

Enforcement of Foreign Arbitration Awards

تنفيذ أحكام التحكيم الأجنبية

By

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(فَلَا وَرَبِّكَ لَا يُؤْمِنُونَ حَتَّىٰ يُحَكِّمُوكَ فِيمَا شَجَرَ بَيْنَهُمْ ثُمَّ لَا يَجِدُوا فِي أَنفُسِهِمْ حَرَجًا مِّمَّا قَضَيْتَ وَيُسَلِّمُوا تَسْلِيمًا)

صدق الله العظيم – سورة النساء الآية رقم (65)

The holy Koran provides:

**“In the Name of Allah, the Merciful, the Most Compassionate
“But no, by your Lord, they will not believe you until they make you the judge regarding the disagreement between them, then, they will not find in themselves any discomfort concerning your verdict, and will surrender to you in full submission”.**

Surat An Nisa' “The Women” (65)

God Almighty has spoken the truth

Key words

Awards, arbitral, arbitration, dispute, settlement, procedures, provisions, process, mechanism, jurisdiction, domestic, national, foreign, international, enforcement, constitution, law, code, article, Procedures, the Civil Procedures Code, the UAE Federal Civil Code, court of first instance, court of appeal, court of cassation, tribunal, appeal, civil, commercial, convention, treaty, agreement, public policy, registering, ratification, recognition, nullify, rectify, approve, reject, refusal, judgment, cases, Arab, GCC States, United Arab Emirates “UAE”, UNCITRAL, Model Law, Washington Convention, interview.

Abstract

The dissertation examines in depth and focuses on enforcement of the foreign arbitration awards based on the national laws and treaty obligation as applied in the UAE. The importance of this study is derived from the fact that enforcing arbitral award is the ultimate aim and outcome of the entire arbitration process. So it is extremely significant for international businesses and it will lead to stability and progress since the arbitral award is not useful if it's not enforced smoothly and expeditiously.

It's well-known that arbitration became evident recently due to the huge growth and expansion in the international trade and investments between different countries. Accordingly, the arbitration has emerged as the preferred mechanism for resolving the disputes due to the huge advantages thereof. Arbitration is the quicker and most simple way for resolving various international, and commercial, civil and economic disputes in the Arab world and particularly in the UAE as well as other countries in the world. Therefore, arbitration will be useless and a waste of effort, time and money unless it is enforced as per the provisions of the law and the international treaty obligations.

This study defines and elaborates the foreign arbitration, foreign arbitral awards and enforcement, and also discusses the methods and procedures of enforcing arbitral awards and clarifies the issues that may result in refusal of enforcement, setting aside and nullifying the arbitral awards by the national courts. Further, the study enlightens the procedures and conditions concerning enforcement processes in light of the New York Convention of 1958 and some international, regional and bilateral conventions as well as the legal procedures necessary for enforcing the foreign arbitral awards in the UAE, in addition to the formalities and mechanisms necessary for enforcing the foreign arbitral awards.

Moreover, this research analyses and sheds light on the international, regional and bilateral conventions and agreements ratified by the UAE that will clarify the necessary mechanisms to facilitate enforcing foreign arbitral awards under the provisions of national laws as well as the state's treaty obligations, such as the New York Convention, GCC Treaty, Riyadh Convention of Arab League, and bilateral agreements with some states such as France, India and some Arab countries. Further, the study deals with some legal issues related to this essential topic. Looking at other laws in the GCC states in addition to some Arab and foreign countries is also possible.

The study contains some interviews and communications with judges, arbitrators, lawyers and legal experts with regards to enforcing foreign arbitral awards, along with an analysis of some judgments issued by various courts regarding the subject matter. Finally, the study provides conclusion and recommendations.

ملخص البحث

تتناول هذه الأطروحة وتبحث بعمق موضوع تنفيذ أحكام التحكيم الأجنبية وفقاً لأحكام القوانين الوطنية والالتزامات المنصوص عليها في المعاهدات والاتفاقيات الدولية وبصفة خاصة بحسب ما هو مطبق في دولة الإمارات العربية المتحدة . وتتمثل أهمية هذا البحث في الحقيقة التي مفادها أن تنفيذ أحكام التحكيم الأجنبية يعتبر الهدف الأهم والغاية النهائية لعملية التحكيم برمتها ، ولذلك فإن هذا الموضوع قد أصبح يتبوأ الصدارة والأهمية القصوى في التجارة الدولية مما يؤدي إلى استقرارها وتطورها ، حيث أن حكم التحكيم يكون غير ذي جدوى ما لم يكن قابلاً للتنفيذ بطريقة واضحة وسهلة على وجه السرعة.

لقد أصبح التحكيم في غابة الأهمية مؤخرًا بسبب النمو الهائل وتوسع التجارة والاستثمارات بين مختلف دول العالم ، وبالتالي فقد برز دور التحكيم باعتباره أفضل الوسائل لتسوية المنازعات نتيجة للميزات الكبيرة التي يوفرها لأطراف النزاع حيث أنه يعتبر أسهل الوسائل وأسرعها لتسوية منازعات التجارة الدولية والتجارية والمدنية والاقتصادية على مستوى العالم العربي وبصفة خاصة في دولة الإمارات العربية المتحدة فضلًا عن جميع الدول الأجنبية الأخرى ، وعليه فإن حكم التحكيم لن يساوي الورقة التي كتب فيها وسيكون إضاعة للوقت والمال ما لم يتم تنفيذه وفقاً لأحكام القانون والتزامات المعاهدات الدولية.

تتناول هذه الدراسة تعريفات للتحكيم والتحكيم الأجنبي وأحكام التحكيم الأجنبية والتنفيذ وتبين أنواع التحكيم والحكم التحكيمي ، كما تناقش الوسائل والإجراءات اللازمة لتنفيذ أحكام التحكيم الأجنبية وفقاً لأحكام القانون بدولة الإمارات العربية المتحدة والحالات التي يمكن أن يترتب عليها بطلان أحكام التحكيم وعدم تنفيذها من قبل المحاكم الوطنية. كما أن البحث يوضح الممارسات التحكيمية وغير ذلك من الشروط والإجراءات المنصوص عليها القوانين الوطنية وكذلك التزام الدولة بالمعاهدات الدولية مثل اتفاقية نيويورك لتنفيذ الأحكام الأجنبية لعام 1958م فضلاً عن بعض المعاهدات والاتفاقيات الدولية والإقليمية والثنائية ذات الصلة ، والتي توفر أفضل الطرق لتنفيذ أحكام التحكيم الأجنبية.

في واقع الأمر ، فإن هذا البحث يركز أيضاً على الدراسة المعمقة والتحليل الجوهري للاتفاقيات الثنائية والإقليمية والمعاهدات الدولية التي توفر الآلية الملزمة لضمان وتسهيل تنفيذ أحكام التحكيم الأجنبية ، والتي تمت المصادقة عليها من قبل دولة الإمارات العربية المتحدة مثل اتفاقية نيويورك واتفاقية دول مجلس التعاون الخليجي واتفاقية الرياض واتفاقية عمان والاتفاقيات الثنائية المبرمة مع فرنسا والهند وبعض الدول العربية ، والتي من شأنها تسهيل تنفيذ أحكام المحكمين. يشمل البحث يشمل بعض الجوانب القانونية التي تنظم هذا الموضوع الحيوي ، وكذلك يمكن النظر في بعض الجوانب القانونية المرتبطة بتنفيذ أحكام التحكيم الأجنبية في دول مجلس التعاون الخليجي وبعض الدول العربية والأجنبية.

كما تتضمن الدراسة بعض المقابلات التي تمت مع بعض الشخصيات القانونية التي تمارس التحكيم في الدولة من السادة القضاة والمحكمين والمحامين والخبراء القانونيين بغرض استطلاع آرائهم في موضع الدراسة ، وكذلك تم تحليل بعض الأحكام القضائية الصادرة من مختلف المحاكم في هذا الصدد. وأخيراً يُختتم البحث بالخاتمة والتوصيات.

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The UAE Civil Transactions Law No.5 of 1985	
The DIFC Arbitration Law No.1 of 2008	
Dubai Law No. 6 of 1997 concerning Contracts of the Government Departments in the Emirate of Dubai. Orders of HH the Ruler of Dubai on the Arbitration provision in the government contracts “Dubai Order of 6 Feb 1988”	
UAE Draft Arbitration Law, the last version released for discussion on 16 February 2013	
The Sudan Arbitration Law of 2005	
Bahrain Law No. 9 of 1994 Egyptian Arbitration Law of 1994 Egyptian Procedures law “Jordanian law No.18 of 1952 regarding enforcing foreign awards Jordanian Law No.31 of 2001, published in the Official Gazette No,4496” The Lebanese Procedures Law of 1985 The Yemen Law No 22 of 1992 concerning Arbitration GCC Unified Arbitration Law Draft	
The 1985 UNCITRAL Model Law on International Commercial Arbitration	
The Arbitration Act of 1996 (UK)	
The Civil Procedures Rules of 1998 (UK)	

Instruments, Conventions and treaties

The International treaties

1. Federal Decree No. 43 of 2006 regarding the UAE joining the convention of New York for Recognition and Enforcement of Foreign Arbitral Awards.
2. The ICSID Convention on the Settlement of the Investment Disputes between States and Nationals of other States (ICSID) of 1965.

The Regional Conventions

4. The GCC Convention for the Enforcement of Judgments, delegations and Judicial Notices, signed and ratified on 1996.
5. Riyadh Convention of 1983 ratified by Arab countries.
6. Amman Agreement for enforcing of Foreign Arbitral Awards 1987 “The Arab league states”.
7. The Arab League Convention regarding enforcement of the judgments and awards between Arab states of 1952.
8. Agreement of Encouragement and Protection of Investment between the members of the Organization of the Islamic Conference
9. The Unified Agreement for investing Arabic capital in the Arab states

The Bilateral Conventions ratified by UAE

10. The Convention on Judicial Assistance, Recognition and Enforcement of Judgments in Civil and Commercial Matters signed between France and UAE “the Paris Convention 1992”.
11. Agreement between UAE and India on Juridical and Judicial Cooperation in Civil and Commercial matters.

Bilateral agreements between UAE and some Arab states

12. The Agreement on Legal and Judicial Cooperation between the UAE and The Hashemite kingdom of Jordan.
13. The Treaty on Judicial Cooperation in Criminal Matters, Extradition of Offenders, Cooperation in Civil, Commercial and Personal Matters with Morocco.
14. Agreement on Legal and Judicial Cooperation in Civil and Commercial Matters, Criminal Matters and Personal Status Matters with Extradition and Assistance in the Settlement Estate

<p>with the Arab Republic of Syria.</p> <p>15. Agreement on Legal and Judicial affairs concluded with Kingdom of Saudi Arabia.</p> <p>16. The Agreement on Legal and Judicial Cooperation with Somalia</p> <p>17. The Treaty on Mutual Legal assistance in Criminal Matters, Extradition of Offenders, Cooperation in Civil, Commercial and Personal Matters, Service of Judicial and Extra-Judicial Documents, Obtaining Evidence, Commissions and the Recognition and Enforcement of Foreign Judgments and Arbitral Awards with Sudan.</p> <p>18. Agreement on Legal and Judicial Assistance with Egypt.</p> <p>19. Agreement on Judicial Cooperation, Enforcement of Judgments and Extradition of Criminals between the UAE and Tunisia.</p> <p>20. Agreement on Judicial Cooperation Service of Process, Letters, Enforcement of Judgments and Extradition of Criminals (Algeria);</p>	
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1. Case No.320/2005 commercial (Challenge), Dubai Court of Cassation judgment dated 12 December 2005
2. Case No.268 of 2010 “Maxtel International vs. Airmech” issued by Dubai Court of First Instance on 21 January 2011
3. Case No. 35/2010 dated 27th April 2010, Fujairah Court of First Instance has enforced two foreign awards issued by an arbitrator in London according to the rules of London Maritime Arbitrators Association (LMAA).
4. Case No. 764/Judicial Year No. 24 delivered by the UAE Supreme Federal Court on 7 June 2005
5. Case No. 489/2012 “Compagnie Française' Entreprises S.A v The Republic of Sudan”, the Dubai Court of First Instance ruled on 18 December 2012 regarding enforcing foreign award of ICC Case No. 5277/RP/BGD .

