



**A Study on UAE Courts Supervisory Powers in
Arbitration on the Grounds of Public Policy
Consideration**

**دراسة حول سلطة محاكم الامارات العربية المتحدة في الرقابة على التحكيم
وفقا للنظام العام**

by

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of the requirements for the degree of
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ABSTRACT

A comprehensive lineup of the problem and how important it is to tackle it:

The Court of Cessation may overturn the arbitration award on the basis that the arbitration award conflicts the principal of “public policy. Since the definition of public order is an expanded one, in addition to the absence of a consistent measure of its' elements, all that will make it difficult for the disputing parties to determine whether they should proceed the arbitration path or court’s path, whereas a wrong decision will lead to a waste of time, money and the delay of rights.

For these reasons, this dissertation will analyze different UAE Courts decisions, and I will try and mention as many examples as I can for public order to help litigants as well as arbitrators and the courts to base their decisions on the rationale and strong jurisprudence.

المخلص

بسم الله و الصلاة و السلام على من لا نبي بعده

لما انه للمحكمة ان تبطل حكم التحكيم لمخالفته لقواعد النظام العام ، ولما ان مفهوم النظام العام يعد مفهوم واسع ولغياب القواعد الثابتة التي يمكن من خلالها قياس مدى توافر فكرة النظام العام بالتالي فإنه لا يمكن حصر الحالات التي تعد من النظام العام ، وهذا يشكل صعوبة للمتعاقدین و المتقاضين من تحديد فيما اذا كان عليهم اللجوء للقضاء ام للتحكيم لفض منازعاتهم وعليه فأن الخطاء باتخاذ مثل هكذا قرار قد يؤدي الى اضرار الوقت و المال و تأخير استيفاء الحقوق.

لهذه الاسباب سنتناول هذه الرسالة بالدراسة و التحليل لاحكام محاكم التمييز في الامارات العربية المتحدة، وستقوم بالمغامرة بمحاولة وضع اكبر قدر ممكن من الحالات المتعلقة بالنظام العام و التحكيم لمساعدة المتقاضين و المحكمين والمحاكم لتأسيس قراراتهم على الاسس المنطقية و الفقهية المتينة.

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Chapter One

1.1 Introduction

The laws in most countries of the world allow contracting parties to agree to refer their disputes to arbitration, but in order to enforce or invalidate the arbitration awards, the judicial authority represented by the courts and its departments such as the enforcement department must be used. Therefore, the legislator has defined the courts authorities and restricted the events that could invalidate the arbitral award by the courts. In reviewing these reasons, we find that they were regulated to ensure the respect of the disputing parties' freedom of will and to guarantee applying justice rules and ensure that the arbitrators are not violating public order of the state.

We will be addressing briefly how the judiciary monitors the respect of the parties' will by the arbitrators during the arbitration procedures. Then we will expand on the part related to public order, which is the subject of the research.

Currently there is no special arbitration legislation in the UAE, but there will be one in the near future. UAE legislators organized the arbitration provisions in the third part of Federal Civil Procedure Code (CPC)¹. CPC is the law that is specialized in organizing the procedures that are followed by the courts in civil and commercial matters, where the arbitration provisions are aforementioned in the Chapter (III) "Arbitration" - Articles 203 - 218; Chapter (IV) "Execution of Foreign judgments" - Articles 235 - 238; Chapter (V) "Execution procedures" - Articles 239 – 243.

In addition to the CPC, the legislator ratified the following international treaties relating to arbitration:

- Federal Decree No. 43 for the Year 2006 Regarding the United Arab Emirates joining the Convention of New York on Recognition and Enforcement of Foreign Arbitral Awards 1958

¹ The UAE Civil Procedure Code (11) of 1992 (Hereinafter called (CPC))

- Al Riyadh Convention ratified on 1999
- In 1981, the U.A.E ratified the Washington Convention or Convention on the Settlement of Investment Disputes of 1965.

1.2 Research Questions and Problems:

The UAE legal library has a shortfall of works that analyze UAE cassation court jurisprudence and UAE laws in respect of public order. This dissertation aims to fill the gap. On the other hand, this dissertation will raise a number of potential problems and will answer questions that were not addressed or not answered clearly by the other researchers, including the following:

Does the defense of public order stand as a stumbling block in the development of arbitration?

Does the idea of public order applications in arbitration cases differ from one emirate to another in the UAE?

Is there coordination or harmony between Cassation Courts in UAE regarding public order in arbitration cases?

Has the UAE legislator limited the power of the courts from looking into disputes related to public order and ousted the jurisdiction of arbitrators?

On the other hand, did the legislator prevent the arbitration from ruling certain disputes not related to public order?

Are there disputes that are out of the jurisdiction of both arbitration and the courts? If yes, are they related to public order?

How can this research help researchers or disputing parties avoid any waste of time and money with respect to arbitration?

Moreover, this dissertation will study the grounds for challenging arbitration awards in

general.

The answers to the above questions will be from the practical experiences of the judges in the UAE judiciary.

1.3 Research Methods:

This dissertation adopted the traditional doctrinal legal research in the collection and analysis of the information. The sources were primary and secondary legal resources such as case law, Acts, books, journals, websites, Govt. publication and UAE Court Judgments.

1.4 Significance of Research:

This study is significant in a number of respects. First, it's the only study in the UAE that attempts to study how the UAE legislator limited the power of courts from looking into disputes related to public order and outs the jurisdiction of arbitrators. The study also investigates how the legislator prevented the arbitrator from ruling on certain disputes which are not related to public order. Secondly, the study is also unique since it's the first of its kind that analyzes Article 733 of the Civil Transactions Law, where arbitration shall not be permissible in public order matters. Third, this dissertation raises many question that were not addressed by the other researchers as mentioned in the above Research Questions paragraph.

1.5 Reasons for refusing to ratify the award:

When the arbitration award is issued, the losing party may execute it voluntarily if he is satisfied, but if he is not satisfied, then the only way to implement or to revoke this award is to resort to the courts. The legislator determines exceptional cases that nullified the arbitral award. Thus, Article 216 of the CPC provides that:

1. The parties to a dispute may, at the time of consideration of the arbitrators' award, request

the nullification of the same in the following events:

- a. If the award was issued without, or was based on invalid terms of reference or an agreement which has expired by the time prescribed, or if the arbitrator has exceeded his limits under the terms of reference.
 - b. If the award was issued by arbitrators who were not appointed in accordance with the law, or by only a number of the arbitrators who were not authorized to issue the award in the absence of the others, or if it was based on terms of reference in which the dispute was not specified, or if it was issued by a person who is not competent to act as an arbitrator or by an arbitrator who does not satisfy the legal requirements.
 - c. If the award of the arbitrators or the arbitration proceedings become void and such voidness is affected the award.
2. A request for nullification of the award shall not be rejected on the grounds of a waiver by a party of its right to the same prior to the issue of the award.

With reference to the Civil Procedures Law, we noted that the reasons for the annulment of the arbitration award are divided into two categories as follows:

- Procedural reasons.
- Objective reasons.

2. Chapter Two: Procedural reasons:

The arbitral award may be valid in itself, but the procedures preceding the award are null and void². In other words, for the purposes of dispute resolution, certain procedures must be respected in order to help the parties present their arguments, defense and evidence on an equal basis and enabling them to prove their rights or the obligations of the other party. When the arbitrator or the arbitral tribunal does not respect these procedural rules during arbitration, the arbitral award should be null and void³. This is similar in terms of the general idea of the challenge of court decisions when it comes to non-observance of the Court of First Instance or the Court of Appeal for formality, the ruling is subject to dissolution by the Court of Appeal or by the Court of Cassation. In the following we will discuss those procedural reasons.

2.1 The lack of respect for the rights of defense, the principle of confrontation and equality:

The CPC stipulates in Article (216 / c) that a party may request nullification of the arbitration award if the award of the arbitrators or the arbitration procedures became void and such a void affects the award.

Examples of this are the right of the litigant to discuss the opponent's defense to persuade the arbitrator to decide in his favor, and to enable him to do so, each litigant should obtain a copy of his opponent's memorandums and evidence to be able to defend himself, informing him of the date of the hearings, hearing of the witnesses and hiring of experts etc.⁴

More examples of not respecting the right of the defense are when the arbitrator is not giving a sufficient window of time for litigants to present their defense, or when the arbitration award is passed on the arbitrators personal evidence, not allowing the litigants

² Abdel Fattah, D. (1997). Repeal the arbitral award. 1st ed. Cairo: Dr. Adel Khair Center for Law and Arbitration, p.103.

³ Sami, D. (1997). International Commercial Arbitration. Cairo: House of Culture for Publishing and Distribution, p.433.

⁴ Abdel Fattah, D. (1997). Repeal the arbitral award. 1st ed. Cairo: Dr. Adel Khair Center for Law and Arbitration, p.186.

to confront each other⁵, hearing one of the litigants in the absence of the other, disallowing one of the litigants from presenting an oral plead after they express their desire to do so and having them present their plead before only some of the arbitral tribunal without the rest of them.⁶

Also, as Article (209) of the CPC states in paragraph (2 /a and b) that the arbitrator shall suspend the proceedings to refer to the President of the competent court in the following: a. To pass a judgment in accordance with the law to penalize any witness who fails to appear or refuses to give a statement. b. To order a party to submit any documents in its possession which are necessary for the issue of the arbitration award. Otherwise the award is considered to be null and invalid. This protects the right to achieve all aspects of defense for litigants in the event that the arbitrator is unable to achieve them.

The Dubai Court of Cassation decided that the arbitrator must abide by the basic principles of litigation. One of the most important principles would be respecting the rights of the defense and for the dispute to be dealt with only after fully informing the litigants and enabling them to study and respond to the other litigant's memorandums and documents, while allowing them a sufficient frame of time to prepare their defense. Applying this principle in the present case, the court found that the arbitrator has not been in any way in accordance with these procedures. For that, the court held that the arbitration award is considered to be null and invalid.⁷

The highlighted question here is what if one of the litigants prevented the other litigant from obtaining evidence during the arbitration proceedings, which - if submitted - would have reshaped and changed the judgment? In this event, the jurisprudence sees it to be one of the reasons that cause the arbitral award to be invalid for committed fraud and forgery by one of the litigants, which holds the same invalidity impact as presenting falsified papers or providing a false witness.⁸

Article 211 of the CPC states that; “The arbitrators shall cause the witnesses to take oath. Whoever makes a false statement before the arbitrators shall be deemed to have committed

⁵ Abdel Fattah, D. (1997). Repeal the arbitral award. 1st ed. Cairo: Dr. Adel Khair Center for Law and Arbitration, p.187.

⁶ Shafiq, M. (1996). International Commercial Arbitration. 1st ed. Cairo: Arab Renaissance House, p.310.

⁷ Cassation Court of Dubai, Case No. 96/1988 Civil challenge.

⁸ Mokhtar Burberry, M. (1997). International Commercial Arbitration. Cairo: Arab Renaissance House, p.239.

the crime of perjury." According to the Dubai Court of Cassation⁹ the arbitrators must witness swearing the oath prior to giving testimony, this condition is mandatory in order to ensure the validity of the testimonial, since the law recognizes false testimonies to be crimes of perjury as stated in Article 252 of the Penal Code, which made the penalty for the crime of false testimony conditioned to the witness being sworn in before the legal authority. Thus, the arbitrators are not entitled to dispose of their duty in this regard, even if the litigants had not objected to such violation of this procedure. This violation results in the invalidity of the arbitration proceedings conducted by the arbitrators.

The question raised here is whether the litigants agreed to waive this right before the arbitrators' verdict not to permit swearing the oath.

Waiving the right of having witnesses swear the oath by litigants would not preclude the invalidity of the award, in accordance with the provisions of the second paragraph of Article 216/2 of the CPC which states that: "A request for nullification of the award shall not be rejected on the grounds of a waiver by a party of its right to the same prior to the issue of the award."

On the other hand, we must mention an important provision in the CPC which states that the arbitrator shall issue his award without being bound by any procedures other than those stipulated in this arbitration articles in the CPC and those articles pertaining with calling of the parties, hearing of their pleas and enabling them to submit their documents. Notwithstanding the foregoing, the parties to the dispute may agree on certain procedures to be followed by the arbitrators,¹⁰ they are usually referred to in the rules of procedure of arbitration centers.

In spite of the above, the arbitral tribunal's consideration of this formal condition does not entitle any of the litigants to abuse their rights when applying this principle in order to annul the arbitration award. In this respect, the court¹¹ held that pronouncing the words "I Swear" by the witness is sufficient for the oath to be valid and it is not required to include the word of majesty or the name of the lord. It is also not required for the oath to be in the

⁹ Cassation Court of Dubai, Case No. 503/2003 Civil challenge.

¹⁰ Article (212) CPC.

