



Challenging International Arbitration Awards in UAE
Courts on Public Policy Ground

الطعن في قرارات التحكيم الدولية في محاكم دولة الإمارات العربية المتحدة على
أساس النظام العام

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Abstract

The Arbitration has become a very attractive tool for foreign investors in the UAE and most of it international in nature. Judge typically prefers to apply the national law that he is familiar with on the enforceability of an arbitration award.

The Public Policy is one of the major bases for the arbitration award non-enforcement. Which can be used unfairly by the national judges to stop the execution of the foreign award, claiming it is contrary to the public policy

The dissertation will evaluate and discuss the U.A.E. position among other nations on the public policy issues. By scrutinizing the ground for non-recognition of the arbitration award, non-arbitrability, the national law, and concept of public policy, the concept of public policy in international arbitration, the Shari'a law and concept of public policy and finally conclusion and recommendation.

ملخص

أصبح التحكيم وسيلة جذابة للغاية للمستثمرين الأجانب في دولة الإمارات العربية المتحدة، وأغلبها ذات طابع دولي. عادة القاضي بفضل بتطبيق القانون الوطني الذي هو على دراية بشأنه في تنفيذ قرارات التحكيم. النظام العامة واحدة من الأسباب الرئيسية لعدم تنفيذ قرارات التحكيم والتي يمكن للقضاء الوطنيين أن يستخدمها بإجحاف لوقف تنفيذ قرار تحكيم أجنبي، مدعيا أنه يتعارض مع النظام العامة. في هذه الرسالة سوف يتم تقييم ومناقشة موقف دولة الإمارات العربية المتحدة من بين دول أخرى في قضايا النظام العامة. بالتدقيق في أسس عدم الاعتراف بقرار التحكيم وعدم قابلية التحكيم، والقانون الوطني، ومفهوم النظام العامة، ومفهوم النظام العامة في التحكيم الدولي، والشريعة الإسلامية ومفهوم النظام العامة وأخيراً الاستنتاجات والتوصيات.

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1. Chapter 1 Dissertation Overview

1.1 Introduction

The Arbitration has become a very attractive tool for foreign investors¹ as a dispute resolution mechanism for its broad enforceability, Neutral forum, Procedural flexibility, Arbitrators with relevant dispute experience and Party autonomy.² More than 500 arbitrations take place in the UAE and most of it international in nature³. Judge typically prefers to apply the national law that he is familiar with on the enforceability of an arbitration award.

The Public Policy is one of the major bases for the arbitration award non-enforcement, and the weakest point in arbitration chain is considered to be the enforcement.⁴ Which can be used unfairly by the national judges to stop the execution of the foreign award, claiming it is contrary to the public policy; it can be “helpful as a tool and dangerous as a weapon.”⁵ In the U.A.E, the courts exercise a jurisdiction to avoid execution of the award by the concept of public policy even though the term is not yet fully explained. The English court stated in 1824⁶ “Public policy is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all, but when other points fail.” The concept of public policy varies from one nation to another and from period to period. The UAE Judicial attitude towards arbitration has changed since the country ratified the New York Convention and other treaties. This shift from the outdated court unfriendliness towards arbitration, to focusing on the international policy favoring commercial arbitration, was also same as the attitude

¹ Corporate choices in International Arbitration Industry perspectives, PwC, 2013, p 6; Alan Redfern and other, Law and Practice of International Commercial Arbitration, (4th ed, Sweet & Maxwell, London, 2004), p 1.

² Latham & Watkins <https://www.lw.com/.../guide-to-international-arbitratio>.

³ M. Beswetherick and K. Hutchison, Enforcement of Arbitration Awards, Moving in the Right Direction, Clyde and Co.

⁴ Wafa Janahi. Problems and Weaknesses Arising from the Enforcement of Foreign Arbitral Awards in National Courts.

⁵ Loukas Mistelis, “Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of International Arbitral Awards” International Law forum du Droit International 2 Volume 2, No. 4, December 2000, 248.

