Arbitrators Appointment: Process, Challenges and Remedies

تعيين المحكمين: الالية و التحديات و الحلول

by

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Abstract

This Dissertation objective is to bring more understanding on the mechanism of arbitrator's appointment process whether by the institutions or by ad-hoc arbitration, shed more light on parties given powers to effect arbitrator's appointment, investigating the challenges facing the process. This Dissertation also shed more light on the roles of the parties, legislation and arbitrators if the parties fail to agree on an appointed arbitrator, due to disagreement or defective arbitration agreement/clause or challenge the arbitrator's appointment or jurisdiction.

This Dissertation will focus only on two legal jurisdictions and their arbitration institutions and legal framework. The first which is the United Arab Emirates Law & the English Law (England and Wales). It will cover the United Arab Emirates Arbitration Law of 2016 and the older provisions on Arbitration in the UAE Civil Procedure 1992 and the English Arbitration Act of 1996. For institutions I will focus on t arbitration institutions in the UK and UAE.

نبذة مختصرة

يهدف هذا البحث إلى تحقيق مزيد من الفهم حول آلية عملية تعيين المحكم سواء من خلال المؤسسات أو من خلال التحكيم المؤقت، وإلقاء مزيد من الضوء على الأطراف التي تم منحها صلاحيات لتعيين اختيار المحكم، والتحقيق في التحديات التي تواجه العملية. كما ألقت هذه الرسالة مزيدًا من الضوء على أدوار التشريعات والمحكّمين إذا أخفقت الأطراف في تعيين محكّم نظرا للاختلاف في تعيين المحكم او بسبب البنود التحكيمية المتضررة أو الطعن في استحسان المحكم أو سلطته أو قضائه أو إذا كان المحكم قد تمّ فضله أو تعيين الأدوار على التعيين بديل.

سوف تركز هذه الرسالة فقط على سلطتين قانونيتين ومؤسساتهم وإطار عملهم القانوني. الأول هو قانون دولة الإمارات العربية المتحدة والقانون الإنجليزي (قانون إنجلترا و ويلز). إنها تغطي بشكل جيد قانون التحكيم في دولة الإمارات العربية المتحدة لعام 2016 وقانون التحكيم الإنجليزي لعام 1996. وبالنسبة للمؤسسات، سنركز على عدة مؤسسات للتحكيم في دولة الإمارات العربية المتحدة و المملكة المتحدة.

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Chapter One: Introduction

1.1 Introduction

Arbitrators have an important role in the arbitration process as they are the third party appointed to resolve the disputed issue in an unbiased and neutral manner as their decision on the dispute can end the conflict raised by the parties concluding the arbitration process.[1] However, for an arbitrator to fulfill his role, a proper appointment mechanism should set on place to avoid any challenge that may arise prior or after the arbitration process. Such mechanism can be derived from the parties' agreement, institutional arbitration rules and legislation set by the relevant authorities in order to succeed the arbitration process.[2]

I think it is important to state here the research questions/issues to be investigated (e.g. how are arbitrators appointed, what qualities to look for in making the appointment, how could arbitrators challenged and what are the possible outcomes of the challenge?)

1.2 Objectives of the Dissertation

The objectives of this Dissertation are to:

- Bring more understanding on the mechanism of arbitrator's appointment process whether by the institutions or by ad-hoc arbitration.
- Shed more light on the power of appointment of arbitrators given to the parties, their arbitrators to appoint chair of arbitration tribunal, arbitration institutions and the courts.

[1] Julian D M Lew Comparative International Commercial Arbitration (Kluwer, 2003) Page 130
[2] Ibid Page 130

- Explain the roles of the parties, institutions, legislation, rules and arbitrators if the parties failed to agree on a selected arbitrator, due to disagreement or failed Pathological (defective) arbitration agreement/clause or challenge the arbitrator's appointment or jurisdiction.

1.3 Significance of the Topic

Arbitrator's appointment is an important topic to discuss due to its effects in steering the arbitration process, which could determine its success or failure. The aim of arbitrator's appointment is to facilitate the appointment of the arbitrator who conducts and oversee the arbitration proceedings. Having the right appointment mechanism will lead to appointing the proper arbitrators who will lead the process to an undisputed award, without been challenged in the courts.

1.4 Research Methodology

In this research, I adopted the qualitative method, where I used various including books, articles, guidebooks from various arbitration centers in the UK and the UAE, court cases & legislative materials, which contain the various decisions made relating to all phases of the arbitration process.

1.5 Structure of Dissertation

This dissertation will consist of ten (10) chapters as follows:

Chapter One introduces the dissertation, highlighting the objectives of the research, the significant of the research, the research methodology and dissertation structure.

Chapter Two provides an overview of the concept of arbitration and the arbitration agreement. Also, the origins of modern arbitration as well as defining arbitration and the arbitration agreement through the eyes of United Arab Emirates Law & the English Law (England and Wales).

Chapter Three examines the definition of the arbitrator and discusses the role of the arbitrator in the arbitration process. It also discusses the qualities and qualifications of a good arbitrator from the perspective of United Arab Emirates Law & the English Law (England and Wales).

Chapter Four explains the power given to the parties to appoint the arbitrator & looks at the different legislative provisions of arbitrator's appointment through the eyes of United Arab Emirates Law & the English Law (England and Wales). Also, it explains the roles the parties' arbitrators in appointing the Chair of arbitration. Lastly, it discusses the powers of the arbitration institutions and courts to appoint arbitrators. Chapter also will shed more light on the provisions agreed by the parties to appoint the arbitrator through Ad-hoc arbitration process and explains the arbitrator's appointment provision set by the institutions of arbitration in case of institutional arbitration. Also, we will examine the arbitrator appointment provisions in the various arbitration institutions in the United Arab Emirates & United Kingdom including: Dubai International Arbitration Centre (DIAC), Dubai International Financial Centre (DIFC), Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC), Abu Dhabi Global Market (ADGM), Chartered institute of Arbitration (CIArb) & London Courts of International Arbitration (LCIA).

Chapter Five examines the challenges facing the arbitrator appointment process which include: the validity of the arbitration agreement, defective arbitration agreement/clause (Pathological),

challenging arbitrator's jurisdiction and challenging arbitrators impartiality in the arbitration process. This chapter will highlight the UAE and English case law relating to the arbitrator challenge and will discuss the recommendations on how to avoid and reduce the risks of challenging arbitrators' appointment in the arbitration process.

Finally, this dissertation will end with a summary of what have been explained, discussed and examined in the dissertation.

Chapter Two: An Overview of Arbitration and the Arbitration Agreement

2.1 Introduction

This chapter will give an overview of the concept of arbitration and the arbitration agreements well as give a brief of the origins of modern arbitration as well as defining arbitration and the arbitration agreement through the eyes of United Arab Emirates Law & the English Law. We will also the link between the arbitration and the agreement to take part in the arbitration process.

2.2 Arbitration

Arbitration is an innovative process of dispute resolution and it is one of the most method used as an alternative to litigation in legal courts and it is a tool that has been adopted by the disputing parties over a long period of time. In the old days, it was a method of alternative dispute resolution and was not been governed by legal frame as it is these days.[3] It is a method in which neutral third party, or an odd-numbered panel of neutral parties, gives a decision based on the merits of the disputed matter and arbitrated parties can keep some control over the proceedings of arbitration. In some circumstances, the framework for the arbitration proceedings are set out by legal framework or by agreement; in other situations, the parties endeavor together to plan and mutually agree for an arbitration process which is suitable to their potential disagreements.[4]

Arbitration in its basics is a process that build over consent and agreement, every case of arbitration start of in an agreement which highlight both parties' consent. Rarely, that an arbitration is made

[3] Emilia Onyema International Commercial Arbitration and the Arbitrator's Contract (Routledge 2010) Page 18.
[4] Albert K. Fiadjoe Alternative Dispute Resolution, A Developing World Perspective (Cavendish 2004) Page 42.

on under consent and isn't deliberate. A new exemption is probably when an arbitration is done on offer under international treaties and involves high stake investors and investment.[5]

Emilia Onyema, state that "In the period before the Model Law, the process of arbitration in various trade associations was both faster and cheaper than litigation in state courts and the arbitrator was not remunerated, as he most often rendered his services for free, being content with the recognition accorded him by his peers/nominees. This earned arbitration the reputation of being cheap and fast."[6]

Though these days it's a bit different, as have been the perception by some of the parties of the arbitration practice that it appears that arbitration has negative aspects while in the contrary as arbitration have not reduced in its practice parties entering into agreement.[7]

The popularity of the arbitration process has improved and increased to a degree that arbitration is nowadays announced as the favored process of dispute resolution in the global market, which means that the benefits that the parties reap from the arbitration process goes beyond the some of the parties perception in the process.[8]

The advantages of the arbitration process have resulted in some significant results such as increasing the growth of the related legislation to arbitration and process of arbitration; making new and better procedures and mechanisms in terms of modernizing arbitration to the benefits of the parties; increased the effectiveness of the courts ratification process of related local/international agreements; initiated a yearly review of the arbitration procedure and process of various local and international arbitration institutions in the last two decades and ensured a continuous support from the national courts to the of local/international arbitration institutions.[9]

[5] Neil Andrews Arbitration and Contract Law: Common Law Perspectives (Springer 2016) Page 8.
[6] Emilia Onyema International Commercial Arbitration and the Arbitrator's Contract (Routledge 2010) Page 19.
[7] Ibid Page 19.
[8] Ibid Page 19.
[9] Ibid Page 19.

The Earl S. Wolaver in his book explains that "The origin of arbitration is lost in obscurity. At what time or place man first decided to submit to his chief or to his friends for a decision and a settlement with his adversary, instead of resorting to violence and self-help, or to the public legal machinery available, is not known; and any inquiry of this sort would belong more properly in the history of social growth and ethics than in either law or economics."[10]

In examining the thousands of occasions and instances through which arbitration has been used throughout the history involving not only every conceivable human relation, as well as the affairs of states and of nations, as well-it is necessary at the beginning to choose it, the circumstances and practices that form the background of our present commercial arbitration.[11]

However, Earl concluded with one of the earliest accounts of English modern arbitration as Merchants law which he quotes a famous British Mercantilist:

"Geraud Malynes, a mercantilist of the I7th century, said the trader preferred the law of merchants as a "law not too cruell in her frowns, nor too partiall in her favors." Why the merchant chose this loose and informal method of decision to the deliberative and well-ordered common law, has always been a matter of interesting speculation."[12]

The UAE Law of Arbitration Federal Law No. 6 of 2016 which supersedes the arbitration provisions set in the arbitration provisions included in the UAE Civil Procedure Law No.11 of 1992 defines arbitration as:

"A procedure regulated by law in which a dispute between two or more parties is submitted, by agreement of the parties, to an arbitral tribunal which makes a binding decision on the dispute."[13]

The English Arbitration Law Act of 1996 does not clearly express the definition of arbitration; however, it implies its definition through the general provisions:

[10] Earl S. Wolaver Historical Background Of Commercial Arbitration (University Of Pennsylvania 1934) Page 132.
[11] Ibid.
[12] Ibid 144.
[13] UAE Law of Arbitration Federal Law No. 6 of 2016 Article 1

"The provisions of this Part are founded on the following principles, and shall be construed accordingly— (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; (c) in matters governed by this Part the court should not intervene except as provided by this Part."[14]

2.3 Arbitration Agreement

Arbitration Agreement is an agreement to refer an existing dispute or future misunderstandings and disputes to arbitration which are likely to have been drawn up as a separate contract as it is unusual to find an agreement to refer future disputes to arbitration completely isolated from any other contractual relationship.[15] An agreement to arbitrate is therefore usually made in writing between agreeing parties, based upon contract and steered by the will of the parties, and has the important result of creating a metaphorical wall to the existing court litigation where both parties have an interest to prove its existence by all means where there is no obvious written agreement or contract to arbitrate may in some jurisdictions be conditional to the conduct of the parties.[16]

Julian Baily defines an arbitration agreement as "An arbitration agreement is an agreement to submit present or future disputes to arbitration, whether or not those disputes are of a contractual nature. The agreement need not be described by the parties as an "arbitration agreement". An agreement will be upheld as an arbitration agreement even if it is poorly drafted, provided that it is evident that the parties intended by their agreement for disputes to be resolved by way of arbitration.".[17]

When drafting an agreement, the dispute resolution clause usually will include arbitration provisions which deem such clause to be a valid an arbitration agreement since it includes the relevant characteristics of an arbitration agreement, however a crystalized dispute will only be