¹¹ Cassation Court of Dubai, Case No. 171/2010 Commercial challenge, Cassation Court of Dubai, Case No. 200/2010 Commercial challenge, Cassation Court of Dubai, Case No. 212/2010 Commercial challenge.

same wording form that is mentioned by CPC, since the form and meaning of the oath given to the witnesses by the arbitral tribunal which is "I hereby swear that the evidence I present is the truth, the whole truth, and nothing but the truth" - indicates that the testimony is the word of truth and nothing other than the truth, and so the court refused to acknowledge the testimony of a witness provided by one of the litigants, as the witness didn't take the oath before their testimony in accordance to the previous version. In this context, the Court of Cassation in Dubai decided that the rule indicated in article (208 / 3) of the CPC that if there shall be more than one arbitrator, they shall jointly conduct the investigation and each of them shall sign the minutes of sessions is a procedural rule in order to ensure that the litigants enabled the proof. Nevertheless, the violation of this rule by conducting the investigation by one of the arbitrators does not entail nullification so long as it was conducted on the basis of an implicit authorization from the arbitral tribunal involved - and allowing litigants to deny what the other side claims through the same way because the end-result of this investigation is ultimately subject to the assessment of the arbitrators and their collective judgment in the conclusion of the subject matter of the dispute so long as the appellant had not claimed that an arbitrator has solely implemented procedures to the investigation at some of its stages that had prevented him from presenting his defense or evidence properly and the result of this investigation was subject to the collective assessment of the arbitrators together when the subject matter of the dispute was concluded.¹²

In order to clarify the Court's view in its previous decision, in practice the courts in the UAE, which is constituted of a three-judge panel would most likely refer and delegate the testimony of the witnesses to one of the judges to carry out the investigation. Therefore, the Cassation Court considers one of the arbitration committee's members acting on behalf of the whole committee to carry out the investigation's valid legal procedure and is not contradictory to the CPC.

The law also specified formal procedures that must be followed even when the arbitration's award is issued, as the arbitrators' award must be issued by an agreeing majority or by

¹² Cassation Court of Dubai, Case No. 537/1999 Civil challenge.

consensus, and the judgment must be written with the dissenting opinions if there are any. It must also include in particular, a copy of the agreement on arbitration and the summary of the statements stated by the litigants as well as their presented documents, the reasons, statement, date and place of arbitration and the signatures of the arbitrators. In the event that one or more of the arbitrators refuse to sign the judgment, this too shall be stated therein and the judgment shall be valid if signed by the majority of the arbitrators.¹³

The Cassation Court of Dubai decided that it is a basic fundament that the award would be valid if passed by the majority of the arbitrators. Therefore, the fact that an objection by any of the arbitrators is not proven - whatever the opinion might be - does not invalidate the arbitral award.¹⁴ With respect, the way I see it, the litigants have the right to obtain the judgment with all that was stated in it as the opposing ruling is a part of the whole ruling and it wouldn't be permissible to withhold it from the litigants.

2.2: The constitution of the arbitral tribunal:

The legislator lays down certain mandatory and complementary rules to complement the parties' autonomy when selecting the arbitrators.

The question that arises here: is the legislator's interference with the constitution of the arbitral tribunal considered arbitrary in the litigants' autonomy who wishes to have a certain form of arbitration board?

It is not possible to answer this question before presenting the legal basis related to this matter, analyzing it and studying its' applications by the courts.

In Article (204/1) of the Civil Procedure Code, we find that the legislator intervenes through non-mandatory rule which states that if a dispute arises between the parties prior to the execution of an agreement between them to refer the same to arbitration, or if one or more of the nominated arbitrators refuses to act as such, withdraws, is dismissed, has his appointment revoked or is prevented from acting due to an encumbrance, and no agreement exists between the parties in this respect, the court which has jurisdiction to

¹³ Article (212-5) CPC.

¹⁴ Cassation Court of Dubai, Case No. 13/1991 Civil challenge.

consider the dispute shall appoint the necessary number of arbitrators at the request of one of the parties filed in the normal procedure for filing a suit. The number of arbitrators appointed by the court shall be equal or complementary to the number agreed between the parties to the dispute.

Moreover, if there is more than one arbitrator, the number shall, at all times be odd¹⁵ otherwise the award will be considered null and void. The rationale here is to ensure that a judgment is accomplished and thus justice can be achieved as it could be impossible to issue a conflicting award if the arbitrators were an even number which will disrupt justice. Some suggest that the president can weigh down whichever side they vote with, but this contradicts with the fact that the president is one amongst equals. Each member of the board is equal in their arbitration authority and votes, otherwise, they would not be competent to pass judgment and conclude disputes between people, which necessitated the legislation in Article 206/2, which invalidates any award issued by an arbitration board of members of an even number.

Another provision of the law states that in the event of the arbitrator being a minor, bankrupt, legally incapacitated or deprived of his civil rights due to a criminal offence and has not been rehabilitated,¹⁶ and then his judgment is null and void. The arbitrator is a person who owns the trust of the litigants, not only when they are appointed and chosen, but also at all of the arbitration stages and its procedures. By virtue of this, the arbitrator equates with a judge in terms of selection conditions and guarantees of the litigants before them.¹⁷ The arbitrator must also hold the impartiality of a judge.¹⁸

However, this does not mean that if the arbitrators are a group, that one of them can refrain from passing judgment, as the Court of Cassation in Dubai decided that a member of the board may determine the hearing and pronounce the ruling without the rest of the members on explicit or implicit authorization from the arbitration committee. The deliberation of the case takes place after the completion of the pleading and before pronouncing the judgment by meeting the arbitrators in one place and after discussing the evidence and legal grounds

¹⁵ Article (206/2) CPC.

¹⁶ Article (206/1) CPC.

¹⁷ Lotfy, M. (n.d.). Good preparation for the Arab court. Sana'a, pp.26-32.

¹⁸ Al Makhlafi, A. (2002). The law applicable to the proceedings and the substance of the dispute in international commercial arbitration. *Journal of Arbitration*, (26), pp.13-18.

presented in the dispute. The signature of the arbitrators on a copy of the judgment is evidence that it was issued by all of them and evidence to their participation in the deliberation in it, and that the proceedings have taken into account the reality of facts in the arbitration without the need for these statements and details to be explicitly and specifically stated or mentioned in the judgment.¹⁹

From the foregoing, it turns out that the legislator's intervention in the formation of the arbitral tribunal does not constitute arbitrariness of the legislator with respect to the will of the parties who wish to have a certain form of arbitration, but it is aimed to protect them and protect the arbitration system.

2.3: Lack of essential arbitration procedures:

The non-compliance of the substantive proceedings in the arbitration means that the arbitral award does not comply with substantial requirements which had been set by the legislator, that in the event that the award is violated, it is to be invalid, such as rendering an oral award, unsigned award by all or most of the arbitrators, award not containing the reasons of the ruling itself,²⁰ or a contradictory award.²¹

It is noted in this section that the UAE legislator has stipulated that the acceptance of the appointment of an arbitrator shall be in writing or may be evidenced by recording the same in the minutes of the sessions²²; otherwise the award is null and void even if the award is correct in substance.

What if one of the litigants had a reason that led to interruption in the arbitration proceedings? Should the arbitrator continue to decide the dispute? In this case, the UAE legislator decided that the hearing of a dispute before the arbitrator shall be terminated if a reason for such termination occurs, as stipulated under CPC,²³ unless the case has been

¹⁹ Cassation Court of Dubai, Case No. 403/2003 Civil challenge.

²⁰ Abdel Fattah, D. (1997). Repeal the arbitral award. 1st ed. Cairo: Dr. Adel Khair Center for Law and Arbitration, p.191.

²¹ Sawi, A. (2002). Arbitration in accordance with Law No. 27 of 1994. Cairo, p.239

²² Article (207) CPC

²³ Article (209/1) CPC

reserved for award. Instances that could lead to discontinuance or interruption include the death of a party or loss of capacity by the party (e.g. termination of agency).²⁴

The reason for the exclusion by the legislator for the effect of the termination of the arbitration proceedings from the event of having the case reserved for judgment was because at this stage, the case is out of the control of the litigants and the door is closed from their side to present any documents. On the other hand, it's now in the arbitrator's full control to reserve for judgment. In this case however, the practical procedure in courts shows that the judge allows the litigants to submit further requests to the court even after the case has been reserved for judgment, and in some cases in order to achieve justice, the judge reopens the case and allows the parties to submit new applications. In my opinion, since the arbitrator's ruling is irrevocable and final, and no appeal on the subject of the ruling can be made, the legislator had to give the arbitrator the authority to accept the request to reopen the argument in order to achieve justice

Furthermore, if during the course of arbitration, a preliminary issue, which is outside the powers of the arbitrator, arises or if a challenge has been filed that a document has been counterfeited, or if criminal proceedings have been taken regarding such counterfeiting or for any other criminal act, the arbitrator shall suspend the proceedings until a final judgment on the same has been passed. It is important to note in this regard, that the arbitrator should not suspend the arbitration proceedings if the criminal case was under the public prosecutor departments authority, unless it has been sent to the criminal court, and of course, both the criminal case and the arbitration case should be related to the same subject matter of the dispute and have the same litigants.

In addition, the arbitrator shall suspend the proceedings and refer to the President of the competent court in the following:

- a. To pass a judgment in accordance with the law to penalize any witness who fails to appear or refuses to give a statement.

²⁴ See Annotation, Federal Law No. 11 of 1992 on the Civil Procedures, commentary by Gordon Blake et al, available at: <http://lazareff-lebars.com/en/commentary-uae-arbitration-chapter-dr-gordon-blanke/>

b. To order a party to submit any documents in its possession which are necessary for the issue of the arbitration award.

c. To decide on evidence by commission.²⁵.

One more example of essential arbitration procedures which was held by the Court of Cassation in Dubai in a dispute arose between a contractor who wanted to prove the progress and the completion before assigning the remaining work to another contractor by the owner to complete the work. The court decided that if the arbitration clause in the construction contract is devoid of conservative measures or expeditious proceedings, or not mentioned later in their agreement for arbitration, then the arbitrator has no authority to take any legal action in conservative measures or expeditious proceedings, whereas the judge of urgent matters has the authority just to give judicial order to conservative measures or expeditious proceedings. After finishing the expeditious procedures, the judge will close the case and will not give a judgment in the dispute since it's out of his jurisdiction.²⁶

Another substantial matter is that the arbitral tribunal is to issue its judgment within six months from the date of the first session and the litigants can agree explicitly or implicitly to extend the deadline. Therefore, the arbitrators are abided to the timeframe set by the litigants.²⁷

The question that arises here is what's settled on by the judiciary in the UAE in case the arbitrator exceeded the period specified by the litigants in order to resolve the dispute?

In many of its decisions, the United Supreme Court has adopted many rules and principles relating to the length of the arbitration proceedings, one of which is that a litigant may ask to invalidate the arbitration award when the specified timeframe is exceeded in accordance with Articles 210/1 and 216/1 of the CPC²⁸, and therefore the court and the law are consistent with the fact that the litigants in the arbitration proceedings are the ones who determine the procedures including the duration of the arbitration. In case the litigants were

²⁵ Article (209/2) CPC

²⁶ Cassation court of Dubai, Case No. 47/2010 Civil

²⁷ [Article 210 CPC]

²⁸ Federal supreme court case No.71 of the year 20

unable to agree upon a specific period of time, Article 210²⁹ states that the arbitrator shall issue his award within six months from the date of the first arbitration session; otherwise any of the parties shall be entitled to refer the dispute to the court or, if a suit has already been filed, to proceed with the same before the court. The parties to the dispute may, expressly or impliedly, agree to extend the date fixed by agreement or under the law and may authorize the arbitrator to extend the same for a specified period. The court may, at the request of the arbitrator or one of the parties, extend the period specified under the above paragraph for such a period, as the court may deem sufficient to decide on the dispute. ³⁰

On the other hand, we will discuss the time duration from another angle in section 3.2: lack of respect for the will of the parties.

This is because the formal reasons that lead to the annulment of the arbitral award are the reasons related to the formation of the arbitral tribunal and the procedures adopted by the tribunal. However, the question that arises here is whether this violation occurred and whether the litigants were informed and aware of it and yet raised no objection and though it is unrelated to public order, would this be considered an implicit waiver by giving up on adherence to invalidity?

The answer to this question is not always a yes or a no, but rather it depends on the circumstances of each case. For example, if the arbitration tribunal or committee is formed by an odd number of arbitrators, its ruling would be invalid even if the litigants agree to it, since it's not supported by any complementary article of the CPC. It should be noted here that Article 216/2 of the CPC states that a request for the nullification of the award shall not be rejected on the grounds of a waiver by a party of its right to the same prior to the issuance of the award in the events mentioned in the first paragraph of the same article.

²⁹ Article (210) CPC

³⁰ Federal supreme court(2013) the rule of the federal supreme court in the development of Emirati judicial thought Abu Dhabi: Federal supreme court p.32

3. Chapter three: The objective reasons

In this topic, there are three main objective reasons that may lead to the annulment of the arbitration award, which are reasons related to the arbitration clause, lack of respect for the will of the parties and finally, violation of public order rules.

Chapter three will focus on the last reason, the violation of public order rules, which is the main subject of this dissertation.

