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Obaid Saqer Busit

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# **THE SYSTEM OF ARBITRATION IN THE U.A.E: PROBLEMS AND PROSPECTS**

**Obaid Saqer Busit**

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**Thesis**

**Submitted in fulfilment**

**of the requirements for the degree of Ph.D.**

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### **Abstract**

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The United Arab Emirates was created in 1971. The discovery and exploitation of major oil resources has constituted a substantial source of wealth and generated much economic activity, predominantly of trans-national character.

This economic activity has, inevitably, given rise to a large increase in the number of legal disputes arising from business transactions. In its current state of development the legal system of the U.A.E. is unable to provide for the reliable and expeditious resolution of the legal actions. The lack of a sufficiently efficacious court system inhibits economic development, particularly in the area of large scale complex transactions involving foreign parties. One way of remedying this is to establish a system of arbitration, providing an alternative disputes resolution mechanism.

For such an alternative to flourish arbitration must be recognised as an autonomous legal institution, sensitive to parties' needs in terms of applicable law and procedure and immune from unnecessary interference from the courts. Above all, the enforcement of arbitral awards by the courts must be a straightforward and reliable process. This thesis is concerned with problems and prospects for instituting a modern system of arbitration in the U.A.E.

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## Introduction

Arbitration is a non-judicial, legal technique for resolving disputes by referring them to a third party for a binding decision. It is most commonly used for the resolution of commercial disputes. The significance of arbitration is demonstrated by its increasing use by the business community. Its primary advantage is the speed by which controversies can be resolved by arbitration, in comparison with the long delays passible under ordinary court procedures. Additionally, arbitrators' expertise in a specific trade can reduce the expenses connected with court procedures. The privacy of the arbitration procedure is also much valued by parties.

In recent years, with the rapid growth of international trade, and with the enforcement of arbitral awards gaining national and international attention, it has become an obvious desire of the business community to have modern laws in step with the rapid growth of international trade. As a result, substantial reforms were made, enacting statutory laws on arbitration in the national and trans-national arena, either by special laws or as part of a code of civil procedure. The specific needs and characteristics of trans-national arbitration practice have generated new theories and practices in international arbitration, detaching arbitration from any particular legal system.

Because of the demands of the business community, arbitration rules have been re-shaped in major aspects. These amendments focus on the main obstacles facing arbitration procedure, i.e. court intervention, by reducing a state court's control and interference in arbitration procedure within its territory and enhancing powers to enforce arbitration awards against a recalcitrant party. The modern trend of arbitration law, grants parties and arbitrators a considerable freedom to hold arbitral hearings away from court control, and by providing an effective enforcement of awards.

Notwithstanding these developments, trans-national arbitration, in the U.A.E. as well as in the majority of Middle Eastern countries, is to some extent still regarded with distrust and suspicion. In the majority of Arab countries, arbitration is rendered less effective due to the fact that these countries lack a developed law of arbitration and still refrain from adhering to the major international conventions in the field of arbitration. As a result, enforcement of an international or foreign award can meet with certain difficulties in the U.A.E. due to the lack of rules regulating these issues.

Domestic arbitration laws in the U.A.E. are not satisfactory. They are vexingly varied and considerably uneven in their level of development and refinement. In some cases the legislation is fragmentary or non-existent, apart from the Abu-Dhabi Code of Civil Procedure (A.D.C.C.P.), which itself is outdated and leaves a

number of issues unclear, especially regarding the scope of the review of the arbitral award by the court and the issue of the applicable law. The position of foreign arbitral awards is also adversely affected by a perspective still current in the U.A.E which sees such awards as an instrument to oust the court's jurisdiction as the competent authority. Consequently, the parties are granted the right to refer their disputes to arbitration but within the purview of the court which retains the jurisdiction to control and supervise arbitration. This situation creates uncertainty and hesitation on the part of arbitration users.

In recent years, however, the explosion of commercial and industrial development in the U.A.E. has led U.A.E. legislators to show a great interest in the question of arbitration at the federal and Emirate level in order to provide a suitable legal climate by the enactment of arbitration legislation. They have attempted to enact a developed, appropriate, efficient arbitration system as a dispute resolution mechanism ensuring independent and easy settlement of disputes. For this reason a separate chapter was devoted to it in the Federal Draft of Code of Civil Procedure (F.D.C.C.P.) and at the local level by the enactment of the Sharjah Arbitration Act (S.A.A.) To what extent have these rules achieved their target in creating a hospitable legal environment for national and trans-national commercial arbitration by granting the parties a fair and efficient system out with the rigid court procedures and ensuring the enforceability of arbitral awards?



## **The aim of the Study**

The aim of the thesis is to examine the law and practice of arbitration in the U.A.E., and make suggestions for reforms and innovation. As far as the researcher has been able to ascertain, no full extensive study of the arbitration system of the U.A.E. has been produced. In order to make reform proposals in a form shaped by modern theory and practice, the researcher looked predominantly to the English system, to abstract from it its main features and its problems, focussing on those features which characterize and define a modern system of arbitration. In examining current U.A.E. law and practice emphasis is on the difficulties and obstacles facing the establishment of trans-national and domestic arbitration in the U.A.E.

Examination of English law and practice is helpful in shedding light onto the solutions available though it must be remembered that it operates in a completely different environment to that in the U.A.E.

## **The Significance of the study**

One reason for choosing this subject is because the arbitration system and the problems of the enforcement of arbitral awards have been comparatively neglected in the U.A.E. The arbitration system in the Emirates at the present time is deeply

complex and its problems will probably increase to critical levels in the future as the domestic and international commercial transactions multiply with the ever-increasing expansion of commercial activity in the U.A.E.

### Problems Encountered

Several problems were encountered which made this research difficult to complete. Not only is data sparse, but sometimes it is inaccessible. The lack of access to courts as well private institutions' decisions concerning arbitration was a major frustration.

Among the difficulties encountered by the researcher is a lack of sufficient published materials about this topic in the U.A.E. Difficulties were faced obtaining access to arbitration cases in the Courts as well as in the Chamber of Commerce, because the material concerning this is unpublished. Some of the cases discussed in the thesis involved disputes between the Emirates government or one of its emanations. In these cases special permission was needed from the ruler of that Emirate to examine these materials. In many cases such permission was denied. The researcher followed different tactics to gain access on some of these cases (Deutsche Schachtbau v. Ras al-Khaimah National Oil).<sup>1</sup>

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1. After many fruitless attempts to obtain the case from the Emirates' legal consultant, we exploited an inter-family dispute within the ruling family, so that the son gave his permission for us to have the documents after his father had denied it.

The secrecy over arbitration cases is asserted in the U.A.E. to avoid the examination of the decisions. The justification of this secrecy is the protection of the parties in the disputes, where as in reality, this justification is no more than a pretext to conceal the interests of those people (Egyptian, Syrian and Sudanese) practising in the U.A.E., as lawyers, legal consultant and judges. They monopolise this type of dispute and are keen to keep U.A.E. nationals from practising in these fields. The researcher faced difficulties in breaching this "knowledge monopoly". Likewise in the case of federal legislation, which again is surrounded by strict secrecy, the researcher took two years and exhausted all methods to gain eventually a copy of the F.D.C.C.P.

The difficulty in following court guideline and precedents is due to the lack of harmony among the staff in the U.A.E. courts, resulting from the differences in nationalities, educational backgrounds and the legal schools they follow. Thus a decision, for example, reached in a particular Emirate court on a particular set of facts will not necessarily produce the same result if, the case is tried before another Emirate court, even though the circumstances are similar.

Finally, the courts decisions in the U.A.E. are not published. The U.A.E legal system is unfamiliar with the system of law reviews. The only exception in this respect was *Al-Adalah* which is confined to federal jurisdiction and limited to the federal Supreme Courts and Court of Appeal judgments only. Judgments of the inferior Federal courts and local Emirates courts which usually

include the decisions relating to arbitration issued by them are not published. This led the researcher to go personally to these institution) in order to examine cases concerning arbitration. This involved time, because of the bureaucratic procedure followed in these institutions, and in many instances access was denied.

### Organization of the thesis

In the light of the aims specified above, the present study is in two parts. Part one has two chapters, which deal with the theory and practice of arbitration systems with special emphasis on the Middle East.

Chapter one deals with the nature of arbitration. There are varies theories concerning this. Some consider arbitration as subordinate to the court of appropriate jurisdiction; others consider arbitration independent, akin to a private judiciary; yet others consider this position to reflect in varying degree both theories. This chapter will present the different theories and the practical consequences of each of them.

Chapter two deals with necessary limitations on the scope of arbitration. Its principal concern is constraints on arbitration imposed by appropriate conceptions of public policy. This chapter will examine in particular certain notions of public policy current in Middle Eastern countries and subject them to critical analysis.

Part two deals with the law and practice of the arbitration system in the U.A.E. This part is divided into five chapters.

Chapter three deals with law and justice of the U.A.E. It attempts to investigate the legal system in the U.A.E., the divisions in this system, the sources of U.A.E. law, and the court structure of the federation and individual emirates. It also examines to what extent the present rules and practice encourages the operation and use of an arbitration system.

Chapter four deals with arbitration law and practice in the U.A.E. The position of arbitration in the U.A.E. is not secure yet because of the legislative vacuum and the outdated rules, leading to some difficulties in implementation of the system in U.A.E. This chapter will consider the practice of arbitration and the difficulties facing the operation of the system.

Chapter five deals with dispute resolution institutions in the U.A.E. These institutions arose as private institutions to render a particular service to certain people in society by avoiding the courts with the difficulties attendant upon litigation. This chapter will consider whether these institution have achieved the role for which they were established.

Chapter six will examine the relationship between the court and arbitration from the period from the initiation of arbitration to the finalisation of the award. The study will examine the basis

of this relationship and its forms in U.A.E. law and practice, with the various factors influencing it. It will analyze the strengths and weaknesses of this relationship in the arbitration system, and the possibility of establishing arbitration with the minimum necessary court interference.

Chapter seven deals with the enforcement of awards, after the issuing of the arbitral award. It will examine the ways to enforce the arbitral award, whether it needs to go through the court to gain the enforcement power or not, and what are the restrictions on the enforcement of arbitral awards under the law and practice of the U.A.E.

The Conclusion will list findings and recommendations resulting from this study.

## **PART ONE**

# Chapter One The Nature of Arbitration

## Introduction

The purpose of this chapter is to discuss arbitration in general terms by abstracting the essentials of arbitration and to consider general theories of arbitration. It will be specially informative as a yardstick when discussing the arbitration system in the U.A.E.

The courts are not the only mechanisms for settling civil disputes. Nor are they always the most desirable means of doing so. Resolving every civil dispute through the courts would involve intolerable costs to individuals, businesses, and society. The increase in case loads and delays may cost the parties expense and time. In the light of these considerations, parties look for an accurate and expeditious means for resolving disputes, which takes into account all of the above factors and safeguards the confidentiality of their transactions. This system is arbitration.

Arbitration has for some years been recognized as a useful and effective device for the settlement of disputes between parties, outside the ordinary procedure of the courts. In essence it is the reference of the dispute to a mutually agreed third party who has the authority to determine an award which is legally binding as a decision.<sup>1</sup> The system

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1. Holtzmann M. Howard "Long Term Multinational Disputes: A Challenge to Arbitration", (1969) 24 Arbitration Journal, 234 at pp. 234.



of arbitration is a voluntary way for the settlement of disputes between parties. What advantages has this system which the courts cannot provide? And what is the nature of this system: does it have a legal character or not? What is the legal nature of the arbitration?

### 1.1 The definition of Arbitration

Before one can discuss the advantages and the disadvantages of arbitration and its nature, one must define "arbitration".

Most people act as arbitrators at some time in their lives, by arbitrating between friends or family. A person's friends or family choose him or her to settle a disagreement because they consider that person to be neutral, and thus in a position to say who was right. If these parties expressly or implicitly agree to accept the decision of this person we can say that arbitration takes place.

It is difficult to establish a suitable definition of arbitration; it is more easily identified than defined.<sup>2</sup> Most attempts to define arbitration have been criticised. It is useful, however, to examine some of these definitions.

*Black's Law Dictionary* describes arbitration as:

The reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard.<sup>3</sup>

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2. Lew J.D.M., *Applicable Law In International Commercial Arbitration* (Oceana Publications New York 1978), at p.11.

The American Arbitration Association defines arbitration as:

reference of a dispute to one or more impartial persons for final and binding determination<sup>4</sup>

Arbitration has also been defined in the following way:-

Arbitration is an adjudicator process by which parties agree to submit their dispute to a neutral person or group of persons, not connected with the courts, whose function is to conduct a hearing and render a judgement.<sup>5</sup>

These definitions fail to take account of all aspects of arbitration. For example, the last definition implies that arbitration should be consensual, but that need not necessarily be the case. Arbitration may be made compulsory by statutes.<sup>6</sup> Moreover, there is no inherent implication that arbitration must be not connected with the court. Indeed, in certain areas it may be desirable that arbitration act as an adjunct to the court (such as in enforcing the defendant to comply with the award). Finally, there is no absolute necessity for arbitrators to render a judgement and

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3. Black Law Dictionary, (fifth edition 1983) at p.55.

4. American Arbitration Association, A Businessman's Guide to Commercial Arbitration, at p.3

5. Meroney, "Mediation and Arbitration of Separation and Divorce Agreements" (1979) 15 Wake Forest Law Review 467 at 473.

6. Examples of statutory arbitration are to be found in the Agricultural Holdings Act of 1948, the Building Societies Act 1962, the Industrial and Provident Societies Act 1965 and the Patents Act 1977.

arbitrators in some disputes may resolve the dispute without rendering a judgement. An arbitrator may act as a mediator to achieve a solution satisfactory both parties.<sup>7</sup>

Since it is difficult to offer a compact definition of arbitration it will be useful to identify its major characteristics .

Arbitration is a method of settling disputes between parties. The dispute is resolved by neutral parties (the arbitrators). Arbitrators are empowered to act by authority vested in them by the parties submitting to arbitration. They are expected to determine the dispute in a judicial way, although this does not necessarily mean that their decision will be determined solely according to the law.<sup>8</sup> Arbitration is an adjudication process, whether private or public. Finally, subject to any appeal, the arbitrators' decision is final and conclusive and puts an end to the parties' dispute.<sup>9</sup>

These are the general characteristics of arbitration. It is difficult to formulate a suitable definition which includes all the characteristics of arbitration. But in general the above characteristics are appropriate to all types of arbitration.

## 1.2 The Advantages and Disadvantages of Arbitration

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7. Rayner W.B., "Arbitration: Private Dispute Resolution as an Alternative to Court", (1984) 22 University of Western Ontario Law Review 33 at pp.35.

8. *Ibid* p.35

9. Lew, (*op. cit* n.2) at p. 12.

There are advantages in a system of arbitration. There may also be disadvantages. This section will examine the advantages.

Flexible mechanisms for the settlement of civil disputes arising from commercial transactions can be highly desirable. "Flexibility" is measured in terms of the speed with which a decision may be issued, the minimalisation of costs and the avoidance of unwanted publicity, and satisfaction of these requirements play a major role in the success of arbitration.

### 1.2.1 Speed in issuing the award

One of the advantages of the arbitration system is that it produces a quicker resolution of a dispute, and time may be of vital importance in a business situation. Taking a dispute to court may involve both parties in a considerable length of time because of court congestion. The court calendars of many countries of the world are so crowded that adjudication may be delayed for periods even in excess of a year. In the absence of arbitration the number of disputes coming before the courts would inevitably be increased, and the settlement of these disputes even more protracted. Find litigation may be even more delayed if the parties' contract contains neither a choice of law nor choice of forum clause, thus giving rise to lengthy and expensive actions over these issues.<sup>10</sup>

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10. Ehrenhaft D. Peter, "Effective International Commercial Arbitration", (1979) 27 Law & Policy in International Business 1191, at pp.1192.

The USA, for example, is one of the countries which suffer this phenomenon, which causes unjustifiable delays in the American judicial system. In 1982 Chief Justice Burger of the Supreme Court of the United States said:

Today I address the administration of justice in civil matters, which shares with criminal justice both delay and lack of finality. Even when an acceptable result is finally achieved in a civil case, that result is often drained of much of its value because of the time lapse, the expense and emotional stress inescapable in the litigation process<sup>11</sup>

In an effort to alleviate court congestion, several American jurisdictions attempted to send some disputes to arbitration for quicker resolution of those disputes.<sup>12</sup>

Arbitration in this case can offer a useful alternative to relieve court congestion, and in order to bring about quicker decisions which the majority of parties seek, especially in international transactions.

#### 1.2.2 Confidentiality

The system of arbitration guarantees the confidentiality since only the parties, and their witnesses and experts are allowed to attend and the award is published only to the parties.<sup>13</sup> Similarly hearings are not public, and exhaustive records are not kept<sup>14</sup>. Especially in the

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11. Burger, "Isn't There a Better Way", (1982) 68 American Bar Association Journal 274.

12. Rayner W.B. (*op. cit. n.7*) at p.37

13. Douglas A Stephenson, "Arbitration" (1986) 83 Law Society Gazette 3813 at p. 3814.

14. Rayner W.B. (*op. cit. n.7*) at p. 41.

commercial sector where disputes may involve international corporations which have a legitimate interest in confidentiality, the arbitration process avoids the necessity for a party to appear in the court, given that such an appearance may affect the commercial reputation of this corporation and may compel the parties to take a public position that make settlement difficult or even impossible.<sup>15</sup>

### 1.2.3 Selection of Expert

Adjudication through arbitration allows expertise other than legal expertise to be referred to in the adjudication. Parties to a dispute when they choose an arbitrator may select an adjudicator who is a professional and expert in the subject matter of the dispute. Such facility for a choice of arbitrators possessing the appropriate special qualifications relevant to dispute may save the parties' time and avoids a hearing supervised by a person unversed in the technical matters of issue. This has led some countries to establish judicial courts staffed by experts in the subject-matter of the litigation, instead of judges<sup>16</sup> and to establish institutions to render serves in arbitration. For example, the British Chartered Institute of Arbitrators maintains a panel of some 350 trained arbitrators listed according to their areas of

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15. Ehrenhaft D. Peter (*op. cit. n.10*) at p.1193.

16. Kuwait has established a court for commercial disputes staffed by merchants.

expertise in thirty eight different areas.<sup>17</sup> This pool of expertise allows the parties to choose arbitrators who have a comprehensive knowledge relevant to the dispute in question.

#### 1.2.4 The appropriate venue for the settlement of trans-national disputes

Judges in national courts, are bound by rigid rules in deciding which country's law is applicable. An arbitrator is not bound in the same way unless parties to a dispute stipulate an applicable law in their contract. Thus an arbitrator, who is well versed in trans-national trade practices, is in a position to exploit those practices more fully for the benefit of the case.

Arbitration is considered an appropriate way for settling trans-national disputes, and is likely to be the most effective way of resolving disputes between traders of different countries, particularly when business organizations involved come from countries with a different social, economic and legal system. Only international commercial arbitration can provide a forum equally familiar and acceptable to business organizations, lawyers and arbitrators from all over the world.<sup>18</sup>

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17. Phillips, "Arbitration in the 1980's" (1980) 46 Arbitration 222.

18. Howard Holtzman, Five ways the American Arbitration Association Can Assist in resolving disputes in trade with the Soviet Union, Paper delivered at Seminar of IBA and Association of Soviet Lawyers, Moscow, 7 June 1988.

The litigation of this kind of dispute (that is, of an trans-national nature) will impose burdens on one of the parties when, as in most cases the chosen forum is the country of business of the opposing party. Litigation abroad is disadvantageous because of the problems posed by different language and court system, and also a party may fear that the court will be biased in favour of its own nationals. But in arbitration such difficulties are avoided since the arbitration panel will comprise of arbitrators from different countries with an umpire who does not share the nationality of any of the disputants to ensure that there is no bias.

#### 1.2.5 The Finality of the award

It is proposed to examine this issue by making reference to the position in England. Before the 1979 Arbitration Act finality could be elusive and many parties used the "case stated" as a mechanism delaying tactic.

The 1979 Act has restricted this abuse on the above grounds and yet it introduced a new possibility for delay by granting the parties leave to appeal. Such right of appeal is not, however, without restrictions in that an appeal must be based on a question of law, where the question of law is genuine and where its determination substantially affects the rights of at least one of the parties. Furthermore it was held in *The Nema*<sup>19</sup> that there had to be clear indication that the arbitrators had

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19. *Pioneer Shipping v. BTP Tioxide* [1982] A.C. 724.



erred in their decision on the question of law in order that leave to appeal should be given. A further restraint was imposed by the High court when it required that the applicant pay into court the sum of the award against him before being granted leave to appeal. All these requirements are designed to ensure finality of the award.

#### 1.2.6 The disadvantages of arbitration

Like any system for resolution of disputes arbitration has disadvantages as well as advantages. Many writers consider the lower costs of arbitration to be a major advantage.<sup>20</sup> But this is not always the case, since arbitration can be more expensive than taking the dispute to court, particularly when the parties have decided to use a panel of arbitrators, and where each one is paid per diem.<sup>21</sup> Also institutional arbitration tends to be expensive, particularly where the amounts at issue are large and the administrative expenses are calculated primarily on an *ad\_valorem* basis.<sup>22</sup>

A further disadvantage of the of arbitration can be its lack of predictability specially in *Amiable compositeur* arbitration, where the arbitrator under no obligation to observe the rule of law, therefore the outcome is often less predictable than that of a court judgement.

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20. Enid A. Marshall *Gill: The Law of Arbitration*, (3rd edition 1983) p.3.

21. Ehrenhaft D. Peter *op. cit n.10*) at p. 1194.

22. Redfern A. & Hunter M. *Law and Practice of International Commercial Arbitration*, (London 1986) at p.37.

Finally, the enforcement of an award may prove more difficult than the enforcement of a judgement, if a court called upon to enforce the award regards the dispute as being either nonarbitrable or in contravention of a public policy.<sup>23</sup>

These are some of the disadvantages which may occur. In spite of such doubts the merits of arbitration as a means for dispute resolution in international transaction seem well accepted.

### 1.3. The Juridical Nature of Arbitration

What is the legal nature of arbitration? As it is a private system of dispute settlement, is it subject to legal regulation, and if so to which legal system is it subject, that is national or trans-national or is it the case that it has no connection with any legal system? Is it subject to regulation by the parties only, or does it require state support in order that awards are enforced ?

The juridical nature of arbitration has for long time been the subject of debate and argument amongst the jurists and legal writers for a long time.<sup>24</sup> Some consider that such argument are not important and are irrelevant to international commercial arbitration.<sup>25</sup> Although the question is somewhat theoretical, it cannot be considered unimportant and

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23. See chapter 2 Limitations on Arbitration Imposed by Public policy.

24. Radwan A., *The General Principles in International Commercial Arbitration* (Cairo 1981), p.19 (Arabic).

25. Rashed Samia, *Arbitration in Private International Relations* part I, (Cairo 1984), at p.69 (Arabic).

irrelevant, because its resolution is vital in order to identify by what authority the arbitrators act, to determine the procedure of arbitration, to assess the possibilities for court interference in the process, and the relationship between national law and laws applicable to arbitration, and in order to clarify the question of whether or not enforcement of the award requires court support in order to achieve finality.

The question to be consider is what is the appropriate theory or the most practical? This section will examine the theories of arbitration and the effect each would have should it be adopted. There are four theories to be considered:- contractual, jurisdictional, hybrid, and Autonomous.

### 1.3.1 The Contractual Theory

Some writers view arbitration as having contractual characteristics.<sup>26</sup> These writers hold that arbitration depends for its existence on the parties willingness to enter into the arbitration agreement<sup>27</sup> .

According to this theory the parties have the power to choose arbitrators, the time and the place of arbitration proceeding, and the applicable law governing substance and procedure.<sup>28</sup>

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26. Ibrahim A.A., *Private International Arbitration* (Cairo 1986), p.29 (Arabic).

27. Domke M., *Commercial Arbitration* (Prentice Hall, Princeton 1965), p.31.

28. Lew, (*op. cit* n.2) at p.54

The theory denies that the state exercises an influence on arbitration,<sup>29</sup> because it is "created by the will and with the consent of the parties".<sup>30</sup> The parties voluntarily consent to their contract, and voluntarily consent to submit the dispute which has arisen out of their contract to arbitration and furthermore may agree voluntarily to accept and abide by out the arbitration award.<sup>31</sup> National laws governing arbitration (that is the national laws of the country where arbitration took place) have no jurisdiction over the arbitration, they serve only to supplement, and to fill in any gaps in the parties' agreement.<sup>32</sup>

An arbitration award may be enforced by the court as a contract and the arbitrator is considered according to this theory, as an agent acting on behalf of the parties.<sup>33</sup>

The contractual theory of arbitration recognizes the parties as having unlimited autonomy in choosing the applicable law governing their arbitration agreement. Thus if the parties failed to specify the applicable law arbitrators may solve this difficulty by recourse to the parties directly or indirectly by considering their implied intentions.<sup>34</sup>

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29. *Ibid* at p.55

30. *Reily v. Russel*, (1864) 34 Mo 524 at p.528.

31. Lew, (*op. cit* n.2) at p.56

32. *Ibid*

33. Radwan A. (*op. cit* n. 24) at p.24

34. For further discussion in this issue see, Lew J.D.M., *Applicable law in international commercial arbitration* (New York 1978); Ole Lando "The law applicable to the merits of the dispute", Contemporary problems in

### 1.3.2 The Jurisdictional Theory

This theory refers to the power and regulation of the state, within whose jurisdiction the arbitration takes place. It grants the state all powers with regard to the validity of arbitration, limitations on the power of the arbitrators and enforcement of awards, because, according to the theory, the function of adjudication is a sovereign prerogative.

The state alone has the right to administer justice, so that if the law allows the parties to submit to arbitration, this institution could be exercising a public function, from which, logically, it must be concluded that the award is a judgment in the same sense as the decision rendered by a judge of the state.<sup>35</sup>

Supporters of this theory view arbitration as "compulsory judiciary" which is binding on the parties if they agree to it. Arbitration according to this theory replaces state adjudication.<sup>36</sup> Since the courts are branches of the state and are entrusted with enforcing the law on its behalf, they are entitled to see that all subordinate

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international arbitration, (Law D.M. Edite, 1986) p.101; ; Haardt, "Choice of law in arbitration agreement", in Essays on the law of International Trade, Festschrift Shmitthoff, 215 (1973); David J. Branson and Richard E. Wallace, "Choosing the substantive law to apply in international commercial arbitration", 27 *Virginia Journal of International Law*, pp.39-64; Carlo Croff "The applicable law in international commercial law: is it still a conflict of law problem" (1982) 6 *International Lawyer*, pp. 613-645.; Eiz-Aldeen Abudleh "Conflict of law in international arbitration" (1979) 22 *Al'adalah* pp.47-64 (in Arabic).

35. Klein, *Consideration*, para 105 at pp.181-182 quoted from Lew (*op. cit* n. 2) at p.52.

36. Omer M.A. *The Civil Judiciary system*, part I (Cairo 1976) p.108 (Arabic).

tribunals, whether based on statute or contract, observe the law. The argument is strengthened when it is recognised that the courts lend their support in enforcing arbitration proceedings, by nominating arbitrators in default of appointment, and by the issuing subpoenas, and the execution of the awards. The *quid pro quo* is that arbitration and awards should conform to the standards laid down by the courts.

The decisions issued by arbitrators are considered to be judicial decisions, albeit through the medium of the parties' agreement, because the jurisdiction theory views the arbitrators as acting as delegates from the state.<sup>37</sup> The arbitrators are considered to be judges during the hearing of a case, the only difference between judges and arbitrators being that a "judge derives his nomination and authority directly from the sovereign whilst the arbitrators derives his authority from the sovereign but his nomination is a matter for the parties."<sup>38</sup> Thus the award should be treated in the same way and granted the same effect as an ordinary court judgment.<sup>39</sup> Nevertheless, the theory does not allow arbitrators any greater freedom in the area of application of substantive law than that possessed by the judge<sup>40</sup>

### 1.3.3 The Mixed or Hybrid Theory

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37. Waly F. *The principles of Civil Judiciary Law* , (Cairo 1975) p.73 (Arabic).

38. Radwan A. (*op. cit* n.24) at p.26.

39. Ibrahim A.A. (*op. cit* n.26) at p. 33.

40. Lew. (*op. cit* n.2) at p.53.

This Theory tries to compromise between the former theories by taking an intermediate view in defining the nature of arbitration.

This theory states that arbitration, as a way of settling disputes, goes through two steps, the first step is the will of the parties to submit their dispute to arbitration, choosing the applicable substantive and procedural law, to avoid court intervention. Here arbitration takes on a contractual nature. In the second step the nature of arbitration changes from contractual to judicial in the event of the enforcement of an award.<sup>41</sup> On this view neither the jurisdictional nor the contractual theories have the whole story. "Arbitration requires and depends upon elements from both theories".<sup>42</sup>

This theory holds that arbitration depends upon and is based on these two elements and that it cannot function without either one of them, in that the agreement to submit to arbitration, the form of the arbitration, and the regulation of the proceedings are within the exclusive control of the parties, but the legal effect of their agreement and the enforceable character of the award depends upon the attitude taken by the law of the jurisdiction where the tribunal has its seat.<sup>43</sup> The effect of this hybrid theory is that in a dispute the award is considered to be "a contract" before it is enforced by the judicial authorities but it becomes jurisdictional when it gains the "executory

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41. *Ibid* at p.57.

42. *Ibid*.

43. *Ibid* at p.58

close". By the terms of the jurisdictional theory an award treated as akin to a foreign judgment, cannot be enforced without the "executory close" and without this close an award will not be more than a piece of paper.

#### 1.3.4 The Autonomous Theory

The adherents of this theory argue that the character of arbitration can only be determined by looking at its use and purpose.<sup>44</sup> So it cannot be considered purely contractual nor jurisdictional; but nor is it merely a hybrid compounded from both elements it is *sui generis*.<sup>45</sup>

The difference between the three previous theories and the autonomous theory with respect to their characterization of arbitration is that the previous theories regard arbitration as if it fell within the existing structure of national and international legal systems. However, the autonomous theory regards arbitration *per se* in terms of "what it aims to do, how and why it functions in the way it does, how the relevant laws have developed to help and facilitate the smooth working of arbitration".<sup>46</sup>

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44. *Ibid* p.59

45. *Ibid*.

46. *Ibid*.



The theory, sees arbitration as an autonomous institution, set up and regulated by individuals and not the state and it can be contended that the court's jurisdiction does not extend to controlling it.<sup>47</sup> Arbitration according to this theory is denationalized in that it has no relation with the country where arbitration took place. The parties to arbitration have unlimited autonomy with respect to the applicable law. In the absence of an express choice of law by the parties, the theory excuses arbitrators from resorting to traditional conflict law, which would entail consideration of the place of domicile or place of arbitration, for example. Rather the arbitrators may resort to some trans-national law.

#### 1.4 Choice of Theory

To choose the most suitable theory is not an easy task because of the differences in perspectives, of the parties on the one hand and of the particular national legal system on the other. The parties would obviously prefer the theory which stands to bring them most benefit and they tend to prefer arbitration, rather than taking a dispute to a national court of law since they consider that this provides them with convenient and appropriate method by which to resolve their dispute in a neutral, flexible and rapid way and away which is free from court interference. The legal systems in the majority of world countries allow parties to choose arbitration as a way to resolve their disputes but

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47. *Ibid* p. 61

permission is conditional. The issuing and enforcement of an award must conform with the law of state where it is made. The proper theory is one which resolves differences generated of these different perspectives. If arbitration is seen as an "autonomous institution" set up and regulated by individuals and not the state, the court will have no jurisdiction in the supervision and control of arbitration tribunal. If it is seen as being purely contractual in nature, the proceeding will not be influenced by the court except in that court law may be used to fill in gaps in the parties agreement, so, in effect, the law acts as a supplement to the arbitration tribunal. If arbitration is seen as being jurisdictional, the arbitration tribunal will be considered a branch of the state, and the court is therefore entitled to see all subordinate tribunals, regardless of whether they are based on statutes or the law of contract, observe the law.<sup>48</sup> Under emphasis of this perspective will lead to forfeiting the speed, privacy of arbitration system, and arbitration will resemble the ordinary court which the parties attempted to avoid in the first place. The last alternative left is the "hybrid" theory, which though not beyond criticism, corresponds closest to reality and is easier to implement in practically all legal systems. The theory strikes a balance between two interests; that of the parties in choosing arbitration as mechanism for settling disputes outside the ordinary courts, and that of the court in having authority to enforce

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48. Wally F.; Omer M.A. (*op. cit* n. 36; 37).

awards made by arbitration tribunals. Without the arbitration tribunal there would be no award, and without the powers of the courts there would be no enforcement.

## Conclusion

Writers on the subject of arbitration are not free from error in discussing the nature of arbitration when they interpret arbitration in a narrow sense. Obviously the attempt to classify arbitration in the light of one particular theory (contractual, jurisdictional, hybrid or autonomous) is the likely cause of this error. When each one of the writers consider arbitration according to its similarity with one of these four system rather than as a whole. It is contractual because its based on the parties' agreement; jurisdictional, because of the nature of the arbitrators; or hybrid because it possesses the two previous characteristics. It true to say that initially the arbitration system is contractual, and then procedural, and finally once a judgment is made so it becomes jurisdictional. But it can not be considered as being one only of the former merely on the grounds that it has one characteristic in common with a given system.

Conceptually, arbitration all over the world and in all legal systems is a way for settling disputes in the public or private sector. Arbitration may be considered as clay in the hands of the states, to be molded according to each state's needs. Every state or legal system regulates arbitration according to their policies and interests. It

becomes essentially a matter jurisdiction where states want to control arbitration, as in state controlled socialist countries where arbitration institutions are attached to the national chamber of commerce which in turn retains a close connection with the state. These chambers of commerce will not enforce arbitration agreement in accordance with an other state's law but rather in accordance with socialist procedural law.<sup>49</sup> These requirements mean that arbitration in socialist countries may be characterised as being jurisdictional in nature. This is in contrast to a state such as Switzerland which tries to attract trans-national arbitration by having a *laissez-faire* attitude by restricting court interference in arbitration process and allowing parties autonomy in choosing the applicable law.

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49. See Vladimir Gsovki and Kazimierz Grzybowski, *Government Law and Courts in Soviet Union and Eastern Europe* vol. I (London 1959) p.820.

## Chapter Two

### Limitations on Arbitration Imposed by Public policy

#### Introduction

Public policy is of importance for the arbitration system as whole and enforcement of awards in particular. In the U.A.E, and in the majority of Middle Eastern countries, the effectiveness of arbitration may be compromised by interference with and even the setting aside of arbitral awards by the courts exercising a jurisdiction based on the notions of public policy. This is problematic for the emergence of a modern arbitration system.

Law and practice in U.A.E, as in other Middle Eastern countries, specifies matters which are considered to be public policy without explaining the term itself. Therefore, it will be useful, before examining the U.A.E arbitration system, to examine how this term is employed in non-Middle Eastern countries.

Notions of public policy operative in a given jurisdiction are strongly and closely related to the given society. They differ from place to place, and what is considered to concern public policy in one state may not be seen as fundamentally standard in another.

The factors which cause public policy to differ from one state or society to another, are many: religion, politics, economics, customs etc.. Therefore, what might be considered as an absolutely exclusive domain of national courts in some countries may be left to party autonomy and arbitration in others.<sup>1</sup> What may be seen as the prerogative of national courts in the the Middle East countries may be left to the arbitration of the parties in Europe or U.S.A.

Middle Eastern countries by and large adopt a broad notion of public policy which may be used as a justification for refusing the enforcement of arbitral award in a variety of circumstances.

The chapter will analyze public policy, by examining the three separate areas where considerations of public policy arise: subject matter of the dispute; questions relating to due process; the parties to the dispute. One seeks to find a yardstick, whereby one can identify the proper use of public policy and the illegitimate use of public policy. Within the limited frame of this chapter, no detailed descriptions of the U.A.E. situation will be introduced. The object of this chapter is to place the U.A.E. position in its context of the Middle Eastern countries, since the U.A.E. jurisdictions are part of the family of Middle Eastern jurisdictions.

## 2.1 Definition of Public Policy

Public Policy reflects the fundamental economic, legal, moral, political, religious and social standards of every state, or "extra-national community".<sup>2</sup> The term "public policy" is used interchangeably with the

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1. Bockstiegel Karl-Heinz Public Policy and Arbitrability International arbitration Cogress, (8th:New York 6-9 May 1986), (Kluwer Law and Taxation Publishers, Deventer, The Netherlands 1987) pp.178-204.

2. Lew J.D.M. *Applicable Law in International Commercial Arbitration* (Oceana Publications New York 1978) p. 532.

term "ordre public": *ordre public* was used as a more general term, whereas "public policy" was more commonly used in connection with a specific application of the principle.<sup>3</sup> Before any award can be implemented by a national court, it must be exposed to the relevant public policy: if it does not violate it, the arbitral award, even a foreign arbitral award should be recognised and enforced by the relevant court.

In Loucks v. Standard Oil Co. of New York<sup>4</sup> , Justice Cardozo epitomised the appropriate attitude, stating:-

"A right of action is property - if a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home ... the courts are not free to refuse to enforce a foreign right at the pleasure of the judge, to suit the individual notion of expediency or fairness. They do not close their door unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of common weal".

Justice Cardozo based the rules of refusal of enforcement of judgment or award on the grounds of some moral, social or economic principle. These rules are not fixed and can be hard to define. They may vary from country to country.

## 2.2 The levels of Public policy

Public policy can be divided into <sup>two</sup> ~~two~~ levels:

- (1) national public policy
- (2) international public policy.

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3. *Ibid*

4. 224 N.Y. 99 at p.111 (1918).

### 2.2.1 National Public Policy

In domestic law, public policy forms a set of rules that parties may not contract out of, for example, Article 6 of the 1981 French Civil Code states: "Laws relating to public policy and morals cannot be contracted out of by means of special agreements".

### 2.2.2 International Public Policy

The principles which constitute international public policy are international treaties, world customs which have been ratified by the world community, the rules of public policy accepted by civilised countries, the general principles of morality and the rules of natural law.<sup>5</sup>

#### 2.2.2.1 Interaction between national and international public policy

If a national judge found that enforcement of a foreign award would violate canons of public policy operative in the jurisdiction, or if the dispute is not of the kind than can be settled by arbitration in his country, he would refuse the enforcement on the grounds that it violated the public policy.

It is hard to draw a line or to distinguish precisely between domestic and international public policy. Rules of international public policy are taken from the realm of domestic public policy, and some domestic policy is derived from international public policy, e.g. the New Code of Civil Procedure of France (12 May 1981, Art.1502.5) require the setting aside of an international arbitral award if its execution would

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5. *Ibid.*



be contrary to two levels of public policy (national ...) and international. Courts respect international public policy, by prohibiting matters such as slavery, kidnaping, murder and piracy. Thus the distinction can be discerned only from court judgments in different legal systems around the world, and in how the judgments or the court decisions distinguish between domestic and international public order.<sup>6</sup> The efficacy of international arbitration is enhanced if national courts restrain the impact of potentially broad conceptions of national public policy. An appropriate attitude is exemplified by Fotochrome Inc. v. Copal Ltd.,<sup>7</sup> where the United States Court of Appeals for the Second Circuit in a case involving a Japanese firm, construed narrowly the public policy defense by ruling that:-

The public policy limitation of the New York convention is to be construed narrowly and to be applied only where the enforcement would violate the foreign state's most basic notions of morality and justice.<sup>8</sup>

Further Judge Holtzman has said:-

In modern practice of court and tribunals, public policy does not seem to be a major obstacle to international arbitration in general and to arbitrability in particular.<sup>9</sup>

### 2.3 Applications of the public policy

Public policy commonly arises in three contexts:

(1) the subject matter of the dispute

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6. *Fritz Scherk v. Alberto Culver Co*, 417 US 506 (1974).

7. 517 F.2d 512 (1975).

8. *Ibid* p.516.

9. Report of Holtzmann ICC Court of Arbitration 60th Anniversary, Paris 1984.

(2) the minimum standard of procedure followed in the arbitration (due process)

(3) questions relating to the parties to the arbitration agreement particularly where one of the parties is a government or state or a government entity.

### 2.3.1 The subject matter

The parties cannot be left free to themselves to arbitrate anything under the sun in whatever way they feel fit, there must be some control of that process. Certain matters are properly beyond the control of the parties and must be dealt with by the national legal system. As a result legal systems provide for the exclusion of arbitrability with regard to disputes in some areas which are considered a matter of public policy and the preserve of the legal system. The reasoning behind this is that national legal authority in a particular country is the only authority suitable to find a solution, or that it is a kind of dispute requiring much technique and knowledge which only the national courts can provide. Sometimes this kind of dispute involves certain groups or parties requiring protection. Or it may reflect a special national interest in judicial, rather than arbitral, resolution of a dispute.<sup>10</sup> Arbitration should not be the vehicle for resolving disputes arising out of illegal, immoral and unethical commercial arrangements. Even if the arbitrators allow the matter to pass and render an award, national courts will deny its effect.<sup>11</sup>

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10. See *Parson's and Whittemore Overseas Co. v. Societe General de l'Industrie du Papier (RAKTA)* 508 F.2d. 969 (1974).

11. *Northrop Corporation v. Triad Financial Establishment*, 593 F.Supp 928 (1984).

If the court finds that recognition and enforcement of the subject matter of a arbitral award would be contrary to public policy, or the dispute would not be capable of settlement by arbitration, the court will refuse the enforcement of the award *ex officio*. The court raises a motion for the refusal of enforcement.

Examples falling within this category include disputes relating to anti-trust, the validity of intellectual property (patents, trademarks, copyright...), disputes which raise issues of penal law.

#### 2.3.1.1 Antitrust Law

Antitrust Law is legislation introduced for the protection of trade and commerce from unlawful restraints, price discriminations, price fixing, and monopolies. Most Western states have enacted such legislation, the U.S.A. being the most prominent. We will look to the U.S.A. in particular, because it serves as a case study of the way a developed system has come to terms with arbitrating a significant issue of public policy.

Why should antitrust matters be reserved for the national legal system? The most important aspect is not the the complexity of the issue in this area, though that is an important feature, but the predominate concern is the public interest in the resolution of such disputes which raise issues of general importance for the entire economy.<sup>12</sup> The general

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12. The U.S. Lower Federal Court for the Second Circuit in American Safety Equipment Corp. v. J.P. McGuire & Co. stated that-

"Contracts that lead to antitrust disputes are likely to be contracts of adhesion and therefore choice-of-form agreements are tainted by unfairness of the contract itself, and the issues of antitrust are too complicated to be addressed in a non-judicial forum. Finally business regulation should not be left to the business community."

391 F.2d 821 at pp.827-28.

economic welfare goes beyond the importance of the dispute for the parties themselves, it is more public law, than private law. These matters preclude arbitrators the freedom to poach on the judicial preserve of antitrust law.

The U.S. courts have drawn their conclusion from the function and primacy of antitrust law by not allowing the arbitration of antitrust disputes. Thus, as a general rule antitrust claims are for judicial, rather than arbitral determination, under the the national law. Arbitrating such matters would violate public policy.

But the U.S. Supreme Court has registered a rather fundamental change by allowing arbitration in appropriate but limited situations involving issues of antitrust law, where where there is an agreement involving an international transaction. The U.S. Supreme Court in Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc.<sup>13</sup> ruled to compel the arbitration of a claim based on U.S. antitrust laws in an international commercial contract, and allowing international arbitrators to adjudicate issues arising under the antitrust law.<sup>14</sup>

Nevertheless, the *Mitsubishi* decision has no affect on the domestic arbitration, under the U.S. practice similar issues arising in interstate transactions is still un-arbitrable. Thus, at least for the present, there will be difficulties with arbitration agreements in domestic transactions where the disputes involve nonarbitrable issues.

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13. 723 F. 2d. 155 (1983).

14. (1985) 10 Yearbook of Commercial Arbitration 519.

15. McDermott John "Arbitration and the Courts" (1986) 11 The Justice System Journal 248-56.

### 2.3.1.2 The Validity of Industrial/Intellectual Property

This group includes Industrial patents and trade mark rights. The identification and protection of Industrial and intellectual property has been established by states by the way of a specific procedure, or by a group of states, as in the case of European Patents.<sup>16</sup>

States which give these rights also have the authority to determine the procedure and the validity of these rights.<sup>17</sup> The jurisdiction to solve disputes over industrial or intellectual property is reserved to the court which conferred this right, through the state's Codes of Patents law, and arbitration in this field is considered null and void.<sup>18</sup>

### 2.3.1.3 Protective concerns in relation to certain parties

Many Gulf states established legislation concerning the protection of certain parties.<sup>19</sup> The classic example of this group is the Act concerning employee disputes. The law regulates disputes at work between the employer and his employees and appoints the authority which settle the dispute. The employer cannot arbitrate such a dispute.

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16. Bockstiegel Karl-Heinz (*op.cit* n.1) at p.197.

17. *Ibid.*

18. *Scherk v. Grandes Marques*, Italy Court di Cassazion, 12 May 1977 in (1979) 4 Yearbook of Commercial Arbitration 286 at p.289.

19. See U.A.E Federal Law no. 8/1980 governs labour relationships (1980) 10 UAE Official Gazette 134.

These Acts representing government policy intend to secure the position of the employee against the employer as the strong party in the contract. Allowing such a dispute to be taken to arbitration may jeopardize this group's right. In large part these groups consist of South Asians (Indian, Pakistani, Bangladeshi and Iranian), who are in a weak position in any dispute with a national. The Government therefore to avoid circumstances where a member of such a group may lose their dispute in unequal arbitration ban arbitration in this respect and consider it a matter of public policy. Any employee/employer dispute must be referred to the special tribunal prepared for this purpose.

#### **2.3.1.4 Subject matter and Middle Eastern Countries: the particular problem of Commercial Agents**

All systems need some public policy limitation. In the Middle East there are problems above and beyond that. We will isolate two of these problems; the commercial agency contract and appointment of arbitrators which will be discussed later under due process. This issue will be discussed under the U.A.E and Saudi law.

Foreign companies trading in the Middle East especially in the Gulf countries have two options available to them for selling their products in this area. (i) direct sales from overseas to local customers; (ii) sales through a distributor or commercial agent.

The first option presents obstacles including sales promotion and advertising and protection of patent, as well as the nature of the these particular markets.<sup>20</sup> For example under the U.A.E. legislations a foreign company with a direct contractual relationship with the customer must

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20. Nicholas B. Angell, "Organizing A Business In The U.A.E.", (1980) 3 Middle East Executive Reports 2.

be licensed, possess a representative office and a branch operation which must be locally incorporated. Because of these difficulties the first alternative is not chosen by most companies. The latter alternative would be usual in doing business in these area through a commercial agency.

#### **(1) What is commercial agent contract**

The law and regulations in some of the Middle Eastern Countries created obstacles in the way of foreign companies to do business in their countries by making the foreign company conduct its business through a national representative. One of these economic restrictions is a commercial agent.

Commercial agency contracts, are contracts concerning the distribution of goods in a particular state, where the foreign company is required to sell its products only through distributors or trade agents in that particular state.<sup>21</sup>

The U.A.E. Federal Law 18/1981 Art.1 defined commercial agent as:

the representation of the principal by an agent for distribution, sale, display or provision of any commodity or service within the state in consideration of any commission or profit.

#### **(2) Who can be an agent**

The U.A.E federal law specifies only one basic essential qualification for trade agents in the U.A.E. Art. 2 of the federal law provided that the commercial agency business shall only be conducted by persons enjoying U.A.E. nationality, whether they are individuals or companies fully owned by U.A.E nationals.

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21. See the Commercial Agencies Act, issued by the Royal Decree No. 11/1963 and its Implementation Rules No. 1897/1982; The U.A.E Federal Commercial Agencies Law No. 18/1981.

The commercial Agencies law requires a trade agent to register his agency with the Ministry of Economy and Commerce.<sup>22</sup> The agent's application for registration includes the name of the foreign principal; the name of the agent; their respective nationalities; addresses; assets a description of the goods and/or services covered by the agency; the territorial limits of the agency; and effective dates of the agency,<sup>23</sup> and be supported by, *inter\_alia* a written and authenticated agreement between the agent and the principal in its letter to the Ministry of Economy and Commerce. The Ministry is empowered under the law to allow such registration or reject it. In cases of rejection the applicant may appeal the decision to the competent court.

(3) Why the subject matter of commercial agent contracts is not subject to arbitration.

The major cause for concern to foreign principals in these laws are the clauses relating to the termination and deregistration of the agency. The disputes concerning these matters or arising in connection with commercial agencies is non-arbitrable. Arbitration under this issue is considered a matter of violation of public policy.<sup>24</sup> Instead the parties disputes are referred to specially designated government tribunals.

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22. Art. 3 Federal Law 18/1981.

23. *Ibid* art. 10.

24. See El-Ahdab Abdul Hamid, "Arbitration in Saudi Arabia: Under the New Arbitration Act, 1983 and Its Implementation Rules of 1985" (1986) 3 Journal of International Arbitration 27-56 at p. 40.



The reasons for not submitting these disputes to arbitration as has been set down by the legislature is ostensibly to secure the general interest in the special nature of these disputes which, if taken to arbitration may involve a breach of the national right, and may thwart the state economy. Therefore it should be left to the court or the special tribunals which have been established for this purpose. Also, there is a concern to insure legal protection for the national commercial agent against the unfair termination of a duly registered agency by the foreign company.

The above justifications for excluding arbitration did not include another powerful cause for such exclusion. An intent of such provisions appears to be an attempt to give a measure of security to certain people in society by keeping these disputes away from arbitration because of the sensitivity of these disputes, which may involve a matter the agent would like to keep concealed; allowing arbitration may lead to the disclosure of these matters and may affect particular people who would prefer not to be in the picture because of the position they hold in society. Also an arbitral settlement may offer the principal freedom to choose an other agent if there are legitimate grounds for dissatisfaction. Under Commercial Agent law provision this is not possible without the consent of the current agent. Permission may entail payment of an indemnity to the local trade agent in order to reach a mutual agreement. Changing the agent is not easy because persons possessing the most important commercial agencies have some control or influence over the specially designated government tribunals.

Thus termination of such a contract may prove to be difficult and perhaps costly. Once a trade agent is chosen, the choice may be difficult to reverse.<sup>25</sup>

#### (4) The role of the agent

On the one hand there would be a genuine role of the commercial agent in terms of obtaining information about the market. He may assist in respect of language which is a great problem in some of these states, in his connection, business reputation and influence to actively promote and defend the foreign company's products. On the other hand this system transfers from the legitimate side into effectively a way whereby all economic activities of any significance have to be channeled to a certain point i.e. the agent, which allows persons of influence to control the range of goods and services on offer which are valuable to all, and to take profits from the trade in these goods and services, even though these people have no economic function as such. When the supplier has an economic function, and the distributor has an economic function, the agent may have a genuine economic function, if without him the supplier could not effectively make contact with the potential distributor. In these circumstances the agent has a real role in terms of the economy, but if the role of the agent is only as a coordinator, the transaction could be made with the distributor directly. Accordingly the role of the agent can impede rather than promote the economy. Irrespective of the services he renders to the principal, the trade agent takes commission on all transactions in his territory, regardless of how the sale is made.

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25. Williamson L. Staven "Distributorships Under the New Federal Law" (1981) 4 Middle East Executive Reports 2.

A pervasive system of commercial agents restricts consumer choice, raises prices and establishes a powerful vested interest in the continuance of a mercantilist as opposed to a free-market economy.

In many commercial agency disputes there is no real general interest or public policy involved. The ban on arbitration in these contracts is no more than a pretext for other reasons with no link whatsoever to national interest. In contrast these forms of law destroy any free market notion the governments in these state ostensibly try to establish. Furthermore the existence of these regulations violates genuine concerns of public policy, because they are enacted for the sake of a certain groups in the society, to serve their interests and disregard the effect on community welfare and developments. Since the continuance of these rules will have this effect then why have agents at all? Modern economic theories say that in terms of economic efficiency there is a strong argument for allowing the supplier to make immediate contact with the commercial outlet that he will supply.

The trend in the world now is to look for markets as the best way to develop the economy. The free market economy is more effective than an economy dominated by either socialist models or even dominated by the desire of a certain ruling family or cartel to take a cut from all significant economic activities.

Under an economic system that takes market functions into account, parties to contractual disputes are more willing to assert equal legal right in the form of arbitrating their disputes. Under the regulations of commercial agents the legislators were less concerned with the contractual nature of these agreements based on the parties intention

and the position of the other party to the contract than the primary concern of insuring the interests part of the agent's as a powerful group interest.

If the Middle East countries in general and the Gulf states in particular are going to follow a free market principle as their main vehicle of economic development, the notion of a free market demands access to the domestic market by allowing people to set up trade or manufacture without any unnecessary restrictions and de-licensing. Obviously that does not mean that economic activities should be left un-regulated. There must be control of activities in terms of pollution, minimum standards of safety for workers and similar matters. Breaking away from a system of commercial agents will help the development of a more modern and open society.

### 2.3.2 Due process

"Due process" implies the fundamental principles which constitute fair impartial and effective arbitration, whereby parties have an equal opportunity to be heard. Violation of a party's right to due process might be considered sufficiently important is to be considered a violation of public policy.<sup>26</sup> On this issue there is be less room for cultural deferences because notions of neutrality and lack of bias are universal. However there are some differences in some of the Middle East countries concerning the way these principles should be realized which we shall examine in the end of this section.

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26. Van den Berg A.J. "Commentary on cases related to the New York Convention", (1985) 10 Yearbook of Commercial Arbitration 385.

This principle demands that each party must have the right to present his case. But if, after having been duly notified, a party refuses to participate or remains inactive by deliberate default, the party concerned may lose this right.<sup>27</sup>

For example the Italian Supreme Court affirmed its well established case law that:-

no review of the merits of the arbitral award is permitted under the convention {New York Convention of 1958} even if the award is made in the absence of a party who was duly notified of the arbitration and did not participate.<sup>28</sup>

The respondent cannot claim a violation of public policy if he neglected to participate in the arbitration. In Parsons v. Whittemore Overseas Co. (RAKTA)<sup>29</sup>, the respondent raised the element of due process, where an American company abandoned a construction project in Egypt, following the severance of United States - Egyptian diplomatic relations in 1967, in accord with U.S. policy.<sup>30</sup> The Second Circuit rejected the defense put forward by the American Company that:-

the arbitrators had violated standards of due process by refusing to postpone a hearing because one of the witnesses could not be present due to a prior commitment.<sup>31</sup>

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27. *Ibid* at p.405.

28. Italy Supreme Court Judgement No.78, Sub.3, (1985) 10 Yearbook of Commercial Arbitration 385.

29. 508 F.2d 969 (1974).

30. *Ibid*.

31. *Ibid* at p.975

### 2.3.2.1 Lack of neutrality of the arbitrator

It is well established that neutrality is a necessary qualification to be an arbitrator. Neutrality is "the fundamental requirement of every arbitration. Neutrality of the arbitrator means basically that he has no personal interest in the case and is independent vis-a-vis the parties".<sup>32</sup>

Such a serious allegation of lack of neutrality must pass a threshold of plausibility. An example is a decision of the district court of New York: In this case the respondent had asserted that enforcement of the award should be refused because one of the arbitrators was the president of a firm that served as general agents for a shipowning corporation which had pursued a claim against it in prior arbitration and court proceedings.

The court found that the arbitrator's relationship with the respondent was:-

far too tenuous ... to require the disqualification of an experienced and respected maritime arbitrator, particularly where (the respondent) offers no challenge to (the arbitrator's) personal integrity.<sup>33</sup>

In Middle-Eastern jurisdictions the question of a personal interest in the case may come up especially in arbitration administered by "trade associations". Certain trade associations have their own arbitrators and usually they are from the merchants who regularly do business together. For example, members of the arbitration committee in the U.A.E. Chamber of Commerce are themselves merchants.<sup>34</sup>

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32. Van den Berg A.J., *The New York Arbitration Convention of 1958 towards a Uniform Judicial Interpretation*, (Netherlands 1981), p.377.

33. *Transmarine Seaways Corp. of Monrovia v. Marc Rich and Co.*, 480 F.Supp. 1063 (1980).

34. See chapter 5.

Regarding the neutrality of arbitrators, it is their duty to disclose any relationship they may have which could have any bearing on the dispute, and any interest they might have in the outcome of the controversy. The decision of the U.S. Supreme Court in Commonwealth Coatings Corp.<sup>35</sup> embodied this requirement. It also mentions the code of ethics for arbitration in commercial disputes, and the rules of the A.A.A.. The U.S. Court recognised that in certain circumstances, where the personal or financial interest in the outcome of the arbitration is involved, and where these relevant circumstances are fully disclosed, the arbitrator will not generally be disqualified.<sup>36</sup>

The number of arbitrators appointed to determine a particular dispute is considered a matter of public policy. Non compliance with any conditions about the number of arbitrators can result in the nullification of an award. Whilst the number of arbitrators has no bearing as such on the neutrality of each arbitrator, to satisfy the requirement of overall neutrality there must be an adequate number of arbitrators. Thus the arbitration laws of many countries prescribe the number mandatorily, *inter alia*, in order to guarantee the impartiality of the arbitration process. The significance of the number of arbitrators arises where each party to the dispute can nominate his arbitrator. Partiality is less likely if there is an additional arbitrator not appointed by one of the party's alone.<sup>37</sup>

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35. 393 US 145 (1968).

36. *International Produce inc. v. A/S Rosshavet*, 638 F. 2d. 548 (2d cir, 1981).

37. Van den Berg A.J., (*op.cit* n.32) at p.376.

### 2.3.2.2 Reasons for award

Many countries issue mandatory rules requiring that an award must contain the reasons on which the arbitral decision is based, or how the arbitrators reached the decision. If the arbitrators do not satisfy this requirement, the award is considered against "domestic" public order. For instance, in order to decide whether to grant leave to appeal, the High Court in the U.K. must know the reasons for the arbitration decision. Not stating the reasons for the award does not lead to a refusal to enforce, but the court may order the arbitrators to state the reasons in sufficient detail for the court to be able to understand the case. According to the Arbitration Act of 1979, awards without reason are still admitted; however, the judge may order that reasons be given.<sup>38</sup>

In this respect, Article III of the European Convention 1961 states:-

"The parties shall be presumed to have agreed that reasons shall be given for the award unless they (a) either expressly declare that reasons shall not be given, or (b) have assented to an arbitral procedure under which it is not customary to give reason for award, provided that in this case neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given".

However, should this element be given undue emphasis, obstacles are laid in the path of arbitration. Arbitrators will be afraid that their award may be upset, because they gave no reason for their award. The court has its sword drawn on the arbitrators: any award without reason will face the challenge of the court, and the refusal of enforcement.

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38. See Schmitthoff C., " The United Kingdom Arbitration Act 1979", (1980) 5 Yearbook of Commercail Arbitration 231 at p. 237.



In Trave Schiffahrtsgesellschaft mbH v. Ninemia Martimie Corp<sup>39</sup>, a dispute between the buyers and sellers of a vessel was referred to arbitration. The arbitrator published an interim final award, and at a later date sent the parties privileged reasons for the decisions. The seller applied for an order under Section 1(5) of 1979 Arbitration Act, which directs the arbitrator to state further reasons for the award. The judge declined to make the order and dismissed the appeal, on the grounds that as the arbitrator's had given privileged reasons there was a strong indication that he had not intended a reasoned award, within the meaning of Section 1(5) of the Act of 1979.<sup>40</sup> Therefore, the court cannot order the arbitrators to state further reasons and the arbitrator should not be burdened with the task unless reasons are likely to be

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39. [1986] 2 WLR 773.

40. Under the United Kingdom's Arbitration Act of 1975 the refusal of enforcement is provided for in Section 5:-

1. Enforcement of a convention award shall not be refused except in the cases mentioned in this section.

2. Enforcement of a convention award may be refused if the person against whom it is invoked proves:

(a) that the party to the arbitration agreement was under the law applicable to him, under some incapacity; or

(b) that the arbitration agreement was not valid under the law to which parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceeding or was otherwise unable to present his case; or

(d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or

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

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

needed for an appeal.<sup>41</sup> This subsection therefore deprived the court of jurisdiction of the power order the arbitrators to state the reasons for the award.<sup>42</sup> The court jurisdiction to order further reasons under section 1(5.b) should be exercised very sparingly and only after giving the fullest consideration to whether leave to appeal is likely to be granted.<sup>43</sup>

### 2.3.2.3 Due process and the Middle East countries

Two particular issues related to due process which arise and cause problems for those doing business in Middle-Eastern countries will be considered in this section. These issues are respectively:

- (i) A requirement that the arbitrator be specified by name in the original contract.
- (ii) That the arbitrator have a particular religious affiliation.

The first requirement will be discussed in the context of Egyptian law, an influential jurisdiction for other Middle Eastern countries. The second requirement will be discussed by reference to the law of Saudi Arabia, an appropriate paradigm in the light of increasing moves away from secularism in a number of Middle East countries.

- (i) The nomination of the arbitrator in the contract.

One of the essential features of Egyptian arbitration law is that arbitration agreements are considered to be valid only if the parties expressly name the arbitrators. Article 502 of the Egyptian Code of Civil and Commercial Procedure stated that:

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41. [1986] 2 WLR 773; [1986] 2 All ER 244

42. *Ibid.*

43. *Universal Petroleum v. Handels und Transport Gesellschaft mbH*, [1987] 1 Lloyd's Rep. 517.