[14] English Arbitration Law Act of 1996 Article 1
[15] Julian DM Lew Contemporary Problems In International Arbitration (Springer – Science + Business Media, B.Y.1987) Page 51.
[16] Ibid Page 51.
[17] Julian Baily Construction Law. Volume I, II & III (Taylor & Francis Group 2011) Page 1632

considered where it agreed that such the resolution of a dispute with an independent and impartial third party who's power are given by legislation and the parties.[18]

The validity of the arbitration agreement is well connected to the parties agreement, therefore there is a drive to formalize provisions of an arbitration agreement is to establish parties actual agreement to arbitrate. Therefore, disagreements regarding an arbitration agreement or the formal requirements of the parties and establishment of a clear path to arbitration are usually the way parties tackle in the same time. Rarely, courts may accept authority to hear a dispute due to the fact that the agreement fails to satisfy the requisite formal requirements of the existence of an agreement to arbitrate.[19]

The UAE Law of Arbitration Federal Law No. 6 of 2016 defines arbitration agreement as: "An agreement between parties to submit to arbitration, made before or after a dispute has arisen."[20]

The English Arbitration Law Act of 1996 defines it as"(1) In this Part an "arbitration agreement" means an agreement to submit to arbitration present or future disputes (whether they are contractual or not). (2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement."[21]

[18] Julian Baily Construction Law. Volume I, II & III (Taylor & Francis Group 2011) Page 1632
[19] Julian D M Lew Comparative International Commercial Arbitration (Kluwer, 2003) 130
[20] UAE Law of Arbitration Federal Law No. 6 of 2016 Article 1
[21] English Arbitration Law Act of 1996 Article 6

Chapter Three: Arbitrator

3.1 Introduction

In this chapter we will examines the definition of the arbitrator and discuss his role in the arbitration process as well as the attributes required out of him during the process. Also, we will examine the arbitrator required merits and qualification through the eyes of United Arab Emirates Law & the English Law.

3.2 Arbitrator's Roles & Responsibilities

An arbitrator is an impartial person who make a judgment and decision in a dispute matter that that the parties agree to refer such dispute to him.[22]

Emilia Onyema explains:

"The arbitrator is the person who decides the underlying dispute covered by the arbitration agreement between the disputing parties. The whole essence of arbitral practice is private judging which, the disputing parties (and institution) appoint the arbitrator to perform."[23]

The Arbitrator should be competent and not be chosen if they are noticeably disqualifying features such as reaching age of capacity or have illness hindering him or prior misconduct and fraud.[24]

The arbitrator has a duty to act and behave in an impartial and neutral manner as well as having a duty in following the ethics rules and applying a cultural of neutrality in his proceedings and must be aware of the distinguish and essential differences and between the legislative systems both as to virtues and process. Also, to add value to his process an arbitrator is required to be able to

[22] Albert K. Fiadjoe Alternative Dispute Resolution, A Developing World Perspective (Cavendish 2004) Page 72
[23] Emilia Onyema International Commercial Arbitration and the Arbitrator's Contract (Routledge 2010) Page 64
[24] Neil Andrews Arbitration and Contract Law (Springer International Publishing 2016) Page 100

comprehend the parties' positions and to evaluate whether a particular party is defending his right or is he trying to obstruct the arbitration process for his own purposes.[25]

As per Albert K. Fiadjoe "The arbitrators must be independent and impartial in accordance with codes of ethics and conduct. A breach of that duty may result in the arbitrator being challenged and eventually removed by the court, or by the arbitration institution concerned. It may also lead to the annulment of the award."[26]

3.3 Arbitrator Qualification

An arbitrator qualifications conventionally known to be of the exceptional traits in any international arbitrator which include charisma, impartiality, common sense are all on the qualified level as well as an exceptional arbitrator is always assumed to be usually be a lawyer or a legal advocate that represent the interest of the parties as an international lawyer.[27] It was usually also thought the he should have reasonable good amount of general legal knowledge, training and applied practice in at least one of the most international legal jurisdictions in the world as well as having a good knowledge of procedure law, private law, international law contract law, commercial law and if possible having knowledge public international law.[28] In addition to this, the arbitrator should have a high level of knowledge, amount of training as well as experience of comparative law and the comparative method, while having a good working experience familiarity and knowledge in at least two of the great legal jurisdictions of the world such as the common law and civil law jurisdictions.[29]

Julian explains in his book "The second general observation is that international commercial arbitration in London depends almost entirely on the services of what lawyers call 'laymen', in

[25] Arthur W. Rovine Contemporary Issues in International Arbitration and Mediation (Brill Academic 2006) Page 88
[26] Albert K. Fiadjoe Alternative Dispute Resolution, A Developing World Perspective (Cavendish 2004) Page 73
[27] Julian DM Lew Contemporary Problems In International Arbitration (Springer – Science + Business Media, B.Y.1987) Page 16.
[28] Ibid Page 16
[29] Ibid Page 16.

other words, men appointed to be arbitrators because of their experience in the commercial field or because of their technical expertise as engineers, architects, etc, rather than because they possess a legal qualification. This is considered, rightly, to strengthen rather than weaken the quality and authority of the award. But it also undoubedly increases the risk of those procedural injustices which, through inadvertence or misunderstanding, can occasionally arise even when the proceedings are conducted by the most fair-minded and experienced lawyer."[30]

Article 10 UAE Law of Arbitration Federal Law No. 6 of 2018 elaborate on the characteristics required of the arbitrator such not being of a certain gender or from a particular nationality (unless otherwise established upon agreement of the parties or provided for by law) as well as being an impartial person who has the capacity stipulated by legislation such as is not a minor or under any court prohibition directive or without civil rights due to financial obligations; unless he has been settled, or in the State due to a criminal offence or transgression for a crime involving immorality or breach of good-will; even if he has been rehabilitated or being a member of the board or an administrative roles of any of the arbitration institutions responsible for the arbitration process

Article 10 also sets a procedure for conflict of interest disclosure "When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing anything likely to give rise to doubts as to his impartiality or independence. An Arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the Parties and all the arbitrators unless they have already been informed of them by him."[31]

Which if referred back to previous UAE Arbitration provisions under the UAE Civil Procedure Code of 1992 article 206 Law of Arbitration which is superseded by UAE Arbitration Law of 201 Article 10 show how the legislator view of the arbitrator qualification has matured.[32]

[30] Julian DM Lew Contemporary Problems In International Arbitration (Springer – Science + Business Media, B.Y.1987) Page 157

[31] UAE Law of Arbitration Federal Law No. 6 of 2018 Article 10

[32] The UAE Civil Procedure Code of 1992 article 206 state that "An arbitrator may not be a minor, bankrupt, legally incapacitated or deprived of his civil rights due to a criminal offence unless he has been rehabilitated."

Under article 24 English Arbitration Act an arbitrator may be removed due to lack of qualification "A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds— (b) that he does not possess the qualifications required by the arbitration agreement;"[33]

[33] English Arbitration Law Act of 1996 Article 24

Chapter Four: Arbitrators' Appointment Methods

4.1 Introduction

In this chapter, we will explain the power given to the parties to appoint the arbitrator(s) as well as explaining the roles of the party appointed arbitrators to appoint the Chair of the tribunal. Lastly, it will discuss the arbitrators appointment powers vested in the arbitration institutions and the courts as well as shed more light on the provisions agreed by the parties to appoint the arbitrator through Ad-hoc arbitration process. Also, we will highlight the legislative provisions in the UAE and English laws on arbitrator's appointment, and explain the arbitrator's appointment provisions in the various arbitration institution rules in the UAE and England such as the Dubai International Arbitration Centre(DIAC), Dubai International Financial Centre(DIFC), Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC), Abu Dhabi Global Market (ADGM), Chartered institute of Arbitration (CIArb) and the London Court of International Arbitration (LCIA).

Appointment of arbitrators who will lead the arbitration process and conclude with an award is the most important thing the parties of an arbitration process could do with respect to resolving their dispute. The expertise, understanding, and knowledge of the arbitrators will have a significant influence on the quality of the process from appointment to the award. Furthermore, arbitrators have more influence in the process than the courts, because unlike the courts, their verdict typically cannot be nulled unless on the basis of jurisdiction or misconduct.[34]

4.2 Arbitrator appointment by the Parties

[34] Margaret L. Moss The Principles and Practice of International Commercial Arbitration (Cambridge University Press 2008) Page 116

The simplest and least difficult arbitrator appointment process is parties doing the arbitrator appointment especially if it's an arbitration tribunal where the disputing parties exercise their power of party autonomy by appointing the arbitrator/arbitrators. However, the only difficult part in this process is when the parties cannot agree on appointing the sole arbitrator.[35]

The process of appointment and associated legislation of arbitrator appointment have been advancing over time to support the parties agree on appoint of a sole arbitrator or an arbitration tribunal. [36]

The UAE Law of Arbitration, Federal Law No. 6 of 2018 shows the improvements made from the previous provisions in the UAE Civil Code. Article 9 of the new Law of Arbitration provides for the Composition of the Arbitral Tribunal, which comprises, by agreement of the parties, of one or more arbitrators. It stipulates that if the parties have not agreed on the number of arbitrators then the court decides as a concerned authority. In any event, such number of arbitrators must be three or odd number, otherwise the Arbitration is void.[37] Also, article 11 states in detail the procedure to appoint arbitrator or arbitrators which gives the parties the right to agree on a preferred procedure of appointing the arbitrator or arbitrators as well as the time and mechanism of appointment.[38]

Similar provisions can be found in the English Law, where Article 15 of the English Arbitration Act of 1996 provides for the composition and process appoint the arbitrator or the arbitration tribunal. It states that the parties are free to decide on the number of arbitrators, whether a sole arbitrator or several arbitrators who form the tribunal and whether there is to be a chair of arbitrator. Unlike the UAE arbitration law, under the Englis Arbitration Act there can be an even number of

[35] Emilia Onyema International Commercial Arbitration and the Arbitrator's Contract (Routledge 2010) Page 85
[36] Ibid, Page 85
[37] UAE Law of Arbitration Federal Law No. 6 of 2018 Article 9
[38] Ibid Article 11

arbitrators if agreed. If the number of an arbitration tribunal is not stated, the number of co-arbitrators shall be two or an even number and the appointment of an arbitrator as chairman of the tribunal will be required,while keeping in mind if there is no agreement as to the number of arbitrators, the tribunal shall consist of a sole arbitrator.[39]

In general, on the best tools used for arbitrator appoint is the list method, where the parties narrow down their potential nominees for appointment and these arbitrators are ranked by the parties in order of preference then after rounds of eliminations the parties will agree one sole arbitrator or an arbitration tribunal.[40]

The parties have the option to agree whether to appoint the arbitrators through institutional arbitration provisions (more details in section 4.3) or have Ad hoc arbitration provisions. Ad hoc arbitration refer to the arbitration proceeding that is not governed by an institution of arbitration as the arbitration clause does not include or stipulate an institutional arbitration, however in some cases Ad hoc arbitration is similar to institutional arbitration or include proceeding which include intervention of institutional arbitration in cases such as providing list of arbitrators for parties' selection.[41] Clare Stanley explains that, ad hoc arbitration are not under the jurisdiction of any arbitral institution, thus allowing the parties to choose their own arbitration arrangement and structure, enabling the parties to formulate a bespoke dispute resolution mechanism that is to their preference and because ad hoc arbitration is bespoke therefore requires the arbitration agreement or clause to cover all elements of the arbitration process, from the applicable arbitration seat law,

[39] English Arbitration Law Act of 1996 Article 15
[40] Emilia Onyema International Commercial Arbitration and the Arbitrator's Contract (Routledge 2010) Page 85
[41] Sundra Rajoo Institutional and Ad hoc Arbitrations: Advantages and Disadvantages The Law Review Journal (2010) 547.

jurisdiction procedural rules, appointment process of the arbitrator(s), and the seat and the language in which the arbitration proceedings will be conducted .[42]

Clare Stanley also further explains that,

"In the context of trust disputes in particular, careful consideration needs to be given to who can and/or should be party to the agreement. Failure to get it right at the outset, can lead to major problems later on. Far from having chosen a confidential and speedy dispute resolution process, the parties can find themselves locked into complex and expensive parallel sets of arbitration and court proceedings."[43]