3.1: Reasons related to the arbitration clause:

Referring to the provisions of the CPC, we note that a number of cases have been mentioned above, which can invalidate the arbitration agreement if one of the litigants or the court itself requests it even if the litigants did not ask for it. Those reasons included lack of agreement on arbitration and invalidity of the arbitration agreement as in the following:

3.1.1: Lack of agreement on arbitration:

Lack of agreement on arbitration includes many examples like when the arbitration award is issued without an arbitration deed³¹ in the event that the litigants did not initially agree that the dispute is to be resolved by arbitration, and when one of the litigants proves that the alleged clause is not covered by an arbitration agreement or that it is not more than an agreement on mediation or expertise determination, and when there is an absence of offer or consent to arbitration by one of the contracting parties³², or when there is consent but with amendments that were never agreed upon by the parties³³, or having one of the litigants adhere to the arbitration clause despite having the other not sign the contract which includes the arbitration clause³⁴. For example, the buyer and the seller both agree on

³¹ (CPC) Article (216)

¹ The parties to a dispute may, at the time of consideration of the arbitrators award, request the nullification of the same in the following events:

A. if the award was issued without, or was based on invalid terms of reference or an agreement which has expired by time, prescription or if the arbitrator has exceeded his limits under the terms of reference.

³² Sawi, A (2002) Arbitration in accordance with law No. 27 of 1994 Cairo P.227

³³ Mokhtar Burberry , M.(1997) international commercial arbitration Cairo: Arab renaissance house p.343

³⁴ Hadad H. (1997) Challenging the invalidity of arbitral awards in private disputes 1st ed. Alexandria Dar al fekr al jamehe P.119

the arbitration clause, which makes it a contract that does not affect the carrier unless they all agree to this condition.

The UAE legislator has ruled out such dispute from being resolved through arbitration by stipulating that the arbitration clause is not established unless it was a written agreement³⁵. The Court of Cassation has also ruled that if there is an unsigned document containing an arbitration clause which the buyer referred to by a signed sale contract, then this arbitration clause is null³⁶. Nevertheless, the contract may refer to the arbitration clause in a model contract such as the FIDIC condition of the contract, in this case, the arbitration clause as stated in the FIDIC contract shall be valid and applied, unless it has been referred to an unknown model contract, in which case the arbitration clause mentioned in it becomes inapplicable³⁷.

From my point of view, I don't agree that the writing is a cornerstone or an element of the arbitration agreement the absence of which will result in the nullity of the arbitration clause, but rather the writing is the only way to prove existence of the arbitration clause. In other words, the proof is one thing, and the existence or absence of a fact is another.

Practically, in some cases the litigant would argue that there is no arbitration clause to merely to prolong the dispute before the court or before the arbitrator. In this case, I believe that there should be a penalty for wasting the other party's and the court's time.

An interesting dispute where the arbitration clause is present in writing in a contract that had been written in two languages, English and Arabic, and the Arabic text includes the arbitration clause while the English text does not. In this case, one of the litigants argued that there is no arbitration clause while the other litigant argued the opposite. My judgment was, since there is a clause in the contract which states that the language to be used if a dispute arises would be the Arabic language then the arbitration clause is valid.

However, if the litigant participates in the arbitration proceedings without objection to the absence of a written arbitration agreement and does not make any reservation prior to

³⁵ (CPC) Article 203

³⁶ Cassation court of Dubai, Case No. 153/2011 Real Estate challenge

³⁷ Abdel Fattah, D. (1997). Repeal the arbitral award. 1st ed. Cairo: Dr. Adel khair center for law and arbitration, P.175-183

having issued an arbitration award, it is deemed that the arbitration agreement has been duly concluded and thus the claim of invalidity cannot be accepted, as the arbitration clause becomes valid as soon as there is a record signed by the litigants and the arbitrator³⁸.

There is another case which occurs when an arbitration agreement is signed by a person who has no authority to act on behalf of the contractor company; an agreement referring to arbitration should be signed by an authorized person on behalf of the company. The manager's responsibility shall be the same as the board of directors' in LLC companies and any provision in the company memorandum otherwise should be void as stated in Article 237 of the Commercial Companies Law³⁹. The Dubai court of Cassation has held that the LLC manager has the full power to enter into an arbitration agreement. The Dubai court of Cassation has held that the power of attorney to a third party by the LLC company to enter into the arbitration agreement in the name and on behalf of the company should mention that he has the power to enter into the arbitration agreement⁴⁰.

It should be noted here that if the employee or the manager exceed their authorization or powers of attorney by signing an arbitration agreement, it would be partially invalid to the interest of their employer, since the company alone has the right to challenge the validity of the agreement on arbitration, and that is what the Court of Cassation in Dubai leans towards⁴¹.

The invalidity or termination of the original contract that includes an arbitration clause does not preclude the arbitration clause from being valid and producing its effect unless the nullification extends to the arbitration clause itself in which case the clause would be ineffective. This is due to the arbitration clause being independent from the main contract. Accordingly, invalidity of the arbitration clause does not lead to invalidity of the original contract that what was held by the cassation court when it was argued that the appellant ‘‘continued to implement this agreement effectively without objecting to any item in it since the date of signing it until the outbreak of the conflict for over two years,

³⁸ Abdel Fattah, A. (1990). Kuwait arbitration law. 1st ed. Kuwait: Kuwait University, P.362.

³⁹ Federal law No.8 of 1984

⁴⁰ Construction Management Guide. (2017) challenging an arbitration award in the UAE courts. (online) available at <http://www.cmguide.org/archives/3088> (accessed july19th 2017)

13 Cassation court of Dubai case No. 2222/2005 Civil Challenge

which indicated that the appellant's General Manager has been allowed by the appellant to sign this agreement, accepting the arbitration clause contained therein ”⁴² Dubai court of Cassation has held that *“It has been confirmed by the consistent jurisprudence of the UAE courts that an arbitration agreement is separate from the main contract in which it is contained or alongside which it exists, and hence survives the termination or nullity of that main contract unless the nullity extends to the arbitration agreement on the specific facts of the case.”*⁴³

3.1.2: The arbitration agreement to be invalid:

If the arbitration award failed in respecting the required legal formality or public order, the legal consequence invalidates the award.⁴⁴

Article 203 of the Code of Civil Procedure stipulates that: "The arbitration agreement shall be valid only for those who are eligible to dispose of the right in dispute."

The question that arises here, is what if the litigant - who signed the arbitration agreement, is fully eligible in some aspects of the arbitration and lacking or incomplete in others?

Full legal capacity is required when the arbitration is approved, even if such eligibility later becomes no longer available, that should never annul the arbitration agreement.

The general rules in the Civil Transaction Code Article 159 stated that: when a minor concludes a contract, the financial dealing of a minor of the age discretion shall be void if they are purely to his detriment and shall be valid if they are purely for his own benefit. Nevertheless, these general rules are not applied on the arbitration contract since the legislator stated that the agreement to arbitration is invalid if it was issued by an ineligible person⁴⁵.

⁴² Cassation court of Dubai , Case No. 164/2008 Civil Challenge

⁴³ (see Case No. 108/Judicial Year 3, ruling of the Federal Court of Cassation of 12 March 2009; Case No. 795/Judicial Year 4, ruling of the Abu Dhabi Court of Cassation of 9 December 2010; and Case No. 164/2008, ruling of the Dubai Court of Cassation of 10 October 2008).” And Blake et al supra

⁴⁴ Al- Shawarbi, D. (1991). The civil procedural. Alexandria: Monshaat Al Maharaf fee Alexandria

⁴⁵ (CPC) Article (216-B)

In this regard, it is necessary to point out that the judicial system as well as Islamic Law has settled on a principle and mutual understanding of independence for the arbitration clauses from the main contract. However, the Federal Supreme Court in the Emirate of Abu Dhabi has issued a judgment which is contrary to that principle and stated that "as consequences for the invalidity of the original contract, the arbitration clause shall be invalid. Accordingly, the jurisdiction shall stay with the court who owns the required jurisdiction to nullify the contract and finalize the dispute"⁴⁶.

By analyzing this judgment, we found out that the court has failed to respect the principle of independency, a principle that is governed by the law⁴⁷.

Meanwhile, the Cassation Court of Dubai has held-on the merit the independence principle of the Arbitration clause and decided contrary to the above Federal Supreme Court decision, when the Cassation Court of Dubai issued a judgment and stated that "*The contracts which include the arbitration clause shall not preclude the validity of the arbitration clause even when the original contract is invalid or canceled and terminated and all effects of nullification, annulment or termination of the original contract shall remain in effect , unless the invalidity extends to the arbitration clause itself. Thus, the arbitration clauses shall not be affected by the contract's invalidity as long as the arbitration clause has its own related subject; those are represented by dispute that is governed by the Arbitration clause and waived from the jurisdiction of the courts and to the jurisdiction of the arbitral tribunal*"⁴⁸.

As an example, when an agreement is reached to settle a dispute in accordance with the arbitration, the disputed parties must determine in that agreement the subject of the dispute. Meanwhile, the Federal Supreme Court in Abu Dhabi has concluded that⁴⁹ if the contracting parties have added the Arbitration agreement at the time when the contract was finalized, it is sufficient to refer to the arbitration clause in general.

⁴⁶ Federal Supreme Court Case No. 209 for the year 15. [However, after noting this case, Blake argues that "more recent case law of the Abu Dhabi Courts (see Case No. 353/2011, ruling of the Abu Dhabi Court of Cassation of 24 August 2011) appears to support the doctrine of reparability."

⁴⁷ Cassation Court of Dubai, Case No. 197/2002 Civil challenge

⁴⁸ Federal Supreme Court (2013). The Role of the Federal Supreme Court in the Development of Emirati Judicial Thought. Abu Dhabi: Federal Supreme Court, p.32

⁴⁹ Federal Supreme Court Case No. 605 for the year 21, Federal Supreme Court Case No. 22 of 22

Since the law and its interpretations in the United Arab Emirates are within the court's powers and responsibility, courts have considered the cases in which the appellant failed to respond at the first session, to the other party without referring to the arbitration clause shall lead the court to conclude that the appellant has waived his right to resolve the dispute through arbitration. As such, the court shall review this case within its jurisdiction⁵⁰.

The disputing parties are not in a position to include or refer to the arbitration clause in a matter that is related to criminal or gambling contracts. Also, contracts that violate public rights and order such as a rental contract for a house for the purpose of prostitution, the arbitration agreement herein shall be considered as invalid. Therefore, if the arbitration agreement is referred in a dispute for such cases, the court will dismiss this request⁵¹. Article, 203/4 of the Civil Code states that arbitration shall not be allowed in cases where there is no right to dispose. This means that only a person - whether natural or legal - that has the capacity to dispose of its own rights may enter into an agreement to arbitrate.⁵²

Matters related to personal status without their financial rights at issue are not arbitrable. Therefore, arbitration is not permissible in the following situations; whether a marriage contract is valid or not, whether a person is an heir or not, whether a person has the right to child custody or not. It also cannot determine whether a child is from the father or mother or whether a child and mother shall receive money for monthly expenses.. In addition, it cannot determine whether a person has reached the age of majority or not. Nevertheless, arbitration is permissible for the amount of expenses to the wife or father or mother⁵³.

In addition, the usage of the allocated money and the money of the moratorium and governmental fixed pricing laws and laws issued in exceptional circumstances are of the public order, all cannot be arbitrated⁵⁴.

⁵⁰ Federal Supreme Court (2013). The Role of the Federal Supreme Court in the Development of Emirati Judicial Thought. Abu Dhabi: Federal Supreme Court, p.32

⁵¹ AlAhdab, A. (1998). Encyclopedia of International Arbitration. 1st ed. Cairo: Dar Al Mahara, p.248.

⁵² [Blake et al supra]

⁵³ Journal of Law and Business. (2017). Effect of Public Order on Arbitration Ruling and its Implementation (Comparative Study) Journal of Law and Business. [online] Available at: <http://www.droitentreprise.com>.

⁵⁴ Mokhtar Burberry, M. (1997). International Commercial Arbitration. Cairo: Arab Renaissance House, p.117.

It is settled that the general matters related to commercial disputes may be referred to arbitration, but in some exceptional legislation for specific cases, resort to arbitration has been considered as invalid such as arbitration in the contract of a commercial agency. The purpose of this exception is to protect the commercial interests of the United Arab Emirates (UAE) citizen's⁵⁵. If a dispute occurred over an agreement for a person who is not holding an Emirati nationality regarding being a commercial agent of a foreign company, such agreement is within the jurisdiction of the court to determine its validity. However, if the agreement is made as a sales agreement and not a commercial representation contract, in this case, arbitration is allowed.

Another example is a contract for the sale of land and real estate - other than free zones ownership - to non-UAE nationals or the Gulf Union Council citizens. The agreement to refer any dispute to arbitration under this contract is an invalid agreement as the UAE's Legislator has pre-considered the invalidity on this type of sale.

"In the view of the Dubai Court of Cassation, the Sole Arbitrator did not have the power to adjudicate matters under Article 3 of Law No. 13 of 2008 given that "such dispute [i.e. the registration vel none of a property under Article 3] is considered to be related to public order for being related to the rules of private ownership and the circulation of wealth ...". To arrive at this conclusion, the Court of Cassation relied on the definition of public policy contained in Article 3 of the UAE Civil Transactions Code"⁵⁶.