⁶ Richardson v Mellish (1824) 2 Bing 229, [1824–34] All ER Rep 258, 266.

of USA courts.⁷ Pursuing award enforcement by heading to a local court is the final approval versus losing party refusing to comply with the arbitration result⁸. A public action is permitting this personal work⁹. Therefore the public policy is one of the leading debated issues in rejecting arbitration award enforcement.¹⁰

The Article V (2) (b) of the New York Convention¹¹, the Model Law Article 36 (1) (b) (ii)¹² and Article 216¹³ of Civil Procedure Code (CPC) of UAE have provided provision for non-enforcement of the award. This Articles led to views that court procedure toward public policy as a legal basis not to execute the award which may be “major potential loophole.”¹⁴

The court attitude should be a narrow approach towards public policy non-enforcement provisions. The court should only refuse enforcement based on a violation of “the most basic notions of morality and justice”¹⁵, as in *Parsons & Whittemore Overseas Co v RAKTA* case and not on minor technicalities as in *Bechtel International Co. Ltd. v. Civil Aviation Department of the Dubai Government*, where the court refused execution of the award based on the ground that witnesses did not swear as per Article 41(2) of the UAE CPC¹⁶. Nevertheless, this attitudinal change by the courts and become more friendly to ratification of awards is evident in a 2009 case¹⁷, where the arbitrator did not sign all the pages but signed the decision page and section of the reasoning for its decision.

The dissertation will evaluate and discuss the U.A.E. position among other nations on the public policy issues. By scrutinizing the ground for non-recognition of the arbitration award, non-arbitrability, the national law, and concept of public policy, the concept of

⁷ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

⁸ Alan Redfern and other, *op. cit.* pp.513.

⁹ Julian D. M. Lew and other, *Comparative International Commercial Arbitration* (2003), 689 Para 26-6.

¹⁰ Gary B. Born, *International Commercial Arbitration: Commentary and Materials* (Second Edition), 2001, P 815.

¹¹ New York convention Article V(2)(b).

¹² Model Law Article 36 (1)(b)(ii).

¹³ Article 216 of CPC.

¹⁴ David P. Stewart, *National Enforcement of Arbitral Awards Under Treaties and Conventions*, in *International arbitration in the 21st century: towards "judicialization" and uniformity?* (Richard B. Lillich & Charles N. Brower eds., 1994).189.

¹⁵ *Parsons & Whittemore Overseas Co v RAKTA* pp 976.

¹⁶ *Bechtel International Co. Ltd. v. Civil Aviation Department of the Dubai Government* 300 F. Supp. 2d 112 (Petition n. 503/2003, Dubai Court of Cassation, 15 May 2005).

¹⁷ Suzanne Abdallah, Al-Tamimi and Co., “Arbitration in the UAE: The Formalities of an Arbitration Award”.

public policy in international arbitration, the Shari'a law and concept of public policy and finally conclusion and recommendation.

1.2 Dissertation Objective

Clarifying the concept of Public policy will help in the development of an effective arbitration law in different countries that have ratified the international convention, which will contribute to winning the confidence of foreign companies, encourage foreign investment and support using Arbitration as an efficient dispute resolution mechanism in the UAE.

1.3 Dissertation Significant for UAE Business

The trade dispute in local court is lengthy, too expensive and foreign investors are not entirely aware of the local law. While the arbitration award is expected to be faster, confidential as a result the international investor prefers to use the arbitration as a dispute resolution mechanism than using the local court. The confidence of foreign companies, encourage foreign investment and support using arbitration as an affected tool for a dispute resolution mechanism in UAE.

1.4 Scope and Dissertation limitation

The main restriction to this dissertation is that the courts in UAE, GCC, Arbitration institutes and the Arbitrator are not thoroughly publishing their cases, causing difficulty to follow the update regarding the foreign arbitral awards enforcement also the public policy subject is very extensive, flexible and changed time to time and place to place.

1.5 Methodology

The dissertation method is mainly doctrinal and qualitative. We will review main available literature, historical analysis: Using all sources, content analysis: reading judgments, legislation and policy documents.

The reason for the selection this method as the primary and secondary data is available to provide a systematic discussion of the rules governing a public police, analyses the

relationship between standard and UAE law and different cases, clarifies areas of difficulty and, possibly, expect future developments.

1.6 The Dissertation Structure

This dissertation consists of six chapters.

Chapter 1 highlight subject introduction, the objective of the dissertation, the significant of the dissertation for the UAE business, discuss the dissertation limitation, dissertation methodology, and dissertation structure.

Chapter 2 deal with the general concept of the arbitration in UAE, philosophies concerning recognition and enforcement of foreign arbitral awards, parties' capacity to the arbitration agreement, and finally shortage in arbitration procedure.