The parties undergoing ad hoc arbitration process can reach in common grounds on the nomination of a sole arbitrator or an arbitration tribunal, which is much easier than the institutional. While the boards of many arbitration institutions are solid, it is hard to question most appointments done by institutions and other appointing authorities, they do not always appoint arbitrators in the right way.[44] This will result in that you might not get the most desired candidate, but you will in theory get a suitable candidate, and most importantly, you will avoid inadequate arbitrator's appointments by one of the parties, which although occasional, can affect the arbitration process in a negative way.[45]

Also, it's good to keep in mind that when arbitrators are chosen by the parties, they're not supposed to have any prejudices in favor of one of the parties over the other. Of course, the appointing party desires an arbitrator that it trusts shares its national or legal background, or holds opinions that may be sympathetic to determining the dispute in favor of him.[46]

[42] Clare Stanley Trusts & Trustees, Vol. 18 journal: The pitfalls of ad hoc arbitration (Wilberforce Chambers 2012) Page 332
[43] Ibid, Page 332
[44] Michael McIlwrath, John Savage International Arbitration and Mediation: A Practical Guide (Kluwer 2010) Page 246
[45] Ibid, Page 246
[46] Margaret L. Moss The Principles and Practice of International Commercial Arbitration (Cambridge University Press 2008) Page 124

This is one of the concerns when parties appoint arbitrators in an arbitration. While party appointed arbitrators are expected to be impartial, it is generally known and recognized that they can get guidance from the appointing party regarding the choice of a chair.[47] It is also known that a party-appointed arbitrator has an obligation to make certain that the arguments brought forth by the appointing party are well explained and communicated to the tribunal.[48]

However, the arbitrator cannot act as a counsel for the party that appointed him, as arbitrators sometimes argue that some party appointed arbitrators do not act in an impartial manner especially in the case when the arbitrator is appointed by governments or semi-government entities.[49]

The result of such arbitrator who looks to be in favor of the party that appointed him or her is that he/she loses credibility with the arbitration community .[50]

4.3 Parties arbitrators' appointment of the Chair of Arbitration

Once the party-appointed arbitrators have both been appointed, the next phase is to appoint the chair of the tribunal, which is appointed by the co-arbitrators in the normal fashion. Sometimes the co-arbitrators seek advice from the parties who appointed them about qualification required for the chair, however in most cases experienced arbitrators choose the chair themselves, without the participation of the parties which can be done as long as the co-arbitrator for the other side agrees with the consent of all parties to do so.[51]

[47] Margaret L. Moss The Principles and Practice of International Commercial Arbitration (Cambridge University Press 2008) Page 124
[48] Ibid, Page 124
[49] Ibid, Page 124
[50] Ibid, Page 124
[51] Ibid, Page 124

The UAE Law of Arbitration. Federal Law No. 6 of 2018 Article 9 and the English Arbitration Act of 1996 Articles 15 & 16 have similar provision in regards to the procedure of to appoint odd or even numbers of arbitrators where it states that if the arbitration tribunal is to contain an even number of arbitrators, each party shall appoint half of the arbitrators.

4.4 Arbitrator appointment by the Institutions

The appointment by the institutions of arbitrators begins when the parties agree on giving a certain arbitration institution the authority to appoint the arbitrators or undergo through an institution rules for the arbitration process when the provisions of dispute resolution kick off and the parties reach arbitration stage.[52]

The arbitration institution rules usually state that either the parties have their freedom to agree on the appointment of arbitrators, or the parties agree on the appointment based on several nominees whom they chose from qualified arbitrator list sent to them by the institution or they decide beforehand that the arbitration institution will have full delegation to do so as per its rules and parties consent or a combination of the a fore mentioned three methods.[53]

However, there is some concern regarding the status of the arbitrator nominated by the institution but the nominee refuses the nomination or is unable to act, therefore the arbitration institution should be careful when appointing arbitrators that are on high demand due to their experience or qualification.[54]

[52] Emilia Onyema International Commercial Arbitration and the Arbitrator's Contract (Routledge 2010) Page 87
[53] Margaret L. Moss The Principles and Practice of International Commercial Arbitration (Cambridge University Press 2008) Page 121
[54] Emilia Onyema above note 19 Page 87

The legislators in the UAE & England wanted to empower the arbitration institutions therefore gave provisions such as UAE Law of Arbitration Federal Law No. 6 of 2016 article 11 which talks about the process if the parties can not agree on a sole Arbitrator or the co-arbitrators can not decide on the chair within fifteen days the concerned authority which in this case the arbitration institution, will make the appointment and such appointment be subject to no appeal, without prejudice to article 14 which mentions cases where such appointment can be challenged.[55] Also, English Arbitration Act of 1996 Article 4 have similar provision where the parties may agree to the application of institutional rules[56]

The first arbitration institution we will examine is Dubai International Arbitration Centre (DIAC). Article 8 of the DIAC 2016 arbitration rules explains the composition of the arbitral tribunal, which consists of any number of arbitrators as has been decided by the parties keeping in mind that if there is more than a sole arbitrator then their number shall be uneven in line with UAE arbitration legislation, and if the parties have not decided on the number of arbitrators, then a sole arbitrator will be appointed.[57]

Article 8 has a provision regarding a time limit of 30 days from the date a request is made or the matter was decided to be submitted as allowed by the secretariat for the parties to jointly nominate either a sole arbitrator or in case of an arbitration tribunal nominate co-arbitrators composed of three arbitrators, where if a party is not successful to nominate an arbitrator/co-arbitrator within

[55] UAE Law of Arbitration Federal Law No. 6 of 2016 Article 11
[56] English Arbitration Law Act of 1996 Article 4
[57] DIAC 2016 arbitration guide article 8

30 days or the time limit granted by the secretariat, the Executive Committee of DIAC shall appoint an arbitrator on the behalf of the defaulting party.[58]

Article 9 of the DIAC 2016 arbitration rules address several aspects of the process and explains the procedure of how to appoint arbitrator or arbitrators. One of these aspects is that any arbitrator conducting an arbitration under the institution's rules shall continue and be impartial and autonomous of the parties involved in the arbitration agreement or clause.[59]

Another aspect article 9 explains is the mechanism for nomination of the chair of the arbitration tribunal in a three or more uneven number of arbitrators, where it states that the process that shall be followed will be in line with the rules of DIAC and subject to approval and appointment by the DIAC. However in the absence of any agreed process to nominate a chair, the co-arbitrators need to decide upon the third arbitrator who shall act as chair to the arbitration process, subject to approval and appointment by the DIAC.[60] If the co-arbitrators can't agree upon a third arbitrator within 15 days from notifying of the DIAC then the decision of appointment of the chair, the DIAC shall appoint a chairperson and on DIAC own discretion can decline an appointment of any candidate suggested by a party if it considers the candidate has an issue of independence, impartiality or otherwise improper, where DIAC can demand from that party a new candidate within an identified time limit to be decided by the DIAC or any additional time as may be required which if that party fails to nominate a candidate or if the DIAC declines to appoint a candidate again, it shall appoint an arbitrator on behalf of that party. [61]

[58] Ibid article 8
[59] DIAC 2016 arbitration guide article 9
[60] Ibid article 9
[61] Ibid article 9

The second arbitration institution is Dubai International Financial Centre (DIFC). Article 5 of the DIFC-LCIA 2016 arbitration rules provides for the composition of the arbitration tribunal and the procedure to appoint an arbitrator or arbitrators where no party or third person may appoint any arbitrator if DIFC-LCIA have been designated as the appointing authority alone and is empowered to appoint a sole arbitrator, three-member tribunal or, more than three arbitrators unless the parties have agreed in writing otherwise or if the LCIA Court determines that in the circumstances. The DIFC-LCIA shall appoint arbitrators with due regard for any particular method or criteria of appointment agreed in writing by the parties and shall also take into account the dispute between them, the nature and aspects of the dispute, its monetary total or value, the location and languages of the parties, the number of parties involved in the arbitration agreement and all other aspects which DIFC-LCIA considers applicable in the circumstances.[62]

Article 5 also gives the president of the DIFC-LCIA the right of being eligible to be appointed as a sole arbitrator or as a co-arbitrator if the parties agree in writing to nominate him while the vice presidents of the DIFC-LCIA and the Chairman of the DIFC-LCIA Board of Directors shall only be eligible to be appointed as an arbitrator if nominated in writing by the parties, however such nomination will relieve such individual temporary from his duties and commitments thereafter related to his duties in any function of the DIFC-LCIA Arbitration Centre.[63]

The third arbitration institution is Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC). Article 8 of the ADCCAC 2013 arbitration rules provides for the composition of the arbitration tribunal, which shall be formed by agreement between the parties, either with a sole arbitrator, or with a number of arbitrators, on condition that, in the latter case the number of

[62] DIFC-LCIA 2016 arbitration guide article 5
[63] Ibid, article 5

the arbitrators shall be an uneven number, however if the parties do not agree in the arbitration agreement or clause on the exact number of arbitrators, ADCCAC will have the authority to appoint a sole arbitrator or otherwise as it appears to the ADCCAC, due to the amount or the nature of the dispute, or the nature of that dispute therefore more than one arbitrator shall be appointed.[64]

Article 9 of the ADCCAC 2013 arbitration rules provides for the procedure of to appoint arbitrator or arbitrators where the arbitrators shall be appointed by agreement of the parties, however if the parties fail to agree on the appointed arbitrators, the arbitrators shall be appointed according to ADCCAC.[65]

Article 9 also state that, if the parties agree that a sole arbitrator shall lead the arbitration process, then they shall designate such a sole arbitrator within a period of fourteen 14 days, and if the parties fail to do so within the set time period additional grace period will be granted to them by ADCCAC, or it will be in ADCCAC jurisdiction to appoint the sole arbitrator on ADCCAC own discretion. On the other hand, if the parties agree that the arbitration tribunal will be formed with three arbitrators, each party shall nominate one candidate on its behalf within a period of fourteen 14 days and would one the parties fail to do so, the ADCCAC will have the authority to be in charge of appointment of the co-arbitrator on behalf of the failing party.[66]

Regarding the appointment of the chair of arbitration tribunal, article 9 state that if the parties agree upon a given process for appointing the chair of the arbitration tribunal, such a process shall be followed, however in the absence of an arbitration agreement or clause the co-arbitrators appointed by the parties shall appoint the chair who shall lead the arbitration process and should the

[64] ADCCAC 2013 arbitration guide article 8
[65] Ibid, article 9
[66] Ibid, article 9

appointed co-arbitrators fail to nominate and naming the chair within time period of fourteen 14 days from the date on which the co-arbitrators were appointed, ADCCAC will have the authority to be in charge of appointment of the chair of the arbitration tribunal on behalf of the co-arbitrators.[67]

However, needless to say article 9 renforces ADCCAC position regarding appointing the arbitrator, co-arbitrators or chair of the arbitration tribunal in case of failure by the parties to appoint the arbitrators. In making the appointment, the ADCCAC shall take into account the terms agreed upon by the parties in the arbitration agreement and the considerations that were taken into account by the parties to ensure that the appointment of such arbitrator is suitable to the nature and circumstances of the dispute as well as meeting the requirements of impartiality and independence.[68]

The fourth arbitration institution is Abu Dhabi Global Market (ADGM). Article 16 ADGM 2015 arbitration rules provides that in the composition of the arbitration tribunal the parties are free to decide the number of arbitrators provided that it is an uneven number and if the numbers were not determined, then the number of arbitrators shall be one.[69]

Article 17 ADGM 2015 arbitration Regulations prove for the procedure of to appoint arbitrator or arbitrators and state that the parties are free to agree on a certain process and procedure for appointing the arbitrator, co-arbitrators or chair of arbitration.[70]

However, if there is such arbitration agreement or clause and unless otherwise agreed by the parties in the arbitration agreement, the ADMG Regulations does not excludes any person by by reason

[67] ADCCAC 2013 arbitration guide article 9
[68] Ibid, article 9
[69] ADGM 2015 arbitration guide article 16
[70] Ibid, article 17

of his nationality from acting as an arbitrator except otherwise agreed by the parties, and in an arbitration with a sole arbitrator if the parties do not agree on the arbitrator within thirty 30 days, then the sole arbitrator shall be appointed by the ADMG.[71]

Article 18 also state that in an arbitration with three 3 arbitrators, each party shall appoint one co-arbitrator, and the two 2 co-arbitrators therefore appointed shall appoint the chair who shall preside over the proceedings. However, if a party fails to appoint an arbitrator within thirty 30 days' time period, or if the two 2 co-arbitrators were unable to nominate the chair within thirty 30 days of their appointment, the appointment shall be done ADGM as their role in administering the arbitration or if there is no such institution, the appointment will be carried out by the local courts.[72]