In addition, in the event that the arbitration agreement is concluded by a person who has no capacity at its conclusion, or that the arbitration agreement deals with a person who is not a party to the contract, for example, the owner and the contractor agree in the contract that if there is a dispute between the contractor and the Engineer in relation to the construction works, either party can submit the dispute to arbitration without having the Engineer's consent and pre-approval to this condition in writing, shall be considered as invalid arbitration agreement.

⁵⁵ Cassation court of Dubai , Case No. 607/2003 Civil Challenge.

⁵⁶ Blanke, G., Cronin, K. and Paulsson, J. (2017). Public Policy in the UAE: Has the Unruly Horse Turned into a Camel? - Kluwer Arbitration Blog. [online] Kluwer Arbitration Blog. Available at: <http://kluwerarbitrationblog.com/2012/10/14/public-policy-in-the-uae-has-the-unruly-horse-turned-into-a-camel/> [Accessed 23 Sep. 2017].

All of these conditions shall be detailed in the following paragraphs.

3.2: lack of respect for the will of the parties:

The will of the disputing parties must be respected by the arbitrator; the arbitrator's authorities are derived from this will. In the case that the arbitrator does not respect the disputing parties' will, it can be considered as a reason for challenging the arbitration decision, and this can be summarized in the following situations:

1. Failure to respect the period agreed upon to resolve the dispute considered between the parties.
2. If the arbitral tribunal failed to apply the law chosen by the parties to govern the dispute.
3. If the judgment includes matters not covered by the arbitration agreement or exceeding the limits of the agreement.

3.2.1: The award issued after the time limit:

If the time limit determined by agreement of the parties or one specified by law has elapsed prior to the issuance of the arbitration award, while explicitly or implicitly the parties have not agreed to the extension of time, then the arbitration award shall be dismissed as the arbitrator no longer has jurisdiction over the matter⁵⁷. This is because the will of the disputing parties must be respected by the arbitrator. In this regard, Article 210 of the UAE's Civil Code has expressly specified the duration of the arbitration and the disputing parties' agreement to the contrary and approvals as follows:

1. If the parties to the dispute did not specify in the arbitration agreement, a date for the issuance of the award, the arbitrator shall pass his award within six months from the date of the first arbitration session; otherwise any of the parties shall be entitled to refer the dispute to the court or, if a suit has already been filed, to proceed with the same before the court.

⁵⁷ Article (216-1-A) CPC

2. The parties to the dispute may, expressly or impliedly, agree to extend the date fixed by agreement or under the law and may authorize the arbitrator to extend the same for a specified period. The court may, at the request of the arbitrator or one of the parties, extend the period specified under the above paragraph for such a period, as the court may deem sufficient to decide on the dispute.
3. The period specified as aforesaid shall cease to run whenever the arbitration is discontinued or terminated before the arbitrator and shall recommence from the date on which the arbitrators are notified of the removal of the reason for which the dispute was discontinued or terminated. If the remaining period is less than a month, it shall be extended to one full month.

The Dubai Court of Cassation has explained that in accordance with Article 210 of the UAE's Civil Law, the arbitrator cannot exceed the fixed date for issuance of the arbitration award which is determined by the parties or extends such time for other periods by his own will. Indeed, the presence of the disputing parties during the arbitration hearing and involvement in the discussion after the deadline can be interpreted as being the disputing parties' acceptance for extension of the pre-agreed deadlines⁵⁸.

It is important to mention that the legislator in Dubai⁵⁹ has decided that the Executive Committee of the Dubai International Arbitration Center may decide to extend the time limit for issuance of the award on the basis of a reasoned request from the Arbitration Commission or at the initiative of the Executive Committee. This can be considered as a provision that may violate the disputing parties will⁶⁰, but I may disagree with this opinion because when the parties agree on the arbitrate at an arbitration center, they are deemed to have agreed on the center's written regulations which give the arbitration center such power.

As such, it is noted that the time limit for the issuance of the award is not part of public order; since it is possible for the parties to agree otherwise than the predetermined period in

⁵⁸ Cassation Court of Dubai, Case No. 102/2010 Civil challenge

⁵⁹ Article (36/4) of Decree No. (11) of 2007 (Ratification of the Arbitration Rules of the Dubai International Arbitration Center)

⁶⁰ Cassation Court of Dubai, Case No. 171/2010 Commercial challenge,

the law. Therefore, the court cannot raise this issue on its own. In this context, the Court of Cassation in Dubai decided that the conclusion to be drawn from the provisions in Articles 210 and 216 of the Civil Code was that the arbitrator that exceeds the agreed period of time to issue his award, or in the case of failure to define the period for issuance of the award and where the arbitrator subsequently exceeded the period stipulated in Article 210, shall result in invalidity of the arbitration award if the invalidity is raised. However, the court may dismiss the request for the award's annulment issued outside the time limit, if the appellant has explicitly or impliedly waived its right in relation to the pre-agreed time limit as this issue should have been raised the first time, at the Cassation court⁶¹.

3.2.2: Tribunal failed to apply the law that the parties agreed to apply:

Based on the principle of freedom of contract, the disputing parties are to agree on the substantive law that will govern their dispute during the arbitration. However, the question that arises is whether the parties can agree on a foreign law which contradicts with the public order or Sharia Islamic law.

The UAE's civil transactions code states that it is not permissible to apply a foreign law if its provisions are contrary to public order and morals. In Article (3) of the Code, it is stated that matters related to personal status such as marriage, inheritance, descend, wealth and the rules of individual ownership and other rules of the society as how it is based are part of public order, which do not contradict with the strict rulings and basic principles of Islamic Sharia law.

The argument over the foreign law application was concluded by Article (27), which stated that provisions of any foreign law could not be applied if those provisions were contrary to Islamic Sharia law, public order or morals in the United Arab Emirates. In the matter of marriage of foreigners, the fulfillment by both spouses of the conditions required by their personal law is enough to validate their marriage contract according to article 12 of the CTC, and it is not permissible to exclude the provisions of the applicable foreign law except to be a

⁶¹ Cassation Court of Dubai, Case No. 344/2009 Civil challenge

contravention of public order or morals in the UAE since this is what was stated and required by article 27 of the CTC. This is what was decided by the **Cassation Court of Dubai**⁶²

3.2.3: If the award covers matters not included in the arbitration agreement or exceeds the limits of the agreement

The arbitrator's powers are derived from the arbitration agreement, and if he exceeds this agreement, he has exceeded his powers. In other words, the arbitrator or the arbitral tribunal is bound by what is presented, and has no right to exceed the limits claiming that this is one of the requirements of the dispute or lead to resolve it or anything related to it⁶³.

For further discussion, it is important to know how the Court of Cassation dealt with the arbitral award when the arbitrator exceeded his pre-defined limits of powers by ruling more than required under the arbitration agreement. Has it invalidated the entire award or nullified what the arbitrator exceeded in his rule?

The disputing parties may, at the time in which the court is approving the arbitrator award, request for invalidity of the award of the arbitrators for the reason related to exceeding the arbitration agreement and arbitrator's power. However, if the award covers issues not demanded by the disputing parties or the award deal with matters more than what has been claimed, those specific parts from the exceeded award but not the entire award is null and void, but in case that the causal links between the eligible claim and exceeded parts of the award cannot be defined from the overall judgment, then the entire award is invalid⁶⁴. The court has the full jurisdiction to assess and decide on the exceeded award and eligible claim requested by the disputing parties. Indeed, the court has the power to review the facts of the case, interpret the agreements and evidence without limitation or restriction from the Court of Cassation as long as their interpretation for the meaning are within the allowance made by the law.

The Cassation Court of Dubai in Case No. 145/2012 Commercial challenge, ratified the Court of Appeal judgment that invalidates part of the arbitration award as the arbitrator has

⁶²Cassation Court of Dubai, case No. 2005 / 14 personal Affairs challenge and 2005 / 18 personal Affairs challenge

⁶³ Mokhtar Burberry, M. (1997). International Commercial Arbitration. Cairo: Arab Renaissance House, p.245.

⁶⁴ Article (216-1) CPC

exceeded the limits of the arbitration agreement and award for things not requested by the disputing parties⁶⁵.

In another award, the court has stated that the failure of the contracting parties in the original contract or in the arbitration agreement to allow for the arbitrator jurisdiction to take precautionary measures or urgent matters and their agreement to arbitrate the dispute over the interpretation or execution of the contract does not empower the arbitrator to adjudicate these matters or not to allow for the parties to adjudicate these matter in the court or to issue an award for them as being of the general jurisdiction⁶⁶.

⁶⁵ Cassation Court of Dubai, Case No. 145/2012 Commercial challenge

⁶⁶ Cassation Court of Dubai, Case No. 47/2010 Civil challenge

4. Chapter Four: Canceling and nullifying the arbitral award for violating the rules of public order

This chapter addresses the following issues:

The validity of the following statement: Public order is a stumbling block to the development of arbitration.

Does the idea of public order differ from one emirate to another in the UAE in arbitration cases?

Is there coordination or harmony between Cassation Courts in UAE regarding public order in arbitration cases?

On the other hand, did the legislator prevent arbitration tribunals from ruling on certain disputes that are not related to public order?

To answer these questions, we shall discuss the definition of public order under United Arab Emirates law as well as the international regime and its influence on the UAE's regime. The dissertation will highlight many scenarios in which public order has been defined under Article 03 of the CTC. In addition, it will examine the scenarios referred to in Article 733 of the Civil Procedure Code that relate to the matters, specifically the invalidity of settlement in the personal and civil status.

4.1: Defining Public Order

All attempts for establishing a comprehensive definition of the phrase 'public order' out of the court's discretion have failed for a reason related to the nature of public order. The nature of public order is not rigid, in applying the principle, public order can adopt different definitions in respect to related time and location.⁶⁷

⁶⁷ Anwar Sultan, D. (1987). Sources of Compliance in Jordanian Civil Law. 1st ed. Amman: University of Jordan, p.110.

To clarify, the definition of public order can be divided into two words, the first is order. It is known that order has many meanings, including: the executive body of the state that applies the law and protects it, as well as the legal rule that comes in implementing the law and providing the necessary protection so that it is not violated.

The second word which is public, means members of society as a whole or the state as a whole versus an individual. Therefore, public order is the set of systems and rules that protect the ideological entity, morals, political and economic concepts within the one state for all individuals. If it's against the interests of an individual or a person it cannot be completely disregarded.

The Dubai Court of Cassation has defined public order when it states in one of its decisions that public order is one of the primary respected rules for all acts that reach the supreme interest of society, including the social, economic, political or moral foundations on which the state is based. Thus, the courts must adhere to public order, even if not argued by any litigants.⁶⁸

The idea of public order within the emirates varies from one emirate to another also, within a single emirate from time to time. However, in accordance with his Excellency the Counselor Mr. Zuhair Bassiouni, judge of the Dubai Discrimination Court, when interviewed on this subject, replied that the idea of public order in the UAE is not generally different from one emirate to another.⁶⁹ Even though United Arab Emirates courts have independent jurisdictions in Dubai, Abu Dhabi and Ras Al Khaimah respectively, nonetheless, the Causation Courts at those Emirates have the same understanding and jurisprudence for public policy.

Accordingly, the legislations have totally agreed that the object of the obligation shall not be contrary to public order and morals, otherwise the contract if contrary with this rule shall be null and void.

⁶⁸ Cassation Court of Dubai, Case No. 14/2012 Real Estate challenge

⁶⁹ Al Ahdab, D. (1990). Arbitration. 4th ed. Beirut: Moahssast Nofal.

On the other hand, the public system can be either a state or international concept, but the UAE legislator has not differentiated between the local and international public order, which we will discuss below:

4.1.1: International Public Order:

The definition of international public order is a set of fundamental rules recognized in international trade and related to contractual ethics, international trade practice, and international social, economic and moral interests.⁷⁰

The rules agreed upon by most countries of the world not to accept within public order are bribery, witness influence⁷¹, fraud and the sale of drugs, exploitation, slave trade⁷² and all that is related to corruption. In addition, the failure to respect procedures related to defense rights.

In addition, the decision to recognize the international arbitral award and its implementation if it was procured by fraud,⁷³ the state is obligated not to implement it, as it is a violation of international public order.

The UNCITRAL Model Law authorizes refusal of enforcement if the disputers or any of those associated in the arbitration lack the capacity, if the arbitration agreement was not valid under the law of the country where the award was rendered, if the country's public policy conflicts with the arbitration award⁷⁴.

Under the New York Convention, the recognition and enforcement may be refused if recognition and enforcement of the award would be contrary to the public policy of that country⁷⁵

Nevertheless, this does not mean that it is not possible to enforce the arbitral award in another country that considers this award not to contradict with the country's public order.

⁷⁰ ⁷⁰ Al-Jamal, D. and Abdel-Al, D. (2017). Arbitration in international and internal private relations. 1st ed. Cairo: Halabi, p.188.