Chapter 3 is a concern of invalidity of arbitration agreements. First, if arbitrator exceeds its jurisdiction, the second award not binding and Finally, irregularity in arbitration composition and arbitral procedures.

Chapter 4 examine the non-arbitrability and concept of public policy first under national law, second under international law and finally under Shari'a law.

Chapter 5 Summarize the conclusion of the dissertation.

2. Chapter 2 Grounds for non-recognition of Arbitration Award

2.1 Arbitration Concept in UAE

The petroleum discovery in UAE in fiftieth was the drive for modern International arbitration concept, and it appeared parallels in 1965 with the formation of Dubai Chamber of Commerce¹⁸.

In March 1992, the UAE issued, Federal Law No.11, Article (203 to 218) and Article (235 to 238) of Civil Procedure Code (CPC) governing the arbitration consists of 20 provisions.¹⁹ Also, four Federal Laws which regulate particular disputes to be resolved by the arbitration. Article 13 organize legal relation between Emirates²⁰, Federal Law No 8 to resolve labor disputes by arbitration²¹, Article 5, allow the Chambers of Commerce to resolve the commercial and industrial dispute by arbitration²² and Federal Law No. 4 for the dispute in Securities and Commodities.²³ The Securities and Commodities Board of Directors has governed authority, and issued regulations for the financial markets in Abu Dhabi and Dubai and the two emirates are using it²⁴.

The dispute which is not a commercial nature Dubai Government and its subsidiary departments follow the different law if submitted to arbitration.²⁵

Article 236 of CPC for the recognition and enforcement of foreign arbitration award.²⁶ DIFC (Dubai International Financial Centre) courts using a common law jurisdiction in Dubai free zone²⁷ and all other areas of the UAE, it adopts in its arbitration the UNCITRAL Mode law.

¹⁸ Dispute Resolution and Arbitration Dubai and UAE.

¹⁹ The UAE, Federal Law No .11 of 1992 Civil Procedure Code.

²⁰ Law No.11 of 1973, Article 13.

²¹ The UAE Federal Law No.8 of 1980.

²² The UAE Federal Law No. 5 of 1976.

²³ The UAE Federal Law No. 4 of 2000.

²⁴ Essam Al Tamimi, "Practical Guide to Litigation and Arbitration in the United Arab Emirates", First Edition, p.147.

²⁵ King & Wood Mallesons, Topic in focus: demystifying UAE arbitration law Topic in focus: demystifying UAE arbitration law.

²⁶ The UAE Article 236 of Federal Law No.11 of 1992.

²⁷ Claudia T. Salomon and James P. Duffy, 'The New Dubai International Arbitration Law' (26 November 2008) New York Law Journal; Ghada Q. Audi and Allesandro Tricoli, 'Updates on the Ratification and Enforcement of Arbitration Awards in the UAE and DIFC Courts'.

UAE ratified several international resolutions allowing the foreign arbitral awards enforcement: In 1981 ratified the Washington Convention (ICSID);²⁸ In 1999 ratified Riyadh Convention²⁹; In 1996 ratified Judgment Enforcement in the GCC states.³⁰

The UAE acceded in 2006 to the New York Convention³¹ and in February 2008 the UAE issued a draft arbitration law grounded on UNCITRAL Model Law.³²

Many International Arbitration Centre establishments in UAE, in Dubai (DIAC)³³ and (DIFC-LCIA)³⁴, in Abu Dhabi (ADCCCA) the government entities prefer using ADCCCA Centre³⁵, in Sharjah (SICAC)³⁶, and smaller institution in other emirates.

2.2 The Arbitral Awards Recognition and Enforcement

The term recognition and enforcement are implemented always inseparably interrelated³⁷. Nevertheless, the two-term have different meanings and purposes in the process of implementation³⁸.

The Model Law in Article 35, New York Convention in Articles IV and English Act 1996 mentions the terms together. As the awards have to be recognized then enforce, therefore the two terms are always together³⁹. Nevertheless, separately recognition and enforcement can be used.⁴⁰

²⁸ The ICSID Convention, World Bank Group opened for signature 18 March 1965 'List of Signatories of the Convention' <<http://www.worldbank.org/icsid/constate/c-states-en.htm>>.

²⁹ Federal Decree No. 53 of 1999 to ratify the Riyadh Convention, published in the UAE certified gazette in 29/4/1999

³⁰ Federal Decree No.41 of 1996 to ratify GCC Convention, published in the UAE certified gazette in 30/6/1996

³¹ Federal Decree No.43 of 2006 to ratify New York Convention, published in the UAE certified gazette in 28/6/2006

³² Recent Developments in Arbitration Law in the UAE, www.wwhgd.com/newsroom-news-71, accessed on April 2016.