Article 18 also states that in case there are multiple parties and where the dispute is to be referred to three 3 arbitrators, the multiple claimants jointly, and the multiple respondents jointly shall each appoint one co-arbitrator in line with the appointment process agreed upon by the parties in the arbitration agreement, otherwise if there were no such agreement in place or in the absence of a joint nomination the co- arbitrators and chair shall be appointed in accordance with rules of ADGM, and if there is no such institution, the local courts may appoint each member of the arbitration tribunal and shall designate one of them to act as chair of the tribunal [73]

The fifth arbitration institution is Chartered institute of Arbitration (CIArb). Article 7 of the CIArb 2015 arbitration rules provides for the composition of the arbitration tribunal. If the parties have agreed on the number of arbitrators in the arbitration agreement or clause, then CIArb will adhere to the parties choice and enforce it. However, if the parties had not previously agreed on the

[71] Ibid, article 18
[72] ADGM 2015 arbitration guide article 18
[73] Ibid, article 18

number of arbitrators, and if they have not agreed on within 30 days after the respondent received the notice of arbitration that there shall be only one arbitrator, then three arbitrators shall be appointed.[74]

Article 8 of the CIArb 2015 arbitration rules provides for the procedure to appoint a sole arbitrator. It states that if the parties have decided that a sole arbitrator is to be appointed and if within thirty 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties cannot agree on the appointment, the CIAr shall appoint the sole arbitrator.[75] Also, as per article 8 states that in appointing the sole arbitrator, the CIArb shall use the list procedure unless the parties agree that the list-procedure is not be used or unless the CIArb determines in its own discretion that the use of the list-procedure is not appropriate for the case.[76]

The list procedure in this article dictates that the CIArb shall send to each of the parties an identical list of arbitrators containing at least three names that they need to review and select candidate from within time limit of fifteen 15 days following reception of the list, which each party shall send back the list to the CIArb after deleting the arbitrator's name or names to which it objects on and numbered the remaining names on the list in the order of its preference.[77]

After the expiration of the above mentioned 15 days, then CIArb shall make the appointment from the arbitrators approved on the lists and in accordance with the preferences indicated by the parties. However, f for any reason the appointment cannot be made in accordance with this procedure, CIArb may reset the clock and repeat the process again.[78]

[74] CIArb 2015 arbitration guide article 7
[75] CIArb 2015 arbitration guide article 8
[76] Ibid, article 8
[77] Ibid,article 8
[78] Ibid,article 8

Article 9 of the CIArb 2015 arbitration rules states in detail the procedure to appoint the chair or an arbitrator in the event of default by a party to make the appointment. The article states that if three arbitrators are to be appointed as per the arbitration agreement, each party shall appoint one co-arbitrator and the two appointed co-arbitrators will choose the chair who will act as the presiding arbitrator of the arbitral tribunal. However, if within thirty 30 days after the appointment of the co-arbitrators the two co-arbitrators have not agreed on the chair of the arbitration tribunal, the chair shall be appointed by CIArb in the same way as a sole arbitrator would be appointed under the provisions of article 8.[79]

The last arbitration institution we will examine London Courts of International Arbitration (LCIA). Article 5 of the LCIA 2014 arbitration rules provides for the procedure for appointment of arbitrator or arbitrators and give guidance regarding the formation of the arbitration tribunal in LCIA where a sole arbitrator or more than one shall be nominated by the parties who at all times shall be impartial and independent of the parties who chose them and no appointed arbitrator shall advise any of the parties on the other parties' dispute or the outcome of the arbitration.[80]

The LCIA as per article 5 shall appoint the arbitration tribunal if nomination and appointment is not received from one of the parties or both after 35 days from the commencement date, and no party or third person may appoint any arbitrator under the arbitration clause or agreement, where LCIA alone is empowered to appoint arbitrators whether a sole arbitrator or more who shall be appointed unless the parties have agreed in writing otherwise or if the LCIA Court determines that in the circumstances appropriate.[81]

[79] CIArb 2015 arbitration guide article 9
[80] LCIA 2015 arbitration guide article 5
[81] Ibid,article 5

Article 5 also states how LCIA shall appoint arbitrators with due regard for any certain process or conditions of appointment agreed in writing by the parties involved and will also take into consideration the type of dispute at hand, the nature of events and circumstances of the dispute, as well as its monetary value, the number of parties, the location and languages of all involved parties and all other aspects which it may considers applicable in the circumstances.[82]

Article 5 also gives the members of the LCIA institution the right of being eligible to be appointed as a sole arbitrator or as a co-arbitrator if the parties agree in writing to nominate them while officials of the LCIA shall only be eligible to be appointed as an arbitrator if nominated in writing by the parties, however such nomination will relieve such individual temporary from his duties and commitments thereafter related to his duties in any function of the LCIA Arbitration Centre."[83]

4.5 Arbitrator appointment by the Court

The courts becomes involved in the cases where either the parties did not add arbitrator appointment provisions or clauses in the arbitration agreement or they can't agree on the arbitrators to be appointed as the sole arbitrator or co-arbitrators in part of an arbitration tribunal, so that in result their appointment methods have failed.[84]

Usually the arbitration framework of the seat of arbitration can refer the disputing parties to the courts as an appointing authority in the absence of an express appointment method in the arbitration agreement and where the disputing parties have not appointed or agreed an arbitration institution or where the agreed arbitration institution failed or refused to act, then the parties can

[82] Ibid,article 5
[83] LCIA 2015 arbitration guide article 5
[84] Emilia Onyema International Commercial Arbitration and the Arbitrator's Contract (Routledge 2010) Page 86

submit a case to the relevant courts that have the jurisdiction to appoint an arbitrator or arbitrators on behalf of the parties.[85]

The legislator in the UAE provide support to the arbitration process by provisions such as the UAE Law of Arbitration Federal Law No. 6 of 2018 article 14 where if the institution of arbitration fails to appoint an arbitrator in accordance with the process specified in the Parties' arbitration agreement or, in the absence of an arbitration agreement, either party may request the local court to intervene and take the necessary action to appoint the arbitrator or the arbitration tribunal, which decision in this matter is subject to no appeal.[86] On the other hand, the English Arbitration law supported the parties to take such decision and avoid resorting to the courts where Article 16 of the English Arbitration Law Act of 1996 gives more power of appointment to the parties to avoid interference by the courts.

An example of case solved by the UAE courts regarding disagreement in appointing an arbitrator and resorting the courts is Union Supreme court, 308/Judicial Year 25, where Judge Al Husayni Al Kanani has held that if the parties have a question on the validity of the arbitrators appointment under the arbitration agreement or clause to which aim is resolve their disputes that might rise between them by arbitration while not have agreed on the process of appointing the arbitrator, either of them may apply to the court to resolve such ambiguity and appoint the arbitrators in respect of who it has been agreed as well as the alternatives available to resolve the dispute.[87]

The same happened in Union Supreme court, 360/Judicial Year 24 in which Judge Munir Tawfiq Salih regarding role of the courts in arbitrator appointment stated that the consequence of article

[85] Ibid,Page 86
[86] UAE Law of Arbitration Federal Law No. 6 of 2016 Article 11
[87] Union Supreme court, 308/Judicial Year 25

204(1) of the Law of Civil Procedures is that the court will appoint the necessary arbitrators only in the absence of an agreement by the parties to the dispute.[88]

Article 204 mentioned in the discussed case is related to the now superseded Civil Procedure Law No. 11 of 1992 which states that if a dispute arises due to the parties have not agreed on the arbitrators or if one or the agreed arbitrators refused to act or withdraws or is removed or judgment is passed rejecting him, the courts will have the jurisdiction to appoint the necessary arbitrators on the request of one of the parties.[89] Article 11 of the UAE Arbitration Law 2018 supersedes this provision and state that any party agreed to have an arbitration agreement and the arbitration process may request the court to take the necessary action to appoint the required arbitrators.[90]

4.6 Summary

In summary, the real holder of the appointing power in the arbitration process is the parties' arbitration agreement where they decide the route the appointing power delegation of authority whether chosen to hold all the power or give the power to their arbitrators to appoint the chair of of the arbitration tribunal, or delegate this power to the arbitration institutions or the courts. If the parties are silent in their arbitration agreement about the appointing powers, the powers will ultimately go to the courts in case if a disagreement occurred between the parties on this issue. This also can be seen in the Arbitrator's Appointment through Ad-hoc arbitration Provisions, where the success depends on the parties' agreement and understanding, however if the Ad-hoc provisions fail, the legislative provisions and the courts will resolve the dispute of arbitrator appointment.

[88] Union Supreme court, 360/Judicial Year 24
[89] Civil Procedure Law No. 11 of 1992 Article 204
[90] UAE Law of Arbitration Federal Law No. 6 of 201 Article 11

The same can be concluded from all the provisions in the arbitration institution provisions which require the party's agreement and cooperation to be successful.

Regarding the different arbitration institution provisions, if one looks carefully, he will notice the similarity between the provisions of DIFC, ADGM, LCIA & CIArb rules because the fact that all of them are based on the LCIA institution provisions. Similarly, one will notice that DIAC & ADCCAC rules are similar to the UAE arbitration law provisions.

The same can be said if one compares the provisions found in the UAE Law of Arbitration Federal Law No. 6 of 2018 with the more established the English Arbitration Law Act of 1996. However as can be concluded from the provisions in article 9 and 14 of UAE Law of Arbitration Federal Law No. 6 of 2018, it is noticed that it is more restricted in regards of number of arbitrators and engagement with local courts is more welcomed unlike English Arbitration Law Act of 1996 where parties are free to decide odd or even number of arbitrators as well as encouraging the agreement of the parties in arbitrator appointment and avoid using the courts to decide.

Chapter Five: Challenges facing Arbitrators Appointment & Recommendations

5.1 Introduction

In this chapter I have divided challenges facing arbitrator's appointment into two parts: Pre-arbitration arbitrator's appointment challenges and challenging the appointment of arbitrators. I will also recommend using remedies used to avoid and reduce risks of the challenges facing the arbitrator appointment process such as using institutional arbitration model articles or following the IBA guidelines and rules.

5.2 Pre-arbitration arbitrator's appointment challenges

5.2.1 Validity of the arbitration agreement

Some the arbitration agreement or clause does not have the right provisions or does not include the mechanism of appointing an arbitrator or institution, which actually is one of the many important decisions parties need to consider when they are engaging in an agreement. While some arbitration agreement or clause choses an arbitrator for appointment by naming an individual whose absence will create a lot of hurdles.[91]

In Dubai Court of Cassation cases No. 175 of 1993 the plaintiff taken an action against the defendant before the Dubai Court of First Instance in which he demanded the appointment of arbitrators pursuant to article of an arbitration agreement executed between them. The plaintiff also wanted the enforcement of an agreement on the basis of the requesting party's claim was that, he had a valid agreement with defendant relating to payment and the failure to return security amounts issued by him in the name of the defendant. The agreement between the parties contained

[91] Emilia Onyema International Commercial Arbitration and the Arbitrator's Contract (Routledge 2010) Page 60.

an arbitration agreement, which provided for the resolution of any disputes by arbitration "in London or anywhere else to be agreed". The parties unsuccessfully failed to decide on the place for the arbitration and the identity of the arbitrators. The Plaintiff decided to resort to the Dubai Court of First Instance to hear the its claim and resolve his dispute due to the defendant was living in Dubai. The Court of First Instance determined that it did have jurisdiction to appoint the arbitrators. The Court of First Instance appointed three arbitrators and ordered them to complete their mandate within three months. The defendant asked for relief, due to avoiding the enforcement of the final award and the confirmation of the provisional attachment to be suspended until the completion of the arbitration, which was rejected by the Court of First Instance.[92]

The defendant appealed in the Court of Appeal, the Court of First Instance's judgment regarding appointing the arbitrators and refusal of relief. The Court of Appeal accepted the appeal and dismissed the judgment made by the Court of First Instance on the grounds of the validity of the arbitration agreement and that the parties agreed to resolve their dispute in "London" therefore, Dubai courts in both cases don't have the jurisdiction to entertain such case. The plaintiff then filed a petition to Dubai Court of Cassation.[93]

The Dubai Court of Cassation reversed the judgment of the Court of Appeal and held that the arbitration agreement is valid and the courts can enforce it pursuant to Article 204 of the UAE Civil Procedure Code which is superseded by article 11 of UAE Arbitration Law 2018.[94]