CHAPTER 1

Introduction

1.1 Background about Arbitration

Litigation before the courts is the original way for resolving disputes in accordance with national laws for the purpose of achieving justice favoring the state and the society. The court system is the original authority and power of the state to settle the various disputes and differences that may arise between persons and to enforce judgments, orders and awards.

Historically, arbitration is a very old practice and well recognized internationally as an exceptional way for justice. In the Arab World generally, and in the UAE in particular, arbitration was carried out by sheikhs and heads of tribes even before the Islam. A stone was found in Iraq from the 31st century BC which contained an arbitration agreement, written in Samarian language, signed between the city of Lahbash and Oma. This agreement provided that the kings of these two cities to appoint a third king to act as an arbitrator to resolve their disputes about boundaries, and to respect the arbitrator's decision and to refer any dispute to the arbitration¹.

Recently during the 20th and 21st centuries, huge developments took place with regards to arbitration in most parts of the world. Arbitration Centers were established all around the world with excellent rules. The recognition and enforcement of arbitral awards was well maintained and guaranteed by friendly and modernized national laws and the international treaties and conventions ratified by the different states. Basically, the arbitration in concept is a creature of consent², as the disputed parties mutually agree to refer their disagreements and disputes to a person in which they trust in his capability and fairness.

Therefore, arbitration became the principal method in international trade for resolving disputes and disagreements between entities, corporations, persons and even countries. It is a method better than litigation which was the original and preferred method for resolving commercial disputes. Actually, arbitration became the most effective Alternative Dispute

¹ Dr. Al Bajad, Mohamded Nasir, *Arbitration in Kingdom of Saudi Arabia* (1st, Saudi Press, Centre of Research and Administrative Studies 1999) 20.

² Dr. David Parratt, *Laws Governing Dispute Resolution, Party & Tribunal Rules*, [BUID Lectures].

Resolution mechanism for resolving different kinds of disputes related to all aspects of international trade and an essential replacement for the prolonged procedures of litigation before the different courts³.

Enforcement of arbitral awards is the backbone, real outcome and ultimate aim of the entire arbitration process. Why do parties resort to arbitration? Definitely in order to get the claimed rights and justice they are seeking, the Khalifa Omer ibn Al Khattab “Emir of faithful” stated in his famous judicial message to Judge Abu Musa Al Ashaari: “It’s useless to talk about a judgment without enforcement⁴.”

The importance of this research is derived from the fact that enforcing foreign arbitral awards has a substantial role in the realization of justice and maintaining the rights of parties through arbitration. Professor Nussbaum stated: “It will be admitted that the increase of arbitration might endanger state jurisdiction and the idea of impartial justice, if legislative and judicial measures for the remedy of abuses were not provided⁵.”

John Murdoch and Will Hughes explained there are several advantages for arbitration that it is quick, convenient, cheap and more suitable for the technical and complicated disputes, provide confidentiality and privacy and commercially expedient⁶.

1.2 Methodology

It will be essential to examine the legal system of the UAE within the concept of enforcing arbitral awards, therefore it is necessary to review and analyze the relevant laws and court judgments in addition to the interview and communications carried out with lawyers, arbitrators and other persons practicing arbitration before the UAE federal and local courts in Dubai and Abu Dhabi. Further, it is essential to explore the issues related to such analysis.

The approach utilized for data collection is the quantitative method through interviews with questions relevant and in line with the objectives of the study that help in demonstrating the key issues of the research.

³ Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (5th, Oxford University Press, Oxford , 2009) 1

⁴ Al Warfaley, Jamal Omaran Ogniah, *Enforcement of Foreign awards of Commercial Arbitration*, (Dar Al Nahda Al Arabia, Cairo 2009) 84.

⁵ Nassbaum, in Nussbaum (eds), *International Year Book on Civil and Commercial Arbitration* (1st, Publisher's Name, Place of Publication 1928).

⁶ John Murdoch & Will Hughes, *Construction Contracts Law & Management* (4th, Tylor & Francis, London & New York 2010).

In conclusion, this paper seeks to clarify to the professionals working in the field of arbitration the necessary procedures to guarantee proper enforcement of the arbitral award.

1.3 Dissertation Structure

The structure of this study as follow:

Chapter 1 begins with background about the arbitration, the dissertation structure, limitations of the study, and the methodology.

Chapter 2 provides definitions for foreign arbitration, arbitral awards, and the enforcement as well as the types of arbitration and arbitral awards, and an overview of domestic, regional, and international institutions of arbitration.

Chapter 3 discusses the procedures and a step required for enforcing foreign arbitral awards and the reasons for award nullification in the UAE and the issues of public policy, and involved legislations, court judgments and the result of interviews with practitioners who worked in the field of arbitration for a long time who also wrote about the subject matter.

Chapter 4 is a brief commentary and analysis for the provisions of international, regional and bilateral conventions and agreements signed by the UAE and different countries with regard to the enforcement and foreign arbitration.

Chapter 5 provides the conclusion and recommendation concerning enforcing the foreign arbitral awards.

The Appendixes comprise interviews with legal experts and practitioners in the field of arbitration in the UAE.

1.4 The Limitations of the study

The limitation of the study covers enforcing arbitral awards in the UAE, some of the Arab countries and other foreign countries. Further, the research defines foreign arbitration, the arbitral awards and the enforcement thereof. After that, the study explains the types of arbitration and of arbitral awards then discusses and attempts to answer the following questions:

What is the foreign arbitral award?

What mechanisms and requirements to guarantee the proper enforcement of foreign arbitral award by the national courts?

How is the enforcement performed?

On what grounds do the national courts refuse to enforce the foreign arbitral awards?

In what cases the foreign arbitral award is nullified and set aside?

What about the state treaty obligations? What are the international, regional and bilateral treaties necessary for enforcing the arbitral awards?

To conclude, this Chapter demonstrates the subject matters studied, discussed and dealt with in this research.

CHAPTER 2

Overview of the Foreign Arbitration

This chapter explores general facts about the arbitration, and then clarifies the several definitions for the arbitration, arbitral award and the enforcement in the different laws of some Arab countries, the types of arbitration and the types of arbitral awards. Further, there is some clarification about the institutions of arbitration and the methods of enforcing the arbitral award.

2.1 Definitions

2.1.1 Definition of arbitration

There are several definitions for arbitration in the laws of some Arab countries. Arbitration was not defined in the UAE Civil Procedures Code; however the UAE draft Arbitration Law defined arbitration⁷ in the following manner:

“The agreement of the parties mutually and based on mutual consent and free will to refer their dispute to the arbitration either before institutional arbitration tribunal or otherwise”.

It is worth noting that UAE Civil Procedures Code, Federal Law No.11 of 1992, provided and clarified the procedures and requirements of the entire arbitration process in Articles 203 to 218.

Egyptian Arbitration Law defined the arbitration as follow: “The parties agreement to resort to arbitration in order to settle all or some disputes occurred or going to happen between them due to specific legal relationship either contractual nor not⁸.”

The Yemen Law regarding Arbitration stipulates: “The parties’ selection for one person or more to resolve their disputes and differences outside the court⁹.”

The arbitration was defined in Article (1) of the rules of arbitration procedures of the GCC Commercial Arbitration Centre, as follow: “Arbitral agreement is the agreement of the parties in writing to refer to arbitration either before or after the dispute¹⁰.”

⁷ UAE Law of Civil Procedures, Article (1).

⁸ Egyptian Arbitration Law 1994 s 27(10).

⁹ Yemen Law 1992 s 22.

There are several definitions for arbitration provided by the national courts, for example, the Dubai Court of Cassation decided that “Arbitration is an exceptional way to resolve disputes by not adopting the normal way of litigation, and it based on the parties consent to refer the dispute to arbitration tribunal¹¹.”

The Jordanian Court of Cassation stated: “Arbitration in the legal context means the disputed parties refer to a person or more to resolve their dispute¹².”

However, arbitration was not defined in any of the conventions mentioned in Chapter 3 below, except in Article (1/I) of Riyadh Convention which defines it as an agreement of the parties in writing to resort to arbitral tribunal or third party to seek binding decision, either before or after the dispute.

2.1.2 Definition of the foreign arbitration

UNCITRAL Model Law stipulates the arbitration shall be considered international in the following cases:

- a. “The parties have different place of business, or
- b. One of the places is located outside the country where the parties are having business, mainly the arbitration place or any place where significant part of the obligation and commercial transaction was carried out therein or the place most connected with the subject matter of the dispute.
- c. If the parties expressly agreed that the arbitration agreement’s subject matter related to more than one state¹³.”

Dr. Musa, Talib Hassan also defined the foreign arbitral award as an agreement between parties in a dispute related to international trade, to an institution other than the national courts to be settled therein¹⁴.

¹⁰ GCC Commercial Arbitration Rules, Articles (1).

¹¹ 1992, 165 (Dubai Court of Cassation).

¹² [1972:1981] 37:35 (Jordanian Court of Cassation).

¹³ UNCITRAL Model Law 1985 s 1 & 3.

¹⁴ Dr. Musa, Talib Hassan, *Summary in the Law of International Trade*(1st, Al Thaqafa , Amman 1997) 159 & 160.

The Jordanian law¹⁵ regarding enforcing foreign awards had been replaced¹⁶ and provided a clear definition for the foreign arbitral awards thereof:

“the expression “Foreign judgment” mentioned in this Law means any judgment issued from a court outside the Hashemite Kingdom of Jordan “including the Religious Courts” related to legal procedures and order to pay amount of money, transferable property or reconcile any account, and this includes the awards of the arbitrators in the procedures of arbitration if that award became enforceable by the force of law in the country where the arbitration occurred and as if it is a judgment issued from the court in that country”.

The Sudanese Arbitration Law stipulates that according to the provisions of this law, arbitration shall be international in the following cases:

1. “If the main office of the disputed parties located in two different countries.
2. If the dispute set forth in the arbitration agreement connected with more than one country¹⁷.”

On the other hand, the Lebanese Procedures Law stipulates that “the Arbitration related to interests of international trade shall be considered as international Arbitration¹⁸.”

The Egyptian Arbitration Law defined the international arbitration as follows: “The arbitration shall be considered international if it’s related to a dispute connected with international trade¹⁹”. Also the said law provided some conditions to consider the arbitration as international, as the arbitration should be about legal relationship of commercial nature and also the arbitration should be international, i.e., related to an international economic activity²⁰.

Furthermore, the Draft Unified Law of Arbitration of the GCC Countries²¹ also defined the arbitration in Article (2) thereof and states that it is usual place of business of each of the disputed parties or the place of signing the arbitration agreement provided that such

¹⁵ The Jordanian Law 1952 s 18

¹⁶ The Jordanian Law 2001 s 31 (2)

¹⁷ The Sudanese Law 2005 s 7

¹⁸ The Lebanese Procedures Law 1985 s 809(90/83)

¹⁹ The Egyptian Arbitration Law 1994 s 27(3)

²⁰ Ibid s 27(2)

²¹ Ahmed Sheta, published in the Journal of Arab Arbitration, Issue No.1, February 2009, Al Tawunyah Printing Press, 2009, Beirut

place is outside GCC states as well as the condition that the disputed issues fall within the scope of the arbitral agreement that concluded with a GCC state and foreign country, further the seat of arbitration or the place where an important part of the obligation was performed is closely linked to the disputed issue.

2.1.3 Definition of the enforcement

Enforcement of the arbitral award is the procedure ordered by the judge who is legally authorized to issue execution order and considered as a meeting point between the public and private ruling. Thus, enforcing an arbitral award is the link between the arbitration and the judiciary. Generally speaking, enforcement of arbitrator's awards requires specific procedures before the courts in order to be enforced appropriately²².

