US Supreme Court in *Green Tree Financial Corp. vs. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402 (2003) [2009] EWCA Civ 585 [Exhibit 70]; <https://www.law.cornell.edu/supct/html/02-634.ZO.html>

⁶⁶⁴ *Ibid*

2) *A dispute about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.*⁶⁶⁵

As stated earlier, this decision differentiated between the “arbitration procedures” and the “question of arbitrability”⁶⁶⁶. The latter has a limited scope and related to the jurisdiction of the arbitral tribunal which should not be exceeded, and related to when the parties are likely to have expected a court to have decided, where they are not likely to have thought that they had agreed that an arbitrator would do so

In *Century Indemnity Co. vs. Wausau* [Exhibit 66], the respondent acknowledged that it must arbitrate the dispute, but objected to the consolidation of arbitration of its two insurance policies.

The court found that the consolidation between the same parties regarding the same legal relationship is not a matter of dispute; however, the dispute may arise in case the objecting party does not participate in an arbitration involving other re-insurers.

In the latter case, the 7th Circuit held that in the absence of any provision in the arbitration agreement that forbids consolidation, it should be allowed to consolidate arbitrations. The court held that:

*“We find based on *Howsam* that the question of whether an arbitration agreement forbids consolidated arbitration is a procedural one, which the arbitrator should resolve”*⁶⁶⁷.

In *Shaw’s Supermarkets, Inc. v. United Food and Commercial Workers Union*, where the case involved class grievances under three separate contracts, the US Court of Appeals held that:

*“The issue before us is who should make the determination as to whether to consolidate the three grievances into a single arbitration: the arbitrator or a federal court. Since each of the grievances is itself concededly arbitrable, we think the answer is clear. Under *Howsam* . . ., this is a procedural matter for the arbitrator”*⁶⁶⁸

⁶⁶⁵ THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION, *DIMITAR KOVACHEV v. PIZZA HUT, INC., FRANCHISE MANAGEMENT, INC., AND FRANCHISE MANAGEMENT INVESTORS US, LLC*; quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); available online https://www.govinfo.gov/content/pkg/USCOURTS-ilnd-1_12-cv-09461/pdf/USCOURTS-ilnd-1_12-cv-09461-0.pdf

⁶⁶⁶ Decision by the US Supreme Court in *Howsam vs. Dean Witter Reynolds Inc.*, 537 U.S. 79, 84 (2002) [Exhibit 61]

⁶⁶⁷ Decision by the US Court of Appeal in *Century Indemnity Co. vs. Wausau*; 7th Circuit says arbitration agreement allows consolidation of proceedings false Ziemer, David Author Information .St. Louis Daily Record / St. Louis Countian; St. Louis, Mo. [St. Louis, Mo]17 Apr 2006 [Exhibit 66]

⁶⁶⁸ Decision by the US Court of Appeals in *Shaw’s Supermarkets, Inc. v. United Food and Commercial Workers Union*; 321 F.3d 251 (1st Cir. 2003) [Exhibit 71]

Further, The US Supreme Court permitted the resolution of "related claims in the same tribunal in order to duplicitous litigation can be avoided"^{669 670}

Similarly, the Swiss Federal Tribunal tends to interpret arbitration clauses broadly: a general reference to 'disputes related to the agreement' may extend to claims arising out of ancillary or connected contracts, provided that those contracts do not contain different of incompatible dispute resolution clauses⁶⁷¹

In a decision issued by the High Court of the Hong Kong Administrative Region, in the case of *Karahas Bodas Company LLC v Pertamina* [Exhibit 67], the case involved a joint venture dispute that arose out of two separate but related contracts with different but affiliated parties. The High Court enforced the arbitral award notwithstanding the respondents' arguments that (1) the two agreements are separate contracts containing separate arbitration clauses; (2) 'the parties to the contracts are different'; and (3) the contracts 'contain no provision for consolidating arbitrations.

§ 2 Arbitration Conventions and Rules

Consolidation of arbitrations is provided for under certain arbitral institutions including ICC [Article 10], JCAA [Rule 53] and LCIA (Article 22),

This is conditional to having arbitrations are between the same parties, the disputes arise in connection with the same legal relationship and the arbitration agreements are compatible at the request of one of the parties and without the need for the approval of the other party to the arbitration agreement, as set out below:

Article 10 of ICC Rules states that:

"The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where: the parties have agreed to consolidation; or all of the claims in the arbitrations are made under the same arbitration agreement; or c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible"⁶⁷² (Emphasis added).

⁶⁶⁹ *DirectTV Latin Am., LLC v. Park 610 LLC*, 691 F. Supp. 2d 405, 406 n. 6 (S.D.N.Y. 2010)

⁶⁷⁰ For an illustration of judicial reluctance to order consolidation unless the agreement of all parties is express, see the US courts, e.g. in *Stolt-Nielsen SA v Animal Feeds Intern Corporation* 2008 WL 4779582 (2nd Cir. 4 November 2008); *Glencore Ltd v Schnitzer Steel Products* 189 F.3d 264, 265-266 (2nd Cir. 1999); *Champ v Siegel Trading Co.* 55 F.3d.269 (7th Cir. 1995).

⁶⁷¹ *Alberta Ltd. v. Money's Mushrooms Ltd.* [2003] B.C.J. No. 2475 Decision No. 4A-103/2011, 20 September 2011, in which an arbitration clause contained in a license agreement was held to be wide enough to cover a dispute arising out of a connected sale-and-purchase agreement; see Redfern and Hunter on International Arbitration, Sixth Edition, Oxford University Press, Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, 2015, pages 94 [Exhibit 59]

⁶⁷² Article 10 of the International Chamber of Commerce 2017 Rules of Arbitration (the ICC Rules of 2017)

Therefore, the Parties' agreement is not a prerequisite for consolidation under the most recent version of ICC Rules, which reflects the modern view of international arbitrations.

Similarly, JCAA Rule 53 provides:

"The arbitral tribunal may, at the written request of a Party and when it finds it necessary, consolidate and hear the pending claim(s) with the other claim(s) (as to which no arbitral tribunal has been constituted), if:

(1) All Parties (including the parties to the other claim(s) have agreed in writing;

(2) The pending claim(s) and the claim(s) to be consolidated arise under the same Arbitration Agreement; provided, however, the written consent to such consolidation by the party to the other claim(s) is necessary when the party has not been a Party to the pending claim(s); or

(3) Both the pending claim(s) and the other claim(s) to be consolidated arise between the same parties, and

(a) The same or a similar question of fact or law arises from the claims;

(b) The dispute is referred by the Arbitration Agreement to arbitration under the Rules or at the JCAA; and

(c) the arbitral proceedings are capable of being conducted in a single proceeding with regard to the place of arbitration, the number of arbitrators, language(s), and other issues governed by the Arbitration Agreements under which the claims arise"⁶⁷³ (Emphasis added).

Further, Article 22 of the LCIA Rules of 2014 provides

"The Arbitral Tribunal shall have the power, upon the application of any party..... (x) to order, with the approval of the LCIA Court, the consolidation of the arbitration with one or more other arbitrations subject to the LCIA Rules commenced under the same arbitration agreement or any compatible arbitration agreement(s) between the same disputing parties, provided that no arbitral tribunal has yet been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such tribunal(s) is (are) composed of the same arbitrators"

There is no provision under the DIAC Rules of 2007 that provides for or forbids the consolidation of related claims. However, DIAC practice has been consistent, when appropriate, to permit consolidation,

The same position exists in ADCCAC Rules:

DIAC states as part of their services in their website that:

"As an institutional arbitration center, its outlook is to provide efficient, flexible and impartial administration of disputes."

Under the Advantages of Arbitration at DIAC, the Centre states *"As a cost-effective and expeditious approach*

⁶⁷³ Japan Commercial Arbitration Association (JCAA) 2014 rules of arbitration

guaranteed by law, arbitration has become a popular dispute resolution alternative for conflicting parties”

Such cost-effectiveness and expeditious proceedings will not typically be achieved by repeating identical claims before separate tribunals administering the same submissions and hearings.

However, unlike the DIAC Rules, such information on the website are not issued by law, therefore, they are not binding to the parties to an arbitration.

In an official inquiry on this issue dated 20 December 2015, the DIAC provided that:

“If the parties and the subject matter of the dispute in all contracts are identical, you can file them all under one arbitration. Nevertheless, there have been cases where the Respondent/s have objected to this and have filed jurisdictional objections. The Executive Committee, where appropriate, has let the arbitration proceed in spite of the Respondent’s objections. But in certain cases, the Executive Committee has decided that each agreement and the corresponding claim needs to be filed as a separate dispute”⁶⁷⁴.

In addition, the next amended version of the DIAC Rules, which is yet to be issued clearly provides for consolidation

Article 4.d of the proposed 2016 DIAC Rules states:

“Any party wishing to commence an arbitration under the DIAC Rules shall send to the Centre a Request which shall include ... where claims arise under more than one arbitration agreement, it shall be indicated to which arbitration agreement each claim pertains”⁶⁷⁵.

This draft version of the DIAC rules cannot be used in proceedings, however, this should be considered as part of the *spirit of the Rules* as set forth in Article 43 of the DIAC Rules.

The tribunal’s decision in DIAC case number 263/2009 (as evidenced by case number 784/2012 in Dubai Courts) where one arbitration proceeding was brought before DIAC for six different arbitration agreements and the respondent in that case objected the consolidation. However, such cases were consolidated despite the respondent’s objection.

However, certain decisions by the DIAC Executive Committee and some tribunals under DIAC determined that consolidation could not be permitted under the DIAC Rules and the UAE Civil Procedures Code. This will be studied in the opposing views in Chapter 3 of this Title. However, all these decisions were issued with reasoning not referring to the recently issued decision by DCC number 547/2015 [Exhibit 15], which was the only released to the public by December 2016 after the issuance of these awards.

⁶⁷⁴ E mail correspondence by DIAC answering an official inquiry [Exhibit 65]

⁶⁷⁵ Proposed DIAC Rules, available online [2016 DIAC RULE - Dubai International Arbitration Centre](#)

Chapter 3 Opposing Views to Consolidation

The views of scholars differ with regard to consolidation, some views are not supporting to consolidation in the absence of consent by the parties.

By way of example, Gary Born argues that consolidation is only available where it has been agreed to by the parties. He confirms that:

*“In almost all cases, the approach taken by national law is that consolidation and joinder / intervention may be ordered by an arbitral tribunal or a national court, but only pursuant to the parties’ (unanimous) agreement thereto. If the parties have not so agreed, both the tribunal and local courts will lack the authority under national law to order either consolidation or joinder / intervention. This approach is consistent with that prescribed by the New York Convention and more general respect for the parties’ procedural autonomy in international arbitration.”*⁶⁷⁶

Redfern and Hunter further state, as a general proposition, that:

*“In principle it is right to allow the parties themselves to decide whether there should be a consolidated arbitration or concurrent hearings in any given dispute.”*⁶⁷⁷

They further argue that:

*“Neither the Model Law nor the UNCITRAL Rules contain any provision for the consolidation of different arbitrations. However, the problem is a real one—and it is a problem to which arbitral institutions such as the ICC and the LCIA have given long and mindful consideration”*⁶⁷⁸.

In addition, they conclude that consolidation must be carefully worked out, they provide that:

“In an appropriate case, provisions such as these should prove useful in bringing everyone concerned before the same arbitral tribunal. However, the procedure to be followed in the conduct of such a consolidated arbitration would have to be carefully worked out, so as to ensure that each party is given a proper opportunity to present its case”

Having careful contemplation to positions of litigant parties in arbitration proceedings, it is frequently the case that the party who took opposing positions to consolidation could be described as a plainly tactical position to deter the proceedings.

⁶⁷⁶ Gary B. Born, *International Commercial Arbitration* (2009), at pages 2067 to 2076 [Exhibit 77]

⁶⁷⁷ Redfern and Hunter on *International Arbitration*, Sixth Edition, Oxford University Press, Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, 2015, page 196 para 2.242

⁶⁷⁸ Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (2009), at pages 157 to 161

However, the main contentions argued by them in order to justify their tactical position are mainly about two issues set out in the following Section:

Section 1 Challenges to Consolidation of Arbitrations

Despite the favoring views to the consolidation of arbitrations and notwithstanding the efficiencies of consolidation which are not a matter of contention between supporting and opposing views to consolidation, consolidation involves certain jurisdictional risks

Redfern and Hunter confirm that:

"There could be some instances where the other party objects to new claims being brought into the arbitration and has strong legal grounds for its objection. In these cases (and indeed in any case in which it seems that it may be exceeding its jurisdiction)"⁶⁷⁹

§ 1 Arbitral Awards Denying Consolidation reviewed

There are some incidents where arbitration centers in the UAE did not accept consolidation of multi-contract arbitrations, this includes the DIAC Executive Committee in DIAC Case 91/2015, this case could reflect that the DIAC Executive Committee does not always accept the consolidation of claims, even for arbitrations between the same parties and have the same choice of jurisdiction.

Despite the decision for consolidation or joinder is the decision of arbitral tribunals not the administrative bodies of arbitration centers, the institutional rules provide the Executive Committee of the DIAC and ADCCAC the power to dismiss consolidation when it is not satisfied *prima facie* that consolidation can be ordered in the absence of the mutual consent of the parties.

In DIAC Case 91/2015, the DIAC Executive Committee *inter alia* found that:

"Taking into consideration that the Request for Arbitration is based on two different agreements, two separate arbitrations should be filed at the DIAC"

There are other instances where very conservative arbitrators tend to take a safe approach and avoid getting into the complications of upholding jurisdiction on multi-contract or multi-party disputes on the pretense that there is no provision permitting consolidation or joinder of arbitration under the UAE and in the absence of express consent of the parties. This includes the tribunal's decision in DIAC Case 281/2015, in which requests for consolidation were rejected.

The tribunal's decision to DIAC case 281/2011 under which the DIAC left the tribunal to decide whether to proceed with a single arbitration that was related to two separate arbitration agreements. In that case, the two

⁶⁷⁹ Redfern and Hunter on International Arbitration, Sixth Edition, Nigel Blackaby, Oxford University Press, Constantine Partasides, Alan Redfern, Martin Hunter, 2015, page 376, para 5.95

disputes were based on closely related factual legal grounds. Despite this, the three-member tribunal concluded that it did not have jurisdiction to consolidate the disputes. In doing so, the tribunal held that:

*“The Tribunal is satisfied that under the law of Dubai consolidation requires the consent of the parties and that no such consent is to be derived from the agreement of the parties to the DIAC Rules. It follows that the Claimant has no right, without the consent of the Respondent, to consolidate disputes arising under two separate arbitration agreements”*⁶⁸⁰

§ 2: The Scope of the Arbitration Agreements

Article 53.1(h) of the Federal Arbitration Law provides as a ground to set aside or oppose enforcement of an arbitral award that:

“The award contains decisions on matters not falling within the terms of the submission to arbitration or beyond its scope”

This is relevant to Article 216.1(a) of the Repealed Arbitration Chapter of the CPC which provides as a ground to set aside or oppose enforcement of an arbitral award that “if it was issued otherwise than with an arbitration instrument or on the basis of an instrument”⁶⁸¹

An arbitral tribunal considering consolidation should be mindful that the scope of its substantive jurisdiction derived from the arbitration agreement would be exceeded when consolidation is ordered. In particular, in multi-contract disputes, each contract will include a clause that any dispute under the agreement will be subject to arbitration. Therefore, an arbitral tribunal could arguably not be entitled to join those claims to one set of proceedings since the claims under different agreements are outside the scope of each of the agreements.

This could also be challenged by the arbitral tribunal or the party seeking consolidation since it could be relatively easy to establish that fragmentation of disputes into distinct proceedings was not contemplated by the parties when they entered into the underlying agreements. Therefore, consolidation was part of the parties’ reasonable commercial expectations, which the English courts defined as ‘the presumption of one-stop forum’, which always contemplates, the parties (as any reasonable person would do) could not have contemplated the fragmentation of disputes.

Indeed, under UAE law, arbitration is an exceptional forum for dispute resolution and fundamentally based on exiting the natural judiciary and, therefore, arbitration should be limited to the issues that the parties intended to submit to arbitration⁶⁸²

⁶⁸⁰ Arbitral Award, DIAC case No. 281/2011

⁶⁸¹ Which is compatible with Article (53) 1(a) of the Federal Arbitration Law

⁶⁸² DCC decision 148 for 2008 commercial dated 16 September 2008; DCC decision number 40 for 2004 issued on 26 September 2004, Civil; Dubai Court of Cassation Decision number 403 for the year 2003 issued on 13 March 2004, and USC decision 449 for 2001 for judicial year 21 issued on 11 April 2001

As such, as stipulated by the Dubai Court of Cassation in frequent decisions, arbitration is a consensual process and limited to what has been agreed by the parties to be referred to arbitration. However, this should not restrict to what has been referred to arbitration by the express consent of the parties to be consolidated in a single set of proceedings. This consolidation is in substance between cases, which have been consensually referred to arbitration.

Therefore, none of the parties may claim that it was forced to arbitration or the arbitrator exceeded its mandate or exceeded its jurisdiction.

The US courts answered this argument by deciding, *“Each of the grievances is itself concededly arbitrable”*⁶⁸³.

Indeed, mutual consent required to establish the competence and jurisdiction of the arbitral tribunal, however, once the tribunal’s jurisdiction is established, it cannot be contested by other challenges such as consolidation of contracts that are already outside the judiciary’s jurisdiction and within the arbitrators’ competence.

§ 3 Parties’ Autonomy to Choose Arbitrators

The second ground for the views opposing consolidation is that the very foundation of international arbitration is the parties’ agreement to arbitrate and their procedural autonomy.

Scholars of this view do not contest the efficiencies of consolidation but rather contest that consolidation in international arbitration has generally been possible only where the parties have unanimously agreed to it whether in their original arbitration agreements, or any subsequent agreements.

Where parties have not unanimously consented to consolidation and in the absence of a legal direction permitting consolidation, national laws generally do not permit consolidation either through orders of arbitral tribunals or national courts.

In particular, each of the arbitration agreements being considered for consolidation by the arbitral tribunal typically provides for the composition of the arbitral tribunal that has to be chosen in the manner agreed upon between the parties. If the consolidation of arbitrations is ordered by the arbitral tribunal, this could (in this view) deny the party objecting’s entitlement it could otherwise have exercised its right to participate directly in selecting the tribunal for each separate arbitration proceedings related for each of the multi-contracts. In that sense, consolidation would be a significant change in the agreed arbitral procedure.

The opposing views to consolidation propose that an arbitral tribunal does not have the jurisdiction or power to order consolidation of claims as it would result in an unenforceable arbitral award the New York Convention.

In specific, Article V (1) (d) of the New York Convention provides for the non-recognition of awards where the composition of the arbitral tribunal was contrary to the agreement of the parties. It states that:

⁶⁸³ Decision by the US Court of Appeals in *Shaw’s Supermarkets, Inc. v. United Food and Commercial Workers Union*; 321 F.3d 251 (1st Cir. 2003) [Exhibit 71]

“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement are sought, proof that:

...

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; ...”⁶⁸⁴

However, on balance between the two views, it is true that Arbitration is a consensual process, however, there are two types of consent in arbitration:

First, the consent to submit a dispute to arbitration: this is the express consent to enter into arbitration agreements, which is mandatory under almost all jurisdictions. In multi-contract consolidation, the objecting party to consolidation, does not typically dispute that each of the agreements, being considered for consolidation, was concededly submitted to arbitration. Therefore, this type of consent should ideally not be an obstacle to consolidation.

Second, Procedural consent: The second type of consent is consent for arbitral procedures, including requiring the production of documents, requiring the presence of witnesses/subpoenas, administering oaths, examining the subject matter of the dispute, appointing experts, Interim measures...etc. all such procedures do not require the consent of the parties once they validly submit to arbitration.

On balance, this dissertation takes the view that consolidation is a procedural matter that does not require the express consent of the parties; it is a procedure that parties must comply with once they decide concededly to enter into an arbitration agreement.

By way of example; the US Supreme Court in *Green Tree* addressed this exact question and determined that:

“We are faced at the outset with a problem concerning the contracts’ silence. Are the contracts in fact silent, or do they forbid class arbitration as petitioner Green Tree Financial Corp. contends? But we cannot do so, not simply because it is a matter of state law, but also because it is a matter for the arbitrator to decide”⁶⁸⁵.

A similar construction was found by the US Supreme Court in *Howsam*⁶⁸⁶.

⁶⁸⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the New York Convention), 330 U.N.T.S. 38 (1959)

⁶⁸⁵ Decision by the US Supreme Court in *Green Tree Financial Corp. vs. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402 (2003) [2009] EWCA Civ 585 [Exhibit 70]

⁶⁸⁶ Decision by the US Court of Appeals in *Shaw’s Supermarkets, Inc. v. United Food and Commercial Workers Union*; 321 F.3d 251 (1st Cir. 2003) [Exhibit 71]

The DCC confirmed the same position when it determined that:

“There is no legal principle that opposes appointing a single arbitrator to try a dispute regarding twelve separate sale agreements that were the subject of the arbitral award, the foregoing procedure is the natural and logical consequence for the proper and fair administration of justice”⁶⁸⁷

Therefore, the DCC in case number 547/2015 [Exhibit 15] did not intervene in the arbitrators’ decision to consolidate arbitrations as long as the tribunal found valid connection between the cases, moreover, the Dubai Supreme Court endorsed this procedure and described it as *“the natural and logical consequence for the proper and fair administration of justice”⁶⁸⁸*.

Indeed, assuming for the sake of argument that every decision by an arbitral tribunal could be contested on the basis that it was not agreed, in this case parties may find reasons to object many other procedures before the arbitral tribunal including, for instance, the production of documents, number and dates of submissions, procedural orders, interim measures and probably the final award itself.

Therefore, consent is required for entering into arbitration agreements rather than the procedures for arbitration.

Further, the willingness of contracting parties to consolidate arbitration may be implicit and arise only from the existence of compatible arbitration clauses. It follows that an arbitral tribunal may order consolidation of arbitral proceedings, in certain cases, in the absence of express provisions regarding consolidation in the contracts. Only the incompatibility of the clauses will hinder this consolidation, based on the implied will of the parties to fragment their disputes.

Further, in case the objecting party to consolidation was the drafter and/or was the stronger party or repeat player of the agreements that are being considered for consolidation, an arbitral tribunal could in this case find that such party, should not use its unequivocal contracting power to oppose the fair administration of justice that is served by consolidation.

In this regard, in *Green Tree*, the Supreme Court of the US it found that *“repeat players should not be able to preclude class action arbitrations in their contracts in order not to obstruct proceedings”⁶⁸⁹*.

Another perspective for the views objecting consolidation is based on the ‘entire agreement’ clause in each of the agreements being considered for consolidation may contradict with the intention of the contracting parties to hear disputes in a single proceeding. However, tribunals I have seen are less likely to accept this argument

⁶⁸⁷ Decision by the Dubai Court of Cassation number 547/2015 (Real Estate Dispute) dated 27 April 2016 [Exhibit 15]

⁶⁸⁸ Same meaning in *Shaw’s Supermarkets* [Exhibit 71], the US Court of Appeals held that *“Since each of the grievances is itself concededly arbitrable, we think the answer is clear. Under Howsam . . . , this is a procedural matter for the arbitrator”*

⁶⁸⁹ Decision by the US Supreme Court in *Green Tree Financial Corp. vs. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402 (2003) [2009] EWCA Civ 585 [Exhibit 70]

since the purpose of the ‘entire agreement’ clause is to prevent parties to an agreement from subsequently relying on statements or representations made during pre-contractual negotiations.

It is highly unlikely that contracting parties’ intent by the ‘entire agreement’ clause was to exclude consolidation of arbitrations. As illustrated above, that parties typically do not contemplate consolidation while entering into agreements, they rather contemplate neutral, efficient and speedy dispute decisions by inserting arbitration as a dispute resolution mechanism.

§ 4 Confidentiality of Arbitration in Relation to Consolidation

The views opposing consolidation pose confidentiality as one of the grounds to challenge an arbitral tribunal’s jurisdiction to consolidate multi-contract arbitrations.

Indeed, most arbitration rules consider arbitration a confidential forum, which should be kept strictly between the parties.

However, whether this process also involves the arbitral tribunal itself, in case the tribunal seized of a particular contract became aware of the decisions of another arbitral tribunal, it might be impacted by its decision and might trigger a breach of confidentiality concerns.

On balance, it is fair to propose that consolidating arbitrations between the same parties should not ideally bring significant implications on confidentiality. In England, the Privy Council⁶⁹⁰ had to consider whether an arbitral award in one arbitration could be relied upon by the winning party in another arbitration under the same agreement, despite an express confidentiality agreement in respect of the first arbitration. In this case, the disclosure of the award was allowed.

The Privy Council found that *“the legitimate use of an earlier award in a later, also private, arbitration between the same parties was not the kind of mischief against which the confidentiality agreement was directed”*⁶⁹¹.

This decision has been rightly described by commentators as:

*“Eminently sensible in the circumstances of the case. The private and, in theory, confidential nature of arbitration should not mean that the parties can go on arbitrating the same point ad infinitum until they get the result they prefer”*⁶⁹²

⁶⁹⁰ In England, the Privy Council is the body of advisers to the Kingdom of England. Its members are often senior members of the House of Lords and the House of Commons, together with leading churchmen, judges, diplomats and military leaders

⁶⁹¹ Law and Practice of International Commercial Arbitration, A. Redfern, M. Hunter. Blackaby and C. Partasides (2004) p.31 referring to Rawding and Seeger, op, cit, pp 488 -489.

⁶⁹² *Ibid*

Section 2 Position of English Courts Supporting Fragmentation of Disputes in Case of Conflicting Jurisdiction Clauses

In certain instances, the English courts supported fragmentation of disputes

In one case, two agreements deal with different aspects of the parties' relationship and such contracts contain conflicting jurisdictions where the first contract deals with the placement of insurance by the broker with the insurer, whilst the other agreement gave the broker the exclusivity in a certain market, then they can be dealt with separately⁶⁹³.

Three cases issued by English Courts will be discussed in this regard, *AmTrust*, *PT Thiess*, *Abu Dhabi Gas* cases, set out below the details of each case:

In a departure from *Fiona Trust* one-stop presumption, the *AmTrust* case decided that the correct approach was not to start with the “one-stop-shop” presumption, instead, to apply a careful and commercially-minded construction of the contracts⁶⁹⁴.

In this case, there were two agreements containing conflicting jurisdictional clauses one gave jurisdiction to English courts and the second to arbitration in Italy. Despite the inconsistent clause in the subsequent agreement between the same parties that gave jurisdiction to arbitration in Italy, the English Court of Appeal held that there was a good arguable case that the jurisdiction clause in an earlier contract gave the English court’s jurisdiction and was not part of the arbitration clause.

In defining the commercially minded construction of contracts, the court differentiated cases where there is a series of agreements centered around a single economic transaction from the situation where there is a single contact creating a relationship which is followed by a later contract embodying a subsequent distinctive agreement where the contracts are not part of the same economic transaction. In the latter cases, it could be concluded that the parties purposely chose to have different jurisdictions to deal with different aspects of their relationship.

In *PT Thiess* case⁶⁹⁵, conflicting jurisdiction clauses were entered into by the parties, one refers to arbitration and the second to English Courts, the English Commercial Court refused a stay of court proceedings in favor of arbitration. The court held that, where different but related agreements contained overlapping and inconsistent dispute resolution clauses, the court would be required to identify the contract under which the substance of the dispute arose, in order to determine which dispute resolution clause would apply⁶⁹⁶.

⁶⁹³ English High Court Decision *Trust Risk Group SPA v AmTrust Europe Ltd.* [2015] EWHC 1927 (Comm)

⁶⁹⁴ *Trust Risk Group SPA v AmTrust Europe Ltd* [2015] EWCA Civ 437

⁶⁹⁵ *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal and Anor* [(2011] EWHC 1842 (Comm)

⁶⁹⁶ *Inconsistent dispute resolution clauses in related contracts* by Ruth Cowley of Norton Rose Fulbright

In *Abu Dhabi Gas* case, the claimant in one arbitration was the respondent in another arbitration between the same parties, one of the parties brought an action seeking the court to order consolidation. Whilst the court favored ordering consolidation, it decided that it was powerless to do so between two sets of arbitral proceedings or to appoint an arbitrator to be ordered by the court to consolidate.

At first, the court plainly wished to have the power to order consolidating the two proceedings, it stated that:

*“As we have often pointed out, there is a danger in having two separate arbitrations in a case like this. You might get inconsistent findings if there were two separate arbitrators. This has been said in many cases ... it is most undesirable that there should be inconsistent findings by two separate arbitrators on virtually the selfsame question, such as causation. It is very desirable that everything should be done to avoid such a circumstance”*⁶⁹⁷

However, the court procedurally recognized that it lacked the power to order consolidation in the absence of consent of the parties, it held that:

“There is no power in this court or any other court to do more upon an application such as this than to appoint an arbitrator or arbitrators, as the case may be; we have no powers to attach conditions to that appointment, and certainly no power to inform or direct an arbitrator as to how he should thereafter conduct the arbitration or arbitrations”

In summary, in *Fiona Trust*, the English courts concluded that there is a *“presumption in favor of one-stop adjudication”*⁶⁹⁸, **this presumption that parties intend their disputes to be resolved in one forum will only be displaced by clear wording to the contrary**. This presumption could apply where conflicting jurisdictional clauses exist in different contracts^{699 700}. The *AmTrust* approach provides that the one-stop presumption of *Fiona Trust* is not always applicable, rather, a commercially minded construction of the relationship and the connection between the multi-contracts and whether they are part of one package or the same economic transaction.

Section 3 Position of U.S Courts Supporting Fragmentation of Disputes

Under the US courts, the opposing decisions to consolidation include the US Supreme Court’s judgment in (*Stolt Nielsen*)⁷⁰¹, the court considered whether an arbitral tribunal might order parties to class arbitration where an arbitration clause is silent on that issue. The court held that the US Federal Arbitration Act does not permit imposing class arbitration unless there is a *“contractual basis for concluding that the parties agreed to do so*.

⁶⁹⁷ English Court of Appeal in *Abu Dhabi Gas Liquefaction Co. Ltd v Eastern Bechtel Corporation* [1982] 2 *Lloyd's Rep* 425

⁶⁹⁸ *Fiona Trust & Holdings v. Privalov & others* [2007] *Bus LR* 1917 [2008] 1 *Lloyd's Rep* 254

⁶⁹⁹ *Continental Bank N.A. v. Aeakos Compania Naviera S.A.* [1994] 1 *WLR* 588 at pp. 592F to 593G.

⁷⁰⁰ *Deutsche Bank AG v. Sebastian Holdings Inc. (No 2)* [2011] 2 *All ER (Comm)* 245 per Thomas LJ at paragraph 41

⁷⁰¹ *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp*, 30 S.Ct. 1758 (2010).

*Since the decision was issued, there has been extensive commentary on the impact this decision will have on consolidated arbitrations*⁷⁰².

The Court concluded that *Green Tree* which decided that consolidation “is a matter for the arbitrator to decide”⁷⁰³, addressed the narrow question of who should interpret the relevant contractual agreement to determine whether or not the parties were silent as to class arbitration. By contrast, the parties in *Stolt-Nielsen* stipulated that the arbitration clause was silent. Based on this narrow application of *Green Tree*, the Court concluded that *Green Tree* did not establish the rule to be applied in deciding whether class arbitration is permitted

The Court concluded that imposing class arbitration on the parties, in the absence of an affirmative agreement between those parties, would be inconsistent with the US Federal Arbitration Act. The Court emphasized the consensual nature of arbitration, underlining that the US Federal Arbitration Act's central purpose is to ensure that private agreements to arbitrate are enforced according to their terms.

The impact of the Court's decision in *Stolt-Nielsen* on consolidated arbitration proceedings⁷⁰⁴ remains unclear. What is known is that parties may consent to agreements that permit (or require) the consolidation of separate arbitration proceedings. However, whether courts, or perhaps more importantly, arbitral panels, retain the authority to order consolidation in the absence of explicit consent of the parties was not directly addressed in *Stolt-Nielsen*. The decision may be interpreted as being limited solely to class arbitrations. Supporting this view, some commentators have argued that the factors suggested by the court apply differently in consolidated arbitrations than in class action arbitrations.

On balance between the two views, whilst the US Federal Arbitration Act fails to provide any legislative direction regarding the consolidation of arbitrations, the UAE courts generally will interpret the law so that consolidation will be granted, unless there is an explicit agreement to the contrary⁷⁰⁵.

Section 4 Consolidation Where Conflicting Jurisdiction Clauses Exist

The question as to whether consolidation can be ordered without the express consent of all parties becomes more complicated where the jurisdictional clauses are inconsistent or conflicting. As discussed earlier, *Fiona Trust* case law held that the question whether the contract was entered into by bribery was not a decision under

702 CONSOLIDATION OF ARBITRATIONS AFTER STOLT-NIELSEN false Dotseth, Keith A; Loynes, Hilary J. Defense Counsel Journal; Chicago, available online <https://www.iadclaw.org/UserFiles/file/July%202011.pdf>

703 Decision by the US Supreme Court in *Green Tree Financial Corp. vs. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402 (2003) [2009] EWCA Civ 585 [Exhibit 70]

704 CONSOLIDATION OF ARBITRATIONS AFTER STOLT-NIELSEN false Dotseth, Keith A; Loynes, Hilary J. Defense Counsel Journal; Chicago, available online <https://www.iadclaw.org/UserFiles/file/July%202011.pdf>

705 To Consolidate or Not to Consolidate A Study of Federal Court Decisions by MacKellar, 44 Arb. J. 15 (1989)

the contract, however, sensible business- persons would not have intended to bring *dispute of this kind would have been within the scope of two inconsistent jurisdiction agreements*.

However, other cases take a different approach than Fiona Trust, some of these decisions were already discussed in the context of multi-contract consolidation in general, but will be demonstrated here in the specific context of consolidating conflicting dispute resolution clauses where at least one these clauses refer to arbitration.

In general, the French courts are favoring this approach in case the other agreement contains no choice of jurisdiction; however, English Courts' views are not settled in this area. I will then demonstrate my view of the UAE law's stance in this regard. The following case laws explain these questions:

1. In "UBS AG", the English Court of Appeal held that sensible business people would not have intended that a dispute that involves a series of separate but interrelated agreements, which contains conflicting jurisdiction clauses to be fragmented. In that case, the Court of Appeal looked to the agreement which was "*at the commercial center of the transaction*"⁷⁰⁶ to determine which jurisdiction clause should cover the dispute.
2. In a similar determination searching for the central gravity of the transaction, in *PT Thiess*⁷⁰⁷, the agreements embodied conflicting jurisdiction clauses, one refers to arbitration and the second to English Courts. The English Commercial Court upheld its jurisdiction, holding that where different but related agreements contained overlapping and inconsistent dispute resolution clauses, the court would be required to identify the contract under which the substance of the dispute arose, rather than the formal nature of the proceedings, in order to determine which dispute resolution clause would apply.
3. In *C v D1 and others*, the case was related to two agreements containing conflicting arbitration clauses that were consolidated without the parties' consent, the first agreement provided for arbitration in Paris which was entered into in 2005, while the second agreement provided for English-seated arbitration and was entered into in 2011. The arbitral tribunal accepted the consolidation of both contracts in a single proceeding.

The English Commercial Court rejected an application by the award debtor to set aside the award on the ground of serious irregularity, the court held that:

*"The Fiona Trust presumption may apply in contractual arrangements between two parties which contain two or more choices of the jurisdiction in different agreements"*⁷⁰⁸.

4. In *AmTrust* case, there were two agreements containing conflicting jurisdictional clauses. The first agreement provided jurisdictions to the English courts while the second agreement to arbitration in Italy. The Court upheld the English court's jurisdiction and was not part of the arbitration clause. The court found that the one-stop presumption of *Fiona Trust* is not always applicable, rather, a commercially minded construction of the relationship and the connection between the multi-contracts and whether they are part of one package or

⁷⁰⁶ UBS AG v HAS Nordbank AG, [2009] EWCA Civ 585 [Exhibit 69]

⁷⁰⁷ PT Thiess Contractors Indonesia v PT Kaltim Prima Coal and Anor [(2011] EWHC 1842 (Comm)

⁷⁰⁸ Decision by the English Court of Appeal in Case C v D1 and others; [2015] EWHC 2126 (Comm) [Exhibit 68]

the same economic transaction.

5. On 14 May 1996, the French Court of Cassation upheld its jurisdiction for a dispute arose where there were two agreements between the same parties, one contains an arbitration clause and the other did not have any choice of jurisdiction⁷⁰⁹. The French Court of Cassation held that the breach in the second agreement fell within the scope of the first agreement⁷¹⁰

6. The Dubai Court of Cassation was confronted with a situation where multiple plaintiffs brought a claim against one respondent, one of those plaintiffs agreed for arbitration but its claim was closely connected from the commercial perspective with the other claims being adjudicated by the court. The court decided that the Dubai Courts have jurisdiction on the entire dispute, include the agreement embodying the arbitration clause since national courts have the default jurisdiction and it is for the fair administration of justice to review disputes altogether. The court decided that:

“Arbitration is an exception forum to the default rule providing jurisdiction to national courts for all civil and commercial disputes. Thus, arbitration agreements shall be binding only upon its parties. In the event a case is filed against multiple litigants or by multiple plaintiffs, where only one of them has agreed to arbitration in the contract, and the claim is associated with this contract, the dispute shall not be, for proper administration of justice, fragmented because it is associated with one transaction in which several parties were involved. Accordingly, the lawsuit shall be heard by one body that is the national courts rather than arbitral tribunals, since the courts have the default jurisdiction while arbitration is an exception dispute resolution mechanism”⁷¹¹.

Conclusions on Consolidation of Arbitrations

The consolidation dilemma can be framed as a struggle between party autonomy and efficiency. On the one hand, ordering consolidation without the consent of all parties can be contrary to party autonomy. As a result, consolidation without consent is not without risk. Under Article V (1) (d) of the ‘New York Convention’, the recognition and enforcement of an award “*may be refused ... if ... the arbitral procedure was not in accordance with the agreement of the parties....*”

In the meantime, fragmenting a multi-contract transaction before several arbitral tribunals lead to obvious procedural inefficiencies, including the duplication of efforts across multiple proceedings, causing higher attorney fees, arbitrator fees and administration fees, systemic inefficiencies (where competing tribunals are deciding similar or identical claims and factual issues) and conflicting results and causations.

⁷⁰⁹ Decision by the French Supreme Court on 14 May 1996, First Civil Chamber, 1997 Rev. Arb. 535, see Professor Bernard Hanotiau book on Multicontract/ multi-party arbitration situations named Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions, by Prof. By Bernard Hanotiau 2005 Edition [Exhibit 72]

⁷¹⁰ Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions, Prof. By Bernard Hanotiau 2005 Edition, P. 140 and 141 [Exhibit 75]

⁷¹¹ Dubai Court of Cassation Decision number 102 for the year 2010 – Civil, issued on 26 December 2010

With regards to conflicting dispute resolution agreements, the English courts concluded that there is a “*presumption in favor of one-stop adjudication*”⁷¹², this presumption poses that parties’ intent to resolve their disputes in one forum will only be displaced by clear wording to the contrary⁷¹³.

The English courts resolved this question by looking to the agreement which was “*at the commercial center of the transaction*”⁷¹⁴ or identifying the contract under which the substance of the dispute arose⁷¹⁵

The French Court of Cassation found supported consolidation when it found that the breach in the second agreement fell within the scope of the first agreement⁷¹⁶

First: The following summarizes the powers conferred upon an arbitral tribunal by the operation of UAE law

The UAE law does not contain any provision forbidding the joinder or consolidation of the agreements in a single proceeding. This was the conclusion of the Dubai Court of Cassation Decision No. 547/2015 [Exhibit 15] where the court, by virtue of its causation, urged parties and arbitrators to consolidate claims under the same economic transaction. The court determined that:

*“There is no legal principle that opposes appointing a single arbitrator to hear and try a dispute regarding twelve separate sale agreements that were the subject of the arbitral award”*⁷¹⁷.

The Dubai Supreme Court held further that consolidating related arbitrations related to the same project represents:

“The natural and logical consequence for the proper and fair administration of justice.”

The conclusion of the DCC is consistent with the Supreme Court of the US in *Green Tree* where it held that “*there is no legislative direction that prohibits class-wide arbitration*” and further held that “*repeat players*

⁷¹² *Harbour Assurance Co (U.K.) Ltd v. Kansa General International Assurance Co* [1993] QB 701 at p. 726B

⁷¹³ *Fiona Trust & Holdings v. Privalov & others* [2007] Bus LR 1917 [2008] 1 Lloyd’s Rep 254

⁷¹⁴ *UBS AG v HAS Nordbank AG*, [2009] EWCA Civ 585 [Exhibit 69]

⁷¹⁵ *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal and Anor* [(2011] EWHC 1842 (Comm)

⁷¹⁶ Decision by the French Supreme Court on 14 May 1996, First Civil Chamber, 1997 Rev. Arb. 535, see Professor Bernard Hanotiau book on Multicontract/ multi-party arbitration situations named Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions, by Prof. By Bernard Hanotiau 2005 Edition [Exhibit 72]

⁷¹⁷ Decision by the Dubai Court of Cassation number 547/2015 (Real Estate Dispute) dated 27 April 2016 [Exhibit 15]

*should not be able to preclude class action arbitrations in their contracts in order not to obstruct proceedings*⁷¹⁸.

The French courts generally support the consolidation of compatible arbitration agreements as long as one of the agreement fall within the scope of another agreement⁷¹⁹ or in case *the force obligatoire of the arbitration clause included in one agreement extended to the other agreement since the two agreements form one transaction*⁷²⁰.

However, the French Courts did not refer to the presumption of one-stop forum adopted by the English courts, which provide that:

*“the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered... to be decided by the same tribunal”*⁷²¹

In addition, the French courts did not rely on the notion of the commercial viability of fragmentation, which sensible business people could not have intended⁷²².

Second: The Powers conferred to an arbitral tribunal by the parties

An arbitral tribunal considering multi-contract arbitration situation should raise a question as to the parties' intent in multi-contract arbitration and whether fragmentation of disputes was contemplated by the parties when they entered into the relevant agreements.

There are two approaches in the interpretation of the intention of contracting parties when considering the consolidation question

First: The Fiona Trust presumption approach, where the parties to multi-contract arbitration situation, as prudent and rational businessmen, could not have intended in structuring the agreements to resolve their disputes by appointing many arbitrators (in a case I saw it was ninety-nine arbitrators) where it's possible to appoint one or three arbitrators, bearing all the burdens, risks and costs that this would entail, where this can

⁷¹⁸ Decision by the US Supreme Court in *Green Tree Financial Corp. vs. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402 (2003) [2009] EWCA Civ 585 [Exhibit 70]

⁷¹⁹ *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* Professor Bernard Hanotiau, 2005 Edition, P. 140 and 141 [Exhibit 75]

⁷²⁰ Decision of the French Supreme Court *Kaeuffer v. Bastuck and others*, 2nd Civ. Ch. 30 March 2000, 18 ASA Bull 381 (2000), see *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions*, Prof. By Bernard Hanotiau 2005 Edition, P. 134

⁷²¹ *Fiona Trust & Holdings v. Privalov & others* [2007] Bus LR 1917 [2008] 1 Lloyd's Rep 254

⁷²² Decision by the English Court of Appeal in *UBS Securities LLC v HSH Nordbank AG*, [2009] EWCA Civ 585, which decided that *“it seems to me plain that the result for which UBS contends would be a wholly un-commercial result and one that sensible business people cannot have intended”*

practically be avoided. On the contrary, the parties to multi-contract arbitration situation are likely to have taken special steps to avoid this situation by purposely drafting compatible choice of jurisdiction which should mean that the parties are likely to have intended to have such claims heard together.

Approach 2: the *AmTrust* approach where a tribunal should not start with the *Fiona Trust* presumption, but instead to apply a careful and commercially-minded construction of the contracts, which implies careful contemplation of the intention of the parties.

This dissertation is of the opinion, *Fiona Trust* presumption should be the starting position for arbitral tribunals deciding the scope of its jurisdiction in multi-contract arbitrations, however; the *AmTrust* approach should not be ignored in case there are strong proof demonstrating that the business transactions concluded in each contract being considered for consolidation are factually having distinctive features.

For example, in case the parties had a single tender and a single set of pre-contract negotiations and concluded separate agreement (even if contracts were concluded at different times), this may support the inference that the business transaction concluded in several contracts is under the same economic transaction. Conversely, in case a tender and negotiations were concluded into a contract and then separate tenders and negotiations concluded a different contract then this may support the frequentation of disputes.

Similarly, even in case there are different phases of tenders and pre-contract negotiations, in case all such negotiations are related to the same project or business transaction then *Fiona Trust* presumption should ideally be taken.

In all events, the decision is not straightforward. However, in case of confusion; it may be advisable that an arbitral tribunal would consider the two factors affect its decision:

First: an arbitrator should be inclined generally take a pro-efficiency approach, which is certainly best served the *Fiona Trust* presumption of one-stop arbitration and order consolidation unless strong evidence and reasons for fragmentation are established where the business transactions have distinctive features.

Second: the tribunal deciding on consolidation should have a mindful and careful decision on the power conferred upon it.

It is true that arbitration is a consensual process, however, an arbitral tribunal should ideally hold that the parties' consent to arbitrate is generally met in the multi-contract arbitration situation. As the US Supreme Court held in *Green Tree*, each of the arbitration agreements were concededly arbitrable, none of the parties expected the court to hear multi-contract arbitration disputes where all the agreements refer to arbitration under the same forum. Further, none of the parties to multi-contract arbitration disputes was forced to arbitration as opposed to any other forum.

The willingness of the parties to consolidate the arbitration may be implicit, and arise only from the existence of compatible arbitration clauses. It follows that the consolidation of arbitral proceedings may in certain cases be preferred in the absence of even an express consolidation clause or even an arbitration clause stipulated in some of the contracts in dispute. Only the incompatibility of the clauses will hinder this consolidation, based on the implicit will of the parties.

The formulation of the arbitration clauses being considered for consolidation may allow a broad scope

(specifically the wording “out of or relating to” rather than “under the agreement.”

The intention of contracting parties to have a unity of the agreements that are related to the same transaction is further reflected by having the agreements as providing a single dispute resolution mechanism.

In this connection, a number of decisions by the Supreme Courts in France and England supported the consolidation of proceedings even in circumstances where the parties entered into conflicting dispute resolution clauses. This matter shall be discussed later in this chapter.

Third: Powers conferred on an arbitral tribunal in arbitration conventions

Whilst the ICC Rules latest version of 2012 addresses consolidation, many international arbitration conventions (including the major institutions in the UAE) do not deal expressly with the subjects of consolidation.

DIAC and ADCCAC Rules requires an arbitral tribunal and the parties, in the absence of express provisions in the institutional rules to act in the spirit of the such rules, it would be contrary to the spirit of the DIAC Rules to require a claimant to commence many (sometimes tens of proceedings), particularly where such claims are clearly connected. Not only would this be onerous, but also it would also represent a considerable waste of time and costs, and could lead to potential delaying tactics, and inconsistent determinations.

TITLE 3: RECOGNITION OF ARBITRAL AWARDS IN INTERNATIONAL JURISDICTIONS & LEGISLATIVE REFORMS PROPOSED TO THE UAE LAWS AND THE UAE JURISPRUDENCE TOWARDS ARBITRATION

As set out in Title 2 under Part 1 of this thesis, recognizing and enforcing arbitral awards before the national courts in the UAE is a challenge, and the process for recognizing and enforcing arbitral awards involves risks that have to be taken into consideration when attempting to agree on arbitration for a dispute that is likely to be enforced in the UAE.

DIFC and ADGM courts are exceptions from this general statement.

As set out above, this dissertation has identified over 130 case laws from the UAE Supreme Courts, which denied the enforcement of arbitral awards or set aside the award whether in its entirety or partially.

The issue that shall be studied in this Title is the methodology and principles of enforcing arbitral awards in foreign jurisdictions in comparison with the relatively problematic position set out above in the UAE.

This involves more emphasis on procedural issues under UAE law that were used as grounds to set aside arbitral awards in comparison to the doctrines used in international jurisdictions in order not to allow these procedural matters to affect the integrity of the eventual award, assuming these procedures are not issues affecting the fair and equitable resolution for the dispute.

Differently stated, not all procedural flaws can be put on the same level. There should be a distinction between the procedural flaws, as follows:

First: procedural flaws that are meant to serve the administration of justice and fair prosecution of the claims on the one hand. For example, the impartiality of arbitrators, due process, equality between the parties, providing each party reasonable opportunity to submit its defenses.

Second: procedural flaws that are more into formalities that are not directly related to the fair administration of justice or the fairness of the arbitral process. For example, the time-limits to an issue awards, the complicated procedures for having an explicit capacity to enter into an agreement to arbitrate, certain formula for taking an oath.