Without prejudice to the provisions contained in special legislative acts, the arbitrators have to be nominated either in the arbitration agreement or in a separate agreement".

The arbitration agreement is legally invalid for violation of public policy if the choice of arbitrator(s) is done without the parties nomination by name.

The issue of the nomination does not cause difficulty whenever the parties accept arbitration, whether they choose the arbitrator by themselves or through other institutions. The difficulty arises when one of the parties tries to frustrate the arbitration procedure by claiming the award is invalid because it violates the Egyptian law by not involving him in the appointment of arbitrators. In many cases this tactic was employed as a means to escape the enforcement of arbitral award by bringing it under the notion of public policy, where arbitration takes place in Egypt but particularly where located in an outside country.<sup>44</sup> Consequently, some Egyptian parties faced with arbitration proceedings brought against them under the rules of international arbitration institutions challenge the legality of the proceedings before the arbitral tribunal formed without their explicit consent in the arbitrators appointment.<sup>45</sup> The second difficulty in this situation is the possibility of remedying this issue under Egyptian law.

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44. El-Kosheri Ahmed, "Some Particular Aspects of Egyptian official Attitudes Towards International Commercial Arbitration" (1985) 400 L'egypte Contemporaine 5-21.

45. In *Westland Helicopters Ltd v. Arab Organisation for Industrialisation and others*, The Egyptian government lawyers defense was that the arbitration clause was null and void according to Art. 502 (3) concerning the way the arbitrator should appointed, (1984) 23 ILM 1071.

Under the prevailing opinion expressed in the courts is that party failure to agree on the name of the arbitrator cannot be remedied by substituting the choice of the court.<sup>46</sup>

Is such provision appropriate for arbitration? The operation of the principle under Egyptian law and other Middle Eastern countries following it is far from ideal. It can be criticized because it is difficult to apply both in domestic as well in international arbitration. However the demerits become clearer when an international contract is involved. International contracts may be performed for many years before a dispute arises and appointing an arbitrator by name may cause difficulties if he refuses or is no longer willing to act as an arbitrator at the time of the dispute. Also it is desirable to appoint the arbitrator according to the nature of the given dispute. The provision of Egyptian law presumes knowledge of the nature of the disputes in advance.<sup>47</sup>

In spite of the number of decisions invalidated under this provision there seems nevertheless to be a reaction to this position. In a recent Egyptian judgment rendered by Guizeh Court there was a departure from the prevailing view of Art. 502. The court ruled that the appointment of a third arbitrator could be concluded by the I.C.C's court of arbitration in the event of the failure of the parties to do so.<sup>48</sup>

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46. El-Kosheri Ahmed, Arbitration in Egypt paper delivered at the I.B.A. Arab Regional Conference, Cairo 15-19 Feb. 1987 (Graham & Trotman) p.170-197.

47. Paulsson Jan "The contribution of English and American Legislation for arbitration" Paper delivered in the Third Euro-Arab Arbitration Congress, Amman, Jordan 23-25 Oct. 1989.

48. *Governor of Port Said and Suez Canal Authority v. Rolaco Holdings A.S. and other*, Case No. 10063/83, published at El-Kosheri Ahmed, p.175.

According to this decision it seems that Egyptian jurisprudence is in the process of correction, but the potential importance of this decision is in its potential influence on other Middle East jurisdiction in moving away from the view which considers the failure of specifying the name of the arbitrator as a violation of public order.<sup>49</sup>

**(ii) The religious affiliation of the arbitrator (capacity)**

Maintaining a tradition of Islamic *shara'ah*, Saudi law requires the person acting as an arbitrator to have a particular religious affiliation. The provision of the Saudi Arbitration law requires that arbitrators must be of the Muslim faith.

The rules determine who may, and who may not, undertake the functions of an arbitrator and similar rules apply in those countries, in which the law is made up of *shari'ah* rules. In such jurisdictions the decisions of the arbitrators are enforced by official agencies in the same manner as the court decision, therefore the person who is entitled to such powers should fulfill the same requirements as a judge.

There is some uncertainty as to the qualification required by arbitrators, in the matter of religious affiliation. In contrast with the rest of the world in respect to the capacity of the arbitrator, which stresses only the technical skills and appropriate qualifications of arbitrators, Islamic *shari'ah* requires that rigid conditions must be met in the person who acts as an arbitrator. These conditions concern his faith, and his knowledge of *shari'ah*.<sup>50</sup>

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49. See chapter 7 on the influenced of this view on the U.A.E. law and practice at pp. 331-333.

50. See Samir Saleh *Commercial Arbitration in the Arab Middle East*, (Grham & Trotman London 1984). pp.26-34.

(a) The nature of the uncertainty

The uncertainty arises because of the different views taken by Islamic scholars according to their understanding and interpretation of the Koran. There are two central opinions; the first doctrine, which represents the majority of Muslim scholars, excludes the appointment of a non-muslim as an arbitrator.<sup>51</sup> A non-muslim is not allowed to have jurisdiction over litigation involving Muslims, and allowing him to do so will be considered as a violation of *shari'ah*. The first opinion focuses the applicable law of the disputes and disregards the subject matter of the litigation.<sup>52</sup> The countries following this principle are Saudi Arabia, Oman, and Yemen.<sup>53</sup>

The second opinion differentiates according to the subject matter of the dispute. It accepts the jurisdiction of a non-muslim arbitrator over disputes involving Muslims in financial, civil and commercial cases which do not involve knowledge of *shari'ah*.<sup>54</sup> It bans arbitration on the question of family and personal status cases, where the law relating to these matters is essentially religious and requires the knowledge of the

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51. Ibn Qudama M., *Kitab al-Mughni*, vol. 8, (Riyadh 1978) pp. 214-25 ; Ibn Rushed Muhammad, *Bidayate al-Mujtahed Wa Nihayat al-Muqtasid*, vol. 2 (Beirut 1935) pp. 462-5.

52. *Ibid* p. 35-38.

53. Samir Saleh (*op.cit* n.50) at p. 290.

54. The distinction between commercial and finance contracts on the one hand, and matters of Islamic law on the other it is not always clear cut because it is difficult to differentiate between those legal disputes which raise the issues of Islamic law and those that do not. As commercial contracts may raise the issue of Islamic law, most notably in the matter of charging interest. The majority of Middle-Eastern courts influenced by Islamic law will disallow the charging of interest. See chapter 3 at pp. 91-95.

islamic *shari'ah*.<sup>55</sup> The latter opinion is applied by the majority of the Middle Eastern countries.<sup>56</sup>

The second opinion seems more appropriate and more practical to the present time, especially where international arbitration is involved, and will facilitate the commercial relations between the West and the East.

The requirement that the arbitrator be a Muslim may still exist under national law concerning domestic matters but it is difficult to implement in international transactions. When a party enters into the market place of international transactions and commerce, if he agrees an arbitration clause providing for international arbitration, he may not validly reject arbitration by invoking religious reasons, because the parties had previously agreed to an arbitration clause providing for arbitration under one of the international tribunals and therefore the parties clearly realize that one or more arbitrators might not be of a particular affiliation.

#### **(b) Impact on international arbitrations**

The question which arises in this context is the legitimacy of an agreement between an Arab national and a foreign party providing for an international arbitration in the event of dispute. As seen above in respect of the validity of arbitrator designated by name; the religious affiliation, question is usually raised as a challenge against the foreign

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55. Madkur Muhammad Salam, *The Judiciary in Islam* (Cairo 1964) (Arabic) pp.40-41.

56. *Ibid.*

party. Many of these challenges are a pretext, to escape the enforcement of arbitral award. The invocation of a public policy rule in favour of a Muslim arbitrator by the court may be appropriate where the law of the contract is Islamic law and when the dispute takes place between national parties or parties from the same faith, or when the parties of the contract have agreed in advance to refer the dispute to a Muslim arbitrator. But such an invocation of public policy linked to the domestic religious mores of that particular state, seems to be an illegitimate intervention, to escape a legal result by justifications which are ground less. Since the defendant has agreed freely to apply international or developed rules, he cannot be heard if he invokes his own domestic law to free himself from the obligation to arbitrate. He knew the position when the arbitration clause was signed. Such a defense aim is no more than an attempt to frustrate the effects of an arbitration clause. Moreover, it is essential in international trade to maintain *bona\_fides* in transactions, a norm that cannot be disregarded by a party. If the party invokes religious affiliation it discloses bad faith, since he agreed to refer the dispute to an international arbitration institution. It was therefore clearly recognised by the parties that one or more of the arbitrators might not be of a particular religious affiliation. Unfortunately, courts in Middle Eastern countries may deploy culturally specific norms of public policy to assist covertly a defendant from the jurisdiction in question to avoid the consequences of freely negotiated agreements.

Legislatures in such countries should differentiate between domestic and international public policy. Failing that national courts should interpret this restriction as not applying to international



arbitration. In international cases at least one party is from a foreign country and may thus not be familiar with national rules or which the expectations usually laid down in the arbitration agreement including any agreed arbitration rules. He may therefore be frustrated by a conflicting mandatory provision of domestic law. In this case the national law could provide a trap for the unwary foreigner.

### **2.3.3 The parties to the Contract:- the particular case of government parties.**

In the Middle East, when one of the party's to the agreement is the government or one of its emanations issues of public policy are particularly likely to arise. This section will examine disputes involving sovereign and national institutions and foreign parties where the concept of public policy may be invoked, to stop the enforcement of foreign arbitral awards.

#### **2.3.3.1 The relation between public policy and state in the Middle East**

Public policy is a weapon which the state may use to preclude the enforcement of foreign judgments or arbitral awards.

The state is the creator and judicial authority is the agent of this defense against enforcement of foreign arbitral awards. Public policy evolved as a limitation, found in many states' codes indicating that disputes regarding state institutions must not be submitted to arbitration.<sup>57</sup> The Arabian Gulf states used to allow the disputes concerning state institutions to be taken to arbitration. However they discovered that this kind of arbitration tribunal raised questions which

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57. See Chapter 4 Arbitration law and Practice in the UAE at pp. 138-139.

were to be considered matters of sovereign and national interest which should not be disclosed to other countries. This led the Gulf states to prohibit arbitration in connection with state institutions or where the state was a participant, and refer their contractual disputes instead expressly to the local courts.<sup>58</sup>

#### 2.3.3.2 The rationale of public policy challenge

The rationale of utilizing public policy to challenge foreign arbitral award is based on two reasons. The first is historical; for a long time the Middle East fell under the influence of Western colonialism. As a reaction against this influence international arbitration is seen in these countries as a concession to foreign interests. The foreign parties used this system as a device to control the wealth of the East, by a mechanism which ousted the legal system and law of the Middle East countries from the disputes, locating the resolution of these disputes in alien territory, according to foreign rules and before arbitrators where foreigners comprised the majority.<sup>59</sup>

The second reason is, the unfamiliarity of the concept of arbitration. Arbitration is still seen as a "myth" to the majority of these countries. This is shown by their great readiness to find defects which preclude the enforcement of foreign awards. This may be attributed to a hesitation to trust the arbitrator as a competent judge or authority to rendered a decision, particularly in disputes which have a bearing the

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58. The Gulf States which prohibit the arbitration in connection with states. State of Kuwait, Saudi Arabia, and UAE.

59. Saleh Samir, "The Settlement of Disputes in the Arab World: Arbitration and other Method" (1986) 1 Arab Law Quarterly 199-200.

national interest of the state. This predisposes the national courts to take a variety of means to reach conclusions which will block the enforcement of foreign arbitral awards.

#### 2.3.3.3 The form of challenging foreign arbitral award

A foreign party enters into a contract with a state or a state corporation and agrees to refer any dispute arising to arbitration. In the majority of cases a state party to such an arbitration agreement, will honor it in cases of dispute, participating in the arbitration, and indeed accepting the award even if it loses. However, on occasions in spite of signing the arbitration agreement a state may raise the defense of public policy based on their national law to escape the enforcement of the arbitration agreement or the arbitral award.

Challenging foreign arbitral awards may take different forms. This topic is not explicitly mentioned in the jurisprudence because of the sensitivity involved. However the reluctance to give full recognition to a foreign award is recognised business risk familiar to those doing business with a state agency in the Middle East.<sup>60</sup>

According to the prevailing practice in these countries, public policy is often the justification used where the state refuses or is unwilling to enforce foreign arbitral award rendered against the national government. The national judge rendering such a decision, will typically invalidate arbitration because of its failure to satisfy the national standard.

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60. Herrmann Gerold, UNCITRAL Model Law on International Commercial Arbitration the Model for Worldwide Harmonisation and Improvement, Paper presented at the Third Euro-Arab Arbitration Congress Amman Jordan 23-25 oct/ 1989.

Different justifications are invoked to achieve this goal. Some have been dealt with when discussing nomination procedures and the issue of religious affiliation.

Other methods may be used reflecting the particular powers and prerogatives of the state. State action may render the dispute no longer amenable to arbitration. For example by revoking a commitment for political or economic reasons, by, says directing an import embargo freeing the domestic party from the obligation to take delivery of goods ordered or revoking an oil concession by a nationalization Act enacted to frustrate the contractual performance owned by the state or its commitments toward the other party. In LIAMCO. v. Libya,<sup>61</sup> the District Court for the District of Columbia (USA) refused to enforce the award on the grounds of Article V (2)(a) of the New York Convention, because Libya's nationalization is an Act of State, and therefore not a matter capable of settlement by arbitration. The Court could not have ordered the parties to submit to arbitration because in so doing it would have been compelled to rule on the validity of Libyan Nationalization Law, violating the Act of State doctrine, as formulated by the United States Supreme Court in 1897, that is:-

"that every sovereign state is bound to respect the independence of every other sovereign state, and that the court of one country will not sit in judgment on the acts of government of another, done within its own territory".<sup>62</sup>

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61. 482 Fed. Supp. 1175 (1980).

62. *Underhill v. Hernandez*, 168 US 250 (1897).

One may argue however that when a state enters into an arbitration agreement it waives the right of restrictive immunity barring such defenses.<sup>63</sup> However waiving of state immunity implicit in the state's acceptance of an arbitration agreement may not necessarily be interpreted as a waiver with regard to enforcement.<sup>64</sup> Arbitration would be useless if the award could not be enforced, and enforcement depends on the attitude taken by the law of the court seized.

Finally specific legislation may be passed to ban an arbitration, taking place outside the country by revoking the participation of its state controlled companies in a foreign arbitration, and insisting that the dispute be brought before its national courts.

The question which may be raised here is the appropriateness of such intervention. Does the law implement a general interest, as when a law enacted by the state reveals a general matter referring to all national subjects ( not only to a particular group e.g. state controlled companies). In this respect the act may qualify to be accepted, excusing non-performance. However if the act is addressed in a particular matter and to particular parties (state controlled companies) then this situation is nothing more than an express tactic to escape the performance of the contract. This is exemplified by the unanimous reluctance on the part of international arbitrators to accept such a law as a defense the Amco Oil case.<sup>65</sup>

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63. Bockstiegel, *60 Years On, a Look at the Future*, (Netherlands, 1984) p.145.

64. *Ibid* p.147.

65. *Amco Sharjah Oil Company v. Emirates General Petroleum Corporation*, ICC Case No. 5331 18.1.1988.

#### 2.3.3.4 Facilitating the enforcement of arbitration agreements or arbitral awards when involving a state party

There is a risk to the foreign party of the plea of sovereign immunity and obstacles in bringing a dispute before the national court of that state. Such a party will prefer the law of his home state or the national law of a developed state. A solution is required to grant both parties a fair compromise.

A possible solution is the application of the *Lex\_mercatoria*.<sup>66</sup> These rules disregard the place of arbitration, that is, location is of no significance in determining the applicable law. The arbitral tribunal is not connected to the law of the place where the arbitration takes place. Thus the parties avoid any involvement in the technicalities of any national system and their rules which may be unsuited to international contracts. The theory goes further, stating that conflict-of-law is irrelevant to international commercial arbitration, because the arbitrators should not decide the dispute according to any municipal substantive law. *lex\_mercatoria* should be attractive to governments. No government wishes to submit to the law of foreign states. A private party may also not wish to have the contract governed by the laws of a particular country because there may be some obligation in the law of this country which may prove contrary to the interests of the private party. In such cases the arbitrator's may by parties' agreement apply "*lex\_mercatoria*". Private parties, when entering into an agreement with a state

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66. Ole Lando, "The lex mercatoria in international Commercial Arbitration" (1985) 34 ICLQ 747.

government, may fear the application of the national law of that state because of lack of impartiality or the possibility of a change in the national law such as a "nationalization law." The TOPCO<sup>67</sup> decision illustrates the application of this principle. In that case the Libyan government accepted stabilization clauses in a concession agreement with the foreign parties. The arbitration held:-

the recognition by international law of a state's right to nationalize is not sufficient to allow a state to disregard its previous contractual commitments, because the same principle also recognizes the power of a state to commit itself internationally.<sup>68</sup>

Applying the rules of *Lex\_mercatoria* in such instances may lead to avoidance of any challenge to "state sovereignty" which could arise were arbitrators to apply the laws of another nation. In the dispute between the Arabian American Oil Company and the Kingdom of Saudi Arabia, arbitration was held in Geneva under an *ad\_hoc* submission agreement.<sup>69</sup> The arbitral tribunal refused to apply the Swiss law even though it was the law of the seat of the arbitration. It justified its refusal by saying:-

Although the present arbitration was instituted, not between states, but between a state and private American corporation, the Arbitration Tribunal is not of the opinion that the law of its seat should be applied to the arbitration...

Considering the jurisdictional immunity of a foreign state, recognized by international law in a spirit of respect for the essential dignity of sovereign power, the Tribunal is unable to hold that arbitral proceeding to which a sovereign state is a party could be subject to the law of another state... For these reasons, the Tribunal find that the law of Geneva cannot be applied to the present arbitration. It follows that the arbitration, as such, can only be governed by international law...<sup>70</sup>

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67. *Texaco Overseas Petroleum Co. v. Government of the Libyan Arab Republic* (1978) 17 ILM 1.

68. *Ibid*

69. *Aramco arbitration* (1963) 27 ILR 117.

70. *Ibid* at p.155-156

Also it can serve to resolve the difficulty between states and private parties concerning so-called "mixed state contracts", to avoid the tangle of nationalization and unilateral action by the host state.<sup>71</sup> The system succeeds to the extent that a number of conflicts are eliminated by the use of these rules. Furthermore, this system may fill gaps in the municipal law. However it should not be taken as a complete replacement for the municipal law system, because *lex mercatoria* rules do not derive binding force from any state authority. An award based on this principle cannot be enforced *per se*; it needs a system which can enforce it, otherwise it will be no more than a piece of paper with no value.<sup>72</sup> But as body of substantive rules on which a local enforcement can be based, the *lex\_Mercatoria* has much to commend it.

## Conclusion

Arbitration and enforcement of an award is bounded and restricted by public policy. Awards may be affected or even set aside, for offending the requirements of public policy. Before an arbitral award can be recognised by a national court, it must be exposed to public policy. If the award does not violate public policy, then the court should implement it.

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71. Keith Highet, "The Enigma of The Lex Mercatoria", (1989) 163 Tulane law review 613-628.

72. *Deutsche Schachtbau v. Ras al-Khaimah National Oil* [1987] 3 WLR 1035; for more detail see Chapter 7 at pp. 338-342.



Fundamental economic, moral, political, religious and social standards of every state set the criteria which determine public policy. As much as states attempt to create a coherent policy with advanced principles, so public policy can move in the other direction, becoming increasingly restrictive, particularly in the context of social sensibilities and expectations prevalent in Middle Eastern states.

The establishment and maintenance of public policy is one of the natural and fundamental principles granted to states, which have ultimate authority in over its regulation. Any interference with this right of the state to determine its own public policy is a violation of the sovereignty of the state. But public policy should not operate as a covert means for refusing the enforcement of validly obtained arbitral awards. There still may be considerable readiness to stop enforcement of arbitration agreement or award. As a result foreign parties may avoid involving themselves in this kind of contract with a Middle Eastern party. This avoidance has a side affect, primarily on those countries which rely on the West in many areas. This factor should be taken into account by Middle Eastern states wanting to regain the international community's complete faith in the ability of the legal system of Middle East countries to recognise and enforce legitimate arbitral awards.

Various ameliorative proposals have been made in recent years and useful efforts undertaken in the this direction of reform, but they have not succeeded in achieving their target. It is necessary to have the initiative come from the Middle-Eastern countries, as a recognition of their self-interest as developing countries in the extensive of overseas trade. Experience has proved the uncertainty and impracticality of present arrangements. The proper way to facilitate enforcement of

arbitral awards by the legal system of these states is by their adopting a system impartial and fair for both parties especially where is an international contract is involved, and by enacting legislation tailored to the specific needs and characteristics of international commercial arbitration. This will prevent denial or miscarriage of justice; in other words it will, ensure due process or fairness of the proceedings.

The yardstick which we can adopt regarding this matter is the confinement of the concept of public policy to situations where genuine goals of the society's welfare and public interest are involved, and where violation has deleterious consequences for the society as a whole. When public policy is used to avoid an unwelcome result for a certain interested party, it is nothing more than a pretext for ends which cannot openly be expressed. The more prevalent this is the more difficult it becomes to create a systematic reliable system of arbitration fitted to the needs of societies seeking to develop their economics in a way that benefits society as a whole and not skewed and limited in favour of particular groupings.

## PART TWO

# **Chapter Three**

## **Law and Justice in the United Arab Emirates**

### **Introduction**

Chapter one sketched the essentials of a viable system of arbitration. Chapter two discussed the limits that national legal systems must place on recourse to arbitration coupled with specific reference to some difficulties that Middle Eastern countries in general experience in accommodating to the requirements of modern arbitration. Now approaches the central issue of this work - fashioning a system of arbitration suited to the current state of the developments of the United Arab Emirates. But before a realistic appraisal of the current position in the Emirates and prospects for future development can be made, it is essential to make acquaintance with the salient facts of the legal systems operative in the Emirates. Only then can one appreciate the prospects and difficulties for future developments in the system of arbitration - a system which, far better or worse, has to accommodate to current institutional facts.

### **3.1 Geographical Background**

The United Arab Emirates (U.A.E.) is composed of seven Emirates, namely Abu Dhabi, Dubai (Dubayy), Sharjah (ash-Shariqah), Umm al-Qaywayn, Ra's al-Khaymah, 'Ajman and al-Fujayrah. Each Emirate is governed by its own hereditary ruler, and each retains primary power

over local affairs. It lies on the eastern side of the Arabian Peninsula on the Arabian Gulf. It is bordered by Saudi Arabia in the west and south, by Qatar on the north-west, and by Oman on the south-east and north-east. The total area of the U.A.E. is approximately 32,000 square miles.<sup>1</sup> Abu Dhabi is the biggest of the Emirates, with an area of 28,000 square miles. Dubai is second largest with 1,500 square miles, then Sharjah 1000 square miles, Ra's al-Khaymah 650 square miles, al-Fujayrah 450 square miles, Umm al-Qaywayn 300 square miles and Ajman 150 square miles.

The discovery of oil has led to immigration to the U.A.E. so that a large part of the population consists of South Asians (Indian, Pakistani, Bangladeshi and Iranian), Africans and Europeans. The U.A.E.'s indigenous inhabitants are Arabs who adhere to the Sunnite and Shi'ite sects of Islam. The most recent statistics give the population of the U.A.E. as an estimated 1,774,000 in 1988.

### 3.2 The legal system before the Union of the Emirates

The Trucial Shaykhdom passed through four stages in the development of its legal system, beginning from before the early 16th century with tribal and *Shari'ah* law; followed by British domination of the Trucial Shaykhdoms (1873 to 1947) when the area was administered by British India; the transitional stage after 1947 when it was administered by the London Foreign Office through a resident political agent. The British left the Arabian Gulf in 1971 and the Trucial States

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1. "The United Arab Emirates: General Survey" Institute of Research of the Arabic Studies (Cairo 1978) p.4 (Arabic).

federated and became known as the United Arab Emirates. R'as al-Khaymah joined the federation in 1972.

### 3.2.1 Traditional law

At the beginning of the 16th century, judicial authority resided in the ruler of each Emirate, who acted as the judge. The ruler generally administered cases personally, according to Islamic law and tribal custom, and only exercised jurisdiction over his own subjects.

As the ruler's subjects increased in number, the ruler appointed members of his family as *qadi* (judges) to deal with legal matters. Of course this did not remove the ruler from the judiciary but, because of his increasing duties, he was not able to try every case. This period was characterised by an absence of written law, apart from *Shari'ah*. This period witnessed the beginning of the European influence on the area.<sup>2</sup> Portugal and the British were slowly developing trading interests in the area.

### 3.2.2 The British Protectorate of the Trucial States

In 1873 the government of Bombay acted for the British Crown handed over the affairs of the Trucial Coast to the government of British India. Britain took on the role of representing the Trucial States in the international arena from 1892 administered from British India. The British judicial establishment in the Arabian Gulf was linked to the Indian judicial system.<sup>3</sup> This arrangement lasted until 1947 just before

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2. Fenelon K.G. *The United Arab Emirates: An Economic and Social Survey*, 2nd ed., (London: Longman, 1976), p.9.

3. Herbert J. Liebesny, "Administration and legal development in Arabia", (1956) 10 Middle East Journal 33 at p. 35.

India achieved independence in 1949. The Foreign Office in London then took direct responsibility for the Trucial Coast until 1971. After Indian independence in 1949, the British shifted the external and security affairs of British Protectorates in the Gulf from India to Bahrain, which became the base of the British Political Resident in the Gulf until the United Arab Emirates achieved independence in 1971. The British Crown exercised extra-territorial jurisdiction over all foreigners, Muslim or non-Muslim from 1947 until 1971. It is worth mentioning that in 1960 some jurisdiction concerning nationals of most Arab and other Moslem states was transferred to local Courts.<sup>4</sup> The British Political Agent gave advice on legislation, though each state maintained full internal control.<sup>5</sup>

The local court was composed of local subjects of the Emirates. The British Crown Law exercised in the Trucial States consisted of Indian Acts and Codes, which were replaced by the Queen's regulations between 1947 and 1971.<sup>6</sup> In "mixed" cases, where a dispute arose between someone subject to British jurisdiction and another subject to the jurisdiction of the Ruler, the court examining the dispute normally consisted of one legally qualified assessor from the British court and one appointee of the ruler concerned.<sup>7</sup>

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4. Fenelon K.G. (*op. cit* n.2) at p.20.

5. Sir Rupert Hay, *The Persian Gulf States* (Washington DC, Middle East Institute, 1959) p.116.

6. Ballantyne W.M., *Legal Development in Arabia* (London, 1980), p.8-15.

7. Donald Harley, *The Trucial States* (London 1970) p.180.

### 3.2.3 The transitional stage in the U.A.E.

By the transitional stage is meant the period which antecede the establishment of the Union of Emirates and which coincides with the British presence (1947 to 1971). At the end of the sixties a period of legislating began in the U.A.E. The legal system at this time was marked by excessive haste in codifying law to fill a legislative vacuum. Codification consisted of adopting legislation from other countries, which often differed markedly from the Emirates in their social, political and economic structures. Furthermore, such legislation was copied, a process frequently characterised by errors and inconsistencies, from the original codes, without any ensuing corrections let alone adaptations made to suit the environment of the U.A.E. Those who took on the task of codifying these laws were not native-born citizens of the Emirates and even though they were from other Arab states, they were not familiar with the particular traditions and customs of the Emirates. The resulting laws could be unpredictable and arbitrary, and led to a legal system which was not ideally suited to the demands of the independent Emirates.

Major elements of legislation were enacted during this period in the U.A.E., including the Dubai Court Law (1970), Ra's al-khaimah Court Law (1971), Abu Dhabi Procedural Law (1970), the Contract Law (1971) applicable to Dubai, Sharjah and Ra's al-Khaimah, the Dubai Penal Procedure Law (1970) and the Dubai Income Tax Decree (1969).

### 3.3.1 Sources of law in the U.A.E.

#### 3.3.1.1 Islamic *Shari'ah* Law

Art.7 of the Provisional Constitution<sup>8</sup> states that Islamic law



(*Shari'ah*) shall be the main source of legislation within the Federation. But is *Shari'ah* the most authoritative source of law, superior to other legislation, or are there other sources of law of equal authority?

Art.75 of the Provisional Constitution states that:-

The Supreme Court shall apply the provisions of the Islamic *Shari'ah*, laws of the Union and other laws in force in the member Emirates of the Union conforming to the Islamic *Shari'ah*. Likewise it shall apply those rules of custom and those principles of natural and comparative law which do not conflict with the principles of that *Shari'ah*.

Does the U.A.E. Provisional Constitution posit *Shari'ah* law as the sovereign source of law in the U.A.E. or just one of the main sources? If *shari'ah* law is the principal source of U.A.E. law, other sources of law must not violate Islamic law. If *Shari'ah* law is only one of the main sources, and not especially privileged, any conflict of norms arising from incompatible rules from different sources be resolved by orthodox, secular legal analysis.

There is no express article in the Constitution stating that *Shari'ah* is the prime source of law. Although Art.7 of the Provisional Constitution states that *Shari'ah* is the main source of law in the U.A.E., it refers to process rather than specifying results.<sup>9</sup> The U.A.E. Federal Supreme Court<sup>10</sup> is extremely cautious in interpreting Art.7 of the

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8. The Provisional Constitution in this context is the constitution which enacted to serve the transitional stage between the period of the establishment of the state and the preparation of the Paramount Constitution. For more detail discussion see below.

9. Gary R. Feulner and Amjad Ali Khan, "Dispute Resolution in the United Arab Emirates", (1986) 1 Arab Law Quarterly 312.

10. The U.A.E. Federal Supreme Court was established to review the Constitutionality of the laws, giving binding interpretation of the constitution and act as an umpire of federal system. Discussed below

Provisional Constitution. For example, Abu Dhabi Civil Procedure Code of 3/1970, Art.61 and Art. 62 is in violation of the Shari'ah in laws concerning interest and alcohol. This caution is due to a fear of issuing precedents, which might then be used to block any law violating the constitution with respect, for example, to interest and alcohol.<sup>11</sup>

Nevertheless Art.8 of Federal Law<sup>12</sup> No.6/1978 concerning federal courts stated that:

The Union Court shall apply the provision of the Islamic *Shari'ah*, Union laws and other laws in force, just as they shall apply those rules of custom and general legal principles which do not conflict with provisions of *Shari'ah*.<sup>13</sup>

The implication of this Article is that *Shari'ah* is the primary source, and other sources should not conflict with the provision of *Shari'ah*.

A Supreme Court decision, as to whether or not *Shari'ah* should be the controlling authority in a case concerning interest, arose in a case involving one of the banks in the U.A.E.<sup>14</sup> The issue was whether the levying of interest, which is allowed by Art.61 and Art.62 of the Abu Dhabi Civil Procedure Code, violated Art.12 of the Federal Law 6/1978.<sup>15</sup>

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11. The U.A.E Supreme Court application for constitutional interpretation of the punishment for drunkenness contained in article 17 of Law 8/1976 of Abu-Dhabi. (1983) 37 *Al-adalah* 76.; *Baruda Bank v. Abu-Dhabi Electronics Co.*, The U.A.E Federal Supreme Court, case no.17/5.

12. The federal law is the laws enacted by the U.A.E. Federal Legislature, discussed below.

13. The Federal Law No.6/1978, article 8.

14. *Janatta Bank v. Najib Transportation and Construction Co.*, The U.A.E Supreme Court Case No. Civil 14/9, (1983) 37 *Al-adalah* 79-80.

15. The Abu-Dhabi Civil Procedure Code, 3/1970, Art. 61 and 62,

The bank concerned failed to recover delayed interest on a loan because the majority in the court held that interest is illegal under *Shari'ah* law.<sup>16</sup> The question before the U.A.E. Supreme Court was whether Art.61 and Art.62 of the Abu Dhabi Civil Procedure Code were constitutional and continued to be so by virtue of Art.148 of the Provisional Constitution, which provides that laws in force before the promulgation of the Constitution were to remain valid unless, or until, they were repealed or amended.<sup>17</sup>

The decision of the Supreme Court of the U.A.E. in this case avoided giving any final decision on an issue of violation of the Constitution occurring in local law, because any ruling over the legality of banking interest in the U.A.E. is considered to be especially sensitive, in that it would threaten the commercial system of the U.A.E., as banking represents a major part of the Emirates' revenue. The judgement of the Supreme Court was thus an attempt to avoid any involvement in such disputes which might lead to unforeseen consequences. However the Supreme Court did try to compromise between the federal and local law in ruling that:-

the court has no jurisdiction to challenge local law which came before the promulgation of the Union, even if it violates Islamic law, because it would prejudice and violate the principle of stability between the Union and the Emirates.<sup>18</sup>

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16. *Janatta Bank Case*, *op. cit* n.14; for further discussion see Ballantyne W.M., *Commercial Law of the Middle East: The Gulf States*, (Lloyds of London, 1986) p.59.

17. *Ibid*; also see Omer A. M, *The Law of Civil Procedure* (UAE University publication 1983) (Arabic) p. 4.

18. *Janatta Bank case*, (1983) 37 *Al-adalah* 79 at p.80

The proper conclusion appears to be that *Shari'ah* is the controlling source of law in the U.A.E. but that the time has not yet come to implement fully this conclusion, especially when it vitiates local law promulgated before the Constitution. However no Emirate can enact laws or decrees violating *Shari'ah*, and the latter will gradually be enforced in the future to all laws past or present.

The Supreme Court's passivity towards applying Islamic law as the primary source of law can be justified by the need to maintain the unity of the Emirates.

#### 3.3.1.2. The Constitution

The Constitution is the next source of law, after *Shari'ah* law. The U.A.E. has had a Provisional Constitution since 1971 this Provisional constitution was drafted basically for the nine Emirates which include in addition to the original seven Emirates plus Qatar and Bahrain. Due to certain difficulties in reaching agreement on state structures Bahrain and Qatar did not join the Union. After this the seven emirates announced adherence to the federation. Thus the Constitution was made basically to serve the union of the nine emirates but because of the withdrawal of Qatar and Bahrain the constitution was modified to meet the needs of the new state. The Constitution of the United Arab Emirates was called a Provisional Constitution, to become a permanent constitution, once it is ratified, after a process of examination to be carried out by a Constitutional Committee.

The Provisional Constitution was supposed to be replaced by a Permanent Federal Constitution in 1976, after the Constitutional

Committee concluded its work. However the Supreme Council of the Emirates refused to accept the Permanent Constitution and extended the Provisional Constitution for another five years. In 1981, the Provisional Constitution was again extended for another five years until 1987, and in 1987 extended till 1992.

The refusal to ratify the Permanent Constitution can be attributed to different reasons, predominantly financial issues relating to the Union budget, which should, according to the Permanent Constitution, receive contributions from all the Emirates. In addition, the Constitution requires federal control of the Emirates' ports, one of the main sources of revenue for the individual Emirates. Finally, the concept of Federation has not yet fully crystallized and acceptance of this concept by individual Emirates will take time. The idea of a Federation has been introduced into a region which has never before witnessed a successful union between states. A similar federation is not found in the Gulf, nor in the Middle East as whole.<sup>19</sup> Despite these obstacles in the way of the Permanent Constitution, enthusiasm for its ratification exists in the U.A.E.

Until the ratification of the permanent constitution the Provisional Constitution is in reality the actual constitution of the U.A.E. and supreme law of the U.A.E., for no federal or local law should violate it. If there is any violation of the Provisional Constitution by any other law, federal or local, that law will be deemed null and void.

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19. For more detail, see Al-Tabtabai, *The Federal System in U.A.E.* (Cairo 1978)( Arabic).

The U.A.E. Provisional Constitution has ten chapters.

Chapter one defines the Union and its goals. Art.7 of the Provisional Constitution provides that "*Shari'ah* law is a principal source of law".

Chapter two sets out the essential pillars of society and the economy. Art.32 carefully preserves each individual state's ownership of its natural resources.

Chapter three states the fundamental rights and duties of the U.A.E. citizen. Art.25 states that:-

All persons are equal before the law, and there is no distinction between citizens of the Union on account of origin, place of birth, religious belief or social position.

Chapter four concerns the Union authorities, the three Councils - the Supreme, the Ministers' and National Councils.

Chapter five states the procedures for legislative measures and decrees and the authorities competent to enact them.

Chapter six concerns the Emirates' powers, duties of co-operation, intense merger, and judicial co-operation.

Chapter seven sets out the distribution of power and relations between the Union and the Emirates.

Chapter eight concerns Union financial affairs.

Chapter nine concerns the armed forces and security.

Chapter ten sets out final and interim provisions, the Constitution's period of amendment, and the preparation of a Permanent Constitution.

### 3.3.1.3. Legislation

Analysis of the U.A.E. Provisional Constitution shows that it is not based on separation of powers. Three councils are authorised to enact federal legislation.

The most important branch of the U.A.E. federal authority is the Supreme Federal Council of Rulers, which controls executive power and the legislative process.<sup>20</sup> The Supreme Council consists of the seven rulers of the Emirates, and its task is to ratify bills which then become legislation. For procedural matters, under the Constitution, a simple majority of the Emirates suffices, but for matters of substance, no fewer than five rulers must approve the bill, two of the five being Dubai and Abu Dhabi, the largest Emirates. If Dubai or Abu Dhabi oppose a bill, the bill is thrown out, unless changes can be made so that it can be ratified. If a bill is not ratified, a draft law is permanently annulled. No other organ of the government of the Emirates has the right to question the Supreme Council about its refusal to ratify a draft law.<sup>21</sup>

The Council of Ministers, composed of the Union's ministers, is in charge of proposing, drafting federal legislation and executing the law. It is supervised by the Supreme Council alone.<sup>22</sup>

Finally, there is the National Federal Council, for which there are forty seats, which are distributed among the Emirates. The members of

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20. Al-Owais H.R., The Federation of the United Arab Emirates and the legislation power of the Federal Government (Harvard University, 1984) unpublished, (L.L.M.thesis).

21. The Provisional Constitution of the U.A.E., article 49.

22. *Ibid* article 48.

the National Council are not elected but are appointed by the ruler of each Emirate for two-year terms. Representation on the National Federal Council is proportional to the population of the individual Emirates.<sup>23</sup> The seats are distributed as follows: Abu Dhabi and Dubai eight seats each, Sharjah, and Ra's al-Khaymah six seats each, and 'Ajman, Umm al-Qaywayn and al-Fujayrah four seats each. The term of office for members of the National Federal Council is two years.<sup>24</sup>

The National Federal Council is the legislature, but only in form rather than in substance.<sup>25</sup> The National Federal Council is supposed to play an important part in the legislative process of the U.A.E. government, but the Constitution does not grant the Council an appropriate role<sup>26</sup> but is merely a consultative body.<sup>27</sup> The only power the Council has in practice, is to voice its opinions about draft laws; control over a proposed federal law lies with the Council of Ministers. If the National Council proposes changes or makes comments, the President of the U.A.E. or the Supreme Council has the right to return the draft of federal law to the National Federal Council. If the National Council insists on an amendment, the President can issue the federal law in the form in which it originally came from the Council of Ministers.<sup>28</sup> This

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23. Al-Tabtabai, *op. cit* n. 15).

24. The Provisional Constitution of the U.A.E. article 72.

25. H.R. Al-Owais *op. cit* n. 16).

26. Provisional Constitution of U.A.E., article 110, section 3, subsection (a)

27. H.R. Al-Owais, *supra*.

28. Article 110 section 3 subsection (a).



illustrates that the role of the National Council is minimal, if not non-existent:

In the U.A.E. the legislature cannot initiate bills and moreover its opinion will not influence the law-making process unless it satisfies the executive. The legislature in the U.A.E. political system is reduced to an almost *pro\_forma* ratification of the government proposals.<sup>29</sup>

Nevertheless the National Council discusses bills, Union projects, debates matters of public interest and proposes amendments to federal law presented to it by the Council of Ministers.

#### 3.3.1.4 Other sources

Alternative sources of law, stated by Art.8 of Union law 6/1978, are rules of custom and general principles which do not conflict with the provisions of *Shari'ah*.

#### 3.3.2. Federal Law

The federal law is that which is enacted through the legislative authority of the U.A.E. As it is passed, it supersedes the local law and decrees of the Emirates which are members of the union. This applies only to those laws enacted after the Union was created; all other earlier laws remain valid. In any case of conflict between local law or decree of any Emirates with the federal law, the former decree or law will be deemed null and void.

The period after the establishment of the U.A.E. witnessed a rapid development of the U.A.E. legal system through the enactment of Federal

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29. Moh'd A. Al-Rokn, The role and power of the legislature under U.A.E. Constitution (University of Warwick, 1986) unpublished p.61 (L.L.M. thesis).

legislation. From the beginning of the Union, the Federal legislators were keen to establish a set of federal laws to fill the legislative vacuum and substitute the archaic law of individual Emirates with modern law. The Federal legislator succeeded, to some extent, to achieve this goal, by introducing many Federal laws. Nevertheless, the U.A.E. still lacks comprehensive legislation essential for the proper functioning of its legal system.

Many Federal laws are drafted, but awaiting ratification. This delay is can be attributed to the refusal by individual Emirates to accept the wording of the law, especially where the proposed law is perceived as against the interest of an individual Emirate.

A consequence of the absence of appropriate federal legislation in the Federal Courts, is that judges resort to domestic or foreign laws in matters which should be covered by federal legislation. For example, as yet there is no Federal Code of Civil Procedure, although it is understood that a comprehensive Federal Code is being drafted. Abu Dhabi has a Civil Court Act (1970), as has Umm al-Qaywayn. The Abu Dhabi Code of Civil Procedure (A.D.C.C.P.) was drafted in rather more detail than similar legislation in other Emirates. A judge may resort to the A.D.C.C.P. in a case brought before a court, since the U.A.E. has no Federal law laying down procedures in civil cases, apart from some federal legislation which falls within civil procedure, such as the Law 1/1973 concerning the Federal Supreme Court, Law 6/1978 concerning Federal Court, Law 17/1978 of Appeal to the Supreme Court, "Cassation" and Law 9/1980 regulating legal practice. To re-inforce federal rules,



judges use the procedural system of the A.D.C.C.P., which is quite inadequate for the judicial requirements of the U.A.E.

Alternatively, in the absence of controlling U.A.E. statutory law and taking into account the impossibility of staffing the courts of the Emirates entirely with U.A.E. nationals resort is had to the laws of the other Arab countries. Judges who preside over courts are frequently from other Arab states. In working in the very open textual system of the emirates, where there is not always applicable local law to apply, they naturally go back to that which they are familiar with by borrowing from codified or uncoded laws of their respective countries of origin.

Not only have some federal laws not been ratified, others have been "stopped". Certain federal laws have been ratified by the Supreme Council and promulgated by the U.A.E. President, so, in theory, the law should come into force one month after publication in the U.A.E. Official Gazette.<sup>30</sup> Nevertheless they are not enforced in some Emirates, due to some reservation there, though they may be enforced in other Emirates. This unpredictable judicial reaction to fully promulgated laws is a major obstacle to foreign investment and business in the U.A.E.

A clear example is Federal Law 8/1984, relating to commercial companies. This law deprives individual Emirates of the power to establish commercial companies and gives the power to the Federal Authority. This act was seen by some of the Emirates as contrary to

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30. The Provisional Constitution of the U.A.E., art. 111.

their internal interests and therefore they "stopped" the law. On December 1985, the U.A.E. Council of Ministers reviewed the first action against this Law by the Executive Council of Abu Dhabi, which took legal procedures to postpone its enforcement, until an amendment was considered by the Council of Ministers. The Council of Ministers resolved that Law 8/1984 should be suspended for a period of one year from 1.1.1986, for further investigation. In March 1987 the Council of Ministers set up a committee to consider Abu Dhabi's suggestions on Law 8/1984. After considering the suggestions, the Council of Ministers put forward proposals to amend Law 8/1984, so that it could be enacted. The Dubai Government also had some reservations on Law 8/1984, which led to delay in its implementation of the Law in Dubai. Amendments were made to a number of provisions in Law 8/1984. The general affect of those amendments was to provide a competent authority within each Emirate with powers conferred by Law 8/1984 on the Minister of the Union, or requiring the Minister of the Union to consult with local competent authorities, such as local municipalities or Chambers of Commerce, which are the fundamental instrument by which all of the emirates regulate both foreign and domestic business activity. In some cases where it involves the establishment of a limited liability company, the procedure followed is that an application to the Ruler's legal advisor of the Emirates may be required, seeking the issue of a decree by the Ruler. The company will be established after the issuance of the Ruler's decree in the Official Gazette.

Although the trend in the U.A.E. is towards federal legislation to govern Commercial activity, nevertheless, the individual Emirates refuse to give up a source of revenue for the Emirates, and prefer to incorporate

companies through its own laws and administration.

### **3.3.3. The Federal or the U.A.E Judiciary**

Before discussing the Federal or the U.A.E. Judiciary Court it is worth focusing on the notion of "Federal judiciary" - what does that term mean? The word "federal" automatically targets the notion of the word "local" as well as "federal"; the federal system in say, the American arrangement, involves certain aspects which are dealt with by the federation and others remain for the local authorities. That is not the case in the U.A.E. where a of federal court is instituted when local courts of a particular emirate has transferred its jurisdiction to the Federal judicial system. In these cases the courts which have been incorporated into the federal system will have jurisdiction over all disputes in that Emirate whether or not they involve federal matters; they can be purely local matters without any federal dimension; that particular federal court may be for example, a Sharjah based court which can take any case or matters rising from a dispute in Sharjah.

Chapter five of the Provisional Constitution deals with the judicial system of the Union, Art.95, and provides for the formation of Federal Supreme Courts, as well as Federal Courts of First Instance. Art.99 sets out the jurisdiction of Federal Supreme Courts and Courts of First Instance.

#### **3.3.3.1. U.A.E. Federal Supreme Court**

The Supreme Court is the highest legal institution in the U.A.E. federal judicial system. Its judges are independent and not subject to any authority but the law and their own conscience.<sup>31</sup>

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31. Provisional Constitution of the U.A.E., art. 94.

The Supreme Court of the U.A.E. consists of a President and up to five judges.<sup>32</sup> In order to meet the increased duties of the Supreme Court, the Supreme Court Law allows up to three alternative judges to be assigned to the Court to make it quorate when necessary.<sup>33</sup> The Supreme Court Law prescribes the number of court chambers, including the Constitutional Chamber.

The Supreme Court should normally sit in the capital of the Union, but may, exceptionally, assemble in the capital of any of the Emirates<sup>34</sup> . The capital of the Union is not Abu Dhabi but "Al-Karama", an area allotted to the Union by the Emirates of Abu Dhabi and Dubai on the borders between them. Until the construction of the Union's capital is complete, Abu Dhabi is the provisional headquarters and capital of the Union.<sup>35</sup>

The Supreme Court was established solely as a constitutional court but, after the issue of Law 17/1978, the Supreme Court was granted the right of review and appeal in relation to Federal Court judgements. Art.99 of the Provisional Constitution clarifies the jurisdiction of the Supreme Court.

#### 3.3.3.2. Federal Courts

The Provisional Constitution of the U.A.E. provides for the

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32. *Ibid* article 96.

33. The Supreme Court Law No 10/1973 article 3.

34. The U.A.E. Provisional Constitution article 100.

35. *Ibid* article 9 section 1 and 3.

establishment of the Union Supreme Court and Union Courts of First Instance. Art.102 of the U.A.E. Provisional Constitution states:

the Union shall have one or more Union primary tribunals which shall sit in the permanent capital of the Union, or in the capitals of some of the Emirates, in order to exercise judicial power within the sphere of their jurisdiction in the following cases:

1. Civil, commercial and administrative disputes between the Union and an individual, whether the Union is plaintiff or defendant.
2. Crimes committed within the boundaries of the permanent capital of the Union, with the exception of such matters reserved for the Union Supreme Court under Art.99 of the Provisional Constitution.
3. Personal status cases, civil and commercial cases and other cases between individuals which shall arise in the permanent capital of the Union.

Art.102 clarifies the jurisdiction of the U.A.E. Federal Court. However, it is restricted to particular cases, and others are left to local jurisdiction.<sup>36</sup>

The policy of the U.A.E. federal judiciary towards the judicial system of the Emirates reflects a transfer from local to federal jurisdiction. The first step in this transfer of judicial authority in the U.A.E. is seen in the jurisdiction over the particular cases mentioned in Art.102 of the Constitution. In addition Art.105 of the Provisional Constitution states that:

all or part of the jurisdiction assigned to the local judicial authorities in accordance with the preceding article may be transferred by a Union law issued at the request of the Emirate concerned, to the primary Union tribunals...<sup>37</sup>

After the initiation of the Federal Court, some of the Emirates (Abu Dhabi, Sharjah, 'Ajman and al-Fujayrah) transferred their local

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36. Omer A.M. (*op. cit* n. 17) at p. 39.

37. The U.A.E. Provisional Constitution article 105.

jurisdiction to the Federal Court.

(i) The seat of the Union Court of First Instance

Law 6/1978 regulates the Union Court of First Instance. The Union Federal Court shall sit in the capitals of the Emirates of Abu Dhabi, Sharjah, 'Ajman and al-Fujayrah, and courts in these Emirates are considered to be Union Courts of First Instance. Other courts in the Emirates and outside the capital are considered as circuits adjunct to the court seated in the capital, for example, al-'Ain court is a circuit adjunct to the Abu Dhabi court.<sup>38</sup>

(ii) The structure of the Court of First Instance

The Court of First Instance consists of one judge and rules on all kinds of cases and claims.<sup>39</sup> U.A.E. legislation is different from other Arabic legislation in this respect. For example, Egyptian legislation divides the Court of First Instance into two divisions, a petty criminal division, where there is one judge, which deals with petty offences, and the main criminal division, where the court is formed of three judges and deals with crime and major trials.<sup>40</sup> The U.A.E. Federal Court system does not have this division<sup>41</sup> but has adopted a single organ, disregarding the complexity or high value of the case.<sup>42</sup>

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38. Law No. 6/1978, article 1 section 1.

39. *Ibid* article 5.

40. Omer M.A. *op.cit.* n.17) at p.42.

41. *Ibid* p.42.

42. *Ibid* p.42.



### (iii) Court Jurisdiction

The lower courts of four Emirates (Abu Dhabi, Sharjah, 'Ajman and al-Fujayrah) became Union Courts of First Instance, and are thus part of the federal jurisdiction, as stated by Law 6/1978. According to this Law, the Union Court of First Instance has jurisdiction in all civil, commercial and administrative disputes between the Union and individuals, whether the Union is plaintiff or defendant.<sup>43</sup>

Disputes under the jurisdiction of these federal courts are restricted to particular areas: firstly, crimes committed within the boundaries of the permanent capital of the Union, with the exception of crimes directly affecting the interest of the Union.<sup>44</sup> Secondly, personal status cases, civil and commercial cases and other cases between individuals which arise in the permanent capital of the Union.<sup>45</sup> Since this law refers to crimes occurring in the permanent capital, which is not yet established, these crimes accede to the local jurisdiction of Abu Dhabi, Sharjah, 'Ajman and al-Fujayrah, which transferred their local jurisdiction to the federal system, according to the Law 6/1978.<sup>46</sup> Thus, if a crime, as stated in Art.99(6) or Art.102(3), is committed in 'Ajman, its Court of First Instance has jurisdiction over that crime.

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43. Federal Law No.6/1978 concerning U.A.E. Federal Courts.

44. The U.A.E. Provisional Constitution article 99 section 6.

45. *Ibid* article 102 section 3.

46. Omer M.A. (*op. cit* n.17) at p. 43.

(iv) Federal administrative disputes

Art.3(1) of Law 6/1978 states that the Union Court of First Instance in the capital has jurisdiction over all administrative disputes between the Union and individuals whether the Union is plaintiff or defendant.

Abu Dhabi Court of First Instance shall be the administrative court of the Union, with jurisdiction over administrative disputes between the Union and individuals.

When referring to administrative disputes, this does not imply that U.A.E. legislation adheres to the French system, in which the administrative court is independent from other courts. The administrative court in the U.A.E. is part of the civil court; the U.A.E. has no special court solely for administrative disputes.<sup>47</sup>

(v) Civil and Commercial disputes

The Union Court of First Instance has jurisdiction in commercial and civil disputes.<sup>48</sup> Art.3 clarifies that any Union Court of First Instance, including that of Abu Dhabi, has jurisdiction over commercial and civil disputes, whether the Union is plaintiff or defendant; jurisdiction is determined by the place of residence of the defendant<sup>49</sup>.

3.3.3.3. The Federal Court of Appeal

The U.A.E. Provisional Constitution does not provide for the

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47. *Ibid* p.45.

48. Federal Law No. 6/1978 article 3.

49. Omer M.A. (*op. cit* n.17) at p.46.

establishment of a Federal Court of Appeal; however Art.103(2) stated:

The law may stipulate that appeals against the judgement of these tribunals shall be heard before one of the Chambers of the Union Supreme Court, in the case and according to the procedures prescribed therein.<sup>50</sup>

Federal legislation does not clearly state its policy on establishing an appeal court. The legislature vested jurisdiction over appeals in the Supreme Court; yet it did not determine which federal court is granted the right to act as appeal court against federal court judgements.<sup>51</sup>

The federal Minister of Justice asked the Supreme Court to settle this dilemma, which issued an interpretative judgement, viz:

The grounds upon which the Supreme Court depended in judging the legitimacy of the establishment of a federal court of appeal are to be found in Art.95 of Provisional Constitution. When this Article refers to a court in the federal system this reference does not apply to any one particular court, and the Provisional Constitution did not intend to restrict the authority of the federal legislature to the establishment of federal courts, but rather to give it the option; secondly, the Provisional Constitution Article must not be interpreted so narrowly, but rather more liberally, especially if this interpretation will enable the federal legislature to establish constitutional forms of federal court. Finally, there is no doubt that the formation of a court of appeal would provide a guarantee of the justice and fairness of the judicial system and this is one of the demands of the U.A.E. Provisional Constitution.<sup>52</sup>

In accordance with the Supreme Court's interpretative judgement, Law 6/1978 states, in Art.1(2) that "local courts of appeal in Abu Dhabi, Sharjah, 'Ajman and al-Fujayrah become Union Courts of Appeal".<sup>53</sup>

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50. The U.A.E. Provisional Constitution article 103 section 2.

51. Omer A.M. (*op.cit* n. 17) at p. 47.

52. (1976) 37 U.A.E. official Gazette p.101.

53. Federal Law No. 6/1978 article 1 section 2.

In practice, there are only two Federal Appeal Courts; one in Abu Dhabi, which has jurisdiction over the judgements of Abu Dhabi Courts of First Instance; and the Sharjah Federal Appeal Court, which has jurisdiction over the judgement of Sharjah, 'Ajman and al-Fujayrah First Instance Courts.

### 3.4 The local system in the Emirates

The local courts, in those Emirates which have not transferred their judicial system to the federal system, have comprehensive jurisdiction over all disputes and litigation within the boundaries of the relevant Emirate. Some of the Emirates have not used federal courts or have not replaced the local court which was there before the establishment of the union with a federal court.

These Emirates (Dubai, Ras'al-Khaimah, and Umm-Al-Quwain) fail to accept the federal judiciary which is in fact their duty to do as part of their membership of the Union. This failure to conform by these Emirates has led to the creation of separate judicial systems within the federal state although there is supposed to be one unified legal system.

I shall take one Emirate, Dubai, as a typical example of this local system.

This particular Emirate has been chosen because:

1. Dubai was one of the pioneering Emirates, after Abu Dhabi, in the process of codification and enactment of law.
2. There is a measure of similarity between the Emirates' codes; some Emirates copy Dubai codes.
3. Dubai is the most commercially significant emirates centre.

4. Dubai has some legal institutions which do not exist in the other Emirates, such as a Supreme Court.

The law of 1970 outlines the Constitution of the court in Dubai. Art.3 states that there are three kinds of court: *Shari'ah*; civil, which is divided into a Court of First Instance and a Court of Appeal; and judicial committees. The ruler has the power to create these when needed, to hear and decide specific cases or civil disputes.<sup>54</sup>

#### 3.4.1 Jurisdiction of Dubai *Shari'ah* court

The *Shari'ah* court, applying Islamic law,<sup>55</sup> has residual jurisdiction in all matters not expressly assigned by law to the civil court.<sup>56</sup> The *Shari'ah* court consists of one judge only.<sup>57</sup>

The judgement of *Shari'ah* court used to be final and it was not subject to appeal, until the issuance of Law 3/1988, concerning the establishment of the Dubai *Shari'ah* Court of Appeal, which has jurisdiction over a judgement in the Dubai *Shari'ah* court. The law regulating the jurisdiction of the *Shari'ah* court has been amended, so that an appeal can be made against a judgement from a *Shari'ah* court.<sup>58</sup>

#### 3.4.2 Jurisdiction of Dubai civil court

Unlike the *Shari'ah* court, the Dubai civil court does not have

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54. The Dubai Court Law of 1970, (law issued 23 September 1970);(1970) 94 Dubai official Gazette 5-31.

55. *Ibid* article 12.

56. *Ibid* article 10.

57. *Ibid* article 11.

58. (1988) 167 Dubai official Gazette p.7.

comprehensive jurisdiction, for this is restricted to particular cases or matters, by decree from the ruler. The trend towards civil courts has been furthered by the issuance of Decree 4/1989, which amended the jurisdiction of civil courts,<sup>59</sup> granting them comprehensive jurisdiction over commercial transactions, depriving the *Shari'ah* courts of this jurisdiction. Decree 4/1989, Art.3 vests the Dubai civil court jurisdiction over matters and suits arising out of any financial or banking transactions to which a bank "or any finance company, financial establishment, financial broker, currency broker or representative office of a foreign bank or financial institution" is a party."

The ruler has issued three decrees assigning specific matters to the civil courts:-

1. Civil or criminal cases and matters arising from them.<sup>60</sup>
2. Civil and commercial transactions.<sup>61</sup>

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59. (1989) 175 Dubai Official Gazette p.13.

60. (i) The Decree of 8.10.1970 assigned specific matters to the civil court, without regard to the nationality of the defendant:

- a. Traffic Law of 1967 and its amendments,
- b. Crime of Issuing Cheques without Covering Funds (Law 1965),
- c. Workers' Compensation Law of 1965 and its amendments,
- d. Dangerous Drugs (Narcotics) Law,
- e. Control of Agricultural Pesticides Law of 1964.

(ii) Criminal or civil cases and matters arising out of the Penal Code of 1970 are not regarded as subject to the civil court, if the offenders are from Dubai and other Trucial Emirates, or Qatar, or Saudi Arabia; the *Shari'ah* court has jurisdiction over these groups. This jurisdiction is assigned to the civil court by Decree 3 of 21.1.1971.

61. a. Ownership, Credit, Sale and Disposal of Mechanical Vehicles, Decree 1 of 8.9.1970,  
b. Insurance contracts, sea and air carriage contracts Decree 2 of 3.1.1971,  
c. Cheques and bills of exchange,  
d. Banking and financial transactions to which any bank or Middle East Finance Company is party.

3. matrimonial disputes, and personal affairs of non-Muslims. The civil court has jurisdiction over personal affairs, and administration of the estates, of non-Muslims. Matrimonial disputes between Muslims are under exclusive jurisdiction of *Shari'ah* courts.

#### 3.4.3 Court structure in Dubai

The Civil courts in Dubai are the Court of First Instance, the Court of Appeal and the Supreme Court.

##### 3.4.3.1. Court of First Instance

The Dubai Court of First Instance is divided into three divisions, each with jurisdiction over particular types of claims. Dubai follows the English civil law system in the Courts of First Instance.<sup>62</sup>

(i) Conciliation division which one judge presides over this division,<sup>63</sup> and deals with small claims and minor offences, and matters arising from them.<sup>64</sup>

(ii) Ordinary division. This division deals with all other civil cases not assigned to the main criminal division or the conciliation division.<sup>65</sup> One judge presides but it is possible to assign two or three judges in this

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62. Omer A.M. (*op. cit* n.17) at p. 42.

63. Dubai court law of 1970 article 15.

64. a. Claims which do not exceed 1000 D.H.  
b. Offences involving fines not exceeding 1000 D.H. or imprisonment not exceeding one year, or penalties which do not exceed these two punishments.

65. *Ibid* article 17.

division, if the Chief Justice or Chief Judge of the civil court agree.<sup>66</sup>

(iii) Main criminal division. Two judges preside but it is possible to assign three.<sup>67</sup> This division deals with crimes involving the death penalty, or imprisonment of ten years or more.<sup>68</sup>

#### 3.4.3.2. Court of Appeal

The structure of the Court of Appeal depends on the nature of the claim. If the case comes from the conciliation division, the Court of Appeal will assign one judge; if it comes from the ordinary division or main criminal division, two judges will be assigned, and it is possible to assign three judges.<sup>69</sup>

#### 3.4.3.3 The Supreme Court of Dubai or "Court of Cassation"

The Supreme Court or the Court of Cassation was formed by the order of the ruler of Dubai, (Law 1/1988 for the Formation of the Court of Cassation).<sup>70</sup> The Court of Cassation has four judges and a Chief Justice of the Court of Cassation.<sup>71</sup> The judgement of the Court of Cassation can be by a majority, when it must contain the opinion of dissenting judges.<sup>72</sup>

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66. *Ibid* article 15.

67. *Ibid* article 15.