³³ DIAC (Dubai International Arbitration Centre), www.diac.ae/idias/, accessed on April 2016.

³⁴ DIFC-LCIA Arbitration Centre, <http://www.difcarbitration.com/>, accessed on April 2016.

³⁵ Abu Dhabi Arbitration Centre Issues its New List of Arbitration Rules, Khalil Mechantaf/September 10, 2013/Leave a comment, Baker & McKenzie, accessed on April 2016.

³⁶ SICAC (Sharjah International Commercial Arbitration Centre), www.tahkeem.ae, accessed on April 2016.

³⁷ Alan Redfern and other, op. cit., Para 10; Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, Oxford University Press, 2005, p 408.

³⁸ Alan Redfern and other, op. cit., Para 10-10; McIlwrath and Savage, *International Arbitration and Mediation: A Practical Guide*, (2010) Para 6-047.

³⁹ Alan Redfern and other, op. cit. Para 10-10.

⁴⁰ *Enforcement of International Arbitration Awards (International Law)*, Cameron May, 2001 Di Pietro, Domenico and Martin Platte, 1st Edn, p.22.

The award can enforce without recognition⁴¹, New York Convention Article III stated “ Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards”.⁴² The Convention is referring to them separately on the conditions that can apply to both.

English courts in the trial of *Bank Mellat v Mark Dallal*⁴³ recognized but did not enforce, because its decision was taken by a relevant treaty and not from arbitration agreement recognition which is usually a protective process⁴⁴, while enforcement is a court procedure that follows recognition guarantees force progresses the award⁴⁵.

The recognition is maybe applied to stop winning party to enforce additional arbitral award gaining from the same disagreement as in *OTV v Hilmarton* case⁴⁶ while winning party can enforcement by a court against the belongings of the losing party is used as a weapon⁴⁷.

In UAE the foreign award to be recognized and enforced, the winning party need to provide an original award and the initial arbitration contract which is Similar to the New York Convention⁴⁸.

The international verdicts are ruled by the appropriate bi- or multilateral conventions and where no agreement or treaty is signed, the awards will be enforced as foreign judgments as per Article 236 of the UAE CPC. As in *R. Price & E. Tamimi* case,⁴⁹ the Court rejected execution of the award on the following the basis:

1. That Plaintiff had not established reciprocity between the laws of the award’s country of origin and laws of the UAE.

⁴¹ Andrew Tweeddale and Keren Tweeddale, op. cit., p. 408; Alan Redfern and other, op. cit. Para 10-10

⁴² Article III of the New York Convention

⁴³ *Bank Mellat v Mark Dallal* (1986), 1 QB441, 2 W.L.R. 745.

⁴⁴ Alan Redfern and other, op. cit. Para 10-11.

⁴⁵ Alan Redfern and other, op. cit. Para 10-12

⁴⁶ *OTV v Hilmarton*, 10 June 1997 Supreme Court, XXII YBCA 696.

⁴⁷ Alan Redfern and other, op. cit. Para 10-13

⁴⁸ Article III and IV of the New York Convention.

⁴⁹ *R. Price & E. Tamimi* case, Jgt. No. 17/01, 10 March 2001, Dubai Court of Cassation.

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2. That Plaintiff was unsuccessful to validate the executability of the UAE arbitration award in the award's country of origin.

Article 42 (1) of the DIFC⁵⁰ stated that: "An arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognized as binding within the DIFC. For the avoidance of doubt, where the UAE has entered into an applicable treaty for the mutual enforcement of judgments, orders or awards the DIFC Court shall comply with the terms of such treaty".

To enforce the domestic award in UAE "The arbitrators' award may not be enforced unless the same has been approved by the court with which the award was filed"⁵¹.

The case merits will not be examined by the court, as stated by the Dubai Court of Cassation.⁵² "Consistent with provisions contained in Article 212 and Article 216 of the UAE CPC, the court, while considering ratification of an arbitration award cannot address the merits and the extent of award's consistency with the law or the facts. Accordingly, any dispute raised by an opposing party challenging the arbitration award based on or relating to the judgment of arbitrator or invalidity or inadequacy of the ground(s) on which the arbitrator decided upon matter and pronounced the award shall be unacceptable".