In Dubai Court of Cassation case No. 167 of 1994, the plaintiff had a case filed against the defendant, requesting that the Dubai Court of First Instance to validate an arbitration agreement

[92] Dubai Court of Cassation cases No. 175 of 1993
[93] Ibid No. 175 of 1993
[94] Ibid No. 175 of 1993

and compel the defendant to participate in appointing an arbitrator or it will be the court's decision to determine such appointment to settle the dispute that had arisen between the parties.[95] The parties entered into an arbitration agreement which named the arbitrator who will settle any dispute between them, however the arbitrator didn't accept the appointment due to not taking his prior consent to engage in such commitment. The dispute related to plaintiff's claim of AED 237,248 against the defendant.[96] The Court of First Instance dismissed the plaintiff's case. Then the plaintiff appealed to the Court of Appeal, which confirmed the judgment of the Court of First Instance. Thereafter, the plaintiff filed a petition to the Court of Cassation. The defendant challenged the petition on the basis that the judgment of the Court of First Instance (which was subsequently upheld by the Court of Appeal) was "unchallengeable".[97] The defendant relied upon Article 204.2 of the UAE Civil Procedure Code, arguing that the application of this provision was not limited to judgments dealing only with the appointment of arbitrators. The plaintiff petition to Court of Cassation was dismissed.[98]

To better understand this case, we need examine it through the effects of article 11 of UAE Arbitration Law and the superseded article 204 of the UAE Civil Procedure Code which both have implication of that unless the arbitrator initially agreed in the arbitration agreement to be part of the arbitration process, the parties can decide on that by their own. Even if the arbitrator gives his prior approval to the parties he may be absent or not be able to work, resigns, or is dismissed, or is under incarceration or is otherwise prevented from working, it is not possible to challenge the court's appointment as regards to the identity of the arbitrators.[99]

[95] Dubai Court of Cassation cases No. 167 of 1994
[96] Ibid No. 167 of 1994
[97] Ibid No. 167 of 1994
[98] Ibid No. 167 of 1994
[99] Ibid No. 167 of 1994

This case is an exception to the general rule that judgments can be appealed, however the exception does not extend to judgments that dismisses a request to appoint an arbitrator.[100] Also, the plaintiff argued that the judgment delivered by the Court of Appeal, in which the Court of First Instance's judgment was upheld, was an order rejecting the request that the named arbitrator be appointed to settle the dispute between the two parties. Hence, it was capable of being challenged before the Court of Cassation to force the named arbitrator to do as the parties agreed.[101] The plaintiff also argued that there was no dispute that the parties were bound by an arbitration agreement and that the plaintiff used its best endeavors to conduct the arbitration. Furthermore, he noted that the defendant had directly refused to respond to the request for arbitration as well as argued that the defendant suggested that the he had not complied with the precursors to the arbitration process as outlined in the arbitration agreement. He further argued that the Courts, having determined not to appoint the named arbitrator or any arbitrator in that manner, had undermined the power vested in it under Article 204 of the Civil Procedure Code.[102]

The Court of Cassation held that these arguments were incorrect.[103] Whenever parties agree to refer to arbitration disputes that arise between them and appoint an arbitrator, the arbitration clause should be enforced and the dispute should be referred to the arbitrator appointed by the parties. Neither party to the dispute may have recourse to the court of competent jurisdiction to appoint an different arbitrator, unless the arbitrator initially agreed to by the parties abstains from working, resigns, is dismissed, is judged to be dismissed or is otherwise prevented from working.[104] The Court of Cassation explained that the burden of proof of establishing the existence of a

[100] Dubai Court of Cassation cases No. 167 of 1994
[101] Ibid No. 167 of 1994
[102] Ibid No. 167 of 1994
[103] Ibid No. 167 of 1994
[104] Ibid No. 167 of 1994

circumstance falling within Article 204 lies with the claimant, because it was the claimant who was seeking the appointment of a different arbitrator.[105] It is established in the decisions of the Court of Cessation that interpretation of facts and evaluation of evidence in order to assess the truth is within the jurisdiction of the court of merits and may not be assessed by the Court of Cassation.[106]

The judgment of the Court of Appeal, which upheld the judgment of the Court of First Instance, was premised on the fact that the plaintiff submitted with its appeal supporting documents that included a message sent to the defendant in respect of the arbitration proceedings together with a reply from the defendant in which the defendant alleged that the request for arbitration should be nullified.[107] The supporting documents also included a photocopy of the message sent to the agreed arbitrator.[108] The Court of Cassation held that the supporting documents described above were not sufficient to prove that the Respondent had chosen not to participate in the arbitration which accordingly, the present petition to cassation was dismissed.[109]

In Dubai International Financial Centre: Court of Appeal, 3/2011 it was held that any dispute or claim arising out of or relating to the arbitration agreement which is not resolved through good faith discussions between the parties shall be settled by referring such dispute to an impartial arbitrator who shall be appointed by agreement of the parties and in the event of such agreement not being met by either parties or one of them they may request the Dubai International Financial Centre to advise and appoint an arbitrator, whom decision shall be final.[110]

[105] Dubai Court of Cassation cases No. 167 of 1994
[106] Ibid No. 167 of 1994
[107] Ibid No. 167 of 1994
[108] Ibid No. 167 of 1994
[109] Ibid No. 167 of 1994
[110] Dubai International Financial Centre: Court of Appeal, 3/2011

In Silver Dry Bulk Co Ltd v Homer Hulbert Maritime Co Ltd where the plaintiff refused the appointed arbitrators as well as resorting to arbitration which Judge Males J held that if there was an concern about whether a appointed arbitrator would have jurisdiction, the court has authority to make a direction that an arbitrator should be constituted by such appointment as had been completed, or to annul or prepare for new appointments, if the plaintiff would like to gratify the test of presenting a worthy debatable case such as presented in the following case Noble Denton Middle East v Noble Denton International Ltd where this rational is applied and where judge Burton J held that article 18 of the English Arbitration Act 1996 which explains what the consequences of a failure in the arbitrator appointment procedure, was simply what might be categorized as a gateway for the court to act as an appointing authority.[111] The statutory regime for arbitration respected the autonomy of the parties. Arbitrators were entitled to decide not only the issues but also the question of their own jurisdiction. In the circumstances, the correct test was only one of whether there was an arguable case, such as presented in the following case Vale do Rio doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd (t/a Bao Steel Ocean Shipping Co) [2000] 2 All E.R. (Comm) 70, [2000] 4 WLUK 467 and Atlanska Plovidba v Consignaciones Asturianas SA (The Lapad) [2004] EWHC 1273 (Admlty), [2004] 2 Lloyd's Rep. 109, [2004] 5 WLUK 667 considered.[112]

There was in this dispute a good arguable case that there was an arbitration agreement and it was good enough to stand on its own. It was inappropriate to make directions for the hearing of an issue by the court; the arbitrator could and would decide the issue of his own jurisdiction.[113]

[111] Silver Dry Bulk Co Ltd v Homer Hulbert Maritime 2017
[112] Ibid 2017
[113] Ibid 2017

In the absence of an application under article 72 of the English Arbitration Act 1996 which explains the rights of a party not attending the arbitration process, it was inappropriate for there to be an issue tried under article 18 which explains failure of appointment, consequently the court directed the appointment of an arbitrator on the basis that there was an arbitration clause, there would have to be exceptional circumstances or strong or very strong reasons to override that arbitration clause, by parity of reasoning with the position in relation to an exclusive jurisdiction clause, such as presented in the following case Deutsche Bank AG v Sebastian Holdings Inc [2009] EWHC 3069 (Comm), [2010] 1 All E.R. (Comm) 808, [2009] 12 WLUK 18 considered. In any event, the English court, would respect the agreement to arbitrate and give the arbitrator the opportunity to decide whether he had jurisdiction.[114] There were no exceptional circumstances or strong or very strong reasons for granting a stay.[115][116]

In Atlanska Plovidba v Consignaciones Asturianas SA (The Lapad) [2004] EWHC 1273 (Admlty), [2004] 2 Lloyd's Rep regarding parties upholding the arbitration process Judge Moore-Bick J held that the case which was rather than simply debatable, however the premise may not be the case that seemed probable than not to be successful in court. It signified a fairly small privilege which reserved the right of determination for the court to upheld what is to be considered justice in the eye of the law, though discounting these cases where the jurisdictional virtues were seen below the standards used in the courts that unwilling defendants should not to be placed to the cost and stress of having to adopt how to deal with arbitral proceedings where it was very likely that one of the parties had to challenge the tribunal on the basis of no jurisdiction. The power of the parties

[114] Silver Dry Bulk Co Ltd v Homer Hulbert Maritime 2017
[115] Ibid 2017
[116] Noble Denton Middle East v Noble Denton International Ltd 2010 [2010] EWHC 2574 (Comm), [2011] 1 Lloyd's Rep. 387, [2010] 5 WLUK 149

for arbitrator's appointment could only be used if there was an apparent failure that is related to the procedure for the appointment of the arbitration tribunal. If the procedure of arbitrators appointment was written clearly in the contract or implied soundly under the jurisdiction of the courts, institution or parties then it would been no failure and the procedure would had functioned in the anticipated way, even without the cooperation of one of the parties since that the court had a right whether to exercise any of its entailed powers even in the respect for the code of party autonomy and the appeal of holding parties to their end of the agreed contract only if solid grounds for exercising the discretion.[117]

In Sumukan Ltd v Commonwealth Secretariat regarding parties' disagreement regarding appointing the potential members of future arbitration panels where the plaintiff have an agreement with the defendant, who was entitled to have the dispute resolved by a panel appointed in accordance with the agreement provisions, however this dispute before crystallization was not thought to reach the point of being disputed in an arbitration process. Also, there was an argument about the chair that has been nominated which the co-arbitrators chose. [118]

The appointment procedure set in the agreement existed at least in part for the protection of parties to arbitrate in a clear process and manner. The sole purpose of the consultation with to the LCIA was not to ensure that the tribunal would consist of arbitrators appointed on a fair appointment basis. In circumstances in which one of the parties to contemplated arbitrations was appointing the potential members of future arbitration panels, the statute should be construed as requiring consultation with appointing authority the LCIA to exact in which this case was in order to ensure, among other things, the impartiality and independence of the arbitrators on the panel. Thus the

[117] Atlanska Plovidba v Consignaciones Asturianas SA (The Lapad) 2004
[118] Sumukan Ltd v Commonwealth Secretariat

plaintiff was entitled to a panel consisting of arbitrators who had been appointed only after such consultation.[119]

In Fiona Trust and Holding Corporation v. Privalov (2007) the House of Lords decision was that there is two essential categories of disagreement between the parties where the arbitration clause will unavoidably begin drafted without meeting of the minds is present.[120] The two essential categories are that the separation principle where the arbitration agreement or clause lives on after the completion of the agreement would not provide a basis for the arbitral tribunal to determine whether the main contract had been nulled, since annulation would also invalidate the arbitration agreement[121] and on the same principle, he further suggested that the total absence of authority to act as agent would nullify both the main contract and the arbitration agreement.[122]

5.2.2 Defective arbitration agreement/clause (Pathological)

Before addressing the cases which involved pathological arbitration agreement/clause we need to understand the term Pathological Arbitration Agreement/Clause. Luis Alfonso Gómez also explains that in general, subject to the scale of the mistake in the arbitration clause, a pathological clause could lead to delays in the arbitration proceedings, but should not necessarily be concluded that the arbitration is ineffective, void or null because international and domestic arbitration legislations and the industry and practice of arbitration try to apply these clauses to its maximum extent possible by understanding the parties intentions and determination who sign the contract.[123]

[119] Sumukan Ltd v Commonwealth Secretariat 2007
[120] Fiona Trust and Holding Corporation v. Privalov 2007
[121] Ibid 2007
[122] Ibid 2007
[123] Luis Alfonso Gómez Causes and Consequences of Faulty Arbitration Clauses Article Published on 17th of September 2007 on http://www.scielo.org.co

Shaun Lee define pathological arbitration clauses: "An arbitration clause is pathological when it deviates from any one of the above four elements. How defective the clause is depends on the extent of the deviation from those elements."[124]

He also explains the history to the term which goes back when Frederic Eisemann coined the term "pathological clauses" or "clauses pathologiques", in "La clause d'arbitrage pathologique" in Commercial Arbitration Essays in Memoriam by Eugenio Minoli (Torino: Unione Tipografico-editrice Torinese, 1974)[125]. Frederic Eisemann was a Doctor of law and he was former Director of the International Chamber of commerce who lived from 1908 until his death in 1986 according to him, there are four essential elements of an arbitration clause.[126] The first which is that to all agreements there should be terms that result into laying out mandatory consequences for the parties signing an agreement.[127] The second is to eliminate the interference of government courts in the resolution of the disputes that is until prior the arbitrators issue the award.[128] The third is to grant jurisdiction and authority to the arbitrators to resolve the disputes that would arise between the disputed parties.[129] The fourth is to establish and formulate the procedure by putting in place of a procedure clear guidance leading under the best practices of interpretation to allow clear understanding and acknowledgement to the award that is susceptible of judicial enforcement.[130] Therefore, he concluded that he defined Pathological arbitration clauses as

[124] Shaun Lee Pathological Arbitration Clauses Article Published on 8th of March 2008 on https://singaporeinternationalarbitration.com
[125] Ibid https://singaporeinternationalarbitration.com
[126] Eugenio Minoli Commercial Arbitration Essays in Memoriam (Torino: Unione Tipografico-editrice Torinese, 1974) Page 563
[127] Ibid Page 563
[128] Ibid Page 563
[129] Ibid Page 563
[130] Ibid Page 563

"An arbitration clause is pathological when it deviates from any one of the above four elements. How defective the clause is depends on the extent of the deviation from those elements."[131]

Due to lack resources and lack of cases found in the UAE and UK courts in Westlaw and other search engines, I will be quoting a lot of international cases.