2.1.4 Definition of the Arbitral Award

Generally speaking, foreign judgments and arbitral awards will not be automatically enforced in the UAE, as the legal formalities and procedures of enforcing the same are really restrictive and heavily qualified.

The New York Convention²³ defined the arbitral award as follows: "The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted". Although this definition is not clear and not inclusive, however it may be applied on the interim or final arbitral awards as well. Accordingly, the enforceable arbitral award is the final award that resolves the dispute completely, either by approving the Respondent's claims, some of the claims or by refusing the entire claims or any part therefrom.

2.1.5 The distinction between domestic and foreign arbitral awards

Some scholars believe there is no difference between international arbitration and foreign arbitration since any arbitration, not national, shall be considered an international arbitration, and any arbitration foreign for a state shall be considered as national in another country. Therefore, if the arbitration is connected with more than one legal system it will be international arbitration, thus distinguishing between foreign arbitration and international

²² Hamdi, Abdel Salam Gasem, 'GCC Commercial Arbitration Center' [2012] GCC Press, 45

²³ New York Convention, Article (1) P (2)

arbitration may lead to confusion in arbitration between individuals or private entities and arbitration that may occur between the states²⁴. Albert Jan van den Berg mentioned that the difference between domestic and foreign awards is mainly based on the public policy, this means the public policy issues in the national laws does not necessarily linked with or complies with the international relations, and the public policy has different criteria from one country to another²⁵.

There are two criteria to differentiate between domestic and foreign awards, which are the economic criteria “the subject matter of the dispute” and the geographical/procedural criteria. In the economic criteria, the subject of dispute is considered. For example, the Lebanese law applies the economic criteria on the subject matter of the dispute. Accordingly it stipulates that arbitration is international if it is involved and connected with international commercial interests without considering the place of arbitration, the applicable procedural law or nationality of the parties.

The draft of UAE Arbitration Law provided a formal difference and distinction between local and international arbitration²⁶.

The distinguishing between domestic and foreign arbitration award is essential because this will determine the applicable law, as the domestic award only applies to local laws, but if the arbitration is foreign then there is a probability of applying the rules of foreign laws.

The distinction between domestic and foreign arbitration is also important because it will determine the jurisdiction of the competent courts to look into the enforcement, application, appeal and filing a suit to nullify the award. Furthermore, the public order also emerges if the arbitral awards contradict with public order in the state where enforcement is requested. As well, it is important to know the nature of the award in order to apply the reciprocal principle between the states.

²⁴ Al Warfaley, Jamal Omeran Ogniah, *Enforcement of Foreign Awards of Commercial Arbitration* [Dar Al Nahda, Cairo 2009] 84

²⁵ Albert Jan van den Berg, *The New York Convention of 1958 an overview*, published in: *Year Book, Commercial Arbitration* published in http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf (accessed on 18 April 2013)

²⁶ Available on <http://www.AlexaLaw.com/t8105-topic>, accessed on 30 January 2013

2.2 Types of Commercial Arbitration

According to Roy Goode, there are three classifications of arbitration as follows:

- a. Ad Hoc arbitration and institutional arbitration,
- b. the domestic versus international arbitration,
- c. Private versus statutory and conventional arbitration²⁷.

The autonomy and agreement of the parties to refer their disputes to be resolved by normal individual or individuals they select for this purpose and request them to resolve their dispute outside the court and to give them freedom not to stick to the legal procedures.

2.3 Types of Arbitral Awards

There are many kinds of arbitral awards, as follows:

2.3.1 The Final Arbitral Awards

Actually in the final award the arbitrators decide in all the aspects of the dispute and provide the resolution thereto, and the roles of the tribunal and the arbitrators elapse accordingly²⁸. The reconcile judgments is considered final awards, the same matter was provided for in Article (52/2) of the UAE Draft Arbitration Law and also there is arbitration procedure that finished as per English Law²⁹.

2.3.2 Preliminary arbitral awards (Interim)

There is no provision in the UAE law regarding the preliminary arbitral awards, which are the interim measures or interim relief, as discussed in details below in this chapter. However, the UAE Draft Arbitration Law³⁰ stipulates: “The tribunal may issue interim measures in parts of the claims before delivering the final award that resolve the dispute”, also the Jordanian Arbitration Law³¹ mentioned the same provision.

2.3.3 The partial arbitral awards

²⁷ Roy Goode, " and Edwan McKedrick (eds), *Goode on Commercial Law* (4th, Lexis Nexis & Penguin Books, 2010).

²⁸ (Al Haddad, Hamza, *Arabic Agreement of Commercial Arbitration*, a study submitted to the 3rd Conference of Arabic European Arbitration, held in Amman from 23 to 25 October 1989, page 4)

²⁹ (E.Gaillard *Arbitrate Commercial International Sentence Arbitral Procedures*, J.Ci.Dr. Inter. Fasc 568-9-n5

³⁰ UAE Draft Arbitration Law, s 46

³¹ Jordanian Arbitration Law, s 40

2.3.4 Award issued by mutual consent of the disputed parties

2.3.4 Arbitral awards issued in absentia”.

2.4 Overview on Arbitration Institutions

Before delving into the research, it is essential to have a general look at the arbitration institutions regionally, internationally and within the UAE which comprises well-established institutions in addition to the arbitration ordered by the national courts, for example the arbitral centres and institutions below mentioned.

There are many advantages for conducting arbitration before one of the leading arbitral institutions such as the ICC International Court of Arbitration and LCIA the Centre that supervises the arbitration process and assist arbitrators, which provides assistance and even interpretation for the delivered awards. Moreover some institutions such as ICC provide scrutiny for the awards and recommend any changes to avoid nullification on the ground of error in procedures.

2.4.1 The UAE Arbitration Institutions

- a. “The Dubai International Arbitration Centre “DIAC”, which was established by the Dubai Chamber of Commerce in 2007.
- b. The DIFC-LCIA was established in February 2008 as a joint venture between two arbitration institutions, Dubai International Financial Centre “DIFC” and the London Court of International Arbitration “LCIA” and has adopted a set of arbitration well- drafted rules based on the UNICITRAL Model Law and similar to the ICC Arbitration Rules, and DIFC has its own commercial and civil laws beside the said rules, particularly the DIFC Arbitration Law No.1 of 2008, all having the force of law and published in the official Gazette³².”
- c. Dubai International Financial Centre “DIFC”, a free zone in Dubai having its own laws based on the common law system such as the UNCITRAL Model law

³² Available on <http://www.difcarbitration.com>, accessed on 20 December 2012

- d. Abu Dhabi Commercial Conciliation and Arbitration Centre “ADCCAC”, established by Abu Dhabi Chamber of Commerce and Industry.
- e. The International Commercial Arbitration Centre of Sharjah “Tahkeem”, was established by the Emiri Decree No.6 of the year 2009.
- f. Ajman Commercial Conciliation and Arbitration Centre
- g. The Ras Al Khaimah of Reconciliation & Commercial Arbitration

2.4.2 The Regional Arbitration Institutions

Arbitration institutions in the GCC region are increasing with modern rules. There are several well-established institutions, such as the GCC Commercial Arbitration Center, hosted by Bahrain; the Arab Centre for Commercial Arbitration “based on the Arab Convention on Commercial Arbitration”, the International Arbitration and Conciliation Centre in Qatar; and the Bahrain Arbitration Centre. Further, the Bahrain Chamber of Dispute Resolution “BCDR-AAA” was established as the world’s first arbitration Free Zone in January 2010 when Bahrain entered into a partnership with the American Arbitration Association in the USA. The good developments in this Centre that the awards issued are not subject to any challenge in Bahrain and guaranteed if the parties agreed to abide by the outcome of the arbitration.

2.4.3 International arbitration institutions

There are several leading and reputable international arbitration institutions, such as the London Court of International Arbitration “LCIA”, based in London UK, ICC International Court of Arbitration, affiliated with the International Chamber of Commerce in Paris; The American Arbitration Center “AAA”, The London Maritime Arbitration Association, The Singapore International Arbitration Centre, The Hong Kong International Arbitration Centre, The Swedish Chamber of Commerce and China International Economic, Trade Association Commission, and the Swiss Chamber of Commerce.

1.5 The Methods of Enforcing Foreign Arbitral Awards

There are many methods of enforcement as follows:

1.5.1 The Voluntary Enforcement

The arbitral award fundamentally is voluntarily carried out “by the parties’ consent” and the losing party willingly complies with the award based on the parties’ agreement to arbitrate even before the execution order³³.

From our point of view, this is the preferred method for enforcing foreign awards due to several reasons as this method saves time, money and efforts, maintains confidentiality of the commercial transactions and prevent the adverse publicity.

1.5.2 Enforcement by the Force of Law (Court Intervention)

If the enforcement is not amiable, then the award should be enforced by the force of law and legal proceedings against the losing party and his assets locally and internationally by a judgment or execution order issued by the concerned courts at the enforcement place, as per the national laws and in line with the provisions of international, regional and bilateral conventions, and agreements ratified by the state³⁴.

On the other hand, the UAE Civil Procedures Code stipulates in Article 296 that orders and judgments issued in a foreign state could be enforced with the same conditions provided for in the law of that country related to enforcement of Egyptian law therein³⁵.

Also Article 301 of the same law stipulates that applying the rules provided in the above Article do not breach the conditions of the conventions signed or going to be signed by between the Republic and other countries in this respect.

In accordance with the provisions of the above articles in both UAE law and the Egyptian law, the two methods for enforcing foreign arbitral award are as follow:

“THE FIRST METHOD: The arbitral awards shall be enforced in accordance with the provisions set forth in Articles 296 to 301 of the Egyptian Procedures Law.

³³ Dr. Abu Al Wafa, Ahmed, *Voluntarily & Compulsory Arbitration* (1st, Dar Alkotoub Alqanonia, Cairo 1978)

³⁴ Dr. Mohamed M. Abu Al Aynein and Dr. Atif M. Abdel Latif, *Arbitration judiciary, an analyzing study for the jurisprudence and judgments of the constitutional court, the Court of Cassation, and Court of Appeal concerning the international and domestic arbitration*, Second Book, 1st, Dar Abu Almajd for Printing, Egypt, 1998.

Dr. Ibid, p. 380

³⁵ Ibid, p.427

THE SECOND METHOD: Egypt is a party to international agreements such as NY Convention and a signatory to several international conventions, therefore the arbitral awards can be enforced by the obligations of the international agreements and conventions³⁶.

Finally, this Chapter discussed and explained several issues regarding the definitions of expressions related to arbitration and also the types of awards and arbitral institutions.

³⁶ Ibid, p.427

CHAPTER 3

The enforcement of foreign arbitration awards in the UAE

3.1 Highlights on Enforcing Foreign Arbitral Awards

3.1.1 According to the New York Convention, the recognition and enforcement of arbitral award may be refused for any of the reasons provided in this Article.

3.2 Highlights on Enforcing Foreign Arbitral Awards under UAE Laws

At the outset, the UAE was declared as an independent federal state on 2 December 1971 when the rulers of the seven emirates “Abu Dhabi, Dubai, Sharjah, Ajman, Umm Al Quwain, Ajman and Ras Al Khaimah” agreed to join the federation.

The legal system of the UAE was established on the ground of the Constitution of 1971 which stipulates the federal law shall prevail and supersedes the local laws of each Emirate.

It is worth mentioning that the Emirates of Abu Dhabi, Dubai and Sharjah, had their own arbitration law before the federal arbitration law was adopted and the said laws are still in effect. Further, the UAE federal Draft Arbitration Law widely distributed but not yet officially issued³⁷.