The award should be final to be recognized and enforce as stated in Article 235 (2) (d)⁵³ of the UAE CPC. "(2) The execution order shall be requested before the court of the 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: (d) That the decision, or the order has acquired the power of the decided order according to the law of the court which delivered it."

The recognition of DIFC award as per Article 43 (1)⁵⁴ which states that: "Where, upon the application of a party for recognition of an arbitral award, the DIFC Court decides that the award shall be recognized, it shall issue an order to that effect."

⁵⁰ The DIFC Article 42(1) of 2008 Arbitration law.

⁵¹ Article 215 of UAE CPC

⁵² In case no. 95 of 2008 – Civil, dated 25 May 2008, the Dubai Court of Cassation

⁵³ Article 235(2)(d) of UAE CPC

⁵⁴ Article 43(1) of the DIFC Arbitration Law

The award should be binding as per Article 42⁵⁵ which stated that: “An arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognized as binding within the DIFC...”.

The DIFC Courts in *Case of Banyan Tree Corporate Pte Ltd v Meydan Group LLC*⁵⁶ confirmed that “Arbitration Law conferred jurisdiction on the DIFC Courts to recognize the award as binding within the DIFC. That jurisdiction is not circumscribed by any requirements for in personam or subject matter connection with the DIFC.”

Dubai will enforce the ratified judgment issued by DIFC following Article 7 of Dubai Law No 12 of 2004⁵⁷ and judgment will also be approved in all UAE following Federal Law⁵⁸ without any additional assessment by the Dubai Courts if the ruling is ultimate, has been translated into Arabic and is suitable for execution.

The basis for no recognition and enforcement by any government should be thorough, the enforcing court not to appraise the merits and probable errors in fact or law by the arbitrator.

The responsibility of providing evidence on the party who claims that an award is unenforceable to prove that one of the unenforceability grounds occurred. The individual pursuing enforcement required to verify the legitimacy of the award as per Geneva Convention 1927⁵⁹.

The CPC, DIFC, New York Convention and other ratified treaty by UAE highlighted different ground for non-recognition and enforcement, i.e. (1) Incapacity of the Parties; (2) Shortage in Arbitration Proceedings Due Process; (3) Invalidity of Arbitration Agreements; (4) Arbitrator exceeds its jurisdiction; (5) Award not binding; (6) Irregularities in composition of arbitrator or Arbitral; (7) Non-Arbitrability and Public Policy.

2.2.1 Incapacity of Parties

⁵⁵ Article 42 of the DIFC Arbitration Law.

⁵⁶ *Banyan Tree Corporate Pte Ltd v Meydan Group LLC*.

⁵⁷ Article 7 of Dubai Law No 12 of 2004.

⁵⁸ The UAE Federal Law No (11) of 1973 regulating Judicial Relations between Member Emirates in the Federation.

⁵⁹ Albert van den Berg A.J., “The New York Arbitration Convention of 1958 towards a Uniform Judicial Interpretation”, (Netherlands 1981), p.264-265.

The incapacity of the winning party will be the first ground on which the losing party may fight on a submission for the arbitration award enforcement in the UAE if he proves that at the time the agreement the winning party was under some incapacity.

The losing party to arbitration if he was able to show that “the parties to the arbitration agreement... were, under the law applicable to them, under some incapacity,” the recognition and enforcement of the award will be refused under the New York Convention⁶⁰. Nevertheless, under the doctrine of good faith, the party cannot trust on his particular inability if the former party continued in honesty. This used by several jurisdictions, for example, Thai seller v FR German buyer, case and Agrarcommerz AG v Privilegiata Fabbrica SpA, case.⁶¹

The parties to an arbitration agreement must have legal capacity and sometimes required authorization by a court or authority, not following one this may lead to unrecognition of the award or one of party request the court to hold the arbitration proceeding⁶².

The UAE regulations have three classes controlling the capacity level of an average individual's: full capacity; reduced capacity and incapacity⁶³.

The obstacles to the ability of a legally aged person to enter into arbitration agreement are : a Physical disability⁶⁴; Bankruptcy⁶⁵; Criminal Conviction period of the sentence⁶⁶; Trustees without authorization⁶⁷; The power of attorney although there is no law provision in UAE but Court of Cassation in Dubai decided that having the power of attorney will not permission to proceed with arbitration contract⁶⁸; “juristic persons shall be subject to the special laws pertaining to them.”⁶⁹

The New York Convention regulation which will judge the party's capacity refers to “the law applicable to parties” with no clarification how it will resolve in the perspective of

⁶⁰ New York Convention Article V (1) (a).