These latter procedural flaws do not normally deprive a party of the fair resolution of its disputes.

Analysis of international jurisdictions reveals that, generally, procedural matters affecting the fairness of the resulting award are relied upon by courts as grounds to set aside awards rather than other formalistic procedures that do not affect the integrity of the arbitration process.

In other words, a procedure is not required for the sake of the procedure itself; rather, it is required to control and guide the fair resolution of disputes.

This comparative research approach shall be the basis for setting the foundation to the suggested improvements in the UAE law and the UAE courts' interpretation of the UAE law and attitude towards the arbitration process in order to be rather supportive of arbitration.

The first Chapter of this Title shall study of the general principles applicable to arbitration, the enforcement process, the grounds to set aside arbitral awards and certain examples of case laws setting aside arbitral awards in each of France, England & Wales, and the US. Thereafter, a separate Chapter in this Title shall demonstrate the areas of improvement in the UAE law in order for the UAE's arbitration system to be more compatible with the international jurisdictions.

The comparative study in this Title is crucial to reach the areas of improvement in the UAE law with respect to favoring arbitration.

Meanwhile, contracting parties as well as litigant parties may need to avail themselves and consider other alternatives in order to mitigate the risk factors inherited in having the seat of arbitration and/or enforcing arbitral awards in the UAE. One of the important factors for risk mitigation in this context is 'third-party litigation funding', and mechanisms to rationally make use of this innovative solution in the UAE. This will also be studied in a separate Chapter in this Title.

Chapter 1 Enforcement of arbitral awards, Comparative Approach to France and Other Jurisdictions

Arbitral awards whether domestic, foreign rendered inside France, or foreign rendered outside France, go through enforcement proceedings (or Exequatur) upon the award debtor to become enforceable in France.

Domestic and foreign arbitral awards shall be enforced in France by order of the Court of First Instance within the ambit of its jurisdiction the arbitral award was rendered.

The foreign arbitral award will receive the exequatur by the Tribunal de Grande Instance of Paris.

The summary enforcement proceeding in France is a simple process involving an ex parte application to the President of the Tribunal de Grande Instance together with simple documents including the original arbitral award in order to grant the Exequatur. Following granting the Exequatur, it is being served upon the award debtor, which can only at this point challenge the Exequatur by filing an application to the Court of Appeal. The appeal, in general, should not stop the enforcement and seizure on the assets of the award debtor.

In France, the rules about enforceability are mostly related to ensuring that the foreign judgment is compatible with the main standards of the local French system.

Articles 1492 CCP (applicable to domestic awards) and 1520 CCP (applicable to international awards) set out the limited circumstances under which an arbitral award could be set aside or denied enforcement; the detailed grounds are considered in the next section.

In contrast to the UAE, which requires a separate action to be initiated to ratify an arbitral award in addition to another separate action for execution and enforcement; in France, the enforcement proceeding is commenced

by submitting a request for enforcement by the award creditor together with a copy of the arbitral award with a translation of these documents if they are not in French (Article 1515 of the CCP).

The enforcement judge shall issue an order, typically within a few weeks.

As will be shown below, the grounds to set aside international awards are more limited than domestic awards.

The order allowing recognition and enforcement (ordonnance d'exequatur) comprises an enforcement order, which is simply stamped on the face of the award. In the rare instances when the order denies enforcement, it must state its reasons, and such an order is appealable (Article 1517 of the CCP).

The enforcement order allows an award creditor to pursue the execution of an arbitral award. An important new feature of French arbitration law since 2011 is that, generally, neither a petition to set aside the award nor an appeal against the enforcement order suspends the forced execution of the award in France (Article 1526, CCP) unless the competent judge finds that execution could cause substantial harm to the rights of one of the parties and suspends execution or sets conditions for execution (Article 1526 of the CCP).

In addition, an international arbitral award has res judicata effect from its issuance, which allows conservatory measures to be undertaken immediately without first seeking a special authorization and even before an enforcement order is obtained (Article 1484, of the 2011 arbitration law).

The foreign arbitral award rendered abroad must be granted the exequatur by an order from the Tribunal de Grande Instance, Paris. Obtaining an enforcement order in relation to foreign arbitral awards (whether rendered in France or abroad) is a rapid, ex parte process.

For international arbitral award rendered in France, There is no appeal open against a TGI decision granting an enforcement order, the available means of recourse is a petition to set aside the award⁷²³. If, however, the parties explicitly waived their right to request setting aside a future arbitral award, the TGI enforcement order can nevertheless be appealed on the same grounds as those provided for setting aside the award according to Articles 1522 and 1524 of the CCP.

For international awards issued outside France, the award debtor can appeal enforcement order on the same grounds as those provided for setting aside a foreign arbitral award issued in France according to Articles 1520, 1525 CCP. Article 1525 of the CCP states:

“An order granting or denying recognition or enforcement of an arbitral award made abroad may be appealed. The appeal shall be brought within one month following service (signification) of the order. However, the parties may agree on other means of notification when an appeal is brought against an award bearing an

⁷²³ Article 1524 of the CCP states “No recourse may be had against an order granting enforcement of an award, except as provided in Article 1522, paragraph 2. However, an action to set aside an award shall be deemed to constitute recourse against the order of the judge having ruled on enforcement or shall bring an end to said judge’s jurisdiction, as regards the parts of the award which are challenged.”

enforcement order. The Court of Appeal may only deny recognition or enforcement of an arbitral award on the grounds listed in Article 1520."

For domestic awards, appeal against enforcement is available only in case of denying enforcement of an award not in case of granting enforcement. Article 1460 of the CCP states:

"The judge acting in support of the arbitration shall rule by way of an order against which no recourse can be had. However, such order may be appealed where the judge holds that no appointment need be made for one of the reasons stated in Article 1455."

Article 1500 of the CCP reads:

"An order denying enforcement may be appealed within one month following service (signification) thereof. If it is appealed, and if one of the parties so requests, the Court of Appeal shall rule on an appeal or application to set aside the award, provided that the time-limit for such appeal or application has not expired."

On 25 November 1958, France signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, 'the New York Convention'

By virtue of international conventions, and particularly the New York Convention, to which France is a party, it is typically easier to execute abroad an arbitral award issued in France than a court judgment issued in France; it generally takes between ten days and a few weeks.

Under the 2011 reform, forced execution of the award can be pursued despite any pending actions against either the award itself or the enforcement order, except when the competent appellate judge finds that execution could cause grave harm to the rights of one of the parties and suspends execution or sets conditions for execution (Article 1526, CCP).

Grounds to set aside domestic awards: In domestic arbitration, an action to set aside an award can be made on limited grounds laid down in Article 1492 of French Code of Civil Procedure, which states that:

"An award may only be set aside where:

- (1) the arbitral tribunal wrongly upheld or declined jurisdiction;*
- (2) the arbitral tribunal was not properly constituted;*
- (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or*
- (4) due process was violated; or*
- (5) the award is contrary to public policy; or*
- (6) The award failed to state the reasons upon which it is based, the date on which it was made, the names or signatures of the arbitrator(s) having made the award; or where the award was not made by majority decision."*

Grounds to set aside International awards: The French law provides limited legal grounds for an action to set aside an award or appeals against an exequatur. These grounds are set out in Articles 1520 and 1525 of the Code of Civil Procedure, whereby any plea regarding points of law in the award cannot be relied upon before the French courts. Article 1520 of the CCP states that:

"An award may only be set aside where:

- (1) if the arbitral tribunal wrongly upheld or declined jurisdiction;*

- (2) *if the arbitral tribunal was not properly constituted;*
- (3) *if the arbitral tribunal ruled without complying with the mandate conferred upon it;*
- (4) *if due process has been violated; and/or*
- (5) *if the recognition or enforcement is contrary to international public policy”*

Section 1: General Principles Applicable to Arbitration in France

1. Validity of an arbitration clause: The dispute resolution and jurisdiction clauses within a contract (including arbitration) should be considered mindfully under French law in order to ensure that parties have an enforceable arbitration clause and that any avoidance in the arbitration clause is not used as ground for nullity of future arbitral awards where such clause was invoked in an arbitration. Although this dissertation did not come across decisions where such void or unenforceable arbitration clauses caused nullity in the award in French courts, the *Rothschild*⁷²⁴ case should be considered in this context. The dispute involved a dispute resolution clause, which restricted one party to litigate in a certain court, but provided that the other party (which was a bank) was free to select 'any other court or competent jurisdiction based upon its sole discretion'.

It is worth noting that it is not uncommon to find this type of clauses which provides many jurisdictional options in banks' standard templates for financing agreements in the UAE (same as in France in the present case). Banks are usually the stronger party to financing agreements and usually enforce (whether duly or unduly) their standard terms and conditions including optional jurisdictional clauses.

The French Court of Cassation held that this clause was potestative and provided great discretionary freedom for one party (the bank) to decide whether it is satisfied and was therefore void. It is unclear whether the *Rothschild* case is authoritative where an optional jurisdictional clause involving agreement to arbitrate that is available for one of the parties but not available for the other, in such case it would contradict an earlier decision by the Angers Court of Appeal.⁷²⁵

2. Immediate Enforcement: An application for exequatur is made by filing an *ex parte* application containing the arbitration agreement and the award being enforced in French. After the exequatur is granted, an action to set aside or oppose the enforcement may be initiated. Pursuant to Article 1526 (1) of the CCP, an application to set aside an arbitral award or to appeal the exequatur order does not stay execution as a matter of law⁷²⁶. It states that:

⁷²⁴ French Court of Cassation, Banque, First Civil Chamber - ECLI:FR: CCASS:2012:C100983, Priv & Edmond de Rothschild Europe (Rothschild), 26 September 2012, available online:

https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/983_26_24187.html.

⁷²⁵ Court of Appeal of Angers, 25 September 1972, [1973] Rev Arb 164

⁷²⁶ Enforcement of international arbitral awards: latest developments, by Elie Kleiman and Shaparak Saleh of Freshfields Bruckhaus Deringer LLP, available online <https://www.lexology.com/library/detail.aspx?g=a3574e2e-478c-4906-ad08-834717397dfa>

“Neither an action to set aside an award nor an appeal against an enforcement order shall suspend enforcement of an award.”

Article 1526(2) of CCP provides an exception from the above rule in circumstances where automatic execution would seriously prejudice the rights of one of the parties. Therefore, the French courts may stop or make the enforcement of the award subject to certain conditions⁷²⁷. It states that:

“However, the first president ruling in expedited proceedings (référé) or, once the matter is referred to him or her, the judge assigned to the matter (Conseiller de la mise en état), may stay or set conditions for enforcement of an award where enforcement could severely prejudice the rights of one of the parties.”

The French jurisprudence rendered to date demonstrates that it is extremely difficult for losing parties to obtain such measures to stop the enforcement of arbitral awards.⁷²⁸

Before the introduction of Article 1526 of the French CCP, an action to set aside an award or to appeal the exequatur used to suspend the award's execution in France, pursuant to the former Article 1506 of the Code of Civil Procedure. Commentators confirm that:

*“As a result of this rule, losing parties would routinely launch an action to set aside or an appeal against the order granting exequatur, as the bringing of such proceedings automatically stayed the execution of the arbitral award.”*⁷²⁹

3. Severability: The doctrine of severability and survival of the arbitration clause is well established under French law. Article 1447 of the French 2011⁷³⁰ CCP states that *“an arbitration agreement is independent of the contract to which it relates. It shall not be affected if such a contract is void.”*

In the Gosset case, the French Court of Cassation determined that:

“In international arbitration, the agreement to arbitrate, whether concluded separately or included in the contract to which it relates, is always, save in exceptional circumstances ... completely autonomous in law, which

⁷²⁷ *Ibid*

⁷²⁸ Paris Court of Appeal, October 18 2011, 11/14286, note D Bensaude, Gaz Pal 2012, 24, p 11; Paris Court of Appeal, 1st Chamber - Section C, July 13 2012, Case No. 12/11616, CIEC Engineering v Carlson Carl Anse Marcel – French International Arbitration Law Report: 2012 note D Bensaude, Gaz Pal 2012, 276, p 12, available online <https://arbitrationlaw.com/library/paris-court-appeal-1st-chamber-%E2%80%93-section-c-13-july-2012-ciec-engineering-v-snc-carlson-anse>.

⁷²⁹ Enforcement of international arbitral awards: latest developments, by Elie Kleiman and Shaparak Saleh of Freshfields Bruckhaus Deringer LLP, available online <https://www.lexology.com/library/detail.aspx?g=a3574e2e-478c-4906-ad08-834717397dfa>

⁷³⁰ Decree No. 2011-48 of 13 January 2011

*excludes the possibility of it being affected by the possible invalidity of the main contract*⁷³¹.

In *Dalico*, the case was brought by a Libyan municipal authority against a Danish contractor in order to oppose the arbitration proceedings initiated by the Danish contractor. The Libyan party argued that the arbitration agreement was governed by Libyan law and that it was invalid under Libyan law. In recognizing the doctrine of severability, the French Court of Cassation established that the validity of an arbitration agreement depends primarily on the parties' common intent, without reference to the law governing the contract or other national laws⁷³². Differently stated, the rules for determining the validity of an arbitration agreement are separate and independent from the laws governing the entire agreement.

The autonomy principle allows an arbitral tribunal to uphold jurisdiction to an arbitration, leading to an award that declares the contract under dispute to be null and that addresses the consequences flowing from such nullity.⁷³³

In this regard, the French Court of Cassation determined that:

*"pursuant to a substantive rule of international arbitration law, the arbitration agreement is legally independent of the main contract which incorporates it either directly or by reference and [...] its existence and validity are to be appreciated subject to the mandatory rules of French law and international public policy, based on the mutual intent of the parties, without a need for a reference to any national law"*⁷³⁴

The doctrine of severability of the arbitration clause from the underlying contract in which it is included, is well established under French law.⁷³⁵

⁷³¹ French Court of Cassation, in *Etablissements Raymond Gosset v Frère Carapelli S.p.A* First Civil Chamber, 7 May 1963 case number 13405, see French International Arbitration Law Reports 1963-2007, Edited by: Thomas Clay, Philippe Pinsolle Published: May 2014, available online <https://www.wildy.com/isbn/9781937518370/french-international-arbitration-law-reports-1963-2007-hardback-juris-publishing>

⁷³² Existence and Validity of an Arbitration Agreement: The French Supreme Court Confirms that the Validity of an Arbitration Agreement Depends Primarily on the Common Intent of the Parties, by Christophe von Krause OF White & Case LLP, 27 January 2010, <http://arbitrationblog.kluwerarbitration.com/2010/01/27/existence-and-validity-of-an-arbitration-agreement-the-french-supreme-court-confirms-that-the-validity-of-an-arbitration-agreement-depends-primarily-on-the-common-intent-of-the-parties/>

⁷³³ Country Q&A, France. Bruno Leurent and Thomas Bevilacqua Winston & Strawn LLP. Country Q&A GENERAL. Arbitration 2010/11, available online <https://docplayer.net/56118880-France-country-q-a-france-bruno-leurent-and-thomas-bevilacqua-winston-strawn-llp-country-q-a-general-arbitration-2010-11.html>

⁷³⁴ French Court of Cassation *Municipalité de Khoms El Mergeb v. Sté Dalico*, Civ. 1ere, 20 December 1993, [1994] Rev Arb 116.

⁷³⁵ French Court of Cassation, in *Etablissements Raymond Gosset v Frère Carapelli S.p.A* First Civil Chamber, 7 May 1963 case number 13405. See French International Arbitration Law Reports 1963-2007, Edited by: Thomas Clay, Philippe Pinsolle Published: May 2014, available online <https://www.wildy.com/isbn/9781937518370/french-international-arbitration-law-reports-1963-2007-hardback-juris-publishing>

4. Procedural Estoppel: The French courts acknowledge the principle of procedural estoppel in arbitration, whereby a party who knows about certain procedural irregularity but refrains knowingly from making a challenge during the proceedings before an arbitral tribunal is deemed to accept these irregularities, to have waived its right to object, and is precluded from raising any objection on these irregularities before the judiciary⁷³⁶. This principle was codified on 13 January 2011 in Article 1466 of the Code of Civil Procedure which states that:

*“A party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity”*⁷³⁷

5. International versus domestic awards: The French Code of Civil Procedure (CCP) draws a clear distinction between domestic (laid down in Articles 1442 till 1503) and international arbitration (laid down in Articles 1504 till 1527).

Arbitration is categorized as international when the dispute is related to international trade interests according to Article 1504 of the CCP, which provides that:

“An arbitration is international when international trade interests are at stake.”

In determining the ‘international trade’, the place where the transaction in dispute occurred is critical. The assessment of the domestic versus international arbitration is performed without regard to the nationality of

⁷³⁶ January 26 2016 Fibre, Excellence SAS v Tembec SAS, case number 15-12.363; Paris Court of Appeal, April 12 2016, Société J&P Avax SA v Société Tecnimont SPA, case number 14/14884; and D Thomson, "Jarvin award upheld in Paris", Global Arbitration Review, April 14 2016 ; Paris Court of Appeal, June 2 1989, Sociétés TAI, ESW et IEC v sociétés SIAPE, Engrais de Gabès et autres, case number 88/8256, Rev Arb 87; Paris Court of Appeal, May 16 2002, STPIF v SB Ballestrero, case number 2000/20742, Rev Arb 1231; Cass civ 1, July 6 2005, Golshani v Gouvernement de la République Islamique d'Iran, case number 01-15.912, Rev Arb 993; Paris Court of Appeal, October 28 2010, Rev Arb 691; French Court of Cassation; civ 1st, Liquidateurs of Sté Jean Lion v. Sté International Company for Commercial Exchange Income, May 6 2009, case number 08-10.281, JCP Edition Gen. 2009, see <https://www.mayerbrown.com/en/perspectives-events/publications/2010/07/coexistence-between-bankruptcy-and-arbitration-law>, Société International Company For Commercial Exchanges (Income), case number 08-10.281;

⁷³⁷ French Court of Cassation Cass civ 1, January 31 2006, *Intercafcio v Dafci*, case number 03-19.054; French Court of Cassation; civ 1st, Liquidateurs of Sté Jean Lion v. Sté International Company for Commercial Exchange Income, May 6 2009, case number 08-10.281, JCP Edition Gen. 2009, see <https://www.mayerbrown.com/en/perspectives-events/publications/2010/07/coexistence-between-bankruptcy-and-arbitration-law>

the parties, applicable substantive law or the seat of the arbitration^{738 739}.

A well-established case law determined that arbitration is considered international when the underlying transaction from which the dispute arose was not economically performed in a single country⁷⁴⁰.

To clarify this with an example, in the Tapie case⁷⁴¹, Mr. Tapie argued that the arbitration should be categorized as international⁷⁴² since the dispute was related to the sale of a German company, Adidas.

The Paris Court of Appeal rejected this argument and determined that this dispute dealt with the sale of the German company, but was related to a dispute between a French bank and its French clients in France and to alleged failures committed by the French bank.

The court held that arbitration is categorized as international if the dispute concerns economic transactions involving the transfer of goods, services, funds, technologies, or people in different countries. The court repeated that nationality of the parties, and the applicable laws are not to be taken account⁷⁴³.

6. Public Policy Considerations: Article 1514 of CCP states that:

“An arbitral award (international award) shall be recognized or enforced in France if the party relying on it can

⁷³⁸ French Court of Cassation, First Civil Chamber, 13 March 2007 Chefaro case, Rev. Arb. 2007 p. 349, see Arbitration procedures and practice in France: overview by Alexandre Bailly and Xavier Haranger, Morgan Lewis, [https://uk.practicallaw.thomsonreuters.com/7-501-9500?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/7-501-9500?transitionType=Default&contextData=(sc.Default)&firstPage=true); French Court of Cassation First Civil Chamber, 20 November 2013)

⁷³⁹ Arbitration procedures and practice in France: overview | Practical Law by Alexandre Bailly and Xavier Haranger, Morgan Lewis

⁷⁴⁰ See Paris Court of Appeal, in SARL Carthago Films v. SARL Babel Products, March 29 (2001), Rev. Arb. 2001, 543; Paris Court of Appeal, June 14 2001, SA compagnie commerciale André v SA Tradigrain France, Rev Arb, 773; Paris Court of Appeal, October 16 2004, SA Marion v. SRL Molino Peila, Rev arb 859; Paris Court of Appeal, May 10 2007, Caisse Centrale de Réassurance SARL, Rev arb 2007, 825, see Dilatory Challenges of Awards and Fraudulent Arbitration Proceedings in Crosshairs by Elie Kleiman of Freshfields Bruckhaus Deringer LLP, <https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/France/Freshfields-Bruckhaus-Deringer-LLP/Dilatory-challenges-of-awards-and-fraudulent-arbitration-proceedings-in-crosshairs>; Paris Court of Appeal, Pole 1 - 1st Chamber June 11 2009, Madame Kristine Karsten v Madame Stéphanie Stein, Rev arb, 652

⁷⁴¹ Paris Court of Appeal, 1st Chamber, dated 17 February 2015, No. 77, case number (13/13278), Crédit Lyonnais v. Bernard Tapie, see Proving Bribery, Fraud and Money Laundering in International Arbitration by Kathrin Betz, Cambridge University Press, online http://assets.cambridge.org/97811084/17846/frontmatter/9781108417846_frontmatter.pdf

⁷⁴² Since revision of an award was only applicable at that time to domestic arbitration.

⁷⁴³ Paris Court of Appeal orders the retraction of an award made where one arbitrator lacked independence: the ongoing Tapie saga by Herbert Smith Freehills LLP, - Laurence Franc-Menget and Peter Archer, <https://www.lexology.com/library/detail.aspx?g=42ecdbca-65c4-4468-8a9e-514a86132ae0>

prove its existence and if such recognition or enforcement is not manifestly contrary to international public policy.”

Therefore, the French courts, while enforcing arbitral awards, will review awards for any violations to the French international public policy. However, and having regards that the laws preclude enforcement in case the award is “manifestly contrary to international public policy”, the French courts have interpreted the word “manifestly” that violation of French international public policy needs to be clear and definitive. In this regard, the French Court of Cassation held that it might annul an award (or refuse enforcement) based on public policy consideration only where such violation is ‘flagrant and concrete.’⁷⁴⁴

In this regard, the French Court of Cassation held that *“In order to be sanctioned, the arbitrator’s breach of public policy must be established to be “flagrant, actual and concrete”*⁷⁴⁵.

And held further that *“An award could be annulled only if it misapplied rules pertaining to public policy in a “flagrant, effective and concrete manner”*⁷⁴⁶

In applying public policy considerations for arbitral awards, the French courts determined that punitive damages within an award⁷⁴⁷, the contract was obtained by fraud⁷⁴⁸ or the award is intended to be enforced against an insolvent party⁷⁴⁹.

7. Revision of awards: Pursuant to the *Fougerolle*⁷⁵⁰ case law, revision for an international award should be heard by the tribunal itself (rather than the court), provided that it can be reconvened. This provision was codified in Article 1502 of the Code of Civil Procedure, which is applicable to both domestic and international

⁷⁴⁴ French Court of Cassation, SNF SAS v Cytec Industries BV (Holland), First Civil Chamber, 4 June 2008.

⁷⁴⁵ French Court of Cassation Verhoeft v. Moreau, Cass. 1e civ., 21 March 2000, Rev Arb 807

⁷⁴⁶ Paris Court of Appeal decision in SA Thales Air Defence v. GIE Euromissile and SA EADS France (1er Ch., sect. C, 18 November 2004)

⁷⁴⁷ French Court of Cassation, Schlenszka & Langhorne v. Fontaine Pajot S.A, First Civil Chamber, 1 December 2010, Bulletin 2010, I, case number 09-13303, see The current European perspective on the exequatur of U.S. punitive damages: opening the gate but keeping a guard, <https://biblio.ugent.be/publication/8045332/file/8045333.pdf>.

⁷⁴⁸ Paris Court of Appeal in *Société MK Group v. S.A.R.L. Onix et Société Financière Initiative*, 16 janvier 2018, case number 15/21703, see Paris Court of Appeal considers setting aside ICC award on public policy grounds by Armand Terrien of Quinn Emanuel Urquhart & Sullivan UK LLP, [https://uk.practicallaw.thomsonreuters.com/w-012-7897?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-012-7897?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

⁷⁴⁹ French Court of Cassation; civ 1st, Liquidateurs of Sté Jean Lion v. Sté International Company for Commercial Exchange Income, May 6 2009, case number 08-10.281, JCP Edition Gen. 2009, see <https://www.mayerbrown.com/en/perspectives-events/publications/2010/07/coexistence-between-bankruptcy-and-arbitration-law>

⁷⁵⁰ French Court of Cassation Cass civ 1, May 25 1992, *Fougerolle*, case number 90-18.210, Rev Arb 1993, 91

arbitration by virtue of Article 1506 of the CCP, parties to both domestic and international arbitration are entitled to apply for “revision”, if revision of award is successful, and the court can “review” the award on merits⁷⁵¹. The circumstances that provide grounds for revision of awards are provided in Article 595 of the CCP⁷⁵². One of the cases in Article 595 is whether the award or the underlying agreement involves fraud. Pursuant to Article 1502 of the CCP, an application for revision of the award “shall be made to the arbitral tribunal.” If the arbitral tribunal cannot be reconvened, then an application for revision of an award can be heard as follows:

- (i) Where the disputed award is international, a new tribunal must be constituted.
- (ii) Where the award is domestic, the “Court of Appeal which would have had jurisdiction to hear other forms of recourse against the award” may hear an application for revision.⁷⁵³ This application must be made within two months from the date on which the party became aware of the circumstances on which it relies to seek revision of the award⁷⁵⁴.

In the Tapie case, the award debtor initiated an appeal for annulment and a revision action, the annulment action was rejected by the Paris Court of Appeal but the revision action was granted⁷⁵⁵ and the award was retracted on the ground that the award was tainted by fraud.

8. State Immunity: state immunity is a principle by which a sovereign state is exempt from the jurisdiction of foreign national courts. The extent to which this principle is applied in arbitral awards being enforced in France needs further analysis. In this regard, the decision of the French Court of Cassation in *Creighton v Qatar*⁷⁵⁶ establishes that this principle should not apply to the extent the relevant institutional rules (in this case the ICC Rules) precludes the state immunity. In more details, Creighton Ltd, was a company contracted by the

⁷⁵¹ Article 601 of the Code of Civil Procedure: “If the judge declares the motion admissible, he will rule in the same judgment on the merits of the litigation save where there is need for a further investigation.”

⁷⁵² Including the following cases: if it comes to light, after the judgment is handed down, that it was obtained fraudulently by the party in whose favor it was rendered; 2. decisive evidence that had been withheld by another party is recovered after the judgment was handed down; 3. the judgment is based on documents that have since been proven or have been held by a court to be false; 4. the judgment is based on affidavits, testimonies or oaths that have been held by a court to be false.

⁷⁵³ France, Applicable procedural law for recognition and enforcement of arbitral awards by Elie Kleiman, Shaparak Saleh and Yann Dehaudt-Delville of Freshfields Bruckhaus Deringer LLP, <https://globalarbitrationreview.com/jurisdiction/1004826/france>

⁷⁵⁴ Article 596 of the Code of Civil Procedure: “The time-limit for a motion for revision is two months. It shall run as from the date on which the party is aware of the grounds for the revision upon which he relies”

⁷⁵⁵ Paris Court of Appeal, 1st Chamber, dated 17 February 2015, No. 77, case number (13/13278), *Crédit Lyonnais v. Bernard Tapie*, see *Proving Bribery, Fraud and Money Laundering in International Arbitration* by Kathrin Betz, Cambridge University Press, online http://assets.cambridge.org/97811084/17846/frontmatter/9781108417846_frontmatter.pdf

⁷⁵⁶ French Court of Cassation, *Creighton Ltd (Cayman Islands) v Minister of Finance and Minister of Internal Affairs and Agriculture of the Government of the State of Qatar*, 6 July 2000, Rev Arb 114

Government of Qatar to build a hospital, a dispute arose between the parties since Creighton was expelled from the project. Creighton commenced an ICC arbitration in Paris, and the final award was rendered against Qatar.

Qatar unsuccessfully attempted to challenge the award in France, therefore, Creighton sought to seize Qatari bank accounts in France to satisfy the award amount. Following the successful seizure of its bank accounts, Qatar initiated proceedings to lift this seizure on the ground of immunity of Qatar as a sovereign state from execution. In January 1997, the Paris Court of First Instance ordered the lifting of the seizures since the agreement between the parties prevented any waiver of Qatar's immunity.

In June 1998, the Paris Court of Appeal confirmed the Court of First Instance's decision and determined that the no waiver of immunity from execution should be applicable in this case since the parties agreed to that in the underlying agreement.

On 6 July 2000, the French Court of Cassation overturned the Court of Appeal's decision on the ground that the ICC Rules states that:

*"Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made"*⁷⁵⁷

The French Court of Cassation found that, in agreeing to ICC arbitration, a state waives not only its immunity from jurisdiction, but also its immunity from execution⁷⁵⁸. As a consequence, state immunity on jurisdiction and execution is waived, immunity on enforcement and execution on state assets in France is therefore waived.

However, in three judgments related to enforcing interim measures ordered by a foreign court, the French Court of Cassation applied a higher threshold of proof to the waiver of a state sovereign immunity from execution⁷⁵⁹. For example, while addressing a similar defense regarding Argentina's waiver of sovereign immunity, the French Court of Cassation determined that:

"According to customary international law, as reflected by the United Nations Convention of 2 December 2004 on the Jurisdictional Immunities of States and their Property, while States can waive, by written contract, their immunity from execution against assets or categories of assets used or destined to be used for public purposes, they can only do so in an express and specific manner, mentioning the assets or the category of assets over which the waiver is

⁷⁵⁷ now reflected in Article 35(6) of the 2012 ICC Rules

⁷⁵⁸ Enforcement Of Arbitral Awards Against Sovereign States, A New, Milestone: Signing ICC Arbitration Clause Entails Waiver Of Immunity From Execution Held French Court Of Cassation In Creighton v.Qatar, July 6, 2000 By Nathalie Meyer-Fabre; available online http://www.meyerfabre.fr/uploadok/Fvg7Dt_pdf11.pdf

⁷⁵⁹ French Court of Cassation, Ch. Cie. Iere, jugement No. 395 du 28 mars 2013 (11-10.450), jugement No. 395 du 28 mars 2013 (11-10.450), and jugement No. 396 du 28 mars 2013 (11-13.323).

granted."⁷⁶⁰

9. State diplomatic Immunity: In another case, Compagnie NOGA, a Swiss company, could not enforce an ICC award against diplomatic assets of Russia in France. The Swiss company successfully obtained an *Exequatur* for the award by the Paris Court of First Instance to seize bank accounts of the Russian embassy in France, the commercial delegation of the Russian Federation, and the permanent delegation of the Russian Federation at the United Nations Educational, Scientific, and Cultural Organization (UNESCO). However, Russia successfully lifted this seizure by challenging this decision before the Paris Court of Appeal. Despite the explicit contractual waivers of immunity from execution in the underlying agreements, the Court of Appeal determined that Russia had not waived its immunity, under the Vienna Convention of 1961. A general waiver of immunity from execution did not extend to assets protected for being of diplomatic nature under international conventions⁷⁶¹.

10. Due process: A fundamental principle in the French law is the due process in conducting the arbitration proceedings⁷⁶². Due process means the fair hearing and adjudication of disputes, including the right of the parties to be heard and to have reasonable (or proper) opportunity to present their respective cases. Violation of due process is therefore a ground for annulment of arbitral awards⁷⁶³ under Articles 1520(4) and 1492 (4) of the French Code of Civil Procedure. The right to due process is protected by the French international public policy⁷⁶⁴. The principle of equal treatment of the parties in dispute must be observed by arbitral tribunals, failing which the award may be set aside.^{765 766}

⁷⁶⁰ *NML v Argentina: NML v Argentina: Supreme Court tightens waiver of sovereign immunity test* by Elie Kleiman and Julie Spinelli of Freshfields Bruckhaus Deringer LLP

⁷⁶¹ Paris Court of Appeal in *Ambassade de la Federation de Russie en France v Compagnie NOGA d'Importation et d'Exportation SA*, 1st Ch., Section A, 10 August 2000, [2001] Rev Arb 114, Paris Court of Appeal, Ch. Iere A, 10 August 2000, [2001] Rev Arb 114. Also see Redfern and Hunter on International Arbitration, Sixth Edition, Oxford University Press, Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, 2015, para 11.155

⁷⁶² Paris Court of Appeal, *Citel v. Eamonn M.*, 1e ch. (section C), 12 Jun. 2003 case no. 2001/16937; Paris Court of Appeal, *C.C.M. Sulzer v. Somgec*, 1e ch. (section Supp.), 27 Nov. 1987, case no. 86/4787.

⁷⁶³ French Court of *Cassation* Cass Civ 1, May 21 1997, V 2000 [1997] Rev Arb 536-537; Cass Civ 1, 5 January 1999 [1999] Rev Arb, 206-261; French Court of *Cassation* Cass Civ 2, March 30 2004, *Rado* [2005] Rev Arb 115-118; Paris Court of Appeal, January 17 2002 [2002] Rev Arb, 203-205; Paris Court of Appeal, December 9 2003, *AGGR* [2004] Rev Arb 641-644; Paris Court of Appeal, January 21 1999, case number 08/18859 1st Chamber, Section D.

⁷⁶⁴ Paris Court of Appeal, September 9 1997, *Monsieur Richard H v Société Graziano Trasmissioni SpA*, 96/80322, *obs Y Derains*, Rev Arb 1998, pp 712-714 ; Paris Court of Appeal, March 25 2010, *Société Overseas Mining Investments Ltd v Société Commercial Caribbean Niquel SA*, 08/23901, Rev Arb 2011, pp 442-446 (confirmed by Cass Civ 1, June 29 2011, *Société Overseas Mining Investments Ltd v Société Commercial Caribbean Niquel SA*, 10-23.321, Rev Arb 2011, pp 678-679).

⁷⁶⁵ Paris Court of Appeal, November 18 1987, *Chambre arbitrale de Paris, Sociétés Carfa Trade Group et Omnium de travaux v République de Guinée et autres* [1988] Rev Arb 657

⁷⁶⁶ *Paris Court of Appeal rules on Iraq war's impact on due process in arbitral proceedings* By Elie Kleiman and Yann Dehaut-Delville of Freshfields Bruckhaus Deringer LLP, available online

11. *Kompetenz-kompetenz*: An arbitral tribunal, under French law, has the power to rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement, subject to later review by the national courts in an action to set aside an award. Article 1465 of the French CCP reads:

“The arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction.”

Further, the French Court of Cassation established that arbitral tribunals should rule on their own jurisdiction⁷⁶⁷, including:

*“The extension of an arbitration agreement within a contract encompassing other agreements in group contracts that do not include a jurisdiction clause, as well as the extension of an arbitration agreement to parties that have not expressly consented to arbitrate.”*⁷⁶⁸

12. Disclosure required by arbitrators: As set out below, French jurisprudence confirms that lack of adequate and complete disclosures by arbitrators and potential conflict of interest were historically two of the most common reasons to set aside arbitral awards in France. The French law and French courts have made lack of adequate disclosure one of the most critical grounds to challenge arbitral award.

Article 1456 of the French CCP (which is applicable for both domestic and international arbitration by virtue of Article 1506) provides that arbitrators are required to disclose any circumstance that might affect their independence or impartiality.

Article 1456 of the French CCP indeed states that:

“Before accepting a mandate, an arbitrator shall disclose any circumstance that may affect his or her independence or impartiality. He or she shall also disclose promptly any such circumstance that may arise after accepting the mandate.”

This disclosure obligation is broad, as it applies to all circumstances that are likely to affect the independence or impartiality of an arbitrator⁷⁶⁹. However, an erroneous or incomplete disclosure should not necessarily lead to an automatic recusal of an arbitrator or to the annulment of the resulting arbitral award⁷⁷⁰. This is manifested

<https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/France/Freshfields-Bruckhaus-Deringer-LLP/Paris-Court-of-Appeal-rules-on-Iraq-wars-impact-on-due-process-in-arbitral-proceedings>

⁷⁶⁷ Supreme Court, Commercial Section, November 25 2008, case number 07-21888

⁷⁶⁸ Arbitral Tribunal to Rule on Extension of Arbitration Agreement in a Group of Contracts, 19 February 2009, by Elie Kleiman of Freshfields Bruckhaus Deringer LLP, <https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/France/Freshfields-Bruckhaus-Deringer-LLP/Arbitral-Tribunal-to-Rule-on-Extension-of-Arbitration-Agreement-in-a-Group-of-Contracts>

⁷⁶⁹ French Court of Cassation Cass civ 1, March 16 1999, *Etat du Qatar v Société Creighton*, 96-12.748, Rev Arb 1999, 308

⁷⁷⁰ Paris Court of Appeal in *e Nidera v. Leplatre* judgment of 16 December 2010, the court rejected the plea that the arbitrator was a chairman of an association where one of the parties was a member of it, the court found that this is

by the extensive jurisprudence in the French courts. In some circumstances, the French courts found that disclosures that would not trigger reasonable doubts, in the parties' minds, as to the arbitrator's independence and impartiality may not be used as grounds to annul an award or recuse an arbitrator⁷⁷¹.

For example, the French courts held that where one of the litigant parties was a member among 800 other members of an association where the arbitrator was a chairperson, this is not considered a valid ground to set aside an award even if no disclosure was made⁷⁷² because of the remote relationship between the litigant party and the arbitrator under these circumstances.

However, given the fine line between the two issues and the relatively large number of awards set aside using this ground, arbitrators taking France as the seat of arbitration or seeking to enforce awards in France are strongly encouraged to disclose any and all relevant circumstances that exist even if they may not give doubt to their impartiality or independence of arbitrators. The disclosure obligation continues to apply until the tribunal is discharged from its duties⁷⁷³.

However, having regards to the estoppel doctrine, when a party is notified of relevant circumstances that are likely to bring a challenge and fails to object to them in a timely manner, it cannot bring a subsequent challenge based on the same circumstances⁷⁷⁴.

The French courts consistently held that an arbitrator's duty to disclose must be considered in light of their

pointless disclosure since the party was a member among 800 other members and this circumstance is not a reportable disclosure

⁷⁷¹ French Court of *Cassation* Cass Civ 1, 10 October 2012 Tecso, no 11-20.299 4.125

⁷⁷² Paris Court of Appeal in *e Nidera v. Leplatre* judgment of 16 December 2010

⁷⁷³ Paris Court of Appeal, February 17 2005, *Société Mytilineos Holdings v The Authority for Privatization and State Equity Administration*, Rev Arb 2005, 716; Paris Court of Appeal, February 12 2009, *SA J&P Avax SA v société Tecnimont SPA*, Rev Arb 2009, 186

⁷⁷⁴ Paris Court of Appeal, September 22 2015, 14/17200, see Arbitrators' duty of disclosure by Elie Kleiman, Martin Brasart of Freshfields Bruckhaus Deringer LLP, available online <https://www.lexology.com/library/detail.aspx?g=435dba8f-5247-4ac3-8892-369d25018da8>, French Court of Cassation; civ 1, in *Orance Telecom-Orange FCR v Equatorial Guinea* June 15 2017, 16-17.108, see the French Court of Cassation rejects appeal and upholds ICC award against Equatorial Guinea by Alex Francis and Merlin Papadhopulli of Herbert Smith Freehills, available online [https://uk.practicallaw.thomsonreuters.com/w-009-0910?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-009-0910?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

influence on the arbitrator's judgment^{775 776}.

The French courts, in certain circumstances, consider that if a party wishes to challenge an arbitrator's independence, it should demonstrate that the arbitrator's judgment is likely to be affected by the nature of the relationship⁷⁷⁷, and that these circumstances create a risk of bias to one of the parties to the arbitration.⁷⁷⁸

In *Société Dukan* case⁷⁷⁹, the French Court of Cassation established that the litigant parties to an arbitration do not have an obligation to search publicly available or other information to trace or verify the arbitrator's impartiality or independence. Rather, the parties should rely on the declarations by the arbitrators. As such, the challenge based on publicly available information can be raised even at a later stage in the arbitral proceedings unless the objecting party is precluded from raising its challenge under procedural estoppel.

13. Judicial review of arbitrator jurisdiction: Given the limited grounds to challenge an award laid down in Articles 1492, 1520 and 1525 of the Code of Civil Procedure, any plea regarding points of law in the award cannot be relied upon before the French courts. However, the French Court of Cassation confirmed that, in the context of the review of arbitrators' jurisdiction in an action to recognize or set aside an arbitral award, the French courts are entitled to review *"all legal and factual elements that are relevant to determine the reach of the arbitration"*

⁷⁷⁵ Paris Court of Appeal, January 12 1995, *Ardi v Scapnor*, Rev Arb 1996, 72 ; Paris Court of Appeal, November 28 2002, *Voith Turbo GmbH AG v Société Nationale des Chemins de Fer Tunisiens*, Rev Arb 2003, 445; and Paris Court of Appeal, SA Auto Guadeloupe Investissements v Columbus Acquisitions Inc., 13/13459 October 14 2014, see French Court of Cassation emphasizes principle of independence of arbitrators – Alvarez decision on conflict of interest upheld by Laurence Franc-Menget of Herbert Smith Freehills, <https://hsfnotes.com/arbitration/2016/02/10/french-court-de-cassation-emphasizes-principle-of-independence-of-arbitrators-alvarez-decision-on-conflict-of-interest-upheld/>

⁷⁷⁶ Arbitrators' duty of disclosure - Newsletters - International Law Office by Elie Kleiman Martin Brasart of Freshfields Bruckhaus Deringer LLP, available online <https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/France/Freshfields-Bruckhaus-Deringer-LLP/Arbitrators-duty-of-disclosure>

⁷⁷⁷ Court of Appeal Sets Aside ICC Award as Arbitrator Lacked Independence by Elie Kleiman of Freshfields Bruckhaus Deringer LLP, available online <https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/France/Freshfields-Bruckhaus-Deringer-LLP/Court-of-Appeal-Sets-Aside-ICC-Award-as-Arbitrator-Lacked-Independence>

⁷⁷⁸ Paris Court of Appeal, June 2 1989, *Sociétés TAI, ESW et IEC v sociétés SIAPE, Engrais de Gabès et autres*, case number 88/8256, Rev Arb 87; Paris Court of Appeal, April 9 1992, *Société Annahold BV et D Frydman v société L'Oréal et B*, Rev Arb 1996, p 483; see Court of Appeal Sets Aside ICC Award as Arbitrator Lacked Independence by Elie Kleiman of Freshfields Bruckhaus Deringer LLP, available online <https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/France/Freshfields-Bruckhaus-Deringer-LLP/Court-of-Appeal-Sets-Aside-ICC-Award-as-Arbitrator-Lacked-Independence>; Paris Court of Appeal, January 12 1996, *Gouvernement de l'Etat du Qatar v Creighton Ltd*, Rev arb 1996, p 428.

⁷⁷⁹ French Court of Cassation Cass civ 1, December 18 2014, *Société Dukan de Nitya*, case number 14-11.085; Paris Court of Appeal, SA Auto Guadeloupe Investissements v Columbus Acquisitions Inc., 13/13459 October 14 2014, see French Court of Cassation emphasizes principle of independence of arbitrators – Alvarez decision on conflict of interest upheld by Laurence Franc-Menget of Herbert Smith Freehills, <https://hsfnotes.com/arbitration/2016/02/10/french-court-de-cassation-emphasizes-principle-of-independence-of-arbitrators-alvarez-decision-on-conflict-of-interest-upheld/>

agreement and draw the corresponding conclusions regarding the arbitrators' compliance with their mission"

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14. 'Economic viability': in several decisions, the Paris Court of Appeal established that when the enforcement of an award could jeopardize the economic viability of an award debtor, the court may stay the award enforcement⁷⁸². However, when the enforcement of an award would not seriously jeopardize the viability of the award debtor, but reasonable doubts are established as to the award creditor's behavior as to refunding the enforced amount in case the arbitral award is set aside, the court may modulate the enforcement and order the award debtor to pay the award money to an escrow account⁷⁸³.

However, the standard set by the French courts for the modulation of enforcement of awards is high⁷⁸⁴. The court may ask for financial statements to be reviewed and expert reports may be needed in order to assess the financial liquidity of an award debtor. Therefore, having regards to this high threshold of proof, the Paris Court of Appeal case history demonstrates that a stay or modulation of the enforcement of an award is likely to be

⁷⁸⁰ French Court of Cassation, First Civil Chamber, *Fondation Albert Abela Family Foundation (AAFF) et. al. v. Fondation Joseph Abela Family Foundation (JAFF)*, *Revue de l'Arbitrage* (2010), p. 813 et seq.

⁷⁸¹ *Dallah: one test, two different findings* by Elie Kleiman and Julie Spinelli of Freshfields Bruckhaus Deringer LLP, available online <https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/France/Freshfields-Bruckhaus-Deringer-LLP/Dallah-one-test-two-different-findings>. Also see *Insight: In Dallah, the Paris Court of Appeal and UK Supreme Court Reach Contrary Decisions Applying Same Law to Same Facts*, available online <https://www.whitecase.com/publications/newsletter/insight-dallah-paris-court-appeal-and-uk-supreme-court-reach-contrary>

⁷⁸² Paris Court of Appeal (ord), April 3 2014, *Farmex Technologies*, No 13/22288 and Paris Court of Appeal (ord), July 4 2014, *Assurances Pilliot*, case number 14/12102, obs J Pellerin and L De Maria, *Paris J Int Arb* 2014, case number 4, 783, Court of Appeal Rouen (ord), September 26 2012, *Société Cotoni del Firello*, case number 12/00056).

⁷⁸³ Paris Court of Appeal (ord), March 27 2014, *Fairtrade*, case number 13/24165, obs J Pellerin and L De Maria, *Paris J Int Arb* 2014, case number 4, 783; Paris Court of Appeal, April 23 2013, *SASU Spie Batingnolles Nord v Chemoprojekt*, case number 13/02612, *Rev Arb*, 542, see *GAR France*, 19 October 2015 by Philip Dunham, Xavier Nyssen; available online https://globalarbitrationreview.com/print_article/gar/chapter/1036947/france?print=true. Paris Court of Appeal, October 3 2013, CMN, case number 13/07263, see the French Law Standard of Review for Conformity of Awards with International Public Policy where Corruption is Alleged; available online <http://arbitrationblog.kluwerarbitration.com/2014/12/10/the-french-law-standard-of-review-for-conformity-of-awards-with-international-public-policy-where-corruption-is-alleged-is-the-requirement-of-a-flagrant-breach-now-gone/>.

⁷⁸⁴ Paris Court of Appeal (ord), October 18 2011, *SAS Mambo Commodités*, case number 11/14286, *Rev Arb* 2012, 393; Paris Court of Appeal, 1st Chamber - Section C, July 13 2012, Case No. 12/11616, *CIEC Engineering v Carlson Carl Anse Marcel* – French International Arbitration Law Report: 2012 note D Bensaude, *Gaz Pal* 2012, 276, p 12, available online <https://arbitrationlaw.com/library/paris-court-appeal-1st-chamber-%E2%80%93-section-c-13-july-2012-ciec-engineering-v-snc-carlson-anse>; Paris Court of Appeal (ord), March 8 2012, *Pierre Cardin*, case number 12/02299, *Rev Arb* 2012, 406

refused⁷⁸⁵.

15. Res Judicata: Article 1484 CCP states that:

*"As soon as it is made, an arbitral award shall be res judicata with regard to the claims adjudicated in that award. The award may be declared provisionally enforceable."*⁷⁸⁶

As such, both domestic and international arbitral awards have *res judicata* under French law, with immediate effect after issuance of the award. Accordingly, provisional and conservatory measures shall take an immediate effect even before an enforcement order by the judiciary is awarded⁷⁸⁷.

16. Under French law, even if an award that was issued abroad has been annulled by the courts of the seat of the arbitration, this does not, by itself, constitute a basis for opposing the recognition or enforcement of the award in France⁷⁸⁸.

17. Under French law, due process and party equality⁷⁸⁹ are important principles that must be respected in arbitration. Another case confirms the principle of collegiality; that is, the rule that each arbitrator has a right to participate in the deliberations and decision-making process with the other arbitrators⁷⁹⁰.