⁷¹ eral private relations. 1st ed. Cairo: Halabi, p.189,360. Al, D. (2017). Arbitration in international and int-Jamal, D. and Abdel-Al⁷¹

⁷² Al, D. (2017). Arbitration in international and internal private relations. 1st ed. Cairo: Halabi, p.189,360.-Jamal, D. and Abdel-Al⁷²

⁷³ Sami Awni, The Role of the Judiciary in Supervising Arbitral Awards, International Arbitration Conference, The Lebanese Arbitration Center in cooperation with the International Chamber of Commerce, Beirut, Pp. 1-16(Unpublished lecture(

Page 819 Arbitration with the Arab Countries – third revised and expanded Edition – Abdel Hamid El- Ahdab and Jalal El Ahdab – wolter Kluwer⁷⁴

⁷⁵ The New York Convention Article V (2) (B)

The US Supreme Court stated in the case of Wilko VS Sauan 346 of the United States of America No. 427 of 1953, that "arbitration agreements will not be implemented if public policy matters are subject to dispute or conflict."⁷⁶ Thus, the International arbitration decision shall be revoked if it violates international public order and does not revoke or violate the internal public order.

Another example is when the Paris Court of Appeals, in its judgment for recognizing an international award which was DIAC arbitration award that was canceled by Dubai Court of Cassation, held that the Court of Cassation canceled this DIAC award that is limited to the UAE and the French courts should not require adhering to it when recognizing and enforcing this international award. Taking into consideration that French courts traditionally rejected the arguments in favor of arbitration awards clearly contrary to international public police⁷⁷

In the author's experience within the UAE's courts, there is no doubt that the international public order term is not recognized. The enforcement of the arbitration award shall be in accordance with the UAE's local definition of public order as defined by many courts. Thus, the international arbitration award will not be implemented if it conflicts with the local public order as it may deny the basic definition made by the local courts.

As for my point of view in this regard and from practical experience in the courts, there is no so-called international public order in UAE. When an international arbitral award is challenged in a country, the local judge in the court, who will enforce the award, will only be interested with the local concept of public order. It will not impose on its state an international public order if it conflicts with the local public order because it is a denial of local public order. The ruling on this issue will be in accordance with the UAE judge's assessment.

⁷⁶ Brand, Joseph L. (1997), America's Arbitration Experience, Banking and Finance Dispute Resolution Through Arbitration, University Of Bahrain, Bahrain April

⁷⁷ Enforcement of local arbitration awards in the Arab world and overseas. Mohamed El Ghatit. Int. A.L.R. 2013, 16(4), 105-109] International Arbitration Law Review[

Therefore, it is not possible to accept the distinction between the international and internal public order⁷⁸.

Indeed, the idea of public order is differentiated from one country to another, which puts the idea of an international public order into doubt. That shall make the exercise of the arbitrator's authority in international commercial arbitration constrained to at least have concern over the attitude of the courts of the potential country in which the enforcement shall be sought. Otherwise, the award rendered may be challenged for failure to comply with public order of such a country.⁷⁹

This leads to the inquiry of foreign arbitration in which the local courts accepted to enforce the award, is the award treated as a court judgment or an arbitral award?

Indeed, if the local courts decided to enforce the foreign judgment which contains recognition of an arbitral award issued in the foreign jurisdiction, it will be treated as a foreign court judgment not as an arbitral award. However, this does not preclude the award from being scrutinized by the local's courts in accordance with the provisions of Article V(2) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards which do not permit the enforcement of an award contrary to local public order.⁸⁰

4.1.2: local Public Order:

As for the local public order, it is defined as the public order within one country and varies from one country to another. In the United Arab Emirates, and to clarify its meaning, the legislator in Article (3) of the CTC has stated, "Public order shall be deemed to include matters relating to personal statuses such as marriage, inheritance, lineage, matters relating to sovereignty, freedom of trade, the circulation of wealth, rules of private ownership and

⁷⁸ Facebook.com. (2014). Exclude the application of the law In order to pay public order. [online] Available at: <https://www.facebook.com/lawdroit/posts/691036080936655> [Accessed 25 Jul. 2017.]

⁷⁹ Abdel Muttalib, D. and El Desouki, P. (2016). The effect of public order on arbitral award and its implementation (A comparative study). [online] Mohamah.net. Available at: <http://www.mohamah.net/law/%D8%A8%D8%AD%D8%AB-%D9%82%D8%A7%D9%86%D9%88%D9%86%D9%8A-%D9%85%D8%AA%D9%85%D9%8A%D8%B2-%D8%B9%D9%86-%D8%AD%D9%83%D9%85-%D8%A7%D9%84%D8%AA%D8%AD%D9%83%D9%8A%D9%85-%D9%88%D8%AA%D8%A3%D8%AB%D9%8A%D8%B1/> [Accessed 25 Jul. 2017.]

⁸⁰ Cassation Court of Dubai, Case No. 287/2003 Civil challenge

other rules and foundations upon which society is based, in such a manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Sharia"

The above article is not an exclusive Article, but there are other examples made by legislators and that shall be examined in the following sections.

4.2: The ground of challenging the arbitration award on the grounds of public policy in different Causation UAE Courts.

In this chapter, we will address the situations that lead to the nullity of the arbitral award if the cause is related to public order.

As long as the idea of public order is a flexible idea, it is necessary to segregate the cases in which the arbitral awards shall be invalidated; those have been settled by the courts. The discussion will include specific cases decided by the UAE courts. As such, this section of the research will help researchers, scholars and disputants to shorten their time and expenses when they wish to seek arbitration in the UAE.

The UAE Civil Procedure Code provided that arbitration is not permitted in cases that conciliation is not permissible⁸¹. That shall lead to another question, which issues cannot be reconciled and stipulated by the legislator?

It is noted that the UAE's legislators did not explicitly mention the term "public order" in Article 203/4. Meanwhile, New York Convention has recognized the same as detailing that there are two reasons for not recognizing the arbitral award, where enforcement is contrary to public order, and where the subject matter in the dispute is not allowed by law to settle the dispute by arbitration. Article (V) of the New York Convention provided that recognition and enforcement of the arbitral award may be refused if the law of that country does not permit the settlement of the dispute by arbitration or if enforcement contradicts with public order in that country.⁸²

⁸¹ Article (203-4)) CPC(

⁸² Convention, N. (2017). Texts The New York Convention » New York Convention. [online] Newyorkconvention.org. Available at: <http://www.newyorkconvention.org/new+york+convention+texts> [Accessed 8Jun. 2017].

In view of the above, it is apparent that the legislators have allowed for arbitration in matters that the arbitral award can be enforced and provided reasons that may lead to non-recognition of arbitral awards which are contrary to public order.

On the other hand, the Riyadh Convention provided that execution of the arbitration award may be refused "if the laws of the requested state do not admit the solution of the issue by means of arbitration"⁸³

In addition, the procedure adopted by the arbitral tribunal in resolving the dispute itself may lead to the invalidity of the arbitral award, such as a provision that violates the principles of respect for the right of defense or that the provision includes racial or religious discrimination.

What if part of the arbitration award violates public order, would the courts rule that part null and void?

When asked about this, Judge Zuhair Bassiouni, judge of the Dubai Court of Cassation, said that if that part doesn't affect the rest of the award, then the court will hold that the arbitration award is valid except that part, otherwise the arbitration award may be declared null and void.

4.3: The cases mentioned in the definition of public order in the Civil Transaction Code, Article (3):

The general rule is that all kinds of contracts can be subject to arbitration except in certain cases; otherwise the arbitration system will be in danger and will be harmed⁸⁴. The Legislator mentioned examples of public order cases in article (3) of the CTC in order to define its meaning, in the following:

4.3.1: Public order shall be deemed to include matters relating to personal statuses such as marriage, inheritance and lineage:

⁸³ Article 37 / A of Riyadh Convention.

⁸⁴ Abdul Qader, N. (1996). Arbitration agreement in accordance with the Arbitration Law in civil and commercial law. Cairo: Dar Al Nahdah Al Arabia, p.175.

In order to clarify this provision, we should look into the Personal Status Code. Article (5) states that: "The State courts shall have jurisdiction on Personal Status litigations in which citizens or aliens, having a domicile or residence or place of business in the State, are defendants." In this regard arbitrators do not have jurisdiction on Personal Status litigations, but the code excluded the non-Muslims and the foreigners who ask to apply their own state regulation on their disputes⁸⁵, therefore I believe that they can agree on arbitration if their state laws allow them to do so.

The Cassation Court in Dubai held that articles (3), (17/1) and (27) of the Civil Transaction Code indicated that the UAE legislator stated that the national judge shall apply the foreign law regardless of the source of this law unless it is contrary to the provisions of Islamic law, public order or literature. The foreign law shall not be contrary to these provisions unless it is contrary to the social, political, economic or moral bases which contradict the fundamental interests of the society in the United Arab Emirates. It is decided that the basic rules of inheritance, which are based on conclusive texts in Islamic law, are considered for Muslims, whether national or foreign, from public order and cannot be violated, so that the national judge may not give preference to any foreign law that is incompatible with the basic rules of inheritance in Islamic law when the deceased is Muslim. As for the non-Muslim heir, the first paragraph of article 17 of the civil transactions law must be applied by applying the provisions of the foreign inheritance law at the time of his death, even if these provisions are contrary to the rules of inheritance in Islamic law. The non-Muslim heirs are not subject to Islamic Law in this regard. Since it was proven that the case is against a non-Muslim Indian citizen then Indian law is applicable in respect of the provisions of inheritance on the liabilities⁸⁶.

On the other hand, the Personal Status Code determines the cases that it is considered under court's jurisdiction, and then any other Personal Status can be subject to arbitration:

The lawsuits introduced by the children, the wife, the parents or the fostering nurse, as the case may be, in the following instances:

⁸⁵ UAE Federal Personal Affairs Law No. 28 Year 2005, Article (1)

⁸⁶ Cassation Court of Dubai, Case No. 46/2002 Personal Affairs challenge.

- a) Costs, wages and the like.
- b) Fostering, visitation and related matters.
- c) Dowry, trousseau, gifts and the like.
- d) Divorce, divorce in return of money, discharge, rescission and separation between spouses of all kinds.⁸⁷

In spite of the above, the Personal Status Law established special provisions for arbitration in the case of differentiation (divorce) for the damage, which is established under the Sharia Courts supervision, which is a basic rule in Islamic law⁸⁸, which is as follows:

In case prejudice is not established, and discordance is still continuing between the spouses and the Family Orientation Committee as well as the judge, and they were not successful in reconciling them, the judge shall issue a judgment appointing two arbitrators from among their parents, if possible, after asking each of the spouses to nominate, in the next hearing at most, , otherwise from those who have the experience and ability to reconcile. Should one of the spouses procrastinate in nominating his arbitrator or abstain from attending this hearing, the judgment shall not be subject to any appeal. The judgment appointing the two arbitrators must include the starting and closing dates of their assignment provided it does not exceed ninety days extendable by a decision of the court.

The court shall notify the two arbitrators and the parties to the litigation of the judgment appointing the arbitrators and shall ask each of them to take the oath that he will perform his assignment with equity and probity⁸⁹. In case the arbitrators fail to reconcile the spouses, the decision shall be based on the following:

- 1) Should the offence be entirely from the husband's part and the wife is asking for separation, or both parties are claiming separation, the arbitrators shall decide a

⁸⁷ UAE Federal Personal Affairs Law, No. 28 Year 2005 Arical (9)

⁸⁸ UAE Federal Personal Affairs Law, No. 28, Issued on 19/11/2005, Arical (119 to 122)

⁸⁹ UAE Federal Personal Affairs Law, No. 28, Issued on 19/11/2005 Article (118)

non-retractable divorce without prejudice to the rights of the wife resulting from marriage and divorce.

2) In case the offence is entirely from the wife's part, the arbitrators shall decide divorce for a consideration deemed adequate by them and payable by the wife.

3) Where both parties participated in the offence, the arbitrators shall decide separation without consideration or with one in proportion to each one's share in the offence.

4) If the case is not clear as to who is the offender among them and if the husband is the claimant, the arbitrators shall recommend dismissal of his case; but if the wife or both of them are claiming separation, the arbitrators shall decide separation between them without consideration.⁹⁰

The judge shall render his judgment in accordance with the decision reached by the arbitrators if they agreed. Otherwise, he shall appoint others or join to them a third as the mediator. The court shall ask the arbitrator or the mediator to take an oath that he will perform his duties with equity and probity.⁹¹

The Cassation Court stated that after reviewing Articles (119,120 and 121) of the Federal Personal Affairs Law the court finds that the judge amendment for the award is just an amendment of the compensation amount mentioned in the award not for the decision of the divorce where he found out that such compensation is not suitability to the abuse for the claimant, therefore it is not considered an interfering with the divorce decision as long as arbitrators agreed to give this decision after their inability to reconcile between the spouses and that the judge shall rule on the arbitrator award.⁹²

It should be noted that the arbitrators' number is an even number in Personal Affairs cases; this is another difference in the rules of arbitration. I believe it is better because of the

⁹⁰ UAE Federal Personal Affairs Law No. 28, Issued on 19/11/2005 Article (119)

⁹¹ UAE Federal Personal Affairs Law No. 28, Issued on 19/11/2005 Article (121/2)

⁹² Cassation Court of Dubai, Case No. 85/2010 Personal Affairs challenge

nature of the conflict being between married couples, especially one representing the husband and the other representing the wife and that will protect their privacy especially that in such a dispute it's hard to ask for witness evidence outside of the family.