The UAE law provided certain restrictions regarding the foreign arbitration carried out by the government entities. For example, pursuant to the instructions issued by HH the Ruler of Dubai on the Arbitration provision in the government contracts as per Dubai Order of 6 February 1988³⁸ stipulates that no government entity is entitled to enter into a contract provide for arbitration proceedings outside Dubai and any provision to the contrary shall not bind the entity of Dubai government and considered be null and void, except in exceptional circumstances and obtaining prior written approval from HH the Ruler of Dubai. This Order was later became the basis for Dubai Law No.6 of 1997 which also provided the same with regards to referral of disputes to arbitration outside the Emirate of Dubai issued³⁹.

³⁷ UAE Constitution Act 1971

³⁸ HH the Ruler of Dubai Order of 6 February 1988

³⁹ Dubai Law No.6 of 1997

3.2.1 Update about the UAE Draft Arbitration Law with regards to enforcing foreign awards

The UAE distributed a draft of the new Federal Arbitration Law since 2006 for discussion and the last draft of the Arbitration Law was released on 16 February 2013 but it is still draft law. This draft law was based on the UNCITRAL Model Law which is the most favored law by the international arbitration community and also heavily influenced and inspired by the Egyptian Arbitration Law. The most important feature of this draft law is that there is no need for the recognition process⁴⁰.

3.3 The Procedures for Recognition of the Foreign Arbitral Award as per UAE legislations

The procedures of enforcing foreign arbitral awards by UAE national courts commences with the validity of the foreign arbitral award as stipulated in the Federal Civil Procedures Code. The court is entitled to return the award to the arbitrators in order to review specific point not settled or for the purpose interpretation if unclear for enforcement by the said court.

Chapter (IV) of the UAE Civil Procedure Code, Articles 235 – 238 stipulates and clarifies the requirements necessary for the Execution of Foreign judgments, as per the following details: “Article 235: 1. The execution of the decisions and orders delivered in a foreign country may be mandated in the state of the United Arab Emirates under the same conditions decided in the law of that country for executing the decisions and the orders delivered”

“Article 235:2 The execution order shall be requested before the court of first instance in which area the execution is required, through the usual procedures of the action prosecution, and it shall not be possible to order the execution before the verification of the following:

a. That the state's courts are not authorized to examine the litigation in which the decision or the order has been delivered and that the foreign courts which have delivered it are authorized therewith according to the international rules of the judicial jurisdiction decided

⁴⁰ UAE Draft Arbitration Law 2006

in their law”. Pursuant to this paragraph, the UAE Courts shall not perform the foreign award or judgment if the national courts themselves have had jurisdiction on the dispute. This prerequisite was implemented in the Case No 117/93 ruled by Dubai Court of Cassation in this Case the Defendants domiciled in Dubai therefore Dubai court considered them having jurisdiction as per the UAE applicable law, therefore the Court of Cassation decided to refuse enforcing the foreign award relate to money issued in Hong Kong against the Defendant.

b. That the decision or the order has been delivered from an authorized court according to the law of the country in which it has been issued.

d. That the litigant parties, in the action in which the foreign decision has been delivered, have been assigned to attend and have been properly represented.

c. That the decision or the order has acquired the power of the decided order according to the law of the court which delivered it.

e. That it does not conflict with a decision or an order delivered previously from a court in the state nor does it include what breaches the morals or the public order therein.

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

Article 237 of the UAE Civil Procedures Code states: “1. The authenticated pieces in writing and the reconciliation reports which the courts authenticate in a foreign country may have the order to be executed in the state under the same conditions decided in the law of that country, in order to execute the similar ones issued in the state of the United Arab Emirates.

2. The execution order referred to in the preceding clause shall be requested with a petition submitted to the execution judge and it shall not be possible to order the execution except after verifying the fulfillment of the conditions required for the liability of the document or the report for execution according to the law of the country in which its documentation or authentication has accomplished, and verifying that it is free from what breaches the morals and public order in the state.

Article 238: The rules stipulated in the preceding clauses shall not breach the rules of the agreements between the state and the other countries in this respect”.

Once the award is delivered, the arbitral tribunal must give one copy to each of the arbitration parties. In the event that national court provided any form of assistance during the proceedings of arbitration “for example if a party refuses to present before the tribunal or because any delay to it”, the original award and attachments thereof should be registered with the court secretariat. After that the court shall decide a date for the hearing to order enforcing the award and notify the parties about the decision, although the court is entitled to decide without any hearing from the parties”.

On the other hand, The UAE Civil Procedure Code, Federal Law No. (11) of 1992 in chapter (V) clarifies and provides the execution procedures and requirements to enforce the judgments and arbitral awards as per the following details:

“Article (239): 1. Execution must be preceded by the announcement of the writ of execution in accordance with announcement procedures determined herein.

2. Announcement paper shall include a statement of the required debt and an assignment to the debtor to settle it within fifteen days as of its notification of the same. Announcement shall also include the execution petitioner selected address within the execution court jurisdiction if its original address or place of business was not within such jurisdiction.

3. If writ of execution was issued by virtue of a documentary credit opening contract, announcement shall also include a statement of the debtor’s account extracted from the creditor’s trade boards.

4. In case of execution by evacuation of real property or handing over of movable monies or real property, the announcement of the writ of execution shall include a detailed statement of such monies.

5. If the writ of execution specified the evacuation or handing over date, the announcement shall include the same”.

“Article (240): 1. If the debtor expressed its desire to the execution commissioner upon the announcement of the writ of execution or at any stage of the procedures, to settle the debt against which execution effected in full or part, the execution commissioner shall record

the same in the report and assign the debtor to deposit the offered amount with the court treasury in favour of the execution petitioner. Deposit shall be made on the same day or not later than the next day.

2. If the offered amount was part of the debt, execution commissioner shall continue with the execution in respect of the remaining balance.

Article (241): 1. Execution commissioner may not break doors or locks by force for effecting execution unless under the approval of the execution judge and in presence of a policeman whose signature shall appear on the execution report”.

“Article (242): 1. In case of the debtor’s death or if it became incapacitated or the capacity of the person acting on behalf of the debtor was removed before commencement of execution or before completion thereof, execution may not be effected against its heirs or successors except after the lapse of eight days after the date on which they were notified of the writ of execution”.

2. In the event of the debtor’s death or if it became incapacitated or the capacity of the person acting on behalf of the debtor was removed after commencement of execution, execution procedures and all other appointments there under shall stop until expedited by either parties.

3. Announcement referred to in the preceding paragraphs, may be notified to the heirs collectively at the last address in which the debtor was residing without stating their names and capacities, before the lapse of three months after the date of death.

“Article (243): 1. Third parties may not carry out or be forced to carry out actions required under writ of execution unless the debtor was notified of the intention to do so before eight days at least”.

Furthermore, the procedure for recognition of the award provided in Article (215) of the Civil Procedures Code, under which an award may be challenged for material errors. This issue remains a major obstacle for enforcing international arbitrations conducted under the current laws of the UAE.

3.4 The Recognition Process

In the absence of another bilateral or multi treaties, such as the Riyadh convention or bilateral agreement between UAE and another country such as Yemen or India, in this event the foreign arbitration awards shall be enforce as per the rules that apply to the foreign judgments and the principle of reciprocity shall be considered. Judgments and orders passed in a foreign country may be ordered for implementation and execution within the UAE under the same conditions provided for in the law of the foreign state for the execution of judgments and orders passed in the state “Article 235 of the Civil Code”.

A petition for execution order shall be filed before the Court of First Instance under which the enforcement is requested as per the procedures of a normal lawsuit. The execution shall not be decided unless the state courts have no jurisdiction over the dispute on which the order or judgment was delivered and that the foreign courts issued the same have such jurisdiction in accordance with the Rules of International Judicial Jurisdiction provided in its applicable laws;

3.5 The Mechanism of Enforcing Foreign Arbitral Awards

The foreign arbitration awards are enforced according to the UAE domestic laws and the obligation of international, regional or bilateral treaties and conventions such as the New York Convention.

Recently, Dubai Court of First Instance decided to enforce two foreign arbitration awards, one of them from the objective side and the other from the costs. The two awards were issued according to the rules of DIFC-LCIA, although both companies are based in Dubai. The successful party obtained the two awards requested enforcement thereof, but the losing party rejected and refused to enforce these awards and applied for nullification due to several procedural reasons supported by the Civil Procedures Code⁴¹.

Although UAE has ratified and joined New York Convention, the UAE courts have much reservations and uncertain to apply by the provisions of this binding agreement concerning enforcement and often refuse to enforce the foreign arbitration awards. Instead, the courts continued to apply the provisions set forth in the Civil Procedures Code as detailed in Ar-

⁴¹ *Macsteel International v Airmech* [2010] 268 (Dubai Court of First Instance)

Article 235 thereof.

Consequently, in many cases the courts are reluctant to implement the provisions of New York Convention and continued to apply the provisions of Article 235 of the Civil Procedures Code, with regards to enforcing or nullifying the awards of foreign arbitrators. In several occasions the courts applied the conditions and formalities as a justification for not enforcing foreign arbitral awards.

3.6 The Requirements of Enforcing the Foreign Arbitral Award

The following conditions shall be considered carefully:

- a. the order or judgment was issued by the concerned court in accordance with the applicable laws in which the same was passed.
- b. the parties of the lawsuit that the foreign award or judgment was delivered were duly summoned and attended the sessions.
- c. the award or judgment gets an absolute degree as per the laws the concerned court.
- d. The award is not contradicting or conflict with any an order, award or judgment previously issued by any other court in the country and also not violating the public policy or moral code.
- e. The foreign award or judgment should be translated to Arabic language.
- f. The foreign award, order or judgment requested to be enforced the UAE should be notarized and duly authenticated by the Foreign affairs Ministry in the state where the award, judgment or order was issued and also should be authenticated by the consulate or embassy of the UAE in that country.

Additionally, there are specific requirements in the laws of the UAE as well as the remaining Arab countries. For instance the Sudanese Arbitration Law of 2005 stipulates in Article (45) that the award of the arbitral tribunal issued according to this law shall not be enforced unless the following is conditions are met:

1. Copy of the arbitration award is attached.
2. The time of filing the suit of nullification has elapsed.
3. The losing party was properly summoned”.

The conditions for enforcing the foreign arbitral award are provided in Article (46) of Sudan Arbitration Law of 2005, which states the foreign Arbitration award shall not be enforced the Sudanese courts unless the following conditions are fulfilled:

- a. the order or award issued by the arbitral tribunal was issued in accordance with the rules of arbitration intentional jurisdiction provided in the state where the award was rendered, and the same became final according to that law.
- b. the disputed parties in the decided arbitration were properly summoned and represented in proper way.
- c. The order or award is not conflicting with any order or judgment rendered by any Court in Sudan.
- d. The judgment is not contradictory with the public policy or morals in the Sudan.
- e. The state where the subjected judgment issued accepts to enforce judgments issued by Sudanese court or based on agreements of enforcing awards ratified by the Sudan.

Article (47) states: “The judgment issued by the competent court to enforce the arbitral award is not subject to any appeal”.

3.7 The Steps of Enforcement

The general trends of the UAE national courts concerning the recognizing and enforcing arbitration awards reflect the fact that in order to ensure recognition and enforcement, the award has to undergo through specific ratification process and procedures before the te courts in The UAE. This process is based on normal procedures before the competent court, which will lead to an order of recognition and enforcement issued by the court of first instance having jurisdiction, which in turn is subject to the normal procedures and of appeal before the court of appeal.

Recently, the court in the UAE has become friendly to the arbitration and also have a positive look on recognizing and enforcing the foreign arbitration awards. To start the procedures and process of ratification, there is no time limits forced by the law.. Significantly, the enforcement of an award is suspended pending completion of the recognition process (Dubai Court of Cassation, petition No. 265/2007, judgment of 03/02/2008).

The recognition and enforcement of foreign awards is guided by the international, regional and bilateral treaties and conventions detailed in Chapter 3 of this study.