68. *Ibid* article 18.

69. Dubai court law of 1970 article 20.

70. The Dubai Cassation Court Law No. 1 of 1988, (1988) 166 Dubai official Gazette 5-9.

71. *Ibid* article 3.

72. *Ibid* article 3 section (d).



(i) The jurisdiction of the Court of Cassation

1. Judgements issued by the Court of Appeal in the following areas:

- a. Claims which exceed 50,000 D.H. in value,
- b. Claims of unlimited value,
- c. If the judgement of the Court of Appeal raises new legal issues or it has importance for the public. However, this jurisdiction must be permitted by the Court of Appeal. If the Court of Appeal refuses to grant this permission, the case is referred to the Chief Justice of the Court of Cassation, who is granted the right to refuse or accept it.<sup>73</sup>

2. All criminal decisions and judgements issued by the Court of Appeal.<sup>74</sup>

3. All civil or criminal cases assigned by the ruler according to Art.8 of law 1\1988.<sup>75</sup>

(ii) Appeal grounds

The Supreme Court "Court of Cassation" hears appeals on grounds referred to in the notes below in (1) Civil judgements or decisions,<sup>76</sup> (2) Criminal decisions and judgements,<sup>77</sup>.

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73. *Ibid* article 5.

74. *Ibid* article 5 section 2.

75. *Ibid* article 5 section 3.

76. a. If judgements violate the law, or if they are erroneous in implementing or applying the law,  
b. If the judgement violates rules of jurisdiction,  
c. If the court which issued the judgement violated court duties or court procedures,  
d. If judgement is without grounds, or if the basis of the court's reasoning is not sufficient and adequate,  
e. In cases of two repugnant judgements with the same parties; the appeal is against the second decision, though the first judgement may also be contested if its issue violated legal procedures.  
*Ibid* article 6.

#### 3.4.3.4 The Judicial Committee

Under the residual authority of the Ruler and particularly, for sensitive or complex matters arising within the Emirate, the Ruler might constitute a judicial committee to investigate and judge a matters specifically.

The judicial committee may take two different forms. A permanent Judicial Committee can be set up for the settlement of disputes of a particular kind, like the one appointed by the Ruler of Dubai for lands litigation within the Emirate of Dubai.

The second type is *ad-hoc*, established only by decree of a Ruler of the Emirate for a particular dispute. The Ruler simply sets up for that particular occasion a judicial committee to hear that matter and resolve it outside the courts system. This is particularly prove to happen if the Ruler perceives the dispute as having ramifications for his interests or those associated with him or in his relationships with other Emirates.

The subject matter of the disputes, and the names of the committee members are normally incorporated by reference in the Ruler's decree, only the Ruler or someone appointed by him has the power to

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77. The Supreme Court appeals against criminal decisions and judgements if:-

- a. They violate the law or apply it erroneously,
- b. They violate the rules of jurisdiction or if the court exceeds its legal authority,
- c. They violate procedures sought by law regarding nullity, or which the party required but the court did not follow,
- d. They did not determine one of the demands, or if judgement in a civil allegation exceeds the demand of the plaintiff,
- e. The judgement lacks reasons, or the reasons are not adequate,
- f. Two repugnant judgements have been made in the case.

choose the members of the committee. The committee does not constitute a court of justice. The members usually come from those with a special expertise in the matters referred to the committee.

The question which arises here is, Do the parties of the dispute have the right to challenge its decision or is the decision final? In theory a decision of the Permanent Committee is not obligatory, parties are not obliged to implement it.<sup>78</sup> However, there has been no attempt to challenge its decisions - this may be attributed to the fact that this Committee is respected by those whose disputes have been resolved by it and might also be because it is established by the Ruler and challenging it might be a sensitive matter for the party dissatisfied with the ruling.

In H.Enterprise and Engineering Co. v. A. Gulf Co.<sup>79</sup>, an *ad-hoc* committee, it has exclusive jurisdiction over referred matters and when it issues its decision, that decision is considered final and unappealable. To date no court has taken an appeal or heard any case with regard to a referred dispute.

In R.Omran v. M.Omran, the Dubai Cassation Court stated:

The Dubai Court of Cassation's jurisdiction is limited to appeals from Court of Appeal judgments, and it has no power to hear  
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78. *A. Gh. v. A. Commercial Est. and M. A. B.*, The Dubai Judicial Committee, case No. 100/1980 unpublished.

79. The Dubai Court of Cassation, case No.10/1989 unpublished.

appeals from the decision of the judicial committee appointed by the Ruler, without a decree allowing the court to hear the challenge.<sup>80</sup>

Therefore, any challenge against this committee will be deemed void if it is submitted without the permission from the Ruler. The implication is that this decision is intended to be final unless the Ruler decides otherwise.

### 3.5. Federal legislation and obstacles to its implementation

A complex of different factors gives rise to the lack of implementation of Federal legislation in the Emirates. The perceptiveness of any particular Emirate to Federal law depends to a large extent on the current views of the particular Ruler. These views may change according to his estimate of the advantages of the Union as a whole.<sup>81</sup> Or in relation to a particular legislative proposal. Underlying differing reactions at a particular point in time is an ongoing sensitivity on the part of Ruler's and those associated with them to any curtailment of the authority of Rulers' and any diminution of revenue derived from controls over business and financial matters. This entails that local law and precepts derived from the *shari'ah* will continue to be of importance and the reconciling of Rulers to the legal realities of a meaningful Union a continuing problem.

#### 3.5.1. Local Law

Before the establishment of the Union in 1971, the Emirates had

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80. The Dubai Court of Cassation case No. 51/1989, unpublished.

81. W.M. Ballantyne, International Bar Association Seminar on Middle East Law, Hamburg, West Germany, 1-4 July 1981, (IBA publication) p.13; Michelmores Peter G. *Ibid* p.113.

their own laws. The advent of Federal law filled some gaps in local law but also new legislation was enacted which was not consistent and co-ordinated with local law. Theoretically federal law has priority and superiority over individual Emirate law; however, the reality is different. The U.A.E. Federal Supreme Court in Janatta Bank v. Najib Transportation and Construction Co.,<sup>82</sup> expressed this view in granting the local law predominance over the constitution of the U.A.E., the superior law of the country, by overturning the Abu-Dhabi Federal Court of Appeal decision which refused to order the payment of interest, pursuant article 8 of the Federal law 6/1978 which prohibits any decision by Federal courts that is in breach of *shari'ah* rules.

The existence of the local judiciary is protected by the U.A.E. Provisional Constitution Art.104 and Art.105, which did not require Emirates to transfer their judicial authority but allowed retention of local systems.

Local law remains in those Emirates which did not transfer their judicial system: namely Dubai, Umm al-Quwayn and Ra's al-Khaimah. Even the Emirates which transferred to federal jurisdiction have their own local law, for example, Sharjah has its own company law which is based on English statutory and common law principles.<sup>83</sup>

The federal legislators were most enthusiastic for federal legislation

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82. *Op. cit n. 14.*

83. W.M. Ballantyne, (*op. cit n. 16*) at p. 36.

to replace local law as the predominant form of law in the Emirates. This is not easy to accomplish, because almost all U.A.E. legislation has been drafted but it awaits ratification by the member Emirates to be brought into force. Federal criminal law, for example, took four years to come into force, and the National Council of the U.A.E. was dissolved because it opposed that code.

There is in fact no effective federal legislation, irrespective of ratification. Local Emirates freeze ratified laws, because legislation deprives the ruler of his natural rights as governor and violates his interests. The Law 8/1984 relating to Commercial Companies (discussed above) is a clear example. Some of the Emirates enact a local law in an area restricted exclusively by the U.A.E. Constitution to the Federal legislator, for example, the Commercial Companies Law, introduced by the Government of Sharjah. This local law will apparently be at the expense of the Federal law, and add another complication for the Federal system. It will place the Federal Court of Sharjah in a dilemma as to whether to enforce the domestic or the federal law as the applicable law.

### **3.5.2. Implementation of federal law and restriction of the ruler's authority**

There is no doubt that implementation of federal law will restrict the local ruler's authority, in that the ruler's jurisdiction will be limited.

Although the U.A.E. is a federal entity and the number of federal laws, some of which have yet to be brought into force, is increasing considerably, the separate Emirates are still autonomous.<sup>84</sup> Tradition is

entrenched throughout the Emirates, where the ruler is the sole governor and has, traditionally, jurisdiction over of all legal matters in his Emirate. By joining the Union, the local ruler is deprived of what he considers is his legitimate rights. For example, the right to grant a pardon, to commute sentences, or to approve capital sentences is granted to the President of the U.A.E.<sup>85</sup>

U.A.E. society still has not adjusted to the federal system and the theory of the federal state has not yet crystallised. There is no doubt that some time is needed before the U.A.E. can take the shape of a modern federation.

### 3.5.3. Reservation of the implementation of Federal Law

The U.A.E. has a policy of codifying *Shari'ah* law, especially in disputes where financial matters or business are concerned. The aim of the U.A.E. legislature is to establish federal codes derived from the *Shari'ah*.

Commercial laws and company laws were drafted and the legislative authorities were bringing the bills into force. After ratification, federal commercial and company law were to be implemented in the U.A.E. Before these were implemented the business and bank lobbies made known

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84. Michelmores Peter G., International Bar Association Seminar on Middle East Law, Hamburg, West Germany, 1-4 July 1981, (IBA publication) at p.115.

85. U.A.E. Provisional Constitution article 54 section 10.

their refusal to accept these two laws, thus bringing the U.A.E. stock market to the brink of a crash. This led to government intervention to freeze the legislation. Thus, these special interest groups can play a very influential role, through their unique position to threaten a stock-market crash, which would have resulted in the loss of millions of D.H. in revenue.

Federal law authorises the enforcement of local law provided it is not in conflict with, or in violation of, federal law or *Shari'ah* law.<sup>86</sup> Nevertheless, certain modern commercial and banking transactions,<sup>87</sup> such as charging interest, receive recognition by local authorities in some Emirates, even though they are in breach of *Shari'ah* law.<sup>88</sup>

The logical conclusion is that legal affairs in the U.A.E. must continue to depend in significant part on the local law, or that suitable amendments must be made to federal legislation in those areas which have a bearing on the central interests of individual Emirates. An example which supports this opinion is the Federal Law 5/1985 (Federal Civil Transaction Law), which changed previous Federal law by excluding commercial transactions from Federal law. It refers such disputes to the local system which existed before the Federal Law.<sup>89</sup>

Differences have arisen in local and federal courts over the

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86. G.Feulner and A.A.Khan (*op. cit n. 9*) at p.313.

87. *Ibid.*

88. *Ibid.*

89. Federal Law 1/1987 concerning the Amendment of Federal Law 5/1985 of U.A.E. Federal Civil Transaction Law.



(il)legality of charging interest, on whether the practice violates the Federal Constitution, which considers *Shari'ah* as the primary source of law.<sup>90</sup> One argument was that the Koran prohibits "usury", not interest ! The supporters of this argument are trying to find a way of making the charging of interest legal under *Shari'ah* law. The Chairman of the U.A.E. Central Bank sought to resolve the problem by his statement that:

In future only the civil court should try banking cases rather than *Shari'ah* courts and these cases would be decided according to the terms of the written contract between the parties.<sup>91</sup>

Of course, the statement of the Chairman lack direct legal authority.

It seems that the Federal Government deliberately left this conflict unresolved, by not issuing a specific interpretation of Art 7 and its relevance to the payment of interest. Until the Government issues a definitive interpretation, the legal status of the practice of charging interest will depend on local laws, which may or may not legalise interest.

### 3.6 The Problems facing litigants in the U.A.E.

In considering litigation in the U.A.E., it important to understand that, due to the federated nature of the U.A.E., there may be both federal and Emirates law and regulations to consider in case of the Emirates which have not transferred their judicial system to the Federal system. For foreign businessmen the U.A.E. legal systems are less predictable than they are accustomed to. These uncertainties and this

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90. See Islamic *Shari'ah* Law, discussed above.

91. Peter G. Michelmores (*op. cit* n.83) at p.129.

unpredictability can be attributed to several difficulties concerning litigation under the U.A.E. legal system. This section will examine these difficulties.

### 3.6.1 The applicable law

The main feature of the federal rules of the U.A.E. is that the legal environment has undergone a very dramatic change and development by the introduction of sources of different legislation. Moreover, these changes have been accompanied by the massive commercial development the U.A.E. has witnessed.

At the federal level, article 7 of the Provisional Constitution states that the Islamic *shari'ah* shall be a main source of legislation. In theory *shari'ah* would govern judicial decisions, and any violation of this article will be deemed null and void. The interpretation of this article has become a matter of dispute. It causes some uncertainty in some transactions, for example, those which ostensibly involves an element of *riba* (interest) which violate article 7. However, the U.A.E. Provisional Constitution reserved certain areas for the federal government, and for federal legislation. In areas not exclusively reserved for the Federation, the Emirates are free to legislate.<sup>92</sup> The *riba* issue has been taken under certain Emirates' jurisdiction as an unreserved area to avoid the application of article 7 of the Provisional Constitution. Nevertheless, the issue still continues to cause a state of nervous conflict with the more secular aspect of commerce because the compatibility of this reservation

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92. Article 122 of the Provisional Constitution stated:

The Emirates shall have jurisdiction in all matters not assigned to the exclusive jurisdiction of the Union with the provisions of the two preceding Articles {120 and 121}.

of jurisdiction with article 7 of the Provisional Constitution must be open to question.

A number of federal laws, are either limited to certain matters or, in practice, not enforced at all due to the individual Emirates' policy to retain authority for themselves regardless of the federal law provisions. Because of this many regulations relating to the conduct of business are not based on codified law. The lack of legislation on the federal and Emirates level caused uncertainty in court decisions. The judges are generally foreigners, coming from different countries, with different training and backgrounds. They are strongly influenced by their national laws. Wherever there is dispute in a particular case and there are no clear references in the U.A.E. law, they invoke laws from their own countries. Thus a decision, for example, reached by the Abu-Dhabi court on a particular set of facts will not necessarily be echoed in a case tried before the Dubai court even if there are similar circumstances. It is not unusual, therefore, for one judge in one jurisdiction to reach a conclusion on a particular set of facts and subsequently for a different judge in very similar circumstances to reach a different decision. The resulting uncertainty is exacerbated by the legislative vacuum and the lack of any formal system of precedent in the U.A.E.. Thus decisions will rely, to a great extent, on the judge who presides over the court. Legal decisions are quite unpredictable.

### 3.6.2 The court system

This situation is aggravated by the current court system in the U.A.E.. As we discussed above the Court system is divided into federal and local divisions and under each one of these divisions is divided into

the civil court and *shari'ah* court. When considering proceedings for example in Dubai or Abu-Dhabi it is necessary to consider whether proceedings should be brought in the *shari'ah* Court or the Civil court. One of disadvantages of this dual court system is the potential conflict of laws and the attempt by each court to guard its jurisdiction. In some case the jurisdiction between these courts is intertwined especially in connection of banking and financial matters. There have been attempts to resolve this conflict in some of the Emirates but it still exists.

The second factor associated with the court system is the long delays of ordinary court procedure. A common delaying tactic of a defendant is to appeal an interim decision given by the Court of First Instance. The Court of Appeal will conduct a separate set of hearings before a judgment is issued on the appeal of the interim decision. Once the appeal procedure has been exhausted, the file is returned to the Court of First Instance, whereupon the substantive hearing will recommence. This procedure will involve time which may takes months or years until the case is solved and involve considerable expense in connection with the court procedures.<sup>93</sup>

This is the position as it works in the U.A.E. in terms of formal legal institutions and formal sources of law. Any individual who has a dispute in the U.A.E. that faces the above mentioned difficulties which hinder his attempts to obtain a legal solution. Businessmen will need

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93. Al-Hosani A.A., Constitutional and Judicial Organisations in the United Arab Emirates, (Exeter University 1989) unpublished (Ph.D. Thesis), pp.222-35.

reliable dispute resolution mechanisms to be available as soon as possible for they cannot wait for the legal system to solve itself.

In the light of the forgoing discussion, it makes it far more desirable that U.A.E. has alternative dispute resolution system which is at the moment is only found in arbitration.

## Conclusion

The majority of Middle Eastern countries, especially the Gulf States, regard codified law as something "alien" which has been imported from the West. The U.A.E. is one state which this opinion is influential. Awareness of this point will help to illuminate our studies of the U.A.E. legal system.

U.A.E. society is not familiar with the role of law in the community, except for a few rules relating to traffic and some aspects of penal law. This is not odd or strange if one realises that the modern legal system only began in the seventies. Twenty years is not long enough to evolve a modern legal system. Moreover, the system must tolerate instability in the local and federal judiciary for a variety of reasons.

In the federal sector, the U.A.E. Provisional Constitution is a direct cause of instability in the sense that it encourages instability by granting the individual Emirates the right to keep their own judicial systems and local laws:

all matters established by law, regulation, decrees, order and decision in the various member Emirates of the Union in effect upon the coming into force of this Constitution shall continue to be applicable unless amended or replaced in accordance with the

provision of this Constitution...<sup>94</sup>

Secondly, the Federation of the U.A.E. is rendered almost powerless because of the lack of Federal legislation, which almost entirely consists of bills awaiting ratification or frozen legislation, which is used for occasional guidance in some of the Emirates' courts.

Thirdly, because federal legislation has been drafted without procedural rules to explain bills and their method of enforcement, civil law has come into force without a federal code of civil procedure. Federal penal law has been issued without a federal code of penal procedure.

Finally, there is the difficulty of enacting legislation. Emirates which are members of the Union cannot enact legislation, because this power lies with the federal legislature. The consequence is that existing institutions, such as municipalities and chambers of commerce in the Emirates play a significant role.

With respect local law, it applies either generally within the particular Emirate, or to a specific group within the community. For example, article (2)(d) of the Dubai Court Law of 1970, regarding the jurisdiction of the civil court, specifies "banking and financial transactions to which any bank or the Middle East Finance Company is party"; thus focusing attention on a particular finance company identified with influential persons.

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94. U.A.E. provisional Constitution article 148.

Secondly, though giving jurisdiction to the *Shari'ah* courts, the Emirates have restricted the *Shari'ah* courts. Certain claims are excluded from the *Shari'ah* court and vested in the civil courts, jurisdiction over banking, for example, is excluded in order to avoid the question of interest.<sup>95</sup> In Dubai, under Decree 4/1989, banking litigation appears exclusively before the civil courts, which have honoured the express terms of banking contracts, including the provision of interest.

Thirdly, Emirates with a local judiciary, are in favour of retaining it and are keen to keep federal legislation out of the local court system.

Finally, the shortage of U.A.E. nationals in the legal machinery means that many judges at all levels of both federal and local courts are not U.A.E. nationals. Some of the Emirates encourage U.A.E. nationals to join the judicial field, but in other Emirates there are none. Dubai court, for example, has been dominated by non-nationals, and no U.A.E. nationals have been accepted on the grounds that they are not qualified.

This is the predominant state of the federal and local sector in the U.A.E.. These problems are made worse by the doctrine which I call "Emiratism" which has started to spread in the Emirates. "Emiratism" sees the concerns of an Emirate as separate from those of the Union. The consequence of this doctrine is enterprise of a local, rather than a federal, nature, such as the free zones in Dubai, 'Ajman and

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95. See Dubai Court Law of 1970, Ras Al-Khaima Court Law of 1971 article 9, Abu-Dhabi Civil Procedure articles 61 and 62

al-Fujayrah. Under these circumstances, it is essential to establish a system which can settle civil and commercial disputes, and which frees the parties from the lack of federal law, from outdated local law and from restrictions on the courts. Foreign companies which wish to do business with U.A.E. companies should not have to suffer because of a lack of familiarity with the local judicial system and suspicion of pro-national bias in the courts (where one of the parties might be a government agency). A system with the expectation of savings in time and expense.

Thus the importance of a modern and reliable system of arbitration is of considerable importance in the economic development of the Emirates. Improvement of the formal legal system is problematic and uncertain, at least for the foreseeable future. Establishing modern arbitration may be more feasible with potential benefits exceeding those benefits already long associated with arbitration in developed countries.



## Chapter Four

### Arbitration Law and Practice in the U.A.E.

#### Introduction

The machinery for the settlement of disputes by means of arbitration in the U.A.E. is governed to a large extent by the rules of arbitration set out in the Abu Dhabi Code of Civil Procedure in force since 1970, which devotes chapter IX to arbitration (Article 82 to 98) (hereafter referred to as A.D.C.C.P.). The A.D.C.C.P. is substantially based on the 1927 Sudan Civil Judiciary Act, which in turn was much influenced by the English common law system.<sup>1</sup> The A.D.C.C.P. was enacted to regulate arbitration in Abu-Dhabi. However, this law has influence beyond the boundaries of Abu-Dhabi extending to the rest of the Emirates. U.A.E. federal and local laws recognize several types of arbitration, and from a review of case law in the Emirates, the impact of the A.D.C.C.P. provisions is clear. The reason may be attributed to the A.D.C.C.P. being the first and only law which devoted a chapter to arbitration, compared with the other Emirates which suffer from a legal vacuum in these matters.<sup>2</sup> It is also due to the fact that there are no

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1. For more detail see Omer A. M, *The Law of Civil Procedure* (U.A.E. University publication 1983) (Arabic) p.5.

2. The contract law of 1971, effective in Dubai, and Ra's al-Khaymah, provides for arbitration in general terms, but does not define types of arbitration. In order to fill the gaps left by inadequate statutes the courts apply the rules of the A.D.C.C.P.

clear cut distinctions between the law operative in one Emirate and the law in another because if the judges in a particular Emirate are confronted with a legislative vacuum, they may seek assistance from and apply by analogy a relevant the principle embodied in the A.D.C.C.P.<sup>3</sup>

The Draft Code of Federal Civil Procedure (F.D.C.C.P.) which is intended to regulate arbitration throughout the Federation is not yet ratified; however its provisions may be included in this study; since after ratification it will be the primary law governing arbitration in the U.A.E. as a whole. In addition to these laws there is the Sharjah Arbitration Act of 1990 (S.A.A.) This law was introduced to fill the legislative vacuum in Sharjah in the matter of arbitration until the ratification of the F.D.C.C.P. The S.A.A. is limited to the Emirate of Sharjah only. This chapter will be confined to examining the A.D.C.C.P and F.D.C.C.P. The S.A.A. will be examined in the following chapter.

The aim of this chapter is to examine arbitration law and practice in the U.A.E. and any major problems which arise from it.

#### 4.1 The necessity for arbitration

The U.A.E. has witnessed a phenomenal development in domestic and international commerce, but in comparison to this growth, the volume of federal legislation regulating business activity is very small, with some areas of activity not yet covered by legal regulations. The

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3. *Developing Cooling Co. v. Traco Co.* The Dubai Court of Appeal, case No. 6/1979 Civil issued 28.5.1979 unpublished; *United Mill v. Qatar General Insurance and Reninsurance Co. S.A.Q.*, Dubai Civil Court case No.3/87 unpublished; also *A. Real Estate v. M.D.*, Sharjah Court of Appeal case No.83/1979 issued 22.10.1979 Abdulah R. Hilal, p.2125.

regulation of business has primarily been conducted according to local rules of the separate Emirates, on an independent basis, and often uncodified. Regulations are quite unpredictable and discretionary, due to a legislative vacuum in these Emirates.<sup>4</sup>

This section will attempt to outline the reasons behind the establishment of the arbitration procedure and why it is necessary in the U.A.E. Some are similar to those which prompt the use of arbitration in other countries, but there are others which might have no parallels in other legal systems.

#### 4.2 Lack of legislation in the U.A.E.

The lack of legislation plays a major role in the establishment of the arbitration system in the U.A.E. Either state statutes are silent on certain legal issues, or else the existing statutes are deficient, in that the law lacks authority, even though there may be provision in the statutes. The lack of legislation is due to:

(a) Restrictions on the legislative role of individual Emirates, which are party to the Union, which are unable to enact relevant laws<sup>5</sup>

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4. Nicholas B. Angell Legal Factors Relating to Foreign Corporate Investment In The United Arab Emirates Paper delivered at a I.B.A. conference on "Corporate Investments in Far East and Middle East" New Delhi, edited by Guenther H.W. Stratmann (Duesseldorf 1983) p. 187-197.

5. U.A.E. Provisional Constitution Art. 121 stated:

without prejudice to the provision of the preceding Article the union shall have exclusive legislative jurisdiction in the following matters:-

Labour relations and social security; real estate and expropriation in the public interest; the extradition of criminals; banks; insurance of all kinds; protection of agricultural and animal wealth; major legislation relating to penal law; civil and commercial transactions and company law; procedures before the civil and criminal courts; protection of cultural, technical and industrial

to fill the legislative vacuum.<sup>6</sup> The Emirates are able to issue laws to regulate activities in some areas of the law but their role in this must not encroach upon major legislation which comes under federal law, including civil procedure law. However, an Emirate may issue temporary Decrees or local orders, to regulate specific issues in civil procedure, for the enforcement of awards, for example.

(b) Delays in issuing federal legislation. Laws may take years to be ratified, for example the Civil Procedure Code (F.D.C.C.P.) was drafted in 1980 and has not yet been ratified. Some of the federal laws have been ratified but are not in force because the individual Emirates have not implemented them because of the fear that such laws may encroach upon their own interests.

(c) The Legislative vacuum. The laws of Emirates are varied and quite inconsistent in their level of development and refinement; in some cases they are fragmentary or non-existent.<sup>7</sup> In consequence, many courts try to fill the gap in legislation by applying rules from different sources. Sharjah Court of Appeal responded to this problem by stating,

... due to the delay in issuing the Federal Law of Civil Procedure, the court is obliged to follow the rules of Islamic *Shari'ah*, customary usage, the rule of justice and the comparative law of the Arab countries.<sup>8</sup>

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property and copyright; printing and publishing; import of arms and ammunition except for use by armed forces or the security forces belonging to any emirate; other aviation affairs which are not within the executive jurisdiction of the union, delimitation of territorial waters and regulation of navigation on the high seas

6. *Ibid* Art.122.

7. See chapter 3 Law and Justice in the U.A.E., at p. 125.

8. (1982) 32 *Al-Adalah* p.57.

### 4.3 The Court System in the U.A.E. and its Relation to the Development of Arbitration as an Alternative to Litigation.

The court system has encouraged the establishment of the arbitration system. In Chapter three the various types of courts and their jurisdiction within the judicial process is explained.<sup>9</sup> In this section I will highlight those aspects of the court system which may make parties unwilling to take their case to court.

#### (a) The structure of the court

The courts, with their various divisions are a principal reason for the choice of arbitration by a parties in disputes. The average court case, in fairly uncomplicated litigation can take up to two years to be resolved, where according the F.D.C.C.P., arbitration cases must not extend for a period exceeding six months.<sup>10</sup> Arbitration is usually quicker than the court proceedings.<sup>11</sup>

#### (b) The Selection of expert

A judge, without such special knowledge of a particular case, may be unable to adjudicate properly. In many instances, the parties to a dispute may wish to select an adjudicator whose area of expertise is one other than the Law. The settlement of the dispute may be carried out

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9. For more detail see chapter 3.

10. F.D.C.C.P. Art.208 sec.1.

11. *Omran v. Omran*,, Dubai Court of appeal case No.196/1984 Civil issued 6.4.1985 unpublished.

by technical experts, who may well have a better understanding of the issue in dispute and the evidence called to resolve the issue. The advent of modern practices, such as joint ventures and the transfer of technology, with which the courts are unfamiliar, has meant that there are no rules to regulate such matters, not only in the Emirates, but also in other Arab countries, as in most legal systems.

(c) The rules applied by the court

The poor state of legislation creates uncertainty and hesitation by potential users of U.A.E. courts, especially by foreigners unfamiliar with the U.A.E. domestic legal scene. Many international contractors and companies are reluctant to submit their disputes to the national court, for fear of partiality by the courts, particularly where the defendant is the Federal or an Emirate government. Arbitration solves this problem, by giving the parties to the agreement the right to choose their arbitrators and the law governing the arbitration.

(d) Lack of Publicity

Unwanted publicity can be avoided by going to arbitration because the proceedings are held in private.

Only the parties and their witnesses and lawyers are allowed to attend and the award is issued to the parties only.<sup>12</sup> U.A.E. court sessions are open to the public, with undesirable publicity, especially in the commercial sector where disputes may involve international corporations which have a legitimate interest in confidentiality. The arbitration process avoids the necessity for a party to appear in the court, given

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12. See chapter one for more detail at p.32.

that such an appearance may affect the commercial reputation of this corporation and may compel the parties to take a public position that might make settlement difficult or even impossible.<sup>13</sup>

#### 4.4 Limitations on arbitration outside the Emirates

Some Emirates have issued Decrees prohibiting arbitration outside that Emirate. For example, the Emirate of Dubai issued a Decree,

ordering that from 6th. February 1988, no contract to which the Government of Dubai or one of its departments is a party may provide for arbitration outside Dubai nor that any such arbitration be subject to any law or procedure other than the laws and procedures in force in Dubai.<sup>14</sup>

Such legislation contributes to increased arbitration in Dubai, because any future arbitration involving the government of Dubai, its departments, will be situated in Dubai. At the same time, a foreign party is given the opportunity to avoid the local courts by taking their dispute to arbitration.

The aim of introducing this Decree was to secure the position of government contracts for the Dubai government, which was suffering losses in international arbitration, as are many of the Gulf states, by establishing a national arbitration system governing any arbitration proceedings involving Dubai government and its departments. The Decree failed to to achieve the purpose for which it was introduced because the Decree was not truly effective, nor attractive in providing a forum for

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13. Ehrenhaft Peter D., "Effective International Commercial Arbitration" (1979) 27 Law & Policy in International Business 1191 at p.1193.

14. (1988) 166 Dubai Official Gazette, p.11

arbitration suitable, for foreign companies doing business with the government of Dubai given the condition of the domestic law of arbitration in Dubai. The rules which govern tribunals are inadequate; parties are referred to domestic rules of "Dubai Law or Procedure" which are not fully developed. Foreign companies decline to submit to this system.

The Dubai government reconsidered this Decree, by amending it so much that the amendment, in reality, superseded the original Decree,

Excluding from {the first Decree} wherever the general interest demands the Ruler of Dubai may exclude the Government of Dubai departments and corporations from the obligation of the 1988 Decree.<sup>15</sup>

Reconsideration of the 1988 Decree was necessary in the present period, until the establishment of modern arbitration rules in the Emirate, or the ratification of the F.D.C.C.P. The Dubai Government should aim to consider the Dubai Chamber of Commerce Arbitration Draft,<sup>16</sup> which might provide a model in those areas where U.A.E. rules are silent. Establishing rules, to encourage arbitration in Dubai, could be a direct result of the 1988 Decree, on the basis of a fair trial for both parties by an inexpensive method, compared with the high cost of international arbitration. A flexible procedure is needed, which has moved away from the rigid rules of the courts, so that an efficient alternative to international arbitration and domestic litigation can be provided in Dubai.

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15. (1988) 167 Dubai Official Gazette, p.10.

16. See chapter 5 Chamber of Commerce.



## 4.5 Forms and Nature of arbitration

### 4.5.1 Forms of arbitration

Two forms of arbitration exist in the U.A.E.

(a) Mandatory arbitration, i.e. arising out of a statute, which provides for disputes of a particular class to be determined by arbitration. In this form of arbitration, any disputes are determined by a decision of a committee rather than by a court. One illustration is Art. 27-28 of the Federal Law 18/1981, regulating commercial agencies. This provides, *inter alia*, that disputes in respect of agencies or distribution agreements must be referred to the Committee for the Settlement of Commercial Disputes established by U.A.E. Federal Ministry of Economy and Trade.

(b) Consensual arbitration, i.e. founded on the agreement of the parties, is governed by Chapter Nine of A.D.C.C.P. and is also dealt with under Chapter Three of the F.D.C.C.P. Parties can waive their right to settle a case through the courts and take their case to arbitration.

A court can grant a Stay of Proceedings in mandatory arbitration, even if the parties do not raise such a challenge. In the case of voluntary arbitration, the onus is upon the parties to request a Stay of Proceedings. If one of the parties to a dispute brings a court action and the other party does not raise any objection to court proceedings, then the arbitration clause is deemed to be null and void. The application to Stay the Proceedings must be made before any suit is

delivered to the court or any other step is taken in the proceedings, or the court will honour such an arbitration clause.<sup>17</sup>

Consensual arbitration, according to the A.D.C.C.P., is divided into three categories:-

- i) Court arbitration
- ii) Registered arbitration
- iii) Contractual arbitration

*(i) Court arbitration arising during court proceedings.*

Parties may petition the court, to refer part, or all, of a dispute to arbitration.<sup>18</sup> Every application shall be in writing and shall state the matter sought to be referred.<sup>19</sup> The consent of the parties is not enough to refer a case to arbitration without court approval. The court has discretionary power to order arbitration or to try the case.<sup>20</sup> Referring a case to arbitration does not mean that the court has no jurisdiction but, rather, that the court stays the proceedings, until the arbitrators have issued their award; the court has inherent and comprehensive jurisdiction to control the arbitration process.<sup>21</sup> In referring any such matter to arbitration,

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17. Supreme Court judgment No.56/4 Civil issued 13.12.1982 and No. 76/14 issued 15.3. 1983 Unpublished.

18. *F. Saleh v. M. Qwshajy* U.A.E. Supreme Court No.114/6 Civil issued 14.11.1984 unpublished.

19. A.D.C.C.P. Art. 82 sec.2.

20. A.D.C.C.P. Art.82 sec.1.

21. Samir Saleh, *Commercial Arbitration in the Arab Middle East*, (Graham & Trotman London 1984) p.351

The court shall specify in the order of reference the names of the arbitrators, the precise matter or matters submitted to arbitration, and such period as it considers reasonable for the delivery of the award.<sup>22</sup>

The A.D.C.C.P. does not specify the reasons for sending a case to arbitration. It seems that the court passes on cases which need technical knowledge, or cases where the parties prefer to keep a dispute in camera.

The award shall be in writing and shall be submitted to the court, together with any depositions and documents which have been taken and proved before them, and the court shall cause notice to be served on the parties to attend and hear the award.<sup>23</sup>

The award is considered final when the court ratifies the award, after examining its merits. A decree follows and no appeal shall be made regarding the decree, except in so far as the decree is in excess of, or not in accordance with, the award.<sup>24</sup>

*(ii) Registered arbitration.*

In this type of arbitration, a party or parties to a contract containing an arbitration clause or, where they agree to arbitrate a dispute arising between them, may apply to the court of appropriate jurisdiction so that the agreement to arbitrate can be filed with the court.<sup>25</sup> The parties register the arbitration agreement, in two cases; firstly when their contracts did not contain provision of arbitration.

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22. A.D.C.C.P. Art.83 sec.1.

23. *Ibid* Art. 90.

24. A.D.C.C.P. Art.94 sec.1,2,3.

25. A.D.C.C.P. Art.95 (1).

When a dispute arises in such a case then the parties agree that this dispute should be arbitrated and there is a procedure made available for the party by the court whereby the parties can register with the court an arbitration agreement. Once they have done that, the court loses its jurisdiction over that particular matter, and the disputed matter shall be dealt with by arbitration. Secondly the parties may if they choose register an arbitration agreement before the occurrence of any dispute to ensure against the other party going against the arbitration or refusing arbitration. In this case registering arbitration is an evidential safeguard. Should a dispute designated for arbitration arise an application to the court shall be in writing and shall be recognized as a suit against the other party.<sup>26</sup> Upon such an application being made, the court shall notify the other party about the registration of the agreement, requiring such a party to show cause, within the time specified in the notice, as to why an arbitration should not be instituted.<sup>27</sup> Where no sufficient cause is shown, the court shall order the arbitration to be held, and shall make an order of reference to the arbitrator or arbitrators appointed, in accordance with the provisions of the agreement.<sup>28</sup> If there are no such provisions and the parties can not agree, the court shall appoint the arbitrators in the manner provided in A.D.C.C.P. Art.85.<sup>29</sup>

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26. *Ibid* Art.95 (2).

27. *Ibid* Art. 95 (3).

28. *Ibid* Art 95 (4).

29. *Ibid* Art 95 (5).

This type of arbitration is dependent upon contractual elements, i.e. an agreement to submit any dispute arising between parties to arbitration; and jurisdictional elements, in that its requirements are that, any one of the parties should file the arbitration clause with the court which originally had jurisdiction.<sup>30</sup>

(iii) *Contractual arbitration*

Contractual arbitration differs from the previous types in that it is not connected with the court. Art.97(1) states:

Where any matter has been referred to arbitration without the intervention of a Court and an award has been made thereon any person interested in the award may apply to any Court having jurisdiction over the subject matter of the award that the award be filed in Court.

In contractual arbitration, the court has no jurisdiction apart from granting leave for enforcement. An award is considered final and is not subject to appeal.<sup>31</sup> The U.A.E. Supreme Court stated,

...The court in such a case {contractual arbitration} has no jurisdiction to hear the parties' testimony nor to review its merits nor to consider the evidence... the court does not issue a judicial decision but rather grants leave for the enforcement of the award, thus the court decision is final and is not subject to appeal.<sup>32</sup>

The A.D.C.C.P. does not recognize arbitration by *amicable composition*".<sup>33</sup>

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30. A.D.C.C.P. Art.95 sec.1.

31. A.D.C.C.P. Art.98 sec.3.

32. *F.Saleh V. Mounuer Qwshajy, (op. cit n. 18).*

33. The A.D.C.C.P. in this issue seems to adhere to the English arbitration system which required, the arbitrator to make his decision according to a fixed and recognizable system of law. The arbitrator cannot be allow to decide the case according to the principles of *ex aequo et bono* *Orion Compania Espanola de Seguros v. Belfort*,[1962] 2 Lloyd's Rep.257.

The F.D.C.C.P. recognizes two types of arbitration: "ordinary/judicial arbitration", in which arbitrators are bound to determine a dispute, according to substantive law and F.D.C.C.P. provisions regarding arbitration.<sup>34</sup> The second type is "arbitration by *amicable composition*", where arbitrators are exempt from applying substantive law but still bound to apply the procedural provision of the F.D.C.C.P. relating to arbitration. Under provision of F.D.C.C.P. the concept of *amicable composition* does not appear to be different from the Western concept of arbitration of *ex aequo et bono*.<sup>35</sup> Which is an adjudicate on the basis of equitable principles.<sup>36</sup>

#### 4.5.2 An analysis of the forms and nature of arbitration in the U.A.E.

The prevailing types of arbitration in the U.A.E. are "court", "registered" and "contractual".<sup>37</sup> The arbitrator is bound to determine an issue in conformity with the rules of law,<sup>38</sup> and arbitrate by *amicable compositeur*, where the arbitrator is authorized to make a decision according to principles of equity, *ex aequo bono*.

In A. Constriction v. A.S.<sup>39</sup> The Dubai Court of Appeal upheld that,

arbitrators are not obliged to decide their case in conformity with the rule of law in cases where the arbitration is to be decided as *amiable compositeur*.

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34. F.D.C.C.P. Art.209 (1),(2).

35. F.D.C.C.P. Art. 206 (2); 209 (2).

36. F.D.C.C.P. Art.203.

37. A.D.C.C.P. Art. 82,95,97; F.D.C.C.P. Art.201.

38. F.D.C.C.P. Art.209(2); see Sharjah Court of Appeal case No. 145/1979 civil issued in 17.3.1980 published in Abdulah R. Hilal *op.cit* n.73 p.2200.

39. The Dubai Court of Appeal case No. 168/1979 civil issued 23.1.1980 unpublished.

In addition, the F.D.C.C.P. introduced *ad hoc* arbitration, where the parties are allowed to determine the procedure to be followed in order to settle a dispute.<sup>40</sup>

At face value and under the provisions of the A.D.C.C.P., "court" arbitration does not appear to differ from an ordinary law suit, because of the court's power and influence on this type of arbitration. Although the parties have autonomy to request reference of the dispute to arbitration, the court has the discretionary power to refer the dispute to arbitration or not.<sup>41</sup> There is no law which binds the court to stay the proceeding and refer the case to arbitration. Even if parties agree, the court has the ultimate power to grant such action or to block it. Whenever a court refers any dispute to arbitration, it has the jurisdiction to appoint the arbitrators, to delineate the subject matter and to set a time limit for issuing the award.<sup>42</sup> The role of the arbitrators is to settle the dispute, and the court has jurisdiction to enforce the award, or to set it aside and try the case *de nova*. This is akin to seeking the testimony of a technical "expert", although he only prepares the way for eventual resolution of a dispute.

The various types of arbitration in the U.A.E. appear to be jurisdictional in nature. Samir Saleh<sup>43</sup> reviews some kinds of arbitration,

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40. F.D.C.C.P. Art 201(1).

41. A.D.C.C.P. Art.86(2).

42. A.D.C.C.P. Art.83(1).

43. Samir Saleh (*op. cit n. 21*) p.345.

focusing on the as applied in court decisions concerning arbitration. He characterizes arbitration as,

closely controlled by the court and mainly treated as an incident in the course of a judicial dispute.<sup>44</sup>

To some extent this may be true but not all arbitration is jurisdictional though in "contractual" arbitration, for example, the court's role is to compel parties to enter into the arbitration or else to enforce the award. In United Mill v. Qatar General Insurance and Reinsurance Co.S.A.Q.<sup>45</sup> the court refused to hear the case and ordered the parties to apply the arbitration clause. In Alam Traders v. Gulf Daewoo Est. and Daewoo Corp.<sup>46</sup>, the parties to a contract to import iron agreed to submit their dispute to arbitration. The defendant did not fulfill his obligations, which led the plaintiff to sue him before the Dubai court. The court ruled that the dispute should be referred to arbitration and refused to accept the case. Some U.A.E. courts have gone further in expressing the contractual nature of the arbitration. In M.A.Omran v. R.A Omran, the Dubai Court of Appeal highlighted the contractual nature of arbitration in upholding that,

arbitration is a system for the settlement of disputes approved by Islamic *Shari'ah*, legislation, and judicial discretion, thus when an agreement is established according to the rules, it cannot be amended or vacated without the parties' consent.<sup>47</sup>

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44. *Ibid.*

45. The Dubai Civil Court case No.3/87 unpublished.

46. The Dubai Shari'ah Court case No.22/1988 civil issued 17.4.1989 unpublished.

47. The Dubai court of Appeal case No.196/1984 civil unpublished.



The Court of Appeal treated arbitration as purely contractual to be left untouched by the court.<sup>48</sup> In S.Y. Co. v. Abu Dhabi Express Service Co.& Shanaz General Stores,<sup>49</sup> the court ruled that,

...{the} parties' arbitration agreement to submit a dispute to arbitration can be characterized as being contractual in nature.

The contractual character of arbitration prevails in Chamber of Commerce arbitration, where the court has no jurisdiction.<sup>50</sup>

Yet the jurisdictional nature of arbitration cannot be denied due to the existence of statutes and court precedents. A.D.C.C.P. Art.82-94 give the court comprehensive jurisdiction over arbitration. When a court refers a case to arbitration, the court hands over jurisdiction with regard to that dispute, and postpones any decision on that case until the arbitrators have made their award. The legislation thus vested wide discretionary power in the courts.<sup>51</sup>

A review of the existing statutes and case law reveals that apart from the special case of court arbitration, arbitration arises from agreement between the parties and gives rise to the jurisdictional consequences.

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48. *Ibid.*

49. The Abu-Dhabi Court of Appeal case No. 236/1979 issued 30.6.1980 unpublished.

50. See chapter 5 Chamber of Commerce.

51. *General Prosecutor v. Saleh Fraid Est. & Ali M.A. Al-hamady*, The U.A.E. Supreme Court case No. 145/7, unpublished.

## 4.6 The Arbitration Agreement

### 4.6.1 The form and contents of the agreement

In order to take disputes to arbitration, parties should agree, in writing, to submit a dispute which has already arisen, or may arise to arbitration.<sup>52</sup>

There are two kinds of arbitration agreements, namely an agreement to submit any future dispute to arbitration, which is called an "arbitral clause". This clause is usually included in the main contract which creates those rights and duties, which will be the subject of intended arbitration in any case where a dispute arises.<sup>53</sup> Or, an agreement to submit an existing dispute to arbitration which is called a "submission agreement". Sometimes the term "arbitration agreement" is used interchangeably with "arbitration clause". "Arbitration agreement" can be defined as "a part of a contract or treaty which pledges the parties concerned to use arbitration as a means of settling any present or future dispute".<sup>54</sup> An arbitration agreement can be a separate document, signed by the parties or, more frequently, an arbitration clause included in the text of a contract binding the parties. Neither the A.D.C.C.P. nor the F.D.C.C.P. make any distinction between an arbitration agreement concluded before a dispute has arisen (an arbitral clause),

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52. F.D.C.C.P. Art.201(1).

53. Michael J. Mustill & Stewart C. Boyd, *Commercial Arbitration*, (London 1989) at p.6.

54. A Dictionary of Arbitration and Terms, edited by Katharine Seide, (New York 1970).

and an agreement concluded thereafter (submission agreement). Both kinds of agreement are valid. The only formal requirement of an arbitration agreement is that it must be in writing.<sup>55</sup> Legislation in the U.A.E. does not specify what is to be understood by "written form". We rely for this explanation on the approach of the English system in this respect. Thus the terms of the agreement need not be contained in one document but may consist of an exchange of letters, cables, telex, or fax between the parties or their legal advisors.<sup>56</sup>

To be valid, an arbitration agreement must specify,

- (1) The subject matter;
- (2) That the subject matter may not include any problem for which no compromise is allowed; and
- (3) The parties must have legal capacity.

(1) The arbitration agreement must encompass the specific dispute between the parties, by specifying which issues are to be resolved by arbitration and which are to be resolved by litigation. It is assumed that issues not included in the arbitration clause must be resolved by litigation. The terms in the arbitration agreement often give a broad coverage, for example:

"all disputes arising out of or relating to this contract."

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55. F.D.C.C.P. Art. 202(2); A.D.C.C.P. Art. 82(2).

56. See William H. Gill, "The National Report of United Kingdom", (1977) 2 Yearbook of International Commercial Arbitration, p.94.

(2) The subject matter may not include any problem for which no compromise is allowed, according to law, primarily including family and personal matters (including guardianship, marriage, divorce and inheritance) and disputes over immigration and naturalization.<sup>57</sup> Some of these matters are exclusively reserved for the jurisdiction of the *Shari'ah* courts; others are a matter of state policy and thus regulated by the state and come under the jurisdiction of the civil courts or special tribunals.

(3) The parties must have legal capacity. Any person, who can enter into a contract, physically or legally, can also agree to arbitrate. For a party to have the right of arbitration, under F.D.C.C.P., they must have this legal capacity.<sup>58</sup> This also applies to persons who are not citizens or resident of the U.A.E. A foreigner can, therefore, be a party to U.A.E. arbitration, either as claimant or defendant.

#### 4.6.2 The separability of the Arbitration Agreement

When an arbitration agreement is an integral part of a contract, problems may arise when a party claims that the entire contract is void or voidable. Does the invalidity of the contract led to the invalidity of the arbitration agreement?

The arbitration agreement has been considered to be part of the contract, such that anything affecting the validity of the main contract also affects and may invalidate the agreement. In some jurisdictions the

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57. The F.D.C.C.P. Explanatory Memorandum Art.201.

58. *Ibid* Art.201(3).

invalidity of the arbitration agreement led to setting an arbitral award aside as well as for rejection of its recognition and enforcement. The nullity of the agreement led to the invalidity of all procedures based on it.

The reasons for the invalidity of arbitration agreement can be varied. It can be related to the agreement, for example, if the subject matter of the dispute is of kind which cannot be arbitrated in the particular jurisdiction, or if it is based on fraud. Listing grounds for the invalidity of arbitration agreement is extremely difficult.<sup>59</sup>

The issue of the separability of the arbitration agreement, arises where there are disputes concerning the validity of the contract. Can the arbitration agreement be considered independent from the main contract, and thus not affected by the nullity, or is it affected by the nullity of the contract regardless?

In this section I will examine the position of the U.A.E. law on the principle of separating an arbitration clause from the rest of a contract. But since this principle is not specifically defined by federal or local arbitration law we shall refer to the written authorities in other legal systems and international practice in this regard especially in the common law system, to see their relevance to U.A.E. practice.

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59. Arbitration agreement and Competence of arbitral Tribunal ICCA UNCITRAL'S Project for A Model Law On International Commercial Arbitration, Lausanne Meeting (1984) p.72.

The authorities on this field are in disagreement regarding this issue. Some consider that the arbitration agreement is independent from the main contract whether it is included in the main contract or contained in a separate document.<sup>60</sup> The arbitration clause has a legal weight, irrespective of the validity of the contract.<sup>61</sup> Whereas others consider that the arbitration agreement is connected with the main contract and the nullity of the main contract consequently leads to nullity of the agreement.<sup>62</sup> The second group's argument is that the arbitration agreement is founded in, and exist because of the contract, therefore, the invalidity of the contract will mean the invalidity of the arbitral agreement itself.<sup>63</sup>

Some legal systems take a midway stance regarding this point. For example, French law differentiates between domestic and international arbitration: as far as international arbitration is concerned, the arbitration agreement is deemed to be separate from the main contract, However such a power is denied in domestic arbitration.<sup>64</sup>

International conventions on arbitration are silent in this respect. Neither the New York Convention 1958 nor the European Convention of 1961 contain any provision on the separability of the arbitration clause.

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60. Waley Fathy *Civil Judiciary Law* (Cairo, 1980) p.927 (Arabic).

61. Rashed Samia, *Arbitration in Private International Relations*, part.1 (Cairo, 1984) p.115.

62. Abou El Wafa *Voluntary and Mandatory Arbitration* 5th edition (Alexandria,1988), p.33.

63. *Ibid.*

64. Yves Derain, "National Report of France" (1981) 6 Yearbook Commercial arbitration, p.1-23.

However, the UNCITRAL Model Law, regulated this issue when it provided in article 16 (1):

...an arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract. A decision by arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

According to the traditional view of English law regarding the independence of the arbitration agreement, if the main contract is invalid *ab inito*, the arbitration agreement becomes invalid and falls to the ground.<sup>65</sup> This view has been expressed by Lord Mac millan in Heyman v. Darwins Ltd.<sup>66</sup>

If it appears that the dispute is as to whether there has ever been a binding contract between the parties, such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been as part of it an agreement to arbitrate. The greater includes the less.

Lord Mac\_millan explains the relation between the contract and the agreement, as being connected to each other, and the validity of the agreement is based on the validity of the contract. If the greater (the contract) is challenged -the agreement as a part of it - should also be challenged. An eminent author has commented on this issue, saying:

The view expressed by Lord MacMillan in Heyman v. Darwins Ltd. is correct in strict legal logic, but it is not good law and it is hardly reconcilable with the modern trend of arbitration practice.<sup>67</sup>

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65. Clive M. Schmitthoff, "The Jurisdiction of the arbitrator" *The Art of Arbitration: Liber Amicorum*, Pieter Sanders, 1983, p.290.

66. 1 [1942] ALL ER at p.345.

67. Schmitthoff (*op. cit n.65*) at p. 291.

In Bremer Vulkan Schiffben and Maschinenfabrik v. South India Shipping Cop.,Ltd.<sup>68</sup> Lord Diplock during discussion of the issues of this case, mentioned what might be taken as recognition of the principle of separability of the arbitration agreement. Lord Diplock said:

Such a contract is often to be found as an arbitration clause in a commercial, industrial or other type of contract. Where so found, it is in strict analysis, a separate contract, ancillary to the main contract.

The concept of separability of the arbitration clause has not been fully worked out by the English courts.<sup>69</sup> The orthodox view of the English system of law is that the questions of existence and validity *ab initio* of the contract fall outside the scope of the arbitration clause in the contract. Thus "English court are inclined to treat the arbitration clause in a contract as separable agreement for certain purposes only (i.e., as surviving the termination of the principal contract by fundamental breach of condition and frustration".<sup>70</sup>

Cases decided under the U.S. Federal Arbitration Act have favoured the separability of the arbitration agreement. The arbitration clause is separable from the main contract, and if one of the parties claim that a contract is invalid because it was induced by fraud or for any similar reason, the issue ought to be determined by the arbitrators rather than the court.<sup>71</sup> This principle has been established in USA

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68. [1981] 2 WLR 141 at p.166.

69. Johan Steyn, National Report England (1983) 8 Yearbook Commercial Arbitration, p.11.

70. *Ibid.*

71. Holtzmann H., "National Report United States" (1977) 2 Yearbook Commercial Arbitration, p.123.



within the framework of the Federal Arbitration Act, following the United States Supreme Court decision in Prima Paint Co. v. Flood & Conklin Mfg.Co.,<sup>72</sup> The case involved, a dispute between a New Jersey corporation and a Maryland corporation, the court held:

... except where the parties otherwise intend, arbitration clauses as matter of federal law are "separable" from the contract in which they are embedded and where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.

If a conclusion can be drawn here, it seems that the principle of severability is not specifically defined by the U.S. or under the English arbitration laws. But as well known in common law countries, law is often made by the judge, and in this respect the U.S. court has taken the lead,<sup>73</sup> whereas the English courts have not been on the forefront in developing the severability concept. Nonetheless, the common denominator of the majority of the countries of the European continent is the separability of the arbitration agreement from the main contract.<sup>74</sup>

We shall now examine this issue in the U.A.E and since the legislation does not deal with this issue, we shall examine how the U.A.E court settles this problem. The attitude of U.A.E. courts differs in this regard, some being traditional, withholding this power from the court, and some abandon this attitude. It may worth mentioning that the judge under the U.A.E system does not make the law nor is his decision binding on other courts.

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72. 388 U.S.395 (1967).

73. *Ibid.*

74. Article 1697 par..2 of the Belgian Judicial Code; article 1053 of the Dutch Code of Civil Procedure; the French Decree of 1980 Art.26.

(I) The traditional view of the tenet of the separability in the U.A.E. Court

This issue in the U.A.E. usually reaches a court when the party resisting arbitration files a suit, notwithstanding a contractual agreement to submit to arbitration. The question of the separability of the arbitral clause has been resolved differently in the various courts of the U.A.E., due to the different ethnic backgrounds of judges presiding over cases. The judges may be influenced by the legal practice in their country of origin. Differences also arise because of the ambiguity of law as between the different Emirates.<sup>75</sup> As yet there are insufficient precedents for judge to follow.

According to modern practice, the arbitral clause is dependent on the contract in which it is found. As a result, if an allegation is made at the arbitration tribunal that the contract is null and void, the tribunal, having jurisdiction which is delegated by the court, cannot give a decision on this allegation. This decision lies with a court, which has the jurisdiction to consider the validity of the contract. Thus an eminent author, Abu al-Wafa Ahmad has explained that,

..the arbitrator derives his authority and power from the contract, thus if the nullity of the contract is alleged this will mean that the arbitration clause {as a term of the contract} will be considered invalid.<sup>76</sup>

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75. See Abu-Dhabi Civil Procedure Code.

76. Abou El Wafa Ahmad, *Voluntary and Mandatory Arbitration*, (op. cit n.62) p.242.

Accordingly, arbitrators have no jurisdiction to decide whether there has ever been a binding contract between the parties, or whether the contract involve duress, fraudulent representation or mistake, or whether the contract is rescinded or is illegal.<sup>77</sup>

The traditional view in the U.A.E. was expressed by Dubai Court of Appeal in Lotah Shipyard and Marine Service Co.(S.M.S) V. Marty Chartering Coanik Istanbul.<sup>78</sup> The plaintiff, *Lotah S.M.S. Co.* by charter-party, dated May 28. 1987 let their Vessel *Lotah Floury* to charterers for a single voyage from a port in Turkey to the port of al-Fujayrah in the U.A.E. The respondent agreed to pay half of the hire charge in Turkey and the rest on the vessel's arrival at its last destination. The parties agreed to resolve their disputes by arbitration in the following clause,

any controversy or claim {that} shall arise out of this charter-party will be referred to arbitration which will take place in London.<sup>79</sup>

The respondent failed to pay the hire and to fulfill other obligations to the plaintiff. The plaintiff brought a suit in Dubai Civil Court claiming D.H.853,326 which included the hire, the cost of stevedores, towage of the vessel and other assistance. The respondent was moved to dismiss that action or stay the action pending arbitration. The Dubai Civil Court dismissed the case and ordered arbitration.<sup>80</sup>

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77. Rule introduced by Lord Mac Millan in Heyman v. Darwins Ltd, [1942] 1 All ER 337 "...the greater includes the lesser"

78. The Dubai Court of Appeal case No.213/88 issued 25.9.1988, unpublished.

79. *Ibid.*

80. The Dubai Court of Appeal case No. 776/1987 civil issued 26.4.1988 unpublished.

Lotah S.M.S. Co., appealed to the Dubai Court of Appeal seeking an order to negate the arbitration clause, on the grounds of the nullity of the charter-party, which was based on a fraudulent representation in the personality of the respondent and his authority to enter into a charter-party. Since the arbitration agreement was included in the charter-party which was therefore null and void the arbitration agreement was also null and void. The respondent requested the Court of Appeal to compel the arbitration. Dubai Court of Appeal denied the motion to compel arbitration and referred the case to the Dubai Civil Court to settle the dispute. The Court of Appeal explained the reason behind the denial of the arbitration by saying,

... the arbitrators derive their authority and power from the terms of the contract which contains the arbitration agreement, therefore, if the nullity of the contract is alleged, the arbitration agreement {as a term of the contract} is possibly null and void itself.<sup>81</sup>

It explained the scope of the arbitrator's jurisdiction by saying,

... an arbitrator has no jurisdiction to decide whether there has ever been a binding contract between the parties, whether the contract involves duress, fraudulent representation, or mistake, or whether the contract is rescinded or illegal.<sup>82</sup>

The Dubai Court of Appeal concluded that,

...since the charter-party was based on fraudulent representation, that causes the arbitration to be deemed null and void."<sup>83</sup>

It is clear that the Dubai Court of Appeal did not empower an arbitrator with the right to adjudicate on the validity of a main contract in a case where one of the parties alleged invalidity of the main contract. Instead it regarded this right as part of a court's jurisdiction.

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81. The Dubai Court of Appeal case No.213/1988 civil issued in 25.9.1988 unpublished.

82. *Ibid.*

83. *Ibid.*

## (II) The progressive view of the separability doctrine

A more progressive view of the separability doctrine has been introduced by some Middle Eastern countries.<sup>84</sup> The invalidity or avoidance of the contract as a general principle does not extend to the invalidity of the arbitration agreement. This is the principle upon which Dubai Court of *Cassation* based its revocation of the Court of Appeal judgment in the Lotah S.M.S. Co..

The respondent appealed to the Dubai Court of *Cassation*, seeking to activate the arbitration clause in the charter-party. The Court of *Cassation* departed from the old or traditional approach, when it affirmed the order of the Dubai Civil Court in referring the dispute to arbitration. The court ruled that,

..the arbitration clause is binding on the parties and alleging that the contract involved fraudulent representation does not deprive the arbitration agreement of its validity.<sup>85</sup>

The Dubai Court of Cassation has taken the lead over judgments in the federal and other Emirate courts, when it set down the separability tenet in the Lotah S.M.S. case. This may encourage other U.A.E. courts to follow this court decision. The judgment of the Court of *Cassation* tried to imply or to follow the trend established by modern legal systems.

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84. Article 17 of the new Egyptian draft Arbitration Act which specifies:-  
"The arbitration clause forming a part of the contract is treated as an agreement independent from the other clauses of the contract, and any award rendered by the arbitration tribunal pronouncing the nullity of the contract does not imply *ipso jure* the nullity of the arbitration clause"

85. The Dubai Court of Cassation case No. 79/1988 civil issued 11.3.1989 unpublished.

This kind of decision enhances arbitration as a system of dispute resolution and closes the door in the face of any one of the parties attempting to use any tactic to invalidate an arbitration clause because it will not guarantee an outcome in his favour, and at the same time, asserts the trust in the arbitrator to decide such disputes.

The F.D.C.C.P should reconsider this issue of separability. It must not be left without an authority, especially as the judge, under the U.A.E system, does not make the law nor is there a rule of precedent to be bound on the other courts. Since the traditional approach has been the object of increased criticism in other countries and appears to be rapidly falling out of favor, then it is more appropriate and progressive to follow the same direction as by the Federal Courts in the USA. This might be enough for the time being, in allowing this right of separability, especially in international agreement.

#### 4.6.3 The effect of the Arbitration Agreement

The arbitration agreements effect is to exclude the jurisdiction of the state court over a dispute which enters into its domain. Accordingly, the court in which such a dispute is brought must declare that it has no jurisdiction over it, and direct the parties to arbitration. Therefore if a dispute, covered by an arbitration agreement, is brought before a court by one of the parties, the court must, on the request of the other party, bar the suit. The U.A.E. Supreme Court upheld that,

The party seeking arbitration should make a plea for a stay of the proceeding at the first hearing of the case. If he does, the action will be stayed until the arbitration proceeding is exhausted.

If he does not, the action will proceed and the arbitration clause will be deemed null and void.<sup>86</sup>

Unless a party seeking arbitration invokes the arbitration clause if the dispute brought is before a court, he may have waived his right to arbitration. A court is under no obligation to raise this right on behalf of a party.<sup>87</sup>

Similarly, where there is an agreement to arbitrate, if one of the parties refuses to go to arbitration, the other party may apply to the court, to order the other contracting party to proceed to arbitration.