4.3.2: Governance and ruling system Provisions:

The provisions relating to the system of government are the legal rules that have been established in the constitution of the state and include the sovereignty over land, water of the state, nationality, freedom of religious belief, personal freedom, public freedom, the judiciary and distribution of legislative laws, executive powers and the relationship between the Union and the UAE.

Public law looks after the public's interest. Individuals cannot agree on what is contrary to it. For example, it is not permissible to agree with a candidate in an election to give him cash equivalent in exchange for voting in the elections⁹³

4.3.3. Freedom of trade and wealth trading:

The Constitution of the United Arab Emirates states that the emirates of the Union constitute one economic unit and that the transfer of capital and the passage of all goods is guaranteed and may not be restricted except by a federal law from which it is not permissible to agree otherwise than the rules regulated by federal laws⁹⁴.

4.3.4: Personal property in a manner that does not violate the principles of Islamic law:

Personal property or sole proprietorship means the personal right, which in Islam has many restrictions, including:

1. Preventing harm to others.

⁹³ Al-Shawarbi, D. (1991). The civil procedural. Alexandria: Monshaat Al Maharaf fee Alexandria.

⁹⁴ Article (11) of the Constitution of the United Arab Emirates

2. Illicit trade: Islam forbade all means that are incompatible with Sharia rulings such as interest (riba), gambling, monopoly and fraud.

3. Money is not a path to state authority: Islam prohibits individuals of high status to use their power and authority through bribery to achieve a political position or a job that they may not be eligible for or influencing the internal and external policy in capitalist countries. Then any arbitration agreement in this regard shall be null and void.

5. The distribution of money after death is restricted by the system of inheritance: it is forbidden to bequest in more than one third of the ownership, which is considered an Islamic rule of the general divine system that an individual cannot agree otherwise. Where inheritance is not permissible to be beneficiaries' bequest, it is forbidden to favor some heirs at the expense of others, or to deprive the inheritance. Inheritance legislation is an important factor in the fragmentation of large wealth, distribution of property and eliminates the disparity between the social classes.

Therefore, all provisions related to the system of funds aren't subject to arbitration⁹⁵.

4.4: The cases mentioned in Article (733) of the Civil Transactions Law:

The CPC provides that arbitration may not be permitted in cases where it is not permissible to settle. The Civil Transactions Law specifies cases in which Article (733) may not be reconciled and provides that:

Compromise may not be reached in the case that it includes any of the following impediments:

- 1-Extinction of debt in debt
- 2-Sale of food exchanged before its receipt
- 3- Deferred exchange of gold for silver and vice versa
- 4- Usury on credits granted
- 5- Relieving the debtor from the deferred debt, with a view to expediting reimbursement

⁹⁵Cassation Court of Dubai, Case No. 14/2012 Real Estate challenge

6-Removal of the deferred debt security from the debtor, against expediting payment with an increment added to it.

7-Beneficial advanced payment.

The question is whether the provisions mentioned in Article (733) above relate to public order or not?

When asked about this, Judge Zuhair Bassiouni, judge of the Dubai Court of Cassation, stated that these cases are related to public order. Therefore, arbitration shall not be permissible in the matters mentioned in Article (733).

In the following paragraphs we will define and discuss the provisions mentioned in Article (733):

1: Extinction of debt in debt:

This legal rule is based on Islamic law. The rule was decided by the Emirati legislator in the Civil Transaction Code, but it has limited application in comparison with the Islamic application. Therefore, the judiciary decided to impose this rule among individuals (natural persons) and avoid its application in companies' transactions. Dubai cassation court in several decisions held that the decision as required under Article 710 of the Civil Transactions Act that "the loan is granting the ownership of property or fungible things to another with the condition that the other party should return it's like in amount, kind and discretion to the lender upon the expiry of the period of the loan". Article 714 stated that : " if the contract of the loan provides for a benefit in excess of the essence of the contract otherwise, than a guarantee of the rights of the lender, such provision shall be void but the contract shall be valid "and the court has settled the principle that the interest is prohibited in the loan contracts as in the following: interest in any kind of civil and commercial transaction in accordance with Article 409 of the Punishment Code is prohibited, and its null under article 714 of the Civil Transactions Act, but such a ban shall not extend to

transactions between companies or between natural persons as it may be agreed to charge interest between them.⁹⁶

The Council of the Islamic Fiqh Academy of the Islamic World League at its eighteenth session held in Makah on 12/4/2006 has considered the issue of (Extinction of debt in debt) forbidden and decided the following rules of conduct, which cannot be agreed on the contrary⁹⁷ :

Termination of debt in debt not permissible: One of its applications is to sell debt to the debtor at a deferred price more than the amount of debt. It is forbidden to do so, which is what is called "scheduling the debt" because it is a form of Riba (interest) in Islam, therefore it is considered a matter of public order.

Moreover, all that leads to the increase of debt against the debtor in return in order to increase the period of the loan is forbidden and includes the following transactions:

- When a loan contract is amended to create new debts to the debtor in order to repay all or some of the first debt.
- A person buys a commodity at a price more than its real price provided that the buyer returns the item to the seller as one of the installments, and the rest of installment to be paid in the future as agreed.

2: Sale of food exchanged before its receipt:

The trader may not sell food to third parties before the goods are seized, and the description of acquisition shall be stated according to the commercial custom among the merchants.

Is the seized subject a matter of public order?

⁹⁶ Cassation Court of Dubai, Case No. 490/2003 Civil challenge, Cassation Court of Dubai, Case No. 204/2014 Labor challenge, Cassation Court of Dubai, Case No. 212/2010 Commercial challenge

⁹⁷ Themwl.org. (2017). Dissolution loan in religin. [online] Available at: <http://www.themwl.org/web/%D9%81%D8%B3%D8%AE-%D8%A7%D9%84%D8%AF%D9%8A%D9%86-%D9%81%D9%8A-%D8%A7%D9%84%D8%AF%D9%8A%D9%86> [Accessed 22 Jun. 2017].

The Islamic jurists stated that it's a rule of public order, so it is not permissible to arbitrate therein⁹⁸.

3: Deferred exchange of gold for silver and vice versa:

Islam has legislated gold and silver provisions that are different from the rest of the goods and services because they are the origin of money, and these provisions are mainly under two elements which are receiving the value and similarity as will be discussed later. The scholars of Islam unanimously agreed that it is (haram) or forbidden to sell gold with gold or silver with a delayed price⁹⁹.

Why is it not permissible to exchange an item like gold for gold and wheat for wheat?

Because in Jahiliyah (pre-Islamic) times they used to sell bad dates for good dates by cheating those who do not know the types or the quality of dates. So as long as there is an exchange of one sort of goods, it must be in equal quantities so that it is not considered to be fraud and exploitation. Furthermore, if you have bad dates and want to replace them with good dates, then you have first to sell the good dates and take the money and obtain as much quantity as you want from the bad ones or vice versa.

Based on that, it is not permissible to exchange an item like gold for gold or wheat for wheat, except in two situations:

First is receiving the value: it is not permissible to exchange a class of goods of one type with the same type except they are same weight. For example one kilogram of dates cannot be exchange for two kilogram of dates what so ever the quality is. So in this regards you can sell your dates for money or exchange it with different type of goods then you can buy as much as you need of dates.

The second: The exchange should be should be in the same place.

⁹⁸ Al-Zghaythar, D. (2017). Ruling on selling food before it is seized. [saaaid.net](https://saaaid.net/Doat/aldgithr/d8.pdf), pp.15-16.

<https://saaaid.net/Doat/aldgithr/d8.pdf>

⁹⁹ CNN Arabic. (2017). Ifta al-Jordan: Selling gold in murabaha for buying is riba mohram. [online] Available at: <https://arabic.cnn.com/business/2017/04/18/jordan-gold-fatwa> [Accessed 22 Jul. 2017].

Article 733/4 to 733/7 stated that:

4- Usury on credits granted.

5- Relieving the debtor from the deferred debt, with a view to expediting reimbursement .

6- Removal of the deferred debt security from the debtor, against expediting payment with an increment added to it.

7- Beneficial advanced payment.

Interest (riba) is divided into two major types which are clarified by the Muslim scholars as in the following: the first is Riba Al Naseha where you pay more than what you take. For example, you borrow \$100 but the repayment is \$120. The second form is riba al-fadl , where any increase in the pay back amount is made without delay on the due date. For example, you have a cheque for \$100 and sell it to the bank for \$80 since it will be due after two months¹⁰⁰.

From the foregoing, we find that all of the above mentioned in Article 733 relate to public order, as it includes transactions that affect all classes of society, and the violation of these rules will cause great damage to society therefore its subject to public order and the court will order the debtor to return just the capital to the lender without any increase or interest, so long as it's not commercial debt¹⁰¹.

However, the legislator's mistake is that it is stipulated that arbitration cannot be done in matters that cannot be resolved through reconciliation. In our search for the definition in the Civil Transactions Law of matters that cannot be resolved by reconciliation, we found that Article 733 above, set an exclusive list of cases where the settlement is not permissible, but in practice we consider all matters of public order as matters that are not a subject of reconciliation.

¹⁰⁰ Nabulsi.com. (2017). Raba al-Nasee'ah and Raba al-Fadl. [online] Available at: <http://www.nabulsi.com/blue/ar/art.php?art=7323&id=142&sid=1177&ssid=1187&sssid=1192> [Accessed 22 Jul. 2017].

¹⁰¹ Commercial action means all transactions and contracts between traders and traders or between traders and non-traders. Trader definition is mentioned in article 11 of the Commercial transactions law. See also Cassation Court of Dubai, Case No. 2001 / 408 civil challenge

4.5: The invalidity of reconciliation in matters relating to personal status and capacity:

Reconciliation is a contract such as any other contract where the general rules must be met, neither its subject nor its cause should be contrary to public order, the contractors should have the capacity and they should be free from defects of consent.

In this regard, capacity and personal status are part of public order rules that cannot be agreed or reconciled to amend its legal provisions by arbitration. Article 89 of the Civil Transaction Code stated that no person may divest himself of his personal liberty, his capacity or vary the concomitants thereof.¹⁰²

It is permissible to settle the financial personal status rights, such as abandonment alimony by a divorced woman. However, it is not permissible to waive the existence of the right to alimony or to waive the right of child custodianship, and the heirs may reconcile their rights to inheritance, but it's not permissible to agree that there is no inheritance right or to arbitrate in this matter. The law states that anyone of the heirs can ask the court to determine his inheritance share percentage since the courts are the only authority that may do so. It is not permissible to arbitrate in this regard, and if it is done, it is invalid since it's a matter of public order¹⁰³.

On the other hand, the general principle is that an adult can approve the contracts he entered into when he was a minor, but Article 203/4¹⁰⁴ stated that an arbitration agreement may be made only by the parties who are legally entitled to dispose of the disputed right. Here, it's noted that the legislator did not leave this matter to the provisions of the principles of general law, thus the adult cannot approve the arbitration contract he entered into when he was a minor.

¹⁰² Al - Sanhory, D. (1968). Al waseet in explaining the civil law. Cairo: Dar Al Nahdah Al Arabia, p.556.

¹⁰³ The UAE Civil Transactions Code, Federal Law (5) of 1985 Article (1244): The court will, upon request of one of the heirs or of the interested parties, issue a certificate of inheritance specifying the legal heirs and the share of each in the inheritance

¹⁰⁴ Article ,CPC

The lack of capacity could be found in the arbitrator. The arbitrator should not be interdicted, a minor, bankrupt or deprived of his civil rights by a criminal penalty¹⁰⁵.

The terms of the appointment of the arbitrator are similar with some of the terms of appointment of the judge. We find that the legislator stipulated more capacity conditions in the judge's appointment, for example, the judge in the court of the first instance should have more than 10 years of experience in order to be appointed, 14 years of experience for the Judge of Appeals, and they should not have been convicted in a matter of dishonor and honesty¹⁰⁶. Here, it must be pointed out that the judge may be an arbitrator, except under certain conditions¹⁰⁷

The parties to a dispute may, at the time of consideration of the arbitration award, request nullification of the same if it was issued by a person who is not competent to act as an arbitrator or by an arbitrator who does not satisfy the legal requirements.¹⁰⁸

We note that the role of the state depends on the method of subsequent control of the arbitral awards by the judiciary and this alone is not enough¹⁰⁹, it is necessary for the state to enact laws of competence and experience and formal conditions for the arbitrators' appointment.

4.6: Violation of the Federal Civil Procedures Law relating to public order:

The Supreme Federal Court ruled that the arbitrator shall issue his award without being bound by any procedures other than those stipulated in this Arbitration Chapter mentioned in the CPC and those pertaining to calling of the parties, hearing of their pleas and enabling them to submit their documents. Notwithstanding the foregoing, the parties to the dispute may agree on certain procedures to be followed by the arbitrator.