⁷⁸⁵ Dilatory challenges of awards and fraudulent arbitration proceedings in crosshairs, Elie Kleiman and Yann Dehaudt-Delville of Freshfields Bruckhaus Deringer LLP, available online:

<https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/France/Freshfields-Bruckhaus-Deringer-LLP/Dilatory-challenges-of-awards-and-fraudulent-arbitration-proceedings-in-crosshairs>

⁷⁸⁶ Which is equally applicable to domestic and international arbitration by virtue of Article 1506 of the CCP

⁷⁸⁷ French Court of Cassation, 2nd Civil Chamber, 12 October 2006, case number 05-12835

⁷⁸⁸ French Court of Cassation First Civil Chamber, 10 June 1997, Hilmarton v OTV and French Court of Cassation First Civil Chamber, 29 June 2007, Putrabali and French Court of Cassation 2nd Civil Chamber, 12 October 2006 case number 05-12835

⁷⁸⁹ French Court of Cassation, 7 January 1992, Sociétés BKMI et Siemens v société Dutco ("Dutco case"), [1992] Rev Arb 470, see Award Annulled Due to Withdrawn Counterclaims Introduced by Insolvent Defendant, 12 April 2012, Contributed by Elie Kleiman of Freshfields Bruckhaus Deringer LLP, available online:

<https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/France/Freshfields-Bruckhaus-Deringer-LLP/Award-annulled-due-to-withdrawn-counterclaims-introduced-by-insolvent-defendant>

⁷⁹⁰ French Court of Cassation First Civil Chamber, 8 July 2009

18. Under French law, when an agreement that contains an arbitration clause is assigned or transferred, the arbitration clause included therein shall be deemed assigned or transferred with the underlying agreement^{791 792}.

19. The French law allows under certain circumstances the extension of the arbitration clause to multiparty and/or multi-contract situations, which implies that the arbitration clause within a contract to be interpreted broadly to include contracts not covered by the arbitration agreement or entities that were not parties to the contract containing the arbitration agreement. Under certain circumstances, French jurisprudence has permitted the extension of an arbitration clause to situations involving chains or series of related contracts.⁷⁹³

20. Under French law, French courts should not accept jurisdiction where a valid arbitration clause exists between the parties⁷⁹⁴ except where the arbitration clause is manifestly null or inapplicable and the arbitral tribunal was not constituted when the judge was seized of the matter⁷⁹⁵. Such nullity and inapplicability, that may declare the national courts competent to review the dispute, is narrowly construed whereby a national judge shall not review substantively or in detail the validity of the arbitration clause before arbitral tribunals do^{796 797}.

⁷⁹¹ French Court of Cassation Com., 3 March 1992; French Court of Cassation First Civil Chamber, *Taurus Film v. les Film du jeudi* 8 February 2000, Rev. Arb. [2000] 280; French Court of Cassation First Civil Chamber, in *Generali France v Universal Legend* 11 July 2006

⁷⁹² Country Q&A, France, Bruno Leurent and Thomas Bevilacqua Winston & Strawn LLP. Country Q&A GENERAL. Arbitration 2010/11, available online <https://docplayer.net/56118880-France-country-q-a-france-bruno-leurent-and-thomas-bevilacqua-winston-strawn-llp-country-q-a-general-arbitration-2010-11.html>

⁷⁹³ French Court of Cassation First Civil Chamber, case number 04-20.842), *SOCIÉTÉ ABS V AMKOR ET AUTRES* 27 March 2007, available online:

<https://arbitrationlaw.com/library/cour-de-cassation-first-civil-chamber-27-march-2007-petition-no-04-20842-soci%C3%A9t%C3%A9-abs-v-amkor> and French Court of Cassation Com., 5 March 1991 and French Court of Cassation First Civil Chamber, *office des poursuites et des Faillies de Nyon (OPF) v Dumartheray* [2007] 30 October 2006

⁷⁹⁴ French Court of Cassation *Pacific Auto [France] v. Komatsu Asia & Pac. PTE Ltd*, [Cass. 1e civ.], 17 March 2010, case no. 08-21641.

⁷⁹⁵ French Court of Cassation First Civil Chamber, 1 July 2009 and French Court of Cassation First Civil Chamber, 25 April 2006, 2008 (2) Rev. Arb. 299

⁷⁹⁶ French Court of Cassation First Civil Chamber, *Copropriété Maritime Jules Verne and others (France) v société ABS American Bureau of Shipping US*, 7 June 2006, available online <https://arbitrationlaw.com/library/cour-de-cassation-first-civil-chamber-7-june-2006-copropi%C3%A9t%C3%A9-maritime-jules-verne-and-others>

⁷⁹⁷ Country Q&A, France, Bruno Leurent and Thomas Bevilacqua Winston & Strawn LLP. Country Q&A GENERAL. Arbitration 2010/11, available online <https://docplayer.net/56118880-France-country-q-a-france-bruno-leurent-and-thomas-bevilacqua-winston-strawn-llp-country-q-a-general-arbitration-2010-11.html>

Section 2: Setting aside Arbitral Awards by French Courts

In contrast to the UAE jurisprudence where more than 130 case laws were identified and studied in Chapter 2, of Title 1 under Part 1 of this thesis, where these case laws confirmed setting aside arbitral awards; it was considerably difficult to identify case laws in France that confirmed setting aside arbitral awards.

In fact, after extensive research to the French case laws, only 22 cases were found where arbitral awards were annulled by the French national courts.

Indeed, France is worldwide regarded as one of the supportive jurisdictions to arbitration, if not actually the supportive jurisdiction in the world in that respect.

This section shall demonstrate the most important case laws identified by the author's research to the French cases where arbitral awards were set aside.

This study and analysis shall be useful in demonstrating the recommendations for improvements in the UAE and in the UAE courts' interpretation and application of the law in order to get the UAE legal system closer to France as an arbitration-friendly jurisdiction and contributing to eliminate any potential reputation of judicial hostility to arbitration in the UAE.

§ 1 French Courts Setting Aside Arbitral Awards

2. Insolvent award debtor: In applying international public policy considerations, the French Court of Cassation denied enforcement of an award⁷⁹⁸ against an insolvent party to satisfy an arbitral award out of his income after being protected by the insolvency. The court determined that such an act is contrary to French international public policy rules. Apparently, this decision is not about setting aside an award per se but rather is related to denying enforcement due to the financial position of the award debtor.
3. Fraud: On 16 January 2018, the Paris Court of Appeal⁷⁹⁹ set aside an ICC international arbitral award on public policy grounds where the award involved fraud, where a falsified version of an agreement was submitted to the arbitral tribunal. In particular, the contracting parties intended to enter into a memorandum of understanding to sell shares in exchange for the commitment by the buyer to make an

⁷⁹⁸ French Court of Cassation; civ 1st, Liquidateurs of Sté Jean Lion v. Sté International Company for Commercial Exchange Income, May 6 2009, case number 08-10.281, JCP Edition Gen. 2009, see <https://www.mayerbrown.com/en/perspectives-events/publications/2010/07/coexistence-between-bankruptcy-and-arbitration-law>

⁷⁹⁹ Paris Court of Appeal in *Société MK Group v. S.A.R.L. Onix et Société Financière Initiative*, 16 janvier 2018, case number 15/21703, see Paris Court of Appeal considers setting aside ICC award on public policy grounds by Armand Terrien of Quinn Emanuel Urquhart & Sullivan UK LLP, [https://uk.practicallaw.thomsonreuters.com/w-012-7897?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-012-7897?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

investment into the seller (rather than paying a consideration). The buyer was a Laotian government entity (from Laos) while the seller is a Russian company.

However, the parties came to know that paying such investment by the Laotian entity is against the Laotian laws, therefore, the parties entered into two versions of a memorandum of understanding. The English version of the MoU indicated that the transfer of shares is subject to investment while the Laotian version did not have this condition (since it is contrary to the Laotian laws).

The Laotian government entity did not make the investment and received the transferred shares in accordance with the Laotian version; the Russian company initiated an arbitration and was unsuccessful since the Laotian version supported the Laotian party. The Paris Court of Appeal found that having two contradictory versions amounts to fraud and annulled the award. The arbitral award demonstrates that following *Gulf Leaders* case law⁸⁰⁰, the French courts review fraud and generally public policy matters in arbitral awards with respect to both in fact and law.

4. Corruption: September 13, 2017⁸⁰¹ the French Court of Cassation upheld two decisions issued by the Paris Court of Appeal⁸⁰² to set aside two arbitral awards since the underlying agreements were obtained through corruption. The court regarded corruption as an element against French international public policy, which is a ground to annul the arbitral awards based on Article 1520.2 of the CCP.

The court referred to and relied upon a decision by the Paris Criminal Court, which found that the seller in the underlying agreement was guilty of corruption.

⁸⁰⁰ Paris Court of Appeal, Pôle 1, Ch.1, *Gulf Leaders for Management and Services Holding Company ("Gulf Leaders") v. SA Crédit Foncier de France*, dated 4 March 2014, Rev. Arb. 2014.955, see the French Law Standard of Review for Conformity of Awards with International Public Policy where Corruption is Alleged; available online <http://arbitrationblog.kluwerarbitration.com/2014/12/10/the-french-law-standard-of-review-for-conformity-of-awards-with-international-public-policy-where-corruption-is-alleged-is-the-requirement-of-a-flagrant-breach-now-gone/>

⁸⁰¹ French Supreme Court, First Civil Chamber, September 13, 2017, appeals no. 16-25.657 and 16-26.445, available online <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000035572584&fastReqId=336764552&fastPos=1>

⁸⁰² Paris Court of Appeals 27 September 2016, case number 15/12614 *Société Ancienne Maison Marcel Bauche v. Société Indagro*; summary available online:

http://newyorkconvention1958.org/index.php?lvl=notice_display&id=3647&opac_view=2

Paris Court of Appeals, November 15, 2016, case number 16/11198, see *International Arbitration Review*, ninth edition, by James Carter, https://thelawreviews.co.uk/digital_assets/90373e1f-4963-4a77-8346-592a0ebedf52/The-International-Arbitration-Review---Edition-9.pdf

5. Money laundering: In a decision dated 21 February 2017, the Paris Court of Appeal⁸⁰³ set aside an award for USD 15 million on the ground that the recognition of the arbitral award would be contrary to French international public policy. The court determined that the recognition and enforcement of the arbitral award is contrary (or undermines) the fight against money laundering activities and will allow perpetrators to benefit from their illegal activities. In carrying out this assessment, the court determined that it is not bound by the evidence submitted before the arbitral tribunal. As such, the court investigated the matter substantively and disagreed with the findings of the arbitral tribunal, which found that there was no sufficient evidence to corroborate that there was any serious sign of money laundering.
6. Public policy and prerogative rights to public institutions: In *INSERM v. Fondation Letten F. Saugstad* (INSERM Case), the French State Council (Conseil d'Etat) issued an unprecedented decision dated 9 November 2016 to annul an arbitral award related to a public contract performed in France⁸⁰⁴. The ground for annulment was the arbitral tribunal's failure to allow a public institution to substitute a contractor without terminating the contract with the contractor being substituted; the substitution of contractors by public institutions for the public interest is considered a public policy rule applicable to public contracts. The nature of this dispute being related to a public institution gave the administrative courts the jurisdiction over this dispute, rather than the civil and commercial courts.

In this case, the contract was related to Gaz de France, a French government-owned institution, and the contract was concluded with a company called "SAS" for a public project. Gaz de France later transferred this contract to Fosmax, the ultimate contractual relationship therefore was between Fosmax and SAS.

Fosmax decided to substitute SAS with another contractor, and SAS instituted an arbitration for claiming EUR 36 million since Fosmax was not entitled to substitute it without first terminating the contract. SAS was successful in getting an arbitral award in its favor. However, the French State Council determined that the arbitral award should be set aside since it disregarded that Fosmax has a mandatory prerogative right (or privilege right) to substitute SAS for the public interest as a matter of public policy.

The *Conseil d'Etat* identified that the grounds for setting aside an arbitral award are "*as follows*:"

1. *Arbitrability: Where a public body enters into an agreement to arbitrate (or incorporates an arbitration clause in an agreement) in violation of a rule or law that imposes resorting to administrative courts.*
2. *Irregularities: including the circumstances where:*
 - (i) *The arbitral tribunal wrongfully upholds or declines jurisdiction,*
 - (ii) *The arbitral tribunal is not properly constituted (including as to matters of independence and impartiality),*

⁸⁰³ The Paris Court of Appeal in *Valery Belokon v The Kyrgyz Republic* (21 February 2017) case No. 15/01650, see Paris Court sets aside UNCITRAL investment award against Kyrgyzstan on grounds of money laundering, available online <http://piladvisorygroup.org/paris-court-sets-aside-uncitral-investment-award-kyrgyzstan-grounds-money-laundering>

⁸⁰⁴ French Conseil d'Etat, Assembly, 9 November 2016, no. 388806, *Société Fosmax LNG v. Groupement d'entreprises STS* available online <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000033364623>

- (iii) *The arbitral tribunal awards more than the relief sought by any of the Parties,*
- (iv) *The arbitral tribunal does not respect due process, or*
- (v) *The arbitral award does not provide reasons.*

3. *Award contrary to public policy: including circumstances where:*

- (i) *The award was issued based on a contract that is illegal or contains sever irregularity, including lack of consent*
- (ii) *The award does not take into account rules and rights applicable to public entities, including the principle of the restrain transferability of certain property rights, and the principle that prerogatives in the public interest cannot be waived, or*
- (iii) *The award does not take into account EU public order rules*⁸⁰⁵.

7. Arbitrator's Impartiality: On 16 December 2015, the French Court of Cassation⁸⁰⁶ annulled an arbitral award due to the sole arbitrator's failure to disclose its relationship as a partner in law firm which assisted one of the parties in selling a USD 575 million interest, despite the fact that sole arbitrator was not part of the team who conducted this task.

After the award was issued, the award debtor discovered this relationship as it was published on the prevailing party's website.

The French Court of Cassation held that the disclosure obligation of arbitrators is broad and should include each of the following as long as these circumstances give rise to doubts to the arbitrator's impartiality or independence in the eyes of the parties:

- (i) Any information even if such information is publicly available and accessible by the parties,
- (ii) Extends to the relationship with the parties themselves or their related parties, and
- (iii) Extends to the arbitrator himself/herself and the law firm (or any other entity) that employs or has connections to the arbitrator⁸⁰⁷

⁸⁰⁵ Annulment of international arbitral award: the French Conseil d'Etat makes first foray into the fiefdom of the civil Cassation Court by Andrew Tetley and Aurélie Lopez of Reed Smith on 23 December 2016, available online <https://www.reedsmith.com/en/perspectives/2016/12/annulment-of-international-arbitral-award-the-fren>. Also see French Conseil d'Etat, Assembly, 9 November 2016, no. 388806, Société Fosmax LNG v. Groupement d'entreprises STS available online <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000033364623>

⁸⁰⁶ French Supreme Court Case No. 14-26279 Sociétés Colombus v Société AG, available online <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031652620&fastReqId=936205787&fastPos=1>. See French Court of Cassation emphasizes principle of independence of arbitrators – Alvarez decision on conflict of interest upheld by Laurence Franc-Menget of Herbert Smith Freehills, <https://hsfnote.com/arbitration/2016/02/10/french-court-de-cassation-emphasizes-principle-of-independence-of-arbitrators-alvarez-decision-on-conflict-of-interest-upheld/>

⁸⁰⁷ French Court of Cassation; civ 1, December 18 2014, Société Dukan de Nitya, case number 14-11.085

8. Arbitrator's impartiality : In the Tapie case (set out above), on 17 February 2015, the award of the arbitral tribunal was revised (under revision of an award provision under Article 1502 of the CCP) by the Paris Court of Appeal⁸⁰⁸, on the basis of civil fraud and the lack of impartiality and independence of one of the arbitrators in the tribunal where related criminal investigation evidenced links between one arbitrator (Mr. Pierre Estoup), Tapie and his Counsel (Mr. Lantourne) which had been fraudulently concealed by Estoup, the decision was confirmed by the French Court of Cassation on 30 June 2016.⁸⁰⁹

This case was one of the landmark and rare cases where an arbitral award was revised (under the revision of an award provision under Article 1502 of the CCP) by the Paris Court of Appeal⁸¹⁰ based on civil fraud and the lack of impartiality and independence of one of the arbitrators in the Tribunal. The criminality related to the lack of independence by Estoup was confirmed by the arbitrator's attitude during the arbitration proceedings.

The procedural history of this case started in 1992 when Bernard Tapie, a prominent businessman, wanted to sell Adidas to a subsidiary of Crédit Lyonnais (which partially financed the original purchase)⁸¹¹ to avoid any conflict of interest after becoming a minister.⁸¹²

Crédit Lyonnais sold Adidas on behalf of Tapie in February 1993, at a price of EUR 315 Million; he acquired it in 1990 for EUR 245 Million.

Tapie discovered that Crédit Lyonnais had made an extra profit on this deal despite the fact that the bank was supposed to act just as a mediator, the bank sold Adidas with a resale option to allow a capital gain of EUR 396 million Euros.

⁸⁰⁸ Paris Court of Appeal, 1st Chamber, dated 17 February 2015, No. 77, case number (13/13278), *Crédit Lyonnais v. Bernard Tapie*, see *Proving Bribery, Fraud and Money Laundering in International Arbitration* by Kathrin Betz, Cambridge University Press, online http://assets.cambridge.org/97811084/17846/frontmatter/9781108417846_frontmatter.pdf

⁸⁰⁹ *Case Credit Lyonnais: the Court of Cassation confirmed the cancellation of the arbitration in favor of Bernard Tapie*, by Francetv Info and Reuters France Televisions, June 30, 2016, available online https://www.francetvinfo.fr/politique/affaire/bernard-tapie/affaire-credit-lyonnais-la-cour-de-cassation-confirme-l-annulation-de-l-arbitrage-en-faveur-de-bernard-tapie-qui-devra-rembourser-405-millions-d-euros-a-l-etat_1524729.html

⁸¹⁰ Paris Court of Appeal, 1st Chamber, dated 17 February 2015, No. 77, case number (13/13278), *Crédit Lyonnais v. Bernard Tapie*, see *Proving Bribery, Fraud and Money Laundering in International Arbitration* by Kathrin Betz, Cambridge University Press, online http://assets.cambridge.org/97811084/17846/frontmatter/9781108417846_frontmatter.pdf

⁸¹¹ *Case Adidas-Credit Lyonnais: no, Tapie was not stolen!* - Sophie Fay, *L'Observateur*, July 2, 2013, <https://www.nouvelobs.com/economie/20130702.OBS6127/affaire-adidas-credit-lyonnais-non-tapie-n-a-pas-ete-vole.html>

⁸¹² *Les Echos* 11/02/2010 *Bernard Tapie: what did he really made his business?*, available online <https://www.lesechos.fr/2010/02/bernard-tapie-qua-t-il-vraiment-fait-de-ses-entreprises-1085230>

Mr. Tapie believed that Crédit Lyonnais achieved EUR 400 million profits unduly and contrary to the agreement with him and then was he was claimed bankrupt by the same bank in 1994.

Tapie instituted an action to claim the profits allegedly achieved by the bank.

After consuming almost ten years in court litigations, the Parties agreed to arbitration to resolve the dispute. Tapie commenced an arbitration on On October 25, 2007 and successfully obtained an arbitral award on 11 July 2008 (within almost 8.5 months). The decision of an arbitral tribunal awarded to Tapie EUR 403 million (EUR 243 million of damage, 115 million Interest, and 45 million euros in non-pecuniary damage)⁸¹³.

In the year following the issuance of the award, investigations were opened to determine whether the arbitration was impartial.

On 17 February 2015, the Paris Court of Appeal ordered the revision of the arbitral award; the annulment action was rejected by the court⁸¹⁴.

On 30 June 2016 the French Court of Cassation confirmed the revision of the award based civil fraud⁸¹⁵ and rejected the two appeals against the judgment of the Court of Appeal.⁸¹⁶

9. Lack of jurisdiction, non-signatory to an agreement: In a departure from *Dallah* approach (set out below in cases denied setting aside by the French courts), the Paris Court of Appeal annulled an ICC award. In this case, the award was challenged by the government of Egypt, the court found that the government of Egypt was not a party to the relevant agreement and was therefore not bound by the arbitration clause included therein. The Paris Court of Appeal agreed and the award was set aside.

⁸¹³ Case Tapie: the two letters that reveal the scam - Gérard Davet and Fabrice Lhomme, *Le Monde*, July 29, 2013

⁸¹⁴ Paris Court of Appeal orders the retraction of an award made where one arbitrator lacked independence: the ongoing Tapie saga by Herbert Smith Freehills LLP, - Laurence Franc-Menget and Peter Archer, <https://www.lexology.com/library/detail.aspx?g=42ecdbca-65c4-4468-8a9e-514a86132ae0>

⁸¹⁵ Case Credit Lyonnais: the Court of Cassation confirmed the cancellation of the arbitration in favor of Bernard Tapie, by Francetv Info and Reuters France Televisions, June 30, 2016, available online https://www.francetvinfo.fr/politique/affaire/bernard-tapie/affaire-credit-lyonnais-la-cour-de-cassation-confirme-l-annulation-de-l-arbitrage-en-faveur-de-bernard-tapie-qui-devra-rembourser-405-millions-d-euros-a-l-etat_1524729.html

⁸¹⁶ French Court of Cassation, First Civil Chamber, Judgment No. 932 of 30 June 2016 (15-13.755; 15-13.904; 15-14.145) - ECLI: FR: CCASS: 2016: C100932, available online https://translate.googleusercontent.com/translate_c?depth=2&hl=en&prev=search&rurl=translate.google.com&sl=fr&sp=nmt4&u=https://www.courdecassation.fr/article34752&xid=17259,15700002,15700023,15700124,15700149,15700168,15700173,15700186,15700201&usg=ALkJrhMKRKHPFPL0hX-ejbyMGnHh8f-LQ

While the signatory to the agreement was the Egyptian General Organization of Tourism and Hotels (“EGOTH”), which is a government-owned company; the arbitral tribunal decided that Egypt could be nominated as a party in this arbitration since:

*“the transaction as a whole is to be viewed as a unified contractual scheme . . . the three parties were to be involved throughout the venture . . . the Claimant in future disputes might well have been either the Egyptian government or EGOTH or both”*⁸¹⁷

The French courts rejected this interpretation by the arbitral tribunal since the true party to the agreement was the company rather than the Egyptian government.

10. Lack of jurisdiction, the scope of the arbitration agreement: In *ETECSA*⁸¹⁸, the Paris Court of Appeal set aside an award regarding two loan agreements. The arbitral tribunal upheld jurisdiction on the two arbitration agreements, where the arbitration clause was undisputed in the first agreement but contented in the second, the Court was unable to sever the part related to the original loan agreement and the entire award was consequently set aside.

In this case, an arbitration case under the ICC Rules was commenced regarding a loan agreement by the claimant. The respondent submitted a counterclaim regarding a second loan agreement, which also contained another ICC arbitration clause but was seated in Madrid (as opposed to Paris in the first loan agreement). The claimant objected to the jurisdiction of the arbitral tribunal to hear any claim regarding the second loan agreement since the jurisdiction clause contained a different arbitration seat. The arbitral tribunal rejected this objection and issued an award regarding the two agreements on the basis that they were commercially connected.

The Paris Court of Appeal set aside the award on the ground of lack of jurisdiction over the second loan agreement in the absence of the mutual consent by the parties to bring the arbitration on the second agreement within the arbitration seat in Paris. The Paris Court of Appeal determined that the award related to the first agreement (where the tribunal had jurisdiction) was not distinctly separable from the second agreement (where the tribunal lacked jurisdiction), therefore, the entire award was set aside⁸¹⁹.

11. *Principe de la contradiction*: In a decision dated 23 June 2010, the French Court of Appeal set aside an award because it was based on legal grounds not raised by the parties and the arbitral tribunal did not provide the

⁸¹⁷ Paris Court of Appeal, *The Arab Republic of Egypt v Southern Pacific Properties*, 12 July 1984, published in English at 1984; (1986) 1 *Revue de l'Arbitrage* 75, see *Should the Setting Aside of the Arbitral Award be Abolished?* By Albert Jan van den Berg, available online https://www.arbitration-icca.org/media/4/92247683911386/media213982548067270van_den_berg_setting_aside_icsid_review_2014.pdf

⁸¹⁸ Paris Court of Appeal, Ch. Iere, section C, *Societe Empresa de Telecomunicaciones de Cuba SA (ETECSA) v Telefonica Antillana SA and SNC Banco Nacional de Comercio Exterior*, Paris Court of Appeal, Ch. Iere, section C, Decision of 16 November 2006

⁸¹⁹ Global Arbitration Review, *Arbitrability and Public Policy Challenges* by Elie Kleiman and Claire Pauly and Jones Day, <https://globalarbitrationreview.com/chapter/1178487/arbitrability-and-public-policy-challenges>

parties a reasonable opportunity to present its views in this regard. Specifically, the Egyptian government argued before the court that:

“The arbitral tribunal relied on alleged rules of Egyptian law which were neither raised nor debated by the parties”

Therefore, the Egyptian government alleged that the arbitral tribunal violated the *Principe de la contradiction*, which was essential for the conduct of a fair hearing.

The Paris Court of Appeal agreed and determined that:

*“The arbitral tribunal has, without any adversarial argument, based its decision on the unenforced provisions of Articles 120, 121 and 142 of the Egyptian Civil Transactions Code, that the arbitrators have not so motivated their sentence by applying their reasoning to the elements discussed by the parties.”*⁸²⁰ [Emphasis added]. The decision was upheld by the French court of Cassation⁸²¹.

In this regard, it is important to remember that the French law guaranteed the right of each of the parties to have a reasonable opportunity to plead its case (*Droit de la defense*) and to have the parties opposing views on the case (*principe du contradictoire*). This means that no evidence or argument should serve as a basis for an arbitral award unless the parties are given reasonable opportunity to defend, plead, and comment on such grounds⁸²².

12. *Principe de la contradiction*: In a similar decision dated 25 March 2010, the Paris Court of Appeal set aside an arbitral award on the grounds that the tribunal denied the parties’ due process by failing to invite the

⁸²⁰ Court of Appeal of Paris, June 19, 2008, 06/17901 | Legifrance

⁸²¹ French Court of Cassation, *Gouvernement de la Republique arage d’Egypte v. societe Malicorp Ltd*, Ch. Civ. Jere, 23 June 2010, [2011] Rev Arb 446

⁸²² Paris Court of Appeal in *Burkinabe des Ciments et Materieux (CIMAT) v Societe des Ciments dAbidjan (SCA)* [2001] Rev Arb 165.

- See also *Paris Court of Appeal in Guignier v HRA Europe* [2001] Rev Arb 199, See *Defining 'arbitral awards': Supreme Court weighs in 29 November 2012* Contributed by Elie Kleiman of Freshfields Bruckhaus Deringer LLP, <https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/France/Freshfields-Bruckhaus-Deringer-LLP/Defining-arbitral-awards-Supreme-Court-weighs-in;>
- Paris Court of Appeal in *Societe Fashion Box Group SPA v Societe Al Heelstone LLC* [2006] Rev Arb 857;
- Paris Court of Appeal in *Societe Leng d’or v Societe Pavan SPA* [2007] Rev Arb 933;

parties to submit their pleas on the points and issues relied upon by the arbitrator in the award. Therefore, the tribunal violated the *principe de la contradiction*⁸²³.

13. Arbitrator's Impartiality and procedural estoppel: In *Avax v Tecnimont*⁸²⁴ an ICC award was annulled by the Reims Court of Appeal⁸²⁵. The Chairman of the arbitral tribunal failed to disclose links between the law firm he was employed in and one of the parties (the claimant in the arbitration). The Chairman of the tribunal was an "of counsel" with a major law firm and was personally unaware of any links between his law firm and the claimant. The chairperson of the tribunal had not acted for the claimant or any related companies, but other lawyers at his law firm had acted as counsel and arbitrators in six different matters involving the claimant parent company and subsidiaries. The chairperson of the tribunal had issued an inaccurate declaration of independence by failing to indicate the ties from the outset. He only acknowledged them reluctantly, after multiple requests from the respondent over an eight-month period⁸²⁶.

Although the chairman in this case did disclose that the law firm he was employed at had represented the claimant's parent company and indicated that he had never worked on this case, the respondent discovered later that the chairperson's firm had acted on the claimant's parent company's behalf six months before the chairman's appointment. The firm advised the claimant shortly before the chairperson's appointment and represented a subsidiary of the claimant on a matter that was still being prosecuted during the arbitration and that the firm had advised a subsidiary of the claimant on a tax issue.⁸²⁷

Despite these circumstances, the court acknowledged that the party opposing the enforcement (the respondent) was aware of the conflict of interest during the arbitral proceedings and did not contest the impartiality of the arbitrator within the 30 days allowed as per the ICC rules. However, the court determined

⁸²³ Paris Court of Appeal, March 25 2010, *Société Overseas Mining Investments Ltd v Société Commercial Caribbean Niquel SA*, 08/23901, Rev Arb 2011, (confirmed by Cass Civ 1, June 29 2011, *Société Overseas Mining Investments Ltd v Société Commercial Caribbean Niquel SA*, 10-23.321, Rev Arb 2011)

⁸²⁴ Reims Court of Appeal, in *SA J & P Avax v. Société Tecnimont SPA*, case number 10/02888, 2 November 2011, see Reims Court of Appeal sets aside ICC award for Chairman's lack of independence by Brendan Green (Associate), Herbert Smith LLP, Practical Law, <https://uk.practicallaw.thomsonreuters.com/7-514-2915?transitionType=Default&contextData=%28sc.Default%29>, Paris Court of Appeal judgment in *Tecnimont (SA J&P Avax SA v. Société Tecnimont SPA)*, Court of Appeal of Paris, 12 February 2009, Rev. Arb. 2009.186, note Clay)

⁸²⁵ Conflicts of Interest: Towards Greater Transparency and Uniform Standards of Disclosure? By Alexis Mourre of Castaldi Mourre & Partners May 19, 2009, available online http://arbitrationblog.kluwerarbitration.com/2009/05/19/conflicts-of-interest-towards-greater-transparency-and-uniform-standards-of-disclosure/?_ga=2.227157341.1961107476.1532730615-1500510953.1531935988

⁸²⁶ *Tecnimont SPA v. J&P Avax*: France's highest court reinforces the legal status of arbitration rules, by White and Case LLP, 7 July 2014; <https://www.jdsupra.com/legalnews/tecnimont-spa-v-jp-avax-frances-high-41729/>

⁸²⁷ Court of Appeal Sets Aside ICC Award as Arbitrator Lacked Independence by Elie Kleiman of Freshfields Bruckhaus Deringer LLP, available online <https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/France/Freshfields-Bruckhaus-Deringer-LLP/Court-of-Appeal-Sets-Aside-ICC-Award-as-Arbitrator-Lacked-Independence>

that exceeding the 30 days' time-limit provided by the ICC rules does not mean that the party has waived its right to apply to set the award aside the award on this ground before the judiciary.

However, this decision was overturned by the French Court of Cassation⁸²⁸ and was sent back to the Court of Appeal and confirmed that any attempt to set aside an arbitral award must be within the timeline established as per the institutional rules that govern the respective proceedings.

The purpose of the duty to disclose is to provide the parties with all the relevant facts to enable them to decide whether to accept or to challenge an arbitrator's appointment.⁸²⁹

It is worth noting that the enforcement of the arbitral award consumed considerable time. Despite the arbitral award being issued on December 2007, it was only enforced on 12 April 2016 when the Paris Court of Appeal finally enforced the award after being set aside two times by the Reims Court of Appeal and the two decisions setting aside the award were overturned by the French Court of Cassation⁸³⁰. This may reflect that, despite France being one of the friendliest jurisdictions in enforcing arbitral awards, some reforms may be needed in order for an award, like in the present case, not to take almost nine years to enforce.

14. Arbitrator's impartiality: In *Tecso*⁸³¹ case, the Paris Court of Appeal set aside an arbitral award, as the co-arbitrator nominated by the respondent was an independent counsel with the law firm that represented the respondent and provided such law firm two or three legal opinions. The co-arbitrator however only provided vague disclosures as to this relationship. The Court of Appeal determined that these circumstances provide reasonable doubt as to the co-arbitrator's impartiality and independence. The French Court of Cassation overturned this decision for insufficient reasoning, as the Court of Appeal did not clarify how this relationship would have raised substantial doubt in the parties' mind as to the impartiality of the arbitrator. The court determined that:

"Without explaining how the connection was susceptible to trigger reasonable doubts in the parties' minds as to the arbitrator's independence and impartiality, the Court of Appeal had not enabled the Court of Cassation to

⁸²⁸French Court of Cassation in *Avax v Tecnimont*, First Civil Chamber, 25 June 2014, case number 11-26.529), available online

<https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000029153153&fastReqId=520105247&fastPos=1>. Also, see the decision of the French Court of Cassation in the *Tecnimont* judicial saga on challenge of an arbitrator by Laurence Franc-Menget by Herbert Smith Freehills LLP 3 July 2014, available online <https://hsfnotes.com/arbitration/2014/07/03/new-ruling-of-the-french-cour-de-cassation-in-the-tecnimont-judicial-saga-on-challenge-of-an-arbitrator/>

<https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000029153153&fastReqId=520105247&fastPos=1>

⁸²⁹ IBA Guidelines on Conflict of Interest in International Arbitration, approved on May 22 2004 by the Council of the IBA; explanation to General Standard 3

⁸³⁰ *Tecnimont Saga: Episode V – The Paris Court Strikes Back*, Clément Fouchard, August 3, 2016 <http://arbitrationblog.kluwerarbitration.com/2016/08/03/tecnimont-saga-episode-v-the-paris-court-strikes-back/>

⁸³¹ Paris Court of Appeal in *Tecso v. Neoelectra Group*, June 2, 1989, 1991 Rev. Arb. 87

*exercise its control to annul the award.*⁸³²

It is worth noting that the Chairman of the Arbitral Tribunal was a friend on Facebook of the defendant's counsel. The Court of Appeal held that this circumstance had no bearing on the arbitrator's independence or impartiality.

However, this long litigation was before the codification of the principle of procedural estoppel. Following codification of this principle on 13 January 2011, these objections would be dealt with more efficiently by French courts. Article 1466 of the CCP states that:

*"A party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity."*⁸³³

15. Arbitrator's Impartiality and independence: In the *Allaire*⁸³⁴ case, the Paris Court of Appeal annulled an arbitral award as the co-arbitrator nominated by the claimant had done significant consulting work for the law firm representing the respondent. The co-arbitrator in question admitted this fact but alleged that he did not do any work for this law firm since the beginning of the arbitration. The Court held that the co-arbitrator's relationship with the respondent's counsel was neither occasional nor had it happened in the distant past and concluded that such circumstances could give rise to reasonable and justifiable doubts in the claimants' eyes as to the impartiality of the co-arbitrator. The court found that Allaire raised its objections relating the co-arbitrator during the proceedings and reserved its right to raise it subsequently. As such, procedural estoppel did not apply in this case.
16. Arbitrator's impartiality: In *Nykool* case⁸³⁵, the Court of Appeal set aside an award due to lack of impartiality and independence of the arbitral tribunal where the tribunal members declined to provide any statement regarding their impartiality and independence, which was considered by the Court an instance that raises justifiable doubts in the minds of the litigant parties regarding the tribunal's impartiality and independence.
17. Excessive measure and public policy: The Paris Court of Appeal annulled an ICC award and found that the arbitral tribunal had committed an "excessive measure" since it decided to withdraw counter-claims that had been submitted by the respondent, which could not pay the costs of the counter-claim required by the arbitration institution due to its insolvency⁸³⁶. In typical circumstances, many institutional arbitrations' rules (including the ICC in France and DIAC in the UAE) entitle arbitral tribunals to consider a counterclaim withdrawn if the party raising the counterclaim fails to pay the advance on costs related to its counterclaim. However, having regards to the defendant's position in the present case being unable to meet this

⁸³² French Court of Cassation Cass Civ 1, 10 October 2012 Tecso, no 11-20.299 4.125

⁸³³ French Court of Cassation Cass civ 1, January 31 2006, *Intercafc v Dafci*, case number 03-19.054; French Court of Cassation; civ 1st, Liquidateurs of Sté Jean Lion v. Sté International Company for Commercial Exchange Income, May 6 2009, case number 08-10.281, JCP Edition Gen. 2009, see <https://www.mayerbrown.com/en/perspectives-events/publications/2010/07/coexistence-between-bankruptcy-and-arbitration-law>

⁸³⁴ Paris Court of Appeal, September 9 2010, *Consorts Allaire v SGS Holding France*, Rev Arb 2011, 686

⁸³⁵ and Paris Court of Appeal, March 10 2011, *Société Nykool AB v Société Dole France*, Rev Arb 2011, 732

⁸³⁶ Paris Court of Appeal, November 17 2011, *Société Licencing Projects SL v Société Pirelli*, RG: 09/24158.

obligation due to the insolvency proceedings against it, the court found that this action was an excessive measure and contrary to French international public policy.

18. Due Process: In a decision dated November 8 2016, the Paris Court of Appeal set aside an arbitral award⁸³⁷ based on the arbitral tribunal's failure to provide equal opportunity to each of the Parties to present its case. This arbitration was initiated against the Republic of Iraq during the time of the 2003 war. Iraq was not given the opportunity to present its case, organize its defense, or be represented properly in the arbitration to protect its interests. These facts were more relevant having regards to the circumstances of the case where the arbitration proceedings were commenced more than 15 years after the relevant facts related to the dispute took place, and only seven months after the beginning of the 2003 war against Iraq. Therefore, the court concluded that the claimant's behavior was abusive and took advantage of Iraq's venerable position where it lacked the opportunity to present its case before the arbitral tribunal.
19. Choosing a different arbitration center and public policy: In a dispute between a French company and a Chinese company, the French Court of Cassation in 2012 refused the enforcement of an award made by the China Economic and Trade Arbitration Commission (CIETAC), which was not acting in the capacity of arbitrator but rather the agreement provided that any dispute between the parties will be referred to CIETAC to *"to carry out a mediation and an arbitration."* However, the contract provided that any dispute should be finally resolved *"in accordance with the rules of conciliation and arbitration of the ICC."* Therefore, the court found that the arbitral award issued under the auspices of CIETAC was contrary to international public policy since the institution did not have the capacity to act as an arbitral institution in this dispute⁸³⁸.
20. Fraud and public policy: In this case, an award made by an ad hoc Swiss arbitral tribunal had ordered a French company to pay to an English company and an Israeli company an amount of more than USD 1,000,000. However, the Paris Court of Appeal found that the Israeli company was closed and non-existent, which constituted fraud in obtaining the arbitral award. In particular, the Paris Court of Appeal found that the arbitral tribunal *"upheld a money-laundering scheme allegedly apparent from the structure of the transaction at issue."* Further, the court found that *"the arbitral tribunal had supported a procedural fraud when it accepted to substitute in its award the name of an individual in place of that of one of the original*

⁸³⁷ Paris Court of Appeal, November 8 2016, *Gouvernement de la République d'Irak v Sociétés ThyssenKrupp et MAN*, 13/12002, see ⁸³⁷ [Paris Court of Appeal rules on Iraq war's impact on due process in](https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/France/Freshfields-Bruckhaus-Deringer-LLP/Paris-Court-of-Appeal-rules-on-Iraq-wars-impact-on-due-process-in-arbitral-proceedings) arbitral proceedings By [Elie Kleiman](#) and [Yann Dehaudt-Delville](#) of Freshfields Bruckhaus Deringer LLP, available online <https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/France/Freshfields-Bruckhaus-Deringer-LLP/Paris-Court-of-Appeal-rules-on-Iraq-wars-impact-on-due-process-in-arbitral-proceedings>

⁸³⁸ *French Court of Cassation, First Civil Chamber, 28 March 2012 Seribo v Cass Civ, 1st, 28 March 2012, No. 11-10347, Séribo / Hainan Yangpu Xindadao Industrial*

*claimants, which had been liquidated.*⁸³⁹ This was therefore done contrary to international public policy. The enforcement order was reversed.⁸⁴⁰

In fact, *“the nature of the fraud is not further explained in the case, which has been criticized by commentators for its lack of clarity.”*⁸⁴¹

21. Equality in appointing tribunal members and public policy: In *Ducto*⁸⁴² case, Ducto instituted an arbitration against two respondents under the ICC Rules. Each of the respondents demanded to choose its party-appointed arbitrator. However, this request was denied by the ICC, which requested the two respondents jointly appoint a single arbitrator. The French Court of Cassation set aside the award based on the arbitral tribunal’s failure to accommodate the respondents an equal opportunity with the claimant to appoint the tribunal members, which is contrary to public policy. The court held that *“equality of the parties in the appointment of arbitrators is a matter of public policy which can be waived only after the disputes has arisen.”*⁸⁴³ Following this case law, the ICC rules were amended to mandate that the ICC should select the arbitrators in case the arbitration involves multi-parties who fails to agree for an arbitrator.
22. Amiable compositeur: In the *Alea Europe case*⁸⁴⁴, the Paris Court of Appeal set aside part of an award on the grounds that the arbitral tribunal decided on all claims as amiable compositeur. The tribunal had therefore failed to comply with its mandate because one of the arbitration agreements, which did not authorize the tribunal for amiable compositeur. The Court set aside the part of the award affected by this irregularity.

⁸³⁹ See, FRANCE. Charles Nairac. White & Case, available online <https://docplayer.net/60015980-France-charles-nairac-white-case.html>, para 19

⁸⁴⁰ *SAS Sirec v Metalmonde Steel Lts*, Paris Court of Appeal, June 25, 2013, RG case number 12/01461, General Reports of the XIXth Congress of the International Academy

⁸⁴¹ See, FRANCE. Charles Nairac. White & Case, available online <https://docplayer.net/60015980-France-charles-nairac-white-case.html>, para 19

⁸⁴² French Court of Cassation, 7 January 1992, *Sociétés BKMI et Siemens v société Dutco* ("Dutco case"), [1992] Rev Arb 470, see Award Annulled Due to Withdrawn Counterclaims Introduced by Insolvent Defendant, 12 April 2012, Contributed by Elie Kleiman of Freshfields Bruckhaus Deringer LLP, available online <https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/France/Freshfields-Bruckhaus-Deringer-LLP/Award-annulled-due-to-withdrawn-counterclaims-introduced-by-insolvent-defendant>

⁸⁴³ *Siemens – Dutco Revisited? Balancing Party Autonomy and Equality of the Parties in the Appointment Process in Multiparty Cases*, Kluwer Arbitration Blog, October 15, 2010, by Dr. Stefan Kröll, LL.M., Rechtsanwalt, available online <http://arbitrationblog.kluwerarbitration.com/2010/10/15/siemens-dutco-revisited-balancing-party-autonomy-and-equality-of-the-parties-in-the-appointment-process-in-multiparty-cases/?print=print>

⁸⁴⁴ Paris Court of Appeal, *Alea Europe Ltd. [Switzerland] v. Liquidators of Compagnie Internationale de Caution pour le Développement [France]* pôle 1, ch. 1, 18 Feb. 2010, case no. 08/22135, available online <https://arbitrationlaw.com/library/paris-court-appeal-pole-1-%E2%80%93-1st-chamber-18-february-2010-al%C3%A9a-europe-limited-v-sa-icd-%E2%80%93>

§ 2 French Courts Denying Setting Aside Arbitral Awards in France

In order to demonstrate that France is one of the most supportive jurisdictions to arbitration in the world, set out below a sample of cases where annulment or opposing the enforcement of arbitral awards is sought by award debtors but such requests were rejected by the French courts.

1. EU Competition Law: The French courts (including the French Court of Cassation) refused to set aside an arbitral award based on an alleged violation of EU competition law that should have been applied by the arbitral tribunal. The court determined that in the absence of fraud or an obvious breach of the parties' agreement to arbitrate or other obvious violations of French public policy, the award cannot be investigated in full or set aside based on the alleged violation of EU competition law.⁸⁴⁵
2. Arbitrator's Impartiality: in a decision dated 25 June 2014, the French Court of Cassation refused to set aside an arbitral award due to lack of complete disclosures by the chairman of an arbitral tribunal.⁸⁴⁶

The facts of the case go back when a company named Group Antoine Tabet (GAT) had agreements with the Republic of Congo, meanwhile, a company named TEP (which was owned by Total Group) guaranteed certain payments from the Republic Congo to GAT under these agreements.

GAT initiated arbitration proceedings under the ICC rules but later applied to claim that the chairman of the tribunal was unfit to serve due to his position and ties with one of the parties as a director of the company that owns Total Group. It argued that the arbitrator's position in the group of companies that was guaranteeing any one of the parties' debts (including the award) is likely to affect its impartiality and independence of the arbitrator in this case.

The French Court of Cassation rejected this plea, refused to set aside the award, and determined that the arbitrator's relationship with the Total Group could not affect his judgment or independence since the financing guarantee contracts have no effect on TEP when it comes to paying the award. In other words, the outcome of the arbitration would have no impact on TEP or Total Group.

In this decision, the court took a deeply analytical approach and verified whether the arbitrator's undisclosed relationship with a dispute could cause any interest and therefore a potential conflict for the arbitrator. However, it would be by far more secure for arbitrators, litigant parties and the arbitral award if the arbitrator could disclose its relationship at an early stage of the dispute to avoid these arguments being used in courts.

⁸⁴⁵ French Court of Cassation, SNF SAS v Cytec Industries BV (Holland), First Civil Chamber, 4 June 2008, French Court of Cassation, Ch. Civ. 1ere, 4 June 2008, in which the French Court of Cassation explicitly reiterated the narrow approach to the application of public policy.

⁸⁴⁶ French Court of Cassation Groupe Antoine Tabet v. la République du Congo, Cassation First Civil Chamber, case number 11-16444, 25 June 2014, see French Court of Cassation refuses to set aside ICC award in favour of the Congo by Laurence Franc-Menget of Herbert Smith Freehills LLP, available online <https://hsfnotes.com/arbitration/2014/08/29/french-supreme-court-refuses-to-set-aside-icc-award-in-favour-of-the-congo/>

3. *Appel-nullité pour excès de pouvoir*: In a decision dated 7 October 2015, the *French Court of Cassation*⁸⁴⁷, denied a request to oppose an enforcement of an international arbitral award and determined that there is no "*appel-nullité pour excès de pouvoir*" available to challenge the judgment by the Court of First Instance to oppose enforcement of international arbitral awards. Rather, an action to oppose enforcement should be initiated as an appeal against the Exequatur order and should be based on limited grounds as set out in Articles 1492, 1520 and 1525 of the French Civil Procedure Code.

In this case, the Paris the Court of First Instance granted exequatur for the award. Later, the Paris Court of Appeal confirmed the exequatur.

The award debtor argued that although Article 1525 of the CCP permits the enforcement of the award, the judge of the Court of Appeal exceeded its powers since he failed to verify the existence of the award and the arbitration agreement as required by Articles 1514 and 1515 of the CCP.

Under French law, if a judge exceeds his or her powers, or commits a breach of a fundamental principle of law or public policy, and an ordinary appeal is not available, the decision can be challenged by the "*appel-nullité pour excès de pouvoir*"⁸⁴⁸.

The Court of Cassation confirmed that *appel-nullité pour excès de pouvoir* is not available to oppose enforcement of awards and reiterated that the limited grounds available to oppose enforcement of awards are those in Article 1520 of the CCP.

4. Jurisdiction on non-signatory: In *Dallah* case, the Paris Court of Appeal refused to set aside an arbitral award where the tribunal decided that it had jurisdiction over a non-signatory to the arbitration agreement. In enforcement proceedings, the UK Supreme Court⁸⁴⁹, applying French law, determined that the tribunal did not have jurisdiction over the Government of Pakistan, which was non-signatory to the agreement. Following the issuance of the award, the government of Pakistan initiated an action to set aside the award in France, and the Paris Court of Appeal denied to set aside the award⁸⁵⁰ on the following grounds:

⁸⁴⁷ French Court of Cassation Cass. Civ. 1^{re}, 7 Oct. 2015, F-P+B, case number 14-17.490, available online <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000031294703>

⁸⁴⁸ Appeal Against Order Granting Enforcement Only Permitted Under Limited Grounds Relating to Arbitral Award (French Court of Cassation) by Laurence Franc-Menget, Vincent Bouvard, and Peter Archer of Herbert Smith Freehills; available online <https://hsfnotes.com/arbitration/2015/12/04/appeal-against-order-granting-enforcement-only-permitted-under-limited-grounds-relating-to-arbitral-award-french-supreme-court/>

⁸⁴⁹ Paris Court of Appeal, *Dallah Real Estate and Tourism Holding Co. v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, Case No. 09/28533 17 February 2011; see Insight: In *Dallah*, the Paris Court of Appeal and UK Supreme Court Reach Contrary Decisions Applying Same Law to Same Facts, available online <https://www.whitecase.com/publications/newsletter/insight-dallah-paris-court-appeal-and-uk-supreme-court-reach-contrary>

⁸⁵⁰ *Ibid*

- Before entering into the agreement, the Government of Pakistan was Dallah's sole party negotiating the contractual terms.
- The Government of Pakistan was also involved in the contract performance, specifically there were two employees of the Pakistani Government involved in the performance of the contract.
- The Government itself terminated the contract rather than the signatory to the agreement.