Generally speaking, in accordance with the said Conventions, an award should be enforced provided that it is final and appropriate for enforcement in the country of origin, and (ii) it is not contrary to the principle of public policy as understood in the UAE. It is worth noting that there are two⁴² recent instances of enforcement of foreign awards in the UAE under the New York Convention.

In 2012, the Dubai Court of Appeal upheld the ruling of the Court of First Instance confirming the enforcement in the UAE under the New York Convention of two foreign awards rendered in London.

Recognition and enforcement of DIFC awards before the Dubai courts is facilitated by reference to the 2009 Memorandum of Understanding Between Dubai Courts and DIFC courts “which entered into force as from 16 June 2009” and the related Protocol of Enforcement between Dubai courts and DIFC courts, provided the awards are final and appropriate for enforcement before the DIFC court.

On the other hand, New York Convention explained the judicial applications for foreign annulled awards enforced by court judgment “judicial enforcement| raised a lot of debates. According to Article V (1) (e) of the New York Convention, the court may reject enforcing an award that was set aside in the state where the award was issued⁴³.”

3.8 Summary of Enforcing Arbitral Award under the UK Arbitration Act 1996

Andrew Tweeddale and Karen Tweeddale mentioned Section 2(2) of the UK Arbitration Act stipulates in Section 66 that the provisions of the UK Arbitration Act 1996 applies even if the arbitration seat is not within England and Wales or North Ireland, as any foreign party is entitled to apply to enforce its arbitral award on the basis of this law, even if the said award governed by the Arbitration Act of 1959 Part II, or if it is subject to the New York Convention. According to the provisions of the Arbitration Act of 1996, the

⁴² [2010] 35 (Fujairah Court of First Instance) : [2010] 268 (Dubai Court of First Instance)

⁴³ John UFF, *Construction Law* (10th , Sweet & Maxwell, Sweet & Maxwell, London, 2009) 130

successful party must prove the award issued based on the terms of the arbitration agreement and the arbitral tribunal was appointed in proper manner. Further, the award to be enforced should be within the scope of the agreement of arbitration and also should be final and binding and no public policy reasons available that may prevent enforcement. Nevertheless, enforcing the said award shall be only enforced if there is no doubt about it and this determined based on the *lex arbitri* and also by reference to the applicable law. Further, enforcement under this Code or an action regarding the award accordingly will be more difficult than enforcing that award based on a Convention such as New York Convention⁴⁴.

3.9 Framework of Enforcing Interim Measures

The arbitrators and the arbitral tribunal are not empowered to issue provisional measures in the UAE and some other countries, as the provisional measures of arbitration are automatically enforceable, except when the parties voluntarily perform the interim arbitral award as most legal systems deal with the arbitral awards when it is final and binding. This issue seems to be very problematic and may result in infringement and cause negative effect on the future of international arbitration, so the rights of arbitrated parties may be damaged due to the significance and vital necessity that provisional arbitral interim measure is enforceable in the arbitration seat in a venue other than the seat of arbitration, as the party expect to be unsuccessful in the arbitration may sell or dispose in his entire assets and leave nothing to be enforced upon.

Many countries have provided a number of solutions to the serious adverse effect of enforcing interim measure that leads to enforceability of the arbitrators' decisions on interim measures through an order issued from the court at the seat of arbitration, as an intervention and assistance from the national court, although this matter faced by the problems of enforcing interim arbitral measures issued outside the seat of arbitration, cross boarder and overseas.

⁴⁴ Andrew Tweeddale & Karen Tweeddale, *Arbitration of Commercial Disputes, International & English Law Practice* (1st, Oxford University Press, Oxford, 2010)

3.9.1 Enforcement of the provisional measures through national laws

The arbitral interim measures can be enforced outside the country where the forum allows enforcement of the same, the courts give their assistance to the arbitrators seated in a foreign state and some countries allow this such as Australia as per The International Arbitration Act⁴⁵, as well as Switzerland and Hong Kong.

Ali Yesilirmak mentioned the national laws use four main approaches as follows:

“1. The direct enforcement of arbitral provisional measure as if it were decision issued by the court, by direct enforcement. It is essential to clarify that only the law of Ecuador concerning Arbitration and Mediation of 1997 stipulates for this approach and clearly mentioned no need for court intervention since interim measures are directly enforceable if the parties agreed so in the agreement of arbitration. Article 9(3) thereof stipulates: “If the parties so provide in arbitration agreement, the arbitrators may request the assistance of the public and judicial officers, the police and administrative authorities if necessary to carry out the interim measures, without the need to resorting to the court at the place where the property is located or the measures are carried out”.

2. The second approach is the national court’s executory assistance in connection with enforcing the interim arbitral measures. An example of this approach is the Tunisian Arbitration Law of 1993 as Article (26) thereof stipulates: “If a party does not comply with an arbitral order then the tribunal may require the assistance of the court”.

3. The third approach enhances court assistance, and basically it is transposition of the arbitral order and arbitrator’s decision to be an order from the court, and is applied in Article 1041920 of the German CCP, and it requires “exequatur or transposition of the arbitral tribunal’s measure into a measure that could have been issued by a court and will be treated accordingly by the state court system”

4. The fourth and final approach is the arbitrators’ decision by a separate court order based on the applicable legal system in the respective state. The example for

⁴⁵ UK International Arbitration Act s 22 & 23

this is approach that Article 7(2) of the Kenyan Arbitration Act of 1995 states: “If an arbitral tribunal has already ruled on an interim measure the court treats it as conclusive for the purpose of application” [i.e. for an interim measure]⁴⁶.”

3.9.2 Enforcement of Provisional Measures Through Treaties

The other solution for enforcing the provisional interim measure is delivered through bilateral, multilateral or regional treaties or other instruments to that effect, despite the fact that only few treaties involved in this matter, and it should be noted the most important intentional instruments including New York Convention do not handle this important aspect of enforcing the provisional interim measures, also the UNCITRAL Model Law did not harmonize the matter but there are some efforts in this respect.

On the regional level, the Conventions the Enforcement of Judgments signed by the States of the Arab League and the conventions concluded in America did not deal with this issue⁴⁷.

3.9.3 The Powers Arbitrators to Grant Interim Measures and Relief in the UAE

Actually, the law of arbitration is silent with regards to the granting arbitrators the powers of interim relief and arbitral provisional measures. There is no precedent that had given a party the right for urgent or arbitral interim measure, an attachment against the assets, or interlocutory application. In the event of the parties have not agreed to give the arbitrators such powers, an ongoing arbitral process won't forbid hearing of urgent applications by the courts with regard to appointment of liquidators or custodians or issuance of attachment order against the assets of losing party within the UAE. Accordingly, the parties are entitled to file a request to apply for an interim measures like order of attachment for the assets of the losing party before the local Courts, unless the agreement of arbitration stipulates otherwise⁴⁸.

⁴⁶ Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (13th Title International Arbitration Law Library, Kluwer Law International, 2005)

⁴⁷ Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (13th Title International Arbitration Law Library, Kluwer Law International, 2005) 246

⁴⁸ E.Gaillard *Arbitrate Commercial International Sentence Arbitral Procedures*, J.Ci.Dr. Inter. Fasc 568-9-n5

3.10 The Public Policy

3.10.1 The Application of Public Policy under the New York Convention

Emmanuel Gillard and Demenico Di Pioto mentioned⁴⁹ that the New York Convention expressly stated the public policy in Article V(2)(b) and also present in other provisions. They further mentioned that there is an agreement that public policy as stipulated in Article V(2)(b) of New York Convention is only applicable in the most serious scenarios and was called "emergency break". Only a variation of the most important principles of a legal system shall be under Article (V)(2)(B). further, Emmanuel Gillard and Demenico Di Pioto also mentioned that according to The International Law Association, a Final Report on Public Policy was issued by the Committee on International Commercial Arbitration of International Law Association (ILA) mentioned an example as follows: "The international public policy of any State includes: "(i) fundamental principles, pertaining to justice or morality, that the States wishes to protect even when it is not directly concerned, (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "public policy rules", and (iii) the duty of the State to respect its obligations towards other States on international organizations"⁵⁰.

3.10.2 The Events of Contradiction with the Public Policy

The arbitral award may be refused on the grounds of public policy. Arbitrability means the kind of disputes, in the private procedures of arbitration that can be subject to arbitration and resolved through arbitration processes, as the national laws prefers to determine definite kind of disputes before the state domestic courts exclusively due to various economic, social and political reasons related to the respective country. Examples for matters considered by some countries as not arbitrable are antitrust and competition issues, copy right, patents and trademarks, securities transactions, insolvency, Bribery and Corruption, fraud and natural resources ... etc. In accordance with Article V(2) of New York Convention, arbitral awards cannot be enforced unless the dispute is arbitrable, and the same principal was confirmed by Article 1(5) of the Model Law "UNICITRAL". Further, the dispute re-

⁴⁹ Emmanuel Gillard and Demenico Di Pioto, *Enforcement of Arbitration Agreements and International Arbitral Award, the New York Convention in practice*, Cameron May Ltd, London 2008),

⁵⁰ See also: <http://www.ila-hq.org> last accessed on 4 April 2013)

solved by arbitration should be of Arbitrability, as set forth in Article 3 of the New York Convention of 1958 that a dispute “is capable of settlement by arbitration⁵¹”.

The DIFC Court Judgments and Orders enforcement in the Emirate of Dubai: Pursuant to Article 7(2) of the DIFC Law, the judgments, decisions or orders of DIFC Court may be enforced by Dubai Courts subject to these conditions:

- a. They should be final and binding
- b. They should be translated to the Arabic language
- c. The DIFC Court should certify them for execution with a formula of execution confirmed by DIFC Court

However, the DIFC Law (as amended) provided in Article 7(3) the procedure of enforcement. Initially, the successful party should claim a letter of execution from the DIFC Courts. This letter shall be addressed to the Head of Dubai Court of First Instance, clarifies the procedures required to enforce the order. Then the successful party must submit application for enforcement to execution judge at Dubai Courts attached by the execution letter and all documents translated to Arabic. Dubai Court must enforce the judgment, order or decision once the application is received as stipulated in the Civil Procedures Code. The perfect example for this is the case of Property Concepts Fze vs. Lootah Network Real Estate & Commercial Brokerage (the "Property Concepts Case"), in which an arbitral award issued by DIFC — LCIA was ratified by DIFC Courts and after that was directly executed by the Dubai Courts. Thus, arbitral awards issued by DIFC courts are likely easier to be enforced in Dubai compared with the awards or judgments issued by foreign courts⁵². The arbitral award should be deposited at the court of first instance for approval as set forth in Article (235) of the UAE Civil Procedures Code. In fact, Dubai Courts has enforced many of DIFC Court orders, the enforced judgments include interim orders for instance the freezing orders (Mareva injunctions).

It is worth noting that Fujairah Court of First Instance in the Case No. 35/2010 dated 27 April 2010 delivered judgments to enforce two foreign awards issued by an arbitrator in

⁵¹ Dr. David Parratt, *Law Governing Dispute Resolution and Tribunal Rules* [BUID Lectures].

⁵² Available on http://difccourts.complinet.com/net_file_store/new_rulebooks/d/i/DIFCC_enf_protocol_summary.pdf (Last accessed on 20 April 2013)

London according to London Maritime Arbitrators Association (LMAA) related Rules, the initial award was on the basis of the merits and the second regarding the costs. By virtue of this judgment, it is clear the Court has enforced the awards of foreign arbitrators by the force of the UAE obligation of international treaties which was considered as an integral part of the UAE laws as stipulated in the Civil Procedure Code, Article (283) thereof.

It is clear that the Court of Fujairah enforced the awards of the foreign arbitrators by applying the international conventions and treaties as an integral part of the UAE domestic laws.

Legal Rule No. 327 mentioned in Issue No. 16 of 2005, page 2036 set forth the judgment of Dubai Court of Cassation dated 12 December 2005 regarding the Challenge No.320/2005 (commercial)

Summary of the Rule: The ratified international conventions and treaties should be applied in enforcing the foreign arbitral awards and arbitrators' decisions, enforcement of arbitrators awards issued in Libya in the UAE, the required conditions.