#### 4.7 The domain of arbitration - arbitrability

Any dispute can be submitted to arbitration, provided that it concerns a subject on which a compromise can be concluded,<sup>88</sup> or which is not contrary to mandatory rules. The law specifies that matters of personal status or those involving public order are those in which no compromise is possible out of court. I have already dealt with the area of personal status,(above) thus the issue which I now turn to examine is "public order" as a technical term.

An arbitrator has no power to decide any dispute which is considered to be a matter of public policy, that is, which relates generally to matters involving the social, political and economic

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86. *O. O. S. Ghabash v. Sharjah Insurance Co.*, U.A.E. Supreme Court, case No., 56/4 civil issued 13.12.1982, (1983) 37 *Al-Adalah* 110.

87. *Ibid.*

88. F.D.C.C.P. Art.201(3).

organization of the society and the prevalent moral attitudes in the community.<sup>89</sup>

In determining the scope of those subjects which are not arbitrable under U.A.E. law Art.201(3) of F.D.C.C.P. stated,

Arbitration is prohibited in matters which could not be the subject of compromise. And the parties should have the legal capacity to dispose of their right

We have already dealt with these questions; however one point needs further examination, and that is the validity of the choice of foreign jurisdiction, in the light of the U.A.E. conceptions of public policy.

This rule is not contained in the A.D.C.C.P. nor in the legal codes of other Emirates, which do not have the benefit of statutes regulating this point. I therefore refer to relevant statutes of the other Middle Eastern countries. The courts in U.A.E. have, until recently, been reluctant to submit a dispute to arbitration, where an issue arises as to the validity of an arbitration agreement made abroad. The original approach to which U.A.E. courts adhered was to ensure that the dispute was not initially within the jurisdiction of the U.A.E. courts. For example, the Abu Dhabi Court of Appeal had to consider the validity of an arbitral clause in a dispute concerning the implementation of a contract, where one of the parties invoked the an arbitral clause, which referred any dispute arising between the parties to arbitration in London. The court stated,

...the court of the U.A.E. has exclusive jurisdiction over the subject matter of the implementation of any contract taking place in the U.A.E.. parties have no power to submit such a dispute to arbitration since this would violate public order {to refer any

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89. For more detail see chapter 2 at pp. 49-50.



dispute under the exclusive jurisdiction of U.A.E. court to any foreign forum} and infringe state sovereignty.<sup>90</sup>

If the subject matter falls within any area under the exclusive jurisdiction of the U.A.E. courts, an agreement has to be considered null and void, with respect to arbitration taking place abroad.<sup>91</sup>

Two years after the above decision, a case was brought before the Sharjah Court of Appeal on the validity of an arbitral clause which referred any dispute arising between its parties to arbitration in London. The respondent invoked a Stay of Court Proceedings and sought to comply with the arbitration clause, but the court denied the respondent's move to stay proceedings and compel to parties to seek arbitration. The court stated,

...the rules of comparative law, in this respect, consider that, when an agreement is concluded to arbitrate abroad in a matter originally within the jurisdiction of the domestic courts, the arbitral clause will remain valid in the part where it refers the dispute to arbitration. That part which specifies that arbitration will take place abroad is deemed to be null and void.<sup>92</sup>

The initial decision by the Abu Dhabi Court of Appeal viewed the parties' agreement to avoid local court jurisdiction as an infringement of state sovereignty. This led to the imposition of extensive restrictions to prevent any recourse to international commercial arbitration taking place outside the U.A.E. At present, any contract which contains such an agreement is deemed to be null and void, and the case is referred to a court with competent jurisdiction. Some respondents in the U.A.E have

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90. The Abu-Dhabi Court of Appeal case No.30/77 civil, unpublished.

91. *Ibid.*

92. Sharjah Court of Appeal case No.40/1979 civil, unpublished.

found that it is more attractive to try a case in there, thus avoiding the consequences of international arbitration.

The decision of the Sharjah Court of Appeal differed from the decision of Abu Dhabi Court of Appeal, for the former considered that only the part which referred arbitration to a foreign country only was deficient and that the second part is valid in that it refers a dispute to arbitration.<sup>93</sup>

A review of the decision of the Abu-Dhabi Court of Appeal in the previous case suggests a perception by the court that certain issues were beyond the expertise of an arbitrator.<sup>94</sup> In addition, issues of public order and state sovereignty cannot be referred to arbitration.<sup>95</sup> This attitude has changed greatly over the years, due to a greater awareness by the courts of the arbitration process and also to the increasing complexities of business transactions in the U.A.E. For example, in KK. Marine Co. v. TBB Abu Dhabi Co.,<sup>96</sup> the respondent appealed to the court to seek to vacate the arbitration clause, because the agreement referred any dispute to arbitration in London and in accordance with English law. The Abu Dhabi Court of Appeal (the same court which issued the former decision) stated, in agreeing to the arbitration in a foreign country:-

...referring a dispute to arbitration taking place outside the U.A.E. does not represent a violation of public order.<sup>97</sup>

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93. Sharjah Court of Appeal case No.40/1979 civil, unpublished.

94. Abu-Dhabi Court of Appeal case No.30/1977 civil

95. *Ibid.*

96. The Abu-Dhabi Court of Appeal case No.303/1981 civil issued 6.7.1981, (1982) 31 *Al-Adalah* 86.

Within the local court system, this point has the solid backing of the new tendency, as shown by the decision of by Dubai Court of *Cassation*, which refused to consider the submission of a dispute to a foreign arbitrator outside Dubai, operating under the auspices of rules of procedure other than U.A.E. Procedure as a violation of public policy.<sup>98</sup> An excellent illustration of the growing acceptance of foreign arbitration was the decision of Dubai *Shari'ah* Court in Alam Traders v. Daewoo Gulf East. and Daewoo Corp. Korea .<sup>99</sup> The contract concerned the import of iron from Korea to the U.A.E. The parties included an arbitration clause in the contract, to refer any disputes arising between them to arbitration in Korea, under the auspices of the rules of arbitration of the Korean Commercial Arbitration Association. The Korean Corporation delayed importing the iron, and the plaintiff brought a claim before Dubai *Shari'ah* Court claiming D.H. 60,000 damage and wished to vacate the arbitration clause, on the grounds that it concerned a matter of public order. The plaintiff argued that such a claim was not contractual and therefor could not be decided by arbitration. The court disagreed with the plaintiff's position and upheld the Korean Corporation's position.

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97. *Ibid.*

98. *Lotah S.M.S V. Marty Chartering Coanik Istanbul, (op. cit n.85).*

99. Case No.22/1988 issued 17.4.1989 unpublished.

Although there have been conflicting decision regarding an express choice of foreign law and arbitration outside the U.A.E., the weight of legal opinion supports the enforcement of such provision in private commercial contract.

In addition to the aforementioned issues, which cannot be settled through arbitration, there are various substantial matters which may not be a proper subject for arbitration because of special legislation or the strength of public interest.

(1) In March 1985, the Executive Council of the Government of the Emirate of Abu Dhabi passed a resolution banning the submission of the Government standard contracts with contractors and consultants to arbitration, referring them instead to the competent court in Abu Dhabi. Government contracts, except Abu Dhabi commercial and personal contracts, cannot be submitted to arbitration, even though the 1985 resolution did not specify this. The government's justification for imposing this restriction was the slow progress of bringing cases to arbitration.

The Abu Dhabi Government has participated in international arbitration in both "*ad hoc*" and "institutional" arbitration. Recently the Abu Dhabi Government has shown markedly less inclination to accept foreign or domestic arbitration clauses in contracts with international firms, referring instead their dispute to the national court. This method may serve the Government well, but it is unlikely to give foreign firms a fair trial or an efficient alternative to international arbitration.<sup>100</sup>

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100. See chapter 2 on the discussion of the relation between public policy and state in the Middle East at p. 76.

(2) Labour disputes which arise between an employer and his employees and other disputes of this type cannot be referred to arbitration and must be heard by the U.A.E. Federal Ministry of Labour and Social Affairs Committee (F.M.L.S.A.C.). If this committee cannot reach an *amicable* settlement, then the Ministry is obliged to move the dispute to court.<sup>101</sup>

(3) The Federal Ministers' Council issued an order prohibiting arbitration in federal government contracts with contractors and consultants in the construction field. Accordingly, any dispute concerning this type of contract must be referred to the U.A.E. courts.

(4) Disputes in respect of commercial agency or distribution agreements must be referred to the Committee for the Settlement of Commercial Disputes (C.S.C.D.). The producer, the manufacturer and the local agent are not allowed to refer their disputes to arbitration.<sup>102</sup>

## Conclusion

There are mixed feelings towards the practice of arbitration U.A.E., varying from rejection to acceptance. The system of arbitration has been seen until recently as an exceptional method of dispute settlement, and the court has retained comprehensive jurisdiction over the settlement of disputes. When a court refers a dispute to arbitration, it does not waive its jurisdiction but, rather, postpones its decision

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101. U.A.E. Federal Law No.8/1980 On Regulating Labour Relations Art. 154-165

102. Federal Trade Agencies Law No.18/1981.

until arbitration channels have been exhausted. Accordingly, the court retains discretionary power to refer a case to arbitration or to try it itself; the court has the power to remit a case from an arbitration tribunal and resolve it. The award in the cases governed by the parties agreement and not referred by the court, are considered final without the approval of the court.

The legislative vacuum in the U.A.E. assists the courts to achieve a point where the legislative gaps are beginning to be filled by rules of arbitration. These rules serve the policy of the court, to retain its supremacy over arbitration tribunals.

The rejection of arbitration has not lasted long, and gradually the courts have begun to take a more positive attitude towards accepting the practice of arbitration. However, this acceptance is not without restrictions and the courts still have comprehensive jurisdiction over the supervision of arbitration. Thus, although much has changed, many limitations still exist.

## **Chapter Five**

### **The U.A.E. Dispute Resolution Institutions**

#### **Introduction**

The object of this chapter is to discuss an important institutional arbitration system in the U.A.E. namely the Chambers of Commerce to be found in each Emirate. The aim is also to stimulate thought and discussion on certain key aspects with a view to suggesting ways in which the arbitration process may be improved and brought into line with that of similar institutions in advanced societies. Beneficial changes may be easier to effect in these private yet important institutions in comparison to difficulties in introducing effective changes into the legal system of the Union. The Chamber of Commerce facilities for arbitration and other dispute resolution alternatives to courts to be discussed below one of particular relevance to disputes involving parties domiciled in the Emirates.

#### **5.1 The Scope and Major Features of U.A.E. Dispute Resolution Institutions**

The institutions have been created for the purpose of offering conciliation or arbitration services. One such institution is the Dubai Judicial Committee, which is subordinate to courts in the Emirate. This was established by the ruler of Dubai himself and its function was to settle property disputes. The parties involved cannot choose their own

arbitrators, and the decision of the judicial committee is final. Given the nature of its formation and the limit of its jurisdiction, it is more like a court than an arbitration tribunal and, as such beyond the scope of this study. The same applies to the Committee of Labour Disputes and the Trade Agencies Committee. The function of the Trade Agencies Committee is, as its name suggests, to settle trade disputes.<sup>1</sup> Although it is considered to be an arbitration committee, in reality it is more like a court of law in that it applies the same rules as a court and it does not allow for voluntary arbitration, in which each party appoints his own arbitrator.

Finally there is the Commission for Settlement of Commercial Disputes. This appeared in the sixties, as a voluntary institution for the resolution of disputes which could not be handled by the existing legal institutions. Rules were drawn up to regulate the arbitration process by the Committee of Commercial Custom and Arbitration in the Chamber of Commerce; this chapter will focus on this process.

These institutions were established primarily to conduct and administer arbitration proceedings. They are related to commerce in general, and their activities are conducted on a national basis, within the territory of the Emirates, although some cases may involve a foreign party. Another characteristic of these Chambers of Commerce is that they are not open to all kinds of disputes or persons: their services are available only for disputes arising from commercial relations between persons carrying on business in the U.A.E., who are registered with the

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1. The Trade Agencies Federal Act No. 18/1981 Art.28.



Chamber of Commerce. However some of the Emirates' Chambers of Commerce do not abide by this principle, as in the case of the Abu Dhabi Chamber of Commerce and Industry,

The Chamber's Arbitration Committee hears all commercial disputes, presented by disputing parties {who are in dispute} in accordance with the provision of the rules...<sup>2</sup>

## 5.2 The rationale for the establishment of the arbitration institutions

The arbitration committee of the Chamber of Commerce and Industry in the U.A.E. was established in the Sixties with the object of settling disputes associated with industry and shipping. This work has been performed under its present structure since 1965,<sup>3</sup> when a tribunal for the settlement of disputes arising amongst its members was founded, to deal with instances where there was no competent court for judging such disputes. Accordingly, the rulers of the Emirates created these committees to settle disputes between merchants through mediation and arbitration. These committees served to fill the gap in the legal system of the Emirates; the Chamber of Commerce and Industry handled arbitration and mediation between the parties and succeeded, to some extent, in solving commercial disputes, by taking into account commercial customs.

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2. The Abu-Dhabi Chamber of Commerce & Industry law No. 6/1976 art. 8.

3. Dubai Chamber of Commerce and Industry established in the 1965; Abu-Dhabi Chamber of Commerce and Industry established in 1969 and Sharjah Chamber of Commerce and Industry in 1970

Although it is a society in which commerce has always played a leading role, the U.A.E. has only recently witnessed the kind of commercial problems that necessitate the establishment of expert committees to settle disputes through conciliation and arbitration. Many merchants prefer to resolve disputes by arbitration rather than by having recourse to the courts; they know that the disputes will be settled by experienced arbitrators who will avoid delay and unwanted publicity. These factors played a major role in the decision of the U.A.E. Chambers of Commerce and Industry to issue rules and procedures for arbitration which would meet the needs of the country.

### 5.3 The Chamber of Commerce in its cultural context

Before examining in detail the arbitration system of the Chamber of Commerce, it is worth examining the dynamic social position of the Chamber of Commerce to see why many people would feel constrained to go to the Chamber of Commerce even if they did not particularly want to, and were not obligated to do so. They can take any way they think proper to follow for solving their disputes, however, parties go to the Chamber of Commerce disregarding the disadvantage of these institutions (see below). This is in large part due to the culture and traditions of the U.A.E. society. Business transactions between fellow citizens are more than just business transactions; they are made in a particular cultural context, where acts of business give rise to more than just expectations of business. Certain personal understanding and expectations still arise in commerce in the Emirates, for it is less depersonalized than in the West.

An attempt by the parties to disputes to avoid the arbitration committee of the Chamber of Commerce, may be seen a matter of mistrust in the ability of the arbitration committee members. The chamber of commerce is an influential body with links which go beyond the obvious, and parties avoid the offence to Chamber of Commerce in case it may affect the future business relationships between the arbitration committee members and the parties to the disputes. They are better off, despite the deficiencies of the Chamber of Commerce, in trying to get a result from the chamber of commerce, even though it may be in some way not be a perfect result for a claimant, rather than ignoring it by going to the court or by appointing an *ad hoc* arbitrator. The relationship among merchant members of the Chamber of Commerce is akin to membership of a guild to take a fellow member to the court is a hostile act which might effect one's reputation and business standing more so than in a western context. The position of the Chamber of Commerce in the U.A.E. differs from the similar institution in the West, where it is merely an association of businessmen, a voluntary forum, representing commercial interests only.

In the U.A.E. business and personal activities are intimately connected. Due to the special relationship between the Chamber of Commerce and the business society of the U.A.E., the Chamber of Commerce is particularly significant for business relationships between fellow citizen of the Emirates. It is part of the grain of the culture, and it will always remain as an important alternative to the formal courts.

## 5.4 The authority of the Chambers of Commerce for settling commercial disputes

Art.5(11) of Law 2/1975 of the Dubai Chamber of Commerce and Industry (D.C.C.I.) stipulates that the Chamber of Commerce shall exercise the following powers:

... settlement of disputes and differences to which a member of the chamber is a party, by way of arbitration.<sup>4</sup>

## 5.5 Jurisdiction of the Arbitration Committee

Under the rules of the U.A.E. Chambers of Commerce and Industry, arbitration is open to all U.A.E. or non-U.A.E. parties wishing to have recourse to it, without exception, provided that the necessary conditions required by the Chambers of Commerce and Industry are met.

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4. Art. 42 of the Chamber's Internal Regulation lay down the Chamber's jurisdiction as settlement institute in the Emirate of Dubai in the following matters:

- (1) Giving advice for the settlement of differences arising between the chamber's members and other parties that may be referred to it by two disputing parties in commercial matters after their acceptance in writing of voluntary enforcement of the Chamber's decision.
- (2) Issuing the arbitral awards in the disputes arising between parties who are members of the Chamber after their agreeing in writing to enforce these awards.
- (3) Making the proper effort to settle disputes of a commercial nature arising between members or non-members.
- (4) Making the proper effort to settle disputes between the members of the Chamber and foreign agents;
- (5) Giving expert advice on matters referred to the Chamber by the local department and organization or members of the Chamber.
- (6) Giving advice on established practice with regard to the case in which the Chamber's opinion is sought.
- (7) The codification of the rules of custom and commercial practice of the Chamber ...

Parties are entitled to take their case to arbitration in one of the U.A.E. Chambers of Commerce and Industry, provided that the dispute concerns a commercial contract and one of the parties is a member of the Chamber of Commerce and that they provide a relevant clause in their contract, or the written arbitration agreement reached by the parties afterwards, to be submitted to the Chamber of Commerce. This means that:-

(a) One of the parties should be a member of the Chamber of Commerce for the area where the arbitration is to take place. The Dubai Chamber of Commerce and Industry Arbitration Committee originally accepted only those cases in which one of the parties was a member of the Chamber of Commerce. However the situation has changed and this requirement no longer exists; so that the arbitration committees in Dubai and Abu Dhabi now examine disputes between parties from different countries. However, the requirement still exists in the Sharjah system.<sup>5</sup> Exceptions occur in the jurisdiction of the Chamber of Commerce of the U.A.E.; this is so when the dispute has been referred to the Chamber of Commerce, from an official authority, including the court.<sup>6</sup>

(b) The dispute must be of a commercial nature,

(c) There should be a written agreement specifying which Chamber of Commerce is involved.

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5. Article 2.

6. Sharjah Art. 2 Dubai Draft Art.2.

It is clear from the practice and the proposed Draft Rules of the arbitration system of Dubai's Chamber of Commerce and Industry (D.D.C.C.I.), that the jurisdiction of the arbitration committee is confined to disputes among traders and companies.

In theory, a dispute involving non-traders or commercial bodies does not come under the arbitration systems of Chambers of Commerce, even if the dispute itself is of a commercial nature. Nevertheless, the Chamber does, from time to time, accept cases not of a commercial nature and over which the chamber has no jurisdiction. One such case involved a dispute between two parties who were not members of the Chamber concerning a piece of real-estate located outside Dubai. Despite the question of jurisdiction raised by one of the parties, the committee accepted the case and issued an award.<sup>7</sup>

The Abu Dhabi Chamber of Commerce and Industry (A.D.C.C.I.) Rules avoid the jurisdiction problem faced by the Dubai and Sharjah rules, by leaving the Chamber's jurisdiction open to all parties. It states that,

The Chamber calls upon all business concerns, desiring to settle disputes over business transactions and negotiations through chamber arbitration.<sup>8</sup>

The arbitration committee of the Dubai Chamber of Commerce accepts disputes, if the parties agree in writing to submit for consideration those disputes which have already arisen or may arise.

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7. Case No. 1007/1983 *infra*.

8. Abu-Dhabi Chamber of Commerce and Industry law No. 6 of 1976.

This can be a separate arbitration agreement signed by the parties; but the arbitration clause is usually included directly in the text of the contract binding the parties.

The Dubai Chamber of Commerce recommends all parties wishing to make use of its system to include in their contract the following standard clause:

All disputes arising from this contract shall finally be settled according to the Dubai Arbitration Rules.

Should the parties fail to include the arbitration clause in their contract, the Chamber of Commerce has the right to ask the parties to sign an arbitration agreement or to allow the plaintiff to resort to arbitration, with the assent of the defendant.<sup>9</sup>

In all cases, the D.D.C.C.I. Rule requires the parties to sign an arbitration agreement even if their contracts include such a clause. The reason for this is to pre-empt any further claim of the party resisting the arbitration, that the clause is invalid.

The Chamber of Commerce also has exceptional jurisdiction over disputes which may be referred to the Chamber by official authorities in the Emirate; the arbitration committee forms a subcommittee to settle these kinds of disputes.<sup>10</sup>

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9. DDCCI rule Art. 4 (b).

10. DDCCI Art. 2.

## 5.6 The Procedure for Settlement of disputes in U.A.E. Chamber of Commerce Arbitration.

The settlement of trade disputes is in two stages, reconciliation and arbitration. one may add a third step, primary conciliation.

### 5.6.1 The Secretariat

The Chamber of Commerce Secretariat is the first place parties turn to for the settlement of a dispute. At this stage, the Secretariat of the Chamber of Commerce tries to solve the dispute by itself. The Secretariat will ask for the claimant's documents, which should include the names, and addresses of the parties involved, an account of the dispute itself, and its scope and dimensions; and copies of relevant documents, communications and contracts exchanged by both parties concerning the case.

The Secretariat will then invite the other party to submit its documents and assigns a day when it will bring both parties together and try to solve the differences between them *amicably*, before passing the case on to the arbitration or conciliation committee.

This raises questions regarding the authority and power of the Secretariat; does it have the power to solve and settle the disputes between the parties, or is its role merely an administrative one?



In theory, the function of the Secretariat is largely administrative in nature; the regulations grant the Secretariat the right only to prepare a file of the case with all the necessary documents.<sup>11</sup> Although the administrative role of the Secretariat in the U.A.E. Chamber of Commerce is basically limited to the preparation of cases for arbitration,<sup>12</sup> in practice the secretary actually exceeds his power, by holding a conciliation session before sending the case to the committee of conciliation. In some arbitration cases, the Secretariat goes further, by rendering its opinion on the case, disregarding its influence on the arbitration members.

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11. ABCCI Rule Art. 3.

12. Article 10 of the SCCI rule states the duties and powers of the secretariat as follows :-

- 1)to receive applications for the arbitration
- 2)to ensure that there is an arbitration clause included in the disputed contract
- 3)to ensure that the conditions of arbitration are fulfilled
- 4)to notify the other party of arbitration
- 5)to prepare a summary of the dispute and present it to the chairmen and vice-chairmen of the arbitration committee
- 6)to invite the parties to the dispute to sign the arbitration agreement.
- 7)to inform the parties of the dispute to the time and place of arbitration
- 8)to prepare a registration file of all dispute submitted to the committee
- 9)to present legal conciliation if necessary, on behalf of the member
- 10)to accumulate a code of commercial practice and legislation which governs commercial matters
- 11)to register the names and addresses of experts in all economic fields
- 12)to assist the conciliation committee
- 13)to invite the arbitration committee to attend the arbitration meeting

No harm is caused if the Secretariat is handling small claims or a case with summary proceedings. If a settlement is reached, they close the case; otherwise parties are free to refer their case to conciliation or arbitration. In spite of the nature of the cases it handles, the power of the Secretariat is limited; on this point the rules are quite clear.<sup>13</sup> Than why does the Chamber of Commerce Secretariat take on this jurisdiction even though it is beyond its scope? The reasons behind this might be due to gaps and uncertainties in the Chamber of Commerce regulations in this regard. This is seen in the Dubai Chamber of Commerce regulations which are not yet ratified, and similar uncertainties are found in Sharjah Chamber of Commerce regulations. Although there are a set of regulations for its power and jurisdiction, there are some loopholes which the Secretariat of a Chamber may utilize, to intervene in a case. Under S.C.C.I. Regulations Art.10(8), the Secretariat prepares the file of a dispute. This preparation includes discovering the facts and issues of the case. The Secretariat often does not stop at this point but goes further, by giving its opinion on the case. The second factor which gives the Secretariat cause to voice its opinion, is that the members of the arbitration committee come from different backgrounds and with different qualifications. They often need some assistance, especially where there is a legal issue involved in the dispute. The Secretariat, in the course of explaining the legal issue, attempts to give its opinion not only on the legal issue but on the dispute as a whole.

The need to curtail the power of the Secretariat in certain cases, is that its opinion could influence the arbitrators' decision, so that the decision becomes that of the Secretariat rather than the arbitrator.<sup>14</sup>

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13. SCCI Art.10 ABCCI Art. 3.

14. As is the case of the Secretariat under the rules and practice of Dubai Chamber of Commerce.

## 5.6.2 Conciliation and its procedure

Conciliation is an attempt, by the Chamber of Commerce, to achieve an *amicable* settlement whenever possible, by eliminating the differences between two parties. Parties may to resort to any conciliation or arbitration committee.

### 5.6.2.1 Request for conciliation

The party wishing to make use of the conciliation procedure must apply in writing to the secretary enclosing the relevant papers and documents.<sup>15</sup>

The U.A.E. Chambers of Commerce have given no details of the cost of conciliation, and there is no clear provision in the regulations which require a deposit for the cost of conciliation.<sup>16</sup>

Having received an application for conciliation, along with the relevant papers and documents, the secretary general of the arbitration committee notifies the other party, of the application and asks them whether they are prepared to agree to conciliation. If they agree they are to submit a written statement of their point of view on the dispute, within 15 days from the date of the notification, together with any supporting papers and documents.<sup>17</sup>

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15. DDCCI Art.20(1), SCCI Art.11(b), ABCCI Sec.I required the petition should be addressed to the Chairman of Arbitration Committee.

16. See for example Conciliation Arbitration and Expertise of Arab-Euro Chamber of Commerce Art.12 and Art.2 of the ICC Rule

17. DDCCI Art. 20 (3).

The S.C.C.I. Regulations do not take into account the views of the other party to a dispute and presumes that they are aware of the conciliation. This silence in the S.C.C.I. Regulation regarding the right of the respondent, tends to deprive him of his due process in law. He needs this notice in order adequately to prepare his supporting evidence. It is clear that the S.C.C.I. regulations in this regard must be amended.

#### 5.6.2.2 Appointment of Conciliation Committee

If both parties concerned accept the attempt at conciliation, the procedure begins for the appointment of conciliators. According to the D.D.C.C.I. Regulations, the reconciliation committee is to be appointed by the arbitration committee of the Chamber and is composed of one or more persons, who may be members of the arbitration committee, or any other ordinary persons.<sup>18</sup>

The D.D.C.C.I. Regulations are silent as to the number of conciliators to take part in the conciliation process. However, it is likely that any mention of a specific number has been omitted purposely, so that the arbitration committee may use its discretionary powers to consider the numbers of conciliators in accordance with the requirement of the situation.

The S.C.C.I. reconciliation committee, having originated from the arbitration committee of the Chamber of Commerce, does not permit independent conciliation on behalf of the respondent.<sup>19</sup> Unlike D.D.C.C.I.,

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18. DDCCI Art. 13.

19. SCCI Art. 11.

the S.C.C.I. regulations specify the number of conciliators; it allows the General Director and Secretary of the Chamber of Commerce to set the number of conciliators.<sup>20</sup>

The reconciliation committee is appointed, according to A.D.C.C.I. regulations, by the chairman of the arbitration committee, and is composed of one member or more, either from the arbitration committee or the general public.<sup>21</sup>

#### 5.6.2.3 Conciliation procedure

The conciliator or conciliation committee shall consider the application and shall communicate directly with the parties or their legal advisor.<sup>22</sup> The conciliation committee shall try to bridge the gap between the parties' points of view; if the committee reaches a settlement, and the settlement is approved by both parties, the committee shall set down minutes to be signed by its members and the parties concerned.<sup>23</sup>

The A.D.C.C.I. Regulations do not specify how long the conciliation committee should take to reach a settlement. However, the D.D.C.C.I. and S.C.C.I. regulations set a time limit for the conciliation committee to accomplish its task: the D.D.C.C.I. regulations stipulate one month from

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20. *Ibid.*

21. ABCCI Rule Sec.I (C).

22. DDCCI Art.20 (5).

23. ABCCI Sec. I (5) ,DDCCI Art.20 (6) it required settlement should be take place in the existence of the parties, realizing the difficulty to achieve a settlement in the absence of the parties.

the beginning of the procedure, extendible on the acceptance of the arbitration committee, while the S.C.C.I. regulations stipulate two months, which can also be extended.<sup>24</sup>

#### 5.6.2.4 The results of the conciliation

Three results are possible once the conciliation committee has completed its task,

(1) The dispute may be settled, in which case the committee shall draw up minutes, photocopies of which shall be handed to the parties concerned for inspection.<sup>25</sup>

(2) The basis for an agreement may be established. In this case the committee shall recommend that the parties settle their dispute within a given period.<sup>26</sup>

(3) The attempt at conciliation may fail, either as result of the refusal by one of the parties to accept the conditions of conciliation, or as a result of the failure to draw up a conciliation report within the time stipulated, or as a result of the refusal by one of the parties to sign the minutes.

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24. SCCI Art. 13.

25. DDCCI Art.20 (7), ABCCI Sec.I (6).

26. SCCI Art.13 (b).

Failure of reconciliation does not affect the parties' right to commence legal action,<sup>27</sup> or resort to arbitration if there is an arbitration agreement.<sup>28</sup> Furthermore, the parties' rights shall in no way be affected by what might have been accepted, presented or written down during the unsuccessful reconciliation session or prior to reconciliation.<sup>29</sup>

### 5.6.3 Arbitration

Arbitration takes place when, or if, the conciliation committee fails to reach a settlement; the parties may, however, refer their case to arbitration first.

The U.A.E. Chamber of Commerce arbitration system is open to all parties without exception, provided that the conditions necessary for intervention exist. Where the parties consent to arbitration, the arbitration committee becomes the final authority in the settlement of disputes<sup>30</sup>.

#### 5.6.3.1 Request for arbitration

The request for arbitration is the first step towards arbitration. The party or parties wishing to initiate proceedings must forward a request in writing to the Secretariat of the Chamber of Commerce (Dubai and Sharjah) or, in the case of Abu Dhabi, to the Chairman of the Arbitration Committee.<sup>31</sup>

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27. ABCCI Sec.I (2) DDCCI Art.22, SCCI Art. 14.

28. *Ibid.*

29. ABCCI Sec. I (1).

30. DDCCI Rule Art. 2.

31. ABCCI Art. 1.

The request for arbitration should include all the documents needed for an initial analysis of the problem.<sup>32</sup> The request must include the required information for this purpose.<sup>33</sup>

The D.D.C.C.I. and S.C.C.I. Regulations require the parties seeking arbitration to sign an arbitration agreement, in which they undertake to abide by the judgment awarded by the committee as final and not subject to other authorities.<sup>34</sup> Nevertheless many cases have later been taken to the court of appeal.<sup>35</sup>

#### 5.6.3.2 Response by Respondent

The Secretariat of the Chamber of Commerce shall give notice of requests for arbitration to the other parties within 15 days of receiving the application.<sup>36</sup> In the case of mandatory arbitration, where the parties sign an arbitration agreement before the beginning of the dispute, the

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32. DDCCI Art. 24, ABCCI Art.1, SCCI Art. 15.

33. According to ABCCI Art.1 DDCCI Art.24 SCCI Art.16 the following information must satisfied:

- 1) petitioner's name, nationality and qualifications;
- 2) address and occupation;
- 3) opponent's name, nationality, full address and occupation;
- 4) his claims and the legally reasoned facts of the dispute;
- 5) the signed agreement and arbitration clause;
- 6) copies of documentary evidence;
- 7) the petitioner's request, his arbitrator's name, address and telephone number(only in cases in which the arbitration clause requests that each party appoint an arbitrator)
- 8) where the arbitration petition is submitted by a legal attorney, the power of attorney must be presented ;ABCCI Art.1
- 9) a written undertaking to pay the arbitrator's fee shall be attached to the written petition.

34. DDCCI Art. 24(7) SCCI(C).

35. The arbitration Committee treated as Court of First Instance see, *C. Pharmacy v. A.& Co. Pvt. Ltd* 15.2.1989 and Case No.1007/83, unpublished.

36. SCCI Art. 17.



D.D.C.C.I. requires the respondent to reply within thirty days of the date of notification and to enclose in the reply all the necessary papers and documentary evidence.<sup>37</sup>

The arbitration regulations of the U.A.E. Chambers of Commerce do not mention the possibility of refusal by the respondent to attend arbitration; a part of the D.D.C.C.I. Regulations, regarding mandatory arbitration, state that,

... if the respondent does not reply within the period of the thirty days laid down by the rules, the arbitration committee is entitled to go ahead with the proceedings.<sup>38</sup>

What application does this provision have in the case of voluntary arbitration? For example, when the parties have not signed an arbitration agreement in advance, or where no answer is received within the stated time ? It is likely that, in these cases, the claim will be refused because there is no obligation upon the party to refer his dispute to arbitration.

In cases in which the respondent replies to the request, he must forward particulars similar to those given by in the claimant in his request for arbitration.<sup>39</sup>

#### 5.6.3.3 Composition of the Arbitration Committee

The committee will begin arbitration proceedings to settle the dispute as soon as is practicable, after receiving the response, or after the expiration of thirty days following the respondent's receipt of the notice.

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37. DDCCI Art. 25 (2).

38. DDCCI Art.25 (4).

39. DDCCI Art. 25(3), ABCCI Rule required the respondent to nominate his arbitrator' and mention his name and telephone number Art. 1(7).

(i) Appointment of the arbitrators

One basic principle governs the constitution of the arbitral tribunal: the freedom of each party to select an arbitrator or arbitrators. This right is enshrined in the A.D.C.C.I. regulations, which came into force in 1989;<sup>40</sup> however in practice, the U.A.E. Chambers of Commerce do not grant this right to the parties in whose disputes it is involved.

While the D.D.C.C.I. regulations outline the possibility of the appointment of arbitrators, unlike the A.D.C.C.I. regulations, it has restricted the option rather than leaving it open. The D.D.C.C.I.

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40. The ABCCI art.7(a) envisages two possibilities regarding the appointment of the arbitrators:-

1) Where there is an arbitration clause, and the signatories to the agreement agree to appoint a single arbitrator, the arbitration committee shall, upon completion of notification procedures, call the parties to a meeting to be held in the Chamber's premises within 7 days of the date of finalisation of notification procedures in order to agree on the nomination of the arbitrator. Should they disagree within ten days from the date of the meeting the matter shall be referred to the Arbitration and Trade Practice Committee(committee), whose decision on the matter shall be final unless there are extraordinary circumstances, provided for in Article 30 and 31.

2) If both parties agree to nominate more than one arbitrator, each party shall name his arbitrator either in the arbitration petition or in his reply ; otherwise the arbitration Committee shall appoint an arbitrator on his behalf, with no right of appeal against the decision except for reasons provided for in Article 30 and 31. The Committee shall then call the arbitrators of both parties to a meeting on chamber premises within one week from the date of completion of notification in order to appoint an Umpire. If the disagreement over the appointment of an umpire is not resolved within 10 days, he shall be appointed by the arbitration Committee whose decision shall be final and unappealable unless for reason provided for in Article 30 and 31.

3) If the parties agree on arbitration through the chamber's Committee, the Committee shall have to consider the dispute within 10 days from the date of completion.

regulations include the notion of the "chamber member", a criterion which restricts each party's autonomy to choose its own arbitrators. Art.14 of the D.D.C.C.I. states:

...if the parties to the dispute are members of the Chamber of Commerce, the arbitration committee of the chamber will have the jurisdiction to appoint an arbitration panel of three of its members.

However, if one of the parties is not a member of the Dubai Chamber of Commerce, the parties will retain the right to choose.<sup>41</sup> The reason for this particular D.D.C.C.I. regulation can be attributed to the desire of the committee to maintain control over the arbitration procedure. The committee does not wish to lose the position it has held since 1965 as the chief instrument in the settlement of disputes. An element of professional prestige is also very important.

In order to maintain its high reputation as an attractive commercial environment, it is important that the Dubai Chamber of Commerce should review the arbitration system in general, as befits such a prestigious institution in the Gulf. On this point in particular, it should learn from the experience of the A.D.C.C.I. regulations in this respect.<sup>42</sup>

Regarding the practice in the Dubai Chamber of Commerce, the arbitration committee is obliged to hear commercial disputes referred to it, irrespective of their nature and the nationality of the disputants, so

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41. DDCCI Art. 14(2). The New proposal of the DDCCI is abolishing this article and open this right for both members and non-members.

42. Upon the writer recommendation article 14 is abolished from the the DDCCI Rule.

long as at least one of the parties to the contract is a member of the Chamber. The arbitration committee consists of not less than seven Chamber members. These members are required to meet certain conditions.<sup>43</sup>

The S.C.C.I. does not differentiate between members or non-members; all parties may submit their dispute to the paramount committee of arbitration, which consists of not less than seven of its own members with acknowledged commercial experience.<sup>44</sup> The S.C.C.I. regulations do not specify any requirement for the arbitrator, apart from commercial expertise.<sup>45</sup>

#### (ii) Challenge of arbitrator

Presumably, a person appointed as neutral arbitrator shall disclose to the chamber any circumstances likely to affect his impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past counsel. Failure to disclose such matters will be seen as a violation of neutrality.

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43. According to art. 16 DDCCI and art. 31 ABCCI rule require that the arbitrator must:

- 1) be of good morality and conduct;
- 2) have no conviction of a felony of dishonesty such as the issue of bad cheques;
- 3) be neutral and faithful while doing his job;
- 4) not be a lawyer or advisor of one of the disputing parties, nor one of their employees. The DDCCI does not stipulate this requirement. The appointment of the arbitrator; this should be left to the parties to decide on whether to accept it or to challenge it;
- 5) not be involved in the dispute or participate in the reconciliation committee.

44. SCCI Art. 4.

45. SCCI art. 4.

The objection most commonly raised by disputants concerns the impartiality of an arbitrator. This is one of the fundamental requirements of arbitration, and means basically that the arbitrator should have no personal interest in the case and not side with one of the parties.<sup>46</sup>

The A.D.C.C.I. gives the parties the right to object to the arbitrator:

It shall be permissible for any party to object to the appointment of an arbitrator within seven days from the date of notification thereof.<sup>47</sup>

The A.D.C.C.I. requires the objecting party to give its reasons to the chairman of the arbitration committee within seven day of the notification.<sup>48</sup> The arbitration committee will then take the final decision on the matter. This decision is not open to appeal and the parties are not informed of the reasons why the objection has been sustained or rejected.<sup>49</sup>

This is usually no problem when the arbitrator has been appointed by the parties themselves. Difficulties arise in cases which have been referred to the arbitration committee. Do the parties have the right to challenge a committee member on the issue of personal interest or not ? The question of personal interest may arise especially in arbitration

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46. A.J. Van den Berg, *The New York Arbitration Convention of 1958* (Kluwer 1981) p.377.

47. ABCCI Art. 35.

48. ABCCI Art. 37.

49. *Ibid* Art. 40.

administered by a committee, with arbitrators chosen from a small circle of member merchants who regularly do business with each other. This section will examine how the U.A.E. Chambers of Commerce has dealt with this point and also the guarantees which are offered to the parties.

The S.C.C.I. regulations do not mention this right specifically, although Art.5 states, at one point, that, if one of the member of the arbitration committee is somehow involved personally in the dispute, or if he is a relative of one of the parties to the dispute, he must not participate in the arbitration. This power belongs not to the parties but to the committee member concerned, and there is no explicit indication that says a party can challenge a committee member.

No problem arises when a member of the arbitration committee withdraws voluntarily because of his indirect involvement with one of the parties to the dispute; difficulties may occur, however, when a member of the arbitration committee is himself party to the dispute. The guarantee which covers the claimant in the dispute is that his opponent will withdraw from the committee.<sup>50</sup> But does this act, on the part of the committee member, ensure absolute neutrality for the other party?

The practice of Dubai and Sharjah arbitration committees in situations like this is for the member party to withdraw from the committee and for the committee to resume its work. The Chamber of Commerce focuses on the member with the direct interest, and ignores

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50. SCCI Rule Art. 5.

his committee member colleagues who may feel constrained in making any adverse decision against him. Even if the committee members try to be neutral the influence of his previous membership of the committee should not be discounted.

Thus the committee cannot be expected to be above a suspicion of bias, however unfounded it may be on particular occasions.

Nevertheless, these challenges are rare in the U.A.E. Chambers of Commerce. The parties are reluctant to disturb the good relations between the traders and members of the committee. Any such challenge is seen as a personal matter which affects not only the committee but also the members and the Chamber of Commerce as a whole. A merchant may choose to lose his case rather than challenge or reject the integrity of the committee, the reason being that such conduct on his part may affect his trade and his relations with the committee members who are the leading traders in the Emirates and the Gulf.

The arbitration system in the above Emirates must not be an instrument in the hands of a group of traders represented in the arbitration committee to do whatever they want without any supervision from the Chamber. As a result, parties to disputes avoid seeking arbitration in some of the above Chambers of Commerce. The Chamber of Commerce thought the only way to secure its future and regain the confidence of prospective clients would be to re-establish new rules regulating arbitration, as is the case in Dubai and Abu Dhabi Chambers of Commerce. But because of their unsatisfactory nature, what was supposed to promote commercial arbitration, which in essence is based on the free will of the two parties and their mutual confidence in the

institutional framework administering the arbitration process, becomes a more or less bureaucratic proceeding imposed by the arbitration committee. Following the guidelines established by international institutions is not enough to ensure the effective practice of the Chamber of Commerce arbitration system. However, they certainly need more than the imposition of outdated rules which often disregard the arbitration committee itself. The Chamber should, firstly, reconsider the power of the committee in a way which ensures an impartial trial for the parties, and the possibility of working without an arbitration committee. Secondly, most Chambers of Commerce in the Emirates fail to secure power to supervise the arbitration tribunal. The rule throughout the Emirates is that this power is entrusted to the arbitration committee.<sup>51</sup> Problems arise whenever arbitration is handled by the arbitration committee; how is it possible to handle two different tasks, both settlement and supervision?

Thus it is essential to have a higher committee with the jurisdiction to review the supervision of arbitrators' decisions and any challenges or objections that are brought before it. This higher Committee should not be made up of members associated with arbitrators or the Committee.

### (iii) Challenge to jurisdiction

Parties occasionally bring a challenge to the jurisdiction of the arbitrators before the arbitration tribunal, for reasons concerning, either the nature of the parties to the case (discussed above), or the

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51. ABCCI Art.36, DDCI Art.27.



subject matter. For example if the dispute concerns subject matter outside the rules of the chamber. In such situations, a party may challenge the jurisdiction of the arbitration committee because the subject matter does not lie within the jurisdiction of the arbitration committee.

In practice, such challenges to jurisdiction are often tactical moves intended to delay the arbitration proceedings. This has led the majority of national and international arbitration institutions to impose rules which seek as far as possible to reduce opportunities for prevarication and delay.<sup>52</sup>

The one known precedent was set in the Dubai Chamber of Commerce arbitration committee. The case was between two parties over the joint ownership of property located in Abu Dhabi. Although the parties were not members of the Dubai Chamber of Commerce, the committee accepted the case, under the clause on exceptional jurisdiction, disregarding the fact that the property in question was located in Abu Dhabi and that only the Abu Dhabi court or Chamber of Commerce arbitration committee had territorial jurisdiction.<sup>53</sup>

The respondent brought the case to the Dubai Court of Appeal, challenging the Dubai Chamber of Commerce arbitration committee decision on the grounds *inter alia* that the Dubai Chamber of Commerce

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52. For similar situation see, Anthony Hallgarten Arbitration in London, paper presented in Arbitration in Western Europe, Moscow ,5-7 June 1988 (IBA publication).

53. Case No. 1007/83 Dubai Chamber of Commerce unpublished.

arbitration committee has no jurisdiction over the dispute, since the property was located in Abu Dhabi, and the parties to the disputes were not members of the Dubai Chamber of Commerce. Secondly, the arbitration committee award involved matters beyond the scope of the submission to arbitration. The arbitrators had exceeded their authority since they had never been asked to determine the state of the partnership between the parties, but their mission was to determine the ownership of a particular piece of property. Thirdly, the arbitrators' award violated the common principles of justice because the award was not made by a majority vote. Finally, the award violated the due process of law when it was issued in the absence of the respondent.

The challenge raised by the respondent was dismissed by the Court of Appeal and the award considered valid and enforceable. The Dubai Court of Appeal considered the Chamber of Commerce's justification that the parties' signature on the arbitration agreement gave the arbitration committee jurisdiction even over subject matter arising out of Dubai. The Dubai Court of Appeal disregarded the other two challenges made by the respondent.<sup>54</sup>

The second kind of challenge to the jurisdiction of the arbitration tribunal occurs when the respondent asserts that there are circumstances which render the arbitration clause invalid, either *ab initio* or by reason of some subsequent "frustrating" event. These cases are rare in the U.A.E. Chambers of Commerce, especially in Dubai and Sharjah, because parties are required to sign a separate arbitration agreement before referring the case to an arbitration committee.<sup>55</sup>

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54. *M.A. Omran v. R.A. Omran*, The Dubai Court of Appeal Case No.196/1984 unpublished.

55. SCCI Art. 18(a).

The A.D.C.C.I., D.D.C.C.I., and S.C.C.I. Regulations do not contain any provision of the power of arbitral tribunal to decide upon its jurisdiction along the lines of *Kompetenz-Kompetenz*, the principle which states that when the jurisdiction of the arbitrator is challenged he has the right to decide upon his own jurisdiction.<sup>56</sup>

(iv) Vacancies of the arbitrators

Where a challenge is successful, or when an arbitrator dies, resigns, withdraws, is disqualified or becomes incapable of performing the duties of the office, he has to be replaced.

The S.C.C.I. Regulations are silent upon this eventuality, since the committee is the authority which handles these duties, and in the event of a vacancy occurring will fill the gap with one of its members. The A.D.C.C.I. Regulations differ from those of the S.C.C.I., in that,

In the case of refusal or death, a substitute arbitrator shall be appointed according to the same terms and condition applied to his predecessor.<sup>57</sup>

The D.D.C.C.I. follow the same guidelines introduced by the A.D.C.C.I. when granting the arbitration committee of the Chamber the right to adjourn proceedings on the case until another arbitrator is appointed, under to the same terms and conditions applied to his predecessor.<sup>58</sup>

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56. ICC Rule Art. 8(3).

57. ABCCI Art.10.

58. DDCCI Art.32.

#### 5.6.3.4 Arbitral proceedings

The regulations applicable to the arbitration procedure are those embodied in the U.A.E. Chamber of Commerce arbitration Regulations (A.D.C.C.I., D.D.C.C.I. and S.C.C.I.). Each arbitration institution provides its own regulations for conducting arbitration. In addition, arbitration institutions frequently permit arbitration under their auspices to be conducted under specified regulations. Where there is no specific ruling, this may be remedied by referral to international rules such as the Arab-Europe Chamber of Commerce, the International Chamber of Commerce (I.C.C.) or UNCITRAL Rules. An instance of this kind is seen in Dubai's arbitration procedure in which this rule applies.

##### (i) The terms of reference

The procedure commences once the Secretariat has sent the disputants' papers to the arbitrators. After receiving the papers, the arbitrators then draw up the terms of reference, on the basis of the documents presented, or in the presence of the parties. The arbitrators should undertake this task before initiating arbitration to consider the facts of the case, in order to decide if there is a case or not.<sup>59</sup>

The terms of reference in the U.A.E. Chamber of Commerce arbitration regulations take a different form. The A.D.C.C.I. specifies in Art.11:

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59. The term of reference include the following:-

- (a) the full names and addresses of the parties;
- (b) a brief summary of the fact and circumstance of the case;
- (c) a definition of the issue to be determined;
- (d) the arbitrator's full-name, description and address;
- (e) the place of arbitration.

Once the file on the subject matter of the dispute is delivered, the arbitrator(s) shall study it and set down minutes containing the purport of each disputed party, stating both agreed and controversial points and, confirming the existence of an arbitration clause...

The S.C.C.I. regulations outline the terms of reference *inter alia* in Art.18. Unlike other institutions, it grants the power to draw up its terms of reference to the Secretariat of the arbitration committee rather than to the arbitrators, and it confines its summary to the subject matter of the dispute only.

The D.D.C.C.I. Regulations are silent on this issue. However, in practice, the arbitration secretary handles the drawing up of the terms of reference, by submitting all the documents and necessary information to the arbitration committee. The main reason for this is that the committee members are often unfamiliar with procedures, which need legal and technical knowledge in order to draft such a clause.

The essential factor of the terms of reference is that they should consider whether the continuation of the arbitration is appropriate or not. Therefore I consider that they should be reconsidered in the D.D.C.C.I. Regulations and included in the S.C.C.I. in more detail and granted to the arbitrators rather than the secretary.<sup>60</sup>

#### (ii) The hearing procedure

After all papers have been prepared and the parties invited to the hearing, the members of the arbitration tribunal meet together to consult on the case. The meeting takes place on the premises of the

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60. The DDCCI consider the writer recommendation by including the terms of reference requirement in its draft.

Chamber of Commerce. Generally speaking, in the domestic sector the place of arbitration for proceedings conducted by A.D.C.C.I., D.D.C.C.I. and S.C.C.I. is their seat of operation, i.e. the premises of the Chamber of Commerce in Abu Dhabi, Dubai or Sharjah.

The arbitration proceedings are conducted in Arabic under the S.C.C.I. regulations. If the document is drawn up in a language other than Arabic, an official translation is required by an official interpreter.<sup>61</sup> The D.D.C.C.I. Regulations carry the same requirement, but include cases in which arbitration can proceed in a foreign language other than Arabic if the arbitrators accept this procedure.<sup>62</sup> The A.D.C.C.I. Regulations are more flexible, allowing the procedure to be conducted in the language of the arbitration agreement.<sup>63</sup>

The arbitrator or arbitration committee member shall hold hearing in private. Anyone having a direct interest in the arbitration is entitled to attend.<sup>64</sup>

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61. SCCI Art. 27.

62. DDCCI Art. 42.

63. ABCCI In article 25 states:

{The} language of arbitration is Arabic. Arbitrators must request litigants to translate foreign language documents into Arabic. However, it shall be permissible to conduct the arbitration in a foreign language if litigants are ignorant of Arabic, in which case Arbitration shall proceed in the language in which the agreement is issued.

64. DDCCI Art. 34, ABCCI Art.20 and SCCI Art. 20.

The arbitrators may, at the beginning of the hearing, ask for a statement clarifying the issue at hand. The claimant's party shall then present its claim, its proofs and its witnesses, who shall submit to questioning. The respondent shall present his defence, proofs and witnesses, who shall also submit to questioning.

The arbitrators may be satisfied with the documents presented to them, without having to question the parties.<sup>65</sup> The arbitrators reserve the right to request further evidence, supported by additional documents, if the evidence provided in the first instance is deemed insufficient.

In all cases arbitrators have the discretion to vary this procedure. However, they must at all times,

- (1) adhere to the common principles of justice.
- (2) respect the right of defence.
- (3) treat opponents equally and allow each party the right to examine any document produced by the other party.<sup>66</sup>

The A.D.C.C.I. Regulations state that arbitrators should work within the framework of local practice and the Law of each Emirate and of the U.A.E. as a whole.<sup>67</sup>

This section shall examine matters which arise during the course of the hearing.

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65. DDCCI Art. 40.

66. DDCCI Art. 37.

67. ABCCI Art. 24.

**(a) Attendance of arbitrators at the hearing**

The arbitrators shall attend all the hearing sessions, so that they may be able to deliver a decision on the case. The question of arbitrators' attendance or participation in the hearing is not a problem in cases where the arbitral tribunal consists of either three arbitrators or only one. Difficulties arise in institutions which embrace committees or tribunals with more than three members often busy merchants with their own business affairs to attend to. This problem is more obvious in Dubai and Sharjah, where claimants and their opponents are not permitted to choose their own arbitrators. In Abu Dhabi, however, it is a different matter, since each party has the option to choose its own arbitrator.

The success of the arbitration procedure depends on the attendance of all members of the committee at all meetings. Poor attendance by the members increases the possibility of failure. There are other reasons for failure:

- (1) The size of the committee, given that the Dubai Chamber of Commerce consists of nine members while Sharjah consists of seven, all leading traders in the Emirates.
- (2) The arbitration members are not devoted to their assignment, since they all have substantial interests.

The rules and practice endeavor to find solutions to these problems.

One solution introduced by the Dubai Chamber of Commerce is the "*summary review*", a method which allows the absent members to keep abreast of events, by furnishing them with a summary of what has taken place in their absence. However, it does not give them the



opportunity to examine documents or cross-examine witnesses. The method is deficient because the arbitrator depends totally on the summary of the matters which the secretary deems to be significant, thus missing first hand experience of the case. Obviously what one person, the secretary, thinks important may not seem to be of value to another. This method leads to an artificial decision taken by members based on a summary of the facts rather than on reality.

The second method, introduced by S.C.C.I. Regulation Art.18, is the "*majority principle*". This principle gives the committee the power to try the case without all members necessarily being present. The case may be heard by a majority of members, which include the chairman and vice-chairmen of the arbitration committee. However, this method has the same drawbacks as the one mentioned previously: a member may miss one session and attend another, and the decision he makes may ultimately be an uninformed one.

It would seem that there is no clear solution to the problem of non-attendance of members at the arbitration hearings. One alternative may be to reduce the number of members from nine or seven to three, thus facilitating the hearing and expediting the case.

A practical solution would be to replace the arbitration committee with an index of qualified arbitrators in the U.A.E. and the rest of the world from which the disputants can choose their particular arbitrators, and the two arbitrators can then appoint an umpire. In case the arbitrators disagree upon the choice of the umpire, the choice will be made by the Chamber of Commerce.

(b) Default

In the event of a party's failure to attend the hearing at any stage, even though summoned, and in the event that the arbitration committee is satisfied that the party has been absent without a valid excuse, the committee shall have the power to proceed with the arbitration, and the proceedings shall be deemed to have been conducted in the presence of all parties.<sup>68</sup>

Similarly, if one of the parties is late in presenting its reply to its opponent's claim, the latter's claims shall be considered as a presumption in his favour, unless the contrary is proved.<sup>69</sup>

(c) Interim-measure

Because of the large sums of money which may be involved in arbitration, and because of the length of the arbitration proceedings, there is strong pressure on the parties to seek an interim measure. The question is, who grants such a right, the court or the arbitral tribunal?

Opinions on this issue are varied. Some international institutions allow for interim measures to be sought from the court, either before the constitution of the arbitral tribunal or afterwards.<sup>70</sup> Others grant the arbitrators restricted powers, the power to issue orders based on necessity as is the case in the American Arbitration Association (A.A.A.) regulations in which the text was re-phrased,

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68. DDCCI Art. 31, SCCI Art.24

69. ABCCI Art. 19.

70. ICC Rule Art. 8(5).

as may be deemed necessary to safeguard the property which is the subject matter of the arbitration.<sup>71</sup>

Arbitrators, under the auspices of the U.A.E. Chambers of Commerce arbitration system, are granted various powers and can order a case without reference to the domestic court. The arbitrator can subpoena witnesses or documents; he can do this on his own initiative or at the request of any of the parties.<sup>72</sup>

The D.D.C.C.I. Regulations go one step further, by offering the arbitrator precautionary power. The arbitrator may issue such an order if it is deemed necessary to safeguard the property which is the subject matter of the arbitration without prejudicing the right of other party.<sup>73</sup> The drafters of the D.D.C.C.I. were in error in thinking a private institute can order such a power. In order to have such a power, the institute who claims it should enjoy the backing of the state *imperium*. Therefore the Chamber of Commerce arbitrators should apply to the court for an interim-measure; without a court order, the arbitrators cannot mandate one.<sup>74</sup>

#### (d) The Experts

The arbitrators or arbitration committee may sometimes consult experts for the purpose of clarifying technical questions, other special matters, or business practice.

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71. AAA Rule Art. 34.

72. DDCCI Art.35, SCCI Art.22, ABCCI Art. 12.

73. DDCCI Art.41.

74. See the argument of this issue in Chapter 6 at pp. 205-206.

In this respect, the U.A.E. Chamber of Commerce regulations are varied. The S.C.C.I. regulations grant the arbitration committee the power to appoint an expert to assist the arbitration committee.<sup>75</sup> The S.C.C.I. disregards the parties' right to appoint an expert. The regulations are not clear on the procedure which should be followed when appointing experts.

The D.D.C.C.I. and A.D.C.C.I. Regulations are better organized than the S.C.C.I. regulations. The D.D.C.C.I. gives the arbitration committee or the arbitration tribunal discretionary power to appoint an expert, at the request of one of the parties. If necessary, the tribunal shall determine expert's terms of reference, state the time in which he shall have to present his report, and shall fix his fees.<sup>76</sup>

The D.D.C.C.I. and A.D.C.C.I. Regulations seem reluctant to state the more particular requirements of procedure comprehensively. It is thus for the committee or the tribunal which handles the arbitration, to fill the procedure gap as regards the appointment of an expert. For example, the parties right to hear and interrogate the expert; the question of his impartiality, and the power to challenge it.

(e) Closure of the hearing

The U.A.E. Chambers of Commerce arbitration regulations do not discuss this issue apart from Art.22 of A.D.C.C.I. Thus I shall refer to the international rules applied by the resolution of disputes institutions.

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75. SCCI Art. 22.

76. DDCCI Art.36, ABCCI Art.15.

When the arbitrators are satisfied that the parties have no further proofs to offer or witnesses to be heard, they shall declare the hearings closed, and minutes will be recorded and agreed.<sup>77</sup>

In exceptional circumstances the hearing may be reopened at the discretion of the arbitrators, or upon a petition from a party any time before the award is made.<sup>78</sup>

#### 5.6.5 The decision of the arbitrators

The hearing of the case shall be completed by the making of an award or the reaching of a settlement. A ruling to terminate the proceedings shall be given, in particular, in cases where the parties settle their disputes during the course of arbitration. The arbitration tribunal, upon their request, may set forth the terms of the agreed settlement in an award.<sup>79</sup>

The arbitrator's decision should meet the following requirements, in order to be deemed valid. The first requirement concerns the time limit of the issuance of the award. The time limit is not observed in the D.D.C.C.I. and the S.C.C.I. Chamber of Commerce because of the time a case usually takes to arbitrate, which can be attributed to some extent to the parties participating in the arbitration.<sup>80</sup> This has lead some Emirates to restrict the time limit of the issuance of the award. For

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77. AAA Rules Art.35, UNCITRAL Art. 29(1).

78. AAA Rule Art. 36.

79. DDCCI Art.30

80. See the attendance of arbitrators in the hearing, discussed above.

example the D.D.C.C.I. Regulations require that the arbitration tribunal should promptly settle upon the award no later than ninety days beginning from the date of commencing proceedings. The arbitration committee of the Chamber may extend the time if it deems this necessary.<sup>81</sup> The A.D.C.C.I. Regulations differ from the D.D.C.C.I. Regulations from the point of view of the time limit. The A.D.C.C.I. Regulations require the issue of the award within a period of a maximum of one month from the closing of the hearing.<sup>82</sup> The S.C.C.I. regulations have no provision regarding the time limit for the arbitration committee to issue the award. Secondly the form of the award is required to be given in a certain form.<sup>83</sup> Finally, the arbitrators' decision should be based on the majority vote of the arbitrators.<sup>84</sup>

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81. DDCCI Art.44.

82. ABCCI Art. 23

83. The award shall be in writing and it shall contain the following:-

- (1) A summary of the litigation hearing and claims involved
- (2) points of dispute (subject matters)
- (3) replies to the points of dispute
- (4) decision regarding the party which has to bear expenses of arbitration and legal expertise.SCCI Art.31 , ABCCI Art.23  
i.e,( the one against whom costs are awarded)

The SCCI Rule adds a further requirement for the aforementioned by requesting the arbitrators to state the reason for the award, including the ruling, date of issue, and the signature of the chairman, vice-chairmen and the rest of the members.SCCI Art.30

84. The ABCCI art.26 considers the voting system on the award in two categories. The first if the tribunal consists of three members, they shall take a majority vote on the case. In the case of disagreement the chairman of the panel refers the case to the Chamber of Arbitration and Trade Practice Committee to obtain its opinion on the case; this decision is not obligatory. If the committee fails to deliver a decision on the case the award shall be made by the chairman of the arbitration tribunal alone, and he shall submit the reason for which he made his award. The second category states where the case is referred to the arbitration committee, the decision should be made according to the majority vote of the members.The SCCI Art.29 and DDCCI Art.9(b) came similar to the ABCCI Rule Art.26.

#### 5.6.6 The enforcement of the award<sup>85</sup>

As provided in the U.A.E. Chamber of Commerce arbitration rules the award is final.<sup>86</sup> However practice reveals the opposite to be the case: the parties' agreement to consider the decision of the chamber as final, does not deprive them of the power of appeal to the court.<sup>87</sup>

The parties' agreement to refer their case to arbitration does not prevent one of them from having the right to resort to the court. It may request assistance from the court, if the other party refuses to abide by the award, or simply because the decision of the arbitration committee did not find in its favour. This means that, in practice, the arbitration clause in many of the Chambers of Commerce arbitration tribunals is merely a formality which may be set aside and the case referred to the court. These matters should be reconsidered on the grounds of coordination between the Chamber of Commerce and the court, by distributing the powers between them as follows: firstly, the court has the jurisdiction of appeal if the award is made in error, or in violation of the law. Secondly, to assist to party in whose favour the award is made. This coordination will ensure the speedy and confidential issue and enforcement of the award, and shall pre-empt any procedural delay. Also it will reduce the pressure on the courts which complain of the increase of cases. Enforcement of the award may take place at the Chamber of Commerce or in the court.