5. Procedural Estoppel: In applying a similar principle of *Tecso* (set out in case number 14 of the preceding subsection), when the French Court of Cassation did not accept challenging an award since the petitioner failed to contest the arbitrator within the 30 days allowed in the ICC Rules, in *A Rahman Golshani v Iran*⁸⁵¹, the French Court of Cassation specifically applied the notion of procedural estoppel to deny setting aside an international arbitral award. The court determined that, the objecting party has participated without reservations in the arbitration proceedings. The same party was precluded from arguing before the judiciary that the underlying arbitration agreement did not exist or was null and void.

6. Sever Prejudice: in *Gold Reserve v Venezuela* case⁸⁵², the Paris Court of Appeal refused to stay the enforcement of a USD 713 million ICSID arbitral award⁸⁵³ against Venezuela and issued an exequatur order, based on Venezuela's application to set aside the award.

The Court rejected Venezuela's defense predicated upon that it would sustain "severe prejudice" if enforcement of such a high award amount is granted.

The court determined that this defense was irrelevant to the grounds to oppose enforcement of an award laid down in Article 1520 of the CCP. The court further determined that the execution of the arbitral award would not cause substantial doubt on the 'economic viability' of Venezuela, which should be assessed in the context of the country's resources as compared with the award amount. The court further emphasized the importance of the principle of immediate ex parte enforceability of arbitral awards laid down in Article 1526 of the Code of Civil Procedure.

The court also rejected Venezuela's sovereign immunity arguments in determining that the annulment grounds set forth by Article 1520 of the French CCP are irrelevant when assessing whether enforcement would cause "severe prejudice" to the award debtor's rights. Later on, the Paris Court of Appeal denied Venezuela's application to set aside the award⁸⁵⁴.

⁸⁵¹ *Rahman Golshani v de la République islamique d'Iran* / 01-15.912, [2005], Rev Arb 993, 06 July 2005, case number 01-15.912, Bulletin 2005 I CASE NUMBER 302 p. 252, summary available online http://newyorkconvention1958.org/index.php?lvl=notice_display&id=168&opac_view=6

⁸⁵² Paris Court of Appeal (ord), January 29 2015, *Bolivarian Republic of Venezuela v Gold Reserve Inc.*, case number 14/21103

⁸⁵³ ICSID Case ARB(AF)/09/1, *Gold Reserve Inc. v Bolivarian Republic of Venezuela*, September 22 2014, para 863.

⁸⁵⁴ Paris Court of Appeal in *Gold Reserve Inc. v. Venezuela*, Case No. 14/21103, 7 February 2017

7. Procedural Estoppel: The French Court of Cassation⁸⁵⁵ confirmed the Paris Court of Appeal decision⁸⁵⁶ and rejected an action to set aside an arbitral award. The court found a relationship between one of the parties and an arbitrator, where the arbitrator in this dispute was an arbitrator in a previous dispute where one of the parties was involved. Despite the arbitrator failing to disclose this material information, the concerned party did disclose the relationship. The other party (who later objected before judiciary) did not contest this relationship and continued in arbitration by signing the terms of reference without reservation. It was only until this party was discontent with the way the arbitration was proceeding and (probably felt that arbitration is progressing against its favor) that it started to object. Therefore, the court applied procedural estoppel and denied setting aside the award. Accordingly, objections need to be raised in a timely manner.

8. Allegation of Corruption: In *Gulf Leaders* case, the court dismissed a claim of corruption in concluding a contract that included an arbitration clause since the claim for corruption was neither proved by the arbitral tribunal nor to the court. However, the court established that it is entitled to review any claim of corruption or otherwise violation of international public policy based on fact and law and is not bound by the findings of the arbitral tribunal, the court determined that:

*“Where it is claimed that an award gives effect to a contract obtained by corruption, it is for the judge in set aside proceedings, seized of an application based upon article 1520-5° of the Code of Civil Procedure, to identify in law and in fact all elements permitting it to pronounce upon the alleged illegality of the agreement and to appreciate whether the recognition or enforcement of the award violates international public policy in an actual or concrete manner.”*⁸⁵⁷

9. In another decision⁸⁵⁸, the Paris Court of Appeal reached the same conclusion of *Gulf leaders* where the claim for corruption was not proven before the court (in addition to the arbitral tribunal) and the arbitral awards, as a consequence, were not set aside by the judiciary.

⁸⁵⁵ French Court of Cassation, France Telecom-Orange FCR v Equatorial Guinea, Cass. Civ. 1, 15 June 2017, case number 16-17.108

⁸⁵⁶ Paris Court of Appeal, September 22 2015, 14/17200, see Arbitrators' duty of disclosure by Elie Kleiman, Martin Brasart of Freshfields Bruckhaus Deringer LLP, available online <https://www.lexology.com/library/detail.aspx?g=435dba8f-5247-4ac3-8892-369d25018da8>

⁸⁵⁷ Paris Court of Appeal, Pôle 1, Ch.1, Gulf Leaders for Management and Services Holding Company (“Gulf Leaders”) v. SA Crédit Foncier de France, dated 4 March 2014, Rev. Arb. 2014.955, see the French Law Standard of Review for Conformity of Awards with International Public Policy where Corruption is Alleged; available online <http://arbitrationblog.kluwerarbitration.com/2014/12/10/the-french-law-standard-of-review-for-conformity-of-awards-with-international-public-policy-where-corruption-is-alleged-is-the-requirement-of-a-flagrant-breach-now-gone/>

⁸⁵⁸ Paris Court of Appeal in SAS Man Diesel & Turbo France (“Man Diesel”) v Sté Al Maimana General Trading Company Ltd (Pôle 1, 1er Ch., 4 November 2014) and Paris Court of Appeal, Pole 1 – First Chamber *The Republic of Congo v Commission Import Export SA “COMMISIMPEX”*, 12 June 2012; available online <https://arbitrationlaw.com/library/paris-court-appeal-1st-chamber-%E2%80%93-section-c-12-june-2012-republic-congo-v-commission-import>.

10. In Two other decisions⁸⁵⁹, the Paris Court of Appeal reached the same conclusion of *Gulf leaders* where the claim for corruption was not proven before the court (in addition to the arbitral tribunal) and the arbitral awards were not set aside by the judiciary.

§ 3 Enforcing awards in France even if set aside by the national courts of the seat of the arbitration

Another important feature of the French Courts is their acceptability of arbitral awards even if set aside in the country of the seat.

Indeed, the French case laws permitted courts to recognize and enforce arbitral awards that have been set aside in the country of origin. This attitude is illustrated by the Norsolor, Hilmarton and Chromalloy case laws.

This entails that the procedural law of the seat of the arbitration is not the sole source of validity of an arbitral award⁸⁶⁰

On the surface reading of the New York Convention, two opposing provisions may exist that could produce conflicting decisions as per the French courts:

Article V (1) (e) of the New York Convention states that:

*"Recognition and enforcement of the award may be refused . . . only if . . . the award . . . has been set aside or suspended by a competent authority of the country in which . . . the award was made"*⁸⁶¹

Article VII (1) provides that the Convention shall not:

*"Deprive any party of any right he may have to avail himself of an arbitral award in this manner and to the extent allowed by the law or treaties of the country where such award is sought to be relied on."*⁸⁶²

⁸⁵⁹ *Ibid.*

⁸⁶⁰ 'L'exécution des sentences annulées dans leur pays d'origine'. In English, The execution of the annulled awards in their country of origin; by Emmanuel Gaillard Emmanuel Gaillard, Professeur a l'Universite de Paris XII Professor at the Universite de Paris XII, available online:

https://www.shearman.com/-/media/Files/NewsInsights/Publications/1998/01/Lexcution-des-sentences-annulees-dans-leur-pays-d-origi_/Files/IA_JDI-Sentences-annulees-dans-leur-pays-d-origi_/FileAttachment/IA_JDI-Sentences-annulees-dans-leur-pays-d-origi_.pdf?la=en&hash=9A0EE9F57BE16D2C11BC8877153A8316C481D317

⁸⁶¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the New York Convention), 330 U.N.T.S. 38 (1959), Article V(1)(e)

⁸⁶² New York Convention, *supra* note 4, Article VII (1) which provides "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an

In substance, Article V (1) (e) of the New York Convention does not impose an obligation on the country where the enforcement of an award is sought to annul the award in case it was set aside by the country of origin. This Article states “may” which leaves it open for each country to decide on that based on its internal laws.

Article VII (1) does not derive any party seeking enforcement the benefit of any laws in France. Applying this Article, and having regards to Article 1502 of the French Code of Civil Procedure, which does not include, as one of the grounds to refuse enforcing an award, the ground that it has been set aside in its country of origin.

Article 1502 of the French Code of Civil Procedure states:

"An appeal against a decision which grants recognition or enforcement is available only in the following cases:

- *Where the arbitrator rules in the absence of an arbitration agreement or on the basis of an agreement that was void or had expired;*
- *Where the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly appointed;*
- *Where the arbitrator ruled without complying with the mission conferred upon him or her;*
- *When the due process has not been respected;*
- *Where the recognition or enforcement is contrary to international public policy"*

Therefore, the French jurisprudence confirmed that arbitral awards that were annulled in its state of origin might be enforced in France.

Therefore, many commentators maintain that France has a very liberal approach to the enforcement of annulled arbitral awards.⁸⁶³

As per the French courts' approach:

*"The place in which the arbitration was held is not the only connection between the arbitration and national legal orders: it would be perfectly proper to recognize an award in one state that had been set aside in another, the law of the seat of the arbitration having no precedence over the law of the place of enforcement"*⁸⁶⁴.

CASE LAWS ON ENFORCING FOREIGN ARBITRAL AWARDS IN FRANCE DESPITE BEING SET ASIDE IN THE COUNTRY OF THE SEAT

arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

⁸⁶³ Enforcement of Annulled Arbitral Awards in the United States: Is a Return to Chromalloy Warranted by Jessica Rodriguez

⁸⁶⁴ 'L'exécution des sentences annulées dans leur pays d'origine'. In English, The execution of the annulled awards in their country of origin; by Emmanuel Gaillard Emmanuel Gaillard, Professeur a l'Universite de Paris XII Professor at the Universite de Paris XII, available online:

https://www.shearman.com/-/media/Files/NewsInsights/Publications/1998/01/Lexcution-des-sentences-annulees-dans-leur-pays-d-origi_/Files/IA_JDI-Sentences-annulees-dans-leur-pays-d-origi_/FileAttachment/IA_JDI-Sentences-annulees-dans-leur-pays-d-origi_.pdf?la=en&hash=9A0EE9F57BE16D2C11BC8877153A8316C481D317

The Hilmarton Case

The *Hilmarton* case is well known among international arbitration specialists.⁸⁶⁵

The French Court of Cassation held that the recognition of an award in France that had been set aside in its country of seat or origin was not contrary to the French international public policy.

In this case, an English company Hilmarton instituted an ICC arbitration case for a breach of contract claim against a French company OTV.

The arbitral tribunal rendered the award in Geneva and dismissed this claim.

OTV brought an action in France to recognize the award, which was successfully recognized and enforced by the Paris Court of First Instance.

However, after enforcing the award in France, it was nullified in Switzerland; this decision was confirmed by the Swiss Federal Tribunal.

When the case was brought to the Paris Court of Appeal, the court was confronted with the legal question of whether to recognize in France an award that had been set aside in its country of seat and origin.

The Paris Court of Appeal and the French Court of Cassation answered to the affirmative. In a decision of March 23, 1994, the French Court of Cassation ruled that this award was:

*"An international award which was not integrated into the Swiss . . . legal order, such that its existence continued in spite of its being set aside and that its recognition in France was not contrary to international public policy"*⁸⁶⁶

The French Court of Cassation upheld the decision of the Paris Court of Appeal and dismissed the action to set aside the award, on the grounds that Article 1502 of the French Code of Civil Procedure, which does not include, as one of the grounds to set aside arbitral awards, the issue of setting aside the award in question in its country of origin.

The French Court of Cassation held that the recognition of an award in France that had been set aside in its country of the seat was not contrary to the French international public policy.

The French Court of Cassation held further that the international arbitral awards are not integrated into the legal order of any legal system and therefore continues to exist despite setting aside the country of origin.

⁸⁶⁵ French Court of Cassation dated 23 March 1994 / Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV), case number 92-15.137; summary available online http://newyorkconvention1958.org/index.php?lvl=notice_display&id=140

⁸⁶⁶ E. Gaillard, 1994 Journal du Droit International 701; Note, C. Jarroson, 1994 Rev. Arb. 377; Note, B. Oppetit, 1994 RTD COM. 702; XVIII Y.B. Corn. Arb. 663 (1993).

The Norsolor Case

A dispute arose in relation to the termination of a contract between the French company Norsolor and Pabalk, a Turkish company.

An ICC arbitral proceedings were instituted, seated in Vienna granted certain reliefs by the claimant.⁸⁶⁷ The award was partially set aside in Vienna; the award was then annulled by the Paris Court of Appeal based on Article V (1) (e) of the New York Convention.

The French Court of Cassation overturned the judgment of the Court of Appeal, citing Article VII of the New York Convention and Article 12 of the French CCP.⁸⁶⁸

The Chromalloy Case

Chromalloy, a US company and the State of Egypt entered into an agreement in 1988. Following the termination of this agreement by the Republic of Egypt, Chromalloy initiated an arbitration as provided by the parties in the contract. An award was rendered in 1994 in Cairo in favor of Chromalloy.

The Paris Court of First Instance allowed enforcement of the award in France, whereas the enforcement of the award was set aside by the Cairo Court of Appeal.

The Republic of Egypt filed an appeal against the enforcement order. The Paris Court of Appeal confirmed the enforcement order and dismissed the appeal.

The court relied upon the New York Convention and that the contracting states to the convention have implicitly consented to the exception under Article VII which provides that the provisions of the New York Convention may not deprive a party of any right it might be entitled to under the laws or treaties of the country where it seeks to enforce its award.⁸⁶⁹

The French Court of Cassation held that:

⁸⁶⁷ ICC Award No. 3131, 1993 Rev. Arb. 525.

⁸⁶⁸ French Court of Cassation 09 October 1984, First Civil Chamber, Société Pabalk Ticaret Limited Sirketi v Société Norsolor S.A. / case number 83-11.355; summary available online http://newyorkconvention1958.org/index.php?lvl=notice_display&id=118; see <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007014185>

⁸⁶⁹ Paris Court of Appeal de Paris, 14 January 1997, République arabe d'Egypte v Société Chromalloy Aero Services / 95/23025, summary available online http://newyorkconvention1958.org/index.php?lvl=notice_display&id=147

*"The award rendered in Switzerland was an international award that was not integrated into the legal order of that state, such that its existence continued despite its nullification."*⁸⁷⁰

The Putrabali Case

In the decision of *Putrabali*, the French Court of Cassation addressed the issue related to the enforcement of awards in France when such awards were annulled in the country of origin, even if the award was not a final award and was replaced by a final award that was subsequently issued.

The claimant is PT Putrabali Adyamulia ("Putrabali"), an Indonesian company, and the respondent is Société Est Epices (now Rena Holdings SA) ("SEE"), a French company.

The French Court of Cassation relied upon Article VII of the New York Convention⁸⁷¹, which does not deprive a party the right to rely on the laws of the country in which it seeks to rely upon the award⁸⁷² to seek enforcement. The court concluded that:

*"it was permissible for Rena Holdings to present in France the award made in London on 10th April 2001.....and to rely on the provisions of French law of international arbitration, which do not provide that the annulment of an arbitral award in its country of origin as a valid ground to refuse the recognition and enforcement of the award rendered abroad"*⁸⁷³.

The first award under the IGPA was in favor of Putrabali. However, SEE appealed to the IGPA Board of Appeal, which overturned the First Award and decided in favor of SEE (the Second Award).

Putrabali filed an appeal before the English Court under the English Arbitration Act, the judgment was in favor of Putrabali⁸⁷⁴.

⁸⁷⁰ French Court of Cassation dated 23 March 1994 / Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV), case number 92-15.137; summary available online http://newyorkconvention1958.org/index.php?lvl=notice_display&id=140

⁸⁷¹ Which provides that *"The provisions of the Convention "shall not ... deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon"*

⁸⁷² Enforcement of arbitral awards in France, Reed Smith LLP, 29 July 2008, <https://www.lexology.com/library/detail.aspx?g=296a065e-da7d-422c-b603-b7da54f4439c>

⁸⁷³ French Court of Cassation, 1st civ 29 June 2007, Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices / 05-18.053, summary available online http://newyorkconvention1958.org/index.php?lvl=notice_display&id=176

⁸⁷⁴ see *"The Intan 6 v.360a SN"* [2003] 2 Lloyd's Rep. 700)

The case was returned to the IGPA Board of Appeal, the IGPA Board of Appeal decided in favor of Putrabali (the “Revised Award”).

Unlike the Hilmarton case, the English courts did not annul the arbitral award; rather, it returned the award to the IGPA Board of Appeal that issued the final award on the case.

However, the difficulty started from the SEE’s action when, after the publication of the Revised Award, it applied to the Tribunal de Grande Instance in Paris and obtained an enforcement order (Exequatur) in relation to the Second Award.

Meanwhile, Putrabali brought an action to enforce the Revised Award in France.

This situation involving an order of enforcement for two contradicting awards was put forward to the French Court of Cassation.

In ordinary circumstances, Putrabali should be successful since the award issued in its favor is final, supersedes and replaces the Second Award. Meanwhile, the court should not ideally recognize the Second Award, which was actually non-existent and corrected by the Revised Award.

However, the court enforced the Second Award issued in SEE’s favor because the summary enforcement procedure of awards in France is a simple process involving an ex parte application with an original arbitration arbitral award and a translation. The exequatur is later served on the award debtor and could only be contested once served.

The Supreme Court confirmed the exequatur to the Second Award and refused to grant an exequatur to the Revised Award.

The French Court of Cassation upheld the decision of the Court of Appeal and determined that:

“An international arbitral award, which does not belong to any state legal system, is an international decision of justice and its validity must be examined according to the applicable rules of the country where its recognition and enforcement are sought”^{875 876}

§ 4 Comparison of Enforcing Domestic vs. International Arbitral awards in France

Issue	Domestic Arbitration	Foreign Awards
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⁸⁷⁵ French Court of Cassation, 1st civ 29 June 2007, Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices / 05-18.053, summary available online http://newyorkconvention1958.org/index.php?lvl=notice_display&id=176

⁸⁷⁶ Enforcement of arbitral awards in France, Reed Smith LLP, 29 July 2008, available online <https://www.lexology.com/library/detail.aspx?g=296a065e-da7d-422c-b603-b7da54f4439c>

Execution of an award	Exequatur ⁸⁷⁷	Exequatur ⁸⁷⁸
Right of appeal	<p>If enforcement is denied, the right of appeal exists.⁸⁷⁹</p> <p>If enforcement is granted, there is no appeal the exequatur but the award debtor can challenge as per the next point.</p>	<p>If the award is denied enforcement, the right to appeal exists.⁸⁸⁰</p> <p>The right to appeal the exequatur Exists. The award debtor can appeal that order on the same grounds as those provided for setting aside a Foreign arbitral award issued in France⁸⁸¹.</p>
In case no appeal to Exequatur, any other Challenge available?	<p>The award debtor can bring a petition to set aside the award⁸⁸² before the Court of Appeal⁸⁸³ at the place of issuance of the award.</p> <p>Grounds ⁸⁸⁴</p>	N/A

⁸⁷⁷ Article 1487 of the French CCP provides *“An arbitral award may only be enforced by virtue of an enforcement order (exequatur) issued by the Tribunal de grande instance of the place where the award was made.”*

⁸⁷⁸ Article 1516 of the French CCP provides *“An arbitral award may only be enforced by virtue of an enforcement order (exequatur) issued by the Tribunal de grande instance of the place where the award was made or by the Tribunal de grande instance of Paris if the award was made abroad”*

⁸⁷⁹ Article 1500 of the French CCP provides that *“An order denying enforcement may be appealed within one month following service (signification) thereof.”*

⁸⁸⁰ Article 1523 of the French CCP provides that *“An order denying recognition or enforcement of an international arbitral award made in France may be appealed.”*

⁸⁸¹ Article 1525 of the French CCP provides that *“An order granting or denying recognition or enforcement of an arbitral award made abroad may be appealed... the Court of Appeal may only deny recognition or enforcement of an arbitral award on the grounds listed in Article 1520”*

⁸⁸² Article 1491 of the French CCP provides *“An action to set aside an award may be brought except where the parties have agreed that the award may be appealed”*

⁸⁸³ Article 1494 of the French CCP provides *“Appeals and actions to set aside shall be brought before the Court of Appeal of the place where the award was made. Such recourse can be had as soon as the award is rendered. If no application is made within one month following notification of the award, recourse shall no longer be admissible.”*

⁸⁸⁴ Article 1492 of the French CCP provides *“An award may only be set aside where: (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) the award is contrary to public policy; or (6) the award failed to state the reasons upon which it is based, the date on which it was made, the names or signatures of the arbitrator(s) having made the award; or where the award was not made by majority decision.”*

	<ul style="list-style-type: none"> • The arbitral tribunal wrongfully found that it had, or did not have, jurisdiction. • An irregularity in the appointment of the tribunal. • Exceeding the substantive jurisdiction by the tribunal or failing to comply with its mission. • Failure to respect the principles of due process and fair trial (le principe de la contradiction). • Recognition or enforcement of the award conflicts with international public policy. 	
Enforcement Process	<p>- (Demande d'exequatur) The request consists of a short demand that is typically written by hand on the original or a copy of the award.</p> <p>- Copy of the arbitration agreement.</p>	<p>- Application for exequatur to Paris TGI (Article 1516, CCP).⁸⁸⁵</p> <p>- (Demande d'exequatur).</p> <p>- Copy of the arbitration agreement.</p>
	<p>neither a petition to set aside the award nor an appeal against the enforcement order suspends the forced execution of the award in France (Article 1526, CCP)^{886 887}</p> <p>Decree No. 2011-48⁸⁸⁸ put an end to the suspensory nature of the appeal, this decree facilitated the enforcement of arbitral awards</p>	

Section 3: Enforcing Arbitral awards in Other Jurisdictions

Following the study of the main rules applicable to arbitration and enforcement of arbitral awards in France, this chapter shall briefly study the procedures of the recognition and enforcement of arbitral awards in other

⁸⁸⁵ Article 1516 of the French CCP provides “An arbitral award may only be enforced by virtue of an enforcement order (exequatur) issued by the Tribunal de grande instance of the place where the award was made or by the Tribunal de grande instance of Paris if the award was made abroad. ...”

⁸⁸⁶ Article 1526 states “neither an action to set aside an award nor an appeal against an enforcement order shall suspend enforcement of an award.”

⁸⁸⁷ Article 1496 states that “unless an arbitral award is provisionally enforceable, enforcement shall be stayed until expiration of the time-limit set for appeals or actions to set aside, or upon the filing of an appeal or action to set aside during this period.”

⁸⁸⁸ French Decree No. 2011-48 reforming the law governing arbitration, available online in English http://www.sccinstitute.com/media/37105/french_law_on_arbitration.pdf

jurisdictions. This will constitute the basis for comparison with the UAE law in order to identify potential areas of improvements in the UAE law in relation to the practice and recognition of arbitration.

§ 1 Enforcing Arbitral awards in English Courts

Most arbitral awards in England, Wales, and Northern Ireland are enforced voluntarily by award debtors⁸⁸⁹. In addition, the English courts have a good record of enforcing arbitral awards.

There is a high evidentiary threshold to be met in order for the grounds for challenging awards under any of sections 66, 67 and 69 of English 1996 Arbitration Act to be met, and few and far between are those cases where the challenges have been found successful⁸⁹⁰.

For domestic arbitrations, the parties can agree on the form of an arbitral award (*section 52, Arbitration (International Investment Disputes) Act 1996*). In the absence of an agreement between the parties, the award must be in writing, signed by all the arbitrators, and indicates the reasons for the award.

Section 66 of the Arbitration Act of 1996 provides:

“(1) an award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

(2) Where leave is so given, judgment may be entered in terms of the award.

(3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award”

The national courts in England and Wales can enforce an arbitral award in the same way as a judgment or order of the courts.

Grounds to Refuse Domestic Awards’ Enforcement

Time: Challenges must be brought within 28 days of the date of the award; or any appeal, review or correction to the final award.

Grounds: There are only three grounds of challenge or appeal of an arbitral award:

⁸⁸⁹ Practical Law: Arbitration procedures and practice in UK (England and Wales): overview, Stephen Jagusch and Epaminontas E Triantafyllou Quinn Emanuel Urquhart & Sullivan LLP, available online:

[https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

⁸⁹⁰ English Courts Set Aside Award on Grounds of Serious Irregularity by Herbert Smith Freehills LLP, Kluwer Arbitration Blog, Maguelonne de Brugiere/March 24, 2015

First: Challenge to the tribunal's substantive jurisdiction (section 67, of the 1996 Arbitration Act).

Substantive jurisdiction is defined as (section 82(1), of the 1996 Arbitration Act) as:

- Where there is a valid arbitration agreement.
- Where the tribunal is properly constituted.
- Where matters have been submitted to arbitration in accordance with the arbitration agreement.

Second: Challenge on one or more of the grounds of 'serious irregularity' specified in the 1996 Arbitration Act. Although in practice, the evidentiary threshold for this ground is particularly difficult to satisfy under section 68, Arbitration Act⁸⁹¹.

Third: An appeal on the points of law (section 69, Arbitration Act), can only be brought with the agreement of all the parties to the arbitration or with the leave of the court, which has a high threshold of proof.⁸⁹²

Grounds to Refuse Foreign Awards' Enforcement

The New York Convention provides limited grounds for the courts to refuse to enforce foreign awards. These grounds are set out in the New York Convention. The courts in England may refuse to enforce an award for one of the following reasons:

- The Incapacity of a party to enter into the arbitration agreement.

⁸⁹¹ Section 68.2 of the Arbitration Act provides

"Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant

(b) the tribunal exceeding its powers...;

(c) Failure to conduct the proceedings in accordance with the procedure agreed by the parties..."

⁸⁹² Leave to appeal the arbitral award under this section 69 shall be given only *"if the court is satisfied—*

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) That, despite the agreement of the parties to resolve the matter in arbitration, it is just and proper in all the circumstances for the court to determine the question."

- The invalidity of underlying arbitration agreement under the law specified in the arbitration agreement or, if not specified, under the law of the country where the award was made.
- The Due process, where a proper notice was not served to any of the party of the appointment of the arbitrator or of the arbitration proceedings, or the party has been otherwise unable to present its case.
- The Lack of substantive jurisdiction where the award dealt with matters not submitted to arbitration.
- The composition of the tribunal or the procedure not having been in accordance with the agreement of the parties or in the absence of an affirmative agreement between the parties, the law of the country where the arbitration took place.
- The award is contrary to public policy to recognize or enforce the award.

International Conventions

The UK is a party to the following:

- The New York Convention, the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.
- Geneva Convention on the Execution of Foreign Arbitral Awards 1927, which covers a small number of additional countries that are not also signatories of the New York Convention.
- International Centre for Settlement of Investment Disputes Convention 1966, (ICSID Convention).

§ 2 Enforcing Arbitral awards in the United States' Courts

The US Federal Arbitration Act sets out the legislative framework for the enforcement of arbitration agreements and arbitral awards in the United States. It was passed in 1925.

The US Supreme Court confirmed four limited grounds for annulling an arbitral award⁸⁹³, namely

⁸⁹³ Section 10. of the US Federal Arbitration Act sets out the grounds for annulment, it states;

“(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

- (i) fraud by the opposing party in having the award
- (ii) corruption, lack of impartiality or other procedural irregularities by the tribunal by the tribunal,
- (iii) Lack of substantive jurisdiction by the tribunal.

The US Supreme Court established jurisprudence confirms the US Federal Arbitration Act's 'liberal approach supporting arbitration' when conducting a judicial review of arbitral awards⁸⁹⁴.

The US Supreme Court decisions ensure that the US Federal Arbitration Act must be broadly interpreted and applied by both state and federal courts in a manner that is supportive of arbitration. Parties seeking to enforce an arbitral award in the United States need not be concerned that 'any potential judicial hostility to arbitration'.

The US courts do not provide the same level of recognition of arbitral awards annulled in the country of origin as French courts do. Indeed, commentators confirm that:

"In the 1990s the *Hilmarton* case in France and the U.S *Chromalloy* decision in the United States seemed to indicate that French and U.S. case law was moving in a similar direction. In both cases, the courts enforced awards that had been set aside in their place of origin, not pursuant to the New York Convention, but on the basis of the more favorable provisions of domestic arbitration law. However, since then, the French and U.S. courts have taken diametrically opposed views. While the French courts continue to ignore foreign annulment decisions altogether and will enforce an international arbitral award regardless of what the home jurisdiction finds as to its validity, the U.S. courts have increasingly refused to enforce awards, which were set aside at the place of arbitration. U.S. courts will disregard a foreign annulment decision only if it fundamentally violates U.S. public policy"⁸⁹⁵

In most cases, arbitral awards that were set aside at the country of the seat are typically not enforced in the U.S and other countries pursuant to Article V(1)(e) of the New York Convention⁸⁹⁶. This does not apply to France, as studied earlier.

However, the following three cases provided contrary to the above rule:

In the US *Chromalloy*⁸⁹⁷ (as differentiated from French *Chromalloy* discussed before), the arbitral award was set aside in Egypt, the US courts successfully used Article VII and not Article V of the New York Convention to

(5) *Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."*

⁸⁹⁴ *Hall St. Assocs., LLC v Mattel* 552 U.S. 576, 588 (2008)

⁸⁹⁵ Christopher Koch, 'The Enforcement of Awards Annulled in their Place of Origin *The French and U.S. Experience*' (2009) 26 *Journal of International Arbitration*, Issue 2, pp. 267–292, see online <https://heinonline.org/HOL/LandingPage?handle=hein.kluwer/jia0026&div=19&id=&page=>

⁸⁹⁶ Kluwer Arbitration Blog Lorraine Brennan/October 15, 2014 /1 Comment JAMS Arbitration, Mediation, and ADR Services

⁸⁹⁷ *In Re Chromalloy Aero services and the Arab Republic of Egypt*, 939 F. Supp. 906 (D.C. Cir. 1996).

conclude that it must enforce the award that was annulled in Egypt because to decide otherwise would violate clear US public policy. *Chromalloy* was not followed in the US, and several subsequent cases rejected its grounds to ratify the award annulled at the seat.

In *Pemex Case*, the court ordered that an arbitral award that had been set aside by the Mexican courts could be enforced in the US^{898 899}.

Case Law *Commisa v Pemex*⁹⁰⁰

Commisa is a Mexican subsidiary of a US company, and Pemex a Mexican state-owned company. Just prior to and probably in anticipation of the arbitral tribunal for USD 300 million against the Mexican state-owned company, the Mexican government passed two laws that directly affected the dispute. The first law provided Mexico's court with the exclusive jurisdiction over claims relating to public contracts (under which the dispute in the arbitration arose)⁹⁰¹.

A second law provided that state-owned entities no longer had the right to arbitrate certain issues including the issue in the arbitration. As a result of these amendments, the award was set aside by the courts in Mexico. The US Company, Commisa, commenced proceedings to enforce the award in the US and simultaneously appealed to the Mexican court's judgment to set aside the award.

The US court enforced the award and its decision to enforce the award was then upheld by the Court of Appeal.

Chapter 2: Mitigating Factors to Arbitration Risks, Third-Party Litigation Funding

Having studied the considerable risks that are involved in the enforcement of the arbitral awards in the UAE and the extent to which the UAE departs from the other jurisdictions, it became evident that agreeing to arbitration rather than the judicial adjudication in the UAE involves high risks and inherent limitations.

These limitations are more relevant when realizing that arbitration is a relatively expensive dispute resolution mechanism.

⁸⁹⁸ The U.S Court of Appeals, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, No. 10 Civ. 206 (AKH), 2013 WL 4517225 (S.D.N.Y. Aug. 23, 2013).

⁸⁹⁹ Enforcement of Annulled Arbitral Awards in the United States, by Jessica Rodriguez

⁹⁰⁰ U.S Court of Appeals, *Corporacion Mexicana De Mantenimiento Integral v. Pemex*, Docket No. 13-4022 (2nd Cir. August 2, 2016).

⁹⁰¹ Reference : Hadeef and Partners, Arbitral award enforced after being set aside by Michael Dunmore

In 2013, the United Nations Conference on Trade and Development (UNCTAD) reported that arbitration center fees, tribunal fees and expenses, and experts' fees are, on average, exceeded USD 8 million per party per case.

A study of investor-state arbitrations carried out under the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID) concluded that between FY2011 and FY2015, on average, claimants and respondents incurred costs of approximately USD 5.6 million and USD 4.9 million, respectively per case⁹⁰².

Under these circumstances where arbitration is frequently expensive, results are inherently uncertain of any litigation and enforcement is having its own limitations, arbitration in the UAE can be argued to be cumulatively problematic.

One of the solutions to this outstanding problem is third-party litigation funding.

Litigation funding, is a practice that is common in many countries in the world, yet is more developed in Australia, the US, and England. It basically enables a party to litigate or arbitrate without having to pay for it, whether because they are unable to pay for it or because they do not want to take the legal risks associated with the legal proceedings.

Companies and individuals tend to focus on their core business domains and do not wish to bear the risks and cost of litigations, therefore, Litigation Funding Companies provide a reasonable solution to them by bearing almost the entire cost and other burdens of litigations on claimants' behalf, while managing to maximize their compensation.

In practice, many established businesses have meritorious claims, however, they prefer to invest their money into their businesses rather than investing in expensive litigation that they are not certain of their outcomes and prefer to leave that to specialized companies that can take legal and financial risks more prudently.

Third-party professional funders typically pay all of the costs associated with a dispute in return for a share in the final proceeds collected out of the dispute if the claim is successful. In case of no success, litigations funders receive nothing and lose their investments into the litigations.

Despite the considerable investments in litigation funding throughout the world, still the UAE is a very pre-mature market in this domain.

Commentators confirm that historically, "the Middle East has not been an area of mainstream activity in dispute resolution funding"⁹⁰³.

While there are a few examples of funded disputes in the UAE, "it is only recently that funding has started to gain more tangible traction with potential litigants and the market has shifted gear. This is in part due to

⁹⁰² Source: Queen Mary University of London & White & Case, 2015 International Arbitration Survey

⁹⁰³ Legal developments and funding in the UAE 27 June 2016, by *Keith Hutchison of Clyde and Co.*, <https://www.clydeco.com/insight/article/legal-developments-and-funding-in-the-uae>

increased knowledge and awareness of funding amongst litigants and lawyers in the region, while developments in local legal systems have helped to shape the landscape into one where funders are more ready to invest”⁹⁰⁴.

The Rise of Litigation Funding in the UAE

Undoubtedly, funders have been discouraged from pursuing meritorious claims. The main causes are:

1. Arbitration has traditionally faced challenges over the years in the UAE, particularly when it comes to the enforcement of awards, which is the main subject of this dissertation, therefore, the two issues are interrelated.
2. The institutional rules under the UAE’s major arbitral institutions do not provide for efficient proceedings for complex arbitrations including multi-party and multi-contract arbitrations.

The UAE arbitral institutions do not accept consolidation, interventions, joinder, parallel proceedings or class actions, where one of the parties (typically the respondent) object such process. Such inefficiency in the UAE arbitration centers produces proceedings that are entirely inefficient and deter or even make it impossible for funders to invest their money into meritorious claims in the UAE.

International Players

Investing in third-party litigation funding is a multi-billion business; examples of some funders include:

New Investments	Investment Amount in AED Millions	Issued Capital USD Millions
Harbour Litigation Funding	http://www.harbourlitigationfunding.com	620
Burford Capital	www.burfordcapital.com	500
Therium	http://www.therium.com	400
Bentham	http://www.benthamimf.com Recovered 1.6 B over 10 Years	200
Calunius	http://www.calunius.com	120
Total Issued Capital		USD 1,800

⁹⁰⁴ *Ibid*

In the UAE, there are three significant developments that changed the litigation funding horizon:

- (1) The rise of arbitration as a dispute resolution mechanism and parallel improvements in treatment of arbitration by the local courts; As previously reported, during 10 months in 2008, the Dubai International Arbitration Centre (DIAC), had cases totaling for 10 months in 2018 USD 5 billion⁹⁰⁵ with average value per case of USD 112 million in 2011⁹⁰⁶;
- (2) The establishment of the DIFC and ADGM Courts in Dubai and Abu Dhabi respectively, with specialized common law courts to support complex disputes. This sophisticated system has increased confidence in the UAE as a jurisdiction for both litigant parties and international funders; and
- (3) The Dubai and Abu Dhabi court fees are capped at AED 40,000 per contract per case in Abu Dhabi⁹⁰⁷ and in Dubai Courts⁹⁰⁸. In contrast, the DIFC Courts have a cap of USD 135,000 (AED 500,000) which is 13 multiples of the Dubai Courts in addition to fees related to legal representations usually payable to international companies familiar with the common law system, who are generally more expensive than the local lawyers are.

Financially, litigation funding is a high risk – high return business, therefore, the margins in litigation funding business are different from other businesses and management does not take cases unless they are confident by more than 96% that cases under typical circumstances will be successful.

Historically and scientifically, the losing cases for prudent litigation funders should not exceed 4% on average.

The following sections shall demonstrate the most common methods and challenges to financing construction claims in the UAE, including:

1. Funding delayed construction projects by the real estate developers
2. Funding canceled construction projects by the real estate developers.

Section 1: Claims for Damages in Real Estate Disputes under UAE law

§ 1 Legal Framework for Claims for Damages under UAE law

Article 308 of the UAE Civil Transactions Code states *“Under all circumstances and, if justified, the judge shall*

⁹⁰⁵ Reza Hashimiani, partner at Freshfields Bruckhaus Deringer in DIAC Conference 5 October 2016

⁹⁰⁶ MidEast construction disputes double in value Average value of regional construction rows hits USD 112m, by Construction Week Online, <https://www.constructionweekonline.com/article-17085-mideast-construction-disputes-double-in-value>

⁹⁰⁷ Abu Dhabi Court fees are established by Law No. 13 of 2017 concerning the Judicial Fees payable in Abu Dhabi, which repeals Law No. 6 of 2013 concerning the Judicial Fees in the Emirate of Abu Dhabi. This law has reinstated the cap on fees (civil and commercial) claims to be 5% of the claimed amount with a cap of AED 40,000.

⁹⁰⁸ The Dubai Law No. 21 of 2015 on Judicial Fees Payable before Dubai Courts, issued on 3 October 2015 and published in the Official Gazette Issue No. 389 (August 2015), which establishes of AED 40,000 per case

condemn the extortionist to pay damages as deemed adequate by him.”

Article 300 of the UAE Civil Transactions Code *“whoever impair or deteriorate the property of another, shall be liable to replace it.”*

As per Article 293 of the UAE Civil Transactions Code *“The right to have damage make good shall include moral damage, and any infringement of the liberty, dignity, honor, and reputation, social standing or financial condition of another shall be regarded as being moral damage.”*

Dubai Court of Cassation decision number 352/1995 stated *“Indemnity assessed by the judge shall include the loss sustained by the creditor as well as the lost profit provided it is the natural result of the breach of its obligations or delay in performing such obligations”*⁹⁰⁹.

Dubai Court of Cassation judgment number 239 / 2005 is very clear in this regard, it states:

“The Damages shall, under all circumstances, be assessed to cover the prejudice sustained and the lost profits, provided it is a natural consequence of the prejudicial act” and added *“the law does not prevent to calculate the lost profit as long as the person suffering the prejudice was aiming to have this income and that hope has acceptable reasons. Thus, if the lost opportunity is probable then it has to be compensated.”*⁹¹⁰

The same judgment held *“estimating the compensation is limited to the subject court decision as long as it separates each line item and identifies the value for each line item of compensation. However, there is no specific way to calculate compensation as the law did not determine that.”*

Lost profit: Dubai Court of Cassation decision number 205/2002 [Exhibit 3] and DCC decision number 51/2007 [Exhibit 8] awarded the loss of rent for an investor because of the contractor’s delay.

Also, the Abu Dhabi Court of Cassation held that:

*“The UAE Civil Code – articles 282, 291 and 293 provide that any harm done shall render the doer liable to make good the harm, and that the indemnity shall in all cases commensurate and be proportionate to the harm suffered and loss of profit, provided that that is a result of the harmful act. Loss of opportunity suffered by the employer in a construction contract in the exploitation and enjoyment of his building by unjustified non-performance on the part of the contractor of his obligations under the construction contract, or defective execution of the work precluding enjoyment of the land, will be an element of damage in respect of which an indemnity will be payable to the employer”*⁹¹¹

Differentiation between Direct losses and Consequential Damages

⁹⁰⁹ Dubai Court of Cassation Decision number 352 for the year 1995 dated 22 April 1995

⁹¹⁰ Dubai Court of Cassation Decision number 239 for the year 2005 dated 15 January 2006

⁹¹¹ Abu Dhabi Court of Cassation decision number 125 for the Judicial Year 1 dated 14 November 2007 [Exhibit 9]

There is certainly a misconception that loss of profits is a consequential loss. The scope of what the UAE law considers as direct losses is wide. The following categorizes the distinction between direct and indirect loss:

- i. Direct loss is the foreseeable damage arising naturally in the ordinary course of things, from the breach of contract⁹¹².
- ii. Indirect loss is not foreseeable, contemplated by the parties or a probable consequence of the breach of contract⁹¹³. It rather arises from an unusual circumstance of the case; therefore, it is not recoverable.

The UAE law's exclusion or limitation of "indirect and consequential losses" should not be construed to exclude loss of profits, where such loss is regarded as direct (a natural consequence of the breach), such loss of profit may be excluded if regarded indirect (not a natural consequence of the breach).

For that reason, Article 292 of the UAE Civil Transactions Code clearly states *"Damages shall, under all circumstances, be assessed to cover the prejudice sustained and the lost profits, and provided it is a natural consequence of the prejudicial act"*

In the normal course of things, that the delayed properties in dispute, when completed, will be either used by claimants or leased out. Therefore, property developers' deprivation to investors from such rental income or use of their properties during the delay period is typically considered by the UAE jurisprudence as direct loss and is generally recoverable.

However, the property developers' deprivation to claimants from his or her money would have been used to purchase other properties from desperate sellers during the financial crisis, despite being a reasonably sensible commercial argument, however, the UAE law does not recognize such unforeseen loss of profit, unless the seller is specifically aware that the claimant is engaged in this type of business.

§ 2: UAE Supreme Courts Judgments that awarded loss of Rent

The above principles are held by the following case laws:

The Dubai Court of Cassation awarded the loss of rent for an investor who suffered losses out of the contractor's delay. Decision number 205/2002 [Exhibit 4] states that:

"causing the miss of an opportunity to the employer to take advantage of his property and use it, due to non-performance by the contractor is a type of damage that must be compensated for the employer Since the judgment of the Court of Appeal did not scrutinize the loss of rent value for the period of delay, the judgment

⁹¹² The UAE Civil Transactions Code Commentary provides that direct damage occurs where the act causing the loss *"is done on the thing itself," in the present case, the harmful act is done on the Property itself, which is the main subject of the dispute; therefore, the Objecting Parties are direct perpetrators. Such offense directly caused damage to the Claimant.*

⁹¹³ Direct or indirect loss? By Peter Godwin, Dominic Roughton, David Gilmore and Emma Kratochvilova of Herbert Smith Freehills LLP; <https://www.lexology.com/library/detail.aspx?g=dc64e7bb-dc6e-4de6-8cad-558ea017b374>

*was erred and therefore annulled*⁹¹⁴.

Similarly, and even more strictly, DCC decision number 51/2007⁹¹⁵ [Exhibit 8] compensated a landlord for the loss of rent caused by the contractor's negligence to build a swimming pool in the building.

The judgment compensated the property owner for the following losses the property owner suffered by missing the swimming pool in his building:

- (1) The loss value of rent which was realized as a result of the due to the apartments and shops not being leased as fast as expected,
- (2) The loss of rent due to leasing the properties at a lower value than the value that could have been leased at if the pool was there; and
- (3) The loss of rent due to certain tenants left the building since the pool facility was not built.

Abu Dhabi Court of Cassation Judgments to Award Deprivation of Money

Further, the ADCC compensated a claimant for deprivation from its money during the delay in the construction period as compared with the contractual completion date, failing which, the reasonable completion date as per the industry practice. The ADCC Decision number 859 / 2010 [Exhibit 1] held that:

*"...and obliging the Defendant to pay back to the Claimants an amount of 1,373,600 AED, including an amount of two hundred thousand dirhams as compensation against depriving them of the paid amount along the delay period"*⁹¹⁶.

Section 2: Challenges facing Litigation Funders in the UAE:

This thesis is focused and concentrated on jurisdictional challenges in real estate disputes in the UAE, the research is not intended to discuss the merits of claims. However, this section shall discuss briefly the most common challenges facing litigation funders while dealing with the merits of real estate disputes and illustrate the methodology of UAE courts in dealing with such challenges:

The main topics include:

- **Effect of Global Financial Crisis on real estate projects in the UAE**
- **Real estate Completion Dates which are unspecified.**

⁹¹⁴ Dubai Court of Cassation judgment number 205 for the year 2002 dated 23 June 2002 [Exhibit 4]

⁹¹⁵ Dubai Court of Cassation judgment number 51 for the year 2007 issued on 29 April 2007 [Exhibit 8]

⁹¹⁶ Abu Dhabi Court of Cassation Judgment number 859 for the year 2010 dated 17 April 2011, [Exhibit 1]

- **Real estate Completion Dates which are anticipated.**
- **Reasonable Care Standard for real estate disputes**
- **Limitation of Liabilities under UAE law**

§ 1: Effect of Global Financial Crisis on real estate projects in the UAE

It is a public knowledge that the many real estate developers undertook significant miscalculated expansions in projects before the financial crisis that lead them to severe financial troubles once the financial crisis hit the UAE and the worldwide markets by late 2008 till 2013, which led to many real estate developers' restructuring and consequently in-ability to complete their commitments.

The Real Estate Regulatory Authority in Dubai (RERA) has not officially published the list of canceled projects.

RERA data reveals that since the beginning of 2009 until 2014; 253 projects were on hold⁹¹⁷.

The UAE official news confirm that:

"Eighteen developers have been listed on the court's website with the total number of canceled projects being 36. No date of when the information was uploaded has been mentioned on the website. The Dubai Court has put out a list of developers and their canceled projects."⁹¹⁸

As such, many real estate developers' obligations to customers was stopped due to non-availability of funds although investors paid most or at least part of the purchase price of their properties and such money should have been preserved by the real estate developers for the sole purpose of building investors' properties, albeit the legislation which enforces this action was not in place until 2008, however, proper practice of developers should, even without legislation, keep investors' money mainly for building their properties.

This presumably internal management failure for not preserving investors' money for building their properties cannot be used legally as an excuse to breach developers' obligations to customers.

On the contrary, during the crisis period, the construction cost was reduced by 20%⁹¹⁹ and this reduction might have reached in Dubai to 50% [Exhibit 57], that should have helped real estate developers to re-negotiate the contracts but the real estate developers' genuine problem is the waste of claimants' money that should have

⁹¹⁷ For full list of cancelled projects issued by Dubai Courts, see online

https://www.zawya.com/mena/en/story/List_of_officially_cancelled_projects_in_Dubai-ZAWYA20140609033034/

⁹¹⁸ For full list of cancelled projects issued by Dubai Courts, see online:

https://www.zawya.com/mena/en/story/List_of_officially_cancelled_projects_in_Dubai-ZAWYA20140609033034/

⁹¹⁹ Impact of Economic and Financial Crisis in the Construction Industry, by Professor PhD Tudor NISTORESCU PhD Student Cristina PLOSCARU University of Craiova, available online <https://mnmk.ro/documents/2010/3NistorescuFFF.pdf>

been allocated to the project not the restructuring at all.

It might be common for litigation funders operating or intend to operate in the UAE to face challenges by real estate developers that the global financial crisis inhibited them from satisfying their obligations to complete real estate projects as scheduled and in accordance with the terms prescribed in their contracts with investors.

Litigation Funders need to be aware that, in the UAE, Global Financial Crisis that occurred during 2008 until 2013 cannot be used to excuse to delay contractual obligations for real estate developers for the following reasons:

(A) When Global Financial Crisis took place on late 2008, many properties have been or at least should have been already started projects, contractors are on-site, money is paid by investors, the former is almost all that is needed by a developer to complete a real estate project

Therefore, arbitral tribunals are likely to consider that the effect of the Global Financial Crisis on projects that were commenced well before the Global Financial Crisis should have been completely avoided.

(B) The same principle above should be applied and becomes more relevant when the projects have completion dates that are close to the end of 2008 or 2009, such projects should have been started and should be on track before the global financial crisis even commences, therefore, arbitral tribunals are likely to consider that the financial crisis has no effect on such projects

(C) In order to assess the effect of the possibility of completing real estate projects during global financial crises, it is necessary to assess the performance of other developers in the ordinary skill and compare any defaulting developer to other developers in the same skill and scale. This concept is taken from the common law sources which tend to assess the "reasonable expectations" of a party to a dispute and whether such party is entitled to expect a certain performance of an adversary, as follows:

Since DIFC in Dubai is a common law jurisdiction, DIFC law defines "reasonable care" as:

The care which a person of ordinary care and skill, engaged in the type of activity in which the defendant was engaged, would have exercised; and

A professional person exercises reasonable care if he shows the standard of care of an ordinary skilled person exercising and professing to have the special skill in question.