3.11 Grounds for Refusing Recognition and Enforcing Arbitration Award

3.11.1 The reasons for refusing to recognize and enforce the arbitration awards under New York Convention

Emmanuel Gillard and Demenico Di Pietro mentioned⁵³: “Although New York Convention provides an international framework, domestic law and applicable arbitration rules play an important role in deciding issues under the Convention such as: “ Objective arbitrability (Art. V(2)(a): law of the country where recognition and enforcement is sought, validity of arbitration agreement (Art. (V)(1)(c) : law of the country of the seat of arbitration in the absence of a choice of law by the parties”, scope of the submission (Art.(1)(c) : no explicit provision on the applicable law, procedural rules governing the arbitration (Art. V(1)(d): laws of the country of the arbitration seat arbitration with respect to any issues not agreed upon by the parties”, and public policy (Art. (V)(2)(b): law of the state where recognizing and enforcing of the award is requested”.

⁵³ Emmanuel Gillard and Demenico Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Award, the New York Convention in practice*, Cameron May Ltd, London 2008).

Generally speaking, there are some reasons for rejecting enforcement of the foreign arbitral awards by the national courts, such as:

- “a. valid arbitration agreement is not available
- b. Inadequacy of the scope of arbitration agreement
- c. Procedural defects of arbitration
- d. Inadequacy of the scope of arbitration agreement
- e. Arbitrator bias
- f. Non-arbitrability
- g. Public Policy – public order
- h. Inapplicability of the convention”.

In the Case No. 489/2012⁵⁴ “Compagnie Française' Entreprises S.A v The Republic of Sudan”, the Dubai Court of First Instance rendered its judgments in the session of 18th December 2012 in the questions decided that UAE courts should comply with the state obligations provided in the international conventions related to enforcing foreign arbitral awards. The Court refused to enforce an award issued under the Rules of the International Chamber of Commerce in Paris, as the losing party “Ministry of Irrigation in Sudan” has no place of business in Dubai. The foreign arbitral award regarding the above mentioned case was issued based on the application of the successful party in ICC Case No. 5277/RP/BGD regarding outstanding payments for the construction of Jonglei Canal in South Sudan, as the losing party (Sudan) refused to enforce the award in voluntarily manner, therefore the enforcement application submitted to Dubai Courts.

The Rule: In accordance with Article 238 of the Code of Civil Transaction, and according to the judgments of this court, the conventions between UAE and other countries.

Basically, the United Arab Emirates has joined New York Convention on 2006 by the fed-

⁵⁴ Case No. 489/201254 (Compagnie Française' Entreprises S.A v The Republic of Sudan), 2012, (Dubai Court of First Instance)

eral decree No. 43 dated 13 June 2006. Before UAE ratify New York Convention, the awards of foreign arbitration were enforced in the UAE as per the domestic laws, mainly Article 235 of the Federal Law No.11 of 1992 re the Civil Procedures Code in addition to the bilateral agreements and the multi-parties regional conventions and agreements that governs enforcing of the foreign arbitral awards in the UAE.

3.11.2 Reasons for refusal of enforcing Arbitral Awards in under UAE laws

Accordingly to the UAE laws, the courts may reject enforcing the arbitration awards for several reasons, such as:

- a. Lack of jurisdiction for the arbitration panel in the place of arbitration.
- b. Material mistake in the award of the arbitrator in the place of arbitration.
- c. Not serving the notice or improper representation for the parties in the procedures of the foreign arbitration.
- d. The foreign award contradicts with previous judgment issued by the UAE courts.
- e. The foreign award is contradictory with the public order in the UAE.

Although the UAE has joined New York Convention, the courts have much reservation to apply and abide by the provisions of this binding agreement with regards to enforcement or refusing to enforce the foreign arbitration awards. Instead the courts continued to apply the provisions set forth in Article 235 of the Civil Procedures Code. In many instances the courts were Conservative in implementing the provisions of the New York Convention and continued to apply the provisions of the Civil Procedures Code Article 235 thereof with regards to implementing or nullifying the awards the foreign arbitrators. On several occasions the courts applied the conditions of formalities as a base for not implementing foreign awards.

According to Dr. Mohammed El Hassan in the interview, the UAE courts recently had changed their position regarding the enforcement of foreign arbitration awards and have taken more flexible approach in this regard. Actually, the courts dispensed the traditional basis mentioned in the Civil Transactions Code Article 235 thereof stipulates not to apply such awards, and instead the courts applied the specific provisions set forth in New York Convention.

The Dubai Court of First Instance enforced two awards, one on merits and the other on cost in the Case No. 35/2010 and Case No.268 of 2010 “Maxtel International vs. Air-

mech”⁵⁵ dated 21 January 2011. The said judgments were issued by a sole arbitrator in London based on DIFC-LCIA Arbitration Rules regarding two companies located in Dubai on is a free zone and the other is limited liability company. This enforcement by Dubai courts really considered as an important progress and application for New York Convention.

Finally, if the UAE Courts continue in this way, the gaps will be filled and the legal ambiguities and escapes in the provisions of the Civil Procedures Code shall be archive and the records of history.

3.12 Nullification and the Foreign Award

There are several procedural reasons that can lead to the nullification of the award provided in the provisions of New York Convention as detailed in Chapter 4 below, and accordingly enforcement will be rejected. “There are a number of reasons stands as a good ground to nullify the arbitral awards, such as:

- a. Absence of valid agreement of arbitration.
- b. The signatory of arbitration clause is not authorized to represent the Defendant, i.e. disqualification of the person who signed the arbitration clause
- c. The formation of the arbitral tribunal is null and void.
- d. There are no terms of reference, including referral to Article 216(A) of the Civil Procedures Code and Article 5(c) of New York Convention.
- e. Bias of the arbitrators.
- f. Procedural errors and defects of the arbitration process.
- g. The arbitration panel failed to implement binding legal provisions regarding the oath and witness testimony.
- h. The arbitration panel failed to deliver the judgment within six months in clear violation to the Civil Procedures Code”.

The above reasons were also raised and decided in the Case No. 35/2010 before Fujairah Court of First Instance.

⁵⁵ Case No. 35/2010 and Case No.268 of 2010, (*Maxtel International vs. Airmech*) , 2011, (Dubai Court of First Instance).

El Ahdhab, Abdul Hameed explained⁵⁶ that Amman Convention provided there are three reasons for setting aside the awards, the first reason that if the tribunal acted ultra vires its power and the second reason that an extant fact is existed that would substantially amend change the award and third reason there is undue influence on the arbitrators that may have any effect on their decision⁵⁷.

In light of the facts set forth in this Chapter, there are many difficulties that may result in making the recognition and enforcing the arbitral award rather complicated process and not clear crystal, due to the complicated procedures in the UAE and the Arab countries.

⁵⁶ El Ahdhab, Abdul Hameed, *Encyclopedia of International Arbitration*, (Volume 3) Al Halabi Publishers, 2006, Beirut)

⁵⁷ El Ahdhab, Abdul Hameed, *Enforcement of Arbitral Awards in the Arab Countries*, Wolters Kluwer.

CHAPTER 4

Enforcement within the frame of international, regional

And bilateral conventions

4.1 Overview of Enforcing Arbitral Awards within the context of the treaty obligation of the state

There are several legal instruments and international arrangements that can assist and provide favorable climate and easy tools for enforcing arbitral awards. These instruments are consisted of international, regional and bilateral treaties and multi-parties conventions ratified by the concerned state. This Chapter describes in detail the international instruments ratified by the UAE and the Arab states which can facilitate enforcing the foreign arbitral awards in a smooth and flexible manner.

At the outset, the UAE law provides for applying the state treaty obligations, as Article (238) of the UAE Civil procedures Code states: (Rules provided for in the preceding Articles do not prejudice rules and regulations provided for in conventions signed between the UAE and other countries in this respect). Consequently, once the convention officially ratified by the state, then it shall be an integral part of the national laws⁵⁸.

4.2 The International conventions

4.2.1 The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958

4.2.1.1 Overview of the New York Convention

The New York Convention done in New York on 10 June 1958 and was ratified and approved up to this date by 148 states⁵⁹. The New York Convention considered as the main reason for making arbitration the best and preferred method for resolving the foreign commercial disputes internationally. The main objective of this Convention is to enforce

⁵⁸ Abdel Hamid El Ahdab, *Arbitration with Arab Countries*, Wolters Kluwer

⁵⁹ <http://www.newyorkconvention.org/new-york-convention-countries/contracting-states> (accessed on 5 January 2013).

arbitral awards made in the territory of another country, and the field of application of this Convention Provided in Article (1) thereof,

Further, Article 3 of the Convention clarify the general obligation of the member states to recognize and enforce such awards as binding obligation, as Article (3) states: “When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration”.

To analyze this Article (3), the UAE joined NY Convention without any reservations or declarations under Articles 1, X and XI of NY Convention, accordingly the UAE courts are theoretically obliged to enforce and to recognize the arbitral awards even the awards rendered in a states that did not join the Convention.

As clarified above, the New York Convention in Article (5) clarify and set forth the grounds for refusing recognition or enforcement of arbitral award, these reasons and grounds as follows:

“a. The agreement to arbitrate is invalid as per the governing law of the parties or “in the event this cannot be established” according to the laws of the state in which the award was issued,

b. in the event of a breach of due process,

c. if the award contradictory and not complies with the arbitral agreement,

d. in the cases of irregularities that may affect the composition of the arbitral proceedings or the tribunal”.

There is another reason for refusing enforcement by the competent authorities if the subject matter pertaining to the dispute is not arbitral in accordance with the national law or if the enforcement is against the public order.

4.2.1.2 The New York Convention application within the GCC Countries

All the GCC countries are signatory of New York convention. The first GCC country that has joined the NYC Convention is the Kingdom of Saudi Arabia, and then followed by the remaining GCC states. The Sultanate of Oman joined the Convention by Royal Decree No.98/36, State of Kuwait has by Decree No.10 of 1987, State of Qatar ratified the on 30th December 2002 and Kingdom of Bahrain joined by Decree No.4 of 1988.

On the other hand, the Kingdom of Bahrain has joined New York Convention by the Decree No.4 of 1988 subject to the following reservations:

“a. Bahrain decision to join the Convention shall not be considered as an acknowledgement of Israel and also shall not be a reason to create any kind of relations with Israel.

b. Bahrain shall apply New York Convention on the basis of reciprocity principle, and will not acknowledge or enforce arbitral awards except that issued in a contracting state which is a member in New York Convention in accordance with Article 3 of the Convention”. However, in accordance with Article (1/3) of the Convention, the Kingdom of Bahrain shall implement New York Convention with regards to the disputes arise from legal relations, either contractual or not, that considered of commercial nature”.

4.2.1.3 The application of New York Convention in the UAE

Basically, the UAE became a contracting state and ratified New York without any reservations, as per the Federal Decree No. 43 dated 13 June 2006. Article (1) thereof stipulates the convention shall be effective as of 19 November 2006. The UAE joined New York Convention mainly to achieve more economic progress, to increase its presence in the international modern economy, to provide favorable climate for international trade in consistency with the targets of the Convention, and also to enhance the trust of foreign countries and investors in the domestic economy. Moreover, arbitral awards issued by the UAE institution shall be recognized and enforced in most parts of the world based on this Convention. This great developments regarding adherence to the treaty obligations of New York Convention as applied by the UAE courts considered as a good indication and hope

to the foreign investors and the concerned parties who seek to enforce international foreign arbitral award against any person domiciled in the UAE.

In light of the foregoing, the New York became an integral part of the UAE local laws based on the state's treaty obligations and as set forth in Article (238) of the Federal Civil procedures Code as mentioned above.