¹⁰⁵ Article (206-1) CPC

¹⁰⁶ Federal Law No. 3 of 1983 concerning the Federal Judicial Authority. Article (1 and 18)

¹⁰⁷ Federal Law No. 3 of 1983 concerning the Federal Judicial Authority. Article (26).

¹⁰⁸ Article 216/B

¹⁰⁹ Al - Sanhory, D. (1968). Al waseet in explaining the civil law. Cairo: Dar Al Nahdah Al Arabia, p.556.

To ensure the adequacy of the arbitration award, it must include the arbitration instrument, the summary of the witnesses' statements, their evidence, the reasons for the judgment, the date of its issuance, the place where it was issued and the signatures of the arbitrators and the court should review the award to make sure that there is no breach of public order rules including procedures and public order rules exclusively mentioned in article 216 of the Federal Civil Procedure Code¹¹⁰.

Article 212 of the CPC stated that:

1. The arbitrator shall issue his award without being bound by any procedures other than those stipulated in this Chapter and those pertaining to calling of the parties, hearing of their pleas and enabling them to submit their documents. Notwithstanding the foregoing, the parties in the dispute may agree on certain procedures to be followed by the arbitrator.
2. Where the arbitration is conducted in connection with an appeal suit, the filing shall be made with the court, which has jurisdiction to consider the appeal.

We note that the principle established by the Federal Supreme Court has clarified the legal provision in Article 212 and the idea of public order. Thus, the court has completed what is in this article, a deficiency and did well.

In another case the Federal Supreme Court stated that the law limited the cases that invalidate the arbitration award, which may not be expanded.¹¹¹

The cassation court of Dubai held that it's not essential for the witness to mention the word of God in the oath and that does not annul the arbitration award¹¹². I disagree with the Court of Cassation, as by mentioning the word of God in the oath the witness is affirming

¹¹⁰ Federal Supreme Court Case No. 118 / Year 23

¹¹¹ Supreme Federal Court Case No. 433 of 17 ,Abdel Majid, M. (2000). Legal regulation of local and international arbitration. Cairo: Manshaat al Mahrafah, p.328..
Federal Supreme Court (2013). The Role of the Federal Supreme Court in the Development of Emirati Judicial Thought. Abu Dhabi: Federal Supreme Court, p.35.

¹¹² Cassation Court of Dubai, Case No. 171/2010 Commercial challenge, Cassation Court of Dubai, Case No. 200/2010 Commercial challenge, Cassation Court of Dubai, Case No. 212/2010 Commercial challenge

to the court and to the disputants that what he is saying is witnessed by God, so the litigants and the arbitrator assure that he is saying the truth.¹¹³

It is true that the Court's authority to control the extent to which the arbitral award is adhered to in terms of formality and procedure without reopening the dispute, but this principle in some cases clashes with reality, as there are cases where the Court cannot give its judgment without dealing with the subject of the award in order to find out whether it is in conflict with a rule of public order or not. The court has established that the creditor has the right to claim the delay of benefits without proving the damage caused by the delay provided that the debt is a commercial debt. In order to ascertain whether this rule applies to the subject of the arbitration award, the court was obliged to look over the disputed arbitration case to determine whether the debt is commercial or civil. If the dispute is a civil one, and the arbitrators ruled in favor of the creditor on interest for the delay, then their decision is void and null because it is against the UAE rule of public order and violates the provisions of Islamic law. In the same manner, the Cassation Court of Dubai¹¹⁴ held that the court authority should not extend to the substance of the dispute in the arbitration award unless the court finds out that the arbitrator exceeded his authority and gave his judgment on public policy matters or matters mentioned in Article 216 of the CPC, since such a matter should be protected by the courts.

4.7: The invalidity of the arbitration on the crimes:

It is forbidden for the parties in a criminal dispute to refer the dispute to arbitration, even if one of the parties is the public prosecutor. However, the parties may refer the dispute regarding the compensation for damage caused by crime to arbitration.

The question is, are all crimes not arbitrable?

¹¹³ Cassation Court of Dubai, Case No. 190/2011 Commercial challenge

¹¹⁴ Cassation Court of Dubai, Case No. 14/1012 Real Estate challenge

In my opinion, the crimes in which the public prosecutor cannot continue his investigation if the victim waived his rights may be referred to arbitration, such as cheque crimes or minor harm.

We observe a type of arbitration called tribal arbitration, which issues disciplinary judgments decided by the arbitrator in criminal cases, including murder, which is not by the courts and nor challenged in the courts, but enforced by the chief of the clan despite the existence of the state and the judicial system .

The tribal arbitration mechanism states that each litigant appoints a guarantor to fulfill what he is sentenced to, or to provide financial security that is held by the arbitrator and after the submission of evidence and upon the issuance of the judgment, each of the disputing parties and their co-guarantor shall sign the judgment.^{115, 116}

4.8: Final judgment or decisive arbitration:

The golden rule is that the final judgment is the title of truth and terminates the argument; otherwise society will never be in congruence, so this matter is a matter of public policy¹¹⁷. This is why the dispute cannot be re-opened by arbitration or by the court.

Article 187 of the Code of Civil Procedure indicates that judgments issued by the Court of Cassation are final among the same litigants in the same dispute, and prevent the litigants from returning to the debate on the matter that has been overturned, even by legal or factual evidence that has never been raised¹¹⁸.

¹¹⁵ Hajjah., A. (2017). Tribal custom in the reform. 1st ed. Amman.

¹¹⁶ For the tribal system in UAE see

http://ecssr.ac.ae/ECSSR/appmanager/nd/42;ECSSR_COOKIE=Xcx6ZptTTFz3nJhVKhyQyQkLn4d3D1qhMM2QwV21JQsVHz4S5mty!-247728713!842236085?_nfpb=true&_nfls=false&_pageLabel=P12800666901383799889645&ftId=%2FFeatureTopic%2FAbdullah_AIAwadhi%2FFeatureTopic_0958.xml&_event=viewFeaturedTopic&lang=ar.

¹¹⁷ Arbitration Procedures in the UAE - Dr. Khalid kadfoor Al- Mehairi- Institute for international law copyrights , page22

¹¹⁸ Cassation Court of Dubai, Case No. 185/1993 Civil challenge

5. Chapter Five: Important disputes should be just determined by the courts exclusively

Why would the legislator legislate against resolving certain disputes by arbitration and vests the courts exclusive jurisdiction over such disputes?

In this chapter, we will discuss whether the policy rationale for such legislation is related to public order issues.

5.1: Pre-Emption Lawsuits:

The legislator decided that the pre-emption lawsuit is to be filed against the buyer at the court nearest to its properties, and added that this court is to judge each dispute that arises in relation to the real price of the pre-emptive property and has the power to grant the preemptor one month to settle the price or his preemption right is considered void ⁽¹⁾.

This is what the legislator rules on, but, what if the parties agreed to settle the dispute among them through arbitration?

In my opinion, the preemptor may waive his preemption right, which means that it is not part of the Public Policy. While on the other hand, arbitration is not allowed in matters of public policy, only the courts were supposed to rule on these disputes because the pre-emption right is considered an Islamic Sharia Law under which the neighbor's rights are considered un-touchable and cannot be violated, following the society in general.

5.2 :Selling properties:

Selling properties to either Non-Emiratis nationals or Gulf countries nationals is null unless these properties are sold in the freehold areas. Furthermore, the Dubai Court of

Cassation stated that selling properties without following the registration requirement as per Law No.13 of 2008 Article 3 is non-arbitrable as it is contravening public policy.¹¹⁹

The ban to sell properties to expats in United Arab Emirates is considered a protection to the local's rights and the country's economy; therefore, it is related to public policy. In this regard, the Cassation Court of Dubai rules that arbitration is not allowed in any matter related to public policy. In addition, the Fourth clause of Article 203 of the Civil Procedure law stipulated that: "Arbitration shall not be permissible in matters, which are not capable of being reconciled". Therefore, it's not correct to add the sold units on the plan without abiding to the legislator's decision in Article 3 of Law no. 13 of 2008 that is related to Regulating the Interim Real Estate Register in the Emirate of Dubai, which obliged its registration in the interim register, thus can't be subject to arbitration for violating public policy. Taking into consideration that if the parties referred a dispute that includes a combination of matters that should not be agreed to be solved by arbitration and others that can be, then the dispute shall not be permissible for arbitration and the arbitration clause mentioned in these contracts shall be deemed null and void. The Cassation Court of Dubai has held that if the appeal court judgment contradicts the above rules and confirms the first instant judgment to not accept the case due to the existence of an arbitration clause, then this judgment is wrong for violating the law and failed to properly apply the law.¹²⁰

5.3: Inventions & Patent Contracts:

Even though there is a relationship between the inventor and the other party (who might be the investor or the employer) and although the contract is not necessarily related to Public Policy, nonetheless it must be referred to the court for any disputes arising among the parties so as to justly compensate the inventor, especially if the invention has economic value which exceeds their expectations at the time the contract was signed. The court is

¹¹⁹ Cassation Court of Dubai , Case No. 180/2011 date of Judgment 12/2/2012

¹²⁰ Cassation Court of Dubai, Case No. 2011/181 real estate challenge

supposed to determine an additional compensation to the inventor, by law, in case the parties did not agree to a certain amount.¹²¹

5.4: Labor Disputes:

If the employee is dismissed arbitrarily, the concerned court may oblige the employer to pay compensation to the employee. The court may determine the amount of the compensation taking into consideration the employee's type of job and the damage¹²². Thus, the legislator granted the courts exclusive jurisdiction to settle the dispute and refrained the disputing parties from resolving the labor disputes through arbitration, despite the fact that the matter is not related to public policy.

Moreover, in cassation appeal 123/2009, both parties, the claimant and the defendant asked the court to respect their wishes as they agreed to solve their dispute by arbitration and they asked the court to dismiss the case for want of jurisdiction. The Court stated that Article 7 of the Labor Law forbids any agreement contrary to the law unless it's more beneficial to the employee and held that such rights are part of public policy and the employee cannot waive his rights as doing so is contrary to public policy.¹²³

Furthermore, it's not permissible to approach arbitration in relation to the Law Provisions that are related to the employee's injuries, especially if the employee may not have the capability to afford the arbitration cost, which is excessive most of the time for this class. Taking into consideration that there are no court fees applied when the employer raises an employment case. Therefore, the law is protecting these rights through the judicial system which is part of public policy due to its economic and social significance.

5.5: Bankruptcy:

¹²¹ Law on the Regulation and Protection of Industrial Property of Patents (1992), Part II, Chapter I, Article 9

¹²² Law on the Amendment of the Law on the Regulation of Labor Relations (1986) Article (123)

¹²³ <http://www.tamimi.com/en/magazine/law-update/section-8/april-7/limitations-on-labour-contracts.html>

No arbitration tribunal can give a decision that a company is bankrupt, since such judgment can only be given by the court.¹²⁴ Bankruptcy is a public policy subject since it's an execution judgment and the legislator give the court the power to take such action.

5.6: Anti- dumping¹²⁵:

A new federal law was issued in the UAE relating to Anti- dumping in order to protect local products or the GCC products from foreign products when the foreign products are being sold for less than the fair market price in order to set fair competition¹²⁶

Protecting the national industry is a Public Policy matter. Therefore, the legislator in Article no. 7 of the Law restricted the Federal Appeal Courts to consider the appeals filed against the final decisions issued by the Minister of Economy or his representative in the execution of the law provisions and its executive regulations¹²⁷.

5.7: Intellectual Property

These disputes, whether national or international, have a criminal side in most of the cases and the criminal side is non-arbitrable.¹²⁸

On an international scale, intellectual property disputes arising between countries because of its common commercial procedures, shall be settled by mutual efforts or through arbitration under the auspices of the World Intellectual Property Organization Arbitration center or through non-institutional arbitration. In relation with the multiple parties commercial relationships, the dispute settlement system of the World Trade Organization (WTO) embodied this system and is focused on settling any disputes arising among the countries related to international trade including intellectual property disputes among the countries.

¹²⁴ Article 645/3 of the Federal Commercial Transaction Law No (18) of 1993

¹²⁵ Decree N(1) of 2017 of UAE

¹²⁶ <https://www.thenational.ae/uae/government/fnc-passes-uae-anti-dumping-law-1.42890>

¹²⁷ <http://www.albayan.ae/economy/local-market/2017-05-21-1.2952856>

¹²⁸ Role of Arbitration in IP Disputes Dr.Ahdab .A

With regard to disputes arising between individuals and companies, (non-governmental sectors) the arbitration and settlement centers of the World Intellectual Property Organization (WIPO) are concerned in settling such disputes.¹²⁹

As mentioned above, the Intellectual Property rights which are related to crimes, cannot be referred to arbitration since it's related to public policy, while everything else is arbitrable, as it is not related to public policy.