Therefore, in an attempt to prove the appropriate performance of real estate developers in the UAE during the global financial crisis, it is important to define the performance of comparable developers in the UAE.

In fact, many major developers in the UAE continued to meet their obligations and continued to deliver projects as illustrated from the audited financial statements of Emaar, Al Dar and Dubai Holding Commercial Operations Group LLC.

Emaar, Dubai Holding and Al Dar completed almost AED 49 billion worth of projects as per their audited financial statements which demonstrates that failure of real estate developers is clearly due to management failure and negligence in managing investors' money, as follows:

Emaar, the largest property developer in the UAE, completed properties that worth AED 9.6 billion

during 2008 and AED 6.2 billion during 2009⁹²⁰.

Dubai Holding Commercial Operations Group LLC the Group that 100% owns several property developers including Tatweer Dubai LLC, TCOM Investments, Dubai Properties LLC and Sama Dubai LLC, Dubai Holding Commercial Operations Group LLC completed properties that worth AED 3.4 billion during 2008 (including Land, Buildings and Infrastructure works) and AED 14 billion during 2009 (including land and buildings)⁹²¹.

Al Dar Properties, the Self-financed property developer operating in Abu Dhabi that is comparable to the Second Respondent in terms of skill and professional standard, Al Dar completed properties that worth AED 1 billion during 2008 and AED 14.5 billion during 2009⁹²².

During 2008, Al Raha Gardens phase 2 by Al Dar was substantially complete and 444 villas were delivered.

During 2009, several projects were completed by Al Dar and became operational as individual business units such as seven hotels and the Yas Marina

Therefore, in assessing the acceptability of real estate claims in the UAE and assessing whether the financial crisis can be invoked as a valid argument by real estate developers to be excused of performance, litigation funders must consider that major real estate developers in Dubai continued to deliver their construction projects during the global financial crisis.

In fact, real estate developers' failure to complete their projects as per their contractual obligations to investors cannot be attributed to Global Financial Crisis or restructuring their operations. The real reason for real estate developers' failure is non-compliance with law number 8 for 2007 issued by the Emirate of Dubai which preserves the rights of depositors and makes sure that depositors' money is kept into a project Trust Account in order to be safe from misuse by developers. The details of this law and application to real estate projects in Dubai will follow in the research.

More importantly, the UAE jurisprudence established that the financial crisis does not constitute exceptional circumstances that would allow companies to get out of paying their debts and satisfying commitments under Article 249 of the UAE Civil Transactions Code.⁹²³

As per the Dubai Court of Cassation decision number 200 / 2013 [Exhibit 2], Dubai Supreme Court considered 68% to 75% progress of completion at the anticipated completion date as negligence. That judgment was

⁹²⁰ Audited financial statements for Emaar Properties for the years 2008 and 2009.

⁹²¹ Audited financial statements for Dubai Holdings for the years 2008 and 2009

⁹²² Audited financial statements for Al Dar Properties for the years 2008 and 2009

⁹²³ Al Tamimi & Co, Dubai : The Global Financial Crisis And The Principle Of Exceptional Circumstances by Ahmed Allouz & Marwa El Mahdy, available online <https://www.tamimi.com/law-update-articles/dubai-the-global-financial-crisis-and-the-principle-of-exceptional-circumstances/>

referring to facts that took place during 2010 when the financial crisis was in place and the judgment did not give any consideration to that defense since it is entirely irrelevant to contractual obligations. The same findings were held by the Dubai Court of Cassation Judgment No. 379/2016 [Exhibit 7]

In this connection, the Dubai Court of Cassation held that the global financial crisis does not meet the criteria of sudden incidences which relieve a party from its obligation, it determined that:

“It is established in the judgment of this court that, in order to consider a sudden incidence as a force majeure, that it should be absolutely unpredictable and further impossible to execute the contract given such incidence, in case any of these conditions is absent then the force majeure does not exist.

It is established further that the global financial crisis does not meet the criteria of sudden incidences which relieve a party from its obligation.

Generally, the fluctuations in the money markets, commerce, and business normally occur after periods of stability. Similarly, the crisis occurs after periods of economic boom. All such incidences should be expected and should be obvious to any reasonably skilled person who should be diligent and alert.

The un-predictability of incidences that is a necessary condition for force majeure or sudden incidences should be absolute rather than a relative concept; the criteria here are based on the incidence itself, rather than the person dealing with the incidence. Making profits and losses in commerce and the business market is expected for any reasonable person”⁹²⁴

Similarly, the Dubai Court of Cassation found that:

“It is established in the judgment of this court that, in order to consider a sudden incidence as a force majeure, that it should be absolutely unpredictable and further impossible to execute the contract given such incidence, in case one of these conditions is absent then the force majeure does not exist.

It is established further that the global financial crisis does not meet the criteria of sudden incidences which relieve a party from its obligation. Generally, the fluctuations in the money markets, commerce, and business normally occur after periods of stability, similarly, the crisis occurs after periods of economic boom; all such incidences are expected and obvious to any reasonable person who should be diligent and alert.

The un-predictability of incidences that is a necessary condition for force majeure should be absolute rather than a relative concept, the criteria here are based on the incidence itself, rather than the person dealing with the incidence”⁹²⁵

The Dubai Court of Cassation stated in the same judgment that:

⁹²⁴ Dubai Court of Cassation decision number 124 for the year 2011, issued on 25 September 2011, Real Estate [Exhibit 10]

⁹²⁵ Dubai Court of Cassation decision number 529 for the year 2015, issued on 12 October 2016, Real Estate [Exhibit 11]

*"The financial unfavorable events occur frequently and could be anticipated in general"*⁹²⁶

Similarly, the USC held that:

*"If the contractor is in breach of his obligations to complete the work and does not comply with the conditions and specifications agreed, or if he departs from the principles of the trade or displays a shortcoming in technical competence or if he makes bad choices of materials used in the work or if his standard of care falls below that of the reasonable man in the performance of his obligation or if he delays in completing the work without reason, then his liability will be made out. In such event the head contractor may either demand specific performance of the contract, or he may require that the contract be rescinded"*⁹²⁷

§ 2: Properties Completion Dates which are unspecified

Litigation funders are further facing a question on the acceptability of real estate claims where the completion dates as per the agreements are entirely unspecified.

Funders coming from common law background are typically hesitant to accept such claims, especially when they do not see in agreements invoked by claimants that "time is of the essence"

"Time is of the essence" is a common law term that establishes that contracts' completion must be performed in a timely manner and that the time for completion of a contract is an essential contractual obligation⁹²⁸. Time is of the essence is not an implied term, therefore, time is not of the essence under common law jurisdictions unless the contract demonstrates otherwise.

However, even if time is of the essence and the delay was minor, the breaching party could be excused for that⁹²⁹.

A more effective term is an express statement in a contract that exceeding the completion date shall constitute a breach, where this term shall be enforced, even if such enforcement results in the forfeiture by the party who does not strictly comply with all terms of the contract⁹³⁰.

In contrast, under UAE law, any construction agreement must be performed in a timely manner regardless whether the contract stipulates that time is of the essence or whether the contract states that exceeding the

⁹²⁶ Dubai Court of Cassation Judgment number 200 for the year 2013 dated 6 October 2013

⁹²⁷ Union Supreme Court decision number 446 for the judicial year 21, issued on 15 May 2001

⁹²⁸ Bryan A. Garner, Edition (2001). *Black's Law Dictionary (2nd Pocket Edition)*. West Publishing Company. p. 584.

⁹²⁹ Supreme Court of Arizona "Foundation Development Corp. v. Loehmann's, Inc", 22 Ill.163 Ariz. 438, 788 P.2d 1189 (1990), see Case Briefs <https://www.casebriefs.com/blog/law/property/property-law-keyed-to-cribbet/non-freehold-estates-landlord-and-tenant/foundation-development-corp-v-loehmanns-inc/>

⁹³⁰ *The U.S Court of Appeals, Dove v. Rose Acre Farms, Inc.*, 434 N.E.2d 931, 1982 Ind. App. 1180, Case Briefs.

contractual hand-over date constitutes a breach.

It is fair to say that time is of the essence in almost all construction agreements as per the UAE jurisprudence. If no contract execution period was specified, the court will assume a reasonable period and consider any time beyond this reasonable period as a delay that entitles claimants for compensation.

Once again, the UAE law departs from common law jurisdictions in the definition of “reasonable time” for completion. In common law jurisdictions, reasonable time may excuse delay that can be reasonably required, based upon subjective circumstances such as unexpected weather⁹³¹

However, under UAE law the judge shall excuse performance for reasonable circumstances of delay, meanwhile, the UAE jurisprudence demonstrates less acceptability for excusing performance based on subjective circumstances as the common law jurisdictions do.

This is clarified by the Abu Dhabi Court of Cassation judgment 688 / 24 – Real Estate and ADCC 541 / 21 that defines the duties of the subcontractors in real estate projects as follows:

“If there is no time specified for performance, work must be executed in a reasonable period that allows such execution as per the nature of business. If the contractor fails to perform the duties or provides less than the reasonable care standard with no valid reasons then such contract shall be in breach and shall be liable for prejudice of the injured party”⁹³².

Further, ADCC judgment number 859 for 2010 [Exhibit 1] states that:

“The contractor to achieve an end may not be excused in his commitment by stating that he exerted all efforts to achieve that. Failure to achieve the ultimate end is a breach of the contractual obligation, which implies a contractual responsibility on the contractor’s shoulders. Unless the contract specifies a completion date for performing the commitments, such completion date must be specified according to the nature of transaction. The conventions and norms of this category of business that the contract belongs to, if the contract is from the nominated contracts and the nature of the transaction and the surrounding circumstances and the terms of the contract itself, if the contract is from the non-nominated contracts.”

The judgment further states that:

“It's shown that the defendant did neither specify a date for the commencement of the project nor a date for completing the property, the subject of the contract... in these circumstances the contract must be performed according to the requirements of goodwill. Non-specifying a date for the completion of the property, the subject of the contract, and non-setting a date for commencement or completion of the project does not leave the project execution to the petitioning company, indeed under these circumstances the contract must execute in a

⁹³¹ Bryan A. Garner, Edition (2001). Black's Law Dictionary (2nd Pocket Edition). West Publishing Company. p. 584.

⁹³² Abu Dhabi Court of Cassation judgment number 541 for the year 21 dated 15 May 2001

*reasonable period from the date of signing the contract for booking the unit in order to demonstrate the company's seriousness in executing the project*⁹³³.

§ 3: Anticipated Completion Date is not an Excuse to Default Contractual Obligations.

As demonstrated above, under UAE law, any construction agreement must be performed in a timely manner regardless whether the contract stipulates that time is of the essence or whether the contract states that exceeding the completion date constitutes a breach.

If no contract execution period was specified, the court will assume a reasonable period and consider any time beyond this reasonable period as a delay that entitles claimants for compensation.

In case a contract indicates a completion date, even as anticipated, the judge or arbitrator in this case shall be relieved from the burden of assessing the reasonable completion date, as it is the case if the completion date is unspecified, rather, the judge shall consider the anticipated completion date as the reasonable completion date that should be met by the parties.

In case the contract between a real estate developer and a purchaser in the dispute being considered by litigation funders specifies the completion date, this relieves the court or an arbitral tribunal to estimate the execution time as per the reasonable standards. This applies even if anticipated or even if the agreement provides that, the real estate developer puts itself under the obligation to exercise reasonable care to achieve this date rather than a firm commitment to meet it.

For that reason, Dubai Court of Cassation in its judgment number 200 / 2013 [Exhibit 2] considered anticipated completion date as a date that has to be met to complete the property and failure to do so is referred to by the Court of Cassation as 'negligence'. This is a clear description that since the anticipated completion date was mentioned by the parties in the agreement; parties should have meant to do so.

This interpretation in line with Article 265 (2) of the UAE Civil Transactions Code states that:

"If there is scope for an interpretative construction of the contract, an inquiry shall be made into the mutual intentions of the parties beyond the literal meaning of the words, and guidance may be sought in so doing from the nature of the transaction, and the trust and confidence which should exist between the parties in accordance with the custom prevailing in this transaction."

Once a property developer establishes an anticipated completion date, such developer is, or at least should be, with superior knowledge in his field and should be able to reasonably meet the anticipation they accepted in their contracts and as a consequence, investors acting in 'good faith' are entitled to expect that such contractual obligations are completed as anticipated

In typical cases that involve a delay in construction by property developers, claimants' burden of proof is discharged by showing that he had an entitlement to take over the property on a particular date and that the

⁹³³ Abu Dhabi Court of Cassation Judgment number 859 for the year 2010 dated 17 April 2011, [Exhibit 1]

real estate developer failed to meet this completion date.

In conclusion, having the completion date in an agreement defined as 'anticipated completion date' does not undermine an investor's case. Assuming that contracting parties fail to agree on either anticipated completion date or any date for completion at all, the UAE jurisprudence requires judges and arbitral tribunals to estimate a reasonable period for performance of contracts.

The anticipated completion date is a clearer contractual term to arbitrators than the reasonable time that they need to estimate in case no anticipated completion date is stipulated.

There is no construction contract under UAE law having an open-ended execution period.

Section 3: Limitation of Liabilities under UAE law

Another challenge facing third-party litigation funders in the UAE is the contracting parties' stipulations on limitation of liabilities. It is well known that the pillars of the contractual liability are contract breach, damage, and causal effect.

Litigation funders could be faced with a situation where the three pillars of contractual liability co-exist, however, the agreement limits the claimant's ability to claim damages, this section studies the extent to which these provisions are enforceable under UAE law.

§ 1: Legal Doctrine

Parties are free to negotiate and agree on the risk allocation against liability for damages caused by their ordinary negligence in the performance of contractual obligations.

However, a party establishing a waiver of liability to justify perpetrating unlawful acts is deemed to be misusing the waiver of liability clause. The mandatory provisions under the UAE deem this condition void.

In other words, parties cannot agree to a condition that entails 'waiver of liabilities arising out of unlawful acts'. The UAE law does respect generally the agreement contracting parties including limitation of liability. However, the UAE law does not permit a contracting party, to enjoy the benefit of a limitation of liability clause to avoid liabilities for its own unlawful acts, gross misconduct, or gross negligence. Any agreement to the contrary shall be void.

To illustrate this doctrine by an example using a rather academic approach, in case a doctor agrees with a patient for a limitation of liability clause, where the patient shall have no claim whatsoever against the doctor for the consequences of a surgery. Later, the patient faces serious consequence and finds out that the doctor is, in truth, a class teacher and the agreement contains no representation that the perpetrator is a medical doctor.

In case the doctor (who turned to be a class teacher) pleads that he had a limitation of liability clause for any accidents whatsoever, the judge applying the UAE law will dismiss this argument since, although the UAE law respects that parties' agreement, the person in our example acted in violation of an applicable regulating the medical practice cannot claim the benefit of any limitation of liability clause.

In this regard, Article 296 of the UAE Civil Transactions Code provides “Any condition purporting to provide an exemption from liability for a harmful act shall be void.”⁹³⁴

The official explanatory memo to this Article, issued by the UAE Ministry of Justice, states that:

*“This Article tackles a condition precedent of waiver of liability of a person for the unlawful acts perpetrated on another person causing him prejudice, the Article meant that this agreement is void, since it is contrary to mandatory provisions, since accepting such condition encourages the perpetration of prejudicial acts and incites for irresponsible acts”*⁹³⁵

The Dubai Court of Cassation determined that:

*“According to Article 296 of the Civil Transactions Code, (Any condition purporting to provide exemption from liability for a harmful act shall be void). It follows that, it is permissible for contracting parties to stipulate in the contract any conditions in their mutual interest or in the interest of one of them, including conditions to alleviate or increase the contractual obligations as long as such conditions do not contradict with any mandatory provisions and do not depart from the public policy. As such, it shall not be permissible to agree for waiver of liability for willful misconduct from the breaching party or any fraud or gross negligence”*⁹³⁶

The Dubai Court of Cassation held further that “the breaching party, in a contractual relationship, shall become liable for unlawful acts or gross negligence, since he is not allowed to violate the law in all cases whether the parties entered into a contract or not”⁹³⁷

In a case before the Abu Dhabi Court of Cassation, a contractor was aware that the building in a specific area is unlawful. The contractor entered into a waiver of liability clause with the employer for any damages out of this act. The court refused to give effect to this clause since the contractor cannot be protected for its unlawful acts.

In this regard, the employer in this case contended that:

“The contract also stipulates that in the case the Claimant was stopped from working by the municipality, it shall not take any responsibility because the Defendant did not provide it with the building license”

The court rejected this argument and stated that:

“Since the contract provided waiver of liability since the defendant did not provide the claimant the licenses, however, the claimant is a professional company in the construction business and knows that constructing the

⁹³⁴ Article 296 of the UAE Civil Federal Law No. 5 of 1985 as amended, Thomson Reuter’s translation

⁹³⁵ Official explanatory memo to Article 296 of the UAE Civil Federal Law No. 5 of 1985 issued by the UAE Ministry of Justice, Thomson Reuter’s translation

⁹³⁶ Dubai Court of Cassation decision 195 for the year 2003 dated 22 June 2003 [Exhibit 13]

⁹³⁷ Dubai Court of Cassation decision 41/2010

building without license is an unlawful act punishable at law and since it contributed and participated in this unlawful act, then the claimant is reckless with laws and regulations, the subject matter court concluded that the claimant was grossly negligent and refused to compensate it for its contribution in this negligence, since its behaviors was not compatible with the norms and this conclusion by the lower court is reasonable and supported by documents. Therefore, this petition is dismissed”⁹³⁸

The UAE law mandates that the contracting parties cannot agree against overriding mandatory rules, which are regarded as crucial to achieving justice and prevent abuse of the limitation of liabilities. Therefore, parties are precluded from limiting their liability and misuse that condition to commit unlawful acts, this condition shall be void to the extent the violation of law is concerned but will be valid to limit liabilities arising out of other obligations under the agreements.

The same statement above applies to the misuse of the limitation of liability to justify **willful misconduct and gross negligence**

In other words, parties cannot agree to a condition that entails that ‘limitation or waiver of liabilities arising out of unlawful acts’

The definition of gross negligence under UAE law can only be found in one case law where the Abu Dhabi Court of Cassation held that:

“The gross negligence is not the easy error, and which is a form of recklessness and lack of deliberation, but involves disregard for rights of others’ rights and material disregard to the obligations and laws without considering the probable damage that may occur to others as a result of this recklessness”⁹³⁹

In case the parties agreed for ‘limitation of liability for any acts whatsoever’, the unlawful acts must be excluded from this limitation of liability by the operation law.

Putting more emphasis on the violation of law (since gross negligence and willful misconduct require relatively higher threshold of proof), if one of the parties to a dispute commits an unlawful act, it cannot claim any benefit of its waiver of the liability since it is contrary to the UAE mandatory provisions pursuant to the following provisions:

(i) Article 296 of the UAE Civil Transactions Code and its Explanatory memo, which declares void any agreement for:

*“Waiver of liability of a person for the **unlawful acts** perpetrated on another person causing him prejudice since accepting such condition encourages the perpetration of prejudicial acts and incites for irresponsible acts”⁹⁴⁰*

⁹³⁸ Abu Dhabi Court of Cassation Decision No. 446 of 2010 Session 18/8/2010 (Commercial) [Exhibit 56]

⁹³⁹ *Ibid*

⁹⁴⁰ Official explanatory memo to Article 296 of the UAE Civil Federal Law No. 5 of 1985 issued by the UAE Ministry of Justice, Thomson Reuter’s translation

(ii) Dubai Court of Cassation 134/2006 [Exhibit 12], which held that:

*"It shall not be permissible to agree on waiver of liability for any act punishable under the penal code or any other specific laws"*⁹⁴¹

(iii) Dubai Court of Cassation 41 for 2010 which states that:

*"The breaching party, in a contractual relationship, shall become liable for unlawful acts or gross negligence, since he is not allowed to violate the law in all cases whether the parties entered into a contract or not"*⁹⁴²

§ 2: UAE Jurisprudence on limitation of liability as a mandatory provision

The UAE jurisprudences are settled that, by virtue of Article 296 of the UAE Civil Transactions Code, that any contractual agreement purports to limit a party's liability is void when the breaching party perpetrates any of the following acts:

- Violation of any of the applicable law (as per the explanatory memo above)
- Willful misconduct
- Fraud
- Gross or material recklessness

In case the breaching party perpetrates any of the above acts, the limitation of liability clause contained in an agreement is void, as a matter of mandatory rule under UAE law, that contracting parties cannot derogate from in their agreements.

In a case issued by the Dubai Court of Cassation, the breaching party argued that *"the agreement was entered into between parties included a provision that the defendant shall take the responsibility of damages, the Claimants have no right to be indemnified against any damage"*

The court dismissed the claim and determined that

"It is well established pursuant to the provisions of Article 383 of the Civil Transactions Code that it is permissible for contracting parties to include in the contract any conditions of their mutual interest or in the interest of one of them, including conditions to alleviate or increase the contractual liability or waiver of such liability as long as such conditions do not contradict with any mandatory provisions and do not violate the public policy.

As such, it shall not be permissible to agree on waiver of liability for any act punishable under the penal code or any other specific laws"⁹⁴³

⁹⁴¹ Dubai Court of Cassation decision 134 for 2006 [Exhibit 12]

⁹⁴² Dubai Court of Cassation decision 41/2010

⁹⁴³ Dubai Court of Cassation decision 134 for 2006 [Exhibit 12]

In another decision confirming the same principle, the Dubai Court of Cassation held that:

“Pursuant to Article 296 of the Civil Transactions Code, (Any condition purporting to provide exemption from liability for a harmful act shall be void). It follows that, it is permissible for contracting parties to prescribe in the contract any conditions in their mutual interest or in the interest of one of them, including conditions to alleviate or increase the contractual obligations as long as such conditions do not contradict with any mandatory provisions and do not depart from the public policy. As such, it shall not be permissible to agree for waiver of liability for willful misconduct from the breaching party or any fraud or gross negligence”⁹⁴⁴

In a third decision, the Dubai Court of Cassation determined that:

“Whilst it not permissible to use the law’s provisions in tortuous liabilities in considering breach of contract claims, since using tortuous claims provisions in deciding contractual relationships could disregard contractual provisions related to the liability of not executing the contract, which reduced the enforcing power of the contract.

However, the foregoing rules are limited to situations where the prejudice sustained by the injured party was a result of the breaching party’s unlawful acts or gross negligence. In this case, the breaching party, in a contractual relationship, shall become liable since he is not allowed to violate the law in cases whether he entered into a contract or not” ... the court then concluded that “any condition purporting to provide an exemption from liability for a harmful act shall be void.”⁹⁴⁵

In applying this mandatory rule, the UAE law follows a long line of similar provisions in other jurisdictions, which demonstrates familiarity with this doctrine. Mayer and Brown issued a report on the New York Courts’ position, which is very similar to the UAE courts’ position, it provides that:

“Courts will not enforce an exemption from liability if it applies to “harm willfully inflicted or caused by gross or wanton negligence.” It further adds that “even when parties limit liability but do not specifically exclude damages caused by willful misconduct or gross negligence, New York courts will not enforce the provision if the “misconduct for which it would grant immunity smacks of intentional wrongdoing”⁹⁴⁶

White and Case issued a similar report; it states that:

“As a general rule, New York common law instructs courts not to uphold liability disclaimers or limitations of

⁹⁴⁴ Dubai Court of Cassation decision 195 for 2003 [Exhibit 13]

⁹⁴⁵ Dubai Court of Cassation decision 41 for 2010 [Exhibit 14]

⁹⁴⁶ Mayer and Brown’s report “Limitation on Liability Exceptions for Gross Negligence and Willful Misconduct and the Implications for Outsourcing Agreements”, available online <https://www.mayerbrown.com/en/perspectives-events/publications/2013/08/limitations-on-liability-exceptions-for-gross-negl>

*liability for gross negligence or willful misconduct as a matter of public policy”*⁹⁴⁷

The English courts have a specific definition for recklessness, as follows:

The English Court of Appeal (James LJ, Kenneth Jones and Pain JJ) ruled:

*“A man is reckless in the sense required when he carries out a deliberate act knowing that there is some risk of damage resulting from that act but nevertheless continues in the performance of that act”*⁹⁴⁸

This effectively means that a deliberate act is ‘closing the mind to the obvious’

Similarly, the French law declares void any limitation of liability when there is a breach of an “essential obligations”, the French Court of Cassation states that:

*“The limitation of liability clause must be deemed unwritten when inserted in a contract ... since the carrier....failed to this essential obligation”*⁹⁴⁹

In the court wording:

“Whereas, in order to dismiss Banchereau's claim, the judgment holds that, although Chronopost did not respect its obligation to deliver the folds the day after the day of the expedition before noon, it did not, however, committed a gross negligence exclusive of the limitation of liability of the contract;

*Whereas in so doing, while a specialist in rapid transit guaranteeing the reliability and speed of his service, the Chronopost company had undertaken to deliver the folds of the Banchereau within a specified time, and because of the breach to this essential obligation the limiting clause of liability of the contract, which contradicted the scope of the undertaking given, was to be deemed unwritten.”*⁹⁵⁰

Conclusions

Article 296 of the UAE Civil Transactions Code, its explanatory memo and Dubai Court of Cassation 195 / 2003

⁹⁴⁷ In Sourcing and Licensing Agreements Governed by New York Law, Think Twice About a Gross Negligence Carve-out to a Limitation on Liability by Adam Chernichaw of White & Case LLP, available online <https://www.whitecase.com/publications/article/sourcing-and-licensing-agreements-governed-new-york-law-think-twice-about-gross>

⁹⁴⁸ Regina v G and R HL (House of Lords, [2003] UKHL 50, Opinions of the Lords of the Appeal for Judgment in the Cause Regina v. G and another (Appellants) (On Appeal from the Court of Appeal Criminal Division) On 16 OCTOBER 2003; available online, <https://publications.parliament.uk/pa/ld200203/ldjudgmt/jd031016/g-1.htm>

⁹⁴⁹ French Court of Cassation, Commercial Chamber, Public Hearing of Tuesday, 22 October 1996, CASE NUMBER of appeal: 93-18632, available online <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007035966> [Exhibit 54]

⁹⁵⁰ *Ibid*

and confirm that any agreement regarding limitation of liability does not grant immunity to the perpetrator of violation of applicable law, willful misconduct or gross negligence. This is a mandatory provision under UAE law, where parties cannot derogate from such provision or agree otherwise in their contracts, if they do, this will be void.

Based on this principle, the Dubai Court of Cassation decision number 134 for 2006 [Exhibit 12] nullified a limitation of liability clause and refused to immune a party who committed a violation of the law.

§ 3: Opinions of Law Firms

In recognition of this important doctrine in the UAE law, many law firms published articles and practice notes on this subject; this demonstrates the importance of this provision in the UAE law

Al Tamimi & Co. discussed a case where one of the sports organizers entered into a contract with spectators imposing a waiver of liability, Al Tamimi stated that:

*“However, under UAE law, a waiver of liability clause will usually not relieve from liability for failing to the premises or event reasonable safe for spectators”*⁹⁵¹

Baker Botts LLP issued a very useful study and confirmed that *“Clauses excluding and limiting liability are not unlawful per se in the UAE unless they seek to cover acts of fraud or willful misconduct, and subject to some statutory prohibitions”*⁹⁵²

*He reiterated that “This law is just one expression of the strong Middle Eastern legal principle in favor of producing justice between the parties in terms of outcomes”*⁹⁵³

A report by Clyde and Co. states:

*“Contracting parties cannot exclude liability in situations involving: (5) where there is evidence of willful (deliberate) breach and/or gross negligence”*⁹⁵⁴

⁹⁵¹ Al Tamimi & Co, report entitled Reducing Risk in Organizing Major Sports Events in the UAE, available online <https://www.tamimi.com/law-update-articles/reducing-risk-in-organising-major-sports-events-in-the-uae/>

⁹⁵² An international law firm with approximately 725 lawyers practicing throughout a network of offices around the globe

⁹⁵³ Stuart Jordan, a Partner Baker Botts LLP report entitled *“highlights the difficulties in making enforceable contract provisions for the limitation of liability in the UAE”*, available online http://www.gulfconstructiononline.com/news/1620988_Little-success-in-limiting-liability.html

⁹⁵⁴ “Clyde & Co.’s letter on liability in the UAE”, available online <https://www.oilandgasmiddleeast.com/article-11476-clyde--cos-letter-on-liability-in-the-uae>

Chapter 3: Proposed Improvements to the UAE Law and the UAE

Jurisprudence

The Federal Arbitration Law included some improvements compared with the Repealed Arbitration Chapter, however, these improvements are mostly irrelevant to the profound problem being addressed in this dissertation being the UAE courts' attitude to recognizing arbitral awards, which causes many arbitral awards to be annulled.

Under the Federal Arbitration Law, arbitral awards cannot be enforced by providing a declaration of enforcement or Exequatur, as the case in France. Rather, arbitral awards must be ratified and enforced by the Court of Appeal having jurisdiction⁹⁵⁵.

The action to set aside the award can be escalated to the Court of Appeal and the Court of Cassation⁹⁵⁶. Further, the enforcement of an arbitral award can, in some circumstances, be suspended until the Court of Cassation decides on the matter⁹⁵⁷.

Further, the grounds to set aside arbitral awards are substantial, where, if any of such grounds exist, the enforcement shall be refused⁹⁵⁸. The behavior of the UAE courts in setting aside arbitral awards magnifies this risk in future awards being enforced in the UAE.

Therefore, in order to conclude practical solutions of the problems being studied in this dissertation, set out below are the most important proposed amendments to the UAE laws and also the manner in which the UAE courts interpret and apply the doctrines of the UAE law. The purpose of this Chapter is to interpret the existing laws and suggest a new interpretation of laws in a manner that favors arbitration as a dispute resolution mechanism and the international practice of courts in other jurisdictions.

Furthermore, this Chapter demonstrates the most important grounds of annulment of arbitral awards in the UAE Law which are not modified under the Federal Arbitration Law.

⁹⁵⁵ Article 52 of the Federal Arbitration Law states "An arbitral award made in accordance with this Law shall be binding on the Parties, shall constitute res judicata, and shall be as enforceable as a judicial ruling, although to be enforced, a decision confirming the award must be obtained from the Court"

⁹⁵⁶ Article 54.1 of the Federal Arbitration Law states that "The decision of the Court in an action to set aside is final and can only be appealed in cassation"

⁹⁵⁷ Article 56.1 states that "an action to set aside an arbitral award does not stay its enforcement. Nevertheless, the Court seized of the action to set aside the award may order a stay of enforcement if so requested by a Party showing good cause."

⁹⁵⁸ Article 55.2 of the Federal Arbitration Law states that "The chief justice of the Court or whoever he delegates from among its judges shall order the arbitral award confirmed and enforced within sixty days of submission of the request for its confirmation and enforcement, unless it finds one or more of the grounds for setting aside the award under section 1 of Article 53 of this Law"

Section 1: Legislative Reforms

While the Federal Arbitration Law was issued on 16 June 2018, it does not introduce certain noticeable improvement as compared with the Repealed Arbitration Chapter of the UAE Civil Procedures Code that used to govern the arbitration procedures, especially with respect to the annulment of arbitral awards. Therefore, the large number of case laws confirming annulment of arbitral awards remains a continuing risk.

Further, the jurisdiction of DIFC Courts to recognize arbitral awards was curbed by the consistent decisions issued by the Joint Judicial Committee formed to resolve the conflict of jurisdictions between Dubai mainland and DIFC Courts in the years 2017 and 2018.

Therefore, enforcing arbitral awards on the mainland of the UAE, relying on the provisions of the Federal Arbitration Law, and by prosecuting actions before the UAE national courts remain the most frequently used venue to enforce arbitral awards in the UAE. This particular venue has significant limitations; therefore, the following legislative improvements are proposed.

§ 1 Limiting Grounds to set aside arbitral awards

Under French Law, and most arbitration laws, the grounds for nullity of awards are limited to the following:

- Incapacity of a party to enter into the arbitration agreement under the law applicable to that party.
- Invalidity of the arbitration agreement under the law specified in the arbitration agreement or, if not specified, under the law of the country where the award was made.
- Proper notice not having been given to a party of the arbitration proceedings, or the party has been otherwise unable to present its case before the arbitral tribunal.
- The award was dealing with matters not included within the terms of the submission to arbitration, or containing decisions on matters beyond the scope of the submission to arbitration.
- The composition of the arbitral tribunal or the procedures of the arbitration do not comply with the agreement of the parties or if there is no agreement, the law of the country where the arbitration took place.
- The award relating to a matter that is not capable of settlement in arbitration.
- Serious irregularity, related to the due process, equality between the parties or the principle of confrontation.
- The award is contrary to public policy.

The UAE Federal Arbitration Law is based upon the UNCITRAL Model Law. However, the following areas of legislative improvements are proposed to the UAE Federal Arbitration Law with respect to the grounds to set aside arbitral awards.

First : Ground to set aside an award under Article 53.1 of the Federal Arbitration Law, to be retained, repealed or modified	Suggested Improvement
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(a) That no Arbitration Agreement exists or such agreement is void or has lapsed under the law to which the Parties have subjected it or, failing any indication thereon, under this Law.	To delete the phrase “or has lapsed” which is not part of the UNCITRAL Model Law, this provision was used to set aside tens of arbitral awards as set out above. The remaining part of this Article is relevant to Article 36.a (i) of the UNCITRAL Model Law, not change proposed to it.
(b) That a party, at the time of conclusion of the Arbitration Agreement, was incompetent or under some incapacity under the law governing his capacity.	No change, relevant to Article 36.a (i) of the UNCITRAL Model Law.
(c) That a person does not have the legal capacity to dispose of the disputed right under the law governing his capacity, as provided for in Article 4 of this Law.	Not Relevant to either the UNCITRAL Model Law or the French CCP and should be deleted. Article 53.1(b) is sufficient for the matter of capacity to enter into arbitration agreements.
(d) That a party to the Arbitration fails to present its case because it was not given proper notice of the appointment of an Arbitrator or of the arbitral proceedings or because the Arbitral Tribunal breached due process or for any other reason beyond his control.	To replace “the Arbitral Tribunal breached due process or for any other reason beyond his control” with “the party against whom the award is invoked was otherwise unable to present his case.” The latter drafting is more specific and relevant to the particular issue of presenting the case rather than the broader definition of “due process.” While the due process is a ground to set aside arbitral awards (and 1492.4 and 1520.4), given the history of annulment in the UAE, the proposed amendment favors the wording of the Model Law. No change, relevant to Article 36.a (ii) of the UNCITRAL Model Law.
(e) That the arbitral award excludes the application of the Parties’ choice of law for the dispute.	No Change, albeit not part of the UNCITRAL Model Law but relevant to Articles 1492.3 and 1520.3 of the French CCP which provide that “the arbitral tribunal ruled without complying with the mandate conferred upon it.”
(f) That the composition of the Arbitral Tribunal or appointment of an Arbitrator was not in accordance with this Law or the agreement of the Parties.	No change, relevant to Article 36.a(iv) of the UNCITRAL Model Law, Articles 1492.2 and 1520.2 of the French CCP .
(g) That the arbitral proceedings were marred by irregularities that affected the award or the arbitral award was not issued within the specified time frame.	Not Relevant to the UNCITRAL Model Law. Both references relate to (i) “arbitral proceedings marred by irregularities that affected the award” and (ii) “arbitral award

	<p>was not issued within the specified time frame.”</p> <p>Should be deleted.</p> <p>Instead, specific procedures may be included as grounds for nullity, suggested wording includes:</p> <p>‘the award failed to state the reasons upon which it is based, the date on which it was made, the names or signatures of the arbitrator(s) having made the award; or where the award was not made by majority decision’ which are the procedures prescribed in Article 1492.6 of the French CCP.</p> <p>More details on this matter are set out later on this Chapter.</p>
(h) That the award contains decisions on matters not falling within the terms of the submission to arbitration or beyond its scope, provided that, if the decisions on matters submitted to Arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to Arbitration may be set aside	No change, relevant to Article 36.a (iii) of the UNCITRAL Model Law and Articles 1492.1 and 1520.1 of the French CCP.
Article 53.2(a) The subject-matter of the dispute is not capable of settlement by Arbitration	No change, relevant to Article 36.b (i) of the UNCITRAL Model Law.
Article 53.2(b) The arbitral award is in conflict with the public order and morality of the State.	No change, relevant to Article 36.b (ii) of the UNCITRAL Model Law.
Second: Ground to Set aside an award under Article 53.1 of the Federal Arbitration Law, to be Added⁹⁵⁹	Suggested Improvement
Another ground for nullity should be added to the Federal Arbitration Law to provide that “the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case”	This ground should be added to the Federal Arbitration Law in accordance with Article 53(a) (i) of the UNCITRAL Model Law.
The constitution of the arbitral tribunal should be added to grounds to set aside arbitral awards.	This ground should be added to the Federal Arbitration Law in accordance with Articles 1492.2 of the French CCP in order to set aside awards where for example the number

⁹⁵⁹ The title here is about limiting the grounds to set aside arbitral awards. However, adding these grounds should ultimately lead to limiting them since the list of grounds to set aside awards will be exhaustive. As such, the UAE judges will need to identify a particular ground in the list to set aside awards, which eventually will make it increasingly difficult to set aside awards.

Suggested wording proposes “the arbitral tribunal was not properly constituted”	of arbitrators or mechanism for choosing the tribunal members was violated. In addition, it might be considered in the frequent cases where the impartiality of an arbitrator is challenged.
While public policy is usually a ground to set aside arbitral awards even if not specifically stipulated by the law, however, it is desirable to add it to these grounds in order to have an exhaustive list of grounds in the Federal Arbitration Law.	This is relevant to Articles 1492.5 and 1520.2 of the French CCP.

Excluding Time-Limit of Awards from Grounds to Set Aside Arbitral Awards

Most jurisdictions do not regard exceeding the time-limit for issuing the final arbitral award as a ground for setting aside arbitrators’ award.

By way of example, the French *Conseil d’Etat* identified that the grounds for setting aside an arbitral “award are as follows:

- *Arbitrability: Where a public body enters into an agreement to arbitrate (or arbitration clause in an agreement) in violation of a rule or law that imposes resorting to administrative courts.*
- *Irregularities: including the circumstances where (i) the arbitral tribunal wrongfully upholds or declines jurisdiction, (ii) the arbitral tribunal is not properly constituted (including as to matters of independence and impartiality), (iii) the arbitral tribunal awards more than sought by one of the Parties, (iv) the arbitral tribunal does not respect due process or (v) the arbitral award does not provide reasons.*
- *Award contrary to public policy: including the circumstances where (i) an award where the underlying contract is illegal or contains sever irregularity, including lack of consent (ii) the award does not take into account rules and rights applicable to public entities, including the principle of the restrain transferability of certain property rights, and the principle that prerogatives in the public interest cannot be waived or (iii) the award does not take into account EU public order rules”⁹⁶⁰*

Therefore, the French law does not regard exceeding the time-limit for rendering the final award as a ground to set aside arbitral awards. Instead, the time-limit is rather a guide to arbitral tribunal’s in order to foster efficiencies and for the parties and the tribunal to organize their procedural timetable including their submissions, documents production, witness testimonies, oral hearings and other arbitral procedures.

⁹⁶⁰ Annulment of international arbitral award: the French Conseil d’Etat makes first foray into the fiefdom of the civil Cassation Court by Andrew Tetley and Aurélie Lopez of Reed Smith on 23 December 2016, available online <https://www.reedsmith.com/en/perspectives/2016/12/annulment-of-international-arbitral-award-the-fren>. Also see French Conseil d’Etat, Assembly, 9 November 2016, no. 388806, Société Fosmax LNG v. Groupement d’entreprises STS available online <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000033364623>

Other jurisdictions including the US, England, and Hong Kong do not regard exceeding the time-limit as a ground to annul an award.

In the UAE, the DIFC Arbitration Law and the DIFC-LCIA Arbitration Rules follow the same international standard and, therefore, do not stipulate a time-limit for the issuing of the final award. The agreement on the time-limit is regulated by the parties' liberty.

Similarly, ADGM Arbitration Regulations of 2015 contain no provisions regarding the time-limit.

Contrary to the above, the UAE Federal laws depart from the above rules. Article 42.1 of the Federal Arbitration Law states that:

"The Arbitral Tribunal shall issue a final award within the timeframe agreed by the Parties. Failing agreement on a specific time-limit or method of its determination, the award shall be issued within six months from the date of the first hearing of the Arbitration. The Arbitral Tribunal may extend the time for up to six additional months, unless the Parties agree to a longer extension."

The problematic part in this Article is that *"The Arbitral Tribunal may extend the time for up to six additional months, unless the Parties agree to a longer extension."*

Accordingly, if the 12 months' period allowed to an arbitral tribunal is exceeded, the arbitral tribunal does not have the power to extend the time period unless the parties agree or, where applicable, when the institutional rules permit that extension.

In practice, once parties reach the 12 months' period of prosecution, each party realizes its position in the arbitration and can predict the final outcome. The important issue here is where the party feeling arbitration is not proceeding in its favor could validly contest the time extension. Therefore, the arbitral award, under UAE law, would be in serious risk of being annulled.

Also, in practice, many arbitration proceedings require multiple extension of time and, therefore, exceeding the 12 months' time-limit is not a remote probability among arbitral tribunals, especially for cases that require many witnesses, expert witnesses or involve arbitrators who take cases more than their capacity to handle at the same time.

The above demonstration of the problematic nature of the time-limit caused the annulment of a substantial number of arbitral awards by the UAE supreme courts⁹⁶¹.

However, since legislative reforms are not foreseen now, there has been a recent positive attitude taken by Dubai Courts in order to interpret the parties' implied mutual agreement to extend the time-limit.

In the event that the parties continue an arbitration and decide not to submit their dispute to the court of law, then this should be interpreted under normal circumstances as an implied acceptance of any extension of time.

⁹⁶¹ This includes DCC 9 for 1996 dated 13 July 1996 [Exhibit 41], DCC Petition No. 141 of 2006, DCC decision 278 for 2008, DCC decision 128 for 2010, DCC decision 3 for 2010, DCC decision 573 for 2003, DCC decision 400 for 2001, DCC decision 157 for 2009 [Exhibit 44], USC decision 640 for 2002, USC decision 43 for 2003, Union Supreme Court Decision number 71 for the Judicial Year 20, USC 301 for Judicial Year 20, DCC decision 128 for 2010, DCC decision 148 for 2008

This fact becomes more relevant when the party pleading nullity of the award has submitted pleadings, attended hearings or engaged by any means in the proceedings following the expiry of the time-limit without contenting the expiry of the time-limit.

The Dubai Court of Cassation established that:

“the parties’ agreement to a certain date for issuing the arbitral award does not preclude them from agreeing subsequently explicitly or impliedly to extend the time-limit for a period or periods, delegating this extension to the arbitrator or by a courts order; provided that the extended duration is uninterruptedly linked to the previously set period, otherwise such extension will not be effective. The extension of the period to render an award cannot occur after the expiry of the previously set period”⁹⁶².

The reading of the extract of Dubai Court of Cassation’s decision in the foregoing paragraph demonstrates similarity with the text of DCC 9 for 1996 dated 13 July 1996 [Exhibit 41] set out above, however, this new text adds the implied or explicit agreement to extend the time-limit.

Further the same decision states that:

“the period for the extension of the award shall be linked by the mutual attendance of the parties to the arbitration proceedings and not pleadings explicitly and clearly the expiry of the arbitration agreement by exceeding the time-limit or once the arbitrator asks the court of law to extend the time-limit before the expiry of the time-limit”⁹⁶³

The Dubai Court of Cassation decision 39 / 2007 further held that:

“the court notes that the petitioner (the party pleading nullity of the arbitral award by exceeding the time-limit) did not claim explicitly nullity of the arbitration agreement by exceeding the time-limit for issuing the award, which as a consequence, an implied agreement to the extension of the time-limit, especially that the petitioner did not submit a document to prove that they claimed nullity of the arbitration agreement by exceeding the time-limit that was agreed upon or objected the extension”⁹⁶⁴.

Further, the Dubai Court of Cassation decision 405/2016 states that:

⁹⁶² The relevant decisions in this regard include:

Dubai Court of Cassation decision number 222 for 2006 Civil Dispute, dated 25 February 2007;

Dubai Court of Cassation decision number 405 for 2016 Real Estate Dispute, dated 8 March 2017;

Dubai Court of Cassation decision number 39 for 2007 commercial Dispute, dated 2 February 2007; and

Dubai Court of Cassation decision number 362 for 2011 Civil Dispute, dated 24 April 2012

⁹⁶³ DCC 222/2006 [Exhibit 54], 406/2016, 39/2007 and 362/2011

⁹⁶⁴ Dubai Court of Cassation decision number 39 for the year 2007 commercial Dispute, dated 2 February 2007

“The parties to the arbitration continued to attend before the arbitrator during the connected period and pleaded its documents; that necessitates dismissing this defense and ratifying the arbitral award”⁹⁶⁵.

In the same context, the Dubai Court of Cassation decision number 178 /1996 [Exhibit 3] held that:

“in case the litigant parties do not agree to a date for the issuance of the arbitral award then the mutual agreement to extend the time-limit is considered an agreement to arbitrate without a time-limit so it will be extended for six periods and so on until one of the parties declare their desire not to agree to renew the time period or to refer to the court in order to litigate the dispute” the same decision further held that “ the fact is, the parties dealt with the arbitrator for more than two years from the date of the first hearing session and submitted their pleadings, which is considered an implied agreement for the time-limit of arbitration while this period was uninterruptedly linked with the previous period”⁹⁶⁶

All the above decisions, provide an important principle, which is, if the party pleading nullity of the arbitral award before the UAE court on the basis of time-limit of an award does not prove that it contested the continuation of the arbitration, or alternatively leaves the arbitration proceedings and refers to the court of law, then the claim for nullity of the arbitral award shall not be accepted.

Unfortunately, this principle was taken by certain cassation decisions in Dubai and not taken in many other cassation decisions, especially in Abu Dhabi, USC, and Ras Al Khaimah.

In conclusion, the reforms suggested with regard to the time-limit of rendering an award are:

The initial suggestion to repeal Article 42.1 of the Federal Arbitration Law, which states that:

“The Arbitral Tribunal shall issue a final award within the timeframe agreed by the Parties. Failing agreement on a specific time-limit or method of its determination, the award shall be issued within six months from the date of the first hearing of the Arbitration. The Arbitral Tribunal may extend the time for up to six additional months, unless the Parties agree to a longer extension.”

In case this Article is repealed, then this problem would be solved from its roots.

Until such legislative reform, the UAE courts may consider applying the principles set out by the jurisprudence of the Dubai Court of Cassation whereby in case the party pleading nullity of the arbitral award before the UAE court on the basis of time-limit of an award, does not prove that it contested the continuation of the arbitration, or alternatively leaves the arbitration proceedings and refers to the court of law, then the claim for nullity of the arbitral award shall not be accepted.

Authority of DIAC Executive Committee to extend the time-limit

There is a contradiction between the Arabic and English versions of the DIAC Rules regarding the authority of the DIAC Executive Committee to extend the time-limit for rendering the final award. While the Arabic version appears to limit the Executive Committee’s authority to extend the time-limit for 6 months, the English version appears to provide this authority for multiple an open-ended period.

⁹⁶⁵ Dubai Court of Cassation decision number 405 for the year 2016 Real Estate Dispute, dated 8 March 2017

⁹⁶⁶ Dubai Court of Cassation decision number 178 for the year 1996, rights dated 25 January 1997 [Exhibit 3]

Article 36.4 of the DIAC Rules allows the DIAC Executive Committee to extend the time-limit for a period that is not entirely clear.

The DIAC Rules of 2007 provides *inter alia* that:

“(2) The time-limit within which the Tribunal must render its final Award is six months from the date the sole arbitrator (or the Chairman in the case of three arbitrators) receives the file (3) The Tribunal may, on its own initiative, extend the time-limit for up to additional six months (4) The Executive Committee may extend this time-limit further pursuant to a reasoned request from the Tribunal or on its own initiative if it decides that it is necessary to do so”⁹⁶⁷.

The Executive Committee’s authority under the DIAC Rules is realistically unclear for the arbitration community in the UAE since the DIAC Rules official English translation in the foregoing Article states that “The Executive Committee may extend this time-limit further” while the Arabic text of this Article provides “one additional period.”

The official decree setting forth the DIAC Rules as a law is issued in Arabic where in case of contradiction or difference, the Arabic version should prevail.