4.2.4 The Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention) of 1965

This Convention is a multilateral treaty and became effective as of 14th October 1966. Basically, this Convention basically established by the World Bank with several countries as members and currently 147 has ratified it including the UAE which has joined the Convention on 1982. The International Centre for Settlement of Investment Disputes “ICSID” was established based on this convention. The convention aims to provide proper mechanism for resolution of disputed between the contracting states and the investors concerning the international investments.

Jane Jenkins and Simon Stebbings⁶⁰ clarified Articles 54 and Article 53 of the ICSID Convention explains the scope and procedures of enforcement, as Article (53) thereof stipulates this Convention is obligatory on all parties and shall not be appealed or to be subject to any remedy other than the remedies expressly mentioned therein. Whereas Article 45(1) states that each of the contracted countries shall be obliged to enforce and also to recognize the awards delivered under the ICSID Convention immediately, and to should be dealt with as final judgments decided by the national courts in the country of enforcement. The national courts of the contracting state are not entitled to dismiss awards issued by the ICSID tribunals which is not subject to any judicial challenge, because such awards are considered national by the force of the ICSID treaty rather than national laws.

⁶⁰ Jane Jenkins and Simon Stebbings, *International Construction Law* (Edition, the Netherlands, Kluwer Law International, 2006).

4.3 The Regional conventions

4.3.1 Overview on enforcement under the Regional Conventions

In addition to the international Convention, the UAE has joined and ratified several regional conventions that can lead to an easy recognition and enforcement of arbitral awards as detailed herein below.

4.3.2 The Convention of GCC countries of 1996 concerning Enforcement of Judgments, Judicial Notices and delegations

On 1996, the governments of the Gulf Cooperation Council ratified and adopted the Convention for the Enforcement of the Judgments, Judicial Notifications and Delegations, (Agreement on the Enforcement of Judgments, Letters Rogatory and Service of Process “GCC”); in compliance with the Supreme Council decision taken in the Fourteenth Session regarding approving the system of the GCC Commercial Arbitration Centre.

The signatories to the GCC Convention are Sultanate of Oman, Kingdom Saudi Arabia, State of Kuwait, Kingdom of Bahrain, State of Qatar.

The GCC issued the following legislations to ratify this Convention. The Kingdom of Bahrain joined the convention by Law No.6 of 2000 regarding the approval to set up the Centre and its rules. Sultanate of Oman acceded by Cabinet Resolution in the session No. 10/2000 dated 4 April 2000 regarding the approval to set up the Centre and its rules. The United Arab Emirates joined by Cabinet Resolution in the session No. 2/44 of 2001 dated 26 January 2001 regarding the approval to set up the Centre and its rules. The State of Qatar acceded by Cabinet Resolution in the Regular Meeting No.29 of 2001 dated 19 January 2001 regarding approval to set up the Centre and its rules. The Convention was ratified in Kingdom of Saudi Arabia by the Cabinet Resolution issued in the session No. 102 of 30/4/1423 Hijri to approve establishing the Centre and its rules. Finally, State of Kuwait joined the GCC Convention.

The GCC Convention stated in Article 1:

“Each of the GCC states must enforce final judgments delivered by the national courts of each of the contracting states regarding the commercial, administrative and civil cases...”

So, In order for a judgment to be enforceable, the originating court must have had jurisdiction, within the definition provided in the Convention.

The Convention provides several grounds on which enforcement may be challenged. However, the court may not review the merits of the claim, "The task of the judicial authority of the state where the judgment is required to be executed shall be limited to confirming whether the judgment fulfills the requirements as provided by this agreement, without discussing the subject matter."

Article (2) of the GCC Convention provided many reasons to reject the execution of the judgment either partially or completely⁶¹.

The necessary procedures for enforcing the judgments and awards were mentioned in Article (9) of the GCC Convention, which states that the successful party seeking to enforce the judgments in any of the contracting countries shall meet the following requirements:

- a. The judgment true copy duly signed and also attested by the competent authority in the respective country.
- b. A certificate to confirm the judgment is final as per the judicial system, unless the judgment clearly mentioned the judgment is final.
- c. A copy of the notification of the judgment if the judgment was issued in absence, duly certified as a true copy of the original thereof, or a confirmation by any other document to prove the defendant was notified in the proper manner.

The GCC Convention stipulates in Article 12: "Subject to the provisions of Articles 2 and 4, awards issued by arbitrators shall be executed by any of the member states as provided hereunder, subject to the applicable rules in the state where the award is required to be executed".

Further, during the fourth session of the GCC states' Supreme Council held in Riyadh from 7 to 9 Rajab 1414 Hijri, the Council decided to establish the GCC Commercial Arbitration Centre, Article (15) of the rules states: (The judgment issued by the tribunal according to the procedures should be binding and final for the member states and must be

⁶¹ Dr. Al Eisa, Ibrahim, *Dispute Resolution in the GCC Commercial Arbitration Centre*, Gulf Commercial Arbitration, Issue No. 24

enforced in the member states subject to a clear order of enforcement from the competent judicial authority)⁶².

4.3.3 The Amman Agreement for enforcing Foreign Arbitral Awards (1987), between the Arab League states

The Amman Convention was established in Amman on 14 April 1987, signed by 14 Arab countries but was ratified by 8 countries. Unfortunately, UAE did not sign this important convention, which to some extent it is similar to New York Convention. The Arab Centre of Commercial Arbitration was established based on this Convention with a seat in Rabat, Kingdom of Morocco. Amman Convention states the High Court in each of the contracting states may only refuse to enforce the awards if there is contradiction with the public policy in the said country. It also states the awards made by Centre of Rabat are not subject to appeal before the courts of the contracting country in which the award is sought to be enforced. All the tribunal procedures shall be in Arabic only⁶³.

4.3.4 The Arab League Convention regarding enforcement of the judgments and awards between Arab states of 1952.

This Convention has an Arabic nature and was approved by the Arab League Council on 14th September 1952, and according to Article 27 of Riyadh Convention, this Convention is not valid except for the countries un-signatory to Riyadh Convention, such as Egypt⁶⁴.

4.3.5 The Riyadh Arab Agreement for Judicial Cooperation “Riyadh Convention of 1983”

The Riyadh Convention was established on 6 June 1983 and entered into force in 1985. The UAE joined the Riyadh Convention on 15th of April 1999 by virtue of the Federal Decree No. 53 issued in 1999 “arbitration awards delivered by GCC countries can be enforced in the UAE”.

⁶² Ahmed Najm Al Najm, 2011, Secretary General of GCC Commercial Arbitration Centre: (Facts about the arbitration in GCC countries and the Experience on GCC Commercial Arbitration Centre), a paper delivered during the conference of Arbitration and Judiciary in the Islamic Finance Industry on 6 June 2011 in Abu Dhabi, UAE.

⁶³ Janes Jerkins & Simon Stebbings, *The Amman Convention*, from page 295

⁶⁴ *Esam Al Tamimi, Practical Guide to Litigation and Arbitration in the United Arab Emirates, (1st, Kluwer Law International, 2003).*

This Convention is a major regional convention that was ratified by 21 Arab countries, including Kingdom of Bahrain, Sultanate of Oman, the UAE, Qatar, Jordan, Libya, Morocco, Mauritania, Algeria, Tunisia, Palestine, Lebanon, Syria, Sudan, Somalia, Djibouti, Kuwait, Kingdom of Saudi Arabia, Iraq, and Yemen.

The arbitral awards issued in any of the Arab countries can be enforced more smoothly under Riyadh Convention. The Riyadh convention applies in many cases related to the commercial disputes, and also it provides for recognizing and enforcing the foreign arbitration awards in the commercial, civil and administrative issues.

Article 2 thereof states: “This Convention applies to commercial disputes between natural or juristic persons of any nationality, linked by commercial transactions with one of the contracting States or one of its nationals, or which have their main headquarters in one of these States”.

Article 25 of the Riyadh Convention, subject to definite conditions, states: “Each contracting party shall recognize the judgments made by the courts of any other contracting party in civil cases including judgments related to civil rights made by penal courts and in commercial, administrative and personal statute judgments having the force of *res judicata* and shall implement them in its territory as per the procedures stipulated in this Part ..”.

Article 3 of Riyadh Convention stipulates:

“1. Reference to arbitration can be made by one of the two following means: The first is to insert an arbitration clause in contracts entered into between the concerned parties, and the second is to establish an arbitration agreement once the dispute has arisen.

2. The following standard clause should be inserted into contracts where one wishes to refer to arbitration: "All disputes arising out of this Contract shall be settled by the Arab Centre for Commercial Arbitration in compliance with the provisions of the Arab Convention on Commercial Arbitration."

Article (37) of Riyadh Convention states: “Adjudications or arbitrators: Without prejudice to the provisions of Articles 28 and 30 of this Agreement adjudications of arbitrators shall be recognized and executed by any contracting party in the manner stipulated in this Part subject to the legal norms of the requested party, and the competent judicial authority of the requested party may not discuss the subject of such arbitration nor refuse to execute the judgment except in the following cases:

“a. If the law of the requested party does not permit the settlement of the subject of the dispute by arbitration.

b. If the adjudication of the arbitrators is made in execution of a condition or arbitration contract that is void or has not become final.

c. If the arbitrators are incompetent under the contract or condition of arbitration or under the law on the basis of which the adjudication was made.

d. If the litigants have not been served subpoenas in the proper manner. (e) If any part of the adjudication be in contradiction with the provisions of Islamic Shari’a, the public order or the rules of conduct of the requested party”.

The authority requesting recognition of the adjudication of arbitrators and the execution thereof shall submit a certified copy of the adjudication accompanied by a certificate issued by the said authority stating that the adjudication has executive force. If there be a proper, written agreement under which the parties had consented to submit to the competence of the arbitrators in settling a certain dispute or whatever other disputes arising between the two parties in respect of a certain legal relationship, a certified copy of such agreement must be submitted”⁶⁵.

4.3.6 Agreement of Encouragement and Protection of Investment between the members of the Organization of the Islamic Conference

Chapter 2 of this agreement is deals with enforcing arbitral awards.

4.3.7 The Unified Agreement for investing Arabic capital in the Arab states

As per Article (25) chapter (6) of this agreement, any dispute shall be settled by arbitration or reconciliation or by referring the same to the Arabic Court of Investment. The arbitration should be carried out as per the terms provided in the Agreement annex.

Article (34/1) of the this agreement stipulates the award should be final and shall not be subject to any challenge, and Article (34/2) states the judgment issued by the Arabic Court of Investment is binding and enforceable.

⁶⁵ Available on <http://www.unhcr.org/refworld/type,MULTILATERALTREATY,ARAB,,3ae6b38d8,0.html> (accessed on 14 February 2013)

4.4 The Bilateral Conventions

Additionally, the UAE has joined and ratified several bilateral treaties and conventions that can cover the subject of enforcing arbitral awards, as detailed herein below.

4.4.1 The Convention on Judicial Assistance, Recognition and Enforcement of Judgments in Civil and Commercial Matters signed between the UAE and the French Republic “the Paris Convention”.

The Paris Convention was signed in Paris and ratified by the UAE based on Federal Decree No. 31 of 1992. In accordance with the provisions of Paris Convention, judgments delivered in the UAE courts shall be enforced in the France and the contrary applies. The Convention states in Article 13(1) that enforcement is subject to fulfilling specific conditions as follows: “Judgments issued by the courts of one country shall be recognized and can be enforced in the other State if certain conditions are met...”.

Article (14) stipulates the court delivers the judgment should have jurisdiction either as per the rules of the enforcing country or according to the rules mentioned in this Article, as it deliver jurisdictional gateways similarly to what provided in the Convention of GCC, besides as per Article (15) of the convention, the merits should not be reviewed.

The enforcement of arbitral as per this Convention is subject to the following conditions:

- a. The availability of valid arbitration agreement.
- b. The award’s subject matter is arbitrable according to the applicable laws of the enforcing country.
- c. To submit certified copy of the arbitrators’ mandate along with copy of the award duly certified and attested in the issuing country and also a confirmation that the award is not appealable and final.