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85. The enforcement in this context relating to the Chamber of Commerce.

86. SCCI Art. 33.

87. See chapter 6 the power of appeal at pp. 274-277.

*(i) The enforcement of the award under the auspices of the chamber:-*

Once the award has been duly signed by the arbitrator or the committee members, the arbitration award shall be deposited with the Secretariat of the arbitration committee, and it should be registered on the day of issue.<sup>88</sup>

The Secretariat shall furnish both parties a copy of the arbitration award, which will be enforceable upon the payment of the arbitration fees.<sup>89</sup>

If the dispute was referred to the court from the Chamber of Commerce a copy of the award shall be sent to the court within three days of the issue of the award.<sup>90</sup>

The parties shall enforce the arbitration award by mutual consent. In case one of the parties refuses the voluntary enforcement, the other party may have the right to request execution of the said award from the competent court.<sup>91</sup>

This is the case in the U.A.E., where one of the parties is a foreigner and there is no security imposed upon him if he refuses to comply with the award by not paying the sum asked by the arbitrators.

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88. ABCCI Art.28, DDCCI Art. 44.

89. DDCCI Art. 44 , SCCI Art.32, ABCCI Art. 29.

90. SCCI Art. 32.

91. DDCCI Art.45, ABCCI Art. 30, SCCI Art. 35.



The only procedure which will be taken against him is by boycotting his company. This applies if his company operates outside the jurisdiction of the Emirates.

(ii) *Enforcement of the award by the competent court.* If one of the parties refuses the voluntary execution, the other may resort to the court for enforcement by law.<sup>92</sup>

## 5.7 Observations on the arbitration system under the U.A.E. Chamber of Commerce.

The following analyses will cover some cases which come under Sharjah and Dubai rules. The Abu Dhabi rules are quite new, therefore I shall only examine cases under the Sharjah and Dubai systems.

(1) The unpredictability of the arbitration committee decision. Unpredictability is due to different factors which interfere in arbitration proceedings. Some of these factors relate to Committee itself, regarding the number of the committee members, their attendance and the difficulty of this number to reached a decision. The second factor is an internal one, which concerns interference by the Secretariat and its affect on the decision of the committee. In S.M. Ibrahim v. L.H. Hamdan (The *Emir Restaurant* case),<sup>93</sup> the plaintiff bought from the defendant a share equal to 50% of the "Emir" Restaurant and its accessories in Vienna on 22.11.1986, for the sum of US\$.80,000. A deed of sale dated 22.1.1987 was concluded in Sharjah, U.A.E. and attested by the Notary Public of Sharjah Court. After sometime the two parties agreed to the

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92. See chapter 7 the enforcement of arbitral awards.

93. The Dubai Chamber of Commerce Arbitration Committee, Case No. 1891/87 unpublished.

sale of the other 50% share of the restaurant from the defendant to the plaintiff, which was actually concluded on 20.5.1987 by a new sale deed for the sum of US\$80,000. The plaintiff paid the amount to the defendant. It was provided in the said sale deed that the entire right of the profitable use of the whole restaurant devolved to the plaintiff. After concluding the second contract, the plaintiff asked the defendant to transfer to his name the trade licence and the rent deed of the restaurant, but it was discovered that the defendant did not have a trade licence to exploit the restaurant, and also had no right to assign the rent contract in his name, but had rented the restaurant from an occupant of the restaurant. Moreover, the Austrian authorities concerned had previously refused to issue a trade licence to the defendant, and the owner of the restaurant premises to the defendant, and the Municipality authorities ordered eviction of the defendant and the closing of the restaurant.

The plaintiff brought a suit before the Dubai *Shari'ah* Court, which upon the request of the parties, referred the case to the Dubai Chamber of Commerce. The plaintiff applied for the Arbitration Committee for either:

- (a) The specific performance of the two above mentioned sale deeds by transferring the ownership of the whole restaurant to him free from any encumbrances, or
- (b) The rescission of the sale and the return to him of all money paid to the defendant.

The defendant denied the plaintiff's claim *in toto* by alleging that the plaintiff knew that he (defendant) has no trade licence and has no rent contract in his name and the plaintiff knew all the legal problems related to the restaurant.

In this stage an extraneous factor emerged to affect the decision making process, for the Chamber Secretariat was asked to summarize the case. Summarizing the case led to the possibility of the Secretariat considering some of the facts and ignoring others which the Secretariat felt were not important. We may presume that the arbitrators did not know all the facts except those summarized by the Secretariat. Not only did the Secretariat produce their summary but went further, as usual, by giving its decision on the case. The Secretariat introduced a decision which had a great affect on the arbitration committee.

The Secretariat wrote that the seller (the defendant) did not have any title to anything which he had sold, namely he did not have a trade licence empowering him to exploit the restaurant, nor the right to transfer the rent deed to another, as he himself did not have a rent deed in his name. The Secretariat concluded that, as a consequence, the plaintiff (the buyer) bought non-existent right and he had only the right to the furniture of the restaurant, and that the plaintiff - as a result of his eagerness to earn great profits in Vienna - was rash enough to buy the first half of the restaurant, and that as a result of the inability of the defendant to participate due to accumulation of debts, he (the plaintiff) was greedy enough to buy the other half of the restaurant.

This conclusion rendered by the Secretariat was enough for the arbitration tribunal to determine the dispute in favour of the defendant, whereby the plaintiff was ordered to pay the defendant the amount of the cheque he stopped when the allegation started.

The arbitration committee by this decision, disregarded significant points of the transaction. The defendant did not have the right to exploit the restaurant (he has no licence for that) and had no right to sublet the premises of the restaurant (as himself does not have a rent contract). It follows that the seller (the defendant) sold what he does not possess and cannot, consequently, execute his obligation to deliver what he sold. As a result, the sale contract should be rescinded in accordance with Art.272 of Law No.5/1985 concerning the Federal Civil Transactions Code. In addition, the two parties should return to the *status quo ante*, before the conclusion of the sale contract. This means, in essence, that the seller (defendant) should refund the sale price to the buyer (plaintiff).<sup>94</sup>

(2) The above decision to some extent did not represent the actual arbitrators' intentions, due to the intervention of Secretariat opinion in the arbitration process.<sup>95</sup> By using private legal consultants, the some members of the arbitration tribunal, without a legal background, attempted to involve individuals not included in the dispute, in the arbitration process, disregarding case confidentiality.

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94. See the dissenting opinion of the case.

95. See the *Emir Restaurant* case, (*op. cit n. 93*).

(3) The Chamber of Commerce arbitration committee are sometimes involved in a matters which do not come under their jurisdiction and in some cases they even violated general rules of jurisdiction.<sup>96</sup> In G.E.C.O. v. Singer<sup>97</sup> , (The Singer) G.E.C.O. has been acting as the exclusive distributor for Singer products in the U.A.E. sine 1980. Some time in 1988, Singer attempted to appoint a new agent in the U.A.E. G.E.C.O. become aware of this and complained to Sharjah Chamber of Commerce about Singer's conduct. After receipt of the complaint, the Chamber of Commerce reviewed all the documents in the case. The Chamber of Commerce arbitration committee was not satisfied by referring the case to the competent authority which was the Ministry of Economy dismissed the case because it is out of its jurisdiction. The issue in the case related to a commercial agency dispute which is regulated by the U.A.E. Trade Agencies Federal Law 18/1981 Art. 28. This law banned any settlement in this regard except through the tribunal prepared for such purpose,<sup>98</sup> under the competent jurisdiction of the Ministry of Economy.

## Conclusion

The chamber of commerce is valuable and worth preserving. Nonetheless, there needs to be a balance between retaining the social nature of the chamber of commerce and at the same time making more efficient and predictable its way of solving business disputes. It has proved capable, to some extent, of solving disputes brought before the

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96. *M.A. Omran v. R.A. Omran*, (op. cit 54).

97. Sharjah Chamber of Commerce Case No. 2/1989, unpublished.

98. See chapter 4 forms and Nature of Arbitration at p. 140.

arbitration committee and reaching a settlement between the parties. The arbitration system of the Emirates is closer to a conciliation system rather than to arbitration.

Most cases solved by the Emirates' arbitration committee have been in the form of conciliation, even though they may have been introduced as candidates for arbitration. The arbitration committee members try not to decide in favour of one party, but rather to bridge the gap between the parties' points of view and reach a settlement that satisfies all concerned in another word a system of splitting the lost rather than to convicted one of the litigants. But sometime, conciliation is not always enough; in a business dispute one party is right and one party is in the wrong but we want a system which is able to say that someone is in the wrong and must pay, but to be able to do so in such a manner as to remove the antagonism of the debate. At the same time it should still have the element of conciliation which, nonetheless, should not preclude finding that someone needs to pay money and find that he is in the wrong.

Thus, the effectiveness of these dispute resolution institute cannot be solely attributed to the system alone, but rather to external factors which affect it, or intervene in its working, including:

Firstly, the nature of the parties, who come from trade groups, and are often reluctant to challenge a senior member of their own group in court. This is partly due to the cultural background, and partly to the commercial system, in which the member may be handling most of

the transactions for the U.A.E. To issue such a challenge may be deemed a personal insult, which could be prejudicial to future transactions.

Secondly, the lawyer who represents the parties before the arbitration committee must be aware of the need for diplomatic tactful handling of the case. His approach to the committee must not be in the nature of confrontation. As a result, the lawyers encourage and assist the work of the arbitration committee, rather than oppose it.

Finally, whereas the duty of the Secretariat of the Chamber of Commerce is to elucidate and correct points of law, in practice it seldom does so. This results in many decisions which are inequitable. Without the influence of these factors, the system become less effective.

## Chapter Six

### U.A.E. Court and the Arbitration Process

#### Introduction

It has been said that the national attitude towards arbitration is the key factor in determining how attractive a country is as an arbitration forum. The attractiveness of the forum for arbitration is related to the degree of independence from the judiciary that the arbitration process enjoys.

Supporters of arbitration see the Court's judicial review as a threat to arbitrators' decisions and destroying the primary objective of arbitration. Court intervention is seen only as a means of delaying the implementation of the award.

Parties, when they refer their disputes to arbitration, intend to restrict court interference in the process, or to oust the court jurisdiction from the case. But granting the parties power to take their case to arbitration is not unlimited; for example, when a complex legal issue is involved in a dispute submitted to arbitration, the court may feel that only it has the expertise.<sup>1</sup>

The court intervenes in different ways in the arbitration process. There are two opposing facets of the court relationship with arbitration, both supportive and controlling. It may support the arbitration in determining points of law, for example, for governing and issuing an

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1. Of course, this would not be the case where the dispute involves a large scale of international commercial arbitration and where the one or more of the arbitrators is an eminent lawyer.



award which might need clarification by the court, both to provide arbitrators with court backing, and to avoid a parallel body of case law building up. Or a court might appoint arbitrators, where one of the parties refuses to appoint his own arbitrator, or where the parties refuse or disagree to appoint an umpire. Likewise, the court may support the arbitration by staying litigation, where one of the parties has refused to honour the arbitration agreement, by commencing legal proceedings against other parties. The court may specify a time-limit for submitting to arbitration.

The courts which control arbitration and awards share two characteristics; they assist the arbitration to its ultimate conclusion i.e. enforcement of the award, but also provide an opportunity to oppose its implementation. The range of options depends on the nature of the complaint and relief sought; possibilities included are rectification, interpretation, hearing appeals, and remitting or setting awards aside, where appropriate.

The relationship of the U.A.E. courts to arbitration may be different from that of the English courts, in the sense that arbitration in the U.A.E. is usually initiated from or through a court. Usually, a case is referred to arbitration during a suit, or an arbitration agreement is registered with the court.

The object of this chapter is to give a conspectus of the main powers, controls and procedures which the U.A.E. courts exercise over arbitration.

## 6.1 The reality of the relationship between arbitration and the court

In general, the relation between arbitration and the court is determined by to the concept of arbitration in the country where the arbitration takes place. Since the development of arbitration, many theories have been introduced in favour of settling disputes by arbitration out of reach of Court interference, and seeking to shut out Court jurisdiction in matters of reviewing arbitration.<sup>2</sup>

This is not the case under the U.A.E law and practice. According to the prevailing opinion of the U.A.E. courts, decisions and legislation, the relationship between the court and arbitration differs from one case to another, depending on the form of arbitration.<sup>3</sup> In the case of a matter referred to arbitration by a court, the arbitration tribunal is seen as subordinate to the former. The court's agreement to refer all subject matter of the dispute, or part of it, to arbitration does not imply the abandonment of a case, but rather the adjournment of a decision, pending the arbitrator's finding. The court has comprehensive jurisdiction over the dispute, in which it can intervene at any time during arbitration. All matters referred to arbitration by the court therefore should in the U.A.E.<sup>4</sup> take place ultimately at the will of the court.

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2. See chapter 1 The Nature of Arbitration.

3. See Chapter 4 law and Practice in the U.A.E., at pp. 140-142.

4. *Infra*.

Where parties to an arbitration agreement apply to a competent court to register the agreement containing the relevant arbitration clause, the court's power to intervene is limited to ensuring the effectiveness of the arbitration. This may include supervision of the arbitration procedure, and staying the procedure, if one of the parties challenges the arbitration clause.<sup>5</sup>

The relationship of arbitration to the court takes an objective form in contractual arbitration. Then the court intervenes only to enforce an arbitration award where one of the parties refuses co-operation.<sup>6</sup> The Dubai Court of Appeal showed the limits of the court's powers over contractual arbitration when it stated:

... the court, when reviewing an arbitrators decision, did not intend to interfere in the subject matter nor to modify it, but rather to ensure that arbitrators followed the proper legal procedure in delivering their decision.<sup>7</sup>

Jurisdiction is limited, to the court ensuring that an arbitration tribunal is proceeding in the right way, and assisting a tribunal where it requires to invoke a measure beyond its jurisdiction.

## 6.2 The Rationale of the Court's Intervention

One of the variable factors relevant to the court-arbitration relationship is the rationale which informs a courts' interference with private proceedings. There is obviously a great deal to be said for the proposition that, where parties have disputes and they want them

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5. A.D.C.C.P. Art.95-98.

6. A.D.C.C.P. Art.97-98.

7. *A.K.Al.Ababidy v. L. Commodities (Dubai) Ltd*, The Dubai Court of Appeal Case No.260/1985, unpublished.

resolved by arbitration, the resulting award should reflect legal rights and obligations. If an award is based on a mistake by arbitrators or based on incorrect legal premises, a court can intervene to amend this mistake, or to challenge an award which was delivered upon an error in law. This may be seen as the fundamental reason for the court's intervention.

The basis of the court's intervention in the arbitration proceedings can be a matter of differing emphases. For example the traditional view of the English system, prior to the Act of 1979, was that exclusion of review power was impermissible under Common Law, and the Courts reserved for themselves the right to adjudicate upon the dispute. Any ouster of court jurisdiction was seen as an attempt to create an "Alsatia" immune from supervision from English law.<sup>8</sup> The traditional view of the Court was that arbitrators were persons untrained in law, thus there was every probability of the arbitration going wrong. Thus judicial control of arbitration was considered a matter of public policy and no agreement might circumvent the jurisdiction of the Court; at most Court jurisdiction could only be deferred. In Scott v. Avery<sup>9</sup> the express view was that a clause excluding court review did not oust the Court's jurisdiction but only deferred the exercise of jurisdiction until an award had been made by arbitrator.

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8. "there must be no Alsatia in England where the King's writ does not run." *Czarnikov v. Rothschild & Co.*, [1922] 2 K.B. 478-488.

9. [1856] 5 H.L. Cas. 811.

The general approach of U.A.E. jurisprudence aligns with the English traditional view, in holding that no agreement can oust the Court's jurisdiction. In G. Steel Co. v. International Steel Co.<sup>10</sup> in a landmark decision the U.A.E. Supreme Court held that:

...court jurisdiction was not ousted by referring the case to arbitration, but extended its power, to review an arbitrators decision.

Court interference is based on the principal legitimising document used by the arbitrator: the contract. Whenever the arbitrator acts outside the limits of this contract, he opens a way for the Court to interfere, whether in the U.A.E. law system or elsewhere.<sup>11</sup>

### 6.3 Timing of Court Intervention

The timing of Court intervention is important and relevant, especially before submission of the award. If the arbitrator ignores his duties or exceeds his jurisdiction, the court may remove him before submission of the award. Any award made in this situation would be considered null and void. The court may order that any money made payable by the award shall be brought into court. The court may interfere before, during or at the end of arbitration.

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10. The U.A.E. Supreme Court Case No. 138/10 unpublished.

11. See in this respect. Donaldson L.J. Judicial Review of awards; Mustill J. The partnership between the commercial court and arbitrators, Seminar on Proceeding of Form London, I.B.A. 23-26 September 1981, London, (I.B.A. publication 1982); Becker D. Joseph, "The supervisory and adjunctive jurisdiction of American Courts in arbitration cases" reported in *Contemporary Problems in International Arbitration* Edited by Lew J.D.M. (London 1986) p. 207.

### 6.3.1 Before the Commencement of arbitration

The court's role is to enforce compliance to an arbitration agreement, where one of the parties refuses its enforcement or stays the procedure, or where one of the parties takes the case to the court. The court may assist by appointing arbitrators, where the parties do not agree on this issue.

#### 6.3.1.1 Stay of Court proceedings

Any party to such legal proceedings may, at any time, apply to the court to Stay the Proceedings.<sup>12</sup> Where any party to an arbitration agreement refuses to honour an arbitration agreement, by commencing legal proceedings against another party, or against any persons claiming under the agreement in respect of any matters agreed to be referred to arbitration, U.A.E. legislation empowers the court which has the jurisdiction, either to decide a dispute or to refuse to do so, if an arbitration agreement exists.<sup>13</sup>

The court will not give effect to an arbitration agreement, unless one of the parties claims its existence. If an action is brought and no objection is made by the other party at the first hearing, the action may proceed and any arbitration clause shall be deemed null and void.<sup>14</sup>

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12. *B.D. Navigation Agencies and Others v. I. Insurance Co.*, Dubai Court of Appeal, case No. civil 207/1989; 212/1989, unpublished.

13. The U.A.E. F.D.C.C.P. Art.201(5), S.A.A. Art.2(5), A.D.C.C.P. 95(2).

14. F.D.C.C.P. Art.201(5).

Parties seeking arbitration may petition the court with competent jurisdiction under A.D.C.C.P., Art.95(2), to enforce an arbitration agreement. Art. 95(2) states that in the U.A.E. arbitration differs as between rules in the Emirates and under federal legislation. There are no provisions under Dubai law dealing with reluctance by a party to honour an arbitration agreement, and one can only assume that the matters would be settled at the discretion of a court. It appears that a court will Stay the Procedure in matters which are subject to a valid arbitration agreement. The Sharjah Court of Appeal expresses this point:

Parties' agreement to refer the dispute to arbitration prevents the court from exercising its jurisdiction over the case.<sup>15</sup>

**(i) Requirement for granting a Stay:**

Generally in the U.A.E., before a court order for the Stay of Procedure is made, the court should ensure that the following conditions are satisfied:

(1) There must be in existence a written arbitration agreement.<sup>16</sup> The reasons for requiring a "written agreement" are simply that, by agreeing to arbitrate, a party waives, in large part, many of his normal rights under procedural and substantive law of an Emirate. It would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent.<sup>17</sup>

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15. Sharjah Court of Appeal Case No. 125/1979. Published at (1982) 32 *Al-adalah*, p.56.

16. F.D.C.C.P. Art.201(2); Sharjah Arbitration Act sec. 2(2).

17. F.D.C.C.P. Explanatory Memorandum Art.200.

(2) If the court is to exercise its power to Stay the Procedure, there must be a valid arbitration agreement. A party alleging invalidity has the burden of showing why the agreement to arbitrate should not be enforced. The court may invalidate an arbitration agreement if the procedure agreed upon is considered frivolous or cannot reasonably be implemented.<sup>18</sup>

(3) The court will not order a Stay, if this is not requested at the appropriate time by one of the parties to the arbitration. If a party was silent and allowed court proceedings to commence, the court considers this amounts to a waiver of the right of arbitration. The applicant for a Stay must show that from the commencement of the proceedings that he was ready and willing to do everything necessary for the proper conduct of arbitration.

The Dubai Court of Appeal refused to grant a plaintiff the right to Stay the Proceedings in a dispute between a navigation company and an insurance company. The navigation company brought a suit before the court. The insurance company challenged the suit, under the statute of limitation, but the arbitration clause was quoted only as a secondary challenge. The defendant claimed that the case was lost by prescription. The Dubai Court of Appeal denied the Stay of Proceedings under the arbitration clause because of:

The failure of the defendant to emphasize the question of an arbitration agreement before the Proceeding and the raising of the statute of limitation, constitute his failure to be ready and willing to do all things necessary to the proper conduct of arbitration; since he used the power as auxiliary, therefore he is not entitled subsequently to apply for a stay.<sup>19</sup>

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18. The Abu-Dhabi Court of Appeal Case No. retrail 81/1981 published at (1982) 31 *Al-adalah* p.86.



**(ii) Circumstances precluding right of Stay of Court Proceedings.**

The court may refuse to grant Stay of Proceedings and we shall examine the reasons for this. Neither U.A.E. federal nor local law has specifically provided for cases where the court refuses to grant a Stay. A Stay can be deduced from F.D.C.C.P.Art.201 and the Sharjah Arbitration Act, section 2, which require a case to be referred to arbitration.

*(1) A court may refuse to Stay the Proceedings:*

(a) If a court is satisfied that an arbitration agreement is null and void, or incapable of being performed. A court should ensure, before referring a case to arbitration, that there is a valid arbitration agreement. The essential effect of an arbitration agreement is that it excludes the jurisdiction of courts upon a dispute which enters into its domain. Accordingly, a court must declare its lack of jurisdiction in a dispute, if one of the parties claims the existence of an arbitration agreement and claims a stay of procedure. A court, before granting a stay of procedure, should ensure the validity of an arbitration agreement.<sup>20</sup>

The question of the validity of an arbitration agreement appears to include, not only cases where parties did not reach an agreement on referring the case to arbitration, but also cases where an arbitration

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19. *B.D. Navigation Agencies v. I. Insurance Co., (op. cit n. 12).*

20. *B. Exports Services Ltd. Co. v. R. A. Co., The Dubai Court of Appeal Case No. civil 261/1984 unpublished.*

agreement exists but has become void *ab initio*. For example, the parties may invoke foreign law to govern their arbitration agreement, in order to avoid restrictions imposed by their own national law. An instance is the use of interest, which is banned in some Muslim countries, according to *shari'ah* law. In theory contracts which include an arbitration clause that contain an element of interest are contrary to *shari'ah* law. In practice in the U.A.E. a court will be concerned with the rate of interest rather than the principle of interest itself. A U.A.E. court may refuse to enforce an arbitration clause included in a contract with interest calculated at a rate in excess of that permitted under the law of the Emirate where the enforcement is sought.<sup>21</sup>

(b) Where an arbitration agreement although not void is incapable of being performed despite the fact that the parties are ready, able and willing to perform the agreement. For example, where a sole arbitrator named in the agreement cannot or will not to be able to act.

In T.S. Constrictions Co. v. I.B.B. & Partners Ltd Co.,<sup>22</sup> the claimant entered into a subcontract with the respondent, and the parties agreed to refer any disputes arising under the agreement to arbitration. The parties agreed in the arbitration clause, to grant the U.A.E. Federal Supreme Court the power to assign an arbitrator for any dispute that might arise. The respondent brought a suit before the Dubai Court, for the court to appoint an arbitrator. The court appointed a sole arbitrator. The claimant challenged this decision before the Dubai

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21. *Janatta Bank v. Najib Transportation and Construction Co.*, The U.A.E Supreme Court Case No. Civil 40/2.

22. The Dubai Court of Appeal case No. civil 217/1983 , unpublished.

Court of Appeal, alleging that the jurisdiction to assign arbitrators was confined to the U.A.E. Federal Supreme Court, and that the decision of the Dubai court, to assign an arbitrator, was an error of law. The Dubai Court of Appeal ruled that:

the jurisdiction of the Federal Supreme Court was exclusive of arbitration rules and it did not have within its jurisdiction a power to appoint an arbitrator. Therefore the agreement is incapable of being performed.

The Sharjah Court of Appeal followed the same decision reached by the Dubai Court of Appeal, in a dispute between two parties over a case of real-estate. The parties agreed to refer the case to arbitration and a sole arbitrator was named in the agreement. The person chosen by the parties refused to act as arbitrator. A court considered the refusal of the arbitrator vitiated the agreement and therefore revoked the arbitration. The case was referred to a court of competent jurisdiction.<sup>23</sup>

(c) A dispute must fall within the scope of arbitration. For example, if the parties agreed to refer any financial disputes arising under an agreement to arbitration, this means that the agreement shall exclude any dispute which is not of a financial nature.

(d) The parties, in order to be entitled to stay the proceedings, should claim that an arbitration agreement exists and request the court to stay the proceedings. Without this request, a court will consider the parties to have waived their right to arbitration. A court is under no obligation to support an arbitration agreement.<sup>24</sup> Failure to make

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23. *A. Real-Estate Agencies v. M. D.* The Sharjah Court of Appeal case No.83/1979, published in Abdudlah R. Hilal Collection.

reference to specific disputes in a submission for arbitration or in subsequent pleading, results in the annulment of an arbitration agreement.<sup>25</sup> Waiver of arbitration can be expressed or implied. It can be superseded by the parties' expressed or implicit intention to apply to a court to try the case, without one party claiming a stay of procedure. This can invalidate an arbitration agreement.<sup>26</sup>

(iii) **Discretionary Stay:** A court has a general discretion, under A.D.C.C.P., Art 82(1) and the Sharjah Arbitration Act (S.A.A.), 2(1), to stay proceedings in a law suit brought before a court, and to refer a case to arbitration. The requirement of a discretionary Stay is summarized by A.D.C.C.P., Art 82:

(a) There is a case before a court. In any suit all parties interested must agree that any matters in issue between them shall be referred to arbitration. They may, at any time before the judgment is pronounced, apply to a court for an "order of reference", to arbitration.

(b) The parties, or one of them, should ask a court for a referral of some, or all, of the matters relevant to the arbitration.<sup>27</sup>

(c) Every application should be in writing and should state the matter which is to be referred.<sup>28</sup>

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24. *O.O.S. G. v. S. Insurance Co.*, The U.A.E. Supreme Court Case No. 56/4, published in (1983) 37 *Al-adalah*, p.110.

25. *B. Exports Service Ltd. Co. V. R. A. Co.*, (*op. cit n. 20*).

26. *Ibid.*

27. *General Prosecutor v. S. F. Est. and A.M.A. Al.Hmaday*, The U.A.E. Supreme Court case No. 145/7, unpublished.

28. *Ibid.*

"Discretionary Stay" does not imply that a court loses its jurisdiction over a case. Rather, the stay constitutes an adjournment of a court's decision, pending an arbitrators' issue of their finding upon the matters referred to them. This is in order to avoid any contradiction between court and arbitrators. A court has comprehensive jurisdiction in this kind of arbitration (judicial), in that it can revoke or annul a stay and try the case.<sup>29</sup>

#### 6.3.1.2 Power of Court to appoint an arbitrator

Where the contract provides for arbitration in the event of a dispute, typically a clause specifies the the method of choosing arbitrator(s). Parties specify the way in which arbitrators should be selected, or place the nomination in the hands of someone in an official position, such as Chairman of a Chamber of Commerce, or a judge in a court of first instance. The difficulty arises where the parties fail to do this. This failure can be attributed to several possible factors:

(1) Linked to the parties; parties usually specify the method by which arbitrators shall be appointed or specify the name of the arbitrators in the agreement. But the agreement may not specify the way in which arbitrators should be assigned. For example, determining the mechanics of appointment may be postponed during the drafting of the substantive agreement. Or, the parties might disagree over of the appointment of arbitrators, although they have agreed that disputes will go to arbitration. Thus a dispute may arise which it is agreed will go to arbitration without the identity of the arbitrator being determined.

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29. *Ibid.*

(2) The second arises where arbitrators are chosen and after the dispute occurs, they refuse to accept the appointment, or are incapable of performing the duty. In these instances it may be that an arbitration agreement does not state an alternative method of selection which should be followed. The party who claims arbitration in such a case may ask a court to appoint arbitrators. Yet does a court have the power to appoint arbitrators?

In the U.A.E. there are two current positions regarding a court's power to appoint an arbitrator. The first empowers a court to exercise its discretion at the request of one of the parties, with power to choose an appropriate arbitrator in a dispute. The appointment of arbitrators or an umpire under the A.D.C.C.P. is covered in three Articles, 84, 85 and 86.<sup>30</sup>

The second stance, exemplified by Art. 202(1) of the F.D.C.C.P. and Art. 3(1) of the S.A.A., holds that a court is entitled to appoint an arbitrator, only on the application of both parties. The F.D.C.C.P. and S.A.A. rules restrict a court's power to interfere in the appointment of

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30. 84 (1) Arbitrators shall be appointed in such manner as may be agreed upon between the parties;

84 (2) where the parties have agreed upon an even number of arbitrators, a court shall appoint one additional arbitrator.

85 (1) where the parties cannot agree with respect to the appointment of arbitrators, each party shall nominate either one arbitrator or more, provided that each shall nominate the same number;

85 (2) a court shall nominate an additional arbitrator so the number of arbitrators becomes even.

86 (1) where any person appointed refuses to accept the office, or where an arbitrator dies, or refuses to act or becomes incapable of acting, a court shall call upon the party who nominated such an arbitrator or, if such an arbitrator was appointed by agreement, upon the parties to nominate a fresh arbitrator.

86 (2) If, within 7 days of being so called upon, no arbitrator is nominated, a court *may*, after giving the parties an opportunity of being heard, appoint an arbitrator or make an order superseding arbitration.

arbitrators to situations where both parties apply to it; without the parties' request a court has no jurisdiction. This is due to the nature of arbitration, which is based on mutual consent of the parties. If the parties refuse to appoint their arbitrator, a court has no jurisdiction to act on their behalf.<sup>31</sup>

**(i) Analysis of the U.A.E. rules regarding the appointment of arbitrators.**

The A.D.C.C.P., S.A.A. and F.D.C.C.P. lay down procedures for the appointment of arbitrators or umpires, so that an arbitration agreement may not become void. They provide a machinery for effectively working out and enforcing an arbitration agreement. Yet each Emirate has its own set of rules, which embody different aspects in respect of the appointment of arbitrators. This section will examine their scope, and courts' power under these rules.

(1) **The scope of the court.** The A.D.C.C.P. Art 85 and 86 provides that where the parties fail to appoint any arbitrators, or if a valid nomination has been made and an arbitrator refuses to act, or is incapable of acting, or dies, a court may appoint an arbitrator. F.D.C.C.P. Art 202(1) and S.A.A. Art.3(1) clearly state that the parties must either name the arbitrators, or consent to their nomination by a court. It follows that a court has no authority to force an arbitrator upon a reluctant party. A court is dependent on the desire and willing

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31. The F.D.C.C.P. Art. 202(1) stated: "If a dispute arises and the adversaries have not agreed on the arbitrators, or one or more of the agreed arbitrators refuses to carry on the work, or resigned, or were dismissed, or declared ineligible, or there was an impediment preventing any of them from carrying on the work, and there is no agreement in this respect among the adversaries, *a court which was originally competent to consider the dispute shall appoint the arbitrators required upon application by any of the adversaries by following the procedures normally taken in the filing of a lawsuit.*"

consent of the parties. Subsequent acquiescence in the proceedings would not validate the decision if it was made by a court without the consent of the parties. The party who seeks arbitration should apply to a court, in the form of a lawsuit before a court of competent jurisdiction. A party's failure to petition within a reasonable leads to the agreement being deemed null and void.<sup>32</sup>

What is the position where the parties have specified the name of the arbitrator in the agreement? F.D.C.C.P., S.A.A. and A.D.C.C.P. rules do not in terms specify a procedure on the failure of the *persona designata*. But A.D.C.C.P. Art.86 clearly contemplates the appointment of an arbitrator by a court, on the refusal by an arbitrator appointed by the parties. It is clear that the mere fact that the parties agreed to refer a dispute arising between them to a particular arbitrator, does not necessarily lead to the inference that the intention was not to fill any vacancy. The presumption is that, unless the agreement of reference indicates otherwise, the vacancy is to be filled.<sup>33</sup> However, the position will be otherwise if the *persona designata* is, in the context of the parties' agreement, irreplaceable.

In A. Real-estate Agency v. M.D., the parties agreed to appoint the Director of Sharjah Municipalities as the sole arbitrator, by referring any disputes arising under the contract to him. The choice was based on his personal qualities, character, and due to their trust in him. A

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32. Abu-Alwafa Ahmed, *Arbitration law in the Arab states*, (first edition, Alexandria), p.30.

33. *A. Real-estate Agency v. M.D.*, (*op. cit* n. 23).



dispute arose and the parties referred the dispute to the Director, who informed the court that he was not capable of acting as such. The Sharjah Court of Appeal invalidated the arbitration. It held:

... The refusal of an arbitrator to take up his duties in a case where the parties designated him for special qualification leads to the suspension of the arbitration.<sup>34</sup>

The court considered an arbitrator's refusal to take the office as a lapse of the agreement and then referred the case to a court of competent jurisdiction.<sup>35</sup>

Where an arbitration clause provides that, if any dispute arises, it will be referred to a person occupying a particular position, for example, to the Dean of a University Law Department, the nomination shall be binding. It is significant that the parties agreed to appoint an arbitrator based on his official designation.<sup>36</sup> An arbitrator appointed by reference to his office has traits peculiar to that office which weigh with the parties. It may reasonably be assumed that, where an arbitrator is appointed by the parties with reference to an office, the intention is that the arbitration should be conducted by the holder of that office and by no-one else.<sup>37</sup>

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34. *Ibid.*

35. *Ibid.*

36. Wally Fatahy, The assignment of an arbitrator in Egyptian law, paper submitted to the Cairo Conference 1989 p.3.

37. *Ibid.*

If any problem arises about the fulfillment of the appointment of an arbitrator who is assigned to the role by the nature of his office, the parties can approach a court in the ordinary manner, to bring a suit to appoint an arbitrator or to refer the dispute to a court of competent jurisdiction.

(2) A court's power over the appointment of arbitrators under F.D.C.C.P. Art. 202(1) is dependent upon a petition by the parties, without which a court has no power. However, a court under the A.D.C.C.P. has the power to interfere in the questions which arise during its sitting.<sup>38</sup> Is the nature of a court's power mandatory? May a court interfere or not?

The wording of Art. 86(2) states "a court *may* appoint". The expression does not mean that a court must appoint an arbitrator. The use of the word "may" implies that discretion is given to a court. A court should consider whether to make the appointment or not. If a court does not think it desirable to fill up a vacancy and appoint an arbitrator, it may instead make an order superseding the arbitration.<sup>39</sup>

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38. The A.D.C.C.P. presumes that the court has knowledge of the arbitrator's refusal of the appointment even if the parties have not applied to the court. This might be true in the case of court arbitration, where initially the matter of the dispute is before the court, and then the court itself appoints an arbitrator to hear a particular matter. However this is not the case in contractual arbitration where the parties designate their arbitrator as a specific person and that person cannot or will not act. Under these circumstances, according to the F.D.C.C.P., if the parties want to resolve this problem they may apply to the competent court for assistance in the appointment of the arbitrator. However, what cannot be foreseen is in the case of the A.D.C.C.P., how the court will know about this difficulty without notification by the parties. It seems that a provision of the A.D.C.C.P. was omitted from the original code. This article in reality is applicable to court arbitration; the court by its motion interferes in the procedure of the appointment of the arbitrators, whereas in contractual arbitration the court has the power, but needs notice from the concerned parties in order to take such a procedure.

39. *A. Real-estate Agency v. M. D.*, (op. cit n. 23).

(ii) Procedure to appoint an arbitrator

While it is true that both the parties are at liberty, by mutual consent, to choose another arbitrator, it is contrary to the scheme of arbitration to permit only one of the parties to appoint another arbitrator in the place of the designated arbitrator, for consent of the parties is the very essence of arbitration.<sup>40</sup>

The difficulty may arise where an arbitration agreement does not specify the number of arbitrators, nor the mode of appointment.

Both A.D.C.C.P. Art.86, F.D.C.C.P. Art.202(1) and S.A.A. Art.3(1) provide that a substitute can be appointed, if the other party refuses to accept a designated arbitrator, or any other circumstance arises. Under F.D.C.C.P. Art 202(1) and S.A.A. 3(1) a duly appointed arbitrator can be replaced by another if he refuses, resigns, or is dismissed or become incapable of acting, or dies. A court has no jurisdiction to appoint a substitute for him without "an application by any of the parties" to the competent court. Without this application, a court has no power to appoint an arbitrator.

The procedure for appointment of an arbitrator takes different forms according to circumstances. A court, in a case of refusal to act or death of the arbitrator should give the parties a chance to appoint a new arbitrator.<sup>41</sup> In such cases, a court may either itself nominate an arbitrator for the purpose, or may decide a case itself.

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40. *D. International Ltd Co. v. B. v. Bahtia & Batia Engineering Est.*, Dubai Court of Appeal case No. 78/1983 unpublished.

41. *T.S. Constriction Co. v. I.B.B. and associate Ltd Co.*, (op. cit n. 22).

There are two circumstances under which a court appoints an arbitrator according to the A.D.C.C.P. rules. The first is the appointment of an Umpire, where the parties have appointed an even number of arbitrators.<sup>42</sup> Secondly, in the situation where an arbitrator refuses, dies, or withdraws, a court may appoint a fresh arbitrator.<sup>43</sup> Before a court can exercise jurisdiction under Art.86(2), it must be reasonably clear that the parties have made a sufficient attempt to agree for themselves a fresh arbitrator.

It is clear that the A.D.C.C.P. successfully accommodates parties' rights and the power of the court. A.D.C.C.P. Art.86 offers different alternatives to the parties and courts when granting the parties the power to appoint an arbitrator or to substitute another. However, this power is not unlimited; parties are limited by a period of time. Failure to act within time-limits shifts power to a court of competent jurisdiction. This rule was expressed by the Dubai Court of Appeal when it stated:

[it is] conceded according to law and practice, that the appointment of an arbitrator occurs by a petition to a court. A court will not appoint an arbitrator until it ensures that the matter comes under its jurisdiction, and after the parties have failed to appoint arbitrators.<sup>44</sup>

#### 6.3.2 During the arbitration

Once arbitration is established, a court can be requested to intervene on a number of occasions. In this section we shall consider some of the issues which are important in arbitration procedure,

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42. A.D.C.C.P. Art.84(2).

43. A.D.C.C.P. Art.86(2).

44. *T.S. Constriction Co. v. I.B.B. and associate Ltd Co., (op. cit n.22).*

including interim measures, determination of a question of law, and the removal of an arbitrator. U.A.E. law has not made specific provision for these situations in the arbitration rules.

#### 6.3.2.1 Interim measures

As a general rule, courts have an inherent power to order all interim measures which are deemed appropriate for the facilitation of the conduct of arbitration. Most of these measures arise from the fact that the arbitration tribunal possesses no power, in the nature of sanction, to enforce an order, whilst certain powers are within the exclusive jurisdiction of a court.<sup>45</sup>

There is no specific provision under U.A.E. law, even under the F.D.C.C.P. rules, which sets forth the circumstances in which a court may order attachments or other interim remedies in support of arbitration. The availability of such measures depends on the law of the court before which an order is sought. It is a generally admitted principle that, notwithstanding the existence of an arbitration clause, a court, in certain circumstances, may be competent to order urgent or interim measures, such as an attachment or interlocutory payments, in order to secure the subject matter in a dispute, or payment under an award. The Abu Dhabi Court of Appeal has ruled that the fact that a dispute is to be arbitrated does not deprive a court of the authority to grant a preliminary injunction in support of arbitration.<sup>46</sup>

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45. *BAGWSLS Co. v. G. Trade and Constriction Co.*, Abu-Dhabi Court of Appeal case No. retrial 149/1985, (1986) 46 *Al-Adalah* 181.

46. *Ibid.*

### 6.3.2.2 Determining a point of law

The determination of points of law or special case procedure was derived from the common law, upon which the A.D.C.C.P. is based.<sup>47</sup> The reason for such provision was to link a court with an arbitration body and to restrict an arbitrator's authority to consider points of law, which were exclusively confined to a court.<sup>48</sup> A court may hesitate to allow a lay arbitrator, who is not well qualified in law, to decide questions of general law without expert assistance. It also seems that a court will not allow an arbitrator to decide a point of law even if he is legally qualified. This is to avoid any parallel body of case law to building up on a particular point of law. A.D.C.C.P. Art.89 explains this power as follows:

arbitrators may, with the consent of a court, seek a court's opinion in any case before them. Such opinion shall be considered as part of an arbitrators' final decision.

#### Analysis of A.D.C.C.P. Art.89.

Art.89 is so general as to include any question arising during the arbitration, either a point of law or a point of fact. However, the U.A.E. Federal Supreme Court ruled that court jurisdiction under Art.89 is exclusively over the determination of points of law.<sup>49</sup>

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47. The A.D.C.C.P. was originally drafted from the 1927 Sudan Civil Judiciary Act, which was based on the English common law system. For more detail see Omer A. M, *The Law of Civil Procedure* U.A.E. University publication 1983 (Arabic) p.5.

48. *General Prosecutor v. S. Fraud Est.& A.M. Al-sharfa'*, the U.A.E. Supreme Court case No. civil 145/7, unpublished.

49. *Ibid.*

The second observation on Art.89 is that the power to appeal to a court for ruling on a point of law is given to arbitrators only. Parties have no power to appeal to a court for a ruling on a point of law. The only advantage of not allowing the parties this right is the avoidance of any delaying tactic by a party.

What does "question of law" include ? The U.A.E. Supreme Court during the course of considering a courts' power under Art.89, provided *inter alia*, that questions of law includes any legal issue of substantive or procedural law which arises during arbitration.<sup>50</sup> But this does not resolve what is a point of law which must be referred to a court in the U.A.E. system, in contradistinction to a issue of fact which the arbitrator should resolve for himself.

An arbitrator may appeal to a court for ruling on points of law and a court is the final judge in considering what is a question of law and what is not. The effect of a court opinion is that an arbitrator is bound to give effect to it and it becomes part of an award. Parties have the right to challenge it before a Court of Appeal; if they waive their right it becomes final.<sup>51</sup>

There is no specific provision under the F.D.C.C.P., dealing with an arbitrators' power to refer a point of law to a court. Once the matter is referred to arbitration, an arbitrator has full jurisdiction to decide not only all questions of fact but also of law. Courts cannot interfere

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50. *Ibid.*

51. Art. 89 of the A.D.C.C.P..

with this jurisdiction. The F.D.C.C.P. is influenced by Egyptian Law and this, as in most Middle Eastern legal systems, does not consider this issue because the parties who act as arbitrators are usually lawyers. Awards in this system are enforceable only after leave for enforcement has been obtained. A court, before granting enforcement, will examine an award for its compliance with the law. A court, whenever it finds that the arbitrators' have reached a conclusion which they think is wrong in law, will not then grant an enforcement award. Although the F.D.C.C.P. may avoid the negative consequences created by A.D.C.C.P. Art.89, at the same time it may cause other difficulties which may affect the arbitration system. A court cannot give a ruling during the course of the arbitration even when it seems clear that an arbitrator is incorrect over a point of law. The issue will be postponed until the enforcement of an award, when a court will either confirm or revoke an award. This may increase the time and costs of arbitration and may defeat its purpose. The F.D.C.C.P. could avoid these problems by adopting a provision based on section 2 of the Arbitration Act 1979 (England). Whenever a point of law arises in the course of the arbitration, an application may be made to a competent court, to determine the legal question. We should stress here that, to avoid any delaying tactics by the parties, or unnecessary intervention by a court, this right should be limited to cases which might produce substantial savings in costs to the parties. The conditions are as follows:

- (1) The appeal to a court to determine a point of law can be brought by any of the parties to the arbitration with the consent of all the other parties, or consent of the arbitrators.



(2) A court may grant this power even if the above conditions are not satisfied, if the question of law could substantially affect the rights of one or more of the parties.<sup>52</sup>

Co-ordination between arbitrators and courts would avoid any contradiction between a court, arbitrators and parties. A Court has an opportunity to issue directions to arbitrators to conduct the proceedings in a legal and proper manner. The existence of such power with a court will naturally induce arbitrators to obey and respect the opinion of a court.

#### 6.3.2.3 The removal of an arbitrator

The A.D.C.C.P. does not consider the issue of the disqualification of an arbitrator and his removal, but does include provision for the disqualification and removal of the judge, which could be applied to arbitrators. In jurisdictions lacking codified provisions, *Shari'ah* rules concerning disqualification might be invoked.<sup>53</sup>

The rules of removal of an arbitrator in the F.D.C.C.P. and S.A.A. are similar. However, the S.A.A. established a special rule for a court to remove an arbitrator. We shall consider the rules of removal in the F.D.C.C.P. and S.A.A..

##### (i) The conditions for removal

In some cases, the willingness of a party to arbitrate may depend on the arbitrator himself, rather than arbitration *per se*. Arbitration may founder especially if there is only a nomination of a sole arbitrator.

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52. The English Arbitration Act 1979 sec.1(3) and (4).

53. Ballantyne, W.M., "Arbitration in the Gulf states: Delocalisation a short comparative study", (1986) 1 Arab Law Quarterly p.211.

Removal of such an arbitrator cannot be followed by the appointment of another in the absence of a fresh agreement, thus increasing time and costs. The F.D.C.C.P. has a way of avoiding such consequences. It requires parties to mutually agree upon the removal of an arbitrator if arbitration is to be effective.<sup>54</sup>

Any of the parties may challenge a member of the arbitration tribunal, providing the following conditions are fulfilled:

(1) An arbitrator may be disqualified on the same grounds as a court judge under U.A.E. law. The grounds as set out in F.D.C.C.P. Art.108. They mostly relate to situations where the impartiality of an arbitrator is in doubt, including: family relationships, a special interest in the outcome of the dispute, social or financial relations with one of the parties, the existence of a current or past litigation with one of the parties.<sup>55</sup> All these grounds may also be raised with regard to an arbitrator's spouse.

The legislation of the U.A.E. and most Middle Eastern countries adopt the same criteria as the F.D.C.C.P. for challenging a judge, and disregard the difference between arbitrator and judge. The main difference is the freedom of the parties; in arbitration the parties choose an arbitrator, whereas a judge is imposed on them. The legislature provides the parties with such guarantees to avoid any partiality in judgment. They may also apply in a case where an arbitrator has been appointed by a court.

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54. F.D.C.C.P. Art 205(3) S.A.A. art. 6(4).

55. *B.V. Bahtia & Bahtia Engineering Est. v. R. International Ltd. Co.* The Dubai Court of Appeal case No. 210/1985, unpublished.

(2) The grounds of challenge must have been revealed or have arisen subsequent to the appointment of an arbitrator. If the reason for an arbitrator's removal, for example, an interest in the dispute or a relationship with one of the parties, was known to the concerned party before the appointment but he remained silent and did not challenge an arbitrator, he thereby waived his power to challenge.<sup>56</sup>

(3) The objection must be brought before a court of original jurisdiction within five days from the raising of the objection. The time limit stipulated by F.D.C.C.P. Art.205(4) commences when the concerned party becomes aware of the grounds for the disqualification. If a concerned party does not challenge an arbitrator before a competent court within the stipulated five days, he waives his right to challenge him.<sup>57</sup> The F.D.C.C.P. is well drafted, in only permitting the power of challenge up to the closing of the hearing, or the issuing an award. Any challenge after this period will be denied, except where there is a proven fraud claimed against one of the parties. By imposing this restriction, the F.D.C.C.P. rules avoid any delaying tactics by a party who feels that the arbitration will not be made in his favour. At the same time such denial reinforces a strong public policy towards favouring arbitration.

What of a party's power to remove an arbitrator appointed by a court? A court may appoint an arbitrator in cases where the parties failed to do so. There is no express provision regulating this issue. However, it implies that the same rules may be applied by parties applying to a court which appointed that arbitrator, for his removal. If there are sufficient grounds, a court will remove him.<sup>58</sup>

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56. Abd Elfat'h A., "The removal of arbitrator procedure under the Kuwaiti Law" (1984) 8 Kuwait University Law Journal p.227-263.

57. F.D.C.C.P. Explanatory Memorandum Art. 205 (4)

58. Abd Elfat'h A. (*op. cit n. 56*) at p.236.

(ii) The Procedure for the removal

(1) *Where one of the parties challenges one of the arbitrators.*

An arbitration tribunal will suspend all proceedings, until a challenge is finally determined by a competent court. An arbitrator who is challenged with any grounds of disqualification has no jurisdiction to consider the dispute. Any proceedings which take place during the the hearing of an allegation against an arbitrator will be deemed null and void.<sup>59</sup>

(2) *The parties apply to the competent court for the removal of an arbitrator.*

U.A.E. rules do not require any set procedure for the removal. However, the same rules which apply for the removal of the judge may be applicable.<sup>60</sup> Concerned parties may apply to the Registrar of a competent court or to the President of a Court of First Instance for the removal of an arbitrator.<sup>61</sup> Nevertheless, a party may choose any effective way to express its intention of removing an arbitrator.

(3) *F.D.C.C.P. and S.A.A. rules stipulate a time limit within which parties should apply to the competent court. Art.205 (4) states:*

...The challenges [for an arbitrator removal] are to be brought before a court of original jurisdiction within five days of the occurrence of the reason for challenge.

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59. *B.V. Bahtia & Bahtia Engineering Est. v. D. International Ltd. Co, supra.*

60. See Azmay Abdul-fatah' commenting on a similar issue under Kuwaiti law. (*op. cit n.56*) at p.236-239.

61. *Ibid.*

If the parties fail to apply within the specified time limit the challenge shall be denied.

Neither the F.D.C.C.P. nor the S.A.A. rules consider the issue of proof so rules for disqualification of a judge may be applied. F.D.C.C.P. Art.111, concerning the disqualification of a judge, implies that the party who claims partiality has the burden of proof applying the traditional doctrine of *actori incumbi probatio*. One opinion considers this provision is merely limited to the disqualification of a judge and it cannot be applied to an arbitrator;<sup>62</sup> Art.111 is specifically limited to judges, so no other cases may exist by analogy.<sup>63</sup> Yet the policy justifying such a rule would seem equally applicable to arbitrators.

(iii) The consequences of the removal of an arbitrator

(1) An interim award, which is rendered by an arbitrator before a challenge, remains valid, even if he is subsequently removed by a court. However, any final decision which was issued after a challenge is brought before a court will be deemed null and void, even if that arbitrator was not informed of the allegation.<sup>64</sup>

(2) An arbitrator cannot challenge a decision for his removal, even if the challenge is not merited. An arbitrator should not insist on taking a case in which his disinterestedness cannot be taken for granted.

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62. *Ibid* p.253.

63. *Ibid*.

64. The F.D.C.C.P. Explanatory Memorandum Art. 205.

Nevertheless, an arbitrator may sue the party who accuses him, if the party's challenge is proved to be groundless and the party's intention in bringing a challenge was only to avoid arbitration.<sup>65</sup>

(3) A court's decision on the removal of an arbitrator is not final; a party may appeal against this decision.<sup>66</sup>

(iv) Power of a court to remove an arbitrator in special circumstances under S.A.A. rules.

Art.6(3) of the S.A.A. introduced a special reason where a court may remove an arbitrator. Art.6(3) stipulates :

...Where an arbitrator omits to act according to the agreement, on the written application of the concerned party, a court may appoint a person to fill the vacancy.

This Article, which is concerned with the conduct of an arbitrator, establishes a new challenge to an arbitrator. The article grants a court the power to revoke the authority of an appointed arbitrator who acts contrary to the agreement and to appoint another arbitrator to fill the vacancy. The provision of S.A.A. Art.6(3) gives discretion to a court in the matter of removal of an arbitrator, but as a rule, the discretion must be exercised in favour of the removal, when the circumstances mentioned in this Article exist.

(1) *The meaning of the term.* The term "*omit to act according to the agreement*" is a broad term. It is difficult to give an exhaustive definition of what amounts to "omission" on the part of an arbitrator. It may indicate a breach of duty which vitiates the arbitration. This can

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65. Abou El-wafa, *The Arbitration in Arab states law*, (op. cit n.32) at p.45.

66. The F.D.C.C.P. Art. 205(4).

be described as "mishandling the arbitration" to such an extent as to violate the arbitration agreement. It is suggestive of a failure so fundamental as to take the arbitrator beyond his jurisdiction.

*(2) Procedure for removal of an arbitrator.*

(a) The procedure for removal of an arbitrator may begin on the application of any party to the court to which the arbitration is referred. An application for the removal of an arbitrator must be made by one of the parties, and unless such an application is made, a court cannot exercise its power under this subsection.<sup>67</sup>

(b) Parties are required to apply in writing to an arbitrator before applying to a court; without this application, a court will not have jurisdiction.<sup>68</sup>

(c) A court, before removing an arbitrator, should ensure the allegation of omission against the arbitrator is well founded.

(d) A court, after removing an arbitrator, should appoint person(s) to fill a vacancy, according to the rules of appointment.

### 6.3.3 At the end of the arbitration

The main support a court renders at the end of arbitration is to issue an enforcement order at the request of any of the parties to the arbitration. Without this enforcement is not possible, unless the parties agree to enforce their award amicably.<sup>69</sup>

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67. Art 6(3) of the S.A.A..

68. *Ibid.*

69. For more detail see chapter 7 The enforcement of arbitral awards.

## 6.4 Means of court intervention under U.A.E. Law

Where appropriate a court may order rectification, interpretation, retrial, appeal or review. The purpose of this intervention is both to support and control arbitration. It is important to note that methods of recourse against an award are not confined to such orders being made by the court itself. There are various possibilities for the court to refer the issue back to the arbitral tribunal to correct an irregularity in the award; the practical advantages being that the person who originally made the decision is more familiar with the award than any other.

### 6.4.1 Rectification and interpretation of the award

Questions are raised as to the power of an arbitrator to correct his decision and the basis on which he can do so. Under the U.A.E. rules and practice the power of rectification and interpretation of the court's judgment is vested in the court which issued the judgment. The rules under the F.D.C.C.P., S.A.A., and A.D.C.C.P. grant this power to the court of the competent jurisdiction on the subject matters. However, the power under A.D.C.C.P. is unlimited; a court can take it without the parties' consent, whilst, under the F.D.C.C.P. and S.A.A., it is restricted by the parties' consent. It is suggested that these provisions relating to courts can be extended by way of analogy to arbitral awards.

#### (i) The power of rectification and interpretation under the A.D.C.C.P. rules

Under A.D.C.C.P. Art.91 a court has power to correct an arbitrator's award containing error. Once an arbitrator has issued his award, he has no power in the dispute; he becomes *functus officio*. He



terminates his own authority by the issue of an award and becomes a "stranger". A court, under this provision, is bound to correct any obvious mistakes or accidental errors in an award.<sup>70</sup>

The grounds specified in section (1) and (2) of Art.91, to modify and correct an award are exhaustive. This clause is confined to certain circumstances:

(a) *Where an award concerns matters not referred to arbitration.* Sec.1 (A.1) of art.91 contemplates a case where arbitrators consider matters outside the reference of the subject matter. The authority of arbitrators is limited to matters submitted to them. Indeed it would amount to misconduct on the part of an arbitrator, if he considers subject matter not referred to arbitration and would invalidate an award. To avoid such consequences, A.D.C.C.P. Art.91 sec.1 (A.1) empowers a court to modify an award, by removing irrelevant matters from its subject matter, providing this is separable from the rest of an award and removing it will not affect an award.

A court, in the course of modifying an award, must confine itself to matters arising from the provisions of Art.91 sec.1(A.2). A court has no jurisdiction to investigate the merit of the dispute, and come to conclusions of its own, nor can a court substitute another award.

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70. *General Prosecutor v. S.F. Est. and A.M. Al-sharfa'*, The U.A.E. Supreme Court case No. 145/7.

(b) *Clerical mistakes or an error arising by an accidental slip or omission.* Sec. 1 (A.2) of Art.91 provides that a court is bound to rectify an award where there is, a patent inconsistency. A court has no jurisdiction to rectify such error unless the mistake is merely clerical.

The A.D.C.C.P. does not contain any provision for the interpretation of an arbitral award where the arbitrator's award lacks clarity. However, the rule of Art.91 may be interpreted to court the cognate problem of ambiguity in the expression of the award. Thus, where an award is expressed in ambiguous terms, a court may remit an award and refer it to an arbitrator for interpretation under Art.91 sec.1 (C.2).<sup>71</sup>

(ii) *Power of rectification and interpretation power under the F.D.C.C.P. and S.A.A.*

Rectification under the F.D.C.C.P. and S.A.A. are different from the rules of the A.D.C.C.P., regarding the court's powers. F.D.C.C.P. Art.212(1) states that a court, with which an award has been filed, is competent to correct a mistake in an award, at the request of one of the parties in the same circumstances as for the correction of errors in a court judgment.<sup>72</sup> Art.212 does not give an arbitrator the power of rectification once a final and conclusive award is made. However, it is accepted that an arbitrator still has power to correct or interpret his award as long as an award has not yet been deposited with the court, or the time limit for the arbitration has not yet expired.<sup>73</sup> After deposit,

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71. *General Prosecutor v. A. M. Al-sharfa and others, supra.*

72. ...the correction of the material errors shall be vested in this court {the court with the competent jurisdiction}, the court will follow the same rules in correcting judgments. *The concerned parties should request the correction*".

or the expiry of the time limit, any request for correction or interpretation must be made to the competent court of jurisdiction. The only case after deposit or expiry in which an arbitrator has the jurisdiction to rectify his award, would be one in which the parties agreed to grant an arbitrator this power.<sup>74</sup>

The requirements of correction and interpretation specified by F.D.C.C.P. and S.A.A. are:

(1) *Under F.D.C.C.P. and S.A.A., a court has no power to rectify or interpret an award, without the request of the concerned party.* A court does not inherit this power, as is the case in A.D.C.C.P. Art.91 (1) for it cannot order the rectification of an award without the parties' request. A concerned party should apply to a court after the deposit of an award for its rectification or interpretation.

(2) A court's power of rectification and interpretation is limited by the time of the deposit of an award. A court has no jurisdiction to rectify an award as long as an award has not yet been deposited, or the time limit for arbitration has not expired.

(3) A court is required to follow the same rules as in correcting court judgments. The arbitration rules of F.D.C.C.P. do not specify a special rule for the correction of an award, but refer by analogy, to F.D.C.C.P.

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73. See Abu-El Wafa A., *The voluntary and mandatory arbitration*, 5th edition (Alexandria,1988) p.287. Commenting on a similar issue under the Egyptian Law.

74. *Ibid.*

Art. 130, which concerns the rectification of a court judgment. Art.130 stipulates that, if a court judgment contains a clerical or arithmetical error arising from an accidental slip or omission, the judgment may be rectified by a court which issued the judgment. A court, in the course of rectifying a judgment is required not to investigate the merits of the dispute nor come to a conclusion of its own. As far as the correction of an award is concerned, a court has the jurisdiction, upon the parties' request, over clerical errors and mistakes in calculation, as long as the correction does not affect the substance of the decision.

As for the interpretation of an award, it is generally recognized that a court with the competent jurisdiction may interpret an award. The F.D.C.C.P. has similar regulations for rectification, but has no specific relevant article, though it can be deduced from F.D.C.C.P. Art.212(2).<sup>75</sup> Federal Courts apply the same rules on the interpretation of a court judgment.<sup>76</sup> A court, when considering the interpretation of an award, is required not to amend or change the substance of the original award.<sup>77</sup>

**(iii) Analysis of the U.A.E. rules concerning rectification and interpretation.**

(1) U.A.E. law in the federal and the local sector grants to courts the right to rectify and interpret an award. Confronted with an error in his award, an arbitrator has no inherent jurisdiction to correct it; once he

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75. The executive judge will have jurisdiction to adjudicate on all incidents concerning the enforcement of an arbitral award.

76. F.D.C.C.P. article 131.

77. F.D.C.C.P. Explanatory Memorandum Art. 212.

has made a final award an arbitrator is *functus officio*, that is, he has no powers left as soon as he has made his award, and is not entitled to change it. An arbitrator is banned from even correcting obvious mistakes, such as those which could be corrected without affecting the nature of the final decision. The reason for this is the expiry of authority.

The U.A.E law has adopted the traditional view regarding the arbitrator's power to rectify arbitral awards after the delivery of the award; that is, the jurisdiction of an arbitrator in respect of that specific dispute terminates with delivery of the award. The law should reconsider granting the arbitrator this power even after the delivery of the award. It is true that the issue of an award terminates the jurisdiction of the arbitrator in respect of the dispute, but this should not necessarily reflect upon his powers to clarify and resolved difficulties concerning the terms of his award. The right to rectification should remain, and the power of interpretation. He may also correct clerical errors which could affect an award, whether before or after its issue.<sup>78</sup> Legal writers in this field have supported this approach, which is in accord with the concept of arbitration.<sup>79</sup> Some legal systems have adopted this principle in re-structuring their arbitration rules.<sup>80</sup>

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78. Hashem M.M. "The arbitrator *functus officii* in Civil Procedure law", (1984) 1 Journal of Social and Economic Science, (Cairo) pp.1-54.