In fact, both the Arabic and English official translations do not provide the exact time frame for the DIAC Executive Committee to extend the time-limit. The Arabic version indicates “one additional period” while the English translation is wider in scope since it reads “further period.”

It is further important to rely on the Arabic version since any action for annulment before the Dubai Courts will consider solely the Arabic version of Decrees No. 11 for the year 2007.

In order to interpret the true meaning of the phrase “one additional period” ⁹⁶⁸ in the DIAC Rules and the exact time length of this period, we need to read the entire text altogether.

The paragraphs preceding the “one additional period” are indicating a period of six months for each time extension.

Therefore, reading of the phrase “one additional period” in this context shall normally mean ‘one additional six months’.

The Dubai Courts have shown different interpretations of this provision; there is no case law that specifies the interpretation of the additional period so far.

Whilst I personally argued this point before the Dubai Court of Cassation, the Court did not clarify the exact authority of the DIAC Executive Committee to grant multiple time extensions.

However, the Court of Appeal was of the opinion that such a period was open for the judgment of the DIAC Executive Committee since there is a specific limit for it. The court held that the period should not be limited as long as the law did not establish a clear limit for it.

⁹⁶⁷ DIAC Arbitration Rules of 2007, issued by Decree No. 11 for the year 2007 by H.H. the Ruler of Dubai on the 6th of May 2007

⁹⁶⁸ As read in the Arabic version of Article 36.4 of the DIAC Rules

In *MEF v Meydan* case, the Dubai Court of Appeal confirmed that the DIAC Executive Committee is authorized under Article 36 of the DIAC Rules to extend the time-limit to render the award without limit to the number of extensions⁹⁶⁹.

However, Meydan challenged this decision before the Dubai Court of Cassation, the decision was annulled by Dubai Court of Cassation⁹⁷⁰ not for reasons related to the multiple extensions by the DIAC Executive Committee. Rather, the court concluded that the agreement refers to the FIDIC Rules, which refers the arbitration to the ICC rather than DIAC arbitration. Therefore, the Meydan did not consent to submit this dispute to arbitration under DIAC rules, which was the basis for the court to annul the arbitral award.

Therefore, there is no case law that decided on the acceptability of multiple extensions by the DIAC Executive Committee, and arbitrators need to be careful of that.

In the absence of a case law to confirm the Court of Cassation's decision and in the light of the Arabic text, this thesis is of the opinion that under the DIAC Rules, arbitrators are allowed six months to render the award in addition to another six months on the tribunal's own initiative and an additional six months under the authority of the DIAC Executive Committee.

Therefore, it is recommended to amend the DIAC Rules' Arabic version and make sure that the DIAC Executive Committee has ample authority to extend the time-limit for multiple periods without limitations.

Nullity Due to Article 216.1 (c) of the UAE Civil Procedures Code (Article 53.1.g of the Federal Arbitration Law)

Relying on Article 216.1 (C)⁹⁷¹ of the Civil Procedure Code is a common cause of annulment of arbitral awards in the UAE. This Article permits to annul an award based on:

*"If there is a nullity in the award or a nullity in the proceedings having an effect on the award."*⁹⁷²

In fact, this provision is a very generic statement, which permits annulment of arbitral awards based on any misapplications of any procedures that affect the award. Historically, this provision was used for different reasons to annul awards, thus reducing the predictability of the UAE court system in accepting arbitral awards

⁹⁶⁹ Dubai Court confirms power of DIAC Executive Committee to extend time-limit for tribunal to render the arbitral award, by Craig Shepherd. Partner, Herbert Smith Freehills Dubai Office, available online:

<https://hsfnotes.com/arbitration/2014/06/10/dubai-court-confirms-power-of-diac-executive-committee-to-extend-time-limit-for-tribunal-to-render-its-award/>

⁹⁷⁰ Dubai Court of Cassation decision number 138 for 2014 - Commercial dated 9 July 2014.

⁹⁷¹ Article 216.1(C) of the Repealed Arbitration Chapter of the UAE CPC, which is the same wording in Article 53.1(g) of the Federal Arbitration Law

⁹⁷² Article 216.1(C) of the Repealed Arbitration Chapter of the UAE CPC, which is the same wording in Article 53.1(g) of the Federal Arbitration Law

since literally this allows a judge in the judiciary to hold any procedure in an arbitral award invalid and such invalidity affected the entire eventual award.

This is a subjective matter and in fact contradicts with other provisions in the UAE law that: *“The arbitrator shall issue his award without being bound by the procedural rules save as is provided for in this Chapter and the procedures relating to the summoning of the parties, the hearing of their arguments, and enabling them to submit their documents”*⁹⁷³.

The below analysis illustrates the frequency of using Article 216.1(c) (Article 53.1(g) of the Federal Arbitration Law) to annul arbitral awards that could have been otherwise ratified in case this Article is not articulated in the generic ambiguous manner:

1. Failure to Deliberate the Award between the Arbitrators: Failure to issue the award after deliberation between the arbitrators has been used as a ground to set aside awards based on Article 216.1(c) of the UAE Repealed Arbitration Chapter (Article 53.1(g) of the Federal Arbitration Law).

Deliberation requires all the arbitrators to be aware of the opinion of the other arbitrators and to have discussions between them in this regard. For instance, the USC annulled an arbitral award on the ground that one of the arbitrators departed from the UAE and did not attend the last hearing session⁹⁷⁴.

The court further established that deliberations are a condition for the validity of the arbitral award and as it is related to public order and is a condition to validity of deliberations, it should be conducted in confidence between all the arbitrators together as per Article 128/1 of the CPC. The court held further that it should not be permitted to have deliberations unless between the arbitrators who heard the pleadings, failing which, the award shall be annulled.

However, the ADCC decision number 486 for 2008 rejected this argument on the basis that the deliberations are assumed to have occurred in the proper order unless the objecting party proves otherwise⁹⁷⁵.

Therefore, repealing the controversial Article 53.1(g) of the Federal Arbitration Law shall resolve this inconsistent application of this Article by the UAE courts.

2. Arbitrators’ Failure to establish a date for the first hearing: The Dubai Court of Cassation determined that failure to refer to the date of first procedural hearing in the award shall be a ground to set aside the award. The court held that:

“the arbitrator’s award must include information on the date and place of issues, the objective of determination of the date of the first hearing and notifying the parties with such date and place is to enable the party to submit

⁹⁷³ Article 212.1 of the Repealed Arbitration Chapter of the UAE CPC, which is consistent with Articles 23.2 and 53.1(d) of the UAE Federal Arbitration Law which states that:

“where there is no agreement to follow specific procedures, the Arbitral Tribunal may adopt the procedures it considers appropriate, subject to the provisions of this Law and the absence of conflict with the fundamental principles of litigation and international agreements to which the State is party”

⁹⁷⁴ Union Supreme Court decision number 556 for judicial year 24 issued on 19 April 2005

⁹⁷⁵ Abu Dhabi Court of Cassation decision number 486 for the year 2008 issued on 30 October 2008

*their pleadings, defenses and requests and further to provide the basis for court to review and verify that the arbitral award was issued as per law before ratifying it and making sure that the award was issued in the time-limit established for issuing the award*⁹⁷⁶

3. Arbitrators' Failure to take an oath for witnesses in the format prescribed by the UAE law: The Dubai Court of Cassation determined the arbitrator informed the witness that "I have to inform you as a witness that you are under the obligation to say the truth, failing so, you might have serious consequences as a result. Are you aware of that? Then the witness confirmed"⁹⁷⁷.

4. Arbitrators' Failure to address the full name of the parties and date in the supplemental award: In ADCC Petition No. 296 of 2009 issued on 27 May 2009, the Abu Dhabi Court of Cassation annulled an arbitral award since the supplementary award that interprets the original award did not satisfy the formal requirements including the pleading sessions and names of parties.

5. Piercing the Corporate Veil: The DCC 277 for 2002 annulled a DIAC arbitral award for USD 13.4 million since the award was issued against the holding company that was a party to the arbitration agreement, yet the acts that were reviewed by the arbitrator were related to acts of a subsidiary of such holding company.

6. Awarding more than the relief sought by the winning party: In DCC decision No. 307 / 2002, the court annulled the award partially since the arbitrators awarded an interest that was not requested by the winning party to the arbitration as part of his relief sought.

7. Arbitrators awarded compound interest: In a case law, the USC annulled an arbitral award partially due to granting compound interest rather than simple interest⁹⁷⁸. The compound interest charges interest on interest periodically.

8. Nullity for arbitrators' failure to sign all pages of the award: The DCC 156 for 2009⁹⁷⁹ [Exhibit 45] established that as per Article 216.1.c of the CPC⁹⁸⁰, the signature of an arbitral award is an essential requirement since the signature is an essential evidence that the arbitrators were seized for and prosecuted the dispute from a legal standpoint and since, in the absence of the signature, the award cannot be related or traced to the arbitral tribunal.

Therefore, the Dubai Court of Cassation Decision number 233 for the year 2007 confirmed setting aside an award due to the arbitral tribunal's failure to sign both the dispositive part as well as the reasoning part of the award⁹⁸¹.

⁹⁷⁶ Dubai Court of Cassation decision number 344 for the year 2009 – Civil, issued on 28 March 2010

⁹⁷⁷ 2004 of *International Bechtel Co. Ltd. v. Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation decision number 322 for the year 2004 issued on 11 April 2005

⁹⁷⁸ USC decision number 11 for the judicial year 23, decision dated 19 May 2002

⁹⁷⁹ Dubai Court of Cassation Decision number 156 for the year 2009, Civil issued on 27 October 2009 [Exhibit 45]

⁹⁸⁰ Article 216.1(C) of the Repealed Arbitration Chapter of the UAE CPC, which is the same wording in Article 53.1(g) of the Federal Arbitration Law

⁹⁸¹ Dubai Court of Cassation Decision number 233 for the year 2007 - Civil - issued on 13 January 2008

The same principle was confirmed by DCC 391 for the year 2010 dated 26 October 2011, which confirmed setting aside the arbitral award dated 6 December 2009 due to the arbitrators' failure to sign both the dispositive part and the reasoning of the award.

9. The DCC set aside an award due to the arbitrator's failure to suspend the proceedings when one of the arbitrator's fitness to serve was being challenged: The Dubai Court of Cassation decision 75/2008⁹⁸² annulled an arbitral award under the DIAC Rules since the challenged arbitrator continued to take part of the proceedings despite having a challenge against him by one of the parties, who was the award debtor.

10. The DCC set aside an arbitral award due to the arbitral tribunal's failure to exhibit a copy of the agreement to arbitrate: in DCC 173 for 1996⁹⁸³, the court annulled an arbitral award due to the arbitrator's failure to exhibit a copy of the arbitration agreement even when a copy of the arbitration agreement was submitted separately to the court with the motion to ratify the award. The court reasoned that the arbitral award should include, in itself, have all the documents related to it.

As a proposed solution, another model to consider to replace this provision is Section 68.2 of the English Arbitration Act of 1996, which provides a specific definition of 'serious irregularities as:

"Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant

(a) Failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) The tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) Failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) Failure by the tribunal to deal with all the issues that were put to it;

(e) Any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) Uncertainty or ambiguity as to the effect of the award;

(g) The award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) Failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award."

⁹⁸² Dubai Court of Cassation judgment number 75 for the year 2008 – commercial – dated 19 January 2009 [Exhibit 35]

⁹⁸³ Dubai Court of Cassation Decision number 173 for the year 1996 issued on 16 March 1997

Indeed, commentators confirm that:

“In order to succeed under Section 68 of the 1996 Arbitration Act, an applicant needs to satisfy three conditions (1) a serious irregularity that fall within the exhaustive categories in Section 68.2; and (2) substantial injustice”⁹⁸⁴

However, the English courts confirm the high threshold of proof for applications under Section 68.2, the UAE law should equally establish such threshold. Waller L.J. stated that:

“In my view the authorities have been right to place a high hurdle in the way of a party to an arbitration seeking to set aside an Award or its remission by reference to [s.68] and in particular by reference to [s.33] It would be a retrograde step to allow appeals on fact or law from the decisions of arbitrators to come in by the side door of an application under [s.33] and [s.68].”⁹⁸⁵

The contradictory starting point of the time-limit of the final award

The start of the time-limit of rendering the final award as per the Federal Arbitration Law is the first hearing session, which is normally the procedural hearing. In contrast, the start of the time-limit as per DIAC and ADCCAC arbitration rules is the receiving the case file by the sole arbitrator or, in case of three parties' panels, by the chairman of the tribunal.

Article 42.1 of the Federal Arbitration Law states that:

“The Arbitral Tribunal shall issue a final award within the timeframe agreed by the Parties. Failing agreement on a specific time-limit or method of its determination, the award shall be issued within six months from the date of the first hearing of the Arbitration. The Arbitral Tribunal may extend the time for up to six additional months, unless the Parties agree to a longer extension ”

In contrast, Article 36.2 of the DIAC Rules state:

*“The time-limit within which the Tribunal must render its final Award is six months from the date the sole arbitrator (or the Chairman in the case of three arbitrators) receives the file”*⁹⁸⁶

Under ADCCAC Rules, Article 27.1 sets out the start of the time-limit for rendering Arbitral awards, it states:

⁹⁸⁴ See Russell on Arbitration by David St. John Sutton, Judith Gill , and Matthew Gearing, published by Publisher Sweet & Maxwell; 23rd edition dated 31 December 2007

⁹⁸⁵ Bandwidth Shipping Corp Intaari (the Magdalena Oldendorff) [2008] 1 Lloyds Rep. 7, also see The International Journal of Arbitration, Mediation and Dispute Management, Volume 74, No. 4, November 2008, ISSN 00037877, file:///D:/Users/ahmed.hafez/Downloads/340_2009267_102745.pdf; see the High Court of England and Wales in Primera Maritime (Hellas) Ltd & Ors v Jiangsu Eastern Heavy Industry Co. Ltd 15 October 2013 ;

<https://www.casemine.com/judgement/uk/5a8ff7bb60d03e7f57eb19d3>

⁹⁸⁶ DIAC Arbitration Rules of 2007, issued by Decree No. 11 for the year 2007 by H.H. the Ruler of Dubai on the 6th of May 2007

“Unless otherwise agreed: The Panel shall issue the final arbitral award within a maximum period of six months from the date on which the file was received by the sole arbitrator or the president of the Arbitration Panel”⁹⁸⁷.

Arbitrators and judges in national courts question which of the above is more enforceable.

The common practice is that arbitrators are applying the institutional rules while judges apply the law. This may be as a result of habitual reference for each of the arbitrators and judges. Arbitrators usually refer to the rules during the proceedings especially when they are not legal professional including the engineers and finance professional acting as arbitrators in panels. However, the habitual reference for the judges is the text of law rather than the applicable institutional rules.

However, in law, the institutional rules are more specific and could represent the explicit agreement of the parties to opt-out of the law, which is generally respected under the UAE Federal Arbitration Law.

This approach is recognized by Article 36 of the DIAC Rules states that:

“By submitting to arbitration under these Rules the parties shall so be deemed to have agreed that the provisions of this Article shall apply to extending the time-limit for rendering the final award”⁹⁸⁸.

This could represent additional support to the view that, once the DIAC arbitration is chosen, the DIAC Rules represent a part of the parties’ agreement with regards to the timing of issuance of the final award.

For the above reasons, an ideal situation is that the institutional rules for arbitration centers should apply if the above contradiction causes nullity of an arbitral award. However, the consistent behavior of the UAE courts shows more dependence on the UAE laws rather than institutional rules.

Having regard to the fact that many arbitrators consume the full time-lime allowed to them since they are typically busy professionals, this calculation issue can cause arbitral awards to be set aside.

In conclusion, in order to avoid the above issue in the calculation of the time-limit for rendering the final award, the Federal Arbitration Law and the UAE institutional centers (in particular DIAC and ADCCAC) should consider unifying the starting point of the time-limit for rendering the final award by either the first procedural hearing or the receipt of the final by the arbitral tribunal.

Procedural Estoppel

The new Federal Arbitration Law established an important doctrine with regards to procedural estoppel, where any violation of the procedures in this law or the procedures agreed by the parties that are not contested within seven days within the respective party’s knowledge of such violation, shall be deemed an implied acceptance, as long as such violation can be agreed to be deviated from by the parties.

In this regard Article 25 of the Federal Arbitration Law states that:

⁹⁸⁷ ADCCAC Arbitration Rules of 2013, effective from 1st September 2013

⁹⁸⁸ DIAC Arbitration Rules of 2007, issued by Decree No. 11 for the year 2007 by H.H. the Ruler of Dubai on the 6th of May 2007

“A party who knows that any provision of this Law from which the Parties may derogate or any requirement under the Arbitration Agreement has not been complied with and yet does not state its objection to such non-compliance within the time-limit agreed upon, or within seven days of becoming aware of the non-compliance in the absence of such agreement, shall be deemed to have waived its right to object.”

This Article is perfectly consistent with Article 4 of the UNCITRAL Model Law which states that:

“A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.”

Also, The French courts acknowledge the principle of procedural estoppel in arbitration, whereby a party who knows about certain procedural irregularity but refrains knowingly from making a challenge during the proceedings before an arbitral tribunal is deemed to accept these irregularities, to have waived its right to object, and is precluded from raising any objection on these irregularities before the judiciary⁹⁸⁹. This principle was codified on 13 January 2011 in Article 1466 of the Code of Civil Procedure which states that:

*“A party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity.”*⁹⁹⁰

However, the application and interpretation of this Article by the UAE national courts may face the following challenges:

- (1) The definition of the UAE courts to the provisions of the Federal Arbitration Law that the litigant parties can derogate from within the definition of *“from which the Parties may derogate”*⁹⁹¹; and
- (2) The application of this provision in the light of Article 54.5 of the Federal Arbitration Law, which states that *“An action to set aside is admissible even if the party invoking nullity has waived its right to do so prior to the issuance of the arbitral award.”* This Article has the same Arabic wording of Article 216.2 of the Repealed Arbitration Chapter in the CPC, where this provision was historically used to negate

⁹⁸⁹ French Court of Cassation *Gosset* 1st Civil Chamber, 7 May 1963, January 26 2016, *Fibre Excellence SAS v Tembec SAS*, No 15-12.363; Paris Court of Appeal, April 12 2016, *Société J&P Avax SA v Société Tecnimont SPA*, No 14/14884; and D Thomson, "Jarvin award upheld in Paris", *Global Arbitration Review*, April 14 2016 ; Paris Court of Appeal, June 2 1989, *Sociétés TAI, ESW et IEC v sociétés SIAPE, Engrais de Gabès et autres*, No 88/8256, Rev Arb 87; Paris Court of Appeal, May 16 2002, *STPIF v SB Ballestrero*, No 2000/20742, Rev Arb 1231; Cass civ 1, July 6 2005, *Golshani v Gouvernement de la République Islamique d'Iran*, No 01-15.912, Rev Arb 993; Paris Court of Appeal, October 28 2010, Rev Arb 691; French Court of Cassation Cass civ 1, May 6 2009, *Société International Company For Commercial Exchanges (Income)*, No 08-10.281;

⁹⁹⁰ French Court of Cassation Cass civ 1, January 31 2006, *Intercafcio v Dafci*, No 03-19.054; French Court of Cassation Cass civ 1, May 6 2009

⁹⁹¹ Article 25 of the UAE Federal Law No. 6 of 2018 (the Federal Arbitration Law) issued by HH Sheikh Khalifa bin Zayed Al Nahyan, President of the United Arab Emirates

procedural estoppel to set aside arbitral awards. The courts relied on this provision and held that since the parties are permitted to bring an action for nullity (even if they waived such right), the parties can bring arguments based on issues they were silent about during the arbitral proceedings

Therefore, it is recommended that Article 54.5 of the Federal Arbitration Law be repealed, as no similar article can be found in either the UNCITRAL Model Law or the French Arbitration Law.

§ 2 Requisite Authority to Enter into Arbitration Agreements

The traditional approach adopted by the UAE jurisprudence for the authority to enter into arbitration agreements is that if the General Manager of a UAE LLC does not enter into an arbitration agreement himself or herself, then the authority to enter into an arbitration agreement on behalf of an LLC must be given **expressly** to the individual who signed the agreement to arbitrate and this authority cannot, under the applicable laws, be deemed or assumed.

The same principles apply for public and private joint venture companies where the Board of Directors cannot bind these types of companies to arbitration and any arbitration agreement must be approved by the General Assembly.

Therefore, it appears that entering into arbitration agreements is problematic for all forms of legal entities in the UAE.

Where a signatory to an arbitration agreement does not have the requisite authority [express authority] to sign the arbitration agreement in compliance with Article 203(4)⁹⁹² of the Civil Procedure Law, any such agreement purportedly reached is invalid. Any arbitral award rendered pursuant to such an invalid agreement would be at risk of annulment in accordance with Article 216 (1) (b)⁹⁹³ of the Civil Procedure Law.

If there is no capacity or authority, then any arbitration agreement could be invalid and any award pursuant to such an invalid arbitration agreement cannot be ratified by the UAE national courts (Article 216.1 (b) of the Civil Procedure Law)⁹⁹⁴.

The lack of special authorization was historically used by the supreme courts in the UAE to annul a considerable number of arbitral awards. This number was substantial as:

⁹⁹² Article 203(4) of the Civil Procedure Law provides: *"An agreement to arbitrate shall not be valid unless when made by the persons having the competency to the right for relinquishment of the litigated right"*, which is consistent with Article 4.1 of the UAE Federal Arbitration Law which states that:

"An Arbitration Agreement may only be concluded, on pain of nullity, by a natural person having the legal capacity to dispose of his rights or on behalf of a juridical person by a representative with specific authority to arbitrate"

⁹⁹³ Which is relevant to Article 53.1(f) of the Federal Arbitration Law

⁹⁹⁴ Which is consistent with Articles 53.1(b) and 53.1(c) of the Federal Arbitration Law

- (i) Many legal entities habitually issue a wide power of attorney to representatives to act on its behalf without specifying authority to arbitrate since they are unaware of the UAE law's requisite for this particular authority to be specified;
- (ii) Many legal entities assign their representatives to act on its behalf without any power of attorney but only with a valid internal authorization matrix, and
- (iii) Other legal entities, especially those not well-established, do not operate by any authorization but only operate by habits, norms and practices within the companies, where individuals representing such companies are known internally within those companies by the norm.

As a consequence, a substantial number of arbitral awards were annulled, as confirmed by many case laws⁹⁹⁵

The improvements proposed to the UAE law to resolve this profound problem relate to repealing the following provisions:

1. Article 53.1 (c) of the Federal Arbitration Law, which provides as a ground to set aside or oppose enforcement of an arbitral award that:

“A person does not have the legal capacity to dispose of the disputed right under the law governing his capacity, as provided for in Article 4 of this Law”⁹⁹⁶

⁹⁹⁵ This includes Dubai Court of Cassation decision number 325 for 1993., Dubai Court of Cassation decision number 460 for 1998, Dubai Court of Cassation decision number 91 for 1998, Union Supreme Court decision number 25 for 2001, Dubai Court of Cassation decision number 577 for 2003 dated 12 June 2004, Dubai Court of Cassation decision number 51/ 2003 Rights, Dubai Court of Cassation decision number 230/ 2004 Commercial, Dubai Court of Cassation decision number 256 / 2004 Commercial, Dubai Court of Cassation decision number 209 for 2004 [Exhibit 43] - General POA is insufficient to enter into arbitration agreements, Dubai Court of Cassation decision number 51 for 2005 [Exhibit 42]- General POA is insufficient to enter into arbitration agreements, Dubai Court of Cassation Judgments number 164 for the year 2008 issued on 12 October 2008 [Exhibit 16], Dubai Court of Cassation decision number 14 / 2008 Civil, Dubai Court of Cassation decision number 191 for 2009, Dubai Court of Cassation decision number 252 / 2010 Civil, Dubai Court of Cassation decision number 19 / 2010 Real Estate, Dubai Court of Cassation decision number 275 / 2010 Commercial, Dubai Court of Cassation decision number 102 / 2010 Real Estate, Dubai Court of Cassation decision number 190/2010 Civil, USC decision number 308 for 2011, Union Supreme Court decision number 179 for 2011, Abu Dhabi Court of Cassation decision number 465 for 2012, Dubai Court of Cassation decision number 532/2013 commercial, Abu Dhabi Court of Cassation decision number 352 for 2014, Abu Dhabi Court of Cassation decision number 351/ 2014, Dubai Court of Cassation decision number 263/2015 real estate, Dubai Court of Cassation decision number 382/2015 commercial, Dubai Court of Cassation decision number 613 for the year 2015 commercial issued on 18 September 2016

⁹⁹⁶ Both Articles 53.1(b) and 53.1(c) of the Federal Arbitration Law provide no improvement to Article 216.1.b of the repealed arbitration chapter of the CPC which provides the following ground to annul arbitral awards:

“if the award was made by arbitrators appointed otherwise than in accordance with the law, or was issued by some of them without their being authorized to make an award in the absence of the others or if it was issued on the basis of an

2. Article 4.1 of the Federal Arbitration Law defines “the legal capacity to dispose of the disputed right” referred to within Article 53.1(c) of the Federal Arbitration Law, which provides:

*“An Arbitration Agreement may only be concluded, on pain of nullity, by a natural person having the legal capacity to dispose of his rights or on behalf of a juridical person by a representative with specific authority to arbitrate”*⁹⁹⁷

3. Article 58.2 of the UAE Civil Procedures Code, which states that:

“It is not valid, without a special authorization, the declaration of the right prosecuted, disclaiming it, conciliation or arbitration therein.”

4. Article 154 of the UAE Commercial Companies Law, which states that:

*“The Board of Directors shall have all the required powers to do such acts as required for the object of the company, other than as reserved by this Law or the Articles of Association of the company to the General Assembly. However, the Board of Directors may not make conciliation or agree on arbitration, unless such acts are authorized under the Articles of Association of the company or are within the object of the company by nature. In other than these two events, such acts require to issue a special decision by the General Assembly”*⁹⁹⁸

The only Article that should be retained under the present laws is Article 53.1(b) of the Federal Arbitration Law, which provides as a ground to set aside or oppose enforcement of an arbitral award that:

“A party, at the time of conclusion of the Arbitration Agreement, was incompetent or under some incapacity under the law governing his capacity.”

While this Article is related to the issue of capacity to enter into arbitration agreements, this provision should be kept unchanged since it is in line with the UNCITRAL Model Law.

Furthermore, and until this legislative reform takes place, the following doctrines need to be used by the UAE courts in order to establish good faith between the contracting parties and to respect their reasonable expectations with respect to agreements to arbitrate:

- Estoppel Legal Framework in English Law
- Estoppel Legal Framework in the UAE Law
- English Law Precludes a Party from Recovering a benefit for his own wrongdoings
- The UAE Law Precludes a Party Who Caused nullity to Adhere to it

arbitration instrument that does not specify the subject matter of the dispute or was issued by a person not having capacity to make an arbitration agreement or an arbitrator not satisfying the requirements of the law”

⁹⁹⁷ This Article is consistent with Article 203(4) of the Civil Procedure Law provides: “An agreement to arbitrate shall not be valid unless when made by the persons having the competency to the right for relinquishment of the litigated right.”

⁹⁹⁸ Article number 154 of the UAE Federal Commercial Companies Law number 2 of 2015

- EU Regulations of Jurisdiction in contracts involving a weaker party
- Consumer Protection Laws in the UAE & The New UAE Companies' law
- Apparent Authority Principle in English, French and German laws
- Apparent Authority Principle in the UAE law
- Applicability of the Apparent Authority Principle for Arbitration Agreements under UAE law
- Applicable Rules under English Law and the UAE Law with regard to any plea to the jurisdiction
- Willful Blindness Under UAE law with Regard to Authority to Arbitrate
- Evolution of Cassation judgments on Authority to Arbitrate
- The Modern view of Cassation Judgments

Eliminating Contradiction between Dubai Courts and Abu Dhabi Courts with regards to the Requisite Authority to Enter into Arbitration Agreements

The Abu Dhabi Court of Cassation, the Dubai Court of Cassation as well as the Union Supreme Court apply the same federal laws with respect to recognizing arbitral awards. These supreme courts are expected to be the highest authorities interpreting the laws in the UAE.

However, the jurisprudence of these courts applies the same laws differently with respect to recognizing the authority to enter into arbitration agreements.

The recent positive movement with regards to the acceptance of arbitration jurisdiction is only in the Emirate of Dubai. On the other hand, the legal stance is quite different in Abu Dhabi courts and under the Union Supreme Court's jurisdiction, which still predominantly do not follow the second phase of improvement.

In particular, whilst Dubai Courts improved after 2015 with regards to authority to bind companies to arbitrate, the Abu Dhabi Court of Cassation did not issue any case law in this regard that upheld arbitration jurisdiction rather than national courts' jurisdiction for reasons related to incapacity of signatories to bind companies to arbitration agreements. Examples include:

ADCC 465 for the year 2012 dated 21 March 2013:

This contradiction increased the unpredictability of the UAE courts' acceptability for arbitral awards and provides arbitration practitioners substantial doubts that their decisions may not be recognized or enforced. As mentioned before, the enforceability of awards is one of the main focuses of arbitrators.

Therefore, the application of the UAE federal laws with respect to arbitration should be unified between the two Emirates and where the USC has jurisdiction to recognize arbitral awards. This thesis is in favor of adopting the modern case laws in Dubai supporting the arbitration jurisdiction, as this legal methodology is consistent with the other jurisdictions, including France.

Eliminating Contradiction within Dubai Courts with regards to the Requisite Authority to Enter into Arbitration Agreements

The contradiction set out above is not only between the Dubai and Abu Dhabi Supreme courts but also between the case laws in Dubai itself.

The most recent case laws after 2015 by the Dubai Court of Cassation confirm the arbitration jurisdiction when a party contests the capacity of a signatory to bind a company to arbitration. Examples include the following case laws:

Dubai Court of Cassation 386 for the year 2015 [Exhibit 17];

Dubai Court of Cassation 293 for the year 2015 [Exhibit 33];

Dubai Court of Cassation 547 for the year 2015 dated 27 April 2016;

Dubai Court of Cassation 137 for the year 2015;

Dubai Court of Cassation 336 for the year 2015; and

Dubai Court of Cassation 17 for the year 2016.

However, the Dubai Court of Cassation case laws after the year 2015 in this regard are contradictory. Examples include:

Dubai Court of Cassation 263 for the year 2015;

Dubai Court of Cassation 382 for the year 2015;

Dubai Court of Cassation 532 for the year 2013;

DCC 613 for the year 2015 dated 18 September 2016; and

DCC 416 for the year 2015 dated 6 July 2015.

Furthermore, following the issuance of these decisions by the Dubai Court of Cassation, when parties proceed to ratify arbitral awards before the Dubai Courts and rely on these recent Cassation decisions supporting arbitration jurisdiction before the lower courts in Dubai, still certain lower courts' do not follow the same jurisprudence of the Dubai Court of Cassation's traditional approach. The same problematic position, exists with more severity before the Abu Dhabi and the Federal Courts.

Other decisions remain contradictory in this regard. This unclear environment increases the unpredictability of the enforcement process before the UAE national courts.

§ 3 Remaining Legislative Improvements

Direct Enforcement of Arbitral Awards

There is no declaration for enforcement (Exequatur) in the UAE; the ratification of the award must be heard before the Court of Appeal in order to enforce the award.

There are many risk elements that the court may deny the enforcement of the award, which is discussed in Part 1 of this thesis, which makes enforcement more problematic.

Under the Federal Arbitration Law, the judge should order enforcement within 60 days unless a ground to set aside an award was identified (Article 55.2)⁹⁹⁹.

Therefore, the UAE courts must review all grounds for annulment of awards set out in Article 53 of the Federal Arbitration law before ordering enforcement.

In contrast, this process in France is quite different where arbitral awards whether domestic or foreign go through the exequatur to become enforceable. The summary enforcement of arbitral awards in France is a simple process involving an *ex parte* paper application before the President of the Tribunal de Grande Instance.

Article 1487 of the French CCP provides that:

“An arbitral award may only be enforced by virtue of an enforcement order (exequatur) issued by the Tribunal de grande instance of the place where the award was made. Exequatur proceedings shall not be adversarial. Application for exequatur shall be filed by the most diligent party with the Court Registrar, together with the original award and arbitration agreement, or duly authenticated copies of such documents”

The procedure to enforce arbitral awards in France is simple, as follows:

“All that is required is a valid original arbitral award together with its translation in order for the exequatur to be granted. It is then served on the other party. It is only at this point that the other party can contest the exequatur by appealing to the Court of Appeal.”¹⁰⁰⁰

The improvement proposed to the UAE law should include an order of enforcement. The execution should take only a few weeks for to have an exequatur granted, and the award debtor should only be served with the exequatur after the exequatur is issued and it can only challenge it at this time before the Court of Appeal.

It is worth noting that before the introduction of Article 1526 of the French CCP in the 2011 reform to the French arbitration law, an action to set aside an award or to appeal the exequatur used to suspend the

⁹⁹⁹ Article 55.2 of the Federal Arbitration Law states that “The chief justice of the Court or whoever he delegates from among its judges shall order the arbitral award confirmed and enforced within sixty days of submission of the request for its confirmation and enforcement, unless it finds one or more of the grounds for setting aside the award under section 1 of Article 53 of this Law”

¹⁰⁰⁰ Enforcement of arbitral awards in France by Reed Smith LLP, July 29 2008, <https://www.lexology.com/library/detail.aspx?g=296a065e-da7d-422c-b603-b7da54f4439c>

award's execution in France, pursuant to the former Article 1506 of the Code of Civil Procedure. Commentators confirm that:

*“As a result of this rule, losing parties would routinely launch an action to set aside or an appeal against the order granting exequatur, as the bringing of such proceedings automatically stayed the execution of the arbitral award.”*¹⁰⁰¹

Article 1526(2) of the CCP provides an exception from the above rule in circumstances where automatic execution would seriously prejudice the rights of one the parties. Therefore, the French courts may stop or make the enforcement of the award subject to certain conditions¹⁰⁰². It states that:

“The first president ruling in expedited proceedings (référé) or, once the matter is referred to him or her, the judge assigned to the matter (conseiller de la mise en état), may stay or set conditions for enforcement of an award where enforcement could severely prejudice the rights of one of the parties.”

However, the French jurisprudence rendered to date demonstrates that it is extremely difficult for losing parties to obtain such measures to stop the enforcement of arbitral awards.¹⁰⁰³

This is another recommendation to be adopted by the UAE jurisprudence to set a high threshold of proof for stopping the enforcement of arbitral awards.

Setting the Threshold for Staying Enforcement of Awards

In addition, while the first part of Article 56 (1) of the Federal Arbitration Law¹⁰⁰⁴ is consistent with Article 1526 of the French CCP¹⁰⁰⁵, both articles provide that an action to set aside an award shall not suspend the enforcement of the award.

However, it appears that the second part of the Article 56 (1) of the Federal Arbitration Law provides a lower threshold for proving the conditions of staying the enforcement of arbitral awards as compared with Article 1526(2) of CCP, as follows:

¹⁰⁰¹ [Enforcement of international arbitral awards: latest developments](#), by [Elie Kleiman](#) and [Shaparak Saleh](#) of Freshfields Bruckhaus Deringer LLP

¹⁰⁰² [Enforcement of international arbitral awards: latest developments](#), by [Elie Kleiman](#) and [Shaparak Saleh](#) of Freshfields Bruckhaus Deringer LLP

¹⁰⁰³ Paris Court of Appeal, October 18 2011, 11/14286, note D Bensaude, *Gaz Pal* 2012, 24, p 11; Paris Court of Appeal, July 13 2012, 12/11616, note D Bensaude, *Gaz Pal* 2012, 276, p 12.

¹⁰⁰⁴ Which states that “an action to set aside an arbitral award does not stay its enforcement. Nevertheless, the Court seized of the action to set aside the award may order a stay of enforcement if so requested by a Party showing good cause”

¹⁰⁰⁵ Which states that “Neither an action to set aside an award nor an appeal against an enforcement order shall suspend enforcement of an award.”

- The second part of the Article 56 (1) of the Federal Arbitration Law states that *“Nevertheless, the Court seized of the action to set aside the award may order a stay of enforcement if so requested by a Party showing good cause”*
- However, Article 1526(2) of CCP provides an exception from the above rule (in Article in circumstances where automatic execution would seriously prejudice the rights of one of the parties. It states that:

“However, the first president ruling in expedited proceedings (référé) or, once the matter is referred to him or her, the judge assigned to the matter (Conseiller de la mise en état), may stay or set conditions for enforcement of an award where enforcement could severely prejudice the rights of one of the parties.”

Therefore, it is clear that the French law provides a higher threshold for the circumstances allowing staying the enforcement of arbitral awards upon raising an action to set aside arbitral awards by award debtors.

This higher threshold makes it considerably difficult for losing parties to obtain such measures as per the French jurisprudence.¹⁰⁰⁶

Therefore, a suggested improvement to Article 56 (1) of the UAE Federal Arbitration Law is as follows:

The present of the Federal Arbitration Law states that:

“Nevertheless, the Court seized of the action to set aside the award may order a stay of enforcement if so requested by a Party showing a good cause”

The suggested wording provides:

“Nevertheless, the Court seized of the action to set aside the award may order a stay of enforcement if so requested by a Party is severely prejudiced”

Providing Legislative Framework for Fighting Corruption in Arbitration

Surprisingly, fraud and corruption are not among the grounds to set aside arbitral awards in the UAE.

While it could be argued that fraud and corruption are among the issues contrary to the public order, however, this is not entirely clear. Further, other jurisdictions appear to provide legislative provisions providing additional protection for corruption.

By way of example, the French law provides for the ‘Revision of awards’; pursuant to Article 1502 of the French Code of Civil Procedure, which is applicable to both domestic and international arbitration by virtue of Article

¹⁰⁰⁶ Paris Court of Appeal (ord), October 18 2011, SAS Mambo Commodités, case number 11/14286, Rev Arb 2012, 393; Paris Court of Appeal, 1st Chamber - Section C, July 13 2012, Case No. 12/11616, CIEC Engineering v Carlson Carl Anse Marcel – French International Arbitration Law Report: 2012 note D Bensaude, Gaz Pal 2012, 276, p 12, available online <https://arbitrationlaw.com/library/paris-court-appeal-1st-chamber-%E2%80%93-section-c-13-july-2012-ciec-engineering-v-snc-carlson-anse>.

1506 of the CCP, parties to both domestic and international arbitration are entitled to apply for “revision”, if revision of award is successful, the court can “review” the award on merits¹⁰⁰⁷. The circumstances that provide grounds for revision of awards are provided in Article 595 of the CCP¹⁰⁰⁸. One of the cases in Article 595 is whether the award or the underlying agreement involves fraud. Pursuant to Article 1502 of the CCP, an application for revision of the award “shall be made to the arbitral tribunal.” If the arbitral tribunal cannot be reconvened, then an application for revision of an award can be heard as follows:

- (i) Where the disputed award is international, a new tribunal must be constituted.
- (ii) Where the award is domestic, the “Court of Appeal which would have had jurisdiction to hear other forms of recourse against the award” may hear an application for revision.¹⁰⁰⁹ This application must be made within two months from the date on which the party became aware of the circumstances on which it relies to seek revision of the award¹⁰¹⁰.

In practice, the revision of awards under French law was particularly useful in the *Tapie* case where the award debtor initiated an appeal for annulment and a revision action, the annulment action was rejected by the Paris Court of Appeal but the revision action was granted¹⁰¹¹ and the award was retracted on the ground that the award was tainted by fraud.

This process precluded a party to get the enforcement of EUR 403 million where the award was obtained by fraud by the collusion between an arbitrator and a party representative. Therefore, providing this provision under UAE law shall be extremely helpful to ensure the fairness and transparency of arbitration.

The same principle was applied in *Fougerolle*¹⁰¹² case law.

Providing Grounds to Appeal Awards

In the UAE (and indeed internationally) there is no mechanism to measure, supervise and control the performance of arbitrators, save for some preliminary efforts by the ICC to exchange feedback on arbitrators

¹⁰⁰⁷ Article 601 of the Code of Civil Procedure: “If the judge declares the motion admissible, he will rule in the same judgment on the merits of the litigation save where there is need for a further investigation.”

¹⁰⁰⁸ Including the following cases: if it comes to light, after the judgment is handed down, that it was obtained fraudulently by the party in whose favor it was rendered; 2. decisive evidence that had been withheld by another party is recovered after the judgment was handed down; 3. the judgment is based on documents that have since been proven or have been held by a court to be false; 4. the judgment is based on affidavits, testimonies or oaths that have been held by a court to be false.

¹⁰⁰⁹ France, Applicable procedural law for recognition and enforcement of arbitral awards by Elie Kleiman, Shaparak Saleh and Yann Dehaudt-Delville of Freshfields Bruckhaus Deringer LLP, <https://globalarbitrationreview.com/jurisdiction/1004826/france>

¹⁰¹⁰ Article 596 of the Code of Civil Procedure: “The time-limit for a motion for revision is two months. It shall run as from the date on which the party is aware of the grounds for the revision upon which he relies”

¹⁰¹¹ Paris Court of Appeal: Arret du 17 February 2015, No. 77 (13/13278). As at July 2015

¹⁰¹² French Court of *Cassation* Cass civ 1, May 25 1992, *Fougerolle*, No 90-18.210, *Rev Arb* 1993, 91

which is not materialized into a formal process and is facing many challenges regarding confidentiality and personal issues between arbitrators and the administration team of the ICC. However, the English law provides a tool by which arbitrators could feel a certain degree of control and review for their substantially wrong decision, which is the appeal of the arbitral award.

An appeal on the arbitral award on the points of law, can only be brought with the agreement of all the parties to the arbitration or with the leave of the court, which has a high threshold of proof.

Leave to appeal the arbitral award under this section 69 shall be given only:

“If the court is satisfied:

(a) That the determination of the question will substantially affect the rights of one or more of the parties,

(b) That the question is one which the tribunal was asked to determine,

(c) That, on the basis of the findings of fact in the award

(i) The decision of the tribunal on the question is obviously wrong, or

(ii) The question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) That, despite the agreement of the parties to resolve the matter in arbitration, it is just and proper in all the circumstances for the court to determine the question.”¹⁰¹³

Despite the UAE law and courts are having an issue in the enforcement of arbitral awards and introducing this provision may aggravate this concern. However, a similar provision of that under English law would undoubtedly be useful, at least after some time of the stability of the Federal Arbitration law, in order to establish control over the arbitrators’ potential gross errors in judgements.

Assignment of assets under finance agreements

The rise of Islamic Banking in the UAE is considerable. The total size of global Islamic finance assets is projected to grow by nearly 72 percent to USD 3.78 trillion by 2022 from USD 2.2 trillion.

According to the Islamic finance development indicator, the UAE was ranked sixth in quantitative development and Sukuk sub-indicators¹⁰¹⁴.

Islamic banking transactions create serious jurisdictional challenges with regards to arbitration, whereby the financed debtor is not to the actual owner of the property or asset being financed but rather a ‘lessee’ and the Islamic bank is the ‘lessor’. This lessor may (and frequently does) face a jurisdictional challenge in arbitration since it is not a party to the arbitration agreement, while the asset being financed is the lessor’s assets.

¹⁰¹³ Section 69, the 1996 English Arbitration Act

¹⁰¹⁴ [Islamic finance assets will grow 72% to Dh13.8 trillion, citing Tomson Reuters report, https://www.khaleejtimes.com/islamic-finance-assets-will-grow-72-to-dh138-trillion-by-2022](https://www.khaleejtimes.com/islamic-finance-assets-will-grow-72-to-dh138-trillion-by-2022)

In substance, this situation is a typical financing agreement whereby the property is merely collateral for the bank's debt. However, this controversy arises out of the compliance with Islamic Sharia law, which requires actual ownership of the asset being financed by the bank. This process implies two further problematic issues including:

- (iii) Assignment of rights to assets being financed by the investor to the Islamic bank, and
- (iv) The title deed of the property being registered in the name of the financier rather than the real investor, being the debtor to the bank.

These two issues create the possibility of a jurisdictional challenge that the investor is not entitled to arbitrate against the real estate property or asset sellers in general.

Therefore, the UAE laws require urgently a financial lease law in order to address this issue caused by Islamic banks, which are prevalent and widespread in the UAE.

Severability of an arbitration Clause

The UAE Federal Arbitration Law codifies the doctrine of severability of an arbitration clause in Article (6) of the Federal Arbitration Law, which states that:

“(1) an arbitration clause shall be treated as an agreement independent from the other terms of the contract. The nullity, rescission, or termination of the contract shall not affect the arbitration clause if it is valid per se, unless the matter relates to an incapacity among the Parties. (2) A plea that a contract containing an arbitration clause is null or has been rescinded or terminated shall not stay the arbitration proceedings and the Arbitral Tribunal may rule on the validity of such contract.”

The UAE courts' interpretation of the new Federal Arbitration Law is yet to be seen. However, the Federal Arbitration Law established that the doctrine of severability of an arbitration clause should not apply in case of incapacity of the party entering into an arbitration agreement. Therefore, if the signatory to an arbitration agreement lacks capacity (under the strict requirements of the UAE Law set out above) to sign the arbitration clause, this clause shall not survive and, as a consequence, an arbitral tribunal shall not have jurisdiction to prosecute any claim related to it.

This exception of capacity from the severability doctrine could have considerable implications. As set out in the jurisdictional challenges part of this thesis, the incapacity of a signatory to an arbitration agreement is the most important challenge relied upon to annul arbitral awards and content the jurisdiction of the arbitral tribunal. Further, it was the most frequently used jurisdictional challenge by parties to the arbitration.

Therefore, the Federal Arbitration Law's lack of recognition of the separability doctrine when the issue in dispute is related to the capacity to enter into arbitration agreement could cause more challenges to the jurisdiction of arbitral tribunals.

It is worth noting that this exception to *“the matter relates to incapacity among the Parties”*¹⁰¹⁵ in the Federal Arbitration Law does not exist in the UNCITRAL model law, which states that:

¹⁰¹⁵ Article (6) of the Federal Arbitration Law

“An arbitration clause which 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.”

In addition, the French law does not contain this exception. Article 1447 of the French Code of Civil Procedure provides:

“An arbitration agreement is independent of the contract to which it relates. It shall not be affected if such a contract is void. If an arbitration clause is void, it shall be deemed not written”

Further, the capacity to enter into arbitration under UAE law is far more sophisticated than other jurisdictions, which use doctrines like apparent authority, estoppel, and implied authority to bind a party to arbitration where the UAE law only recognizes explicit authority to do so.

In conclusion, it is proposed to delete the phrase “unless *“the matter relates to incapacity among the Parties”*” from Article (6) of the Federal Arbitration Law which departs from the French law and UNCITRAL Model Law.

Arbitrators being Members of the Board of Trustees

Article 10.2 of the Federal Arbitration Law states that:

“The arbitrator cannot be on the board of trustees or the administrative body of the Arbitration Institution responsible for administering the Arbitration in the State.”

This Article is inconsistent with the UNCITRAL Model Law; a similar provision does not exist under most arbitration laws including the French, English and Swiss law.

There is no apparent conflict between being a member of the administrative body of the relevant Arbitration Institution and being concurrently a member of an arbitral tribunal.

Therefore, this provision should be removed from the Federal Arbitration Law.

Enforcing foreign arbitral awards

In order for a party to enforce a foreign arbitral award in the UAE under the New York Convention, the said award must be rendered in a country that is also a signatory to the New York Convention, which is adopted by the UAE by virtue of Decree 43 for the Year 2006.

Unfortunately, Decree 43 for the Year 2006 made no reference to Articles 235 and 236 of the Civil Procedure Code (which refer to the conditions of enforcing foreign arbitral awards in the UAE). Such an absence of an express reference has led to inconsistent and unpredictable results.¹⁰¹⁶

One example of this contradiction was in USC decision 384/2016 [Exhibit 48] when the plaintiff filed a suit requesting the recognition of an arbitral award, which had been issued by the International Chamber of Commerce.

¹⁰¹⁶ Enforcement of Foreign Arbitral awards in the United Arab Emirates By Gregory Mayew and Mark Morris

The Court of First Instance decision dated 30/12/2015 annulled the award. The Court of Appeal Court Appeal No 52/2016 dated 30/3/2016 again annulled the award.

Article 3 of Federal Decree No. 43/2006 adopting the NY Convention states:

“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed 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.”

The Court of Cassation based its decision on Article 238 of the CPC, provides that:

“Rules laid down in the foregoing articles shall be without prejudice to the provisions and conventions between the UAE and other countries in this regard.”

The court found that, based on Article 238 of the CPC, the provisions of conventions between the UAE and other foreign countries or international conventions ratified by the UAE are applicable in relation to the enforcement of foreign judgments and arbitral awards.

The Court held that both the UAE and UK are signatories to the New York Convention, and therefore the award was to be recognized and enforced pursuant to the New York Convention. The Dubai Court of Cassation found that the lower courts had erred in their application of the law, the judgment was overturned¹⁰¹⁷.