The ruling of the UAE Federal Supreme Federal Court delivered in the courts is obliged by the provisions of Paris convention. In this judgment, the Court emphasized that enforc-

ing arbitral award delivered in France shall be carried out based on the conditions of Paris Convention, subject to the requirements of authentication mentioned therein⁶⁶.

The Court confirmed that according to Article 238 of the Civil Procedures Code, the terms and conditions of an international convention duly ratified and signed with a foreign states shall be applicable and prevail over Article 235 and 236 thereof.

Further, the UAE Federal Supreme Court decided in the same Case No. 764 as follows: “The provisions of Article 235, 236 and 238 of the Civil Procedures Code are to the effect, the provisions of conventions between the United Arab Emirates and other foreign countries and international agreements ratified by the UAE, will be applicable with regards to the enforcement of the judgments of foreign courts and the arbitral awards as being domestic law, irrespective of the conditions set out in Article 235 of the Law of Civil Procedures. The courts of the UAE must ascertain that the conditions set out in such international conventions and agreements have been met before ordering that such orders be ratified or enforced in the UAE”.

4.4.2 Agreement between the UAE and Republic of India on Juridical and Judicial Cooperation in Civil and Commercial matters.

The UAE utilized the Reciprocal bilateral treaty with India for the purpose of enforcement. The UAE ratified this convention by the Federal Decree No.31 of 1992 dated 27 April 1992. However, there is another agreement signed by the UAE and India “Agreement on Legal and Judicial Cooperation in Civil and Commercial Matters, Mutual Legal Assistance in Criminal Matters and Extradition of Criminals” ratified Federal Decree No.33 of 2000.

Article (1/2) of the agreement states: “The assistance in accordance with this agreement shall be in the following fields: (b). Execution of judgments, settlements and arbitration awards”.

Further, Article (25) of the agreement stipulates:

⁶⁶ [2005] UAE Supreme Federal Court 764, Judicial Year No. 24 , (Al Shahabi Al Sharqawi, Judgments of Arbitration in the UAE, the Principles and judgments delivered by the Federal Supreme Court in Abu Dhabi and Dubai Court of Cassation within 17 years “1992 to 2008” Bin Dasmal Press, 2008)

“1. without prejudice to Articles (24) and (26) hereof, arbitral awards delivered in any of the member countries should be valid and enforceable within region of the other party, provided that:

a. The arbitrators' award was rendered based on a prior agreement in writing between the disputed parties stipulating that the arbitration shall be referred to settle specific or future dispute resulted from legal relationship between the parties.

b. The award in the matters subject to arbitration should be issues according to the laws of country state requested recognition and enforcement of the award, unless there is a contradiction with the public order in this country.

2. The successful party requesting recognition and enforcement of the arbitral award should submit the award true copy supported by a certificate from ta competent judicial authority at the requesting state, confirming the award is enforceable.

3. Authenticated copy of the parties' agreement about the powers of arbitrators to resolve the dispute”.

It is worth noting that before UAE ratify New York Convention, Dubai Court of Cassation decided the following:

“Whereas the UAE did not sign or join the New York Convention of 1958 and also no domestic law issued in this respect, and whereas the Appellee did not submit any evidence that the state of India, where the arbitrators' award was issued and enforcement requested within UAE, has neither signed nor joined the said agreement. So, when the UAE courts requested to enforce arbitration award delivered in India, the referral should be made UAE Civil Procedures Code and the laws related to arbitration and procedures in India to be sure if the arbitration awards delivered in the UAE can be enforceable in India or not. This will not mean the arbitral award delivered in the UAE that may be enforced in India that the laws of India mention UAE specifically, but means the conditions of enforcing such award in India are the same conditions for enforcement in the UAE or having less burden,

this is called the reciprocal principle stipulated in Article 235/2 of the UAE Civil Procedures Code⁶⁷.

4.5 The UAE has ratified certain arrangements and bilateral agreements with some Arab countries, as explained below.

Furthermore, the UAE has signed and ratified several bilateral treaties relating to enforcing the arbitral awards with a number of Arab states, as explained herein below.

4.5.1 The Agreement on Legal and Judicial Cooperation between the UAE and the Hashemite kingdom of Jordan.

This agreement was ratified in 1999.

Article (25) thereof provided the parties of the agreement acknowledge the arbitral awards and to be enforced in the region of the other country in the same manner upon which the judgments are enforced as stipulated in this chapter, provided the legal rules in the enforcing estate should be considered, and the judiciary in this county is not entitled to reject enforcing such award except in the following conditions:

- a. if the law of the country requested to enforce the arbitrator's award do not allow resolving the dispute through arbitration.
- b. If the arbitrator's award was issued based on void conditions of arbitration contract and conditions or not became final.
- c. if the arbitrators are not entitled to look into the dispute, (d) if the parties were not notified a proper manner.
- e. if the arbitrators awards violating the public order, morals or the public policy in the state requested to enforce the award. The party seeking to enforce the award should submit

⁶⁷ [1999] Dubai Court of Appeal 258, rules mentioned by (Al Shahaabi Al Sharqawi, *Judgments of Arbitration in the UAE, the Principles and judgments delivered by the Federal Supreme Court in Abu Dhabi and Dubai Court of Cassation within 17 years "1992 to 2008"* Bin Dasmal Press, 2008)

an authenticated copy of the award supported by a certificate from the judiciary confirming the execution order”.

4.5.2 The Treaty on Judicial Cooperation in Criminal Matters, Extradition of Offenders, Cooperation in Civil, Commercial and Personal Matters with Morocco.

This Treaty was ratified by the UAE in 2006 and by the Kingdom of Morocco on 2006.

4.5.3 Agreement on Legal and Judicial Cooperation in Civil and Commercial Matters, Criminal Matters and Personal Status Matters with Extradition and Assistance in the Settlement Estate with the Arab Republic of Syria.

This agreement was ratified by the UAE and also by Syria in 2002.

4.5.4 Agreement on Legal and Judicial affairs signed with Kingdom of Saudi Arabia

This agreement became of less significance after the ratification of the GCC Convention as per the details in the Riyadh Convention.

4.5.6 The Agreement on Legal and Judicial Cooperation with Somalia

The agreement was concluded and ratified by the UAE in 1972, and considered among the first bilateral treaties concluded by the UAE.

However, It is worth mentioning that Somalia neither sign nor ratify the New York Convention of 1958, therefore bilateral treaties with this country considered extremely essential for enforcing the arbitral awards because Somalia have not yet joined the New York Convention, despite the fact that Riyadh Convention can provide also help in the enforcement of arbitration awards.

4.5.7 The Treaty on Mutual Legal assistance in Criminal Matters, Extradition of Offenders, Cooperation in Civil, Commercial and Personal Matters, Service of Judicial and Extra-Judicial Documents, Obtaining Evidence, Commissions and the Recognition and Enforcement of Foreign Judgments and Arbitral Awards with Sudan.

The UAE had ratify this treaty by the Federal Decree No.8 of 2005. The bilateral treaty with Sudan considered of a particular importance because this country have not yet joined

the New York Convention, despite the fact that Riyadh Convention can provide assistance concerning enforcing of arbitration awards.

4.5.8 Agreement on Legal and Judicial Assistance with Arab Republic of Egypt.

This agreement was ratified by the UAE in 2000.

4.5.9 Agreement on Judicial Cooperation, Enforcement of Judgments and Extradition of Criminals between the UAE and the Tunisian Republic.

This agreement was duly ratified the two countries.

4.5.10 Agreement on Judicial Cooperation Service of Process, Letters, Rogatory, Enforcement of Judgments and Extradition of Criminals between UAE and the Algerian Democratic and People's Republic

This agreement was ratified by both UAE and Algeria.

To conclude, the above Arab states has joined New York Convention, except Yemen, the Republic of Sudan and Somalia, accordingly the New York Convention has superseded these bilateral agreements excluding the cases of Sudan and Somalia, therefore they became more important because these two states are not a signatory and did not join the New York Convention, so these bilateral agreements are still relevant with regards to the foreign enforcing arbitral awards⁶⁸.

⁶⁸ Available on <http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2012/united-arab-emirates>

CHAPTER 5

Conclusions and Recommendations

5.1 Conclusion

This dissertation has investigated the enforcement of foreign arbitral awards and specifically in the UAE, on the grounds of the national laws and also based on the state's treaty obligation. The aim of the foreign enforcing arbitral awards is to guarantee that justice is achieved and the rights of the investors is properly maintained, as enforcement as explained in the study is the outcome of the entire arbitration process.

The study has shown the procedures and formalities for enforcing the foreign arbitration awards pursuant to the UAE national laws, as well as the applicable laws in some Arab and foreign countries and also based on the treaty obligations of the states. Further, the reasons for refusal enforcement are also dealt with in the research.

The study found that New York Convention is the best mechanism for recognizing and enforcing the arbitral awards, therefore it was adopted and applied by most countries in the world, and considered as the most successful treaty with regards to the arbitration and even in the private international law.

In general, the study also found that enforcement of the foreign arbitral awards is a matter well maintained and organized by the international, regional and bilateral treaties ratified by the UAE and the other different countries, in order to achieve the rapid and proper enforcement according to the applicable laws in the respective state.

Actually, there are many advantages and benefits the UAE will achieve from joining and applying the New York Convention as well the regional and bilateral conventions, as this will result in enhancement of the national economy and attract more foreign investments, besides the UAE arbitral institutions became more trustable and this will promote UAE as an ideal place for international arbitration.

5.2 Recommendations

1. The Arab countries in general and UAE in particular are hereby advised to enforce the foreign arbitral awards in a flexible and clear manner by joining and adhering to the international instruments. Definitely this will result in more credibility and trust to the foreign countries and investors, attract the international investments and technical knowledge and ultimately enhance and strengthen the economies of the Arab world. Accordingly, the UAE is recommended to join Amman Agreement for enforcing Foreign Arbitral Awards (1987) between the states of Arab League, and other countries such as Sudan and Yemen are also recommended to join the New York Convention of 1958 as soon as possible.
2. The UAE is strongly advised to issue and adopt the Draft Arbitration Law sooner rather than later, in order to keep the federal legislations in line with the economic boom and the immense development and progress that took place in the country during the last few years.

APPENDICES

Appendix A

Interview with Dr. Mohamed Elhassan Haj Ali

(Certified arbitrator before ADCCA & LCIA and legal expert

Ex-director of Military Justice Administration, Sudan

(Refer to Chapters 3)

In order to establish impartial view on this study, it will be essential to obtain feedback and the opinions of lawyers, legal experts in the UAE who worked on enforcement of arbitration awards and advised both Respondents and Defendants. Further, it is also essential to examine the views of judges and arbitrators who worked in the subject matter of the research. Developing this interview will explore and clarify the enforcement of arbitral awards. Consequently, the interview questions as follows:

What had resulted from UAE ratification the New York Convention?

After UAE joined the New York Convention, instantly the Convention became part of the UAE national acts and even has priority in application as stipulated in the Civil Procedures Code. Therefore, the local courts had changed the position regarding the enforcement of foreign arbitration awards and have taken more flexible approach in this regard. As a matter of fact, the UAE courts dispensed the traditional basis set forth in Article 235 of the Civil Transactions Law for not applying the foreign arbitral awards, and instead the courts applied the specific provisions set forth in New York Convention.

What is the effect of UAE ratification of New York Convention?

Of course the UAE became arbitration friendly state and furnished better climate for enforcing the foreign arbitral awards. Moreover, the UAE arbitration institutions will be more powerful and attractive for international arbitration

Do you suggest any other issues considered important ought to be added for the reader attention?

All the Arab countries as well as the other countries are encouraged to join the international and regional conventions related to the arbitration and also to guarantee enforcing foreign arbitral awards as per the national laws and the treaty obligations. This will result in making arbitration more effective method and tool of enforcement, to develop the economies by attracting the foreign investments and to obtain the required technology and know-how.

End of the interview

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