79. *Ibid* at p.34.

80. The amendment of the French Code of Civil Procedure consider this point in article 1475 which stipulates:-

The award terminates the jurisdiction of the arbitrator with respect to the dispute which he decides. Nevertheless, an arbitrator has the the power to interpret the award, to rectify errors and material omission which may affect it, and to complete it whenever he has omitted to rule on a element of the claim.

The main reason for giving an arbitrator this power is that the person issuing an award is best fitted to interpret it and because of obvious gains in expeditions. This view is supported by the procedural rule that "...the judgment rectification must be made by the authority who issued it".<sup>81</sup>

(2) There are no specific rules regulating rectification and interpretation under the S.A.A. and F.D.C.C.P.. A court, in such a situation, applies the same rules as those used for court judgments. The logical answer is for issuing judge to correct any errors or ambiguities in his judgment. This rule reinforces the granting of this power to an arbitrator, as the appropriate person to deal with the issue. Since a court remits judgment to the one who issues it, the correction of an award should also be remitted to an arbitrator.

(3) The F.D.C.C.P. rules, though not yet ratified, need to grant an arbitrator the power to amend and interpret an award. By such enactment the F.D.C.C.P. would be in line with the modern trends, which grant the arbitrators the jurisdiction in this matter. But this power should not be unlimited. The correction of errors due to a clerical mistake or an accidental slip or omission should satisfy the following requirements: first, it must be done with the mutual consent of both parties; secondly, the errors must be capable of being categorized as accidental;<sup>82</sup> thirdly, rectification should be confined to mistakes, not

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81. Abd Elfat'h A., "The Authority of the Arbitrators in Rectification and Interpretation of Award, Comparative Study in Kuwait, Egyptian and French Law", (1984) 8 Kuwait University Law Journal p.137.

82. Accidental errors defined by Rowlatt J. in Sutherland & Co v. Hannevig Ltd, said:

"an accidental slip occurs when something is wrongly put in by accident, and an accidental omission occurs when something is left out by accident."

King's Bench Division Law Journal Report vol. 90, 225-228 (1920).

touching the merits of the award; and finally, the correction must not be of mistakes of reasoning or evaluation or assessment.<sup>83</sup>

The same rules can be applied for interpretation of an award by an arbitrator by granting him the power to interpret his award. He is the author of the award and knows all the circumstances of the case. However, if the arbitration tribunal cannot be re-established, this power shall be vested in a court of competent jurisdiction.

#### 6.4.2 Setting aside an award (annulment)

The arbitral award is considered to be like a court judgment. It cannot be challenged except through available channels of appeal. An award is based on the parties' agreement to refer a dispute to arbitration. If there was no arbitration agreement, or the agreement was invalid, or an arbitrator did not act in conformity with the terms of reference defined for him, the award will be void and the parties can bring an action to set aside an award.<sup>84</sup>

Action to set aside an award may be either as a suit against an award, or as opposition to the *exequatur* order. In the former the parties can challenge any time after the issue of an award by the arbitrators; the latter cannot arise unless the award becomes final (after relevant time limits for appeal have expired).

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83. See observation of Hobhouse J. in Mutual Shipping Corporation v. Bayshore Shipping Co. (The Montan), [1984] 1 Lloyd's Report 389-396 at 394.

84. Abul-El Wafa (*op. cit n.73*) at p.317.

Recourse to set aside an award is always available when an appeal is refused, either because the parties have waived their right, or have granted the arbitrator(s) the power of *amiable compositeurs*.<sup>85</sup>

The regulations to set aside an award differ as between the federal and local systems of the U.A.E. There are regulations on this matter in the A.D.C.C.P. and S.A.A.. As the S.A.A. rules are copied from those of the F.D.C.C.P., we shall consider the former when analyzing the rules of the F.D.C.C.P.. We shall also consider this issue in those Emirates which have not made specific provision, i.e in Dubai and Sharjah.

#### 6.4.2.1 To set aside an award under the A.D.C.C.P.

A.D.C.C.P. Art.92 empowers a court to set aside an award. In court arbitration<sup>86</sup> a court has the jurisdiction on its own initiative to ratify the award or set it aside. The parties have no standing to challenge the award. However, when arbitration is according to a contract rather than by court referral, it seems that the parties can challenge an award even before a exaquer order is made in the courts.<sup>87</sup>

(i) A court has power to set aside an award if:

(a) *An award failed to be amended according to Art.91(1)(c) of the A.D.C.C.P.* A court, under A.D.C.C.P. Art.91(c) may return an award to an arbitrator, if an award has left undetermined any of the matters referred to arbitration. The court may also return the award to the

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85. *Ibid.*

86. See chapter 4 arbitration law and practice in the U.A.E. at p.141.

87. *Ibid.*



arbitrator, where an award is not precise enough to be capable of enforcement, or an award is contrary to the law on its face. In these situations a court remits an award to the arbitrators for consideration. An award remitted under this Article becomes void on the failure of arbitrators to reconsider it.

*(b) Arbitrators have been guilty of misconduct.* Art.92(1)(a) empowers a court with the competent jurisdiction to set aside an award where an arbitrator has "misconducted" himself or the proceedings. A question arises as to what the law mean by this term, for it has not been defined in the A.D.C.C.P.

As there is no interpretive case-law, we shall consider this term according to the Sudan Civil Judiciary Act of 1927, which heavily influenced the drafting of the 1970 A.D.C.C.P.<sup>88</sup> It is difficult to give an exhaustive definition of what amounts to misconduct on the part of an arbitrator. The expression is of wide import including, on the one hand, bribery and corruption, and on the other, a mere mistake as to the scope of his authority conferred by the submission.<sup>89</sup> Misconduct of an arbitrator may be found in the area of decision-making, when arbitrators neglect their duties and responsibilities. It may include neglecting minimum standards of natural justice, such as not hearing

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88. The Sudan Civil Judiciary Act of 1927 was influenced by English law. See Abu-Saad Moh'd S. *Comments on the Sudan Islamic Civil Procedure Code* part one, (Cairo 1985) p. 535.

89. In cases arguably involving "misconduct" the courts have shown a tendency not to focus on this term but to have recourse to broad notions of public policy. *T. Overseas Ltd. Co. v. The Ministry of Public Workers*, The Abu-Dhabi Fist Instant Court Case No. Civil 1916/1982.

one party, or failing to give notice to the other party. It includes misconduct of a moral nature, if it affects the settlement of the dispute.<sup>90</sup>

In fact, it is rare to find a challenge brought on the grounds of "misconduct" against an arbitrator. Although there are some cases in which one could envisage misconduct on the part of an arbitrator, no court has yet set aside an award for this reason. Rather, relief has been granted on the grounds of violation of the agreement. The main reason for this seems to be lack of familiarity by judges with the term "misconduct".

Although the provision is based on the Sudan Civil Judiciary Act of 1927, which in turn was influenced by the common-law, the judges who have interpreted the provision have enforce come from different legal schools of thought, principally from Egypt, where they are influenced by French law, which does not contain this principle.<sup>91</sup> For these practitioners, the term "misconduct" (under the A.D.C.C.P.) is more relevant to the behaviour and morals of an arbitrator. None of these judges and lawyers consider an award vitiated by misconduct which is, on the face of it, bad by reason of technical irregularity, or because an arbitrator has caused a denial of natural justice. Nor do they consider within "misconduct" a case in which an arbitrator has acted contrary to public policy, or has been, or appeared to have been unfair. To my mind, such behaviour could constitute "misconduct". These groups interpret and manipulate the A.D.C.C.P. provisions according to the rules

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90. Abu-Saad Moh'd S. (*op. cit* n.88) at p.535.

91. Gary R. Feulner and Amjad Ali Khan, "Dispute Resolution in the United Arab Emirates", (1986) 1 Arab Law Quarterly 312.

of the country of their origin. With the passage of time, the term "misconduct" has fallen into disuse as a challenge against the arbitrators - although the provision is still extant in the A.D.C.C.P. rules.

Since ratification of the F.D.C.C.P. may take time because the rulers of the U.A.E. have still not agreed on the F.D.C.C.P. terms (see Law and justice in the U.A.E. chapter 3), challenges on the grounds of "misconduct" may be revived, by giving an explanation of the term "misconduct" in the A.D.C.C.P.<sup>92</sup>

(c) *Either party has been guilty of wilfully misleading or deceiving the other party.* This may arise when one of the parties to arbitration fails to disclose to the other party that an arbitrator had received fees from the first party, over a period of time, or worked with him for sometime. The deception must be established by clear and convincing evidence by the party who is invoking an annulment under this section.<sup>93</sup>

(d) *The award having been made after the issue of a judgment by a court, following arbitration, or after the expiration of the period allowed by a court to issue an award.* This section considers two situations leading to annulment. The first, dealt with in Art.86(1), provides for the situation when arbitration may be superseded by a court. One of the grounds for this, given in the article, is the failure of an arbitrator to consider and submit an award within the time allowed by a court. In order for an award to be set aside, it must be awarded after the relevant time-limit expired. Arbitrators are required to submit their

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92. The F.D.C.C.P. avoids the dilemma of the definition of "misconduct", by adopting a civil law standard more familiar to the legal practitioners concerned.

93. The F.D.C.C.P. Explanatory Memorandum Art. 214(2).

award within the time limit specified by a court. Where they feel that they would not be able to finish their task in the appointed period, they can apply to a court to extend the time for making an award. Without this extension, an award will be deemed void.<sup>94</sup> This second situation is where the arbitrators issue their award after the expiry of the time specified in the agreement, or by a court.

(e) *The award violates any general principles of justice.* This a broad term which can include many matters including the procedure of arbitration, parties' rights, or public policy. The Abu-Dhabi Court of Appeal in S.A. v. The Department of Public Works, set aside an award under this Article, when an arbitration tribunal issued an award in the absence of some of the arbitrators. The court stated:

... The presence of all arbitrators at all the meetings and above all, at the last meeting when the final act of arbitration is made, is essential to the validity of an award ... the absence of some of the arbitrators at some of the meetings is in violation of the Article[92(1)].<sup>95</sup>

(f) *The award is ineffective.* This ground may be raised when an award is based on an invalid agreement, as if arbitration is based on a "null arbitration agreement". A court should consider this ground first, by ensuring that there is a valid arbitration agreement.

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94. *O. Y. v. O. N.*, The Abu-Dhabi Court of Appeal, case No 48/1973, unpublished.

95. The Abu- Dhabi Court of Appeal Case No.131/1985, unpublished.

Although a court has power to set aside an award violating Art.92(1), this power may be suspended where the defect or the violation can be brought within Art.91(1), which deals with cases where the violation or the defect in an award can be separated from an award without affecting it.

6.4.2.2 The power to "set aside" an award under the laws of Emirates which do not make specific provision for such an order.

In this section we shall consider the Emirate of Dubai as an example of an Emirate which does not have a specific code regulating arbitration. We shall also refer to some cases occurring in Sharjah, before the enactment of the Sharjah Arbitration Act of 1990.

The courts in Dubai, as in other Emirates, are disadvantaged by a lack of authority in the field of law, and arbitration is no exception. Many aspects of federal legislation have been introduced, but do not cover all aspects of law.<sup>96</sup> This affects the role of a court in trying to ease difficulties which arise.<sup>97</sup>

The power to set aside an award could be adopted from a system found in neighboring countries and from the different legal backgrounds of the judges.<sup>98</sup> Reference may be made, in this context, to relevant statutes of other Middle Eastern countries, involving a consideration of

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96. See Chapter 3 Law and Justice in the U.A.E.

97. *Ibid.*

98. Samir Saleh *Commercial Arbitration in the Arab Middle East* (Graham & Trotman 1984) , p.375.

both procedural and of substantive due process of law. Thus courts of Dubai and Sharjah are likely to refuse to enforce an award if the following conditions are met:

(1) *The arbitral award derives its power from an invalid arbitration agreement.* Where the agreement is null, void or not in existence the party may bring an action for setting it aside.<sup>99</sup>

(2) *If the award is beyond the scope of an arbitration agreement.* A submission furnishes the source and prescribes the limit of an arbitrator's authority which must be exercised in conformity with the submission. Arbitrators are inflexibly limited to make a decision on the particular matter referred to them. An award which extends to matters beyond the scope of the submission and goes beyond the term of reference is to that extent *ultra vires*.<sup>100</sup>

(3) *Insufficient specification of the subject matter or inclusion of subject matter which violates public policy.* The parties are required to specify the subject matter in the agreement; insufficient specification of the subject matter can lead to the annulment of an award.<sup>101</sup> It is convenient to make reference here to subject matter which violates public policy. Courts of most nations except from arbitration certain matters which they consider too closely tied to the public interest to be left for adjudication by private tribunal.<sup>102</sup>

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99. The Sharjah Court of Appeal case No. 145/1979, "Abdullah Rashid Hilal Judgments Collection", part 5, p.1881.

100. *K.K.B. Co. v. T.B. Co.*, The Sharjah Court of Appeal case No. 121/1981.

101. *A. General Trade and Contracting v. A.A.A.*, The Sharjah Court of Appeal case No. 41/1990, unpublished.

102. For more detail see chapter 2 at pp. 53-62.

(4) *If the parties did not receive proper notice and due process.* Parties must be given adequate notice of the arbitration agreement. Thus, where the arbitral clause was not clearly printed, but was in a "microscopic type" the Dubai Court of Cassation ruled, this would annul the award, because of the failure to bring the clause to the notice of the complaining party.<sup>103</sup> The parties are entitled to notice of the time and place of the hearing.

They have an absolute right to be heard and to present their evidence before an arbitrator. They must be informed of the documents and evidence submitted by the other parties. If an arbitrator or a party is deprived of such a right, a court will not hesitate to set aside an award.<sup>104</sup> The Dubai Court of Appeal has ruled that, although an arbitrator is allowed considerable latitude in the procedure adopted by him at the hearing, it is essential that he should afford the parties a reasonable opportunity of being heard and presenting their case, otherwise an award may be invalid if such irregularities in procedure can be proved.<sup>105</sup>

These are the common challenges in Dubai and Sharjah Courts. This must not be taken to mean that these are the only challenges which may be brought against an award. A complicating factor in specifying the exact grounds of challenge concerns the differing

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103. *De France Assurance Co v. The Vessel "Flahern" and others*, The Dubai Court of Cassation case No. 140/ 1989 unpublished.

104. *M. A. Bin Safan v. M. Y. Abdul-Khafore*, The Dubai Court of Cassation case No. 96/1988, unpublished.

105. *F. Developing Co. v. TRACO Co.*, The Dubai Court of Appeal case No. 6/1979 unpublished.

nationalities and legal backgrounds of the judges trying a case. The acceptance of a challenge may depend on the legal background of the judge who tries the case.<sup>106</sup>

The Dubai Court of Appeal in M. Omran v. R. Omran states that, one cannot file a petition for setting aside an award until the award is filed in a court.<sup>107</sup> It is likely that this is the practice in Sharjah also.<sup>108</sup>

#### 6.4.2.3 Power to set aside under F.D.C.C.P. rules

##### (i) Grounds for annulment under the F.D.C.C.P.

The grounds for setting aside an award under F.D.C.C.P. and S.A.A. are no different from those in Dubai, Abu Dhabi and other Emirates. The grounds for setting aside an award, are specified in F.D.C.C.P. Art.213. The concern is that arbitrators lack sufficient authority, and that there is irregularity in arbitration procedure, or that laws are violated.<sup>109</sup>

##### (ii) Procedure to set aside an award under F.D.C.C.P.

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106. See Chapter 3 Law and Justice in the U.A.E. at p. 125.

107. The Dubai Court of Appeal case No. 70/1984, unpublished.

108. K.K.B Co. v. T.B. Co (*op. cit n.100*).

109. Article 213 stipulated:-" When the arbitral award is presented to the court of original jurisdiction for confirmation, a party may seek to set aside the award or the court itself may set it aside in the following circumstances:-

(a) If the award is made in the absence of arbitration agreement, nullity, void or expired agreement or if it exceeds the scope of the arbitration agreement .

(b) If the award is made by arbitrators who are not appointed by law, or made by a number of arbitrators not authorized to decide in the absence of the other arbitrators, or made by insufficient specification of the subject matter of the dispute, or made by incapacity or incapability of the arbitrator, or by an arbitrator who did not satisfied the legal requirement.

(c) Waiving one of the party's right during the arbitral procedure does not represent a preventive court right to set award aside."



A claim to set aside the award may occurs where parties to an arbitration agreement waive the right of appeal, or in a case of *amiable compositeur*, where an appeal is banned by law. The action for setting aside can be brought, even though the parties have agreed to the contrary.<sup>110</sup> However, the right of action may be waived, once an award has been rendered. If the right is waived, the party cannot claim this right again, even if the party did not know of any violation or defect in an award, unless the party seeking to invoke this right shows that an award was based on fraud.<sup>111</sup>

An application for setting aside an award is filed after the deposit of an award at a court of original jurisdiction. The F.D.C.C.P. is not specific in its time limit for the filing of this action, and left the period open until the expiry of the statutes of limitation (potentially 15 years).<sup>112</sup> On this point the approach of the Egyptian Civil Procedure Code is adopted. This considers that, where there is violation of the above-mentioned grounds, an award has no legal existence, so the concerned party according to the Federal Transaction Law has the power to issue its challenge within 15 years.<sup>113</sup> The F.D.C.C.P. was ill-advised in this provision. It needs to reconsider the time limit to bring this action. The F.D.C.C.P. rules cannot remain in their present

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110. *Ibid.*

111. F.D.C.C.P. Explanatory Memorandum art.213. p.320.

112. Shehata Moh'd N. A. *The Principles of Civil Procedure Laws in the U.A.E.* first edition part two (Dubai 1990) p.294.

113. Article 473 of the Federal Civil Transactions Law No. 5/1985; for further discussion in this issue see Abul-El wafa *Voluntary and Mandatory arbitration*, (*op. cit n. 73*) at p.321.

form. The best amendment is to adopt the procedure of legislation in other Middle East Countries, which considers the time limit to be 15 or 30 days.<sup>114</sup> This may be waived in those cases where an award is procured by fraud, or undue influence. A party invoking this provision must prove that it could not have discovered the fraud or undue influence, despite the exercise of due diligence.

Under F.D.C.C.P., action to set aside an award may be brought as opposition to an *exequatur*.<sup>115</sup> The party's right to challenge an award is after the deposit of an award in the competent court. It should be noted that instituting the action to set aside an award neither prevents nor stays the enforcement of an award.<sup>116</sup> Additionally, a party is required to petition to a court to Stay the Enforcement. A court, when ordering a Stay of Enforcement will suspend the enforcement of an award.<sup>117</sup> A court's decision to annul is open to appeal, even though a party agreed on the contrary.<sup>118</sup>

#### 6.4.3 Power of Re-hearing

Re-hearing is a remedy granted to a party where the matter cannot satisfactorily be resolved by appeal (as, if the court confirms the award, and there is no right of appeal against the confirmation order).<sup>119</sup>

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114. Mohand Issad "The Arbitration law of Algeria" p.3; A. Buzghaia "The Arbitration law of Libya" p.159 (1979) 4 Yearbook of Commercial Arbitration.

115. See the Explanatory Memorandum of the F.D.C.C.P. art.213.

116. *Ibid.*

117. *Ibid.*

118. *Ibid* art.214.

119. See the power of appeal *Infra*.

The power of appeal cannot be invoked where an award is the result of *amiable composition*. An appeal is further excluded if the parties have expressly waived the right to appeal.<sup>120</sup> It is excluded if the requirement for allowing of an appeal is not met, for example, if the money value of the dispute is below a certain minimum value. Appeal is likewise excluded if arbitration is sought by parties at a court of appeal to stay the Proceedings.<sup>121</sup> Under these circumstances, the legislature introduced a remedy, of re-hearing.

#### 6.4.3.1 The power of re-hearing under local laws of the Emirates

The principle of re-hearing is not found in the local laws of the Emirates, as in Dubai, for example.<sup>122</sup>

Although the A.D.C.C.P. considers the right to retrial as a challenge against a court's judgment, this was not taken into account in any discussion of rules of arbitration. Some authorities consider this power to be applicable to arbitration, so certain cases were brought on this basis. This is the opinion adopted by the Abu Dhabi Court of Appeal.<sup>123</sup> However, a second opinion disagreed on the right to challenge in arbitration, despite the possibility of retrial in court cases according to A.D.C.C.P. Art.102 and Art.107.<sup>124</sup>

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120. It seems that waiver of appeal is not sufficiently recognised in the Dubai court especially where the case involves arbitration and takes place in the Chamber of Commerce arbitration, see chapter 5 for detail.

121. Abu-El Wafa *Voluntary and Mandatory arbitration*, (*op. cit* n.73) at p.310.

122. Shehata, Moh'd N., (*op. cit* n. 112) at p.232.

123. The court was not informative on the authority on which it based its judgment. Case No. 46/1980, "Abdullah Rashid Hilal Judgments Collocation", part 2 at p.686 ; *K.K.Marines Co.v. T.B.B. of Abu-Dhabi*, case No.81/1981 (1982) 31 *Al-Adalah*, p.86.

124. *S.F. Est v. A.M. Al-Sharfa*, The U.A.E Federal Supreme Court, Case No.145/7.

Under the A.D.C.C.P., retrial remain exclusively for court judgments and re-hearings are not be granted by way of analogy.<sup>125</sup> The U.A.E. Federal Supreme Court has ruled that annulment is the appropriate challenge against an arbitration award. This applies, when a court refuses confirmation of an award or, if its judgment is contrary to an award.<sup>126</sup> Art.102 and Art.107, on arbitration, specify that retrials are confined to a court's judgment, and do not apply to an arbitration awards.

#### 6.4.3.2 Power of Re-hearings under F.D.C.C.P. and S.A.A.

There is no provision under the S.A.A. regarding the power of re-hearings. F.D.C.C.P. art. 162 in contrast, confers this power, making it possible to bring an action for re-hearings against an arbitration award, on the same grounds as against a court judgment. It can be instituted against an award on the following grounds:

- (a) If one of the party had acted fraudulently and thus, affected the decision;
- (b) If the decision is based on documents which have been acknowledged or judicially declared to be false after the judgment; or if the decision is based on evidence of a witness which has been declared false after the judgment;

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125. Samir Saleh (*op. cit* n.98) at p. 356.

126. *K.Investment and Real-estates Corp. v. M.H.K. Est.*, Case No. 122/6 (1985) 43 *Al-adalah*, p.72; *General Prosecutor v. S. Trade and Contractors Co.*, Case No. 93/5; *M.S.J. v. J.S.J*, Case No.7/9 ; *S.F. Est v. A.M. Al-Sharfa*, Case No.145/7; *S.F. v. M. Gh.*, Case No. 114/6; *D.Lloyd Insurance Co. v. A. Spare parts Co.*, Case No. 166/8.

- (c) If, after the judgment, decisive documents are discovered which the other party has hindered from being considered by the court;
- (d) If the judgment has been rendered beyond the subject matter or has exceeded the time limit of the parties' claims;
- (e) If the provisions of the judgment are inconsistent in their terms;
- (f) If one of the parties was not properly represented at, or notified by proxy of, the proceedings, provided, in the latter case, that fraud, gross negligence or connivance of the proxy is established;
- (g) If an award was made against an incompetent party, such as a minor, insane person, convicted person or a corporate body who is not properly represented in the proceedings.

Although the re-hearings must be brought before the same court, it must be presumed that, in respect of arbitration as the arbitrator is *functus officii*, the re-hearing cannot be brought before an arbitrators' tribunal, but it must be brought before a court of competent jurisdiction. It should be before a court which is competent for filing an arbitration agreement, or before a court of appeal.<sup>127</sup> Re-hearing applications must be filed within 30 days from the notification of an award.<sup>128</sup> However, the 30 day time limit does not start to run in a case where fraud is alleged [(a) and (f)] until the day of discovery of that fraud, by the party invoking it.<sup>129</sup>

It seems that the grounds which give the parties the right to re-hearing are similar to those involved in setting an award aside. The F.D.C.C.P. gives no logical explanation for imposing the same rules in a

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127. The Explanatory Memorandum of the F.D.C.C.P. Art.214.

128. F.D.C.C.P. article 164.

129. *Ibid.*

different challenge, since this can be invoked by setting an award aside, or by right of appeal. Re-hearing hearings increase the burdens on the arbitration process, and delay the enforcement of the award. This causes some legal systems to abolish this power and restrict orders to setting aside and appeal instead.<sup>130</sup> In accordance with the modern world trends in legal matters, limitation of a court's supervision and intervention in the arbitration process is called for.<sup>131</sup> This power should be reconsidered. An additional benefit will be avoiding duplication of actions arising from Art.213 and 214(2) which concern, respectively, the setting aside of awards, and the re-hearing power, which are based on similar grounds. The adoption of this opinion would not affect the parties' rights. They still have the power to have an award set aside and also the right of appeal. As an essential point of arbitration is to expedite the resolution of disputes between the parties, evidential and procedural irregularities should be accommodated by the appellate process rather than lead to re-hearing.

A further reason for limitation is that these rights have been acknowledged in other systems. An appeal cannot be brought where its requirements are not met, so the party pursues another alternative, i.e. re-hearing. But this is not the case under the F.D.C.C.P., where the power of appeal is unlimited and, apart from *amiable composition*, within its jurisdiction.

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130. The Kuwaiti Civil Procedure Law Art. 186.

131. Such as the exclusion agreement in sec. 3(2) of the Arbitration Act 1979 (England).

#### 6.4.4 Appeal against an arbitration award

Under most Middle Eastern legal systems, an award, after having been issued by the arbitrators, is deposited with a court clerk, together with all relevant documents. If any party takes issue with any finding of law in the arbitrator's decision, he may bring an appeal against the award.

In the case of the Emirates, the procedure is different. After the issue of an award, the party favoured by an award has to file a suit under an award. A court notifies the other party in order that he may introduce his challenge. A court, in this situation, will either accept the opposing party's challenge or set it aside. If the challenge fails the court will embody the award in its judgment. In such case, appeal is not applicable. However, if a court accepts the challenge by a party, it may issue a judgment which is not according to an award. This may give the losing party the right to appeal against the court judgment.

Appeal, under the F.D.C.C.P. and A.D.C.C.P., cannot be brought against the arbitral award directly, until it has been heard in court. However, a court judgment may be appealed against if it does not coincide with an award. The system in the U.A.E. does not consider an arbitration award as enforceable in its own right. Thus it is required to be embodied in a court judgment to be eligible for challenge or enforcement.

Under A.D.C.C.P. Art.94(2), where a court sees no cause to remit an award to arbitration for reconsideration, and no application has been made to set aside an award, or a court has refused such application, a court shall pronounce judgment in accordance with the award. Upon

such judgment, a decree shall follow and no appeal shall be allowed following such a decree. However, if the decree exceeds the parameters of the award or not in accordance with it, an appeal can be brought against it.

An appeal can be brought where an award is embodied in a court judgment and a court judgment does not coincide with an award.<sup>132</sup> The A.D.C.C.P. is different from the F.D.C.C.P. in that the A.D.C.C.P. requires an "action value" to be set in which an appeal cannot be brought if a dispute concerns a sum less than 500 U.A.E. Dh.

The power to appeal against arbitral awards under most Middle Eastern legal systems is exceptional. As a general rule, appeal against an arbitral award cannot be brought before a court, unless the parties have expressly agreed to this, before the issuance of an award. The F.D.C.C.P. follows part of this principle, by not allowing the power of appeal to awards before the confirmation of an award is rendered. But the F.D.C.C.P. departs from the general rule, in allowing parties the power to challenge an arbitral award, where a court refuses to confirm an award.<sup>133</sup>

A system which allows the power of appeal usually imposes some restrictions on this power; for example, requiring a specific amount "action value" which the dispute should exceed. Thus any case in which the value does comes under this amount cannot be appealed. Surprisingly, the F.D.C.C.P. set no limitation, i.e the appeal is opened to

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132. *K.Investment and Real-estates Corp. v. M.H.K. Est., supra.*

133. The Explanatory Memorandum of the F.D.C.C.P. Art.214.



all cases where a court judgment is not coincident with an award. One envisages the intention of the legislature was to open the opportunities for an appeal following the arbitral award. The power of appeal, under the S.A.A., is more wide ranging than under the F.D.C.C.P.. It includes many types of dispute arising during the confirmation of an award or setting aside of an award.<sup>134</sup> A reason which may explain this, is that the S.A.A. does not stipulate the power of re-hearing but substitutes a power of appeal to replace it.

The prospects of an appeal are greatly enlarged under local laws because of the vacuum of statutes which regulate this point. The power of appeal cannot be invoked unless the award is embodied in a court judgment. After it is embodied in a court judgment, an award may be challenged before a Court of Appeal or a Court of Cassation. The award, in this case, is analagous to a court judgment. There is no rule which restricts the power of appeal against an arbitral award, apart from the general rules which are applied in an ordinary court judgment.

#### 6.4.4.1 The procedure for Appeal

An appeal is heard in the Federal Court of Appeal, in the case of the Emirates adhering to the Federal system, and in the local Court of Appeal, in the Emirates which retain their own judicial system.<sup>135</sup>

An appeal should be lodged within twenty days of the day of a court's judgment embodying an award.<sup>136</sup> Appeal implies a re-examination

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134. The S.A.A. Art.17.

135. See chapter 3 at p. 115.

136. F.D.C.C.P. Art.155.

of the issues in arbitration, as to both law and fact. However, most appellate bodies show a reluctance to involve themselves in finding out fact, since that is felt to be more appropriate to the tribunal, which sees all witnesses and hears other evidence.

#### 6.4.5 Further Appeal to The Supreme Court

There is nothing in F.D.C.C.P. Art.214 or A.D.C.C.P. Art.94(3) to prevent the Supreme Court from reviewing a case in connection with arbitration. Appeal to the Supreme Court cannot be made directly against an arbitration award. However, it may be instituted in respect of a court decision dealing with arbitral awards. An appeal may be brought against a court of appeal or a decision made in a retrial in connection with an arbitration case.<sup>137</sup>

An appeal to the Supreme Court denotes the consideration by a court of an award, which is a challenge to essential errors of law or procedure. Therefore, parties cannot bring a challenge before the Supreme Court in a dispute concerning a matter of fact.<sup>138</sup>

The F.D.C.C.P. does not stipulate any requirement for an appeal to the Supreme Court but refers instead to the general rules of appeal to the Supreme Court.<sup>139</sup>

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137. The Explanatory Memorandum of the F.D.C.C.P. Art.214.

138. Al-Qasimy, F. and Al-Sharbeeney, M., *The U.A.E. Legal Encyclopedia* part I, p. 24.

139. F.D.C.C.P. Art.169.

#### 6.4.5.1 The power of General Prosecutor

Upon Art.5 of the Federal law No.17/1978, amended by the law No.3/1985, the U.A.E. General Prosecutor is vested with the power to challenge a court judgment rendered by the Federal Court, which includes judgments related to arbitration. This challenge may be brought before the Supreme Court. The General Prosecutor is empowered with the right to challenge, based on any violation of national interest, of the rules of *Shari'ah* and of general principles of law.<sup>140</sup>

#### 6.4.6 Analysis of the Power to Appeal

One of the features of U.A.E. law is the broad power of appeal. This encourages the challenge of an award, to the extent it has become commonplace to challenge an award on any part of the party who seeks the delay of its enforcement.<sup>141</sup>

As mentioned above, is that there is no direct appeal against an award. Where a court's judgment is contrary to an award, or where an award is set aside, appeal is applicable. Arbitration, under the U.A.E. system, loses its main features of speed, and the avoidance of the more complex procedures of a court. This practice contrasts with that in most other Arab countries, where an awards are subject only to a speedy and simplified external control by a court.

Current arbitration law of the U.A.E. is clearly unsatisfactory, particularly from point of view of court intervention. Review of these negative features should be considered in the light of the world trend

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140. Al-Qasimy F. and Al-Sharbeeney M, (*op. cit n. 138*) at p.25; *General Persecuter v. The Ministry of Public Works and Housing & F.T. Co., The U.A.E. Supreme Court case No. 63/11, (1990) 62 Al-adalah 87.*

141. See Art.214 of the F.D.C.C.P. and Art.17 of the S.A.A..

to reduce and limit a court's power in matters of arbitration. One possibility is to adopt the Exclusion Agreement of the English Arbitration Act 1979, when the F.D.C.C.P. reviews its policy. The Exclusion Agreement introduced in Section 3 of the 1979 Act entails the exclusion of judicial control of the award. This section is the most significant arbitration reform in England because it modified the doctrine of ouster. The Act permits parties to enter into valid exclusion agreements to exclude judicial supervision before the rendering of the arbitrator's decision. The exclusion agreement may be a separate agreement or a part of the arbitration agreement itself.<sup>142</sup>

Introducing a similar provision in the F.D.C.C.P. will relax the court's tight control over the arbitration and facilitate the speedy resolution of disputes.

A second possibility is to impose greater limitation on the power of appeal, especially to the Supreme Court. This power is an extraordinary means of recourse against a judgment. Therefore, it should not be a recourse against any judgment especially, where an arbitral award is involved. At present, appealing to the Supreme Court negates the purpose of arbitration. The present restriction regarding the "action value" is not enough to oust arbitration disputes from the province of the Supreme Court, knowing that the majority of arbitration cases exceed the "action value" limit. Therefore, another restriction should be instituted to limit this intervention, by granting the Supreme Court power to give leave to appeal only where a point of law of general importance is involved.

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142. The 1979 Arbitration Act, sec.3(2).

It is worth considering some guidelines introduced by other legal systems, regarding the power of appeal in arbitration disputes. A jurisdiction which restricted the power of appeal is England. The right of appeal under English arbitration law is not automatic. Before a party can appeal it needs to obtain the leave of the court to do so, it must show either: (a) the point in issue is one of importance to the particular trade or industry and the arbitrators is likely to have been wrong; or (b) in any "one-off" case, the arbitrator is manifestly wrong.<sup>143</sup> By imposing restrictions on the power of appeal, these restrictions should prevent unnecessary appeals, and should reduce the load on the Court of Appeal and Supreme Court. However, if the F.D.C.C.P. rules remain as they do at present, they will lead, not only to expensive time-consuming delays, and the delay of the enforcement, but also the reluctance of the parties, especially the trans-national contractors, to submit their disputes to the any system of arbitration within the purview of the Emirate court.

## Conclusion

Court intervention in arbitration in the U.A.E. seems to be one of the salient features of this system. A court, under the U.A.E. rules, has powers of intervention, both during the arbitral process and after an award has been given. Court intervention does not differentiate between arbitration invoked during a law suit, or arbitration which arises from an agreement between the parties and takes place out of court. In the end, both awards are subject to mandatory confirmation by a U.A.E.

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143. For further consideration, the decisions of the House of Lords in the *Nema, Pioneer Shipping v. B.T.P. Tioxide* [1981] 2 Lloyds' Law Rep.239.; *Italmore Shipping Co. v. Ocean Tanker Co. Inc.*[1982] 1 ALL ER 517.; *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.*,[1985] A.C. 191.

court prior to any enforcement. This practice is the primary source of the delay, and the complex procedure is controlled by a court. All this signifies the courts' suspicion of the arbitration procedure.

An exacerbating factor is the inadequacy of the rules of arbitration under the U.A.E. system. There are significant gaps in the available rules, and the judges coming from different legal systems, are more influenced by their own legal systems than that of the U.A.E. It is not surprising, therefore, to find differing views among the judges in the same jurisdiction; in favour of the arbitration, against it, or in favour of arbitration but with reservations of varying degree. The way a case is dealt with in such a jurisdiction depends to a large degree on the judge who oversees the case.

The above-mentioned reasons should provide urgent motivation for the enactment of an arbitration law based on the essence of arbitration, which is speedy, confidential and simple in its procedure; in which a court becomes an instrument to promote arbitration and coordinate with it, rather than obstructing the tendency to arbitration.

In the meantime, and due to the difficulties of enforcing F.D.C.C.P. rules, the existing rules concerning arbitration can be amended, by adding some provisions to them and explaining some of the Articles to be used, pending the implementation of the F.D.C.C.P. Until these reforms are considered, arbitration rules will be lacking in the certainty, clarity and predictability that the U.A.E. legal system needs to give them.

## Chapter Seven

### The Enforcement of Arbitral Awards in the U.A.E.

#### Introduction

Enforcement is the final stage in the arbitration process. It is the stage in which the arbitrator makes his award, and in which the winning party will wish to have the award recognised and enforced. The parties can agree to execute the decision of the arbitrator on their own without resorting to a court order. However, sometimes a difficulty arises, preventing the enforcement of the award. A conflict may arise between the opposing desires of two parties: one of them wanting enforcement and the other resisting it. It is a contradictory interest between the losing party who tries to resist every challenge in order to stay the enforcement, and the winning party who, loaded with the burden of proving the validity and finality of the award, seeks enforcement. There is a sense in which this situation returns the parties to the same position as before undertaking the arbitration: relief may be rendered from a court, but this is what they were attempting to avoid in the first place. A losing party to the arbitration may reject the amiable enforcement of the award whilst the arbitrator does not exercise power to enforce it. Under U.A.E. rules the award *per se* does not operate as a transfer of property but needs the executory power of the court for enforcement. As a result the party invoking the enforcement of the award resorts to a competent court, to compel a recalcitrant loser to meet his obligations.

The legal system in the country where the enforcement is sought plays a significant role in promoting arbitration or restricting it. Court intervention may be limited to the enforcement of an award, on the court may possess full jurisdiction over an award, and may examine the award *de-novo*.

National religious and cultural features affect attitudes towards an arbitration system, as well as the extent of development of the arbitration system in the country. The U.A.E. is a country in which enforcement is affected by perceptions of the national interest, especially in the case of foreign awards. This chapter examines the enforcement of an arbitral award in the U.A.E. and the obstacles facing such enforcement.

#### 7.1 When does an award becomes enforceable under U.A.E. Law ?

The enforcement of an arbitral award depends on the power vested in a country's court.<sup>1</sup> In order for the court to enforce an award it should ascertain what procedure is relevant to each type of award. Is it domestic or foreign ? A domestic award has requirements different from a foreign award. The majority of legal systems differentiate between domestic and foreign awards. It is important to know the procedure which should be followed for each award.

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1. Pieter Sanders, Appeals Procedure in Arbitration, Reported in Schmitthoff, Clive M. *International Commercial Arbitration*, (Oceana Publications 1974) p.112.



### 7.1.1 The criteria which differentiate between domestic and foreign awards under the U.A.E. rules.

The term "foreign" award in this section will include awards rendered in a country other than the one in which the award is enforced, and awards which are considered "non-domestic" by the forum, e.g. because rendered outside the territory of the U.A.E..

The U.A.E. rules specify criteria which differentiate between domestic and foreign awards. Article 209(4) of the Federal Draft Code of Civil Procedure (F.D.C.C.P.) and article 11(3) of the Sharjah Arbitration Act (S.A.A.) adopt the "territory concept" i.e. the place of arbitration. The place where an award is issued determines its nationality and constitutes an important criterion over the procedure of its enforcement.

Article 209(4) provides that any award issued in the U.A.E. is considered a U.A.E. award and can be enforced in accordance with the procedure laid down in article 212 for U.A.E. awards. Any award rendered outside the territory of the U.A.E. is considered to be foreign, even though rendered upon an agreement concluded in the U.A.E. or between U.A.E. citizens. This concept disregards the other elements of the arbitration, such as the parties' nationality, the subject matter and the law governing the disputes. This provision was criticised on this account and it was considered inadequate to differentiate between domestic and foreign awards. Because applying it may lead to treating an award with substantial foreign elements as the domestic (eg if both parties are foreign to U.A.E., neither have any establishment or assets in U.A.E., and the contract has no connecting factor with U.A.E.).

Nevertheless, the award under art. 209(4) will be considered a domestic award if issued in the U.A.E. But the parties may chose the place where the award is rendered only in the interest of geographical neutrality and may not consider an implicit expression of the parties intent to subject themselves, to the law of that place.<sup>2</sup>

The federal legislature should reconsider re-drafting this article of the F.D.C.C.P., by considering the other factors which may affect an award such as the party's nationality, subject matter of the dispute in its relation to the U.A.E., applicable law, and the place where the award was rendered. The nationality of the award must not depend on one criterion. It must be based on all these criteria. The arbitration will be considered domestic if preponderatly its elements link it with the legal system of a particular state (the applicable law, place of arbitration, nationality of the parties, nationality of the arbitrators, and subject matter of the dispute). The nationality of the award should be judged in the light of the relation of these factors to a certain country.

#### 7.1.2 The Form and Content of the Award

The types of award under the U.A.E. rule can be classified into three categories; domestic, inter-Emirate, and Foreign. The requirements for enforcement for all three categories are the same except for certain rules pertaining to foreign awards. The requirements are as follows:-

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2. Jan Paullsson "Arbitration Unbound: Award Detached from the Law of its Country of Origin", (1981) 30 International and Comparative Law Quarterly 358-387 at pp. 367-368.

(i) The Formal Requirement

(1) The award must be in writing. Article 210 of the F.D.C.C.P. stipulates that an award should be issued by the majority arbitrators, and should be written. An oral award cannot be considered under the U.A.E. law.

(2) The award, unless the parties have agreed otherwise, is to be formulated in Arabic. Where the parties seek enforcement of the award rendered in a foreign language, an official translation into Arabic of the arbitral award is required.

(3) The award should be issued in the name of the supreme authority of the country, the U.A.E. President or a local ruler in the Emirate system. The Sharjah Court of Appeal ruled that the award should be issued in the name of the President of the Union, otherwise, an award would be deemed null and void.<sup>3</sup> The Sharjah Court of Appeal in Edison v. A.A.A. insisted that issuing the award in the name of the supreme authority is one of the formal requirements of an award.<sup>4</sup> An award is not necessarily final after its issue by the arbitrators. In reality it still has to be finalized, by a court decision by the judge. In a court any final award is thus issued in the name of the supreme authority. The mandatory force of an award should not be invoked until the court is granted powers of execution over an award issued in the name of the supreme authority.

(ii) The Contents of an award

In order for an award to be considered for enforcement it should contain the following:

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3. *Edison v. A.A.A.*, The Sharjah Court of Appeal Case No.41/1990, unpublished.

4. *Ibid.*

(a) A copy of the arbitration agreement should be sent to the court by the arbitrators, together with the award. Thus the court can ascertain that the award corresponds to the arbitration agreement; that the arbitrators have considered the subject matter referred to them in the agreement, and the arbitrators were within the scope of the agreement when they rendered the award.

(b) A summary of any challenge submitted by opposing parties; documents presented by all parties showing the facts and the issues.

(c) Article 210(1) of F.D.C.C.P. enjoins the arbitrators to adduce reasons for the award given by them. Arbitrators should formulate briefly how they reached their decision. Even when conferred with the power to act as an *amiable compositeur*, failure to specify the reasons will lead to the invalidity of the award. The F.D.C.C.P. article 210(1) and S.A.A. section 12(1) are not specific as to the extent of the reasons to be presented. Should they correspond to those required in a court judgment or not? The Federal Supreme Court ruled that arbitrators should specify the reason for their award, but they are not required to formulate it in the same way as the judge does in a court case.<sup>5</sup> Specifying the reasons for the award is considered a fundamental principle of justice. The parties are entitled to know the reasons which affect and constitute the basis of the arbitrators' decision.<sup>6</sup>

The only reservation against the provision requiring reasons for the award is that it is unspecific, and may represent a burden on the arbitrators. It would be more convenient if reasons were required only

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5. *M.A. Co.v. Abu-Dhabi Department of Workers*, the U.A.E Court Case No. 2/1981, unpublished.

6. *Ibid.*

if the parties request it in advance. Thus unless the parties request arbitrators to do so, the arbitrators should not be bound to specify the reasons of the award.<sup>7</sup>

(d) The F.D.C.C.P. Article 208 stipulates that "If the issue of the arbitral award is not subject to any time limit the award must be made within six months." If the arbitrators issue the award after this time limit and the parties do not extend the award, it will be deemed void. For a court to enforce an award it should know the time of its issuance, to consider whether the award was issued within the time limit or not. The F.D.C.C.P. requires the arbitrators to specify the date of issue. Where arbitration award comes to the court without indication of the date of issue it is deemed void.<sup>8</sup>

The place where the award is issued should be notified to the court in order to consider the applicable rules. Either the application of article 211 applies where the award takes place within the U.A.E., or article 230 applies where the arbitration take place outside U.A.E..

(e) The decision: in order to be valid, an award must be clear, final, certain, consistent with itself or it can be deemed invalid.<sup>9</sup>

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7. In this respect, Article III of the European Convention 1961 on International Commercial Arbitration stated:

"The parties shall be presumed to have agreed that reasons shall be given for the award unless they (a) either expressly declare that reasons shall not be given, or (b) have assented to an arbitral procedure under which it is not customary to give reason for award, provided that in this case neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given".

In this respect, Art.III of the Convention goes too far in requiring reasons, unless parties say otherwise. It should be the other way around, with no reasons required.

8. F.D.C.C.P. Explanatory Memorandum art.209.

9. *Ibid* art. 212.

(f) The arbitrators' signatures: The award should be signed by all the arbitrators. If some refuse, they are required to specify their reasons. Article 210 of F.D.C.C.P. requires the majority of the arbitrators to sign the award and where the majority fail to do so the award will be deemed null and void. Does neglect to sign by the arbitrator imply the invalidity of an award? It is likely that under the F.D.C.C.P. such an award would be considered void, but under Abu-Dhabi Code of Civil Procedure (A.D.C.C.P.) art. 91(c)(1) one can envisage that the court may remit the award to the arbitrator to sign it.<sup>10</sup>

### 7.1.3 substantive requirements

An award must satisfy the following conditions:

- (a) The award must follow the relevant arbitration agreement;
- (b) The award must be made by the tribunal provided for in the agreement;
- (c) The award is in respect to a matter which may lawfully be referred to arbitration;
- (d) The award is rendered within the time limit and does not exceed the scope of arbitration; and
- (e) The award is not contrary to the public policy.

## 7.2 The requirements and procedure for the enforcement of an award

We shall consider various types of awards in the U.A.E. and how they are enforced.

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10. A.D.C.C.P. art. 91(c)(1) stated that:-

"The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrators upon such terms it thinks fit: (1) where the award has left undetermined any of the matters referred to arbitration...".

### 7.2.1 Domestic awards.

According to local law and practice, domestic awards are the awards which take place and are enforced within individual Emirates. An award rendered, for example, in Dubai enforcement for which is sought in Ajman, is not considered a domestic award even though it is issued within the U.A.E.. In this case the award would be regulated through a special procedure according to Law No. 11 of 1973 (discussed below).

The F.D.C.C.P. and S.A.A. differ on this point. Under F.D.C.C.P. a domestic award is an award rendered in the U.A.E., regardless of where it is rendered within U.A.E. territory.<sup>11</sup> A foreign award is any award rendered outside of the U.A.E.. However, the F.D.C.C.P. is not in force yet and the S.A.A. has exclusive jurisdiction in the Emirate of Sharjah.

#### 7.2.1.1 The domestic award under F.D.C.C.P. and S.A.A.

As mentioned above, arbitrators have no power to enforce their awards. Such powers are exclusive to the courts. Arbitrators should submit the award to the competent courts for their exequatur power (leave for enforcement). When a court has this power, it should ascertain that the award rendered fulfills the formal conditions of enforcement, and there are no legal impediments for the enforcement.<sup>12</sup>

The F.D.C.C.P. does not differentiate between Court Arbitration and Registered Arbitration regarding the enforcement of awards, unlike the the rules of the S.A.A..<sup>13</sup>

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11. F.D.C.C.P. art. 209(4); S.A.A. art. 11(3).

12. Abou El Wafa, *Arbitration in the Arab states*, (First ed. Alexandria) p.73 (Arabic).

13. *Infra*.

(i) Under the Federal Draft of Code of Civil Procedure (F.D.C.C.P.).

According to article 211 and 212 of the F.D.C.C.P. enforcement is as follows:

(a) Deposit of the award: "arbitrators shall deposit the award together with the original arbitration agreement, and the other document of the dispute at the court of the competent jurisdiction". Nothing however, should prevents parties who intend to comply with the award from doing so informally and without recourse to the courts.<sup>14</sup>

(b) The deposit of the award by the arbitrators with the proper court of the competent jurisdiction usually Court of First Instance should take place within fifteen days after the issue of the award. The failure to file the award within the fifteen days will not effect the validity of the award. However, the party invoking the enforcement may ask the arbitrator to file the award, and he may sue the arbitrator for any delay.<sup>15</sup> Deposit can be made with the Court of Appeal where the arbitration was invoked before this court.

(c) Upon the deposit of the award at the court the court clerk shall provide a receipt for the delivery of the award. The court clerk shall present the award, together with all the documents, to the judge or the President of the Circuit, to assign a hearing within fifteen days for the confirmation of the award and notifying the parties.

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14. F.D.C.C.P. Explanatory Memorandum, art. 212.

15. *Ibid.*



(ii) Under the Sharjah Arbitration Act (S.A.A.)

Article 13 of the S.A.A. differs from F.D.C.C.P. art.211, by stipulating two different procedures for the enforcement of the award. The first concerns Court Arbitration, which is regulated by art.13(1) and the second is Registered Arbitration which is regulated by article 13(2).

(a) According to article 13(1), Court Arbitration is where arbitration is invoked during a law suit before a judicial court. The court upon the parties' request, refers the subject matter or part of it to arbitration. Arbitrators are required to submit the award to that court by depositing the award with the court clerk within fifteen days of the issuance of the award and there required to provide each party to the arbitration with a copy of the award. The rest of the procedure is similar to article 211 of the F.D.C.C.P..<sup>16</sup>

(b) Article 13(2) concerns the register of an arbitration award, where the arbitration takes place out of court.

(iii) Granting of *exequatur* power

The award is enforceable only after an *exequatur* clause (leave for enforcement) has been issued by the court at the request of any interested party.<sup>17</sup> This court should be competent in the subject matter of the dispute. The judge's capacity is as an executant.

The court shall examine the award and the arbitration agreement before granting *exequatur* power, to ascertain that (a) there are no legal impediments for the enforcement, (b) the award is based on a valid arbitration agreement, (c) the dispute has been settled by the

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16. See F.D.C.C.P. art. 211.

17. F.D.C.C.P. art. 212.

arbitrators who were appointed according to the agreement, (d) the award is rendered within the time and scope specified in the arbitration agreement and signed by the majority of the arbitrators.<sup>18</sup>

If the judge holds that the above requirements have been satisfactorily met, the court will fix its executory seal at the bottom of the original copy of the award.

We should remember that the judge, by taking this procedure, neither controls its merits nor interferes with the arbitration decision. His task is merely ascertain if whether the legal conditions for the enforcement of the award have been fulfilled, and as such his task should not be extended.

#### 7.2.1.2 The domestic award under Abu-Dhabi Code of Civil Procedure (A.D.C.C.P.), and the practice of the Emirates of Dubai.

##### (i) Under The Abu-Dhabi Code of Civil Procedure (A.D.C.C.P.).

The enforcement of an award under the A.D.C.C.P. depends on the type of arbitration for Court, Register or Contractual. Under Court Arbitration, arbitrators shall submit their decision in writing to the court, together with the other documents. If then confirmed by the court, the award and its enforcement will be issued as a court judgment.

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18. F.D.C.C.P. Explanatory Memorandum, art. 212.

Regarding the other two types of arbitration (Registered and Contractual Arbitration): the party invoking the enforcement of the award will bring an action against the other party if they refuse its enforcement. The court shall assign a time for the parties to raise their objections to the award.<sup>19</sup> The court either considers the challenge of the party and invalidates the arbitration or dismisses the party's challenge. Where the court dismisses the challenge of a party, the award shall merge with, and be subject to, the rules applicable to a court judgment.<sup>20</sup> Whatever type of arbitration, under A.D.C.C.P. rules, any attempt to have an award enforced would inevitably involve a review of the merits of the case.<sup>21</sup>

(ii) Practice of the Emirate of Dubai

(a) Court Arbitration

There are no domestic provisions relating to the enforcement of an arbitration award under Dubai law. Rather, we shall examine the court practice in this regard.

The practice in Dubai does not differ from the one in Abu-Dhabi. Under the Dubai Courts' practice, the enforcement of an arbitral award is not automatic. An award has to be filed with a competent court and the parties are allowed to submit their objections to the award. If a

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19. A.D.C.C.P. art. 97(3).

20. A.D.C.C.P. art. 98(1).

21. See forms and nature of arbitration in chapter 4 at p. 140.

timely objection is not filed, the award becomes final. If the objections are filed, the court either accepts the objections or dismisses them and issues an order for execution of the award.<sup>22</sup> The award shall be due for execution upon an order from the court, and this order shall be issued upon request of a party, after confirming that there is nothing to prevent its execution.<sup>23</sup> It remains unclear whether this implies only a limited court review of the award, or a full review of the facts; in other words, should the court, when enforcing the award, consider the merits of the case as in they do in the Abu-Dhabi Courts?

Consideration of the extent of judicial review of a case in arbitration is considerably important to the parties to the arbitration. This is because one of the major advantages of an arbitration is that it is independent of the courts.

In the Dubai Courts the exercise of this power is influenced by various factors. Because of the different nationality of judges (Egyptians, Sudanese, Jordanians...) sitting in the Dubai Courts, the extent of judicial review in arbitration settlements varies according to the arbitration laws in the respective countries of origin of these judges. Decisions may be influenced to a substantial degree by the judge who tries the case.<sup>24</sup>

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22. *Omran v. Omran*, Dubai Court of appeal case No.196/984 Civil issued 6.4.1985 unpublished.

23. *A. Ltd Co. v. Dubai Insurance Co.* The Dubai Court of Appeal case No. 187/82, unpublished.

24. See Chapter 3 the Law and Justice In the U.A.E.

Secondly, the lack of written statutes or regulations prescribing the standards for judicial review in local arbitral awards affect the arbitral awards.<sup>25</sup>

Thirdly, the courts are often suspicious of the system of arbitration. Although the Dubai Contract law in article 32 emphasizes the power of the court in arbitration by placing it upon the same footing as other contracts, where they belong,<sup>26</sup> nevertheless the courts seem unwilling or less enthusiastic to consider the enforcement of awards without reviewing them.<sup>27</sup>

Fourth, the requirement, under the Dubai Court rules that awards, in order to be enforced, must be embodied in a judgment envisages the courts' power to review the merits of awards. This requirement suggests that a party invoking an arbitral award is required to apply to a competent court for the enforcing of the award. The courts treat an award as if it is lawsuit against the other party, who has the right to submit a challenge, after being notified by the court. The court, in the absence of any statutory provision limiting its jurisdiction over the enforcement of domestic awards, may exercise unrestricted control including, both in procedure and re-examination on the merits.

Finally, some additional uncertainty in this issue results from the fact that the Dubai courts as with the other U.A.E. courts, do not apply a doctrine of binding precedent.

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25. *Ibid.*

26. *Alam Traders V. Gulf Daewoo Est. and Daewoo Corp*, The Dubai Shari'ah Court case No.22/1988 civil issued 17.4.1989 unpublished.

27. *A. Investment Co. v E.Engineering Enterprise*, The Dubai Court of Appeal case No. 448/1990, unpublished.

These factors play a major role in relationships between courts and arbitral award in the practice of the Dubai Courts due to uncertain decisions of these courts.

The legal opinion of the different judges in the Dubai Courts grants the court limited power. The court expressed these limits by its ruling in A. Ltd Co. v. Dubai Insurance Co., that:-

... the judge's authority concerning the confirmation of an arbitral award is to examine the arbitration agreement and the award; to ascertain that no impediment exists preventing the enforcement; that the parties to the arbitration agreement were allowed to submit their case properly, and that the award was rendered according to the arbitration agreement and arbitrators procedure was satisfactorily conducted.<sup>28</sup>

The Court added that the judge, when following these procedures, "has no power to examine or consider the arbitration decision nor to review the award on its merits".<sup>29</sup>

In Omran v. Omran the Dubai Court of Appeal ruled that the court exercising exequatur power will not examine the merits of the award. The court merely examined whether the legal conditions for the enforcement of the award had been fulfilled.<sup>30</sup>

The Dubai *Shari'ah* Court of Appeal followed the same guidelines as in the former cases by ruling, in A. Muhammad A. v. T. General Trading East., that the court's jurisdiction was limited to ascertaining the formal requirements of the award.<sup>31</sup>

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28. *A. Ltd Co. v. Dubai Insurance Co.*, (*op.cit* n.23).

29. *Ibid.*

30. The Dubai Court of Appeal Case No 196/1984, unpublished.

31. The Dubai *Shari'ah* Court of Appeal Case No.18/1988, unpublished.

Other courts, however, have refused to follow the lead suggested in Dubai Insurance Co., and the T. General Trading East. A number of courts, including the Court of Appeal itself, had second thoughts as to the courts' power concerning the power of the court over enforcement.<sup>32</sup> Despite the above mentioned decisions, the enforcement of arbitral awards may involve review by a court, to the extent of the merits of the case before granting enforcement of the award. Enforcement proceedings are often a trial *de\_novo*, whether the arbitration proceedings were conducted within or outside the courts.<sup>33</sup> Although the first tendency represents the modern approach to enforcement of an award, in Dubai Courts the second trend predominates.<sup>34</sup> Until the F.D.C.C.P. is implemented and steps are taken to eliminate the courts' power to review the merits of an arbitral award, the extent of the courts' intervention is unpredictable. Unless this is done the future of arbitration, as an effective alternative to litigation remains very much in the hands of the judges who try the case.

The procedure for the enforcement of an award in the Dubai Courts is as follows:<sup>35</sup> The party invoking the right petitions for an enforcement of the award by filing a suit against the party who refuses the enforcement. The original text of the award, together with an

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32. *E.Engineering Enterprise v. A. Gulf Co.*, The Dubai Shari'ah Court of Appeal case No.71/1988 ; *A. Investment Co. v. E.Engineering Enterprise*, The Dubai Court of Appeal case No. 448/1990, unpublished.

33. Dixon Giles and Wood Priscilla, "Arbitration Law, Practice and Enforcement of Award in U.A.E. II" (Nov. 1988) Middle East Executive Report 24.

34. See the Dubai Civil Court judgment in *The Owner of the vessel (Mondwfay) v. G. Carrier and M.H.* , discussed below.

35. The jurisdiction depend on the subject matters involve, either referred to the Civil Court or to the *Shara'ah* Court, for more detail see chapter 3 at pp. 112-114.

arbitration agreement, are submitted to the court; which reviews them, to ascertain the absence of any grounds preventing the enforcement. It then hears the challenge of the party which refuses to comply with the award.<sup>36</sup> The court will grant an award the *exequatur* power (leave for enforcement) as a judgment of the court if satisfied.

#### (b) Private Institutions

The second issue is associated with the enforcement of domestic awards, if issued by private institutions, such as a chamber of commerce.<sup>37</sup>

The awards of these institutions are enforceable after the issuance of an award but they have no power to enforce any of their awards. A party who has invoked the enforcement of award conducted by the Chamber of Commerce must seek a court judgment on its award in order to attempt to secure enforcement.

The enforcement of an award under this system can be divided into two types. The first is where the award was a result of a case referred to the Chamber by the court. In this case the award is enforced as a Court Arbitration award under the A.D.C.C.P..<sup>38</sup> The second is where the parties resort to the Chamber of Commerce in the first place for the settlement of their disputes. If one of the parties refuses to honour after the Chamber of Commerce arbitration Committee renders their award, the other party must apply to the court in order to secure enforcement. Although it may sound easy, in reality it is not; because

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36. *M. Omran v. R. Omran*, The Dubai Court of Appeal, case No. 196/1984, unpublished.

37. See chapter 5.

38. See the procedure under A.D.C.C.P. *Supra*.



the law and practice in Dubai contains no particular direction in this regard. That leads to a variety of decisions by the Dubai courts. In Omran, a case brought before the Dubai Civil Court concerning enforcement of an award rendered under the auspices of the Dubai Chamber of Commerce, the court ruled that in order to enforce such an award the court has to assign a day for the parties to hear the challenge raised by the other party, but the court may not enforce the award until the parties have been heard. If the court dismisses the challenges an award shall be enforced according to the same rules followed in enforcing domestic awards.<sup>39</sup>

In the same case and the same parties, the Dubai Court of Appeal ruled that the award had been settled under the auspices of the Dubai Chamber of Commerce; the court reviewed the award to ascertain the procedure of arbitration, without dealing with the merits of the award.<sup>40</sup>

#### 7.2.2 An Inter-Emirate award

An Inter-Emirate Award is one which is rendered in one of the Emirates but for which enforcement is sought in another. Inter-Emirate enforcement used to be regulated by the 1970 decree concerning Judicial Relations between Emirates. After the establishment of the Union of the Emirates this law was replaced by Federal Law No. 11/1973 concerning Judicial Relations Between the Emirates. The 1970 decree treated the enforcement of awards, outside the rendering Emirate as foreign awards. Prior to the Union of the Emirates, each Emirate was sovereign. After

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39. *R. Omran v. M. Omran*, The Dubai Court of Appeal case No. 70/84, unpublished.