In view of this example, it appears that there is a controversy over whether the national courts, while ratifying foreign arbitral awards, should apply Articles 235 and 236 of the UAE CPC on the one hand or the New York Convention Article V on the other hand, which was adopted by the UAE Federal Decree No. 43 for the Year 2006.

It could be expected that Decree 43 endorsing the New York Convention would be applied by national courts rather than Article 235 of the CPC, where the award was rendered in a country that is also a signatory to the New York Convention since Article 238 of the Civil Procedure Code provides that:

“The rules stipulated in the preceding clauses [including Articles 235 and 236 of the CPC] shall be without prejudice of the rules of the agreements between the state and the other countries in this respect”¹⁰¹⁸.

However, it is unclear whether the New York Convention represents an agreement between the UAE and the other countries within the definition of Article 238 of the CPC. In particular, can the party enforcing a foreign award use both either of Articles 235 or 236 of the CPC or the New York Convention, and what if the adversary objects the application of either provision?

Therefore, a legislative reform is preferred (but not necessarily required) in order to specify the application of Articles 235 and 236, with respect to hearing claims for judicial recognition to arbitral awards, to cases where the New York Convention is not applicable due to the award being issued in a country that is not a contracting state to the New York Convention.

¹⁰¹⁷ Union Supreme Court decision number 384 for the year 2016 issued on 19 June 2016 [Exhibit 48]

¹⁰¹⁸ Article 238 of the UAE Federal Law No. (11) of 1992, The UAE Civil Procedure Code (the Civil Procedures Code)

Section 2: Improvements Proposed to the UAE jurisprudence

The improvement of the Federal Arbitration Law is insufficient to modernize the recognition of the arbitral awards in the UAE. Several improvements in the legal system's recognition of arbitral awards rely upon the improvements of the case laws that support and recognize the authority of arbitrators to decide their own jurisdiction and their ample authority within the provisions of law.

Therefore, the following improvements are proposed to the UAE courts' application of the existing laws while recognizing arbitral awards.

§ 1 Potential Criminalization of Arbitrators in the UAE

Arbitrators are immune from liabilities resulting from all acts or non-acts performed during the exercise of their judicial decision-making, an exception from this rule could exist in case the arbitrator commits a fraudulent act.

In France, while there is nothing under French laws that provides for immunity of arbitrators, an arbitrator is immune from liability, except where it violates its duties, which includes misrepresentation, willful misconduct, fraud, or denial of justice. Accordingly, arbitrators are immune from liability on incorrect decisions made outside the scope of fraudulent misconduct.^{1019 1020}

The UAE president issued a decree passing Federal Law No. 7 of 2016, which introduces sweeping reforms to the 1987 penal code.

The Penal Code provides that:

“Any person who issues a decision, gives an opinion, submits a report, addresses a case or proves an incident for the benefit or against a person, failing to maintain the requirements of integrity and impartiality, in his capacity as an arbitrator, expert, translator or investigator, appointed by administrative or judicial authority or selected by parties, shall be sentenced to temporary imprisonment”¹⁰²¹

These professions, according to this provision, are subject to Article 255 of the UAE Penal Code, which is about the immunity of witnesses, experts and arbitrators in case they are subject to severe prejudice to their freedom or honor.

Before the introduction of this amendment in 2016, Article 257 previously applied only to expert and translators.

¹⁰¹⁹ Arbitration In France, by Eduardo Silva Romero, Audrey Caminades and Xavier Nyssen of Dechert LLP <https://www.lexology.com/library/detail.aspx?g=5c211581-8870-4b8b-b8d6-364c2b93a03f>

¹⁰²⁰ Court of Cassation, First Civil Chamber, 16 December 1997, No. 96-10703; Paris Court of First Instance, 16 September 2009, Case No. 06/10155; Court of Cassation, First Civil Chamber, 15 January 2014, No. 11-17196

¹⁰²¹ Article 257 of the UAE Federal Law No. 3 of 1987 on issuance of the Penal Code (“the Penal Code”) as amended by the Federal Law No. 7 of 2016

By this amendment, arbitrators who fail to maintain the standard of “integrity and impartiality” may be subject to criminal offense and sentenced to imprisonment.

These provisions are extremely negative. First, the criteria to establish the crime is not concrete to the extent that any arbitrator can be subject to criminal liability i.e. *failing to maintain the requirements of integrity and impartiality*. There is no proper definition of requirements of integrity and impartiality.

The standard of “integrity and impartiality” in the Penal Code is not defined. However, other regulations establish this standard, including:

- The IBA Guidelines on conflict of interest which provide for the obligation of arbitrators to disclose the circumstances that are likely, in the eyes of the parties, to give rise to doubts as to an arbitrator’s impartiality or independence.
- Most institutional arbitration rules define requirements of independence and impartiality of arbitrators as the circumstances that are likely in the eyes of the parties to give rise to justifiable doubts as to their independence or impartiality¹⁰²².

However, it remains unclear whether the above standards will be considered in defining the standard of *integrity and impartiality* by public prosecutors and criminal courts in the UAE.

Therefore, there are two major problems with this law:

First: In the light of lack of clear definition of arbitrators’ “integrity and impartiality”, any arbitrator could be accused criminally, based on subjective criteria.

Second: The law can be used obstructively and abused by parties to an arbitration, commentators argue that:

*“The introduction of criminal sanctions creates a far greater risk for arbitrators, particularly in circumstances where the scope of the offense has not yet been defined. The words ‘integrity’ and ‘impartiality’ are not defined in UAE criminal law, and no evidence of a conscious or positive intention appears to be required under the new law for an offence to have been committed. Inevitably, there is potential for misuse by respondents in UAE seated arbitrations who may seek to rely on the law to disrupt proceedings.”*¹⁰²³

The basis for introducing this amendment could be meant to prevent unlawful intentional malpractice of arbitrators (for example, the *Tapie Affair* in France could be a criminal action under UAE law). However, this amendment is likely to weaken the UAE as an arbitration-friendly jurisdiction, and intimidates arbitrators with criminal proceedings.

The arbitration community in the UAE expressed concerns with regards to this law since any criminal offense will entail considerable risks to arbitrators and experts and can be used obstructively by parties to sabotage arbitration and exploit the proceedings by intimidating arbitrators acting against their interest by criminal actions.

¹⁰²² By way of example, see Articles 9.8 Article 13.3 of the DIAC Rules

¹⁰²³ Arbitration in Dubai: two steps forward, one step back by Stuart Paterson, Benjamin Hopps, Robert Stephen and Janine Mallis of Herbert Smith Freehills LLP; <https://www.lexology.com/library/detail.aspx?g=2771e9a9-3fd8-4bf1-8772-5c102937c87a>

In this connection, law firms operating in the UAE reported that arbitrators started to withdraw from serving for proceedings seated in the UAE after the introduction of this amendment. By way of example, Herbert Smith Freehills reported that:

“Since the introduction of the law, we have seen first-hand the detrimental effects of the new law: in a UAE-seated DIAC arbitration, a nominated arbitrator recently withdrew from the process when lawyers for the respondent raised the possibility of relying on Article 257 on spurious grounds. Anecdotally, we are also aware of a number of arbitrators in the UAE resigning from their mandates, citing the new law. Experts are also resigning/not taking on new mandates, based on the wider scope of the provision as it now applies to them”¹⁰²⁴

However, it appears that this discussion was raised recently since the new penal law has stated arbitrators in particular. In fact, during the preparation of this thesis I found no immunity for arbitrators under UAE law; on the contrary, the UAE cassation decisions explicitly establish potential liability for arbitrators, and criminal liabilities are not excluded from such general lack of immunity to arbitrators.

In this regard, DCC decision number 225 for 2005 [Exhibit 55] provides:

“The arbitrators are no more than a normal person performs specific judicial duties based on the consent and choice of litigant parties and he is not protected with immunity or sureties stipulated for judges and therefore it is possible to be litigated for errors committed by him”¹⁰²⁵

Let us assume the following scenario:

If the same party feels that arbitration is not progressing in its favor or if an arbitrator issued an interim award that is unfavorable for one of the parties, this party can file a complaint before the public prosecutor under Article 257 of the UAE Penal Code.

The public prosecutor has no option under the criminal procedures law but to call this arbitrator for investigation. This easy procedure by itself is intimidating to many arbitrators who are likely to be facing this position for the first time in their lives.

Further, this arbitrator may be temporarily imprisoned or at least be required to surrender its passport to the relevant authorities until the public prosecution’s investigations are completed. These investigations may take months and the court process (with two levels of appeal) may take at least two years.

This dangerous position could be magnified further by the fact that the existing UAE law does not provide a clear definition for breach of “integrity and impartiality.” Therefore, the public prosecutor’s assessment of this position is subjective.

Ironically, in the arbitrator’s best case, if the public prosecutor finds the arbitrator innocent, almost certainly, the arbitrator would have already lost its impartiality and independence since these circumstances could very well be a ground to recuse an arbitrator and affect its impartiality. This is a profound frustration of arbitration and bad administration of justice.

¹⁰²⁴ *Ibid*

¹⁰²⁵ Dubai Court of Cassation decision number 225 for the year 2005 issued on 12 December 2005 [Exhibit 55]

It is very hard for arbitrators to shoulder the risk of being subject to criminal investigations and potentially face imprisonment.

However, on the other hand, meeting the standard required for a criminal offense under the UAE is normally high. Under UAE law, a criminal indictment could only be possible where the defendant has clear criminal intent.

The following should provide some reasons to believe that the use of penal code against arbitrators is not an easy action. Of course, this is not the aim of the arbitration community in the UAE to make it hard to prosecute arbitrators; the real aim is to provide absolute immunity. However, having regards to the present laws, the below should demonstrate such action is really difficult.

The UAE law establishes two main factors to classify an action of this type that arbitrators may face as criminal:

1. The intent of the criminal case, where it should be absolutely clear that the intent of the defendant is to commit a Breach of Trust.
2. Such criminalization is limited exclusively as per Article 404 of the penal code to money paid under 1) deposit, 2) rent, 3) pledge, 4) loan for use, or 5) proxy. Article 404 of the UAE Penal code states that:

“Whoever embezzles, uses or wastes funds securities or any other movable property with the intention to prejudice the interest of the due right’s owners, if it is delivered to him as a deposit, rent, pledge, loan for use, or proxy, shall be punished by detention or by a fine. In the application of this provision, the partner in a joint property, and the owner’s property, and whoever receives anything to use in a certain manner for the benefit of its owner or for the benefit of another, shall be considered as an agent”¹⁰²⁶.

In October 2018, the UAE amended this provision and issued Federal Decree 24 of 2018 which amends several provisions of the Penal Code. Accordingly, the new wording of Article 257 is:

“Any person who, while acting in the capacity of an expert, translator or investigator appointed by a judicial authority in a civil or criminal case, or appointed by an administrative authority, confirms a matter contrary to what is true and misrepresents that matter while knowing the truth about it, shall be sentenced to imprisonment for a minimum term of a year and a maximum term of five years. The punishment shall be temporary imprisonment if the mentioned individuals were assigned to mandate in relation to a felony”

Therefore, despite arbitrators having been removed from the scope of Article 257, the following issues remain controversial:

First, the application of this new amendment is effective from 8 October 2018; therefore, any criminal liability for arbitrators for the period from 29 October 2016 (the effective date of Decree No. 7 of 2016) until 8 October 2018 (the effective date of Decree 24 of 2018) could entail litigation.

Second, Decree 24 of 2018 does not explicitly provide immunity to arbitrators for their decisions; therefore, whilst criminal liability may not be invoked by Article 257 of the Penal Code, the following issues exist:

- (i) The UAE jurisprudence explicitly establishes potential liability on arbitrators, criminal liabilities are not excluded from such a general lack of immunity to arbitrators. A notable example includes the DCC decision number 225 for the year 2005 [Exhibit 55], which provides:

¹⁰²⁶ Article 404 of the Federal Law No. 7 of 2016, which introduces sweeping reforms to the 1987 (“penal code”)

“The arbitrators are no more than a normal person performs specific judicial duties based on the consent and choice of litigant parties and he is not protected with immunity or sureties stipulated for judges and therefore it is possible to be litigated for errors committed by him”¹⁰²⁷

- (ii) Criminal liabilities can be invoked based on general articles of law; and
- (iii) Civil liability could be prosecuted by the losing party to the arbitration. Furthermore, the standard for proving the civil liability of an arbitrator is, without a doubt, lower than the criminal liability.

Third, experts, translators, and investigators are still included in the criminal liability pursuant to Decree 24 of 2018. Witnesses could still probably be included by implication.

In conclusion, a legislative improvement is needed to the UAE law or the UAE jurisprudence to provide an explicit provision for immunity to arbitrators, experts in arbitration translators, individuals working in arbitration centers and others participating in the arbitration process should be established in order to prevent any abusive behavior by a party dissatisfied by the results of arbitration proceedings.

This reform would be in line with the French jurisprudence, which provides for immunity of arbitrators, except in cases of misrepresentation, willful misconduct, fraud, or denial of justice. Accordingly, arbitrators should be immune from liability for incorrect decisions made outside the scope of fraudulent misconduct¹⁰²⁸.

§ 2 Arbitration Clause incorporated by reference

As set out in Part 2, Title 1, Chapter 3, Section 2, § 5 of this thesis, there are frequent incidents where arbitral awards were set aside by the UAE courts where there was a reference to another agreement containing the arbitration clause, where there was not specific reference to the arbitration clause itself. This included the following case laws:

ADCC 214 for 2014,

DCC 261 and 264 for 2009,

ADCC 20 for 2013, and

ADCC 718 for 2012

The problems included in the above case laws are either one of the following:

First) Where the arbitration clause is included in, the tender document based on which the acceptance letter for the tender documents is issued as a general acceptance letter not specifying the arbitration clause.

¹⁰²⁷ Dubai Court of Cassation decision number 225 for the year 2005 issued on 12 December 2005 [Exhibit 55]

¹⁰²⁸ Court of Cassation, First Civil Chamber, 16 December 1997, No. 96-10703; Paris Court of First Instance, 16 September 2009, Case No. 06/10155; Court of Cassation, First Civil Chamber, 15 January 2014, No. 11-17196

Second) The reference to the arbitration clause is made by reference to the DIFIC conditions, which are referred to in the tender documents. In this case, again, the acceptance letter for the tender documents is a general acceptance letter and not specifying the arbitration clause.

It appears that there is no substantial improvement in this regard since the Federal Arbitration Law confirms that the general reference to an agreement containing an arbitration clause shall not be enforceable unless that reference is specific to the arbitration clause itself. In this regard, the Federal Arbitration Law states that “and the reference is such as to make that clause part of the contract”¹⁰²⁹.

Often parties do not include an arbitration clause in the contract itself but rather include it by reference to another standard set of conditions, which contain an arbitration clause

The UAE law in this regard is in line with Article 7.2 of the UNCITRAL Model Law, which provides that:

“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”¹⁰³⁰.

However, France is taking a more modernized approach than the UNCITRAL Model law, which is recommended to be incorporated in the UAE law. In practice, the above two problematic issues are standard business practice, as it is not expected that normal business professionals, even lawyers with no specific background in arbitration, would know that the acceptance letter should have a certain formality to have the arbitration clause enforceable.

To deal with this recurring practical problem, under French law, arbitration clauses incorporated by reference to a general document, which contains the clause, are valid and binding (Cass 1st Civil, November 6 2016).

Incorporation by reference to arbitration clauses is admitted under international arbitration law since the *Bomar Oil Case*¹⁰³¹. In this case, Bomar objected to the jurisdiction of the arbitral tribunal by arguing that the arbitration agreement, which was not included in the document signed by the parties but in a separate document to which reference was made in the main agreement, should be deemed non-existent. The French Court of Cassation refused to examine whether such a reference to standard terms and general conditions were sufficient for the parties to be bound by the arbitration agreement.

The French Court of Cassation refused to set aside the arbitral award. It indicated that in international arbitration, an arbitration agreement which is not indicated in the main contract but incorporated by reference to a document (such as a model contract, like FIDIC or otherwise) is valid. This applies as long as the party against which the arbitration agreement is used is aware of the content of the document at the time the contract was entered into.

¹⁰²⁹ Article 7.2 of the Federal Arbitration Law

¹⁰³⁰ Article 5.3 of the UAE Federal Arbitration Law

¹⁰³¹ French Supreme Court, First Civil Section, *Bomar Oil*, Société Bomar Oil N.V. v. Entreprise tunisienne d'activités pétrolières (ETAP) / 91-15.194 November 9 1993, Rev arb 1994/1, p 108, summary available online

The court held that “the arbitration agreement was *prima facie* neither manifestly null and void nor inapplicable, and left the issue of the binding effect of the arbitration clause incorporated by reference to the scrutiny of the arbitral tribunal”¹⁰³².

Therefore, an amendment is proposed here to the UAE courts’ jurisprudence to permit the incorporation of arbitration clauses by reference to other documents, which is a very common issue especially in construction contracts.

§ 3 Managing Consolidation of Multi-Contract Arbitrations

Where any of the parties have not consented to consolidation (frequently for obstructive reasons), and where national legislation does not provide explicit provisions permitting consolidation, many arbitral tribunals do not permit non-consensual consolidation. This procedure does not promote the fair administration of justice but rather provides for significant inefficiencies and conflicting results.

This has been frequently abused by parties to oppose the proceedings and make it increasingly difficult for claimants to prosecute their claims.

Many international arbitration conventions (including the major institutions in the UAE) do not deal expressly with the subjects of consolidation.

International disputes often involve multiple contracts. Multi-contract disputes represent a difficult question for the international arbitral process, most frequently arising in the form of issues of consolidation, intervention, and joinder in case of multi-parties. The focus of this dissertation is the study of the situation where two or more different arbitrations arising out of different contracts may be ‘consolidated’ into a single arbitral proceeding. The emphasis is on the sources of an arbitral tribunal’s power to decide on consolidation including the institutional rules, the intent of the parties and the legal framework addressing consolidation in the absence of explicit provisions supporting consolidations.

The French jurisprudence allows, under certain circumstances, the extension of the arbitration clause to multiparty and/or multi-contract situations, which implies that the arbitration clause within a contract to be interpreted broadly to include contracts not covered by the arbitration agreement or entities that were not parties to the contract containing the arbitration agreement. Under certain circumstances, French jurisprudence has permitted the extension of an arbitration clause to situations involving chains or series of related contracts.¹⁰³³

Improvement required: despite the UNCITRAL Model Law not containing any provision for the consolidation of different arbitrations, a new amendment to the UAE arbitration law may not be required, rather, an amendment to the UAE institutions’ rules of arbitration are proposed to allow ordering consolidations of multi-contract arbitration by arbitral tribunal based on the request of a party where:

1. the arbitration proceedings are between the same parties,

¹⁰³² [Transfer of Arbitration Clauses in Chains of Contracts](#), by Elie Kleiman of *Freshfields Bruckhaus*

¹⁰³³ French Court of Cassation 1st Civil Chamber, 27 March 2007 and French Court of Cassation Com., 5 March 1991 and French Court of Cassation 1st Civil Chamber, 30 October 2006

2. the disputes are related to the same legal relationship, and
3. The arbitral institution finds that arbitration agreements are compatible.¹⁰³⁴

This will be in line with the Article 10 of the ICC Rules of 2017 and also inline French case law, which generally supports the notion that if an arbitral tribunal does exceed its jurisdiction, then an arbitral tribunal may generally have the power to consolidate multi-contract arbitrations under compatible arbitration clause.^{1035 1036 1037}

The same wording above is proposed to the DIAC and ADCCAC Rule; it is worth noting that the DIAC 2016 Rules which propose positive amendments concerning consolidation were introduced during the year 2016 but were never formally issued until 2019. This change will be in line with the amendments introduced in the ICC Rules, which were effective from 1 January 2012.¹⁰³⁸

Furthermore, the UAE courts may take the example of the French, the US and the English Courts with regards to reasonable expectations of contracting parties with respect to consolidation.

In this regard, the English courts held that there is a “*presumption in favor of one-stop adjudication*”¹⁰³⁹. This presumption poses that parties intend to resolve their disputes in one forum will only be displaced by clear wording to the contrary¹⁰⁴⁰.

¹⁰³⁴ This is taken from the 2017 Arbitration Rules and 2014 Mediation Rules (English version), available online;

<https://iccwbo.org/publication/arbitration-rules-and-mediation-rules/>

¹⁰³⁵ 1992 Rev. Arb. 66 and note by L. Aynes.

¹⁰³⁶ Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions Professor Bernard Hanotiau, Kluwer Law International B.V., 1 Jan 2005, 2005 Edition, P. 140 and 141 [Exhibit 75]

¹⁰³⁷ Decision of the French Supreme Court Kaeuffer v. Bastuck and others, 2nd Civ. Ch. 30 March 2000, 18 ASA Bull 381 (2000), see Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions, Prof. By Bernard Hanotiau 2005 Edition, P. 134

¹⁰³⁸ Article 4.d of the proposed 2016 DIAC Rules states that:

*“Any party wishing to commence an arbitration under the DIAC Rules shall send to the Centre a Request which shall include ... where claims arise under more than one arbitration agreement, it shall be indicated to which arbitration agreement each claim pertains”*¹⁰³⁸

¹⁰³⁹ Harbour Assurance Co (U.K.) Ltd v. Kansa General International Assurance Co [1993] QB 701 at p. 726B

¹⁰⁴⁰ Fiona Trust & Holdings v. Privalov & others [2007] Bus LR 1917 [2008] 1 Lloyd’s Rep 254

The English courts also looked to the agreement which was “*at the commercial center of the transaction*”¹⁰⁴¹ or identifying the contract under which the substance of the dispute arose.¹⁰⁴²

The French Court of Cassation found supported consolidation when it found that the breach in the second agreement fell within the scope of the first agreement.¹⁰⁴³

§ 4 Remaining Improvements Proposed to the UAE jurisprudence

The Application of Article 214 of the UAE CPC (Article 54.6 of the Federal Arbitration Law)

The Repealed Arbitration Chapter of the UAE CPC allows the court seized to ratify an award to return the award to the arbitral tribunal to clarify ambiguity or include missing requirements therein.

Article 214 of the Repealed Arbitration Chapter states that:

“if the arbitrator omits to resolve any of the issues agreed upon in the arbitration clause, or if the award is ambiguous to an extent preventing its execution, the ratifying court may decide to return such award to the arbitrator to consider any omitted issues or to clarify the award, if it were not definite in a way that makes it impossible to execute, and the arbitrators should, in both cases, deliver their decision within three months from the date of their notification with the decision unless the law shall decide otherwise”¹⁰⁴⁴.

In a clearer wording, Article 54.6 of the Federal Arbitration Law provides:

“The Court, when asked to set aside an arbitral award may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time of up to sixty days in order to give the Arbitral Tribunal an opportunity to take any action or make any amendment to the form of the award as will eliminate the grounds for setting aside without affecting the substance of the award”

These provisions should ideally resolve certain causes of nullity, including issues nullity related to the signature on each page of the award, deliberations, oath formula...etc.

In DCC 240 for 2007, the court found that pursuant to Article 214 of the UAE CPC (Article 54.6 of the Federal Arbitration Law), the courts do not have jurisdiction to interpret the arbitral awards where there is an ambiguity

¹⁰⁴¹ UBS AG v HAS Nordbank AG, [2009] EWCA Civ 585 [Exhibit 69]

¹⁰⁴² PT Thiess Contractors Indonesia v PT Kaltim Prima Coal and Anor [(2011) EWHC 1842 (Comm)]

¹⁰⁴³ Decision by the French Supreme Court on 14 May 1996, First Civil Chamber, 1997 Rev. Arb. 535, see Professor Bernard Hanotiau book on Multicontract/ multi-party arbitration situations named Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions, by Prof. By Bernard Hanotiau, Kluwer Law International B.V., 1 Jan 2005, 2005 Edition [Exhibit 72]

¹⁰⁴⁴ Article 214 of the UAE CPC, which corresponds, with some modifications, to Article 54.6 of the Federal Arbitration Law states that “The Court, when asked to set aside an arbitral award may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time of up to sixty days in order to give the Arbitral Tribunal an opportunity to take any action or make any amendment to the form of the award as will eliminate the grounds for setting aside without affecting the substance of the award.”

of such awards. The court upheld the decision issued by the Court of Appeal that the arbitral award needs to be referred to the arbitral tribunal for clarification as the tribunal shall have the exclusive jurisdiction to interpret its decisions.

DCC 276/2006 allowed the judge of the Court of First Instance to correct certain errors in an arbitral award (typo errors).

In a welcome pro-arbitration approach, the Federal Arbitration Law permits the court ratifying an award, under certain circumstances, to suspend the proceedings for 60 days in order to allow the tribunal to amend the arbitral award (Article 54.6). Article 54.6 of the Federal Arbitration Law states that:

“The Court, when asked to set aside an arbitral award may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time of up to sixty days in order to give the Arbitral Tribunal an opportunity to take any action or make any amendment to the form of the award as will eliminate the grounds for setting aside without affecting the substance of the award.”

The UAE courts are encouraged to apply these positive provisions to provide an additional opportunity for tribunals to correct or clarify awards in order for the courts to recognize awards and avoid annulment.

Limiting Public Order Grounds

Public policy grounds are unspecified and, to some extent, are open-ended under UAE law and therefore arbitral awards can be set aside, as arbitration shall be null and void for matters related to public order.

The line between defining the difference between the civil or commercial dispute and matters considered as “freedom of trade” or “circulation of wealth” is very thin.

For instance, the application of the Interim Registration Law was considered as a public policy matter and several arbitral awards were set aside for this reason, including:

1. In DCC Petition No. 14 of 2012 issued on 16 September 2012, Real Estate, Baiti Real Estate Development V Dynasty Zarooni Inc., the court determined that the rules pertaining to the registration of property in the Interim Real Estate Register in the Emirate of Dubai are related to public order. As such, any dispute relating to this issue falls under the jurisdiction of the courts and cannot be resolved by arbitration.
2. In DCC 190/2011, the court set aside an arbitral award and determined that the rules pertaining to the registration of property in the Interim Real Estate Register in the Emirate of Dubai is a public order matter and could not be litigated within the jurisdiction of arbitral tribunals¹⁰⁴⁵.
3. In DCC 320/2014, the court annulled the entire award rather than just that section in which the Tribunal had exceeded its jurisdiction since the tribunal dealt with an issue concerning registration under Article 3 of Dubai

¹⁰⁴⁵ Arbitral awards vs Public Order by James O Wilson published on December 2017, available online <https://www.stalawfirm.com/en/blogs/view/arbitration-award-vs-public-order.html>

Law 13 of 2008, which is an issue of public policy not capable of being settled by the parties and, by extension, arbitration.¹⁰⁴⁶

4. In Dubai Court of Cassation Decisions in Case No. 180 of 2011¹⁰⁴⁷, the court of annulled the award. The court found that an arbitral award annulling the sale and purchase agreement due to the award debtor's failure to register the disputed off plan property in the Dubai interim register as required by Article 3.2 of Law No. 13 of 2008, should be set aside on the grounds that they are related to a public order matter that cannot be subject to arbitration.

5. In Dubai Court of Cassation Petition No. 16 of 2012, the court annulled the award and found that an arbitral award annulling the sale and purchase agreement due to a party's failure to register the disputed off-plan property in the Dubai interim register as required by Article 3.2 of Law No. 13 of 2008, should be set aside on the grounds that they are related to a public order matter that cannot be subject to arbitration.

Further, the application of other laws by arbitral tribunals is a point of contention since arbitral tribunals are skeptical as to whether these laws are related to public policy matters. One of the examples I have seen in an arbitration case is the Escrow Account Law, which the tribunal decided not to rely on in order not to have the resulting award set aside.

Therefore, public policy matters that are outside the jurisdiction of arbitral tribunals should be clearly defined.

Ability to seek a Tribunal-appointed Expert

Frequently, the main issues of contention in arbitration are related to technical, engineering, accounting or other specialized matters requiring highly technical expertise and essentially are matters of an expert's opinion.

If each of the parties presents its own expert evidence to the tribunal, conflicting opinions are usually produced; the evaluation of these opinions is subject to extensive cross-examination by the adversary and by the arbitral tribunal. Under these circumstances, the tribunal is likely, in any event, to appoint its own expert (in addition to the parties' appointed expert) in order to resolve these conflicting technical views.

In this regard, Redfern and Hunter confirm that:

*"One of the least satisfactory features of modern international arbitrations is the prevailing practice of presenting conflicting expert evidence of opinion on matters of great technical complexity... it is sometimes difficult for an arbitral tribunal to make a reasoned judgment as between two conflicting professional opinions on complex technical matters."*¹⁰⁴⁸

¹⁰⁴⁶ Dubai Court Judgment Concerning Severability and Public Policy in Arbitral Awards by Dr. Hassan Arab - Partner, Dispute Resolution in Al Tamimi and Co, available online <https://www.tamimi.com/law-update-articles/dubai-court-judgment-concerning-severability-and-public-policy-in-arbitral-awards/>

¹⁰⁴⁷ issued on 12 February 2012

¹⁰⁴⁸ Redfern and Hunter on International Arbitration, Sixth Edition, Oxford University Press, Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, 2015 pages 428 and 429, para 6.138

For these reasons, the appointment of an independent expert by an arbitral tribunal can, when appropriate, control costs and foster efficiency of the arbitral proceedings.

In this regard, some arbitration laws and jurisprudence provide 'a right' to each litigant party in arbitration to demand from the arbitral tribunal to appoint its own neutral expert given that such requesting party is willing to pay the expert's costs and subject to the arbitrator's assessment of the relevance and necessity of the expert's work to the case of the party seeking the appointment of the expert.

This expert would ultimately be appointed by the arbitral tribunal and therefore the expert's presumed biased opinion to any of the parties shall not typically exist or, at the minimum, will be much less likely than the party-appointed expert.

By way of example, according to the case laws of the Swiss Federal Court (e.g. decisions no. 4A_617/2010 and no. 4A_277/2017), the parties' right to be heard in international arbitration (Article 182(3) of Swiss Private International Law Act of 1987) implies a right to seek appointment of an expert by the tribunal provided that:

- (a) The party expressly requests the tribunal to appoint an expert;
- (b) Such a request is made timely and in the appropriate form;
- (c) The party seeking expert appointment is prepared to deposit the costs of such expertise, at the tribunal's request;
- (d) The expert evidence relates to facts relevant for rendering of the award; and
- (e) The evidence is necessary and proper for proving those facts.

Therefore, incorporating a provision similar to that in the UAE jurisprudence shall foster to a considerable extent the arbitration process in the UAE.

The Use of DIFC and ADGM and Conduit Jurisdiction

Having regards to the unpredictability of the Dubai mainland courts in enforcing arbitral awards and the considerable number of arbitral awards that were set aside by the Dubai Courts, parties were seeking to enforce arbitral awards in DIFC Courts as a conduit to enforce arbitral awards in Dubai Courts in order to circumvent the use of Dubai Courts that were labeled of being anti-arbitration.

Recent years witnessed the rise of the financial free zone jurisdictions in Abu Dhabi and Dubai and using these jurisdictions, which are adopting the common law model and are supportive to arbitration, as a conduit to enforce arbitral awards outside the national courts of the UAE is an increasing trend.

DIFC Courts confirmed, in a number of decisions, that they have jurisdiction of to hear a claim for ratifying and enforcing arbitral awards even in the event that the award debtor has no assets in DIFC.

Therefore, the DIFC Courts were being used as a conduit to enforce arbitral awards and foreign court judgments in Dubai mainland.

This situation created a conflict of jurisdiction between DIFC and Dubai onshore courts. The Dubai government established a Joint Judicial Committee in order to resolve this conflict, which issued a number of important decisions in this regard.

Generally, the Joint Judicial Committee ruled in favor of the Dubai Courts whenever any conflict of jurisdiction exists unless the dispute has a specific connection to the DIFC financial free zone. The committee reasoned that by holding that, the Dubai Courts have the ‘general jurisdiction.’

Taking the example of DIFC Courts, the ADGM courts entered into a memorandum of understanding with the Abu Dhabi Judicial Department, allowing for the reciprocal enforcement of judgments, decisions, orders, and ratified or recognized arbitral awards between the ADGM Courts and the Abu Dhabi courts.

However, applying the same principle, the use of ADGM as a conduit jurisdiction for enforcement of arbitral awards in Abu Dhabi mainland will depend upon the interpretation and application of ADGM’s laws in cases which will probably consume extensive practice and time before there is a firm position on the question.

Having regards to the substantial number of arbitral awards being annulled by the UAE mainland courts, one of the suggestions proposed is to permit the jurisdiction of DIFC and ADGM courts to hear the judicial review, recognize and enforce arbitral awards irrespective of the jurisdiction they were made. This will be consistent with the arbitration laws of the DIFC and ADGM. However, a supportive approach to these jurisdictions should be granted by the Joint Judicial Committee formed in Dubai and by the Union Supreme Court in case any conflict of jurisdiction is escalated to it.

The Use of Oath formulas in Arbitration Proceedings

In DCC decision No. 503 of 2003 issued on 15 May 2004 (Bechtel) [Exhibit 24], the DCC set aside an arbitral award since the arbitral tribunal failed to adopt the formula of oath prescribed in the UAE law. The Court determined that witnesses, summoned during the arbitral proceedings, did not swear an oath at all since the court concluded that the arbitrator informed the witness that *“I have to inform you as a witness that you are under the obligation to say the truth, failing so, you might have serious consequences as a result. Are you aware of that? The witness confirmed.”*¹⁰⁴⁹

However, the DCC 322/2004 departed from Bechtel judgment in a number of important respects, including:

- The annulment is only based upon witness’s failure to swear an oath, in entirety, before testifying rather than a specific formula for administering the oath.
- It is sufficient to administer oath with the formula that the arbitral tribunal tells the witness to administer as long as it does not include any breach of the public policy such as swearing to something other than God.

As such, the DCC 322/2004 provides a more pro-arbitration approach as the court has started to accept other formulas for administering the oath for witnesses and this is recommended to be adopted by the UAE courts.

¹⁰⁴⁹ Dubai Cassation Petition 503/2003 issued on 15 May 2004, International Bechtel Co. Ltd. v. Department of Civil Aviation of the Government of Dubai [Exhibit 24]

Signature of the award

The DCC set aside an award due to the arbitral tribunal's failure to sign both the dispositive part as well as the reasoning part of the award.¹⁰⁵⁰

The court held that:

"Unless an award is signed by all of the arbitrators, the award is null and void. The exception to this rule is where an arbitrator refuses to sign the award. In such cases, the award will be valid only if a majority of the other arbitrators sign the award, while the fact that one of the arbitrators refused to sign the award must be noted in the wording of the award."

The court held further that the arbitral award must be signed in both the grounds and the dispositive part parts of the award by all the arbitrators.

In contrast, the Abu Dhabi Court of Cassation only requires arbitrators to sign the last page, irrespective of whether it contains the decision and part of the reasoning or only the decision. In ADCC 834/2010 determined that:

*"It is well settled and held by the Court of Cassation, that according to Article 212 of the Civil Procedures Law, an arbitrator is not bound by civil procedure followed in court cases and must follow the procedures set out in the chapter dealing with arbitration and any specific procedures that are agreed upon by the parties. The arbitrator must also respect rights of due process by allowing each side to present his requests and arguments, prove his claims, refute the other side's claims, and bring proceedings against adversaries. The test for setting aside an arbitral award for breach of the rules of civil procedure is a deviation from the basic rules of litigation procedure that uphold the principle of equality of arms, including the fundamental right to adversarial proceedings, and contravention of the procedure agreed upon by the parties in this regard. These procedures do not include a requirement to sign all pages of the arbitral award for the rules of civil procedure themselves only require the signature of the head of the circuit on the last page of the award and Article 131 of the Civil Procedure Law is devoid of any requirement that all pages have to be signed."*¹⁰⁵¹

¹⁰⁵⁰ Dubai Court of Cassation Decision number 233 for the year 2007 - Civil - issued on 13 January 2008

¹⁰⁵¹ ADCC 834/2010 dated 30 December 2010. See UAE Courts on the Signing of Arbitral Awards by Dr. Hassan Arab - Partner, Dispute Resolution, available online <https://www.tamimi.com/law-update-articles/uae-courts-on-the-signing-of-arbitral-awards/>

Table of Abbreviations

Abbreviation	Full Name
CPC	UAE Federal Law No. 11 of 1992, the UAE Civil Procedure Code
Repealed Arbitration Chapter	Articles 203 until 218 of the CPC
Civil Code or CTC	The UAE Civil Transactions Code UAE, Federal Law No. 5 of 1985
DIFC Arbitration Law	The DIFC LAW No. 1 of 2008
ADGM Arbitration Law	Arbitration Regulations 2015
CCP	French Civil Code 2016, https://www.trans-lex.org/601101/mark_914000/french-civil-code-2016/
DCC	The Dubai Court of Cassation
ADCC	The Abu Dhabi Court of Cassation
USC	The UAE Union Supreme Court
DIFC	Dubai International Financial Center
The UAE Companies Law	UAE Federal Law No. 2 of 2015 (the UAE Companies Law)
GCC convention of 1996	The GCC Convention for the Execution of Judgments, delegations, and Judicial Notifications (GCC convention of 1996), http://www.arbitrationlaw.com/files/free_pdfs/GCC%20Convention.pdf
UNCITRAL	United Nations Commission on International Trade Law
The Model Law or UNCITRAL Model Law	The UNCITRAL Model Law of the UNCITRAL Model Law on International Commercial Arbitration and adopted by the UNCITRAL on 21 June 1985 with amendments as adopted in 2006
BIT	Bilateral Investment Treaty
DIAC	Dubai International Arbitration Center
ADCCAC	Abu Dhabi Commercial Conciliation and Arbitration Center
ICSID	International Centre for Settlement of Investment Disputes between States and Nationals of Other States of 2006
IBA	International Bar Association
IBA Rules on Taking Evidence	IBA Rules on the Taking of Evidence in International Arbitration Adopted by a resolution of the IBA Council 29 May 2010
IBA Rules on Conflict of Interest	IBA Guidelines on Conflicts of Interest in International Arbitration Adopted by resolution of the IBA Council on Thursday 23 October 2014

ICC	International Chamber of Commerce
ICC Rules	The International Chamber of Commerce 2017 Rules of Arbitration (the ICC Rules of 2017)
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the New York Convention), 330 U.N.T.S. 38 (1959)
Brussels Regulation or Convention	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
Federal Arbitration Law	UAE Federal Law No. 6 of 2018
Interim Registration Law	Dubai Law No. 13 of 2008 regulating the Interim Real Estate Register in the emirate of Dubai
The Penal Code	The UAE Federal Law No. 3 of 1987 on the issuance of the Penal Code
The Escrow Account Law	Dubai Law No. 8 of 2007 On the Matter of Escrow Accounts for Real Estate Development
LLC	Limited Liability Companies
PJSC (Private)	Private Joint Stock Companies
PJSC (Public)	Public Joint Stock Companies
the English 1996 Arbitration Act	Arbitration Act 1996, CHAPTER 23, which regulates arbitration proceedings within the jurisdiction of England and Wales and Northern Ireland. available online http://www.legislation.gov.uk/ukpga/1996/23/data.pdf
The US Federal Arbitration Act	The United States Arbitration Act (Pub.L. 68–401, 43 Stat. 883, enacted February 12, 1925)
ToR	Terms of Reference

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Abu Dhabi Court of Cassation decision numbers 247 & 258 for the year 2008 issued on 26 June 2008.

Abu Dhabi Court of Cassation decision number 352 for the year 2006.

Abu Dhabi Court of Cassation decision number 23 and 24 for the year 2010 issued on 14 April 2010.

Abu Dhabi Court of Cassation decision number 187 for the year 2014.

Abu Dhabi Court of Cassation decision number 352 for the year 2014.

Abu Dhabi Court of Cassation decision number 447 for the year 2010.

Abu Dhabi Court of Cassation decision number 125 for the Judicial Year 1 issued on 14 November 2007 [Exhibit 9]

Abu Dhabi Court of Cassation decision number 465 for the year 2012 commercial issued on 21 February 2013.

Abu Dhabi Court of Cassation decision number 486 for the year 2008 issued on 30 October 2008.

Abu Dhabi Court of Cassation decision number 174 for the year 2014 issued on 22 April 2014.

Abu Dhabi Court of Cassation decision number 186 for the year 2008.

Abu Dhabi Court of Cassation decision number 20 for the year 2013 commercial issued on 22 July 2013.

Abu Dhabi Court of Cassation decision number 718 for the year 2012 issued on 8 April 2013.

Abu Dhabi Court of Cassation decision number 214 for the year 2014 commercial.

Abu Dhabi Court of Cassation decision number 293 for the year 2015 issued on 27 February 2016 [Exhibit 33].

Abu Dhabi Court of Cassation decision number 467 for the year 2013 issued on 10 March 2014.

Abu Dhabi Court of Cassation decision number 541 for the Judicial Year 21 issued on 15 May 2001.

Abu Dhabi Court of Cassation decision number 55 for the year 2014.

Abu Dhabi Court of Cassation decision number 554 for the year 2008 issued on 25 December 2008.

Abu Dhabi Court of Cassation decision number 679 for the year 2010 issued on 16 June 2011 Commercial [Exhibit 49].

Abu Dhabi Court of Cassation decision number 806 for the year 2013.

Abu Dhabi Court of Cassation decision number 293 for the year 2013.

Abu Dhabi Court of Cassation decision number 313 for the year 2013.

Abu Dhabi Court of Cassation decision number 173 for the year 2014 issued on 24 June 2014.

Abu Dhabi Court of Cassation decision number 351 for the year 2014 issued on 26 June 2014.

Abu Dhabi Court of Cassation decision number 519 for the year 2013 issued on 2 October 2013.

Abu Dhabi Court of Cassation decision number 859 for the year 2010 issued on 17 April 2011, [Exhibit 1].

Abu Dhabi Court of Cassation decision number 873 for the Judicial Year 3 issued on 22 October 2009 [Exhibit 21].

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Abu Dhabi Court of Cassation decision number 136 for the year 2009 issued on 31 March 2009.

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Abu Dhabi Court of Cassation decision number 980 for the year 2010 issued on 23 February 2011

Abu Dhabi Court of Cassation Decision Number 83, 91 and 96 for the year 2011 issued on 23 November 2011

Abu Dhabi Court of Cassation Decision Number decision 481 for the year 2013 issued on 3 October 2013

Abu Dhabi Court of Cassation decision number 446 for the year 2010 issued on 18 August 2010 (Commercial) [Exhibit 56]

Abu Dhabi Court of Cassation decision number 352 for the year 2014

Abu Dhabi Court of Cassation decision number 210 for the Judicial Year 15 issued on 17 May 1994

Abu Dhabi Court of Cassation decision number 578 for the year 2011 dated 15 May 2012

Abu Dhabi Court of Cassation decision number 193 for the year 1999 issued on 25 April 1999
[Exhibit 38]

Abu Dhabi Court of Cassation decision number decision 404/18 for the year 1998 issued on 6 May 1997 [Exhibit 52]

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Dubai Court of Cassation decision number 11 for the year 2002 issued on 4 May 2002

Dubai Court of Cassation decision number 213 for the year 2004 issued on 15 May 2005

Dubai Court of Cassation decision number 263 for the year 2007 issued on 3 February 2008

Dubai Court of Cassation decision number 210 for the year 2005 issued on 12 June 2016

Dubai Court of Cassation decision number 55 for the year the year 2007 issued on 7 May 2007.

Dubai Court of Cassation decision number 379 for the year the year 2016 [Exhibit 7]

Dubai Court of Cassation decision number 124 for the year 2011, issued on 25 September 2011, Real Estate [Exhibit 10]

Dubai Court of Cassation decision number 529 for the year 2015, issued on 12 October 2016, Real Estate [Exhibit 11]

Dubai Court of Cassation decision number 204 for the year 2010 issued on 15 May 2011 [Exhibit 36]

Dubai Court of Cassation decision number 210 for the year 2005 issued on 12 June 2006

Dubai Court of Cassation decision number 89 for the year 2005 issued by Dubai Court of Cassation

Dubai Court of Cassation decision number 11 for the year 2002 issued on 4 May 2002,

Dubai Court of Cassation decision number 213 for the year 2004 issued on 15 May 2005

Dubai Court of Cassation decision number 127 for the year 2012 issued on 6 February 2013 [Exhibit 27]

Dubai Court of Cassation decision number 191 for the year 1995 rights issued on 31 March 1996.

Dubai Court of Cassation decision number 200 for the year 2013 issued on 6 October 2013

Dubai Court of Cassation decision number 145 for the year 2012 commercial issued on 21 November 2012

Dubai Court of Cassation decision number 202 for the year 2007 issued on 4 December 2007 [Exhibit 31]

Dubai Court of Cassation decision number 204 for the year 2008 issued on 21 October 2008 [Exhibit 29].

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Dubai Court of Cassation decision number 205 for the year 2002 issued on 23 June 2002 [Exhibit 4]

Dubai Court of Cassation decision number 260 for the year 2005 issued on 5 February 2006

Dubai Court of Cassation decision number 359 for the year 2004, commercial issued on 28 January 2004

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Dubai Court of Cassation decision number 401 for the year 2003 issued by Dubai Court of Cassation issued on 2 February 2003

Dubai Court of Cassation decision number 403 for the year 2001 issued on 9 February 2001

Dubai Court of Cassation decision number 577 for the year 2003 issued on 12 June 2004

Dubai Court of Cassation decision number 242 for the year 2008 issued on 8 February 2009

Dubai Court of Cassation decision number 100 for the year 2004

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Dubai Court of Cassation decision number 146 for the year 2008 issued on 9 November 2008

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[Exhibit 47]

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Dubai Court of Cassation decision number 173 for the year 1996 issued on 16 March 1997

Dubai Court of Cassation decision number 178 for the year 1996 issued on 25 January 1997
[Exhibit 3]

Dubai Court of Cassation decision number 192 for the year 2007, issued on 27 November 2007

Dubai Court of Cassation decision number 193 for the year 2002 issued on 23 June 2002

Dubai Court of Cassation decision number 193 for the year 1993

Dubai Court of Cassation decision number 217 for the year 2005

Dubai Court of Cassation decision number 240 for the year 2007

Dubai Court of Cassation decision number 261 and 264 for the year 2009 – commercial

Dubai Court of Cassation decision number 263 for the year 2015 - Real Estate issued on 17 February 2016

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Dubai Court of Cassation decision number 276 for the year 2006

Dubai Court of Cassation decision number 277 for the year 2002 issued on 13 October 2002

Dubai Court of Cassation decision number 322 for the year 2004 issued on 11 April 2005

Dubai Court of Cassation decision number 328 for the year 2002 – civil issued on 23 November 2002

Dubai Court of Cassation decision number 382 for the year 2015 – Real Estate issued on 20 December 2015

Dubai Court of Cassation decision number 403 for the year 2003 issued on 13 March 2004

Dubai Court of Cassation decision number 40 for the year 2004 commercial issued on 26 September 2004

Dubai Court of Cassation decision number 65 for the year 2012 issued on 27 May 2012 (Civil)

Dubai Court of Cassation decision number 532 for the year 2013 – commercial issued on 30 November 2014

Dubai Court of Cassation decision number 537 for the year 1999 issued on 23 April 2000

Dubai Court of Cassation decision number 75 for the year 2008, commercial, issued on 19 January 2009 [Exhibit 35].

Dubai Court of Cassation decision number 88 for the year 2001 issued on 29 April 2001 - Civil

Dubai Court of Cassation decision number 88 for the year 2004

Dubai Court of Cassation decision number 233 for the year 2007 - Civil - issued on 13 January 2008

Dubai Court of Cassation decision number 9 for the year 1996 issued on 13 July 1996 [Exhibit 41]

Dubai Court of Cassation decision number 102 for the year 2010 – Civil, issued on 26 December 2010.

Dubai Court of Cassation decision number 157 for the year 2009 issued on 27 September 2009 [Exhibit 44]

Dubai Court of Cassation decision number 278 for the year 2008 issued on 14 April 2009

Dubai Court of Cassation decision number 3 for the year 2010 issued on 12 December 2010

Dubai Court of Cassation decision number 317 for the year 2009 Civil issued on 14 February 2010.