Neglecting reading through the set arbitration clauses will lead you to unprofessional clause the is deemed to fail and be nulled such as the case of prominent case of Arab African Energy Corp Ltd V Olieprodukten Nederland BV [1983] where the arbitration clause state that "English law – arbitration, if any, London according ICC Rules"[132]

Another examples are arbitration clauses that so badly written that they were dismissed by International Chamber of Commerce ICC in France due to misrepresenting the ICC with its official name such as the following: "the official Chamber of Commerce in Paris, France"[133], "the Arbitration Commission of the Chamber of Commerce and Industry of Paris"[134] & "a Commission of arbitration of French Chamber of Commerce, Paris "[135]

In Cravat Coal Export Company, Inc. v Taiwan Power Company case 1990 in Kentucky USA, court it was held that due arbitration agreement does not include any obligatory wording such as "Shall" and "Must" that arbitration agreement deemed defective due to inclusion of the phrase "maybe referred to arbitration".[136] Also, the same judgment has been given in Soci Socie et te Sagua Sagua La Sabli La Sablie ere et autre v SARL Optimal Conseil case 2003 in Paris France,

[131] Eugenio Minoli Commercial Arbitration Essays in Memoriam (Torino: Unione Tipografico-editrice Torinese, 1974) Page 563
[132] Arab African Energy Corp Ltd V Olieprodukten Nederland BV [1983]
[133] Alan Redfern,M. Hunter, Nigel Blackaby, Constantine Partaside Law and Practice of International Commercial Arbitration 4th edition (Sweet & Maxwell 2004) page 3-69
[134] Ibid page 3-69
[135] Ibid page 3-69
[136] Cravat Coal Export Company, Inc. v Taiwan Power Company case 1990 in Kentucky USA

where the first instance court held that the phrase does constitute obligation to follow using wording such as "If any resolution of a dispute is possible on the execution of this agreement"[137] which shows that it relies on possibilities rather than concrete decisions.

Gary Born talks in his book International Commercial Arbitration, Second Edition about a case submitted to the ICC where the parties chose an arbitrator who is unwilling to arbitrate between them "by the Director General of the World Health Organization"[138]

Any agreed arbitration clause between the parties there should not have contradicting clauses that make resolution through arbitration difficult and not possible, such that with Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors [2012] EWCA Civ 638 which has been assessed by the court.[139] The court held that it was not recommended that the approach which the court is essential to take to resolve the issues of construction. However, since the insured say that under the arbitration law of Brazil the arbitration agreement is not enforceable against them without their agreement, it is an issue that has to be determined, since it is a vital factor for the court to take into account in deciding whether to continue the injunction. Although the judge made no conclusion about the position under Brazilian law if the insured's argument were correct, the reference to arbitration would be useless and the injunction would have to be nulled. The judge held that the appropriate law of the arbitration agreement in this case was English law, nevertheless the express choice of Brazilian arbitration law as the law governing the policies and the clear link of the policy to Brazil. He considered that the key query was the importance to be given to the choice of LCIA as the seat of the arbitration. He pointed out that the choice of the seat of the arbitration determines the curial law and the supervising jurisdiction of the courts of the country

[137] Soci Socie et te Sagua Sagua La Sabli La Sablie ere et autre v SARL Optimal Conseil case 2003 in Paris France
[138] Gary Born International Commercial Arbitration, Second Edition (Wolters Kluwer Law &Business 2014) page 683
[139] Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors [2012] EWCA Civ 638

where the seat is located, in this case England. That steered him to the clear conclusion that the law with which the agreement to arbitrate had its closest and most real connection was the English law of England and Wales.[140]

5.2.3 Pre-Arbitration Arbitrators Appointment Challenges Recommendations

One of the biggest challenges of arbitrators appointment is parties agreeing on appointing an arbitrator which is one of the vital decision the parties will decide due to the complications that arise from an arbitration award being drafted by an arbitrator that the parties don't agree on which may lead if left until closure to bigger issues in the courts, thus setting up an appointment criteria for arbitrators skilled enough to understand the issues is important as they may very well effect on the quality of the arbitration process and for this reason parties agreeing on appointed arbitrator is an important stage of the arbitration process.[141] Also, the procedure of arbitration is followed without firm guidelines of process so an arbitrator duty is not only to hear parties and give an award, but to guarantee that the procedure is prompt, just and not burden the parties with big expenses. [142]

One of the major precautions to vaccine parties from disagreeing is resorting to an institutional arbitration process, that's why currently parties making an agreement prefer an institutional arbitration over an ad-hoc arbitration.[143] One of the reasons is the arbitration institution role in providing procedural assistance and administrative support to help keep the proceedings of the

[140] Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors [2012] EWCA Civ 638
[141] Jessika Stadwick article "Four factors to consider when selecting an arbitrator" published on 01 June 2013 www.tamimi.com/
[142] Ibid www.tamimi.com/
[143] Richard Bell and Rebecca Soquier article "United Arab Emirates: Dispute Resolution In Abu Dhabi: Part 3: Commercial Arbitration In Abu Dhabi" published on 16 July 2013 www. mondaq.com/

arbitration on track and the appointed arbitrators are impartial and qualified for the process as well as ensuring that the appointed arbitrators follow the procedural rules of the arbitration and bring transparency to the agreeing parties throughout the progress of the process.[144] On the other hand, ad-hoc arbitration process are managed by the agreeing parties, who do their own provisions for arbitrator appointment, opposite from institutional arbitration where an experienced institute dictates the process and takes on the role of administrating the process of arbitration and arbitrator appointment.[145] Nadim Al Jisr Head of Legal Content at Thomson Reuters elaborates about the issue of ad-hoc arbitration and explains that the difficulties that obstruct agreeing on the arbitration process is stemming from the personality, intention or nature of the parties who agree to refer to arbitration to solve their contractual disputes, where in fact, the parties might fail – deliberately or inadvertently – to appoint a sole arbitrator or arbitration tribunal.[146] Also, ad-hoc arbitration is very demanding process and necessitates a teamwork between the parties which if not present will lead the process to being risky, as explained by legal experts Richard Bell and Rebecca Soquier from Clyde&Co in their article about the ad-hic arbitration process where they explain that in order for an ad hoc arbitration to run without any issue, a certain level of collaboration between the parties is required, and where this collaboration is not present, problems can arise.[147] If one of parties engage in delaying schemes or challenges to the arbitration tribunal jurisdiction, then there will be no institution to support in carrying the arbitration proceedings forward, and the parties only remedy would be to seek the intervention of a the courts.[148] Thus, it is not unusual in practice for

[144] Richard Bell and Rebecca Soquier article "United Arab Emirates: Dispute Resolution In Abu Dhabi: Part 3: Commercial Arbitration In Abu Dhabi" published on 16 July 2013 www. mondaq.com/
[145] Nadim Al Jisr article "When courts intervene in dispute resolution" published on 19 October 2016 www.mena.thomsonreuters.com
[146] Ibid www.mena.thomsonreuters.com
[147] Richard Bell and Rebecca Soquier article "United Arab Emirates: Dispute Resolution In Abu Dhabi: Part 3: Commercial Arbitration In Abu Dhabi" published on 16 July 2013 www. mondaq.com/
[148] Ibid www. mondaq.com/

the parties in an ad-hoc arbitration to find it hard to have the arbitration proceedings begin and been carried out in an effective way.[149]

Another choices some entering into an arbitration agreement is to make it in writing as mandated by both UAE and English law require that an arbitration agreement be in writing and form part of the principal agreement or supplementary document, signed by agents with proper delegation to enter both agreeing parties in to an arbitration process.[150]

Also, avoid using bespoke arbitration clause that may be defected and pathological arbitration clauses and since that the UAE's four main arbitral institutions, the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC), the Dubai International Arbitration Centre (DIAC), the Dubai International Financial Centre (DIFC) & Abu Dhabi Global Market (ADGM) and the two arbitral institutions in the UK the London Courts of International Arbitration (LCIA) & Charted Institute of Arbitration (CIARB), each have their own model arbitration clauses, use of which is suggested.[151] Furthermore, as best practice for agreement of arbitration to include additional minimum of details such as the number of arbitrators, the seat of arbitration, the language of the proceedings, governing law and preferably confidentiality, due to of the process since UAE law contains no provisions relating to confidentiality.[152]

The following are module arbitration clauses of the mentioned arbitration institutions:-

Dubai International Arbitration Centre (DIAC) Module Clause state that: "Any dispute arising out of the formation, performance, interpretation, nullification, termination or invalidation of this contract or arising therefrom or related thereto in any manner whatsoever, shall be settled by

[149] Richard Bell and Rebecca Soquier article "United Arab Emirates: Dispute Resolution In Abu Dhabi: Part 3: Commercial Arbitration In Abu Dhabi" published on 16 July 2013 www. mondaq.com/
[150] Patrick Bourke & Anna Anatolitou The International Comparative Legal Guide: international arbitration guide of 2009 (Global Legal Group 2009) Page 463
[151] Ibid 463
[152] Ibid 463

arbitration in accordance with the provisions set forth under the DIAC Arbitration Rules ("the Rules"), by one or more arbitrators appointed in compliance with the Rules."[153]

Dubai International Financial Centre (DIFC) Module Clause state that: "Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Arbitration Rules of the DIFC – LCIA Arbitration Centre, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be [one/three]. The seat, or legal place, of arbitration shall be [City and/or Country] (See Footnote). The language to be used in the arbitration shall be [ ].The governing law of the contract shall be the substantive law of [ ]."[154]

Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC) Module Clause state that: "Any dispute arising out of or related in any manner to the execution, interpretation or termination of this contract shall be finally resolved by means of arbitration in accordance with the Rules of Arbitration of Abu Dhabi Commercial Conciliation & Arbitration Centre (ADCCAC)."[155]

Abu Dhabi Global Market (ADGM) Module Clause state that: "All disputes arising out of or in connection with this contract, including any question regarding its existence, validity or termination and any dispute regarding non-contractual obligations arising out of or in connection with it, shall be referred to and finally resolved by arbitration administered by [insert name of institution] under [insert name of rules]. The legal place, or seat, of the arbitration shall be Abu Dhabi Global Market. The language of the arbitration shall be English. The number of arbitrators shall be three. The law of the arbitration agreement shall be [insert]."[156]

The Charted Institute of Arbitrators Module Clause state that: "Any dispute, controversy, or claim arising out of or in connection with this contract, or the breach, termination or validity thereof, shall be submitted to the Chartered Institute of Arbitrators (CIArb) and settled by final and binding arbitration in accordance with the CIArb Arbitration Rules. Judgment on any award issued under this provision may be entered by any court of competent jurisdiction."[157]

The London Courts of International Arbitration Module Clause state that: "Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause"[158]

[153] DIAC Module Arbitration Clause published in their website www.diac.ae
[154] DIFC Module Arbitration Clause published in their website www.difc-lcia.org
[155] ADDCAC Module Arbitration Clause published in their website www.addcac.ae
[156] ADGM Module Arbitration Clause published in their website www.adgm.com
[157] CIARB Module Arbitration Clause published in their website www.ciarb.org
[158] LCIA Module Arbitration Clause published in their website www.lcia.org