40. *M. Omran v. R. Omran*, The Dubai Court of Appeal case No. 196/1984, unpublished.

the establishment of the Union of the Emirates this law was soon replaced by Federal Law No. 11/1973, concerning Judicial Relations Between the Emirates. This law includes the enforcement of court judgments and arbitral awards issued for civil and commercial matters.<sup>41</sup> It was one of the first Federal Acts of legislation. The law was introduced to fill gaps in federal legislation. The question that arises is one of whether the Federal Law No. 11/1973 achieved the objective on which the 1970 decree failed i.e. providing a system of direct enforcement of arbitration awards between the Emirates.

**(i) The Inter-Emirates Award Enforcement Procedure**

There are no provisions concerning the procedure and substantive law applicable to enforcement in law No. 11 of 1973. Instead it referred to the laws of the Emirate where enforcement of the award is sought.<sup>42</sup> Where a party invokes an Inter-Emirates award, he should apply to the President of the Court which has jurisdiction for the enforcement of the award. The court will then follow the same procedure as a domestic award. The party invoking this type of award is required to submit the following documents:

- (a) An official copy of the award with the enforcement order, authenticated by the competent authority of the member-Emirate where the award was made;**
- (b) The original notice evidencing the proper notification of the award to the parties, or an official certificate of notification;**

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**41. The Federal Law No.11 of the 1973 article 11.**

**42. *Ibid*, art. 17.**

- (c) An official certificate issued from the competent authorities confirming that the award is final and enforceable;
- (d) Where the award was made *ex\_parte* a certificate that the parties were duly summoned to appear before the arbitrators.<sup>43</sup>

(ii) The grounds for denial of enforcement

Law No. 11 1973 art. 13 authorized an Emirate in which the award was sought to deny the enforcement of awards in certain cases, which are as follows:

- (a) If the law of the Emirates where the enforcement was sought does not allow the settlement of the subject matter by arbitration;
- (b) If the award was based on an invalid arbitration clause or arbitration agreement;
- (c) If the arbitrators have no power to arbitrate according to an arbitration clause or arbitration agreement or the law of the rendering Emirate;
- (d) If the award violates public policy in the Emirate where enforcement for the award was sought;
- (e) If the the award is not final under the rendering Emirate.

(iii) The analysis of the Inter-Emirates Award

The object of the Law No.11/1973, according to its preamble, is to promote to judicial relations between the Emirates, filling the legal gap in of these Emirates in respect of enforcement of court and arbitral awards, and removing certain difficulties that may impede the enforcement of courts judgments and arbitral awards.

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43. *Ibid* art. 16.

To what extent did this legislation achieve its objective? The law was based on the Arab League Convention of 1952 concerning the enforcement of court judgment and arbitral award between Arab States.<sup>44</sup>

Although Law No. 11 of 1973 was introduced to facilitate direct enforcement of arbitral award, practice proves otherwise:

(a) According to 11/1973 art. 12 the court where enforcement is sought has no jurisdiction to consider the merits of the case. In practice however, this point is not observed. It seems that where the award is made in one Emirate (Dubai, for instance) and enforcement is sought in, say, Ras-al-Khaimah, in theory the court in Ras-al-Khaimah should enforce the award without considering the merits of the case. As a result the court assumes discretionary power to review the award before enforcing it, this review in many cases involves substantive review of the award.<sup>45</sup>

(b) Law 11/1973 art. 17 provides for the procedure for enforcement according to the law of the Emirate where the enforcement was sought. As a result of the mechanical copying of the 1952 Convention, a matter was overlooked when Law No.11/1973 was drafted, i.e. that some of the Emirates have no law to regulate enforcement, unless this article can be read to include practice. This is unlikely because article 17 stipulates that "the procedure and substantive laws applicable to the enforcement process are the law of the Emirate where the enforcement was sought."<sup>46</sup>

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44. See the Arab League Convention of 1952, *Infra*.

45. Nicholas B. and Feulner G., "Arbitration of Disputes in the United Arab Emirates", Reported in: Arab Comparative & Commercial Law the International Approach, vol. I (Graham & Trotman, 1987) p.233-253.

46. Emphasis added.

(c) The rules of jurisdiction are a matter of public policy and any violation of these rules can make the procedure void. Law 11/1973 emphasized this in article 13(d), which stated that an award contrary to jurisdiction rules will be deemed null and void. In M. Omran v. R. Omran, the Dubai Civil Court gave an award judgment which was enforced against immovable property in Abu-Dhabi by an Abu-Dhabi Court.<sup>47</sup> According to the rules of jurisdiction, where enforcement involves immovable property, it is governed by the *lex situs* - which in this case is the Abu-Dhabi court not Dubai. Nevertheless, the award was enforced, despite the fact that this procedure is contrary to article 13(d) of Law No.11 of 1973.<sup>48</sup>

The failure of Law 11/1973 to achieve its objective may be attributed to two difficulties. The first is an external problem related to the situation in the Emirates, and the second is inherent in the law itself in the way it was drafted.

The external difficulty is represented by the Emirate power at the time when the law was enacted. Law 11/1973 was one of the first federal laws which came into operation at the beginning of the establishment of the union, when federal authority was weak compared with the local authority.<sup>49</sup>

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47. The U.A.E. Federal Supreme Court case No.126/7.

48. *Ibid.*

49. See Chapter 3 Law and Justice in the U.A.E.

The law was an attempt of the federal legislature to create a mechanism to facilitate the enforcement of court judgment and arbitral awards between the Emirates and in turn to implement federal policy over these Emirates. The initiative contained in the federal legislature was not successful because the concept of the federal entity of the state was not yet formed, because each Emirate to some extent was sovereign to itself with its own judicial authority which was not accustomed to federal legislation.

The second internal difficulty of drafting the law was influenced by the situation of the Emirates. The law was enacted at the beginning of the union, influenced by the prevailing law and practice in that period, which aim at not depriving the Emirate of its power but instead working with it.

The best way to achieve that result was to look for a system which could accommodate these events. The best alternative was the application of the old law of 1970.

The 1970 Decree was copied without significant modification, disregarding the fact that it was drafted for the enforcement of court judgment and arbitral award between different sovereignties whereas Law 13/1973 was drafted for one state.

As a result the law gave way to local rules. In practice the law was not observed by the Emirates and the local law or practice was employed.

### 7.2.3 The Foreign award

The term "foreign" award is intended to include awards rendered in one country and for which enforcement is sought in another.

There are three different modes for enforcement of the foreign award: Viz, (1) multilateral Convention, (2) bilateral treaty, or (3) local enforcement, where the former two categories are not applicable.

#### 7.2.3.1 Enforcement under Multilateral Conventions

The enforcement of foreign arbitral awards is covered by many multilateral Conventions and bilateral treaties. These Conventions may be designed for a general purpose, as in the New York Convention of 1958, on the Recognition and Enforcement of Foreign Awards. In addition, certain Conventions reflect the particular needs of certain countries. This is the case of the Arab League Convention of 1952.

##### (i) The Arab League Convention of 1952

The U.A.E. is a member of the Inter-Arab Convention on the Enforcement of Judgment and Awards, commonly Known as the Arab League Convention of 1952. The U.A.E. ratified the Convention by Federal decree No. 29/1972.<sup>50</sup> The introduction of the Convention was intended to establish co-operation between the member states in the field of the enforcement of judgments and arbitral awards.

This section will only examine the rules concerning the enforcement of foreign arbitral awards.

##### (a) The Scope of the Convention

The scope of the Arab League Convention concerning arbitral awards is limited to those which are considered civil or commercial.<sup>51</sup>

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50. The Arab League Convention was ratified by Egypt, Iraq, Kuwait, Jordan, Libya, Saudi Arabia, and Syria.

51. Arab League Convention of the 1952, art.1

The Convention makes no mention of the authority which is to determine the civil or commercial character. It seems that the Convention left some aspects without clarification, in order that States, whilst not contradicting the general principle of the Convention, might fill out the gaps within the regulations which were suitable for that country. One of these issues was the determination of the civil or commercial character of the award, which was left to the ruling of the judge in the country where the enforcement was sought. The judges may also take into consideration the law of the rendering country.<sup>52</sup>

The second limitation is that the award is foreign. Under the Arab League Convention, what is understood by the term "foreign award" is one where an arbitral award is made in the territory of a Convention State-member other than that where the enforcement for the award is sought.<sup>53</sup>

Additionally, the Arab League Convention did not apply to awards rendered against a state's government or its officials.<sup>54</sup> The Convention also excludes awards whose enforcement is sought according to international Conventions or bilateral treaties.<sup>55</sup> This implies that the bilateral Convention (see below) between U.A.E. and Syria has precedence over the Arab League Convention of 1952.

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52. Izz al-Din A.A., "The Arab League Convention. A Comparative Study in Convention and National Law." (1974) 356 L'Egypte Contemporaine, pp.235-360.

53. Arab League Convention, 1952, art.3.

54. Discussed below.

55. Article 4 of the Arab League Convention of the 1952.



(b) Enforcement Procedure under the Arab League Convention

A petitioner seeking enforcement under the Arab League Convention has to apply before a competent court for the enforcement of arbitral award. The Convention imposes an obligation for each of the contracting states to assign a competent court which has jurisdiction for the enforcement of arbitration and relevant judicial remedies.<sup>56</sup>

Under Convention regulations the party applying for enforcement shall at the time of the application submit the following documents:

- (a) an authenticated official copy of the award;
- (b) an original notice as evidence of the proper notification of the award or an official certificate evidencing it;
- (c) an official certificate issued by a competent authority showing that the award is final and enforceable;
- (d) Where the award was made *ex parte* a certificate showing that the parties were duly summoned to appear before the arbitrators.<sup>57</sup>

The main feature of the Arab League Convention is that the court before which the enforcement of a foreign award is sought may not review the merits of the award. However it can examine the grounds for refusal of enforcement by a respondent mentioned in article 3 (discussed immediately below). The national court should not interfere with the substance of the arbitration.<sup>58</sup> *Prima facie* the court shall enforce the

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56. Arab League Convention, art. 8.

57. Arab League Convention 1952 art.5.

58. Izz al-Din A.A. (*op.cit* n.52) at p.97.

award, unless the party against whom the enforcement was sought can object by asserting any grounds of invalidity of the award under the Convention.<sup>59</sup> Article 3 stipulates the grounds for refusal of enforcement by the court under the Arab League Convention which are:

(a) The court may refuse enforcement where the matter is not arbitrable as a matter of public policy under the law of the state where the enforcement was sought. For example, in disputes concerning labour relations or a Commercial Agency under the U.A.E. law, such an award cannot be enforced as these issues are governed by the mandatory law of the state.<sup>60</sup>

(b) Where the award is rendered according to an invalid arbitration agreement or clause. The Convention was silent about the relevant applicable law governing the validity of award. The lack of authority may be resolved, either by the law of the court before which the enforcement of arbitral award is sought, or according to party autonomy.<sup>61</sup>

(c) Where the arbitrators do not have the power to arbitrate under the arbitration agreement or clause, or under the law of the rendering country. The source of the power of the arbitrator to be found in the law of the place where the award is rendered on the choice of applicable law by the parties as expressed in arbitration agreement.<sup>62</sup>

(d) The violation of Due Process, as where, for example, the parties were not properly summoned to arbitration proceedings.

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59. *Ibid.*

60. See chapter 2 at p. 57.

61. Ibrahim, A.A., *The Private International Arbitration*, (Cairo, 1986) p.196.

62. Izz al-Din A.A. (*op.cit* n. 52) at p.307.

(e) The award is not final in the rendering country. This reason should be read in conjunction with the requirement of art. 1 of the Convention, that the award is not appealable under the law of the country where the enforcement is sought e.i. *res judicata*.

The point which should be stated clearly is, that article 3 of the Convention employs a permissive rather than mandatory language: enforcement "may be" refused. This term would suggest that even if the party against whom the award is invoked proves the existence of one of the grounds for refusal of the enforcement, the court still has a certain amount of discretion to overrule the defence and grant the award the *exequatur* power.<sup>63</sup>

The Arab League Convention of 1952 will eventually be replaced by the The Convention on the Judicial Cooperation between the Arab States of the Arab League of 1983 (The Riyadh Convention).

(ii) The Riyadh Convention of 1983

The Riyadh Convention was established in Riyadh, Saudi Arabia in April 1983. Although the Convention is approved by the U.A.E., it is not yet ratified. Nevertheless, it is useful to refer to it, as it will be ratified in the near future.<sup>64</sup>

The Riyadh Convention was instituted to improve the Arab League Convention of 1952. The Convention was expected to fill the gaps of the Arab League of 1952. The lack of uniformity among national legal

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63. Izz al-Din A.A, (*op. cit* n. 52) at p.307.

64. Al-Baharna Husain M. The Enforcement of Foreign Judgments and Arbitral Awards In the G.C.C. Countries with Particular Reference to Bahrain, Lecture addressed to the IBA Conference of Bahrain (5-8/3/1989) (IBA Publications).

systems in their treatments of foreign arbitral awards was to be reduced. The role of national courts in foreign arbitration was to be reduced. It was disappointing to discover that the Convention did not address these issues and did not take these matters beyond the contributions of the 1952 Arab League Convention. Instead it introduced *Shari'ah* laws, which are in them selves controversial,<sup>65</sup> (discussed below).

Despite the fact that this Convention recognizes the principle of the enforcement of the award without examination of the merits of the case, it required the award to be accompanied by a certificate issued by the judicial authority confirming that the award is enforceable.<sup>66</sup> The judicial authority referred to here is the court of the country where the arbitration takes place. To this extent the award is two steps from enforcement because the enforcement of the award is also subject to the national rules applicable in the country where enforcement of the award is sought. Article 37 manifests that the Convention adopted double enforcement process (*double exequatur*). The consequence of article 37 of the Riyadh Convention was to give the national laws relating to enforcement of awards priority of application over the broader aims of the Convention. It would have been preferable for the Convention to have unified the procedures for arbitral award enforcement.<sup>67</sup> Such rules would unify the procedure throughout the Arab States.

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65. Riyadh Convention of 1983, art. 37(e) and 30(a).

66. Riyadh Convention of 1983, art.37.

67. Haddad A. Hamzeh, Enforcement of Foreign Judgments and Award in Jordan and Iraq, A Lecture addressed to the IBA Conference of Bahrain 5-8 March 1989. (IBA publications).

(iii) The Washington Convention ICSID

The International Centre for the Settlement of Investment Disputes (ICSID) was established by the Washington Convention of 1965. Although it is considered the most effective method of enforcing awards, its scope relates only to investment disputes between one state and nationals of other states.

Article 54(1) of the ICSID Convention provides that each contracting state shall recognise an ICSID award and enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in the recognising state. Recognition and enforcement of the ICSID award is made as simple as possible. Any party to an ICSID award may seek the recognition and enforcement of the award by furnishing the competent court or other authority designated by the contracting state with the appropriate documents.<sup>68</sup>

The U.A.E. is a signatory to the ICSID Convention which provides for arbitration proceedings under the auspices of an International Centre for Settlement of Investment Disputes only; sales of goods and services are not covered.<sup>69</sup> Under article 54(1) of the ICSID parties to the Convention are required "to enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state". In theory, the court of the U.A.E. would enforce arbitral awards rendered under the auspices of ICSID

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68. The ICSID Rules Art. 45(2).

69. Federal Decree No.67/1981, (1981) 8 U.A.E. Official Gazette 7658.

without there being any further enforcement procedure.<sup>70</sup> Any such arbitration is, however, confined exclusively to disputes between foreign investors and the Government of the U.A.E. or one of its departments.

In the Westland Helicopters Ltd v. Arab Organisation for Industrialisation and others,<sup>71</sup> when an arms manufacture agreement between Egypt, Saudi Arabia, Kuwait, the U.A.E., and Oman broke down after the Camp David treaty between Egypt and Israel, Egypt looked to the World Bank to sort out the financial question. In this case it was determined that ICSID had no jurisdiction in the matter as the case was not between a private contracting party and a state. The Convention is of more limited significance than the Arab league and Riyadh Conventions.

#### 7.2.3.2 Enforcement Under Bilateral Treaties

In addition to the multilateral conventions, there are various regional and other conventions relating to enforcement of arbitral awards. If an award is not covered by one of the international conventions it may be covered by a bilateral or regional convention. States form treaties to facilitate the enforcement and recognition of court judgments or judicial assistance. These bilateral treaties may contain provisions concerning recognition and enforcement of arbitral awards rendered in territories of the other contracting states.

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70. ICSID art. 45(3).

71. The other respondents are United Arab Emirates, Kingdom of Saudi Arabia, State Qatar, Arab Republic of Egypt, and Arab British Helicopter Company, (1984) 23 ILM 1071.

Recognition and enforcement is likely to be easier to obtain under an international convention, whether it is bilateral or multilateral, where the forum state is bound by such convention.

The U.A.E. is a party to several bilateral treaties, with Tunisia, Morocco, Algeria and Syria. These treaties concern judicial cooperation but only the question of enforcement of arbitral awards will be analysed here.

The bilateral treaties aim to facilitate the enforcement of arbitral awards rendered in one of these states, or the U.A.E.. Also these treaties were meant to fill the juridical gap caused by non compliance to relevant international Conventions. The study of these treaties is divided into two groups: the first group includes the treaties with Tunisia, Morocco and Algeria, which are identical over regulations over the enforcement of awards. Syria is considered separately.

(i) Treaties with Tunisia, Morocco, Algeria.

These bilateral treaties<sup>72</sup> are confined to enforcement orders issued on civil or commercial matters in one of these states.<sup>73</sup> The basic assumption is that courts in the contracting states are required to enforce a foreign arbitral award without going into the merits of the arbitral case.

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72. The treaty between U.A.E. and Tunisia was ratified by U.A.E. Federal Decree 1975, No.32. Treaty with Algeria was ratified by U.A.E. Federal Decree 1984 No. 12; and treaty with Morocco was ratified by U.A.E. Federal Decree 1978, No. 80.

73. Treaty with Algeria Art. 17, Treaty with Morocco Art. 18, Treaty with Tunisia Art.20

Nonetheless the court may refuse the enforcement under the following circumstances:

- (a) If the subject matter of the dispute is not arbitrable under the law of the state where the enforcement is sought,
- (b) If the award is based on an invalid arbitral agreement or clause;
- (c) If the arbitrators do not have the power to arbitrate according to the arbitration agreement or clause, or under the law where the award rendered;
- (d) If the parties were not properly summoned to arbitration proceedings;
- (e) If the award enforcement violates the public policy or morals under the law of the state where the enforcement is sought;
- (f) If the award is not final under the law of the rendering state.<sup>74</sup>

The treaties excludes from their purview arbitral awards against the Government or its officials for their conduct in pursuance of official duties.<sup>75</sup> The treaties also exclude cases where the enforcement of the arbitral award is inconsistent with International Conventions and treaties in force in the state where the enforcement is sought.<sup>76</sup>

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74. Treaty with Algeria Art. 21, Treaty with Morocco Art. 21, Treaty with Tunisia Art. 23.

75. *Infra*.

76. Treaty with Algeria Art. 20(e), Treaty with Morocco Art. 22, Treaty with Tunisia Art. 24.



These do not specify which documents should be submitted by the party invoking the enforcement of award. We may assume that the same documents required in the court judgment also apply to the case of arbitral award.

In order to obtain enforcement, the petitioner is required to submit *inter alia* an authenticated official copy of the award to the judicial authority in the contracting state where the enforcement is sought. This copy should be duly endorsed with an enforcement order made by the court of the issuing state, and an official certificate issued by the competent authorities, evidencing that the award is final and enforceable.<sup>77</sup> There are no specific rules which should be followed where an arbitral award is invoked under these treaties. Instead these treaties were satisfied with referring to the rules of the contracting state where the enforcement is sought.<sup>78</sup> It should be understood that the judicial authority in the U.A.E. includes both the Emirate and the Federal courts, depending on the place where arbitration is sought.

(ii) The U.A.E./Arab Republic of Syria bilateral treaty.<sup>79</sup>

This treaty employs the term "recognize". This element is missing in the treaties of the first group.<sup>80</sup> Neither the U.A.E. Federal Decree

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77. Treaty with Algeria Art. 18, Treaty with Morocco Art. 19, Treaty with Tunisia Art. 21.

78. *Ibid.*

79. U.A.E. Federal Decree 1980, No.12.

80. The term "recognition" and enforcement are used as if "inextricably linked" as they appear in the New York Convention. An award may be recognised without being enforced: however, if it is enforced then it is necessarily recognised by the court which enforced it. Recognition is a defensive process: it is when the party in whose favour the award is made asks the court to grant a remedy by recognising the award as valid and binding upon the parties.

To enforce an award, the court must ensure that it is valid and binding

1980, No.12 nor the treaty defined the terms "recognition". In most cases a party will request the enforcement of an award. In fact, none of the court decisions brought under the treaty so far involved the recognition of an award. Then what is the propose of inclusion this term ? The inclusion of this term in the treaty is seen, rather, as *a clause de style*: it is traditional to provide for it in international treaties relating to foreign judgment and awards. It has no relation whatever with the meaning of the term "recognize" as a limited court power over the enforcement of foreign arbitral award, an interpretation at variance with the predominate courts power under the U.A.E law and practice, which asserts a comprehensive jurisdiction over the awards.<sup>81</sup> Therefore, the term came not more than *a clause de style* without any real meaning attached to it.

The main purpose of article 29 of the Syria treaty is to enable the recognition and enforcement of arbitral award issued in civil and commercial matters, in the other contracting state provided the following requirements are fulfilled:

- (a) The award should be based in a written arbitration agreement, which allows present or future disputes arising from the contract to be submitted to arbitration.

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upon the parties. Enforcement therefore comes after recognition.  
Redfern Alan and Hunter Martin *International Commercial Arbitration*,  
(London 1986), p.334.

81. See Chapter 6 U.A.E. Court and the Arbitration Process.

(b) The subject matter of the award must be arbitrable under the law of the state where the award is to be recognized or enforced. The award must also not be contrary to the constitution, public policy or morals of the state where the enforcement is sought.<sup>82</sup>

The petitioner invoking the enforcement of an award is required, under article 29 of the treaty, to submit *inter alia* an official copy of the award. This is to be accompanied by a certificate from the judicial authority of the rendering state showing that the award is final and enforceable; together with an official copy of the arbitration agreement, to ascertain that the award was rendered according it. The procedural aspect of the "recognition" is governed by the procedural law of the state where the enforcement is sought.<sup>83</sup> The treaty laid emphasis on one of the judicial rules, where enforcement involves immovable property (real estates) governed by the *lex situs*. Thus in the case where the award concerned immovable property the court should refuse enforcement.<sup>84</sup>

The analysis of The enforcement of an arbitral award under Conventions and Bilateral Treaties.

The U.A.E. is not party to any International Convention related to the enforcement of foreign arbitral awards apart from the ICSID Convention which is confined in its scope to investment disputes only. The Conventions or treaties to which the U.A.E. is party are primarily

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82. U.A.E.-Syrian bilateral treaty, art. 29.

83. U.A.E.-Syrian bilateral treaty art. 25.

84. U.A.E.-Syrian bilateral treaty art. 21.

concerned with judicial cooperation in the field of enforcement of court judgments; therefor, the regulations for enforcement of arbitral awards are came secondary commonplace, and outdated.<sup>85</sup> Their aim is to facilitate the enforcement of arbitral awards by simplifying the procedure. In practice these Conventions work differently. By the omission of some aspects of the enforcement of arbitral awards and referring them instead to the relevant national system, the intention is to give priority to national laws instead of the provisions of the Convention. The majority of these legal systems lack appropriate procedures. As result of absence of legislation, awards are treated on the same footing as the procedure for foreign judgments. It would be preferable if the Conventions had unified the conditions for enforcing arbitral awards, which may have led to unification of the Middle East regulations and filled the gaps in the national procedures.

The Conventions increase the burdens placed on the petitioner in arbitration cases. Awards under the Convention may be awarded in the same way as domestic awards. In which case the Convention should not impose more stringent rules on enforcement than already exist for domestic awards. It is possible that they may do away with the requirements applicable to domestic cases which are deemed too cumbersome for enforcement in a foreign award; however, award enforcement under the Conventions may be more difficult than the domestic award in some cases. These Conventions do not recognize a principle of the binding arbitral awards. The award, in order to be capable of enforcement, should be embodied in a court judgment; the

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85. Samir Saleh, "The Recognition and Enforcement of Foreign Arbitral award in the States of the Arab Middle East", Contemporary problems in international arbitration, (Lew D.M. Edit) 1986. p.340-352.

petitioner invoking enforcement, is required to provide a certificate of the award evidencing that the award is final in the country where it was made. In practice this could only be proved by producing an *exequatur* issued in the country in which the award was made. This amounts to a system of so-called *double exequatur* since leave for enforcement has also to be obtained in the country where the enforcement is sought.

Finally, the Conventions exclude an arbitral awards against Government or its officials which is an issue liable to cause disputes as the provisions are vague and may be subject to different interpretations. The provisions do not specify with precision the kind of arbitral award which is excluded from the scope of the treaties. This suggests that any award, of whatever description, is unenforceable in contracting states if it is against the government of the relevant state.<sup>86</sup> One can envisage in Art.4 of the Arab League and 25(c) of the Riyadh Conventions that they adopt the principle of absolute immunity of the state which was the rule in the nineteenth century. The state whatever its legal system does not possess absolute immunity. State immunity may, on an exceptional basis, be waived, where the Government is involved in a civil or commercial operation, whether conducted by the country directly or by an agency created for this purpose.<sup>87</sup> For example, the Government of the U.A.E. could enter into a contract to construct an oil refinery with a Tunisian company. The parties could agree to refer their disputes to arbitration in Tunisia. Suppose, then, that a dispute arose and it was

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86. Arab League Convention art. 4 and Riyadh Convention 25(c).

87. For similar issue see *Eurodif Corporation ET AL. v. Islamic Republic of Iran*, The French Court of Cassation, issued in 14/3/1984 (1984) 23 ILM 1068.

referred to arbitration. The arbitrators might render an award against the U.A.E. Government. According to all the above mentioned treaties this award cannot be enforced.

This problem is one of the obstacles facing arbitration which is associated with the execution of international arbitral awards sought by private parties against a state. The way forward perhaps is to interpret such immunity clauses in a manner which distinguishes between state activity strictly so called and purely commercial activity where the state's position in substance is no different from a non-state commercial entity. This issue has generated case-law in many jurisdiction case-law which may assist U.A.E. courts in interpreting state immunity clauses.

A case that can be criticised for not making this distinction is Southern Pacific Properties Ltd. ET AL(SPP) v. Arab Republic of Egypt (the Pyramids)<sup>88</sup>, the case concerned a project to build a tourist village near the Pyramids in Giza. Due to public pressure the government canceled the project whereupon SPP initiated arbitration to the International Chamber of Commerce against the government of Egypt. Although Egypt objected to ICC's jurisdiction the arbitral tribunal dismissed Egypt's objection and rendered an award in favour of SPP.

When Egypt refused to comply with the ICC award and appealed to the Court of Appeal, SPP sought security. The High Court adjourned the decision on enforcement of the award pursuant to Section 5(5) of the

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88. Decision No.24 ( Cour de Cassation, Jan 6 1987),25 ILM 1004-1007; (1988) 10 Yearbook of International Commercial Arbitration 408.

1975 Act.<sup>89</sup> The judge, however, found difficulty in ordering Egypt to provide security by reason of the State Immunity Act of 1978.<sup>90</sup> By contrast In SEEE v. Yugoslavia SEEE sought enforcement in France of an award rendered in Lausanne against Yugoslavia. The French Court, whilst recognising that Yugoslavia had waived its right to claim immunity from jurisdiction by submitting to arbitration, held that a waiver of immunity from jurisdiction does not automatically result in the state's waiver of its right to immunity from execution as well.<sup>91</sup> But does the state have the right to immunity from execution? The French adopted the "natural activity" approach upon which the claim was based.<sup>92</sup> The French Cour de Cassation set three conditions to be fulfilled for immunity from execution to be denied:

- (a) the state's activity must be commercial
- (b) the funds must have a commercial nature, and
- (c) the funds must be used for the activity upon which the claim is based.<sup>93</sup>

The U.S. arbitration Acts witnessed change in the Foreign Sovereign Immunity Act of 1976 (FSIA)<sup>94</sup> which provides for the circumstances under which foreign states and their instrumentalities as defendants including when such foreign states are sued in actions to enforce Convention awards.<sup>95</sup>

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89. *Ibid.*

90. *Ibid.*

91. *Societe Europeanne d'Etudes et d'Enterprise v. Yugoslavia*, (1985) 24 ILM 345-359.

92. *EURODIF Corporation v. Islamic Republic of Iran*, (*op. cit* n. 87).

93. *Ibid.*

94. 28 U.S.C ss. 1602.

95. *Ibid.*

Section 1605(a) of the FSIA was amended to remove the immunity of foreign states from the jurisdiction of US courts in cases:

"(6) in which the action is brought either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration any differences which have arisen or which may arise between whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate if ...

(a) the arbitration takes place or is authorised to take place in the United States

(b) the agreement or award is governed by a treaty or other international agreement in force with respect to the United States which provides for the recognition and enforcement of arbitral awards;

(c) the underlying claim, except for the agreement to arbitrate, could have been brought in a court of the United States under this section or section 1607 (on counterclaim); or

(d) paragraph (1) of this subsection (on waiver) applies."<sup>96</sup>

The French and American amendment in the field of the Immunity Act states that the position in international arbitration is the direction demanded in the present world.<sup>97</sup>

The amendments in the Immunity Act were due to the relationship between states and private parties, and the nature of the activity between them. If the activity can be defined as commercial, immunity should not be used as justification for escaping enforcement. It is illogical that states participate as parties in commercial ventures, and, when a dispute arises which needs arbitration, the state refuses enforcement citing the Immunity doctrine. Sovereign immunity has become one of the main obstacles in the way of arbitration, supported by states where enforcement is sought.

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96. *Ibid.*

97. And see too the House of Lords decision in this issue in *Playa Larga (Owner of Cargo lately Laden on board) v. I Congreso Del Partido*, [1981] 3 WLR 329.



The USA amendments, in this respect may be considered the first step to overcoming the obstacle of enforcement of arbitral awards with connection to the Immunity doctrine. However, problems may still arise if an enforcement of an award is sought in a state against which the award was made, or its trading company. In Sojuznefteexport v. JOC Oil Co. the Bermuda Supreme Court refused to enforce a unanimous award by three Soviet arbitrators for nearly \$200 million rendered in Moscow in 1984 in favour of SNE, a Soviet state company, against JOC Oil Co., a Bermudan company. The court ostensibly based its refusal on finding that the contract was invalid under Soviet law because it had not been signed properly.<sup>98</sup> Disregarding the challenge raised, the national court will hesitate to enforce an award of foreign law or to accept the application of foreign law to resolve conflicts involving state entity. In practice these types of award are not usually controlled by bilateral treaties but are subject to the national law applicable to them.<sup>99</sup>

#### 7.2.3.3 The Enforcement of Foreign Arbitral Awards Under National Laws.

This section will identify the enforcement of foreign awards under national laws in the Federal and the Emirates sectors rather than under international Conventions, given the diversity of laws and procedures in the U.A.E. and the fact that some of the Emirates have not yet passed the F.D.C.C.P. into law in their respective jurisdictions.

The treatment of foreign arbitral awards under domestic law under the U.A.E. system can be divided into three main categories:

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98. Civil Jurisdiction 1984 No.362 and Civil Jurisdiction 1985 No.329 (Supreme Court of Bermuda, July 16 1987).

99. See, *Deutsche Shachtbau und Tiefbohrgesellschaft mbH (DST) v. Ras al-Khaimah National Oil Company (RaKoil)*, *infra*.

(1) The Federal system, represented by the F.D.C.C.P. and S.A.A., in which domestic legislation recognises the enforcement of arbitration awards issued in foreign country but applies to them the provisions of foreign judgments provided that the reciprocal treatment exists. i.e. that the foreign country where the judgment or the award was rendered permits the enforcement of the U.A.E. judgment or award in its territories.<sup>100</sup>

(2) The local system of Abu-Dhabi, in which the domestic law does not recognise the principle of the enforcement of foreign arbitral awards but certain provisions regulate the enforcement of foreign judgments. In practice this award must be embodied in a court judgment in the rendering country by a competent court in order to be enforced under A.D.C.C.P..

(3) The system in which domestic law contains no provisions for foreign arbitral award nor for considering foreign judgment, as is the situation in Dubai, and Ras-al-Khaimah. In these Emirates enforcement of an award is often, in substance, trial *de\_nova*.

#### (1) Enforcement of arbitral award Under F.D.C.C.P. and S.A.A. rules

If the award is considered "foreign" and is not regulated by the rules of the above-mentioned Conventions, the party seeking the enforcement of the arbitral award will have to follow the procedures laid down in article 231-232 of the F.D.C.C.P..

The application of the F.D.C.C.P. art. 231 is confined to the enforcement of foreign judgments, "foreign judgments shall include arbitral awards rendered in a foreign country".<sup>101</sup>

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100. The F.D.C.C.P. Explanatory Memorandum article 231.

101. The rules of the foreign Judgment shall applied on foreign arbitral awards. F.D.C.C.P. art. 231.

(i) The requirements of the enforcement

Art. 231 prescribes that no enforcement order regarding a foreign award will be passed unless the following conditions are ensured:

(a) The competence of the foreign arbitration tribunal which issued the award. The question relating to the forum which rendered the award, whose local recognition or enforcement is now being sought, may arise in two distinct contexts. The first context is that of the U.A.E. court, before which the enforcement of award has been brought. The judge should verify the existence of the arbitration agreement and its validity under the law applicable to it, including a verification that it had not expired when the award was made. The judge will verify the existence of the arbitration appointment and ascertain its existence and the validity of the arbitration agreement under the applicable law to it, including its validity and its non-expiration at the time the award was made.<sup>102</sup> The second context is that of the competence of the arbitrators. Where the composition of the arbitral tribunal is not in accordance with the agreement of the parties, or where such an agreement had failed within the laws of the country where the arbitration took place, the U.A.E. court will refuse the enforcement of such an award.

(b) The parties are duly summoned to the arbitration proceedings and are properly represented during the proceedings. The defendant may challenge the proceedings, prove that he was not given proper notice of the appointment of the arbitration proceedings, or that he was not represented at the proceedings.

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102. Fouchard P., The Conditions of the Validity of the Arbitral Award Under Conventional and Comparative Law, Paper submitted to the Europ-Arab Meeting, Jordan 1989.

(c) For the "foreign" arbitral award to be considered under the F.D.C.C.P. or the S.A.A., the award must be final in the rendering state. If an award is appealable in a foreign state this is made the criterion of finality and conclusiveness for the purpose of local enforcement. As long as an Appeal can still be brought against a "foreign" arbitral award in its country of origin the award will not be enforced in the U.A.E..<sup>103</sup> When the parties neglect to claim the award and the time limit for the challenge expires, the award can become final.

The legal systems differ in their treatment of cases, where an application has been made to the competent authority to set aside or suspend a foreign award. It is universally recognized that an award is not open to arbitral or ordinary judicial review, irrespective of the admissibility of a motion to suspend it.<sup>104</sup> The F.D.C.C.P. may be silent on this issue as it does not recognize the enforcement of an award, unless the award is final, i.e capable of enforcement in the rendering country.

(d) The award must not be contrary to a court judgment or orders issued by a U.A.E. court if they are *res judicata* in the country where the enforcement is sought, giving priority to national judgment over "foreign" judgment. However, the party who claims this right should ascertain that the U.A.E. court issues a judgment and this judgment is final. Bringing a case before the U.A.E. court is not considered an impediment to enforcement of the "foreign" award.

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103. The F.D.C.C.P. Explanatory Memorandum art. 231.

104. Sanders, P., "A twenty-Years' Review of the Convention on the Recognition and enforcement of Foreign Arbitral Award" (1979) 13 International Lawyers 271.

(e) The award must not violate U.A.E. public policy. "Public policy" in this context, can operate somewhat unpredictably on foreign arbitral awards. By invoking it, the U.A.E. court can decline to enforce a "foreign" award. The term "public policy" has been discussed elsewhere.<sup>105</sup>

In addition to these conditions which apply to the "foreign judgment" and "award", there are two further conditions which apply to awards only.<sup>106</sup>

(a) In order for an award to be enforced in the U.A.E., it should not be concerned with matters which cannot be arbitrated under U.A.E. law. Most countries exempt from arbitration certain matters, which they consider are too close to the public interest to be left for adjudication by private tribunals, as instituted by the state to U.A.E. legislature, for example, the protection of the parties, in a labour dispute, or in establishing a commercial agency in the U.A.E.. Any "foreign" award rendered in connection with matters which come within the exclusive jurisdiction of a tribunal established by the U.A.E. legislature will be deemed null and void.<sup>107</sup>

(b) The award is enforceable under the law of the rendering country.<sup>108</sup> A foreign award in order to be enforceable in the U.A.E. it must be enforceable under the law of the rendering country. If, for one reason or another, it is no longer enforceable or not yet enforceable in the rendering state, it cannot be enforced in the U.A.E.; for example, if the

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105. See chapter 2.

106. F.D.C.C.P. art.232.

107. See Chapter 4 for matters excluded from arbitration under the U.A.E. Law at pp. 167-168.

108. F.D.C.C.P. art. 232.

award has already been barred from execution in the rendering state because it is not yet final. The court will not consider an arbitral award unless this has been reduced to a judgment in the country where the arbitration takes place. In practice this requirement is not straight forward especially in institutional arbitration. In this kind of arbitration, it may happen that the factors of arbitration (subject matter, arbitrators, and parties involve in the dispute) have no relation whatsoever to the place of arbitration, apart from the fact that the proceedings were conducted there. The foreign court may reasonably refuse to enforce such an award, and that means that this award will not be enforced in the U.A.E.. If this should happen, in order for the party to enforce a foreign award before the U.A.E. court, it has to bring a suit before the U.A.E. court *de\_novo*. The U.A.E. should reform its rules concerning this, by abolishing the *double exequatur* procedure and by adopting the New York Convention of 1958 (discussed below).

(ii) Proceedings for enforcement under F.D.C.C.P.

The F.D.C.C.P. confers competence over subject matter upon the Court of First Instance.<sup>109</sup> The court at the respondent's domicile (under the U.A.E. law "domicile" means the place where a person usually resides) is territorially competent. If the respondent has no domicile in the U.A.E., the action may brought in a place where the respondent's property can be levied,<sup>110</sup>

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109. *Ibid* art.235.

110. *Ibid*.

The petition for an enforcement order should be submitted to the Court, together with an authenticated official copy of the award. If the award was rendered in a foreign language, an official translation into Arabic should also be attached. As far as foreign awards are concerned, the courts are limited in their control, before granting leave for enforcement, to the regular formats. The court has no discretion to examine the merits of the award. The F.D.C.C.P. rules which are applied to a domestic award, are deemed applicable to the enforcement of "foreign" award.<sup>111</sup>

## (2) Enforcement Under A.D.C.C.P.

The A.D.C.C.P. do not recognise the principle of the enforcement of "foreign" awards. The problem under the A.D.C.C.P. is that few cases and inadequate guidelines are available to be followed. There are instances of "foreign" awards, but the courts have dealt with them under different categories.

Under the A.D.C.C.P. the attempt to enforce a "foreign" award will not be recognised unless it is incorporated in a foreign court judgment, rather than a "mere" arbitral award. Unless this judgment is made, the procedure which is followed is to bring an action before the Abu-Dhabi court *de-novo*.

Art. 16 of the A.D.C.C.P. stipulates that the party invoking a "foreign" award against a respondent who is domiciled in or has a property in Abu-Dhabi, may apply to the competent court for enforcement of the judgment. The court before which the enforcement is sought should ascertain that the reciprocity principle is met. A foreign

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111. *Ibid* art.211 and 212.

judgment shall not be declared enforceable if it was given in a state whose laws do not provide for the enforcement of the judgment of Abu-Dhabi courts.

The procedures followed the same as those followed in national cases, that is by applying to the Execution Judge. The Judge should ascertain the procedure from requirements similar to those in the F.D.C.C.P..<sup>112</sup> Thus the "foreign" award will be enforced, provided it satisfies the conditions of: (a) the competence of the court which issued it, (b) the finality of the judgment, *res judicata*, (c) that it is not rendered as a result of fraud, or violates the public policy or the customs of the society.<sup>113</sup>

### (3) Enforcement Under Dubai Law and Practice

Enforcement under Dubai law is similar to other Emirates with a local law (Ras al-Khaimah). Dubai law is rather more complicated than Abu-Dhabi law because of the lack of relevant legislation for the enforcement of a "foreign" award. Under existing practice in Dubai, Ras al-Khaimah, "foreign" awards which are incorporated into a judgment of a rendering state would most likely be subject to enforcement. An attempt to enforce an award rendered abroad would inevitably involve trying the case *de\_novo*. The court's attitude is unpredictable, primarily based on the judge who tries the case.

The court's attitude is expressed in The Owner of the vessel (Mondwfay) v. G. Carrier and M.H.,<sup>114</sup> a case brought before The Dubai Civil Court

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112. *Ibid.*

113. A.D.C.C.P. art.17.

114. The Dubai Civil Court, case No. 587/1984, unpublished.



for the enforcement of a "foreign" award. The case concerned a ship (*Mondwfay*) which was chartered for three consecutive voyages for carriage of oil by a G. Carrier U.A.E. company. The parties agreed in advance to submit any dispute arising under charter-party for arbitration in New York. The first voyage was carried out but the second aborted by a disagreement between parties regarding the charge of demurrage. When the dispute arose, the owner of the vessel took his case to arbitration. By appointing their arbitrator the U.A.E. company disregarded the plaintiff's notice for the appointment of his arbitrator, and also disregarded the order of the New York Court to submit any challenge he might have. The Court of New York granted the award leave for enforcement in favor of the ship's owner. The plaintiff brought a case before the Dubai Court for the enforcement of the award which had satisfied all the requirements for its enforcement. The court informed the defendant to submit his challenge against the award. The defendant took a negative attitude, trying to frustrate the arbitration procedure by claiming illegality of the appointment of the arbitrators under the law and practice in Dubai, on the basis that he was not directly involved in choosing his arbitrator. He sought a declaratory judgment proclaiming the arbitration clause to be null and void. The court adopted the defendant's challenge by maintaining a traditional view of the Egyptian legal concept, which stipulated as a general rule, that the parties themselves nominate the arbitrators.<sup>115</sup> The Dubai court interpreted the character of this provision to be one of public order, in

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115. For more detail see chapter 2 at p. 69.

the sense that the arbitration clause is legally invalid if the selection of the arbitrators is made without the direct participation of the concerned parties who select the arbitrator(s) by name.<sup>116</sup> It can be strongly maintained that the court should have disregarded the argument of the defendant, since he refused to participate in the arbitration and thus brought about the situation he was complaining of.

Paradoxically, it seems that in awards made in Dubai, the court has the jurisdiction to appoint an arbitrator in a case where one of the parties has refused to do so, while foreign courts have no power to appoint an arbitrator.<sup>117</sup>

This case shows the courts' attitude towards the enforcement of foreign awards in local courts. The court's decision is not surprising in a country like Dubai where there are no rules the judge can follow, apart from Egyptian law, the predominate code of jurisprudence in the Middle East. Egyptian jurisprudence treats this issue by applying a restrictive attitude to foreign judgment and awards. Courts influenced by this approach invoke too readily a broad and ambiguous concept of public policy.

### 7.3 The Grounds of refusal for Enforcement

#### 7.3.1 The General rules

The first category is concerned with general rules in the Emirates which include public policy, the arbitrators, and procedure,<sup>118</sup> which may

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116. *Ibid.*

117. See Chapter 6 The Court power to nominate the arbitrators, at pp. 232-239.

118. See Chapter 4 arbitration law and practice in the U.A.E.

be called upon when arbitration considers an issue not arbitrable under the law of the country where the enforcement is sought, or they may be called upon when the arbitrator is partisan. Some of the issues in this section have already been mentioned in former chapter.<sup>119</sup>

### 7.3.2 Interference with enforcement in the U.A.E.

Elements of interference with the enforcement of an award are present in the U.A.E., as in many other developing countries.

#### (i) The legal system of the U.A.E..

Each branch of the U.A.E. legal system has its own problem of lack of authority; the Federal system has rules but they are largely un-ratified and the local systems have few rules. Thus the federal court applies domestic law as in the case of Abu-Dhabi, and the local courts or the Emirates rely on the discretion of the Judge or "the Judge's law" as is the case of Dubai.<sup>120</sup> This situation has its impact on the enforcement of the arbitral award, "domestic" as well as "foreign". An attempt to secure enforcement of an arbitral award by the Federal Inter-Emirates Law No.11/1973 was unsuccessful.<sup>121</sup> There are no alternatives available to fill the gap in this area. The only alternative which exists is the ratification of the F.D.C.C.P. despite its shortcomings.

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119. *Ibid.*

120. See Chapter 3 law and Justice in the U.A.E.

121. Inter-Emirates Law No.11/1973*supra*.

(ii) The *Shari'ah* law v. foreign award.

When one of the parties loses his case in arbitration outside the U.A.E., he may attempt to have the arbitration declared null and void by the court in his own country. One avenue is to challenge the award as being in violation of *Shari'ah* law. A question which arises is whether arbitration in a foreign country violates *Shari'ah* rules.

Basically, if the award fulfills *Shari'ah* requirements, it should be deemed valid and should be enforced regardless of the place of rendering.<sup>122</sup> The concept that an award might be in conflict with *Shari'ah* principles in the U.A.E. courts' is based on the traditional approach regarding the enforcement of foreign awards and a sense that such an award might be a violation of public policy, which includes the need to comply with *Shari'ah* law. The approach is that since arbitration may violate *Shari'ah* then it may violate public policy. The court in the U.A.E. may consider that arbitration taking place outside the U.A.E. is at odds with a judicial public policy, conforming to Islamic tenets. Arbitration that takes place outside the U.A.E., or arbitrators who attempt to apply a foreign law may not receive recognition in the U.A.E.<sup>123</sup> Nowadays, despite rapid change in the U.A.E. the traditional courts still cling to observance of *Shari'ah*. Article 7 of the Federal Constitution supports this view when it states that the *Shari'ah* rules

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122. Samir Saleh, "Commercial Arbitration in the Arab Middle East", (Graham & Trotman London, 1984) p.92.

123. For more detail of the traditional approach of foreign arbitration, see the Domain of Arbitration in Chapter 4 at p. 162.

are a major source for the legislation. Many writers have had some difficulty in understanding this article and local judges to consider *Shari'ah* as "the main source".<sup>124</sup>

Some lawyers and judges misunderstood foreign arbitration thinking it against the *Shar'iah*, based on the opinion that foreign arbitration was essentially a device to oust the application of *Shar'iah* law. This view was not universally held and a state of confusion, arose. It became necessary for the judiciary to clarify the situation. A defendant brought a suit before the Abu-Dhabi Court of Appeal challenging the enforcement of awards rendered in a foreign country under foreign law claiming a violation the principle of *Shari'ah*. The Abu-Dhabi Court of Appeal ruled that it is a widespread error in the U.A.E. to presume that applying a foreign law or international treaty is violating the *Shari'ah* law just because it is foreign.<sup>125</sup> Without manifest evidence by the defendant that the foreign law violated any precepts of *Shari'ah*, the court dismissed this challenge.

The Abu-Dhabi Court of Appeal emphasised the evolutionary nature of the *Shari'ah* stating:

*Shari'ah* has the capacity to accommodate the arbitration rules, because of it ability to develop to satisfy the needs of the developing society

The court also emphasized that the notion of "public policy" is based on respect of the general spirit of *Shari'ah* and its sources and on the *Shari'ah* principle that:

individuals must respect their agreements, unless they forbid what is authorized and authorize what is forbidden {by *Shari'ah* law}.<sup>126</sup>

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124. See chapter 3 on the discussion of this issue at p. 91.

125. *A.A Commercial Co.v. S. Motors Ltd Co. and D. Industrial Ltd Co.*, The Abu-Dhabi Court of Appeal case No. 10007/1981 unpublished.

The court came to the conclusion that arbitration which takes place outside U.A.E. under foreign law is not contrary to *Shari'ah* rules unless there is a clear indication of a violation of the *Shari'ah*.<sup>127</sup> Thus a U.A.E. Court may not refuse enforcement of an award rendered in a foreign county on the grounds of violation of *Shari'ah* merely because it has been rendered in a foreign country.

In G. Steel Industry Co. v. International Steel and Contractors Co., the Federal Supreme Court ruled that parties agreement to submit their dispute to arbitration outside the U.A.E. did not represent a violation of the *Shari'ah* where the award was within the scope of the *Shari'ah*.<sup>128</sup>

The conclusion which may be drawn here is not that foreign arbitration is in itself contrary to *Shari'ah*, and thus enforcement of foreign arbitral award does not violate *Shari'ah*, but where the parties are simply pursuing foreign arbitration to escape from the implementation of the *Shari'ah* in a matter banned by it, in this case the enforcement of such an award will be deemed contrary to the *Shari'ah* law.

### (iii) The U.A.E. Law as an obstacle to Arbitration

The role of the law of the U.A.E. as an obstacle to enforcement shall be considered. For instance, provisions concerning the power of appeal are unduly wide so that parties can misuse this power.<sup>129</sup> It would be much better if this right would be restricted by adopting an

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126. *Ibid.*

127. *Ibid.*

128. U.A.E. Supreme Court Case No. 138/10, unpublished.

129. See chapter 3 at pp. 126-128.

exclusion agreement similar to that of the 1979 English Act,<sup>130</sup> making it possible for the parties to agree to exclude any appeal over the substance of the award. By taking this initiative, UAE legislature could follow the predominant theme of the recent amendments to arbitration law.

Secondly, the FDCCP did not specify rules for the enforcement of "foreign" arbitral awards and referred instead to the procedure of foreign judgments. Under the provision of the FDCCP, in order for the award to be recognized and enforced, it should be confirmed by the court where the award was rendered. Under the FDCCP, the party invoking the foreign award is forced to obtain what has become known as a *double exequatur*, that is, to submit the award to judicial confirmation in the rendering country and in the UAE court. That award has merged into the judgment and it is, therefore, no longer enforceable as an award but rather as a court judgment. The FDCCP should reconsider this view by stipulating a specific provision for the enforcement of foreign arbitral awards eliminating the so-called *double exequatur* and by satisfying that the award is final in the rendering country without the needs for indicating that it does not include the *exequatur* in the country of origin.<sup>131</sup>

#### (iv) Obstacles of a special nature

Obstacles of special nature occur in cases concerning the Government or its department contracts. These obstacles are based not on law but on the power the government enjoys or can invoke to

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130. Section 3 of the Arbitration Act 1979.

131. Similar to art. V(1) (e) of the New York Convention of the 1958.

prevent a legal decision. This power can be traced to the private context, which includes the Ruler of the Emirates, his family, or even their employees. This, perforce, lies outside this scope of the study, notwithstanding that it may occur in connection with enforcement of foreign award. However, these cases do not come to the court, due to the fact that they are usually kept *in camera*. Occasionally they are submitted to the court but under a different name or even with different facts; there is restricted access imposed. Generally speaking this type of case is usually settled amiably.

Enforcement of government contracts for instance in road construction or oil exploration with individual Emirates or with the Federal Government, can present special obstacles. The parties to such agreements are typically the Government and a foreign company. The parties to such agreements usually refer any dispute to arbitration. Where the dispute concerns one of the government departments and a foreign party, arbitration may be conducted on an *ad\_hoc* basis in the U.A.E. Disputes over whether the company is entitled to additional compensation for an extension of contract between the company and the Government may occur for example. The main feature of this kind of arbitration, is that it is time-consuming. Such cases may take years to be solved, due to delays in Government decision-making, submitting its evidence and due to the complication of the government members participating in the arbitration. Nonetheless, the parties may finally reach a compromise.<sup>132</sup>

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132. See for example the ultimate compromise effected in *A. General Contracting and Engineering Est. v. The General Command of armed forces*, The Abu-Dhabi Court of Appeal case No. 856/1986 unpublished.



Alternatively, the parties may agree in the contract to refer any dispute to arbitration outside the U.A.E.. But difficulties may arise in the way of enforcing "foreign" arbitral award against the state or its department. A state may challenge the enforcement of a "foreign" award by claiming immunity from its execution.<sup>133</sup>

Problems of arbitration which come under government contracts are often these concerned with Oil Concessions. In order to escape the judicial territory of the contracting state, a foreign company takes the settlement of any dispute arising under the contract out of the state courts. That was the case in the dispute between Deutsche Shachtbau und Tiefbohrgesellschaft mbH (DST) and Ras al-Khaimah National Oil Company (RaKoil). Under the Concession Agreement, the Government of Ras-al-Khaimah granted exclusive rights to explore and exploit petroleum and other mineral resources off-shore to Vitol (a Dutch company).<sup>134</sup> Vitol was obliged, at its own cost, to carry out seismic exploration and, upon identification of "drillable prospects", to drill one or more exploratory wells. If exploration resulted in discovery of "commercial quantities" then the Government of Ras al-Khaimah would *ipso facto* acquire a fifty percent working interest in the concession area, and thus become entitled to half the oil produced therein and liable for half the costs of the concession area operations. Portions of Vitol's interest had been duly assigned, in accordance with the terms of the Concession

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133. See, *LIAMCO. v. Libya*, 482 Fed. Supp. 1175 (1980); *Texas Petroleum Co. and California Asiatic Oil Co. v. Government of the Libyan Arab Republic*, (1978) 17 ILM 1; *Southern Pacific Properties Ltd. ET AL(SPP) v. Arab Republic of Egypt*, Decision No.24 (Cour de Cassation, Jan 6 1987) (1984) 23 ILM 1048.

134. International Chamber of Commerce (ICC) Court of Arbitration, Case No.3572.

Agreement, to Weeks, SIR, DST, CSR, Clovelly, Asamera, United, Kewanee and CSO oil companies. The exploration yielded hydrocarbons below the "commercial quantities" level.

The Government and Rakoil paid its share of the costs in connection with some of the wells which had been explored and defaulted to pay the rest of the amount which was estimated at \$322,070. A dispute arose giving DST as the operator under the 1976 operating Agreement the right to recover from the Government and Rakoil all of the amount on which the latter had defaulted.<sup>135</sup> DST submitted its claims to an arbitral tribunal in Geneva, Rakoil refused to participate in the arbitration tribunal. Due to Rakoil's refusal, the tribunal appointed arbitrators. The arbitral tribunal awarded the DST \$4.635m (which include principle amount, interest, and the cost of the arbitration). Rakoil abstained from the arbitration and refused to pay the award.

The Government of Ras-al-Khaimah and Rakoil took all possible measures to prevent the arbitral tribunal formed by the ICC's Court of arbitration from adjudicating the jurisdictional issue. The first effort to achieve that objective was a suit in a Ras-al-Khaimah Civil Court requesting *inter\_alia* that the Assignment Agreement and the 1976 operating Agreement should be considered void *ab\_initio* with the consequence that the arbitration agreement contained in the agreement had no binding force.<sup>136</sup> The DST refused to attend the Ras-Al-Khaimah court, by contending that the court was not competent to adjudicate the case.

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135. *Ibid.*

136. The Ras-al-Khaimah Civil Court case No.118/1979 unpublished.

There was no justified basis to admit that the court had jurisdiction in a matter governed by the *lex-Mercatoria*, which require the recognition of arbitration agreements.<sup>137</sup>

The Ras-Al-Khaimah Civil Court overturned the DST challenge by ruling according to the tenets of International Law, i.e. that the proper law of the agreement is that of the state in which all the circumstances have the closest real connection to the agreement. The signing of the agreements, the operation and all the transactions took place in Ras-Al-Khaimah, so the respondents were *ipso facto* submitting to the jurisdiction of the courts of the Emirates and to the Ras-al-Khaimah Court.

The court ruled to the effect that DST had no right to claim any amount from the plaintiffs through the arbitration proceedings.<sup>138</sup>

### 7.3.2 The way to Facilitate the enforcement of foreign award

The DST was a clear case of the special interest issue, which demonstrates the need for courts to uphold the legitimacy and credibility of arbitration awards evenhandedly in favour of and against their own nationals. The question which arises is what is the way to remove this obstacle from such arbitration? There are no simple answers. If the other party to the arbitration is an individual and he refuses to honour the award, the party invoking the enforcement may apply to the competent court to enforce it, but the problem lies when the other party is a state and it abstains from enforcement. Before

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137. *Ibid.*

138. *Ibid.*

answering this question let us presume that the Government of Ras-Al-Khaimah did not challenge the award and DST brought an action before the Ras-Al-Khaimah Court requesting the enforcement of an arbitral award against Rakoil. If the Government of Ras-Al-Khaimah (and hypothetically the court) accept the case, there is nothing in the U.A.E. law which prohibits the appointment of foreign arbitrators, and their decision would have been likely to have been followed by the Ras-Al-Khaimah court: The court faces a problem of jurisdiction because the court cannot enforce the award since the law imposes on the court certain restrictions when the dispute concerns the Emirates or its departments. The court has no jurisdiction to consider the case without Government permission to accept the jurisdiction.<sup>139</sup> Finally, if all these requirements are met, the court will still hesitate to act, because they fear that it may have unpleasant consequences for their own government or even in the case of a foreign judge, his job.<sup>140</sup> Accordingly, the court may become hostile to arbitration, especially during the enforcement of "foreign" awards. The way to solve this issue might be by eliminating the basis for misunderstanding between the foreign company and the national government, not only in the U.A.E. but throughout the third world. The first step in achieving this objective is by not resorting to

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139. The majority of the Emirates rules require a permission from the office of the relevant Ruler for any dispute that the Emirate party to. See the local order of the Emirate of Dubai issued on 23/9/1972, the Dubai Court law p.31.

140. Notwithstanding, the varies of solution introduced in this respect, nonetheless, they did not demonstrate a practical remedy, especially where the enforcement is sought against a state before its national courts. See Giorgio Bernini and Albert J. Vanden Berg, "The enforcement of arbitral awards against a state: the problem of immunity from execution"; Pierre Lalive, "Arbitration with foreign states or state-controlled entities: some practical questions" Reported in: *Contemporary problems in International Arbitration*, Lew J (edited) 1986.

the court, when the other party in the agreement is the Government or state department, but considering the negotiation and settlement in an amiable atmosphere. In these kind of agreements we find much greater emphasis upon conciliation than upon arbitration, which seeks to facilitate business relations between the Government or its department and the foreign company. The foreign party in a government contract should realize where a dispute arises in such a contract that the dispute is becomes more more political rather than legal and the prospects of enforcement of legal right very problematic.

(i) The adhering to International Convention relating to Recognition and Enforcement of foreign awards.

The U.A.E. has not signed or acceded to any International Conventions on the recognition and enforcement of "foreign" awards, apart from the above mentioned but these are regional rather than international, except for the ICSID Convention. The domestic rules are more concerned with foreign judgment than the arbitral award. Under these circumstances, the alternative is for the foreign party to arrange for the enforcement to be conducted under the auspices of the court, by a legal action in the court of original jurisdiction claiming the enforcement of the award. The enforcement of the award would then be akin to a judicial proceeding. which may lead to a result not necessarily desirable to the foreign party.

Under the current arbitration law concerning the enforcement of "foreign" arbitral awards, it is clearly undesirable, particularly in the view of the requirement that awards be subject to court confirmation, the so-called; *double exequatur*. We should first of all consolidate the situation as it is and above all promote an adherence to international

Conventions that facilitate to the enforcement of "foreign" awards. One possibility is the accession to the New York Convention of 1958, for the recognition and enforcement of an arbitral award.<sup>141</sup> It is advisable that the U.A.E. should decide to adhere to the Convention.

(a) The problems involving the implementation of the New York Convention

In spite of the potentiality of the Convention there are some difficulties or problems which may occur during the enforcement of an arbitral award under New York Convention, in this section we shall examine some of these problems and the ways which should be followed to solved it.

(1) *Uncertainty concerning interpretation of the convention.* The application of the New York Convention does not depend on the nationality of the parties. Such requirement was contained in the Geneva Convention of 1927 which required that the parties be subject to the jurisdiction of different contracting states. Because of the uncertainty caused by this section, as some courts considered meaning of it as domicile, whilst other considered it nationality.<sup>142</sup> The New York

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141. The New York Convention was instituted to improve the Geneva Convention of 1927 by providing much simpler and more effective methods of recognition and enforcement of foreign awards.

The provisions of this Convention are, firstly, that it gives to the validity of arbitration agreements an effect much wider than that of the Geneva Convention. Secondly, it provides an effective method for the recognition and enforcement of awards.

New York Convention on the Recognition and Enforcement of Arbitral Awards 1958, (1959) 330 United Nations Treaty Series 38.

142. Van den Berg, *The New York Arbitration Convention of 1958* (Kluwer, Netherlands 1981) p. 15.

Convention try to avoid the difficulty of this phrase by abolishing the nationality condition. Since nationality is excluded by the Convention from its scope for the enforcement of awards<sup>143</sup>, if the parties are both subject to the jurisdiction of the state where the agreement is invoked, the agreement invoked may still be considered to fall under Art. II(3) of New York Convention by analogy.<sup>144</sup>

(2) *The extension to non-signatories state.* Does the New York Convention apply in states which are not party to the Convention? According to Article I(1), awards should be made in territories or states other than those where the recognition and enforcement is sought. Even if the state is not a party to the Convention the award may be enforced if the requirements for the award are satisfied. However, Article I(3) opened the door for states contracted to the New York Convention to add reservations if they so wished. The first reservation is that of reciprocity. This principle limits enforcement of foreign awards to those made in states which had adhered to the New York Convention and the second is the commercial relationships. According to this principle, cases where an award is made in a country which does not adhere to the New York Convention, it will not enforce the award if the state where enforcement of the award is sought had the reciprocity reservation.