Dubai Court of Cassation decision number 400 for the year 2001 Civil issued on 16 February 2002

Dubai Court of Cassation decision number 573 for the year 2003 issued on 5 June 2004 - Civil

Dubai Court of Cassation decision number 114 for the year 2007

Dubai Court of Cassation decision number 128 for the year 2005

Dubai Court of Cassation decision number 148 for the year 2008 commercial issued on 16 September 2008

Dubai Court of Cassation decision number 17 for the year 2016 real estate issued on 23 March 2016

Dubai Court of Cassation decision number 21 for the year 2003 Civil, issued on 13 April 2003

Dubai Court of Cassation decision number 273 for the year 2006 issued on 5 March 2007
[Exhibit 20]

Dubai Court of Cassation decision number 386 for the year 2015 - Real Estate Dispute [Exhibit 17]

Dubai Court of Cassation decision number 448 for the year 2003

Dubai Court of Cassation decision number 73 for the year 2010 – Civil, issued on 9 May 2010

Dubai Court of Cassation decision number 137 for the year 2015 Real Estate and 336

Dubai Court of Cassation decision number 409 for the year 2001

Dubai Court of Cassation decision number 51 for the year 2007 issued on 29 April 2007 [Exhibit 8]

Dubai Court of Cassation decision number 164 for the year 2008 issued on 12 October 2008
[Exhibit 16]

Dubai Court of Cassation decision number 210 for the year 2014 Civil

Dubai Court of Cassation Decision Number 117 for the year 93

Dubai Court of Cassation decision number 138 for the year 2014 - Commercial issued on 9 July 2014.

Dubai Court of Cassation decision number 14 for the year 2008 Civil issued on 11 March 2008

Dubai Court of Cassation decision number 156 for the year 2009, Civil issued on 27 October 2009
[Exhibit 45]

Dubai Court of Cassation decision number 16 for the year 2012 issued on 12 October 2008

Dubai Court of Cassation decision number 173 for the year 2010, rights, issued on 3 October 2010

Dubai Court of Cassation decision number 19 for the year 2010 Real Estate

Dubai Court of Cassation decision number 190 for the year 2010 Civil

Dubai Court of Cassation decision number 191 for the year 2009 issued on 13 September 2009

Dubai Court of Cassation decision number 207 for the year 2009 commercial issued on 19 April 2010

Dubai Court of Cassation decision number 209 for the year 2004 issued on 20 March 2005
[Exhibit 43]

Dubai Court of Cassation decision number 220 for the year 2004 issued on 17 January 2005
[Exhibit 53]

Dubai Court of Cassation decision number 230 for the year 2004 Commercial

Dubai Court of Cassation decision number 234 for the year 2010 Real Estate issued on 22 May 2011.

Dubai Court of Cassation decision number 256 for the year 2004 Commercial

Dubai Court of Cassation decision number 271 for the year 2000 – Rights issued on 11 November 2000

Dubai Court of Cassation decision number 275 for the year 2010 Commercial

Dubai Court of Cassation decision number 325 for the year 1993.

Dubai Court of Cassation decision number 351 for the year 2005 issued on 1 July 2006

Dubai Court of Cassation decision number 352 for the year 1995 issued on 22 April 1995

Dubai Court of Cassation decision number 402 for the year 2001 Rights issued on 2 February 2002

Dubai Court of Cassation decision number 33 for the year 2003 (Rights) issued on 12 April 2003

Dubai Court of Cassation decision number 460 for the year 1998 issued on 13 March 1999.

Dubai Court of Cassation decision number 51 for the year 2003 Rights

Dubai Court of Cassation decision number 573 for the year 1999

Dubai Court of Cassation decision number 91 for the year 1998 issued on 6 March 1999

Dubai Court of Cassation decision number 156 for the year 2013 – Civil appeal

Dubai Court of Cassation decision number 344 for the year 2009 – Civil, issued on 28 March 2010

Dubai Court of Cassation decision number 155 for the year 2015 issued on 16 December 2015
[Exhibit 5]

Dubai Court of Cassation decision number 185 for the year 2008, Commercial Challenge, issued on 24 November 2008

Dubai Court of Cassation decision number 91 for the year 1993 issued on 23 October 1993

Dubai Court of Cassation decision number 175 for the year 1993 issued on 12 December 1993

Dubai Court of Cassation decision number 10 for the year 1995 issued on 8 October 1995

Dubai Court of Cassation decision number 186 for the year 1996 issued on 5 January 1997

Dubai Court of Cassation decision number 214 for the year 1998 issued on 3 January 1999

Dubai Court of Cassation decision number 43 for the year 2005

Dubai Court of Cassation decision number 50 for the year 2005

Dubai Court of Cassation decision number 6 for the year 1999

Dubai Court of Cassation decision number 112 for the year 2001 civil issued on 16 June 2001

Dubai Court of Cassation decision number 17 for the year 2016 issued on 23 March 2016

Dubai Court of Cassation decision number 167 for the year 2002 issued on 2 June 2002

Dubai Court of Cassation decision number 307 for the year 2002 issued on 30 November 2002

Dubai Court of Cassation decision number 502 for the year 2002 issued on 22 March 2003

Dubai Court of Cassation decision number 87 for the year 2003 – Civil issued on 10 May 2003

Dubai Court of Cassation decision number 503 for the year 2003, Rights, issued on 15 May 2004
International Bechtel Co. Ltd. v. Department of Civil Aviation of the Government of Dubai
(Bechtel) [Exhibit 24]

Dubai Court of Cassation decision number 575 for the year 2003 issued on 20 June 2004

Dubai Court of Cassation decision number 133 for the year 2004 issued on 27 March 2005

Dubai Court of Cassation decision number 237 for the year 2004 issued on 3 April 2005

Dubai Court of Cassation decision number 218 for the year 2004 the year issued on 15 May 2005 – Civil

Dubai Court of Cassation decision number 51 for the year 2005 issued on 28 May 2005 [Exhibit 42]

Dubai Court of Cassation decision number 7 for the year 2005 issued on 12 June 2005

Dubai Court of Cassation decision number 204 for the year 2005 commercial issued on 2 July 2005

Dubai Court of Cassation decision number 39 for the year 2005 issued on 25 September 2005

Dubai Court of Cassation decision number 220 for the year 2005 commercial issued on 27 October 2005

Dubai Court of Cassation decision number 225 for the year 2005 issued on 12 December 2005 [Exhibit 55]

Dubai Court of Cassation decision number 174 for the year 2005 commercial issued on 19 December 2005

Dubai Court of Cassation decision number 216 for the year 2005 issued on 26 June 2006

Dubai Court of Cassation decision number 222 for the year 2006 Civil Dispute, issued on 25 February 2007

Dubai Court of Cassation decision number 405 for the year 2016 Real Estate Dispute, issued on 8 March 2017

Dubai Court of Cassation decision number 39 for the year 2007 commercial Dispute, issued on 2 February 2007

Dubai Court of Cassation decision number 362 for the year 2011 Civil Dispute, issued on 24 April 2012

Dubai Court of Cassation decision number 141 for the year 2006 issued on 10 October 2006

Dubai Court of Cassation decision number 218 for the year 2006 issued on 17 October 2006

Dubai Court of Cassation decision number 72 for the year 2007 issued on 10 June 2007

Dubai Court of Cassation decision number 137 for the year 2007 issued on 10 September 2007

Dubai Court of Cassation decision number 133 for the year 2007 issued on 23 September 2007

Dubai Court of Cassation decision number 150 for the year 2007 issued on 16 October 2007

Dubai Court of Cassation decision number 268 for the year 2007 issued on 19 February 2008
[Exhibit 40]

Dubai Court of Cassation decision number 268, 290 for the year 2009 issued on 15 November 2009

Dubai Court of Cassation decision number 305 o for the year f 2007 issued on 25 February 2008

Dubai Court of Cassation decision number 128 for the year 2008 Civil issued on 15 June 2008

Dubai Court of Cassation decision number 272 for the year 2008 issued 25 January 2009

Dubai Court of Cassation decision number 108 for the year 2009 issued on 12 March 2009

Dubai Court of Cassation decision number 32 for the year 2009 Civil issued on 29 March 2009

Dubai Court of Cassation decision number 252 for the year 2010 Civil issued on 13 March 2011

Dubai Court of Cassation decision number 180 for the year 2011 issued on 12 February 2012

Dubai Court of Cassation decision number 132 for the year 2012 issued on 22 February 2012

Dubai Court of Cassation decision number 14 for the year 2012 issued on 16 September 2012.

Dubai Court of Cassation decision number 17 for the year 2016 issued on 23 March 2016

Dubai Court of Cassation decision number 547 for the year 2015 (Real Estate Dispute) issued on 27 April 2016 [Exhibit 15]

Dubai Court of Cassation decision number 613 for the year 2015 commercial issued on 18 September 2016

Dubai Court of Cassation decision number 188 for the year 2012 issued on 9 October 2012

Dubai Court of Cassation decision number 53 for the year 2011 judgment issued on 7 December 2011)

Dubai Court of Cassation decision number 416 for the year 2015 judgment issued on 6 July 2015

Dubai Court of Cassation decision number 134 for the year 2006 [Exhibit 12]

Dubai Court of Cassation decision number 195 for the year 2003 issued on 22 June 2003 [Exhibit 13]

Dubai Court of Cassation decision number 41 for the year 2010 [Exhibit 14]

Dubai Court of Cassation decision number 188 for the year 2006 issued on 13 March 2007

Dubai Court of Cassation decision number 239 for the year 2005 issued on 15 January 2006

Dubai Court of Cassation issued decision number 693 for the year 2015 issued on 10 April 2016

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Dubai Court of Cassation, Civil Judgments, decision number 234 for the year 2006, issued on 26 December 2006

Dubai Court of Cassation decision number 364 for the year 2017, Commercial dispute issued on 20 August 2017

Dubai Court of Cassation decision number 318 for the year 2016 issued on 7 June 2017

Dubai Court of Cassation decision number 137 for the year 2015 issued on 24 Feb 2016 [Exhibit 39], translated by Lexis Middle East

Dubai Court of Cassation decision number 236 for the year 2007 issued on 3 Feb 2008, translated by Lexis Middle East

Dubai Court of Cassation decision number 3 for the year 2008 issued on 24 February 2008

Dubai Court of Cassation decision number 39 for the year 2016 issued on 26 October 2016

Dubai Court of Cassation decision number 391 for the year 2010 issued on 26 October 2011

Dubai Court of Cassation decision number 84 for the year 2016 issued on 25 December 2016

Dubai Court of Cassation decision number 806 for the year 2017 issued on 11 October 2017

Dubai Court of Cassation decision number 116 for the year 2016 issued on 22 May 2016

Dubai Court of Cassation decision number 608 for the year 2016 issued on 26 February 2017

Dubai Court of Cassation decision number DCC 489 for the year 2016 issued on 21 May 2017

Dubai Court of Cassation decision number 883 for the year 2017 issued on 11 June 2017

Dubai Court of Cassation decision number 603 for the year 2016 issued on 9 April 2017

Dubai Court of Cassation decision number 75 for the year 2015 issued on 12 August 2015

Dubai Court of Cassation decision number 53 for the year 2011 issued on 7 December 2011

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Dubai Court of Cassation decision number 462 for the year 2002, issued on 02 March 2003

Dubai Court of Cassation decision number 282 for the year 2012

Dubai Court of Cassation decision number 693/ for the year 2015 issued on 10 April 2016

Dubai Court of Cassation decision number 17 for the year 2001 issued on 10 March 2001 [Exhibit 50]

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Union Supreme Court decision number 145 for the Judicial Year 14 issued on 10 January 1993

Union Supreme Court decision number 262 for the Judicial Year 19 issued on 10 November 1998

Union Supreme Court decision number 268 for the Judicial Year 20 issued on 10 November 1998

Union Supreme Court decision number 345 for the Judicial Year 17 issued on 28 January 1996

Union Supreme Court decision number 394 for the Judicial Year 19 issued on 21 September 1999

Union Supreme Court decision number 518 for the Judicial Year 20 issued on 25 May 1999

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Union Supreme Court decision number 515 for the year 19 issued on 27 June 1999 [Exhibit 25]

Union Supreme Court decision number 14 of the Judicial Year 19

Union Supreme Court decision number 225 for the Judicial Year 23 issued on 3 June 2003 [Exhibit 30]

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Union Supreme Court decision number 556 for Judicial Year 24 issued on 19 April 2005

Union Supreme Court decision number 64 for Judicial Year 20 issued on 26 January 1999

Union Supreme Court decision number 640 for the Judicial Year 29 issued on 28 July 2009 [Exhibit 46]

Union Supreme Court decision number 831 of the 25th Judicial Year issued on 23 May 2004

Union Supreme Court decision number 297 for Judicial Year 20 issued on 14 May 2000

Union Supreme Court decision number 43 for Judicial Year 23 issued on 13 April 2003

Union Supreme Court decision number 449 for Judicial Year 21 issued on 11 April 2001

Union Supreme Court decision number 627 for the year 2013 issued on 24 April 2014

Union Supreme Court decision number 308 for the year 2011, issued on 30 October 2011

Union Supreme Court decision number 625 for the year 2013 issued on 16 April 2014

Union Supreme Court decision number 640 for Judicial Year 22 issued on 19 November 2002

Union Supreme Court decision number 11 for the Judicial Year 23, issued on 19 May 2002

Union Supreme Court decision number 176 for Judicial Year 17 issued on 21 November 1995

Union Supreme Court decision number 20 for Judicial Year 20 issued on 12 December 1999

Union Supreme Court decision number 438 for Judicial Year 23 issued on 12 July 2004

Union Supreme Court decision number 44 for the year 2001

Union Supreme Court decision number 605 for Judicial Year 21 issued on 24 May 2000

Union Supreme Court decision number 118 for Judicial Year 23 issued on 21 January 2004
[Exhibit 23]

Union Supreme Court decision number 206 for Judicial Year 27 issued on 27 December 2005

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Union Supreme Court decision number 745 for Judicial Year 27 issued on 28 March 2007 [Exhibit 6]

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Union Supreme Court decision number 301 for Judicial Year 20 issued on 13 December 1998.

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Union Supreme Court decision number 526 for the year 2012 commercial issued on 6 March 2012 [Exhibit 19].

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Joint Judicial Committee Cassation Number 2/2017

Joint Judicial Committee Cassation Number 3/2017

Joint Judicial Committee Cassation Number 4/2017

Joint Judicial Committee Cassation Number 5/2017

Joint Judicial Committee Cassation Number 6/2017

Joint Judicial Committee Cassation Number 7/2017

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England's Court of Appeal in Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964]

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TABLE OF CONTENTS

SUMMARY	3
ABSTRACT	10
PART 1: ENFORCEABILITY OF ARBITRAL AWARDS IN THE UAE	33
TITLE 1: THE UAE JUDICIAL SYSTEM AND ITS RELATIONSHIP TO THE ARBITRATION SYSTEM	33
CHAPTER 1 HISTORY AND PRINCIPLES OF ARBITRATION IN THE UAE	35
SECTION 1 THE COMPETENCE OF COURTS TO RECOGNIZE ARBITRAL AWARDS IN THE UAE	40
§ 1 ENFORCEMENT ARBITRAL AWARDS THROUGH DIFC COURTS	40
§ 2 ENFORCEMENT OF AWARDS IN THE ABU DHABI GLOBAL MARKET	41
§ 3 ENFORCEMENT OF AWARDS IN THE UAE'S MAINLAND	43
SECTION 2 ENFORCING FOREIGN AWARDS AND JUDGMENTS IN THE UAE	44
§ 1 PROCEDURE FOR ENFORCING FOREIGN ARBITRAL AWARDS IN THE UAE	46

ENFORCING FOREIGN JUDGMENTS THROUGH NATIONAL LEGAL ORDERS	48
THE UAE IN RELATION TO THE NEW YORK CONVENTION	50
§ 2 CASE LAWS ON APPLYING THE NEW YORK CONVENTION TO ENFORCE AWARDS IN THE UAE:	51
CASE LAW 1:	51
CASE LAW 2:	52
CASE LAW 3:	53
§ 3 UAE MEMBERSHIP OF INTERNATIONAL CONVENTIONS.....	55
WASHINGTON CONVENTION 1965.....	55
RIYADH CONVENTION OF 1983:.....	58
GCC CONVENTION OF 1996.....	59
SECTION 3: MAIN RULES APPLICABLE TO ARBITRATION IN THE UAE.....	59
§ 1 SEVERABILITY OF AN ARBITRATION CLAUSE AND COMPETENT-COMPETENT DOCTRINE.....	60
FEDERAL ARBITRATION LAW IMPROVEMENT ON SEVERABILITY	63
§ 2 APPLICABILITY OF THE UAE PROCEDURAL LAW AND EVIDENCE LAW TO ARBITRATION	65
CONFIRMATION BY THE NEW FEDERAL ARBITRATION LAW	71
§ 3 ARBITRATION IS AN EXCEPTIONAL DISPUTE RESOLUTION MECHANISM.....	71
§ 4 RULES APPLICABLE TO ARBITRAL PROCEEDINGS IN THE UAE	75
REPRESENTATION OF LITIGANT PARTIES IN ARBITRATION	75
ACTION FOR NULLITY OF A CONTRACT THAT INCLUDES AN ARBITRATION AGREEMENT	75
PARTIAL NULLITY OF THE AWARD AND EFFECT ON THE ENTIRE AWARD	76
ARBITRATOR'S JURISDICTION FOR INTERIM OR CONSERVATORY MEASURES	76
ESTIMATING ARBITRATOR'S FEES	78
PRESUMPTION AND RES JUDICATA.....	78
UNCLEAR ARBITRATION CLAUSES	79

COMMERCIAL AGENCY AGREEMENTS DISPUTES CANNOT BE RESOLVED IN ARBITRATION.....	79
THE REASONING OF THE ARBITRAL AWARD	80
RENOUNCING AN ARBITRATION CLAUSE.....	81
EXHAUSTION OF ARBITRATORS' JURISDICTION	81
IMPROVEMENT IN THE NEW FEDERAL ARBITRATION LAW	82
CHAPTER 2 THE NEW UAE FEDERAL ARBITRATION LAW	83
SECTION 1 IMPROVEMENTS IN THE FEDERAL ARBITRATION LAW:	83
§ 1 ENFORCEMENT OF ARBITRAL AWARDS:	83
§ 2 REMAINING IMPROVEMENTS IN THE FEDERAL ARBITRATION LAW.....	86
ADVERSE INFERENCE	86
ARBITRATION AGREEMENT IN CASE AN AWARD IS ANNULLED:	86
SEVERABILITY OF AN ARBITRATION CLAUSE	86
PROCEDURAL ESTOPPEL	87
PLACE OF SIGNATURE OF THE AWARD	87
SECTION 2 ISSUES THAT REMAIN MOSTLY UNCHANGED UNDER THE OLD ARBITRATION CHAPTER OF THE CPC. 87	
§ 1 EFFECT OF THE UAE ARBITRATION LAW ON THE GROUNDS TO SET ASIDE AN AWARD:	93
§ 2 EFFECT OF THE UAE ARBITRATION LAW ON CAPACITY TO ENTER INTO ARBITRATION AGREEMENTS :	96
§ 3 SUMMARY OF GROUNDS TO SET-ASIDE ARBITRAL AWARDS UNDER UAE LAW	97
§ 4 SUMMARY OF GROUNDS TO REFUSE RECOGNITION OR ENFORCEMENT OF AN ARBITRAL AWARD UNDER DIFC AND ADGM ARBITRATION LAWS.....	100
TITLE 2: NULLITY OF ARBITRAL AWARDS IN THE UAE	102
CHAPTER 1: STUDYING CASE LAWS UPHOLDING ANNULMENT OF ARBITRAL AWARDS IN THE UAE.....	102
SECTION 1: NULLITY RELATED TO EXCEEDING THE TIME–LIMIT FOR RENDERING AN AWARD.....	102
§ 1: CASE LAWS THAT NULLIFIED ARBITRAL AWARDS DUE TO EXCEEDING TIME LIMIT	106
THE DCC SET ASIDE AN AWARD FOR EXCEEDING THE TIME-LIMIT, CASE LAW (1).....	107

THE DCC SET ASIDE AN AWARD FOR EXCEEDING THE TIME-LIMIT, CASE LAW (2).....	107
THE DCC SET ASIDE AN AWARD FOR EXCEEDING THE TIME-LIMIT, CASE LAW (3).....	107
THE DCC SET ASIDE AN AWARD FOR FAILURE TO ESTABLISH A DATE FOR THE AWARD, CASE LAW (4)	108
§ 2: THE DCC ANNULLED AN ARBITRAL AWARD SINCE IT WAS NOT DATED AND AS SUCH THE JUDGE WAS UNABLE TO VERIFY THE TIME-LIMIT.....	108
THE DCC SET ASIDE AN AWARD FOR FAILURE TO MENTION THE DATE OF THE FIRST HEARING IN THE AWARD, CASE LAW (4)	108
THE DCC REFUSE TO SET ASIDE AN AWARD FOR EXCEEDING THE TIME-LIMIT, CASE LAW (5)	109
POSITION OF ADCC REGARDING TIME-LIMIT FOR RENDERING AN AWARD.....	110
CONCLUSIONS ON TIME-LIMIT FOR RENDERING AN AWARD	110
SECTION 2: NULLITY DUE TO ARTICLE 216.1 (C) OF THE UAE CIVIL PROCEDURES CODE (ARTICLE 53.1.G OF THE FEDERAL ARBITRATION LAW)	111
§ 1: ARBITRATORS’ FAILURE TO TAKE AN OATH FOR WITNESSES	112
BECHTEL CASE	112
DCC 322 FOR 2004.....	115
DCC 322 FOR 2004 IN COMPARISON WITH BECHTEL CASE	115
THE DCC DECISION NUMBER 10 OF 1995 ISSUED ON 8 OCTOBER 1995.....	116
§ 2: NULLITY RELATED TO ABSENCE OF DELIBERATIONS BETWEEN THE TRIBUNAL MEMBERS.....	116
USC SET ASIDE AN ARBITRAL AWARD BECAUSE ONE ARBITRATOR DELIBERATED BY E-MAIL.....	117
USC SET ASIDE AN ARBITRAL AWARD FOR SINCE ARBITRATORS DID NOT DELIBERATE	118
THE CONTRADICTION BETWEEN USC’S DECISIONS WITH BOTH ADCC & DCC	118
ADCC ESTABLISHED THAT DELIBERATION OF ARBITRATORS IS PRESUMED	118
DCC ESTABLISH THAT ARBITRATORS’ SIGNATURE IS EVIDENCE THAT THEY PARTICIPATED IN THE DELIBERATIONS	119
§ 3: REMAINING PROCEDURAL FLAWS INCLUDING ARTICLE 216.1.C (ARTICLE 53.1(G) OF THE FEDERAL ARBITRATION LAW).....	120

DCC SET ASIDE AN ARBITRAL AWARD DUE TO ARBITRATOR’S FAILURE TO SET FORTH THE FIRST HEARING DATE IN THE AWARD.....	120
ADCC SET ASIDE A SUPPLEMENTAL ARBITRAL AWARD DUE TO ARBITRATORS’ FAILURE TO SET FORTH THE FULL NAME OF THE PARTIES AND DATE IN THE SUPPLEMENTAL AWARD.	121
ADCC SET ASIDE AN AWARD AFTER TEN SEPARATE COURT ACTIONS TO ENFORCE THE AWARD	121
DCC SET ASIDE AN AWARD DUE TO THE ARBITRATOR’S FAILURE TO SUSPEND THE PROCEEDINGS WHEN ONE OF THE ARBITRATOR’S FITNESS TO SERVE WAS BEING CHALLENGED.	123
IMPROVEMENT IN THE NEW FEDERAL ARBITRATION LAW	124
DCC SET ASIDE AN ARBITRAL AWARD DUE TO PIERCING THE CORPORATE VEIL.....	124
DCC SET ASIDE AN AWARD FOR GRANTING MORE THAN THE RELIEF SOUGHT BY THE PREVAILING PARTY.....	125
USC SET ASIDE AN AWARD DUE TO GRANTING COMPOUND RATHER THAN SIMPLE INTEREST	125
USC AND DCC SET ASIDE ARBITRAL AWARDS BASED ON EXCEEDING THE SUBSTANTIVE JURISDICTION.....	126
DCC PETITION NO. 91 OF 1993 ISSUED ON 23 OCTOBER 1993	127
THE USC SET ASIDE AN AWARD DUE TO FAILURE TO SUBMIT ARABIC TRANSLATION AND EXCEEDING THE TIME-LIMIT	127
DCC SET ASIDE AN AWARD DUE TO UNDUE EXERCISE TO THE RIGHT TO APPEAL AWARDS	127
DCC SET ASIDE TWO ARBITRAL AWARDS DUE TO THE ARBITRAL TRIBUNAL’S’ FAILURE TO SIGN ALL PAGES OF THE AWARD	128
DCC SET ASIDE AN ARBITRAL AWARD DUE TO THE ARBITRAL TRIBUNAL’S’ FAILURE TO EXHIBIT A COPY OF THE AGREEMENT TO ARBITRATE	131
SECTION 3: NULLITY RELATED TO OTHER PROCEDURAL IRREGULARITIES	131
§ 1 NULLITY RELATED TO THE INCOMPETENCE OF AN ARBITRATOR TO ADJUDICATE THE DISPUTE	131
ADCC SET ASIDE AN AWARD SINCE AN ARBITRATOR WAS EMPLOYED BY ONE OF THE PARTIES’ LEGAL REPRESENTATIVES.....	132
UAE CASE LAWS DENIED RECUSAL OF ARBITRATORS.....	133
USC AND DCC SET ASIDE ARBITRAL AWARDS DUE TO MISAPPLICATION OF RULES RELATED TO A PARTY’S FAILURE TO APPOINT AN ARBITRATOR	134
§ 2: NULLITY RELATED TO PUBLIC ORDER	136

ADCC REFUSAL TO SET ASIDE TWO AWARDS ON PUBLIC ORDER GROUNDS	137
THE DCC SET ASIDE TWO ARBITRAL AWARDS BASED ON PUBLIC POLICY VIOLATIONS (1)	139
THE DCC SET ASIDE TWO ARBITRAL AWARDS BASED ON PUBLIC POLICY VIOLATIONS (2)	139
MONETARY INTEREST IN ARBITRAL AWARDS IS NOT A GROUND FOR PUBLIC POLICY VIOLATIONS.....	140
THE DCC SET ASIDE THREE ARBITRAL AWARDS BASED ON PUBLIC POLICY GROUNDS (3)	140
§ 3: SUMMARY OF REMAINING PROCEDURAL IRREGULARITIES	141
NULLITY FOR BREACH OF THE ARBITRATION AGREEMENT WITH RESPECT TO PRE-ARBITRATION PROCEDURES	141
THE DCC REFUSE TO APPOINT AN ARBITRATOR DUE TO VIOLATIONS IN THE PRE-ARBITRATION PROCEEDINGS	143
DCC SET ASIDE AN AWARD DUE TO FAILURE TO SATISFY PRE-ARBITRATION PROCEDURES.....	143
ADCC’S STANCE ON PRE-ARBITRATION PROCEDURES.....	144
UNCLEAR DISPUTE RESOLUTION MECHANISMS ARE NOT ENFORCEABLE.....	144
PARTIES’ AGREEMENT NOT TO APPEAL AN AWARD	147
NULLITY FOR ARBITRATORS’ FAILURE TO REFER TO THE ARBITRATION AGREEMENT IN THE AWARD	149
THE DCC SET ASIDE AN AWARD DUE TO ARBITRATOR’S FAILURE TO INCLUDE THE TEXT OF THE ARBITRATION AGREEMENT INTO THE AWARD	151
USC SET ASIDE AN AWARD DUE TO ARBITRATOR’S FAILURE TO INCLUDE THE TEXT OF THE ARBITRATION AGREEMENT INTO THE AWARD	152
DCC REFUSE TO SET ASIDE AN AWARD BASED ON FAILURE TO STATE THE FULL TEXT OF THE AGREEMENT TO ARBITRATE IN THE AWARD	152
NULLITY RELATED TO FAILURE TO COMPLY WITH THE PRINCIPE DE LA CONTRADICTION AND DUE PROCESS ..	153
THE DCC SET ASIDE TWO ARBITRAL AWARDS DUE TO FAILURE TO SATISFY THE DUE PROCESS.	154
NULLITY RELATED TO PARTIES’ FAILURE TO REFER SPECIFICALLY TO THE AGREEMENT TO ARBITRATE	155
THE NECESSITY TO SIGN TERMS OF REFERENCE	156
CHAPTER 2: SUMMARY OF THE CASE LAWS CONFIRMING SETTING ASIDE ARBITRAL AWARDS IN THE UAE.....	160
SECTION 1 CASE LAWS ANNULLED AWARDS DUE TO LACK OF CAPACITY TO ENTER INTO ARBITRATION AGREEMENTS.....	160

SECTION 2 CASE LAWS ANNULLED AWARDS DUE TO EXCEEDING TIME LIMIT	165
SECTION 3 CASE LAWS ANNULLED AWARDS FOR OTHER GROUNDS.....	167
§ 1 JURISDICTIONAL GROUNDS TO SET ASIDE ARBITRAL AWARDS	167
ARBITRATION CLAUSE CONCLUDED BY REFERENCE TO A DIFFERENT DOCUMENT.....	168
REMAINING JURISDICTIONAL ISSUES	169
§ 2 ARBITRAL AWARDS ANNULLED DUE TO ISSUES VIOLATIONS OF THE PRINCIPE DE LA CONTRADICTION, RIGHT OF DEFENSE AND DUE PROCESS.....	173
§ 3 ANNULMENT RELATED TO PUBLIC ORDER CONSIDERATIONS	175
§ 4 ANNULMENT RELATED TO PROCEDURAL IRREGULARITIES.....	178
PART 2 JURISDICTIONAL CHALLENGES IN ARBITRATION DISPUTES IN THE UAE AND ENFORCEMENT OF AWARDS	184
TITLE 1: THE JURISDICTIONAL CHALLENGE DUE TO LACK OF REQUISITE AUTHORITY TO AGREE TO ARBITRATION	188
CHAPTER 1: THE UAE LAW STANCE IN RELATION TO AUTHORITY TO ARBITRATE	192
SECTION 1: DIFFICULTIES IN THE UAE LAW DEALING WITH AUTHORITY TO ARBITRATE.....	192
§ 1 TRADITIONAL APPROACH WITH REGARDS TO THE AUTHORITY TO ARBITRATE	192
AUTHORITY TO ARBITRATE FOR LLC COMPANIES	192
TRADITIONAL APPROACH WITH REGARDS TO THE AUTHORITY TO ARBITRATE FOR JOINT STOCK COMPANIES	194
TRADITIONAL APPROACH WITH REGARDS TO THE AUTHORITY TO ARBITRATE FOR REMAINING LEGAL ENTITIES	195
§ 2 CASE LAWS SUPPORTING ANNULMENT OF AWARDS DUE TO LACK OF REQUISITE AUTHORITY TO BIND COMPANIES TO ARBITRATION	197
§ 3 SEVER CRITICISMS TO THE UAE COURTS FOR NOT BEING AN ARBITRATION-FRIENDLY JURISDICTION	200
SECTION 2: DOCTRINES IN THE UAE LAW SUPPORTING RECOGNIZING ARBITRATION JURISDICTION	201
§1: THE JURISDICTIONAL RULES FOR PROTECTING WEAKER PARTIES	202
THE EU REGULATIONS OF JURISDICTION IN CONTRACTS INVOLVING A WEAKER PARTY	202
CONSUMER PROTECTION RULES APPLICABLE TO JURISDICTIONAL MATTERS IN THE UAE	203

§ 2: TIMING FOR JURISDICTION CHALLENGES	204
RESERVING THE RIGHT TO CHALLENGE JURISDICTION AT DIFFERENCE STAGES OF PROCEEDINGS	205
THE UNLAWFUL EXERCISE OF THE RIGHT UNDER UAE LAW.	206
§ 3: SUBSEQUENT RATIFICATION FOR ARBITRATION AGREEMENTS	207
RATIFICATION FRAMEWORK UNDER UAE LAW	207
WILLFUL BLINDNESS	209
DELIBERATE SILENCE	210
CHAPTER 2: ESTOPPEL AND APPARENT AUTHORITY DOCTRINES TO RECOGNIZE AUTHORITY TO ARBITRATE...	211
SECTION 1: AGENCY BY EQUITABLE ESTOPPEL.....	211
§ 1 ESTOPPEL LEGAL FRAMEWORK IN ENGLISH LAW	211
§ 2 ESTOPPEL LEGAL FRAMEWORK IN THE UAE LAW	212
§ 3 PARTIES ARE PRECLUDED FROM CAUSING NULLITY WHILE CLAIMING IT.....	213
ENGLISH LAW PRECLUDES A PARTY FROM RECOVERING A BENEFIT FOR HIS OWN WRONGDOINGS	213
THE UAE LAW PRECLUDES A PARTY WHO CAUSED NULLITY TO ADHERE TO IT.....	214
SECTION 2: APPARENT AUTHORITY DOCTRINE	216
§ 1 APPARENT AUTHORITY DOCTRINE IN FRENCH AND ENGLISH LAWS AS COMPARED WITH THE UAE LAW ...	216
APPARENT AUTHORITY DOCTRINE UNDER UAE LAW	218
§ 2 CASE LAWS ON APPARENT AUTHORITY IN THE UAE LAW	218
ABU DHABI COURT OF CASSATION JUDGMENT 1379 FOR THE YEAR 2009	219
DUBAI COURT OF CASSATION JUDGMENT NUMBER 403 FOR THE YEAR 2001.....	219
DUBAI COURT OF CASSATION JUDGMENT 379 FOR 1997	219
ABU DHABI COURT OF CASSATION CASE NUMBER 145 FOR 1993	219
UNION SUPREME COURT DECISION 62 FOR 2004	219
THIS CONSIDERABLE NUMBER OF CASE LAWS DEMONSTRATES THE CONSISTENCY OF THE UAE SUPREME COURTS IN APPLYING THE APPARENT AUTHORITY DOCTRINE.	220

CONDITIONS TO APPLY APPARENT AUTHORITY IN THE UAE LAW	220
§ 3 APPLICABILITY OF THE APPARENT AUTHORITY DOCTRINE REGARDING ARBITRATION AGREEMENTS UNDER UAE LAW:	222
DUBAI COURT OF CASSATION DECISION NUMBER 220/2004 [EXHIBIT 53].....	222
ABU DHABI COURT OF CASSATION JUDGMENT NUMBER 873 FOR 2009 [EXHIBIT 21]	223
DUBAI COURT OF CASSATION JUDGMENT NUMBER 273 FOR THE YEAR 2006 [EXHIBIT 20]	224
SECTION 3: THE MODERN VIEW OF CASSATION JUDGMENTS IN DUBAI AS OPPOSED TO ABU DHABI	224
§ 1 FIRST WAVE OF IMPROVEMENT (FROM 2007 TO 2013) IN DUBAI AND ABU DHABI	225
§ 2 SECOND PHASE OF IMPROVEMENT (FROM 2015 TO 2018) IN DUBAI	228
§ 3 RELAPSE TO THE OLD TRADITIONAL APPROACH.....	233
DCC 137/2015 [EXHIBIT 39]	237
§ 4 SUMMARY PROVISIONS SUPPORTING AND OPPOSING ARBITRATION JURISDICTION	237
CHAPTER 3: REMAINING JURISDICTIONAL CHALLENGES FOR ARBITRATIONS IN THE UAE	239
SECTION 1 JURISDICTION OF DIFC COURT TO HEAR A CLAIM FOR JUDICIAL REVIEW OF ARBITRAL AWARDS ...	239
§ 1 EXECUTION OF FOREIGN JUDGMENTS THROUGH DIFC COURTS, ENFORCEMENT WITHIN DUBAI	242
§ 2 THE DUBAI JUDICIAL COMMITTEE TO RESOLVE CONFLICT OF JURISDICTION	243
§ 3 DECISIONS ON JURISDICTIONAL CONFLICT BY THE JUDICIAL COMMITTEE	245
SECTION 2: OTHER JURISDICTIONAL CHALLENGES IN THE UAE	250
§ 1 ENFORCEMENT OF AWARDS IN THE ABU DHABI GLOBAL MARKET	250
§ 2: THE JURISDICTION WHEN THE UNDERLYING CONTRACT IS TERMINATED OR INVALID UNDER UAE LAW...	251
THE CONTRADICTION BETWEEN ADCC AND DCC AND FURTHER BETWEEN DCC'S OWN DECISIONS.....	253
ADCC 58 FOR 2007, NULLITY OF CONTRACT DOES CAUSE NULLITY OF THE ARBITRATION CLAUSE	254
ADCC 208 FOR 2009, THE TERMINATION OF A CONTRACT DOES NOT TERMINATE THE ARBITRATION CLAUSE.	254
ADCC PETITION NO. 353 OF 2011 ISSUED ON 24 AUGUST 2011, THE TERMINATION OF A CONTRACT DOES NOT TERMINATE THE ARBITRATION CLAUSE	254

DCC 242 FOR 2008, DCC 164/2008 AND DCC PETITION NO.108 OF 2009	255
CONCLUSIONS ON THE JURISDICTION IN CASE THE UNDERLYING AGREEMENT IS TERMINATED OR INVALID...	256
THE FEDERAL ARBITRATION LAW VIEW ON THE JURISDICTION IN CASE THE UNDERLYING AGREEMENT IS TERMINATED OR INVALID UNDER.....	256
§ 3: ARBITRABILITY OF THE ESCROW LAW	256
§ 4 THE JURISDICTIONAL CHALLENGES ON ASSETS ASSIGNED UNDER FINANCE AGREEMENTS	256
LEGAL ANALYSIS ON ASSIGNMENT OF RIGHTS	256
THE ABSOLUTE VS. RELATIVE ASSIGNMENT UNDER UAE LAW.....	256
REFERENCE TO AN ARBITRATION CLAUSE UNDER THE FEDERAL ARBITRATION LAW:.....	256
CASE LAWS ON ASSIGNMENT OF RIGHTS:	256
§ 5: THE JURISDICTIONAL CHALLENGES RELATED TO FAILURE TO ASSIGN SPECIFICALLY THE AGREEMENT TO ARBITRATE.....	256
§ 6: THE JURISDICTIONAL CHALLENGES ON PIERCING THE CORPORATE VEIL IN THE UAE LAW	256
CASE LAWS FOR PIERCING THE CORPORATE VEIL IN ARBITRATION	256
POSITION OF DUBAI COURTS ON PIERCING CORPORATE VEIL IN ARBITRATION.....	256
ATTEMPTS TO HIDE ASSETS BY THE HOLDING COMPANY	256
PRACTICAL CASE STUDY ON PIERCING THE CORPORATE VEIL.....	256
PARTIAL VERSUS ENTIRE ANNULMENT OF AWARDS.....	256
CONCLUSIONS ON PIERCING CORPORATE VEIL.....	256
TITLE 2: THE JURISDICTION FOR COMPLEX ARBITRATIONS IN THE UAE	256
CHAPTER 1: THE POWER CONFERRED UPON AN ARBITRAL TRIBUNAL BY THE OPERATION OF THE UAE LAW TO SUPPORT UPHOLDING JURISDICTION ON MULTI-CONTRACT ARBITRATIONS.....	256
SECTION 1 CONSOLIDATION OF ARBITRATION UNDER UAE LAW	256
§ 1 DUBAI COURT OF CASSATION CASE LAW ON CONSOLIDATION OF ARBITRATION CLAIMS AND CASE LAWS	256
§ 2 UAE CASSATION DECISION WITH REGARDS TO CONSOLIDATION OF CASES IN JUDICIARY	256
§ 3 POWERS CONFERRED UPON AN ARBITRAL TRIBUNAL BY THE INSTITUTIONAL ARBITRATION RULES.....	256

SECTION 2 POWERS CONFERRED UPON AN ARBITRAL TRIBUNAL BY THE PARTIES	256
§ 1 FIRST: PARTIES' INTENTION TO HAVE A SINGLE TRANSACTION	256
THE DRAFTING OF THE ARBITRATION AGREEMENTS	256
THE TIMING FOR ENTERING INTO THE ARBITRATION AGREEMENTS BEING CONSOLIDATED	256
§ 2 SECOND: PARTIES' CONTEMPLATION	256
§ 3 THIRD: PARTIES' REASONABLE EXPECTATIONS.....	256
SECTION 3 VIEWS OF SCHOLARS SUPPORTING CONSOLIDATION.....	256
CHAPTER 2 INTERNATIONAL PRACTICE SUPPORTING CONSOLIDATING MULTI-CONTRACT ARBITRATION	256
SECTION 1 POSITION OF ICSID ARBITRATIONS.....	256
SECTION 2 POSITION OF THE ENGLISH COURTS	256
SECTION 3 POSITION OF FRENCH COURTS	256
§ 1 DETERMINING THE COMMERCIAL VIABILITY OF CONSOLIDATION (VIEW FROM THE U.S COURTS COMPARED WITH FRENCH COURTS).....	256
§ 2 ARBITRATION CONVENTIONS AND RULES.....	256
CHAPTER 3 OPPOSING VIEWS TO CONSOLIDATION	256
SECTION 1 CHALLENGES TO CONSOLIDATION OF ARBITRATIONS	256
§ 1 ARBITRAL AWARDS DENYING CONSOLIDATION REVIEWED	256
§ 2: THE SCOPE OF THE ARBITRATION AGREEMENTS	256
§ 3 PARTIES' AUTONOMY TO CHOOSE ARBITRATORS	256
§ 4 CONFIDENTIALITY OF ARBITRATION IN RELATION TO CONSOLIDATION	256
SECTION 2 POSITION OF ENGLISH COURTS SUPPORTING FRAGMENTATION OF DISPUTES IN CASE OF CONFLICTING JURISDICTION CLAUSES.....	256
SECTION 3 POSITION OF U.S COURTS SUPPORTING FRAGMENTATION OF DISPUTES	256
SECTION 4 CONSOLIDATION WHERE CONFLICTING JURISDICTION CLAUSES EXIST	256
CONCLUSIONS ON CONSOLIDATION OF ARBITRATIONS.....	256

TITLE 3: RECOGNITION OF ARBITRAL AWARDS IN INTERNATIONAL JURISDICTIONS & LEGISLATIVE REFORMS PROPOSED TO THE UAE LAWS AND THE UAE JURISPRUDENCE TOWARDS ARBITRATION.....	256
CHAPTER 1 ENFORCEMENT OF ARBITRAL AWARDS, COMPARATIVE APPROACH TO FRANCE AND OTHER JURISDICTIONS.....	256
SECTION 1: GENERAL PRINCIPLES APPLICABLE TO ARBITRATION IN FRANCE	256
SECTION 2: SETTING ASIDE ARBITRAL AWARDS BY FRENCH COURTS.....	256
§ 1 FRENCH COURTS SETTING ASIDE ARBITRAL AWARDS.....	256
§ 2 FRENCH COURTS DENYING SETTING ASIDE ARBITRAL AWARDS IN FRANCE.....	256
§ 3 ENFORCING AWARDS IN FRANCE EVEN IF SET ASIDE BY THE NATIONAL COURTS OF THE SEAT OF THE ARBITRATION.....	256
THE HILMARTON CASE	256
THE NORSOLOR CASE	256
THE CHROMALLOY CASE.....	256
THE PUTRABALI CASE	256
§ 4 COMPARISON OF ENFORCING DOMESTIC VS. INTERNATIONAL ARBITRAL AWARDS IN FRANCE.....	256
SECTION 3: ENFORCING ARBITRAL AWARDS IN OTHER JURISDICTIONS	256
§ 1 ENFORCING ARBITRAL AWARDS IN ENGLISH COURTS	256
GROUND TO REFUSE DOMESTIC AWARDS' ENFORCEMENT.....	256
GROUND TO REFUSE FOREIGN AWARDS' ENFORCEMENT	256
INTERNATIONAL CONVENTIONS	256
§ 2 ENFORCING ARBITRAL AWARDS IN THE UNITED STATES' COURTS	256
CASE LAW COMMISA V PEMEX	256
CHAPTER 2: MITIGATING FACTORS TO ARBITRATION RISKS, THIRD-PARTY LITIGATION FUNDING.....	256
SECTION 1: CLAIMS FOR DAMAGES IN REAL ESTATE DISPUTES UNDER UAE LAW.....	256
§ 1 LEGAL FRAMEWORK FOR CLAIMS FOR DAMAGES UNDER UAE LAW	256
§ 2: UAE SUPREME COURTS JUDGMENTS THAT AWARDED LOSS OF RENT.....	256

ABU DHABI COURT OF CASSATION JUDGMENTS TO AWARD DEPRIVATION OF MONEY.....	256
SECTION 2: CHALLENGES FACING LITIGATION FUNDERS IN THE UAE:	256
§ 1: EFFECT OF GLOBAL FINANCIAL CRISIS ON REAL ESTATE PROJECTS IN THE UAE	256
§ 2: PROPERTIES COMPLETION DATES WHICH ARE UNSPECIFIED	256
§ 3: ANTICIPATED COMPLETION DATE IS NOT AN EXCUSE TO DEFAULT CONTRACTUAL OBLIGATIONS.	256
SECTION 3: LIMITATION OF LIABILITIES UNDER UAE LAW	256
§ 1: LEGAL DOCTRINE	256
§ 2: UAE JURISPRUDENCE ON LIMITATION OF LIABILITY AS A MANDATORY PROVISION	256
§ 3: OPINIONS OF LAW FIRMS.....	256
CHAPTER 3: PROPOSED IMPROVEMENTS TO THE UAE LAW AND THE UAE JURISPRUDENCE	256
SECTION 1: LEGISLATIVE REFORMS	256
§ 1 LIMITING GROUNDS TO SET ASIDE ARBITRAL AWARDS	256
EXCLUDING TIME-LIMIT OF AWARDS FROM GROUNDS TO SET ASIDE ARBITRAL AWARDS.....	256
AUTHORITY OF DIAC EXECUTIVE COMMITTEE TO EXTEND THE TIME-LIMIT	256
NULLITY DUE TO ARTICLE 216.1 (C) OF THE UAE CIVIL PROCEDURES CODE (ARTICLE 53.1.G OF THE FEDERAL ARBITRATION LAW).....	256
THE CONTRADICTORY STARTING POINT OF THE TIME-LIMIT OF THE FINAL AWARD	256
PROCEDURAL ESTOPPEL	256
§ 2 REQUISITE AUTHORITY TO ENTER INTO ARBITRATION AGREEMENTS	256
ELIMINATING CONTRADICTION BETWEEN DUBAI COURTS AND ABU DHABI COURTS WITH REGARDS TO THE REQUISITE AUTHORITY TO ENTER INTO ARBITRATION AGREEMENTS.....	256
ELIMINATING CONTRADICTION WITHIN DUBAI COURTS WITH REGARDS TO THE REQUISITE AUTHORITY TO ENTER INTO ARBITRATION AGREEMENTS	256
§ 3 REMAINING LEGISLATIVE IMPROVEMENTS.....	256
DIRECT ENFORCEMENT OF ARBITRAL AWARDS	256
SETTING THE THRESHOLD FOR STAYING ENFORCEMENT OF AWARDS.....	256

PROVIDING LEGISLATIVE FRAMEWORK FOR FIGHTING CORRUPTION IN ARBITRATION	256
PROVIDING GROUNDS TO APPEAL AWARDS	256
ASSIGNMENT OF ASSETS UNDER FINANCE AGREEMENTS	256
SEVERABILITY OF AN ARBITRATION CLAUSE	256
ARBITRATORS BEING MEMBERS OF THE BOARD OF TRUSTEES	256
ENFORCING FOREIGN ARBITRAL AWARDS.....	256
SECTION 2: IMPROVEMENTS PROPOSED TO THE UAE JURISPRUDENCE	256
§ 1 POTENTIAL CRIMINALIZATION OF ARBITRATORS IN THE UAE	256
§ 2 ARBITRATION CLAUSE INCORPORATED BY REFERENCE.....	256
§ 3 MANAGING CONSOLIDATION OF MULTI-CONTRACT ARBITRATIONS	256
§ 4 REMAINING IMPROVEMENTS PROPOSED TO THE UAE JURISPRUDENCE	256
THE APPLICATION OF ARTICLE 214 OF THE UAE CPC (ARTICLE 54.6 OF THE FEDERAL ARBITRATION LAW).....	256
LIMITING PUBLIC ORDER GROUNDS.....	256
ABILITY TO SEEK A TRIBUNAL-APPOINTED EXPERT	256
THE USE OF DIFC AND ADGM AND CONDUIT JURISDICTION.....	256
THE USE OF OATH FORMULAS IN ARBITRATION PROCEEDINGS	256
SIGNATURE OF THE AWARD	256
TABLE OF ABBREVIATIONS	256
BIBLIOGRAPHY	256
CASE LAWS – ABU DHABI COURT OF CASSATION.....	256
CASE LAWS - DUBAI COURT OF CASSATION	256
CASE LAWS – UAE - UNION SUPREME COURT	256
CASE LAWS - DIFC COURTS AND JOINT JUDICIAL TRIBUNAL	256
CASE LAWS - COURTS OF ENGLAND AND WALES	256

CASE LAWS - US COURTS 256

CASE LAWS - FRENCH COURTS 256

CASE LAWS - OTHER JURISDICTIONS 256

PUBLISHED ARBITRAL AWARDS 256

TABLE OF LEGISLATION: UAE 256

TABLE OF LEGISLATION AND CONVENTIONS: OTHER JURISDICTIONS 256

SECONDARY SOURCE – BOOKS & ARTICLES 256

TABLE OF CONTENTS 256