5.3 Challenging the appointment of arbitrators

5.3.1 Challenging arbitrator's Jurisdiction

One of the most common challenges facing arbitrator appointment is where one of the parties challenges the arbitrator's jurisdiction in front of the law. The challenge can be done as soon as possible and necessitates the parties to confront him, which will lead to delays that require an order as to procedure, changing time-table or warranting annulment of the arbitration award, or at any later stage.[159]

Julian elaborates on the consequences of such challenge that may lead to question the validity of signed agreement between the parties and the arbitration clause itself:

"The challenge to the arbitrator's authority or jurisdiction may be various: it may relate to the subject-matter of the dispute or the purport of the arbitration agreement; equally, it may give rise to fundamental questions as to the validity of the main contract in which the arbitration agreement is included and the arbitration agreement in itself. In this latter situation it would be argued that as the main contract is null and void, eg, induced by fraud or for an illegal purpose, so all its provisions including the arbitration clause, are void and of no effect."[160]

As per Julian therefore, it should follow that due to challenging the arbitrator and the arbitration agreement provision it raises many question like if the arbitrator would have no jurisdiction to accept any arbitration proceedings, not even to determine the validity of the arbitration agreement signed by the parties and whether such challenge will affect the main agreement or will lead the arbitration agreement to be null and void due to case of fraud is present or due to the correct

[159] Julian DM Lew Contemporary Problems In International Arbitration (Springer – Science + Business Media, B.Y.1987) Page 75.
[160] Ibid Page 76

proceedings used, and is their adequate evidence to nullify both the arbitration agreement and the process that have been taken for arbitration[161]

The legislator in the UAE as well as England and wales have acknowledged that in essence the arbitrators have the right to set their jurisdiction in terms of law and process since they are the appointed capable authority recognized by the legislation. Article 19 of the UAE Arbitration Law of 2018 explains that the arbitration tribunal may rule on its own jurisdiction, as well as rule on any doubts with respect to the validity or applicability of the arbitration agreement or its inclusion of the subject matter of the dispute and if a party question their jurisdiction, the arbitration tribunal also can rules the questions related to its jurisdiction which a party may, within fifteen 15 days after receiving the notice of the ruling made by the arbitration tribunal, request the courts to decide that issue.[162]

Also, in English Law there is similar provisions in article 30 of Arbitration Act of 1996 which explains that except otherwise agreed by the parties, the arbitration tribunal may rule on its own applicable jurisdiction, that is as whether there is a valid arbitration agreement or whether the arbitration tribunal is properly established or what are the disputes that should be submitted to arbitration tribunal in accordance with the arbitration agreement. Article 30 further explains that any such ruling done by the arbitration tribunal may be challenged by any existing arbitration process of appeal or evaluation or in accordance with the provisions of this or can be brought to the courts to decide[163]

[161] Julian DM Lew Contemporary Problems In International Arbitration (Springer – Science + Business Media, B.Y.1987) Page 76
[162] UAE Law of Arbitration Federal Law No. 6 of 2016 Article 19
[163] English Arbitration Law Act of 1996 Article 30

Regarding parties agreeing on the express jurisdiction of the arbitrator, in the Union Supreme court, 274/1993 (13), it was held that since the plaintiff did not agree with defendant expressly, whether in the main agreement or subsequent agreement clause on the jurisdiction of the arbitrators in order to take provisional, attachment, or summary procedures, or relevant applicable provisions in the agreement to arbitrate any dispute over the interpretation or performance of the main agreement which does not authorize the arbitrators to decide any of the above scenarios.[164]

It also explains that since that the arbitrators are not authorized to decide on any of such procedures or matters, the parties may resort to the courts to resolve such matter since the courts have exclusive jurisdiction and directive over such matters.[165]

Sometimes the court will entertain an arbitrator if he exceeds his jurisdiction even if one of the parties did raise the challenge in same what happened in Abu Dhabi Court of Cassation, 806/2013 (9) where it was held that the authority and jurisdiction of the court that approves the arbitrators award may be extended to the subject of the arbitration, as long as it see that the arbitrator went beyond the scope and limits of his jurisdiction and gave a decision on an issue that effects the public order which may not be subjected to his decision.[166]

In the same time the case dictates the grounds for annulment of such practice which include arbitrator exceeding his jurisdiction which can be explained if it has been established that the arbitrator and the arbitration tribunal went beyond the limits of their jurisdiction and decided on a matter that is related to the public order which may not be subject to their decision, the court must intervene, study and examine this legal violation in the light of the legislative provisions of the

[164] Union Supreme court, 274/1993 (13)
[165] Ibid, 274/1993 (13)
[166] Abu Dhabi Court of Cassation, 806/2013

applicable laws in the country of the court, even if this violation do not fall directly within the boundary of being nullified or deeming the arbitration award void that are stipulated in the UAE Arbitration law article 14 regarding challenging the arbitrator and article 37 which discusses the effect conflict of arbitration with public order, considering that the public order is one of the important regulations that shall be adhered to in all the provisions and the rules as it is related to the interest of the society and the social order or political concerns or moral grounds upon which the state is based upon.[167]

In Minister of Finance (Inc) v International Petroleum Investment Co [2019] between two entities one in Malaysia and other in Abu Dhabi one of the parties challenged the appointed arbitrator jurisdiction, however the court have replied otherwise since the court ruled about the challenge that "did not necessarily take precedence over further arbitration proceedings that the parties had agreed to provide for: case law showed that the court and arbitration tribunal could have concurrent jurisdiction."[168] Which stated later "….and allow the further arbitration to proceed first."[169]

On the other hand, in Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd [2018] 10 WLUK 703 the plaintiff went to court without going through arbitration and appealed that the arbitration tribunal appointment and its jurisdiction.[170] The court have allowed the appeal since it was discovered that the appointed arbitration tribunal in fact did not have the jurisdiction to resolve this dispute "It followed that the arbitral tribunal did not have jurisdiction to determine the dispute between the parties"[171]

[167] Abu Dhabi Court of Cassation, 806/2013
[168] Minister of Finance (Inc) v International Petroleum Investment Co (2019)
[169] Ibid (2019)
[170] Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd [2018] 10 WLUK 703
[171] Ibid [2018] 10 WLUK 703

In Frontier Agriculture Ltd v Bratt Brothers (2015) where the plaintiff commenced in arbitration with defendant, however the plaintiff refused to acknowledge the defendant claim and initially and didn't want to proceed nor acknowledge any appointed arbitrator however the plaintiff continued participation, as well participation in accepting the appointment of an arbitrator and participation in the arbitration in respect of the disputed matter. When the plaintiff filled a court case against defendant regarding the appointment of an arbitrator the court accepted his filling and elaborated that even if he did entertain the arbitration process, he didn't lose his right to challenge arbitrator appointment and arbitrator jurisdiction "so had not lost its right to contest the arbitrator's substantive jurisdiction"[172]

5.3.2 Challenging arbitrator's impartiality

There is no doubt that for a healthy arbitration process, the appointed arbitrator must be impartial and handling the proceedings of arbitration in good-well which also mean that the appointed arbitrator must not partake in any monetary expectation in the consequence of the handled dispute or illustrate or show genuine or deceptive bias.[173] Author Albert K. Fiadjoe explains in his book, the arbitrator impartiality essence and its consequences of breach of good-well

"The arbitrators must be independent and impartial in accordance with codes of ethics and conduct. A breach of that duty may result in the arbitrator being challenged and eventually removed by the court, or by the arbitration institution concerned. It may also lead to the annulment of the award."[174]

Challenge of arbitrator impartiality is also been defined in legislation in the UAE Law and English, however it should be under justifiable reason. Article 14 of the UAE arbitration law of 2018 states that the arbitrator may be challenged only if conditions exist that give rise to reasonable doubts as

[172] Frontier Agriculture Ltd v Bratt Brothers (2015)
[173] Neil Andrews Arbitration and Contract Law Common Law Perspectives (Springer 2016) Page 103
[174] Albert K. Fiadjoe Alternative Dispute Resolution, A Developing World Perspective (Cavendish 2004) Page 88

to his neutrality or independence, or if he did not possess the qualifications agreed to by the parties or specified by this Law.[175]

Also, in the same manner article 24 the English arbitration act of 1996 states that the party to an arbitration proceedings may upon giving a notice to the other parties as well as to the arbitrator in question and to any other related arbitrator file a case in the court to remove the arbitrator in question on one of the following grounds where the circumstances occur that give rise to reasonable doubt as to his independence or that he does not possess the qualifications specified by the arbitration agreement or that he is incapable physically or mentally of leading the proceedings of arbitration or there are reasonable doubts as to his capacity to preform or that he had refused or failed appropriately to follow the proceedings or used all reasonable dispatch in following the procedure or issuing an award, and that significant injustice that has been or shall be caused to one of the parties or both.[176]

To add the view of the court and legislating bodies in the UAE Law in perception differ from English Law in the topic of arbitrator immunity. In the UAE, it's common for the losing parties in an arbitration to challenge arbitrators Good-well. Michael Grose explains that although the relatively direct nature of the legislative framework governing arbitration, challenging an award based on procedural flaws are common, where unlike judges, arbitrators do not enjoy the statutory immunity given by the legislator from claims arising from the performance of arbitration.[177]

[175] UAE arbitration law of 2016 article 14
[176] English Arbitration Act of 1996 article 24
[177] Michael Grose Construction Law in the United Arab Emirates and the Gulf (Wiley Blackwell 2016) Page 268

This was further came into a chaos between law professionals & legal experts in the UAE when in 2016 Article 257 of the UAE Federal Penal Code have been amended giving chance for losing party to retaliate against an arbitrator for scenarios of lack of good-well[178]

Article 257 "Anyone who issues a decision, expresses an opinion, submits a report, presents a case or proves an incident in favor of or against a person, in contravention of the requirements of the duty of neutrality and integrity, while acting in his capacity as an arbitrator, expert, translator or fact finder appointed by an administrative or judicial authority or selected by the parties, shall be punished by temporary imprisonment."[179]

On the other hand, the English revere the arbitrator to be in semi-similar status as judges which give them immunity from been liable from given what it seems unjust due to facts presented or due to negligence.[180] Author Arthur W. Rovine Director of the International Arbitration Conference at Fordham Law School shed more light on the subject of Arbitrator immunity in English Law that the common law jurisdictions have taken a functional analysis of the role of arbitrators where under this view, arbitrators carry out judicial or semi-judicial functions that make them comparable to judges.[181]

He also add that the English courts have always recognized that arbitrators are in a semi-judicial role and enjoy an immunity from negligence and errors in law or fact, which is that kind of immunity that the arbitrators can exercise their judicial functions without fear and give the arbitrators the exception to the general principle that a person with a professional proficiency may be liable in damages for negligence if he fails to exercise due care and skill.[182]

[178] Jeremy Glover, Article title" What might changes to the UAE penal code mean for arbitrators and expert witnesses? " Issue 21 of international Quarterly Published on 01 April 2017 on https://www.fenwickelliott.com
[179] UAE Federal Penal Code 2016 Article 257
[180] Arthur W. Rovine - Contemporary Issues in International Arbitration and Mediation (Martinus Nijhoff Publishers 2008) Page 226
[181] Ibid 226
[182] Arthur W. Rovine - Contemporary Issues in International Arbitration and Mediation (Martinus Nijhoff Publishers 2008) Page 226

In Dubai Court of Cassation Case No. 7 of 2005 both parties to a signed arbitration agreement filed a case against the appointed sole arbitrator in the Dubai Court of First.[183] The Court of First Instance removed the appointed sole arbitrator, who responded be appealing to Dubai Court of Cassation and wanted by the appeal to be reappointment of the as sole arbitrator or to be one of the three appointed arbitrators.[184] Dubai Court of Cassation dismissed the case on grounds that the parties are able to remove an appointed arbitrator by mutual agreement at any time after his appointment and it's not required to provide evidence that the arbitrator is not neutral or has purposely did not act in accordance with the arbitration agreement[185] as per article 207 of the Civil Procedure Code of 1992 "No arbitrator may be removed except with the approval of all the parties to the dispute. However, if it is established that the arbitrator has willfully neglected to act in accordance with the terms of reference, despite a written notice to him in this respect, the court which had jurisdiction to consider the dispute may, at the request of one of the parties, dismiss the arbitrator and order a replacement in the same manner as he was originally appointed."[186]