5.8. Trade agency¹³⁰:

In a commercial agency agreement, both parties agreed on arbitration when a dispute occurred and an arbitration award was issued. The court of first instance issued a judgment ratifying the arbitral award, **which was upheld by** the Court of Appeals. However, the Court of Cassation held that only the state's courts have the jurisdiction to rule on any disputes in a commercial agency agreement as stated in Article 6 of the Commercial Agency Law, thus the arbitration agreement in the agreement was declared null and void¹³¹.

The Cassation court concurred with the judicial system theory that the commercial agencies contracts are related to the Public System and organizes the Commercial Agencies in Federal Law no. 18 of 1981. The Emirati legislator takes into consideration the economic role that the Commercial Agencies play through its goods trading, services and being keen to protect the local agents and the consumers, as well as tightening the country's control system and supervisory role over these agencies – the Law set the terms and conditions to regulate the agencies practices and set the penalties for violators.¹³²

5.9: Civil Aviation Law:

¹²⁹ Badrawi, H. (2014). WIPO National Seminar On the intellectual property. 1st ed. Amman: Jordanian University.

¹³⁰ article 28 of Federal law No (14) of the year 1988, see also decision of the Federal Court of Cassation of the UAE of June 28, 1994

¹³¹ <http://www.tamimi.com/en/magazine/law-update/section-5/february-4/uae-courts-jurisdiction-in-commercial-agency-agreements.html>

¹³² Cassation Court of Dubai, Case No. 142/2001 Civil challenge.

Article 63 of the Civil Aviation Law states that: “The court in the place of the accident shall have jurisdiction over claims arising from the search and rescue operations. If the accident occurs on the high seas or in a territory of undetermined sovereignty, the courts of the State shall have jurisdiction. This matter is related to the international aviation safety and is a State priority to protect it; therefore, it is considered a Public policy.

5.10: Public Funds:

Taxes and due fees are non-arbitrable if its collection right is conclusive and is not disputable, these fees can be agreed upon to be set in installments; no public funds are arbitrable.

5.11: Immoral and Taboo Contracts:

Arbitration on gambling debts or a debt related to an immoral act¹³³ are prohibited in Sharia, therefore it is related to public policy according to the Procedures Law provisions.

¹³³ Al - Sanhory, D. (1968). Al waseet in explaining the civil law. Cairo: Dar Al Nahdah Al Arabia, p.556.

6. Chapter Six: Provisions which prohibited the courts from settling a dispute related to public policy and restricted the arbitration to rule at it:

6.1: Disputes arising from securities and commodities exchanges:

Settlement of disputes arising from securities and commodities exchange between traders in securities and commodities shall go through arbitration only, but not any type of arbitration. The legislator determined certain procedures to follow and appointed an arbitration committee to apply the arbitration provisions related to these types of disputes¹³⁴.

Contrary to the general rule that arbitration requires a written consent of the parties, the legislator considered trading in the Stock Exchange is deemed a consent to accept arbitration and an obligation to accept the judgment of tribunal as well as a waiver of all types of appeals unless specified otherwise in the law.

If an arbitration committee was to be constituted to handle a dispute between traders in the Stock Exchange market, it shall be headed by one of the judicial members who is nominated by the Minister of Justice or the Justice Department Chief – on a case by case basis – and two other members, one nominated by the General Manager of the concerned market and the second is to be nominated by the president of the council.¹³⁵

It is noted that the legislator determined a special provision for appeal against the arbitration award issued; the legislator decided that the arbitration decision may be challenged by a request of nullification or cancellation. The application shall be submitted to the competent civil court which has the power to cancel the decision in the following cases:

¹³⁴ The Securities and Commodities Authority Decree No. (1) for the year 2001 Concerning the System of Arbitration in Disputes arising from the Trading of Securities and Commodities.

¹³⁵ The Securities and Commodities Authority Decree No. (1) for the year 2001 Concerning the System of Arbitration in Disputes arising from the Trading of Securities and Commodities Article (10)

1. Invalid notification to the applicant of the appointment of the committee or the arbitral proceedings, or if he is unable to present his case to the Committee for reasons of which the Court is satisfied.
2. Arbitration decision related to matters beyond the scope of the dispute submitted to the Committee. However, if it was possible to separate decisions on matters submitted for the arbitration from those which are not, only the part relating to matters not presented could be annulled from the decision.
3. Violating the rules concerning the formation of the committee or the procedures followed in arbitration.
4. Conflicts in the arbitral decision with public policy¹³⁶.

We note here that the court may revoke the decision if it relates to public policy. In this regard, the Court of Cassation has held that according to Article 4 of Federal Law No. 4/2000 regarding the Emirates Market of Securities and Commodities Authority and Article 30 of the Chairman of the Board of Directors of the Securities and Commodities Authority Decision No. 1/2000 and Article 2 of the Chairman of the Board of Directors of the Securities and Commodities Authority Decision No. 1/2001 related to the Arbitration System in Disputes arising from Trading of Securities and Commodities and Article 9 of the Chairman's Decision No. (3 / D 2001) related to the regulations of the market –that the Chairman of the Board of Directors of the UAE Market is authorized to issue an arbitration rules for resolving disputes arising or related to the trading in securities, and to make it a mandatory arbitration for the dealers in the stock markets and commodities in order to resolve it without approaching the courts. Dealing in the stock exchange market is considered consent to arbitration. Dealers in the stock exchange market and commodities are required to refer to those who open a trading account with the broker in the market and ask him to purchase or sell the shares as well as the brokers and managers of their operations in the market who issue orders to buy and sell shares to accept the arbitration system referred to the above to settle disputes related to the trading of securities and commodities or disputes arising from the circulation of these securities, including requests for the purchase and sale of shares issued by investors to brokers, orders to buy and sell

^{136]} The Securities and Commodities Authority Decree No. (1) for the year 2001 Concerning the System of Arbitration in Disputes arising from the Trading of Securities and Commodities Article (47)

shares issued by intermediaries to the market and any consequences that may result from these transactions which are confirmed in Federal Law No. 4 (2000), when it refers to the arbitration system (disputes related to the trading of securities and commodities), as stated in Resolution No. 1/2001 referring to the jurisdiction of the arbitration system (traders in the field of securities and commodities), which includes all the above mentioned¹³⁷.

6.2: Dispute between the Dubai Construction Council and the borrower, contractor, supervisor or a tenant:

In 1975, in the Emirate of Dubai, a Council was formed to support urban development in the Emirate, to encourage and support people with limited income to rebuild their lands by lending them money to build the lands under certain specified conditions. The legislator limited the settlement of any dispute in this regard through arbitration and ordered an immediate implementation without the need for ratification, as in the usual procedures of ratification and implementing of arbitration provisions.

Dubai Construction Council Regulation of 1975, Article 26 stipulates that:

- A. Arbitration is to settle any disputes arising between the Council, borrower, contractor, supervisor or a tenant.
- B. Arbitration commission is formed of three members to be appointed by the Ruler's decree.
- C. The Arbitration commission shall issue its decision after hearing the disputing parties, its decision shall be binding and final and cannot be challenged before any court and is implemented as well as other decisions issued by the courts in the city of Dubai.
- D. Subject to the provisions of the preceding paragraphs, the arbitral tribunal shall in no case decide to sell the land of the borrower in a compulsory manner.

This legislation is conflicting with CPC.

6.3: Disputes between landlord and a tenant:

¹³⁷ Cassation Court of Dubai, Case No. 76/2008 Commercial challenge

Although the relationship between the landlord and the tenant is not part of public policy, dispute resolution between landlords and tenants arising from a rental relationship of an immovable property, whatever its nature, shall be handled by the tenant's committee's only. It is not permissible to agree on the contrary.

The Dubai Court of Cassation decided¹³⁸ this principle to the effect that the provisions of Article 1 of His Highness the Ruler of Dubai decree No. 2 of 1993 and Article 1 of the Ruler's decree No. 1 of 1999 stipulates that, only this committee may consider disputes arising between landlords and tenants, of any nature, whenever they arise from a rental relationship in place of an immovable property, whether it is land or a building on which it is not permissible to agree on the jurisdiction of the Dubai courts, noting that Article 32 of Law No. 26 of 2007 on the regulation of the relationship between landlords and tenants of real estate in the Emirate of Dubai, has dealt with the agreements of the landlords and tenants or about any subsequent agreement arising to present any dispute that may arise between them at its execution to arbitration. The committee shall, at the request of one of the parties, issue the temporary decisions to preserve the rights and legal positions of the parties until the final decision is issued by arbitration. This provision states that the jurisdiction of the committee in the case of agreement on arbitration between the parties to the rental relationship is limited to temporary decisions until the final decision is issued. Article 33 of the same law states that: "In the event of a dispute arising without the landlord and tenant having agreed on arbitrators, or if one or more of the agreed arbitrators quits or is removed or becomes incapable, and parties didn't agree in this regard, then the Committee shall, upon request by either party, appoint an arbitrator or arbitrators equal or complementary to the agreed number", this indicates that the Committee referred to is competent to appoint an arbitrator in case of agreement on arbitration between the parties of the rental relationship.

¹³⁸ Cassation Court of Dubai, Case No. 2011/1 Civil challenge
Cassation Court of Dubai, Case No 75 / 2008 Commercial

7. Chapter seven: The court authority to raise the public policy issue on its own

In accordance with Article 216 of the Civil Procedure Code, the parties to a dispute may request the nullification of an arbitrator's award when the court considers its ratification in the cases specified in this However, once it has been established that the arbitrator diverged from his area of jurisdiction and adjudicated in a matter relating to public policy which may not be valid for arbitration, the court must intervene in the examination of that legal violation in light of the provisions of the applicable laws, even if this violation to the general rule is not one of the nullification reasons of an arbitration award that is mentioned in Article 216. Taking into consideration that public policy is the primary rule of respect for all acts and judgments being related to the supreme interest of the society and the social, political, economic or moral foundations of the state. However, where the legal rule does not concern public policy or if the purpose is the protection of private rights and interests, it is not sufficient to invoke public policy as a basis for the non-application of the contradicting legal rule¹³⁹.

As stipulated in Article 203/5 of the Civil Procedure Code as amended by Law no. 30 of 2005 - and on the basis of the Court of Cassation decision that the party who adheres to the arbitration clause stipulated in the contract concluded with his opponent and wanted to prevent the court from hearing the case should take a positive position and object to the court exercising jurisdiction in the first hearing, if an objection is not filed on that hearing, the court may proceed with the case, and the parties are deemed to have consented to the court exercising jurisdiction over the matter. The first hearing is limited in the sense that the defendant attend by himself or his attorney for the first time and if he wishes to claim that there is an arbitration clause, otherwise his right to claim at any subsequent hearing will not be accepted. Moreover, requesting a postponement to submit his defense and claim will not change anything since he did not provide his objections in the first hearing and so deemed to have waived his right under the arbitration clause hence accepted the jurisdiction of the court, but the cassation court comments will get over the matters if the

¹³⁹ Cassation Court of Dubai, Case No. 14/2012 Real Estate challenge

appeal court judgment is not established over proper and sufficient grounds and evidences.

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¹⁴⁰ Cassation Court of Dubai, Case No. 204/2010 Real Estate challenge

8. Chapter Eight: Conclusion

This study dealt with the topic in a different way than the books. It dealt with the legal texts of the law and the courts decisions clarifying it, and then applied practical experience to enrich it. In addition, legal questions were raised which might be raised by the reader, and hopefully answered in this study.

This study has provided a critical analysis of the subject by discussing many Cassation Court judgments, some of which have been criticized and therefore makes it easier for the reader to decide whether he should include an arbitration clause in his contract or not, and that will, in turn, save him money and time.

In addition, we replied to queries left unanswered by previous researchers on the subject. We found that the use of the principle of public policy and its interpretation by the courts was not an impediment in the path of arbitration in the country, but on the contrary, it's to protect the rights of the litigants, the rights of the society, its economy and its established principles.

In regards to the question whether there is any coordination or cooperation between Cassation Courts in the United Arab Emirates on public policy in arbitration cases, Judge Zuhair Bassiouni, Dubai Court of Cassation judge, stated that he had previously held meetings among Cassation Courts judges in the country to discuss the differences between them to reach a mutual understanding. However, I believe that periodic meetings should be held annually and its results to be published so that researchers can limit their differences and reach agreement, in order to establish stability.

The study also shows that the idea of public policy and its applications in relation to the arbitration awards are not different from one Emirate to another, and that there is uniformity in their approach, and that this is a good thing that enhances stability in business transactions and resolving disputes related to public policy.

This study revealed that the UAE legislator has prohibited arbitrators from looking into disputes related to public policy and allowed courts to exercise jurisdiction instead because of the nature of these disputes and to expedite its settlement. In other cases, the legislator allowed a special arbitration mechanism to remedy defaults in customary arbitration procedures.

On the other hand, the legislator did not allow arbitration in certain disputes, and makes them subject to the judiciary. Some of these disputes are related to public policy, others are not, but the legislator did not want to remove them from the jurisdiction of the judiciary. I believe that with time, the legislator may amend this in the future. Although, some disputes preferably remain under the exclusive jurisdiction of the judiciary, such as labor and employee's cases.

The study provided answers out of practical experience of the judges in the UAE judiciary, and this is an explanation behind the cassation court's behavior in its decisions in specific cases.

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