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143. *Ibid.*

144. The application by analogy has been confirmed by the Italian Supreme Court in Miserocchi v. Paolo Agnesi where two Italian parties arbitrated in foreign countries. Under Article 2 of the Italian Code of Civil Procedure this kind of arbitration is prohibited. The Supreme Court held that the New York Convention superseded Article 2 of the Italian Court Procedure. cited by Van den Berg p.16, *Ibid.*

(3)*Date of operation.* Does the New York Convention apply to arbitral awards published before the date on which the foreign state becomes a party to the Convention? A case involving a contract concluded in July 1958 was brought to an English Court seeking enforcement of a foreign arbitral award under Section 3 of the 1975 Act.<sup>145</sup>

The Court of Appeal held that an arbitration award in a foreign state which was a party to the New York Convention could be enforced in the United Kingdom. It was a "Convention award" under Section 3 of the Act, whether the award predated or post-dated the foreign state's accession.<sup>146</sup> The House of Lords affirmed the Court of Appeal's decision in considering the critical time for deciding whether an award is a "Convention award" under the 1975 Act, is the time when the proceeding are taken to enforce an award.<sup>147</sup>

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145. *Kuwait Minister of Public Works v. Sir Frederick Sonow & Partners(a firm) and other* C.A. [1983] 2 ALL ER 754-762. The contract was between the Minister of Public Works of the Government of Kuwait and Frederick S. Snow & Partners for the construction of certain civil engineering works at the airport of Kuwait. Thereafter, when certain defects appeared (evident cracks in the runway) a dispute arose and, in October 1964, the Government of Kuwait terminated the contract. The other party took the matter to arbitration and a decision was made in favour of the Kuwaiti Government, awarding it damages and interest of about £3.5 m. The issue was:-

Whether or not the award relied on by the plaintiffs is a Convention award for the purposes of the Arbitration Act 1975.

The ground upon which the defendant based his case was that the award was published on 15 September 1973 at which time the state of Kuwait was not a party to the New York Convention. It became a party to the Convention on 27 July 1978, and an award could be enforced pursuant to the Act only if it published after Kuwait had become a party to the Convention.

146. *Ibid* at p.759.

147. [1984] 1 All ER 733 (H.L.).



The English Judicial system was successful in this decision, because it implied the policy in spirit of the New York Convention, which is the enforcement of arbitral awards, and overcomes the problem of the nature of the award as an obstacle to enforcement by considering that the award to be "Conventional" when published even if the state had not yet acceded to the New York Convention. Regarding the character of the award, the approach of the Court of Appeal was quite innovative on the point that it considered the award "Conventional" from the time of accession of the state in whose territory the award was made:"the change in the character of the award"<sup>148</sup> would accrue by the time of the accession. In disregarding the date of publication, the Court may consider the nature of the award at the time of enforcement of the award, whether or not the state was a party to the Convention. Classification of an award as foreign or domestic should be based upon the purpose for which the award is made, disregarding whether the country was a party to the New York Convention or not.

In addition to considering the previous difficulties in legislature, the U.A.E. should also take account of the following issues before adhering to the Convention:

(1) Concerning reservations on the Convention

The Convention provides that countries which ratify it may do so with either one or two reservations offered in article I(3). The first is the so-called Reciprocity Reservation which "declares that it will apply the Convention to the recognition and enforcement of awards made only

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148. (*Op. cit n.145*) at p.761.

in the territory of another Contracting state". Secondly, the so-called Commercial Reservation limits recognition and enforcement to disputes which are considered commercial under the national law of the place where the enforcement is sought. As a result, in the absence of such circumstances, awards would not be enforced under the Convention but would be enforced under F.D.C.C.P..

## (2) The nationals rules

The U.A.E. legislature should clarify some of the points relating to the implementation of the Convention, to avoid any contradiction between the Domestic and Convention rules, before the U.A.E. confirms the Convention.

*(a) The Convention Award:* There should be clear criteria differentiating between awards which came under the Convention and those which do not. The Convention rules should be respected by applying the Convention rules to the Convention award, where these rules are invoked before the U.A.E. courts. The judge has no power to apply the national rules in such a case. The U.A.E. court, pursuant to article III of the Convention, shall recognize arbitral awards as binding and enforce them in accordance with the Convention rules of procedure and that:

there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral award to which this Convention applies than are imposed on recognition or enforcement of domestic arbitral award.<sup>149</sup>

However, an award rendered without the Convention requirements may still then be brought under article 231 of the F.D.C.C.P..

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149. New York Convention 1958, art. III.

*(b) The Competent Court:* The legislature must appoint a competent court for the enforcement of the Convention Award, to avoid any difficulties over the rigid rules of court jurisdiction. USA arbitration rules could be followed, when granting the Federal Court exclusive jurisdiction of cases arising under the Convention.<sup>150</sup> When enforcement is sought in an Emirate which does not adhere to the federal judicial system, the Court of Appeal should have the jurisdiction to enforce the Convention Award. It would be advisable for the U.A.E. to establish a chamber in these courts especially for the enforcement of "foreign" awards; this would facilitate enforcement.

*(c) The Court Power:* The U.A.E. Courts would have no jurisdiction concerning an award rendered under the Convention, because it is governed by jurisdiction exclusive to the Convention. Where such an award is invoked under the Convention, the U.A.E. court power would be confined to the rules established by the Convention. The courts would have no power to consider or to examine the merits of cases brought under the Convention.

## Conclusion

The ultimate test of the success or usefulness of any arbitral process is whether the award is effective. Effectiveness is often synonymous with enforceability, which is related, to a certain extent, to the court in the country where the enforcement for the award is sought; in particular this is seen in the courts handling of the enforcement of awards rendered in a foreign country. This view has

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150. The US Federal Arbitration Act (FAA) section 203.

encouraged many countries to reconsider their rules concerning the enforcement of "foreign" and "domestic" awards, by introducing modern legislation and by the adherence to International Conventions regarding the enforcement of foreign awards. For example, an award rendered in China can be invoked before an English Court for enforcement. Whilst other countries have taken this step to promote enforcement of "foreign" awards, the U.A.E. is still has not adopted this approach, and the enforcement of arbitral award is more closely related to the place where the preparation for the enforcement was started and to the judge who tries a case, due to the legislative vacuum which exists. This might be solved by the time the F.D.C.C.P. is ratified. The problem lies in the enforcement of "foreign" arbitral award. The U.A.E. rules and practice require, expressly or implicitly that the "foreign" award be embodied in a "foreign judgment" in order to be enforced in the U.A.E.. This may involve submission *de\_novo* to the national court, which may be hostile to this kind of arbitration. This creates uncertainty and hesitation on the part of the parties to an arbitration agreement, to submit their disputes to U.A.E. national courts especially when the arbitration users are foreign. This attitude is perhaps intensified by certain doubts regarding the "foreign" arbitral award which is rendered in a foreign country, under foreign law, and by foreign arbitrators, and which ousts the national court of its jurisdiction. The adherence to archaic bilateral conventions help to prolong inefficient attitudes and prevents progress in developing the national rules by adopting modern concepts of international arbitration.

Probably the most progress under the current arbitration law is the creation of a legal climate to accommodate the specific needs and characteristic of the enforcement of "domestic" and "foreign" arbitral awards. Despite the reforms introduced by the F.D.C.C.P., there is much room for further improvement. One possibility is to enact legislation based on UNCITRAL Model Law. A second possibility is to promote the adherence to international Conventions concerning the recognition and the enforcement of foreign arbitral awards in view of obtaining a final award with a minimal risk of delay as a result of judicial review. That can be achieved by adopting the New York Convention of 1958.

## Conclusion

## Conclusion

When considering referring a dispute to arbitration the parties to the arbitration agreement need to consider the question of venue. The choice of an appropriate venue for the arbitration proceedings will determine the effectiveness of the entire arbitration process. The crucial factor in the choice of venue for arbitration is the attitude of the judiciary and legislature of the country of venue towards arbitral tribunals and their proceedings, with respect to rules of procedure, powers of courts to assist, or intervene in the proceedings, and to the enforcement of awards. Whether arbitration is the right solution for the settlement of the dispute depends on these features.

By examining these features under U.A.E law and practice, one can see that although arbitration should be a purely voluntary process for the private resolution of a dispute, it does not follow that the court will refrain from intervening in arbitration, and from controlling the process of arbitration. Under the U.A.E arbitration system the law has pursued a policy of maintaining close judicial supervision of and control over the substance of the conclusions reached by arbitral tribunals. This power has been increased by the shortfalls, uncertainties and archaic features of the arbitration rules in the U.A.E.

A principal reason for the posture of the courts towards arbitration is the fact that arbitration is seen as no more than a subordinate tribunal to be placed under the control and supervision of the court. This is supported by the traditional view in the U.A.E. which considers the function of adjudication as a sovereign prerogative vested in the ruler or their nominees (the judges). On this view the arbitrator's authority is delegated by the state, albeit through the medium of the parties' agreement to arbitration. Thus the state is justified in imposing certain conditions on the exercise of power.

According to the traditional view of the U.A.E., the authority in the Emirate is in the hand of the *Emir* or his nominee, therefore the *Emir* may be entitled to impose some restrictions; for example by a policy banning foreign arbitration when one of the Emirate's enterprises is party to arbitration; or by granting the courts within that Emirate comprehensive jurisdiction over arbitration, so that the decision of a tribunal does not affect the interests of that Emirate or exceed the limits drawn by the legislature in that Emirate.

However, the traditional view based on tribal tradition or custom is no longer suitable for the emergence of a modern society in the U.A.E., both in the matters of domestic as well as in arbitration involving foreign parties. The traditional view contradicts Emirate policy intended to encourage freedom of trade and commercial transactions which frequently involves commercial relations with foreign parties. The fact is that most international



contractors are reluctant to submit their disputes to the national courts, fearing partiality for U.A.E. nationals. Pressure has evolved on the legislature to establish an alternative arbitration system based on the parties' consent and ensuring an impartial resolution for the foreign parties by limiting court interference in the process of arbitration and abolishing the restrictions on the enforcement on arbitral awards.

Granting the parties the freedom to arbitrate out of the scope of the court interference will facilitate economic development in the U.A.E. It is necessary to embark upon a legislative programme appropriate to the modern and rapid development of the U.A.E. and the urgent needs of U.A.E. society. That can be achieved by providing a hospitable legal environment for domestic and international commercial arbitration. The hospitable legal environment should provide the necessary procedural framework for the fair and efficient conduct of arbitral proceedings and the facilitation of the enforcement of arbitral awards. Creating such an environment would play a very important role in opening up the U.A.E. to the outside world in order to obtain more foreign investment to help its economic construction. At the present time, the U.A.E. does not have adequate arbitration laws which can accommodate the commercial boom in the national as well as the international sector. It has become necessary and urgent to establish a mechanism for the resolution of disputes.

The Draft Federal Code of Civil Procedure (F.D.C.C.P.) is an attempt to modernize and facilitate the use of arbitration in the U.A.E. One of the main objects of the federal legislature is to fill legislative gaps and substitute the old law at the local level with a modern and developed law, accommodating new theories and practices of the Arab and other states. The F.D.C.C.P. surprisingly did not sufficiently depart from the old rules and practices and much of the old was retained. The rest of the law was a mechanical copying of the old Egyptian Code of Civil Procedure, not even considering new trends in Egyptian jurisprudence in this area. It would seem that the committee which was appointed to draft the Code was not concerned to effect a rigorous modernisation. As a result it was drafted in general terms and falls short in many areas; many important points are not contained in the F.D.C.C.P. Some specific illustrations may be made:

*(1) The courts' powers over the arbitration proceeding.* The F.D.C.C.P. did not limit court power, but rather adopted the old concept of strict court control inherent in the prevailing laws and practices. Under the F.D.C.C.P., when a court refers a dispute to arbitration, it does not waive its jurisdiction, but rather postpones its decision until arbitration channels have been exhausted. Accordingly, the court retains discretionary power to refer a case to arbitration or to try it itself; the court has the statutory power to remit a case from an arbitration tribunal and resolve it. This practice is the primary source of the delay, when the discretionary procedure is controlled by a court and uncertainty surrounds the outcome of the case.

(2) *The enforcement of foreign arbitral awards procedure.* Another issue not addressed by the F.D.C.C.P. is that of the foreign award. There are no express rules regulating this issue and references are made instead to the rules relating to foreign judgments notwithstanding the differences between judgments and awards. The reluctance of the F.D.C.C.P. to enclose provisions specifying the procedure of enforcement of foreign arbitral awards, treating such awards as foreign judgments, may be interpreted as a misunderstanding of the nature of the arbitral award, or as distrust in foreign jurisdiction, or fear that persons other than professional judges would misapply the law. Also there may be apprehension that providing such provision may result in a situation which would deprive nationals of their right to be heard by their national judges with adverse effects on the national interest, particularly in cases where the state is a party to the dispute.

The federal arbitration law represented by the Draft of Federal Code of Civil Procedure (F.D.C.C.P.), is not yet in force so it can be modified appropriately. There is no need for a new code; it simply needs re-drafting to expedite U.A.E. arbitral proceedings by removing opportunities for delay and abuse and to ensure the finality of awards. This policy will be enhanced by adherence to international conventions in this regard, especially the New York Convention on Recognition and Enforcement of

Arbitral Awards of 1958, instead of being satisfied with secondary treaties intended not for enforcement of arbitral awards but rather for the enforcement of court judgments.

Applying these modifications will lead to the simplification and suitability of arbitration as a dispute- resolution mechanism, and as a result it will facilitate the unification of the U.A.E. rules in this respect, by providing a basis for all the the present law and practice in the U.A.E. This initiative will in fact implement the declared objective of the Federal Legislature and will represent a pioneering position within the Middle Eastern laws in this matter.

The explosion of commercial and industrial development in the U.A.E. has made the U.A.E. authority attempt to develop more appropriate and efficient mechanisms for dispute resolution in commercial transactions without involving the ordinary courts.

The Chamber of Commerce dispute resolution system in the U.A.E. is a scheme brought into being in order to meet the growing and urgent needs for an adequate and fair machinery for settlement of disputes arising between the U.A.E. and foreign businessmen conducting their business within the U.A.E.

Notwithstanding the objectives these institutions are based on, they are not in a better situation than other types of arbitration forums. This may be attributed to cultural and traditional reasons and to the monopoly of certain groups who constitute the arbitration committee of these institutions. Therefore, the chamber of commerce arbitration system should

re-consider its rules and practice by introducing a policy of granting the parties more freedom in conducting their own dispute shielded from certain cultural factors influencing this system.

As a result of these factors, these institutions have lost their credibility as neutral institutions in commercial disputes. Even though they have achieved partial successes, this cannot be attributed to the efficiency of the institutions, but rather to the position and influence held by the members of the arbitration committee.

It has become important to have an arbitration system for this area especially in the light of the present circumstances the Gulf has witnessed and the invasion of the state of Kuwait, which has led many foreign companies to move their base from Kuwait to the U.A.E. This is because of its unique position between the Gulf states, and particularly its political stability. This is especially true in the case of Dubai, which enjoys more freedom than other states. These events should be a motive to relevant institutions to offer an alternative among the Gulf states.

This should be achieved through enacting modern rules assimilating the needs of the business society in the U.A.E., but this must not blindly copy Western models without considering the demands of the culture and society. These rules should be modified to serve the society of the U.A.E. in the light of the present circumstances.

## Recommendations

Arbitration does not appear as a favourable method of dispute settlement under the current arbitration law and practice. Thus I feel that the legislative authorities into the U.A.E. should take in consideration the following points:

(1) The need to separate the arbitration system from court control, by considering arbitration as an independent institution for dispute settlement, not as an exceptional method restricted by the need for consent by the courts. The court's power should be limited to examining the validity of parties' agreements and, if it is satisfied that the agreement is valid, it should stay the court proceedings.

(2) The courts should not be allowed to use "public policy" as a malleable concept. This step can be accomplished by a stricter definition, limiting the range of issues which sound in "public policy".

(3) The U.A.E. law and practice should not differentiate between national and trans-national arbitration. It is necessary that the federal legislature should provide a legal environment in which the arbitration institutions of the Emirates are seen to be attractive to foreign parties. Thus it is important to observe rules in this respect, that offer the correct guarantees and procedures in decision-making. As a result, international commerce will be

promoted which, in essence, is based upon the good will of the parties, and their mutual confidence in the law of the country where the arbitration takes place or enforcement is sought.

(4) A model arbitration law may be helpful, especially if the U.A.E. legislation considers the modernization of national arbitration laws. This will be helpful primarily for purely national arbitration. It will also indirectly serve international arbitration. The best way of doing this would be to adopt an international model such as the UNCITRAL Model Law.

(5) The U.A.E. suffers from a lack of qualified and specialized arbitrators. This is a major problem, especially in technical matters such as construction contracts, where parties have no choice but to select an arbitrator from outside the U.A.E. merely because of the lack of local expertise. In spite of the competence of the "imported" arbitrator, there are always problems facing him, most notably his knowledge of the U.A.E. law. It is possible that his award will be at odds with local law and consequently it may be deemed null and void. The relevant government departments should organize a training course for practitioners with the aim of acquainting them with the arbitration system and the U.A.E. laws which regulate it.

(6) In Chamber of Commerce arbitration the establishment of a higher committee, the members of which are completely independent of the arbitration committee. Before the parties apply to the court to grant the enforcement, the parties should be required to apply to the higher committee.

The higher committee should be composed of legal professionals, lawyers and commercial specialists. The jurisdiction of the higher committee should be to examine an award before a decision is issued. The arbitrators must submit their decision to the higher committee before the award is confirmed, in case it needs to be ratified or amended. In addition, it would have jurisdiction over any challenge or dispute concerning the award, or any matters relating to the arbitration procedure. The decision of the higher committee would be final. This committee will help to reduce the work load imposed on the court, and court jurisdiction will be limited to granting leave for enforcement only, without examining the merits of the case.

(7) In the domestic sector co-operation between the Chambers of Commerce in the different Emirates should lead to the establishment of model arbitration rules influenced, where appropriate, by modern developments in arbitration law occurring in developed countries.

(8) Co-operation between the arbitration tribunal and the court will facilitate the enforcement of the award, especially after the establishment of a higher committee in respect of Chamber of



Commerce awards. The court will not need to review an award after its ratification by the higher committee. This will help to expedite the enforcement. The will court still need to be involved in the parties' right to seek leave to appeal on points of law.

(9) Enforcement is the fruit of arbitration and the final stage of the process. The efficacy of the system depends on the timely enforcement of its awards. Enforcement relies on a variety of elements, discussed in chapter seven. One of these elements facilitating enforcement is to become a party to particular international convention. One of the most important conventions is the New York Convention of 1958. Therefore, the U.A.E should promote adherence to the New York Convention.

This study is the first in this field in the U.A.E. intended to explain and enlighten on the system of arbitration in the U.A.E. and as a guide for the researchers following in this field. It is hoped that the recommendations of the study will be regarded as a modest attempt to contribute to the strengthening and establishment of a modern arbitration system comparable to the law of the developed countries in this field.

## **Appendix A**

**The U.A.E. Federal Draft Code of Civil Procedure (F.D.C.C.P.)**

Appendix A  
The U.A.E. Federal Draft Code of Civil  
Procedure (F.D.C.C.P.)  
Chapter Three The Arbitration

Article 201

(1) Parties may agree in the main contract or in subsequent agreement undertake to submit to arbitration the dispute which may arise with respect to the implementation of the contract, to arbitrator or more. Also parties may agree to submit their dispute to ad hoc arbitration.

(2) The arbitration agreement cannot be proved unless it is in writing.

(3) Arbitration is prohibited in matters which could not be the subject of compromise. And the parties should have the legal capacity to dispose of their right.

(4) The subject matter of arbitration should be clearly defined in the arbitration agreement ordering the proceeding of the case, even if the arbitrator is authorized to seek compromise.

(5) If the parties agree to arbitrate a certain dispute, no action may be brought before the court until the arbitration proceedings are exhausted. Nevertheless, if an action is brought by one of the party despite the arbitration clause, and no objection is made by the other party at the first hearing, the action may proceed and the arbitration clause shall be deemed null and void.

(6) Arbitration did not included matter's of urgent nature

(7) The interme award cannot be challenge apart from the final award.

Article 202

(1) If the dispute occurs and the parties fail to appoint the arbitrators, or if one or more of the appointed arbitrates is unwilling or unable or is unauthorized to act as an arbitrator, or has been removed as an arbitrator, and the parties have not agreed to appoint an alternative, then any of the parties may petition the court of the original jurisdiction to appoint an arbitrator or arbitrators agreed by the parties.

(2) The decision { of the court} shall be final and not subject to any appeal.

Article 203

Arbitrators in subject of compromise cannot be appoint unless the name of the arbitrators be mentioned in the arbitration agreement or in a separate agreement after the arbitration agreement.

Article 204

(1) Arbitrator may not be a minor, person in custody, person who are deprived of his civil right by criminal conviction, or bankrupt { merchants who have been declared bankrupt}

unless he have been reinstated.

(2) If more than one arbitrator is appointed, the total number of the arbitration shall be uneven.

#### Article 205

(1) The arbitrator's acceptance of his nomination shall be in writing, the acceptance may be proved by the arbitration agreement.

(2) After accepting the appointment, an arbitrator may not decline to act without acceptable cause. Accordingly, he can be held liable for damages if resigns without just cause .

(3) Arbitrator may not be dismissed except by the parties unanimous consent.

(4) An arbitrators may not decline or challenge except for a ground of challenge revealed or having arisen subsequent to his appointment. The challenges are to be brought before the court of original jurisdiction within five days of the occurs of the reason of the challenge. the challenge will denied if it came after the issuing of the award or of the proceeding of the case over.

#### Article 206

(1) The arbitrators shall determine the procedure of arbitration within thirty days of the acceptance of his nomination, by informing the parties of the date of the proceeding and the place of arbitration. The arbitrator is not obliged to follow the rules of the court procedure with the exception of rules contained in the (F.D.C.C.P.), the arbitrators shall specify a timetable for the submission of documents pleadings and their defense.

(2) The arbitrator may settle the dispute in accordance with the document and the pleading submitted by one party only if the other party only if the other party fails to submit it defense during the specified period.

(3) The arbitrators shall jointly carry out the inquisitorial proceedings, and shall individually sign the minutes thereof, unless they appoint one of them to carry out certain proceedings and confirm this in the minutes.

#### Article 207

(1) The dispute shall terminated before the arbitrator due to any cause for termination stipulated in this law {F.D.C.C.P.}. The steps following termination are stated in the said law. Unless arbitrators came to final decision in issuing the award.

(2) If a preliminary matter arisen in the course of arbitration which is outside the jurisdiction of the arbitrators, or an objection is made in respect of forgery of a paper, or if criminal proceedings are commenced in connection with such forgery or in connection with any other penal action, the arbitrator shall stay the arbitration until a final judgment rendered regarding the interlocutory matter. The arbitrator may request the president of the competent court in the following case :-

(a) To hold in contempt defaulting witnesses or witnesses who

- refuse or respond to the question in the course of examination;
- (b) To order a third party to produce a document in his possession which is deemed essential in rendering an award;
- (c) To order the taking of evidence by { judicial delegation}.

#### Article 208

- (1) If the issue of the arbitral award, is not subject to any time limit the award must be made within six months after the date on which they accept their nomination. If the award is not issue within this period, any one of the party may petition or proceed to the competence court { if arbitration arise during judicial hearing} to settle the dispute itself.
- (2) The parties may agreed expressly or implicitly, extend the the period agreed on in the agreement or by the law, and they may empower the arbitrator to extend the period to limit time.
- (3) In the event where the dispute has been suspend or stay before the arbitrator, the running of the time period shall stop until the cause of the suspension or stay of proceeding is over. Arbitration then resumed , if the remaining period is less than a month it shall be extend to a month {by law}.

#### Article 209

- (1)The arbitrator is not obliged to follow the rules of the court procedure, with the exception of the rules contained in the F.D.C.C.P. chapter on arbitration and those which contain certain procedural guarantees, such as hearing both side, the right of defense, and submission of their documents. The parties however, may agree on different rules for arbitration procedure arbitrators should follows.
- (2) The arbitrator is to decide the case in conformity with rules of law, unless the parties, in arbitration agreement, have given him the authority to decide as *amiable compositeur*, except those relating to public policy.
- (3) The rules with respect to provisional execution of judgment are applicable to arbitral awards.
- (4) The award should be render in the U.A.E. If the award rendered out of U.A.E., the rules with respect to foreign award will be applicable on it.

#### Article 210

- (1) The arbitrators shall make their award by a majority vote. The award shall be written, and shall include a copy of the arbitration agreement, a summary of the opposing parties statements and document presented, the reason and dispositive position of the award, the place and the date of its issue and the signature of the arbitrators. If one or more arbitrator refuse to sign the award this should be indicated therein. The award will deemed valid if it have been signed by the majority of the arbitrators.
- (2) The award shall be written in Arabic, unless the parties agreed otherwise, in this case formal interpretation of the award

should be consistent with the original award.

(3) Arbitral award consider issue from the date of arbitrators signatures on it.

#### Article 211

The arbitrators shall deposit the award together with the original arbitration agreement, the pleadings of the parties, and documents, to the court of original jurisdiction within fifteen days after of its issue. Arbitrators shall provide a copy thereof to each party within five days after the deposit of the award to the court. The court clerk shall provide a receipt for its delivery of the award, to present it to the judge or president of circuit to assign a hearing within fifteen days for the confirmation of the award and notifying the parties.

#### Article 212

(1) The arbitral award shall not be enforced until it confirmed by the court with which the award has been deposited, after {judge} examines the award and the arbitration agreement if there is any ground resisting enforcement. The correction of material errors shall be vested in this court, the court will follow the same rules in correcting judgments. The parties should request the correction.

(2) The executive judge will have jurisdiction to adjudicate on all incidents concerning the enforcement of arbitral award.

(3) The voluntary arbitration may enforced without following aforementioned procedure.

#### Article 213

When the arbitral award is presented to the court of original jurisdiction for confirmation, a party may seek to set aside the award or the court itself may set it aside in the following circumstances:-

(a) If the award is made in the absence of arbitration agreement, nullity, void or expired agreement or if it exceed the scope of the arbitration agreement.

(b) If the award made by arbitrators are not appointed by law, or made by a number of arbitrators not authorized to decide in the absence of the other arbitrators, or made by insufficient specification of the subject matter of the dispute, or made by incapacity or inability of the arbitrator, or by arbitrator who did not satisfied the legal requirement.

(c) Waiving one of the party right during the arbitral procedure did not represent a preventive court right to set award aside.

#### Article 214

(1) Arbitral awards may not be subject to appeal.

(2) The court order of confirming or set aside an award may be object of retrial.

Appendix B

The Abu-Dhabi Code of Civil Procedure of 1970

(A.D.C.C.P.)

## Appendix B

### The Abu-Dhabi Code of Civil Procedure of 1970 (A.D.C.C.P.)

#### Chapter nine Arbitration

##### Article 82

(1) The court may at the request of the parties to refer the for arbitration all or part of subject matters of the dispute.

(2) Every such application shall be in writing and shall state the matter sought to be referred.

##### Article 83

(1) A court in referring any such matters to arbitration shall specify:

(a) the names of the arbitrators,

(b) the precise matter or matters submitted to arbitration,

(c) A reasonable time allowing the arbitrators for the delivery of the award.

(2) The court, upon referring any matters of a dispute for arbitration may set the fee to be charged by the arbitrators.

##### Article 84

(1) Arbitrators shall be appointed in such manner as may be agreed upon between the parties;

(2) where the parties have agreed upon an even number of arbitrators, a court shall appoint one additional arbitrator.

##### Article 85

(1) where the parties cannot agree with respect to the appointment of arbitrators, each party shall nominate either one arbitrator or more, provided that each shall nominate the same number;

(2) a court shall nominate an additional arbitrator so the number of arbitrators becomes even.

##### Article 86

(1) where any person appointed refuses to accept the office, or where an arbitrator dies, or refuses to act or becomes incapable of acting, a court shall call upon the party who nominated such an arbitrator or, if such an arbitrator was appointed by agreement, upon the parties to nominate a fresh arbitrator.

(2) If within 7 days of being so called upon, no arbitrator is nominated, a court *may*, after giving the parties an opportunity of being heard, appoint an arbitrator or make an order superseding arbitration.



#### Article 87

(1) In order to ensure the appearance of the parties or their witnesses, before the arbitrators the court shall issue the same processes to the parties and witnesses whom the arbitrators desire to examine, as the court may issue in suit tried before it. However, the court may not take any punitive action for contempt of court unless the arbitrators present a complaint.

#### Article 88

(1) If the court refers to the arbitrators more than one point of the dispute, the arbitrators shall award separately upon each matter referred to them, unless the award on one of such matter is sufficient for determination of the entire dispute.

#### Article 89

Arbitrators may, with the consent of a court, seek a court's opinion in any case before them. Such opinion shall be considered as part of an arbitrators' final decision.

#### Article 90

(1) The arbitrators shall submit their award in writing to the court. The award shall be accompanied by all the documents reviewed and admitted as evidence. The court then shall set a date for the parties to hear the arbitrators award.

#### Article 91

(1) The court may:

(a) The court may amend the arbitrators award if it deems that:

(i) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separate from the other part and does not affect the decision on the matter referred; or

(ii) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such a decision.

(b) The court may issue any appropriate decision regarding expenses if a disagreement occurs over the amount of such expenses.

(c) The court may remit the award to the reconsideration of the same arbitrators upon such terms as it thinks fit.

(i) if an award has left undetermined any of the matters referred to arbitration; or

(ii) where an award is not precise enough to be capable of enforcement; or

(iii) where the award is contrary to the law on its face.

(2) An award remitted under section (1/c) become void on failure of the arbitrators to reconsider it.

## Article 92

(1) The court may set aside any decision handed down by the arbitrators if:

- (a) Any of the arbitrator has "misconducted" himself or the proceedings;
- (b) Either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrators;
- (c) The award having been made after the issue of a judgment by a court, following arbitration, or after the expiration of the period allowed by a court to issue an award;
- (d) The award violates any general principles of justice;
- (e) The award is ineffective.

(2) Any application to set aside an award shall be made within 7 days after the day the delivery of the award.

## Article 93

The court shall continue the hearing if the decision of the arbitrators is set aside in accordance with the provisions of this law.

## Article 94

(1) Where the court sees no cause to remit the award or set aside for any reason stipulated in this law, the court shall proceed to pronounce judgment in accordance with the award of the majority of the arbitrators.

(2) Upon such ruling, a decree shall follow and no appeal shall be allowed following such a decree.

(3) Irrespective of the provision of 94(2), a decree exceeds the parameters of the award or not in accordance with it, an appeal can be brought against it.

## Article 95

(1) Any agreement calling for reference of a dispute to arbitration, may be registered by the parties or any of them to a court having jurisdiction in the matter to which the agreement relates.

(2) The request submitted by one of the parties for the registration of the arbitration agreement, shall be considered as a lawsuit against the other party.

(3) On such request being made, the court shall direct notice thereon to be given to all parties to the agreement, other than the applicants, requiring such party to show cause, within the time specified in the notice, why the agreement should not be registered.

(4) Where no sufficient cause is shown, the court shall order the agreement to be filed, and shall make an order of reference to the arbitrators to be appointed in accordance with

the provisions of the agreement.

(5) If the agreement does not include a provision relating to the appointment of the arbitrators and the parties can not agree on the process of selecting the arbitrators, the court shall appoint the arbitrators in the manner provided in article 85.

#### Article 96

The provision of chapter nine of the A.D.C.C.P. shall apply to disputes referred for arbitration only when they do not contradict the agreement reached between the parties.

#### Article 97

(1) Where any matter has been referred to arbitration without the intervention of a Court and an award has been made thereon any person interested in the award may apply to any court having jurisdiction over the subject matter of the award that the award be filed in Court.

(2) The application for depositing the award shall be considered a lawsuit against the defendant in the award. The court shall notify the defendant of the deposit of the award.

(3) The notify party may submit his challenge of the deposit within a time set by the court.

#### Article 98

(1) If the court did not dismiss the arbitrators award then it shall order the award to be deposit.

(2) If the award was accepted to be deposit, the court shall proceed to pronounce judgment according to the award.

(3) Any such opinion by the court shall be followed by a decree. No appeal shall lie from such decree.

(4) Notwithstanding, of provision (98/3) a decree may be appealed if it is in excess of or not in accordance with the arbitrators decision.

## Appendix C

### Sharjah Arbitration Act (S.A.A.)

## Appendix C

### Sharjah Arbitration Act law No. 13 of 1990 on Arbitration

We Sultan Bin Mohamed Al Qassimi, Ruler of Sharjah, until the Federal law governing arbitration in the State is issued, and in the public interest, hereby resolve that the following be issued:

#### Article 1

This law shall be called "law No. 13 of 1990 on Arbitration" and shall come into force in the Emirate of Sharjah from the date of issue.

#### Article 2

- (1) The parties to a contract may generally agree under the original contract, or under supplementary agreement, that any disputes arising among them in connection with the implementation of specific contract shall be referred to one or more arbitrators. The parties to a contract may also agree to arbitration before the court during legal proceedings, or in a certain dispute under special conditions.
- (2) An arbitration agreement shall not be recognised unless it is in writing.
- (3) Arbitration is not permissible in matters which are not authorised for reconciliation. An arbitration agreement shall not be deemed valid unless it has been concluded by the parties which are legally entitled to the disputed interest.
- (4) The issue to be arbitrated shall be specified in the arbitration agreement or during the court proceedings; even if the arbitrator was authorised to make reconciliations. Otherwise the arbitration shall be deemed null and void.
- (5) If the opposing parties have agreed to refer any dispute to arbitration, such dispute may not be referred to the court unless the arbitration procedures to file a suit in disregard to the condition requiring arbitration, and the other party does not raise any objection to that during the first hearing of the suit, the suit may be heard and condition requiring arbitration shall be deemed to be canceled.
- (6) Interim decisions of the arbitrators may not be contested independently before a court but only with the judgment passed by the court, approving or nullifying the decision of the arbitrators.

#### Article 3

- (1) If a dispute arises before the parties have agreed upon the arbitrators, or one or more of the arbitrators agreed upon have declined to act, or resigned, or have been dismissed, or ceased to act for any reason whatsoever, and no agreement is existing between the parties, the competent court shall appoint the requisite number of arbitrators upon

the request of any of the parties, filed in the normal procedure for filing a law suit.

- (2) A judgment passed as aforesaid is not appealable in any manner whatsoever.

#### Article 4

Arbitrators may not be authorised to reconcile a matter unless they have been specifically named in the arbitration agreement or in a subsequent document

#### Article 5

- (1) An arbitrator may not be a minor, a person under guardianship, a bankrupt, or a person who is deprived of his civil rights due to criminal punishment, unless he has been rehabilitated.
- (2) If there are more than one arbitrator their number in all cases shall be an odd number.

#### Article 6

- (1) The acceptance of the arbitrator to act as such shall be in writing or shall be recorded in the minutes of arbitration session.
- (2) If an arbitrator declines to act as such without any serious reasons, after he has accepted to conduct the arbitration, he may be liable for damages.
- (3) An arbitrator may not be dismissed unless with the consent of all parties. However, the competent court may, upon the request of any party, dismiss an arbitrator and appoint another one, upon the same procedure applied in the appointment of the dismissed arbitrator, if it has been established omission to act in accordance with the arbitration agreement despite a written notice to that effect by the party seeking this removal.
- (4) An arbitrator shall not be dismissed except for reasons occurring or appearing after his appointment. A petition for such dismissal shall be on the same grounds upon which the dismissal of a judge may be petitioned; or for which shall be deemed unfit for arbitration. The application for dismissal shall be filed with the competent court within five days of notification to the other party of the appointment of the arbitrator; or from the date of occurrence of the ground for dismissal; or, from the date of it coming to knowledge, if it is subsequent to the date of notification the appointment of the arbitrator. However, a petition for dismissal shall not be accepted if the arbitrators have already made their award or if proceedings in the suit have been closed.

#### Article 7

- (1) Within 30 days of his acceptance of the arbitration, the

arbitrator shall notify the parties of the date and place of the first session for hearing the dispute. The arbitrator shall also fix a date by which the parties must present their documents, memorandum and defences.

- (2) The arbitrator's decision may be passed upon the document submitted by one of the parties if the other party fails to appear within the prescribed time.
- (3) If the number of the arbitrators are more than one, they shall jointly conduct the proceedings and each one of them shall sign the minutes; unless they agree to nominate one of them for certain procedure and such nomination was recorded in the minutes of the session or unless the arbitration agreement authorises one of them to do so.

#### Article 8

- (1) The arbitration proceedings shall be terminated whenever any reason for such termination, as stipulated by law, shall occur. Unless the suit has been reserved for judgment, such termination shall have legal consequences stipulated under the law.
- (2) If a preliminary issue arises during the arbitration proceedings which is outside the jurisdiction of the arbitrators, or a challenge has been filed that a document has been counterfeited, or criminal proceedings have been initiated regarding such counterfeiting or for any other criminal act, the arbitrator shall suspend proceedings and refer the matter to the President of the competent court in the following circumstances:
  - (a) to pass a judgment, within the legally prescribed penalties, against a witness which fails to appear or fails to deposit testimonies;
  - (b) to order a party to submit any documents in its possession which are necessary for the decision of the arbitration; and
  - (c) to appoint a proxy for arbitrator.

#### Article 9

- (1) If the parties did not stipulate a date for the judgment in the arbitration agreement the arbitrator shall pass his decision within six months from the date of the first arbitration session; otherwise, any of the parties may refer the dispute to the court or, if it has already been filed, request that proceedings continue.
- (2) The parties may agree, whether expressly or impliedly, to extend the date prescribed under the law or the arbitration agreement. They may authorise the arbitrator to extend the date to a specified time.
- (3) The period stipulated for the arbitrator's award shall cease to run whenever arbitrating proceedings are suspended. The period shall commence again from the date on which the arbitrator is notified of the removal of the suspension. If the remaining period, at the time of the suspension, is less

than one month, this remaining period shall be extended to one full month.

#### Article 10

The arbitrators may require a witness to take oath. Any witness providing false statement before the arbitrators on a material issue shall commit the crime of perjury as if he had given such testimony before a court of competent jurisdiction.

#### Article 11

- (1) The arbitrator shall issue his arbitral; award without being bound by any procedures; provided that, the opposing parties shall called to hear their statement and shall be permitted to submit documents. However, the parties may agree upon certain procedures to be followed by the arbitrator.
- (2) The decision of the arbitrator shall be in accordance with the law except where he has been authorised for reconciliation; in which case, he will not bound to conform with law except in relation to the public order.
- (3) The arbitrator's award shall be issued within the U.A.E. Otherwise, the regulations applicable to the decisions of foreign arbitrators in a foreign country shall apply thereto.

#### Article 12

- (1) Arbitration decisions shall be taken by a simple majority. The decision of the arbitrators must be in writing accompanied by a copy of the arbitration agreement, and shall include a summary of the evidence and documents of the parties, grounds for the arbitrators' decision, the wording of the decision, the date and the place of the issue of the decision, and the signatures of the arbitrators. If any of the arbitrators refuses to sign the decision, such refusal shall be stated in the decision; provided that, the award will remain valid if it has been signed by a majority of the arbitrators.
- (2) The decision of the arbitrators shall be written in the Arabic language unless otherwise stipulated by the parties; in which case, an official translation shall be attached with the decision at the time of its filing.
- (3) The decision of the arbitrators shall be deemed to be issued from the date of its signing by the arbitrators.

#### Article 13

- (1) When arbitration is conducted through the court, the arbitrators shall file their decision, the original arbitration agreement, the minutes of their proceedings, and all documents with the clerk of the court which is hearing the law suit, within 15 days following the date which their



decision was issued. The arbitrators shall provide a copy of their decision to each party within 5 days of the aforesaid filing. The court clerk shall record the filing of the arbitrators' decision and notify the judge or the head of the department, as the case may be, in order to convene a hearing within 15 days for approving the arbitrators' decision; the parties to the dispute shall be notified accordingly.

- (2) When arbitration conducted outside the court, the arbitrators shall submit a copy of their decision to each party within 5 days of the date of the decision was made. Upon receiving a petition from either party, the court shall hear an application to approve or nullify the decision of the arbitrators. Such petition shall be filed in the normal procedure for filing a law suit.

#### Article 14

The court may, whilst hearing the application for approving or nullifying the arbitrator's decision, refer back to the arbitrators, for re-investigation or completion, any matter which had been referred for arbitration. The arbitrators shall issue their decision on such referral within three months of their notification, unless the court decides otherwise. Such decision of the arbitrators shall not be contested unless with the final judgment of the court concerning the approval or nullification of the arbitrators' decision.

#### Article 15

- (1) An arbitration decision shall not be implemented unless it has been approved by the court after reviewing the decision and arbitration agreement; after giving the parties an opportunity to present their argument; and after confirming the absence of any legal encumbrance to execution of the arbitral award. The court shall be concerned with the correction of material mistakes in the decision upon receiving a petition from the concerned party in the normal procedures for correcting augment.
- (2) The judge of the execution proceedings shall be concerned with all matters relating to execution of the arbitration decision.

#### Article 16

- (1) A petition that the arbitrator's decision is void may filed during the court hearing on the arbitrators' decision. The court may, at its discretion, declare the decision void, in the following cases.
  - (a) if the arbitrators decision has been made without an arbitration agreement, or on the basis of an invalid or expired agreement, or if the arbitrators have exceeded the limit prescribed by the agreement;

(b) if the decision was made by arbitrator who have not been appointed in accordance with the law; or by some of the arbitrators without authorisation to so issue the decision in the absence of the other; or on the basis of an arbitration agreement which does not specify the issue under dispute; or by person who is not legally competent to act as an arbitrator who does not fulfill the legal requirements;

(c) if any aspect of the arbitrators' decision or their proceedings becomes void and thereby affected the arbitrators decision.

(2) A petition for nullification shall not be rejected by reason of a waiver by a party of its rights prior to the issuance of the arbitrator's decision.

#### Article 17

The judgment of the court approving or nullifying the arbitrator's decision may be appealed on the same basis as referring a judgment of the court for appeal. However, the judgment shall not be appealable if the arbitrators were authorised to rendered his decision according to *amiable composition*, or if they are arbitrating through the court of appeal, or if the parties have waived their right of appeal or if the value of the suit is less than Dh. 10,000.

#### Article 18

The arbitrators shall estimate their fees and the expanses of the arbitration. They may order the party against whom the decision is awarded to pay all or part of such fees and expenses. The court shall have the right to amend the estimate of the arbitrators taking into consideration the nature of the suit and the efforts of the arbitrators.

#### Article 19

All concerned parties shall execute the provision of this law, each within the spheres of its capacity.

## Appendix (D)

### The Abu-Dhabi Chamber of Commerce & Industry Rules

**APPENDIX D**  
(Copy Typical to Original)

**THE ABU DHABI CHAMBER OF COMMERCE AND INDUSTRY**

**Rules on Trade Reconciliation and Arbitration**

Pursuant to article 8 of the chamber's law No. 6 for 1976, The Chamber's Arbitration Committee hears all trade disputes, presented by disputed parties in accordance with the provisions of the rules, hereinafter.

**Terms of Arbitration:**

The Chamber calls upon all business concerns, desiring to settle disputes over business transactions and intercourses through Cgamber arbitration, to include the following clause in their agreement:

"All disputes emanating from this agreement shall finally be settled according to the Abu Dhabi Chamber of Commerce and Industry Arbitration Rules whether through

- (1) The Chamber's Arbitration and Trade Practice Committee, or through
- (2) arbitrator(s) to be appointed according to the rules herein."

**Arbitration Committee:**

**Composition-Life Time-Decisions-Tasks.**

(1) Arbitration Committee shall emerge from duly elected Board of Directors' members.

(2) The Arbitration Committee's power duration is equal to that of the Board of Directors' members (Article 43, The Chamber's Internal Executive Rules).

(3) Immediately upon composition, the Arbitration Committee shall elect its Chairman and Secretary, (Article 44, the Chamber's Internal Executive Rules).

(4) The quorum of Committee's meetings shall be legal upon attendance of, at least three members including Chairman (Article 44, the Chamber's Internal Executive Rules).

(5) Decisions shall be taken by absolute majority vote. In case of equality, the Chairman shall have the casting vote.

(6) The Committee shall convene once a month at least, or upon call by the Chairman, whenever necessary.

(7) The Secretary shall have to set down all discussions and decisions in an official minutes to be signed by him and the Chairman at the end of each session.

**The Committee's Task:**

(1) Settlement of all petitions on reconciliation and arbitration presented by concerned parties.

(2) Appointment of arbitrator(s) upon request of concerned parties.

(3) Appointment of the Chamber's accredited experts according to pertinent defining terms and conditions.

(4) Preparation of and supervision on arbitration courses held once or twice a year for qualifying arbitrators according to terms and conditions to be defined at the beginning of each course.

(5) Definition of trade and local parties.

**(1) Reconciliation**

- (a) Any trade dispute can be reconciliated amicably through Reconciliation Committee.
- (b) Reconciliation Committee is appointed by the Chairman of Arbitration Committee and composed of one member or more, whether from those of the Arbitration Committee or of any other ordinary persons
- (c) Reconciliation is discretionary and, shall not be obligatory towards any disputed party.

#### **RECONCILIATION PETITION**

- (1) Reconciliation petition should be addressed to the Chairman of the Chamber's Arbitration Committee, requesting settlement of dispute through amicable reconciliation. The Chairman of Arbitration Committee shall appoint the committee which will consider the dispute in question.
- (2) Reconciliation petition shall include a detailed narration of facts and the claimant's view point. He shall have to support his claims by documents, define his requests and, to enclose a number of copies thereof; equal to that of concerned persons with whom reconciliation is to be made, together with extra three copies for the Committee's members.
- (3) Upon payment of a DH 100/- fee by the claimant, opponent shall be notified by the Committee's Chairman, requesting him to make a decision on reconciliation. In case of acceptance, the opponent shall have to submit to the Committee all appertaining documents, explaining his point of view on the dispute in question within a respite of 15 days from the date of notification referred to herein.
- (4) Pertinent file shall be examined by the Committee which will directly contact concerned parties, requesting them to present themselves in the reconciliation hearing session.
- (5) Disputed parties shall either attend personally or deputie legal attorneys. The Committee shall try to bridge the gap between the parties' points of view and to suggest an agreement framework. In case the gap bridged and reconciliation approved, the Committee shall set down minutes to be signed by the members and the concerned parties as well.
- (6) The minutes shall be drawn on original copy of which attested copies shall be handed to concerned parties for execution.
- (7) Reconciliation shall have to be executed upon being approved by concerned parties.

#### **RECONCILIATION FAILURE:**

- (1) Failure of reconciliation shall not affect the parties' right to resort to arbitration upon their mutual consent or according to binding arbitrational clause provided for in their agreement. It, also shall not affect their right to resort to concerned courts of law.
- (2) The parties' rights shall, under no circumstances, be affected by what might have been accepted, presented or written down, whether during failing reconciliation sessions or before Reconciliator(s).
- (3) It shall not be permissible for he who participated in a Reconciliation Committee viewing some dispute, to be arbitrator considering the same dispute.

#### **(II) Arbitration**

Arbitration is discretionary. It shall not be binding unless an arbitral clause is provided for in the agreement signed between disputed parties or if they, thereafter agree to resort to arbitration.

## **ARTICLE 1**

Petitioner shall have to submit a written Arbitration Petition duly signed by him or his legal attorney and addressed to Chairman of Arbitration Committee, c/o the Chamber's Director General. He shall have to enclose therewith, a sufficient number of copies for disputed parties plus extra three ones in which the following information shall be stated:

1. Petitioner's name, nationality and qualifications.
2. Address and occupation.
3. Opponent's name, nationality, full address and occupation.
4. His claims and the dispute legally reasoned facts.
5. Signed agreement and arbitration clause.
6. Copies of evidencing documents.
7. Petitioner's requests, his arbitrator's name, address and telephone number, (only in case the arbitration clause provides that each party shall have to appoint his arbitrator).
8. In case Arbitration Petition is submitted by legal attorney, the power of attorney shall be presented as well.

A recognizance promising to pay arbitrator(s) fees shall be attached to the written petition.

## **ARTICLE 2**

Arbitration Petition shall be registered in a special registration, prepared for the purpose, and named "Arbitration Petition Register". Each petition shall be dated and serialized upon payment of fees. A reputable clerk shall be appointed to undertake the task and shall be called "Arbitration Petition Registrar". The clerk shall refer registered petitions together with pertinent documents to the Secretary of Arbitration Committee through the Chamber's Secretariat within a period of three days. He shall, also notify opponent of the submitted petition which should not contain any scratch or omission.

## **ARTICLE 3**

Once petition is submitted, the Arbitration Committee's Secretary shall, within a respite of no more than eight days, prepare a special file containing a minutes in which all information stated in Article 1 hereinbefore should be mentioned, along with a statement on the subject matter of arbitration.

## **ARTICLE 4**

The said minutes shall, thereafter and once being referred to Arbitrator(s), contain all stages of arbitration progress, besides all presented papers, documents, witnesses' and disputed parties' hearings, dates of arbitration commencement and conclusion, and Arbitrator(s) Award. The minutes shall be undersigned by the Clerk and the Arbitrator/Arbitrators.

## **ARTICLE 5**

Opponent shall reply to the Arbitration Petition presented against him within 25 days from the date of notification and, shall enclose

therewith all documents and evidencing papers and, a number of copies thereof; equal to that of opponents' number plus extra three copies. He shall, also nominate his arbitrator and mention his name and telephone number.

#### **ARTICLE 6**

Within the context of this reply, it shall be permissible for an opponent to submit, upon payment of fixed fees, a counter of Arbitration Petition in which he has to state his own views and claims according to the provisions of Article 1 hereinbefore, a case in which the first petitioner shall be notified and given a 25 day respite for counter reply.

#### **ARTICLE 7**

##### **APPOINTMENT OF ARBITRATORS**

case (a): Arbitration clause is providing for the terms of Arbitrator(s) appointment:

1. In case signatories of the agreement agreed, in the arbitration clause, on appointing a sole arbitrator, the Arbitration Committee shall, upon completion of notification procedurs, call disputed parties to a meeting to be held in the Chamber's premises within 7 days from the date of finalisation of notification procedures in order to agree on the sole arbitrator's nomination. In case of disagreement on nomination within 10 days from the date of the said meeting, the matter shall be referred to Arbitration and Trade Practice Committee, the resolution of which shall be decisive and unappealable unless for reasons provided for in Article 30 & 31 hereinafter.

2. In case both parties agree on nominating more than one arbitrator, each party shall name his arbitrator either in the Arbitration Petition or in his reply thereof; as to the case. In case of failure, the Arbitration and Trade Practice Committee shall appoint an arbitrator on his behalf, and the resolution thereof; shall be decisive and unappealable unless for reasons provided for in Article 30 & 31 hereinafter.

The committee shall call arbitrators of both parties to a meeting in the Chamber's premises within one week from the date of completion of notification in order to appoint Umpire. In case of disagreement on appointment within 10 days, he shall be appointed by the Arbitration and Trade Practice Committee whose resolution shall be decisive and unappealable unless for reasons provided for in Article 30 & 31 hereinafter.

3. In case the parties agreed on arbitration through the Chamber's said Committee, the Committee shall have to consider the dispute within 10 days from the date of completion of notifications.

case (b): Agreement between signatories is not including arbitration clause:

In case a dispute arose between signatories and, they, thereafter, accept arbitration through the Chamber, each shall have to appoint either a sole arbitrator, or a three member Arbitration Board or, otherwise to accept arbitration through the Chamber's Arbitration and Trade Practice Committee, following the same procedures provided for in clause (a) of this Article.

#### **ARTICLE 8**

Disputed parties shall have to deposit arbitrators' fees with The Chamber's Cashier in advance and, as fixed by the Arbitration & Trade Practice Committee.

#### **ARTICLE 9**

Arbitrators shall be notified by the said Committee's Decision on appointment and fees, as decided within three days from the date of its issuance.

#### **ARTICLE 10**

In case of refusal or death, a substitute arbitrator shall be appointed according to the same terms and conditions applied to his predecessor.

#### **ARTICLE 11**

Once the file, subject matter of dispute, is delivered, the arbitrator(s) shall have to study it and, to set down a Minutes containing the purport of each disputed party, stating agreed and controversial points and, confirming the existence of Arbitration Clause. Arbitrator(s) shall, within a week from the date of commencement, have the right to complain to the Committee concerning the decision on their fixed fees. The Committee shall promptly consider complaint and, take a final decision thereof.

#### **ARTICLE 12**

Arbitrator(s) shall have full power to settle the dispute and, shall have the right to call all concerned parties and witnesses for cross-examination and hearing. They, also shall have the right to request evidences supported by additional documents; if already presented ones deemed insufficient by them.

#### **ARTICLE 13**

In case a party expresses his will to be heard, the arbitrator(s) shall have to inform the other party, calling him to present himself within reasonable period of time. Arbitration progress shall be resumed in case of unexcused absence.

#### **ARTICLE 14**

Acting at his (their) discretion, or upon request of one of the litigants and, if it deems necessary by the claim circumstances, the arbitrator(s) shall have the right to request an expert's assistance, providing that he (they) shall initially and approximately fix his fees. In accordance with the arbitrators(s)' decision, both of any of the disputed parties shall deposit the decided payment in advance with the Chamber's Cashier within a period of one week from the decision date. The expert shall not be entitled to receive the advance payment unless upon presenting his report. However, the arbitrator(s) shall have the right to decide additional fees for the expert, if he makes his efforts worthwhile.

#### **ARTICLE 15**

Arbitrator(s) shall have to define, in the decision of appointment, the expert's tasks and, the respite during which he shall have to present his report.



#### **ARTICLE 16**

Each disputed party shall be delivered a copy of the expert's report for commentary and, factual and legal notations, taking into account that the expert's final fees, decided by the arbitrator(s) in light of his exerted efforts, must have been already paid up.

#### **ARTICLE 17**

The expert's prescribed fees shall be assumed by the party requesting his appointment, or else; equally borne by litigants, if the decision of appointment is issued at the Arbitrator's discretion and if it is so decided by the latter.

#### **ARTICLE 18**

All duly notified disputed parties shall have to appear in the fixed arbitration session. In case of absence, Arbitration shall continue in absentia unless an acceptable legitimate excuse, reasoning absence, is presented by absent litigant either to arbitrator or to the Arbitration Committee, as to the case.

#### **ARTICLE 19**

In case of delayed replies and presentation of evidences encountering the opponent's claims and documents, the latter claims and documents shall be considered as a presumption in his favour unless the contrary is proved.

#### **ARTICLE 20**

The Arbitration Committee's sessions and arguments shall be held in secrecy and shall be attended by none but those permitted by the Committee whenever necessary.

Upon the demise of one of the opponents, deliberations on dispute shall be postponed untill an excuter, guardian, attorney or a successor is nominated.

#### **ARTICLE 21**

It shall be permissible for both litigants to appoint legal attorneys to present them in all arbitration stages and, to present required papers and documents; for and on behalf of principals, unless otherwise it is decided by the Arbitrator that the personal attendance of both, or one of the litigants is obligatory for the purpose of cross-examination and heard.

#### **ARTICLE 22**

Once the case is thoroughly brought up to the award, the arbitrator shall declare the closure of sessions and, shall refer the file for study and award pronouncement.

#### **ARTICLE 23**

Arbitrator(s) shall issue his (their) Award within a period of maximum one month from the date of session closure. The Award shall contain the following:

1. A brief on litigants' hearing and claims.
2. Points of dispute.
3. Replies to the points of dispute.
4. Decision on the failing party which has to bear expences of Arbitration and expertise.

#### **ARTICLE 24**

Arbitrator(s) shall have to adhere to the common principles of justice, to respect the right of defence, to treat opponents equally and, to be obliged to local practices and laws of each emirate alone and, those of U. A. E. at large. Within the context of dispute consideration, if the Arbitrator fails to define local practices, or laws, he shall refer to the Chamber's Arbitration & Trade Practices Committee for such definitions

#### **ARTICLE 25**

Arbitration language is Arabic. Arbitrator shall have to request litigants to translate foreign language documents into Arabic. However, it shall exceptionally be permissible to proceed arbitration in a foreign language, if litigants are ignorant of Arabic, a case in which Arbitration shall proceed in the language in which the agreement is issued.

#### **ARTICLE 26**

Awards of three-member Arbitration Board shall be taken by majority vote. In case of disagreement, the Chairman of the Board shall have to refer the case to the Chamber's Arbitration & Trade Practice Committee to express unobligatory opinion. In case the Chamber's Committee fails to concord Arbitrators' opinions the Chairman of the Board shall have the right to issue a fully reasoned award even though it is approved by the other two members, a case in which each one shall have to issue his reasoned controversial opinion. However, the Umpire's award shall, in all circumstances, be executory and obligatory towards disputed parties.

#### **ARTICLE 27**

The Arbitrator(s) Award shall, finally settle entire points of dispute and, no recourse shall be accepted unless by virtue of the terms provided for in Civil Courts Law issued in Abu Dhabi.

#### **ARTICLE 28**

##### **AWARD EXECUTION**

One being duly signed by the Arbitrator or the Arbitrators' Committee, the Arbitration award shall be deposited at the Secretariat of the Arbitration Committee, and recorded in the Awards Book in the same date of issuance.

#### **ARTICLE 29**

The above Committee's Secretariat shall hand hastier party a copy of the Arbitration Award which shall be good for execution upon payment of fixed fees and Arbitrator(s)' dues.

#### **ARTICLE 30**

Disputed parties shall have to execute the Arbitrator(s)' award with bona fide. In case of refusal by one, the other party shall have the right to request execution of the said awards from concerned courts of law.

#### **ARTICLE 31**

##### **TERMS & CONDITIONS REQUIRED IN ARBITRATOR**

Arbitrator must enjoy good moralities and conduct, be unconvicted of a felony of dishonesty and distrust or, of issuance of bad cheques. He must be neutral and faithful while doing his job, but shall not be the lawyer or advisor of any of the disputed parties nor one of their employees, relatives, partners, attorneys; nor has previously and amicably mediated or commented on the dispute in question. Arbitrator(s) shall have to fulfill their task, as soon as possible, in light of the Arbitration facts and, without prejudice to each party's right of defence.

#### **ARTICLE 32**

An arbitrator may be rejected, according to the same terms upon which a judge can be rejected, if it is turned out that he is acting in contravention to the terms provided for in Article 31 hereinbefore.

#### **ARTICLE 33**

It shall not be permissible for arbitrators or the Arbitration Committee to commence arbitration tasks unless upon taking the legal oath before the Chairman of the Chamber's Arbitration & Trade Practice Committee or whoever is authorized by him. The said legal oath shall word as hereunder:

"I swear in the name of god, almighty that I will trustfully, faithfully and impartially fulfill my task and duty on settlement of the dispute for which I have been nominated as an arbitrator. I, also oblige myself to settle a just and unbiassed judgement and, declare that I have neither direct nor indirect interest or relation with any of the disputed parties which may hinder fulfillment of my task".

#### **ARTICLE 34**

Once being appointed, the Chairman and members of the Chamber's Arbitration & Trade Practice Committee shall take the following legal oath before the President or Vice President of the Chamber's Board of Directors:

"I swear in the name of god, almighty that I will trustfully, faithfully and impartially fulfill my task and duty on the arbitration of any dispute presented to me within my capacity as a member of the Chamber's Arbitration & Trade Practice Committee. I, therefore oblige myself to lay down a just and unbiased judgement and, to request relief from considering any dispute in which it may be turned out that I have some direct or indirect interest or, relation with any of the disputed parties that may hinder unbiased fulfillment of my task".

#### **ARTICLE 35**

##### **OBJECTION TO ARBITRATOR(S) APPOINTMENT**

It shall be permissible for any disputed party to object to some arbitrator's appointment within seven days from the date of notification thereof.

#### **ARTICLE 36**

Objection shall be explanatorily reasoned and presented to the Chairman of the Chamber's Arbitration and Trade Practice Committee within the abovementioned respite.

#### **ARTICLE 37**

The Chairman of the said Committee shall submit a copy of the Recusance Request to the other party and to other Arbitration parties to be postscripted within seven days. A decision on the objection shall be taken in absentia, if they do not reply within the said respite.

#### **ARTICLE 38**

The Chamber's Arbitration & Trade Practice Committee shall decide on the Recusance Request within 10 days from the latest day of the respite, fixed for the receipt of the above said Parties replies.

#### **ARTICLE 39**

The decision of the Chamber's Arbitration & Trade Practice Committee on the objection refusal or approval shall be decisive and unappealable.

#### **ARTICLE 40**

In case of approval and issuance of a decision on the Arbitrator's dismissal, the other party shall have to nominate a substitute within a respite of 10 days. Fulfilling the required legal terms, the new arbitrator shall commence Arbitration once he takes the abovementioned oath. But in case of refusal the Arbitration Committee shall resume its work from the point it was stopped before objection. In case of absention by the concerned party, from appointing a new arbitrator within the abovementioned respite, the Committee shall do the job instead.

Arbitration shall be made under supervision of the Chamber's Arbitration & Trade Practice Committee. However the arbitrator(s) shall have the right to request clarification on what may deem unobvious by them

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