In Abu Dhabi Court of Cassation Case No. 980 of 2010 where the plaintiff in this case claimed in front of the court that the appointed arbitrator and appointed by the defendant worked for the defendant as part of his legal team and that this situation swayed his impartiality which was held that indeed the arbitrator due to his previous relationship with other party need to be removed.[187]

In Positive Software Solutions Inc. v. New Century Mortgage Corp where the plaintiff found out that the sole appointed arbitrator had been one of the defendant's legal team members in that arbitrator previous legal firm for more than a decade before been appointed as a sole arbitrator for

[183] Dubai Court of Cassation Case No. 7 of 2005
[184] Ibid No. 7 of 2005
[185] Ibid No. 7 of 2005
[186] UAE Civil Procedure Code of 1992 article 207
[187] Abu Dhabi Court of Cassation Case No. 980 of 2010

their which he failed to disclose this connection in the progression of the arbitration session and ruled in favor of his previous employer which is where this relationship was discovered.[188] The court have held that on the grounds of the appointed sole arbitrator previous past connection, it makes reasonable impression of potential unfairness and since that the arbitrator failed to reveal such previous association lead to removing from the arbitration process and replace him with an impartial arbitrator.[189]

In the recent case of Halliburton v Chubb [2018] the court had made a ruling which was important to the international arbitration industry where the ruling raised a very serious quarry about the arbitrator's impartiality which is highly regarded in English law.[190] The High Court held that while an arbitrator was under an obligation to disclose circumstances which give rise to justifiable doubt about his impartiality (e.g. appointments in multiple arbitrations with overlapping subject matter and one common party), nonetheless, in the instant case, the circumstances did not give rise to justifiable doubt about the arbitrator's impartiality. The High Court's decision was affirmed by the Court of Appeal and recently, by the Supreme Court. The Supreme Court held that the test for impartiality was whether a fair-minded and informed observer would have concluded that there was a real possibility of bias on the part of the arbitrator.

5.3.3 Challenging the appointment of arbitrators

The necessities of appointed arbitrator neutrality and good-well and beig impartial have effects on the appointed arbitrator in the event of party dissatisfaction and occurrence of a challenge whether its related to jurisdiction or good-well where the arbitration doctrine naturally enable a

[188] Positive Software Solutions Inc. v. New Century Mortgage Corp [2004]
[189] Ibid [2004]
[190] Halliburton v Chubb [2018]

challenged appointed arbitrator the chance to defend himself and reply on the challenge while the same arbitration doctrine is shy in terms of the scope of and process of defending against a challenge.[191]

Pierre Bienvenu, Global Co-Head of International Arbitration and a Senior Partner in Norton Rose Fulbright Canada, in his article elaborated that it is suitable in the context of a challenge for the arbitrator to make sure that all associated facts are submitted before the arbitration institution or court called upon to determine the validity of challenge. However, when replying to a challenge, the arbitrator should be vigilant before determining whether to respond to criticisms aimed at the his conduct given by the challenging party, or to debate the merits of the challenge, if not then by simply declining to resign from the arbitration tribunal.[192] The challenged arbitrator must be careful not to fall into the argument, and resist any temptation to reply to the party raising the challenge unless he can provide any hard evidence to the decision maker who would be an independent ground to determine the validity challenge.[193]

How the appointed arbitrators follow the procedure of the arbitration institution and its guidelines as well as not exceeding the disputes presented by the parties are the key thing in influencing the success of an arbitration without being challenged for jurisdiction and good-well.[194]

lvira R. Gadelshina, an associate at Khrenov & Partners in an article explains that some aspects are also thought into the appointment of arbitrators through the institution process.[195] She also elaborates on the appointed arbitrator qualification and experience in dealing with institution

[191] Pierre Bienvenu article "Arbitrator's Corner – Pierre Bienvenu talks disclosure, challenges and neutrality" published on 01 October 2018 www.nortonrosefulbright.com
[192] Ibid www.nortonrosefulbright.com
[193] Ibid www.nortonrosefulbright.com
[194] Elvira R. Gadelshina "What plays the key role in the success of an arbitration institution?" published on 01 February 2013, available at: www.financierworldwide.com
[195] Ibid www.financierworldwide.com

procedure and guideline as well as experience in the arbitration process itself, that if it is the case with any other provider of legal services, the arbitrators have the capability to draw on the expertise out of its experience from practicing arbitration.[196] Since international arbitration institutions do not arbitrate disputes themselves but rather administer the process and arbitration proceedings, a decent pool of potential arbitrators experience will grow with institutions support.[197] Also, with regard to the qualifications of members of an arbitration institution, the institutions will have a sensible blend of lawyers trained in civil law jurisdictions and lawyers trained in common law jurisdiction, along with an academically high standing young potentials arbitrators obtaining guidance and experience from their peers giving the arbitration institution an advantage on the process[198]. The ethics and ideals related to arbitration should be also accepted in mind in all disputes been handled, such disputes that have implied ethical controversies, which require a deeper meaning of impartiality and independence.[199]

One of the most important guidelines the appointed arbitrator must follow in order to avoid the risk of potential challenges in good-well is the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration & Rules on the Taking of Evidence in International Arbitration.[200] For example, the disputing parties start the process of appointing an arbitrator can enquire the potential arbitrator if he need to disclose any information that raises reasonable doubt about his impartiality or the his process of work which is not in line with the IBA Guidelines on Conflicts of Interest or Rules on the Taking of Evidence in International

[196] Elvira R. Gadelshina "What plays the key role in the success of an arbitration institution?" published on 01 February 2013, available at: www.financierworldwide.com
[197] Ibid www.financierworldwide.com
[198] Ibid www.financierworldwide.com
[199] Ibid www.financierworldwide.com
[200] Luke Parsons article "Independence, Impartiality And Conflicts Of Interest In Arbitration" published on 08 September 2016 www.quadrantchambers.com

Arbitration., These guidelines can be an tremendously valuable instrument for clearing all conflicts of interest and process errors that are evident at the initial phase of arbitrator appointment.[201] In the event that these guidelines are not particularly demanded to be followed by the disputing parties, the candidate arbitrators themselves will assess if there is any conflict of interest or irregularity in their process by following the IBA guidelines and rules and if not, the arbitration institutions will be following their own guidelines and rules for independence and/or impartiality and/or process as well as considering the IBA guidelines and rules. [202]

It is important to point out that, one should not assume that the guidelines are legal provisions that override any applicable national law or arbitral rules chosen. I In the contrary, they only provide guidance on the subject as Article 6 of the IBA guidelines on conflict of interest makes clear that these guidelines are not legislative provisions and do not supersede any applicable national law or any arbitration rule chosen by the parties., However, it is expected that the IBA guidelines and other sets of procedures and guidelines of the IBA arbitration committee shall assist the parties, practitioners of law, arbitrators, arbitration institutions and the courts in dealing with these vital questions of neutrality and impartiality.[203] Article 6 also explain that the IBA arbitration committee have faith that these guidelines will be practical with a robust common sense and without unduly formalistic interpretation."[204]

However, Lyndon Smith, Senior Associate at Fenwick Elliott discuses in an article about the position of international arbitration community view of the IBS guidelines and rules that nevertheless, the international arbitration community shall, with no doubt, continue to use the IBA

[201] Luke Parsons article "Independence, Impartiality And Conflicts Of Interest In Arbitration" published on 08 September 2016 www.quadrantchambers.com
[202] Ibid www.quadrantchambers.com
[203] IBA Guidelines on Conflicts of Interest in International Arbitration 2014 Article 6
[204] Ibid Article 6

guidelines, nevertheless the fact has now been made that a firm approach to the guidelines when determining a dispute is not essentially the right one to take.[205]

5.4 Summary

In Summary we can conclude that based on all the cases discussed the courts always finally respects the arbitration agreement such as the cases of Dubai Court of Cassation cases No. 167 of 1994, Dubai Court of Cassation cases No. 175 of 1993, Silver Dry Bulk Co Ltd v Homer Hulbert Maritime Co Ltd and Atlanska Plovidba v Consignaciones Asturianas SA. However, if the parties have a defective arbitration clause then it will be liable to possible invalidate the arbitration process.

We also examined some of the legislative provisions for some of the cases such as Article 204 of the UAE Civil Procedure Code which is superseded by article 11 of UAE Arbitration Law 2018, where we found consistency even after the introduction of the new UAE arbitration law of 2018.

WE also can conclude that it's always in the best interest of the arbitrators to declare his relationship with any of the parties and hold the parties, arbitration institutions and/or courts accountable for the decision to appoint him. It also advisable from an ethical point of view to for the appointed arbitrator to send a regret letter if he has a great interest and affiliation with one of the parties. Also, complying with the IBA rules on the taking of evidence and conflict of interest insures the impartiality and neutrality of the arbitration process.

[205] Lyndon Smith article "Conflict of interest – apparent bias of arbitrator – IBA Guidelines" Issue 17 of international Quarterly published on 01 Janaury 2016 www.fenwickelliott.com

Furthermore, we can conclude that to ensure the effectiveness and the quality of the arbitration process the parties need to agree on systematic and clear mechanism in their arbitration agreement, preferably to resort to institutional arbitration, using their model arbitration clauses as well.

Also, the arbitration clause should also include an elaboration of the arbitrator qualification and experience as well as incorporating the International Bar Association (IBA) Guidelines on Conflicts of Interest & the rules on taking of evidence will increase the strength of the arbitration process and the sub-sequent award.

Conclusion

In this Dissertation have brought more understanding on arbitration by providing its definition and the qualification required for the process as well as understanding two legal jurisdictions legal framework. The first which is the United Arab Emirates Law, and the secondis the English Law (Law of England and Wales) which was covered. comprising the United Arab Emirates Arbitration Law of 2018, older provisions in the Civil Procedure Code 1992 and the English Arbitration Act of 1996. We also learned more about the mechanism itself of arbitrator's appointment process whether by the institutions or by ad-hoc arbitration as well as we have seen the relevant guidelines and procedure of the institutional arbitration centers of Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC), the Dubai International Arbitration Centre (DIAC), the Dubai International Financial Centre (DIFC) & Abu Dhabi Global Market (ADGM) and the two arbitral institutions in the UK the London Courts of International Arbitration (LCIA) & Charted Institute of Arbitration (CIARB) and we shed more light on parties given powers to effect arbitrator's appointment, investigating the challenges facing the process.

This Dissertation also shed more light on the role of the parties, legislation and arbitrators if the parties fail to agree on appointment of an arbitrator due to disagreement and where the arbitration agreement or clause does not have the right provisions or does not include the mechanism of appointing an arbitrator. Also we discussed Pathological (defective) arbitration agreement/clauses and defined it and gave examples and how in fact a badly written arbitration clause may have huge consequences depending on the scale of the error and fault which could lead to delays in the arbitral process or even worse disqualify appointed arbitrator due to technicality or due to arbitration agreement considered null, void or ineffective.

This Dissertation also discussed challenges that face appointed arbitrators in terms of jurisdiction or good-well. We learned about how the legislator in the UAE as well as England and Wales have acknowledged that in essence the arbitrators have the right to set their jurisdiction in terms of law and process. However, in the same time, crossing their jurisdiction may lead to parties challenging their eligibility and either disqualifying the arbitrator, appointing new arbitrator or nullifying the process of arbitration. We also learned how the parties can disqualify a appointed arbitrator on the grounds of lack of good-well or impartiality. It is common for the losing parties in an arbitration to challenge arbitrator's impartiality and we further saw the amended 2016 Article 257 of the UAE Federal Penal Code have been amended giving chance for losing party to challenge an arbitrator for lack of good-well or impartiality.

The solution for these challenges of parties against arbitrator's appointment and pathological arbitration clauses was also discussed from resorting to an institutional arbitration process or adopting an institutional arbitration agreement. That is why currently parties choosing arbitration prefer an institutional arbitration over an ad-hoc arbitration and making the arbitration agreement in writing as mandated by both UAE and English law as well as avoiding use of bespoke arbitration clause that may be defective and pathological and instead use any of those published by the UAE's four main arbitral institutions: DIAC, DIFC, ADCCAC & ADGM s well as English arbitration institution such as CIARB and LCIA.

Also, this Dissertation discussed possible solutions for arbitrator challenges regarding jurisdiction and good-well by ensuring appointed arbitrators follow the procedure of the arbitration institution practices and its guidelines as well as not exceeding the disputes presented by the parties and adhering to the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration and Rules on the Taking of Evidence in International Arbitration.

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