⁶¹ Thai seller v FR German buyer, 1991, XVI Y.B. C. A. 11; Agrarcommerz AG v Privilegiata Fabbrica SpA Italian Court, 1992.

⁶² Alan Redfern and other, op. cit. Para 3-25

⁶³ Articles 85 to 88 for Natural Person and Article 157 to 175 for capacity to contract in the Civil code

⁶⁴ Article 173 of the UAE Civil Transaction Law.

⁶⁵ Articles 683 and 685 of the UAE Commercial Transactions code.

⁶⁶ Article 76 of the Penal law

⁶⁷ Article 225 (11) of the UAE Personal Status Law.

⁶⁸ Julian D. M. Lew and other, Comparative International Commercial Arbitration, 2003, Para 26-74. ; Dubai Court of cassation, Civil cassation, Recourse No. 209/2004, Mar. 20, 2005; Recourse No. 222/2005, Jan. 22, 2006, referred to in Abdel H. El-Ahdab, Arbitration with the Arab Countries, Third Edition, P. 790.

⁶⁹ Article 94 of the Civil Transaction Code.

international arbitration⁷⁰. Authors like Van den Berg, Alan Redfern, Poudret and others have recommended that personal regulation is controlled by the place where the enforcement is required⁷¹.

The nationality and venue of headquarters determine the personal law in UAE for the physical persons⁷².

The type of party's capacity in UAE varies on whether the party is a normal individual or a juristic individual. The CPC and Shari'a, which divides it into Ahliyyat Al-Ujub (capacity to obtain rights and not to sustain obligations), Ahliyyat Al-Ida (capacity both to get rights and maintain requirements)⁷³.

CPC Article 157⁷⁴ states that "Every person shall have the capacity to contract unless that capacity is taken from him or restricted by operation of law." In the event of the incapacity, any agreements formed by the individual shall be considered null, the age, impediments, restrictions, and limitations are aspects which affect the legal capacity of an individual to participate in the arbitration agreement⁷⁵.

Article 203 (4) UAE CPC⁷⁶ stated: "An arbitration agreement may be made only by the parties who are legally entitled to dispose of the disputed right."

The Dubai Court of Cassation⁷⁷ clarified Article 203 (4) of civil procedure⁷⁸ that the basis for this part as follows: "Under article of the Law of Civil Procedure, an arbitration agreement may be validly made only by a person who has the capacity to make a disposition over the right in dispute, and that is not the same as the capacity to litigate. That is because an arbitration agreement involves a waiver of the right to bring an action before the courts of the UAE, with the guarantees that it affords to litigating parties, and the authority given to an attorney may be express or implied, or apparent, and the authorization will be express if it is with words or writing, and the authorization will be

⁷⁰ Di Pietro, Domenico, and Martin Platte, op cit. p.144

⁷¹ Albert van den Berg, The New York Convention of 1958: Towards a Uniform Judicial Interpretation, p.276; Poudret, J, and Besson, S, Comparative Law of International Arbitration, second edition, 2007, p.831; Alan Redfern and other, op. cit. Para 3-25

⁷² Article 11(1 and 2) of the UAE Civil Code.

⁷³ Abd el-Razzak Al-sanhori, volume 1, elwaseet fe sharah Al-Qunoon Al-Madani, Beirut, pp.266-268.

⁷⁴ Article 157 of the Civil Transactions law

⁷⁵ Abd el-Razzak Al-sanhori, op. cit., Vol. 1, pp.271-2887.

⁷⁶ Article 203(4) of UAE Civil procedure

⁷⁷ Dubai Court of Cassation (273/2006) February 4, 2007

⁷⁸ Article 203(4) of the UAE Civil procedure.

implied if it may be deduced from the facts of the case, and everything that has been said or written, or the ordinary mode of dealing may be assumed from the surrounding facts.”

2.2.2 Shortage in Arbitration Proceedings Due Process

The second basis on which a respondent may oppose a demand for enforcement of an international arbitration award in the UAE, if defendant manages to show a shortage in proceeding due process. The most challenging basis for refusal of the award in UAE is procedural ground⁷⁹. The notion of due process is not the identical in all national law.⁸⁰ Article V (1) (b) of the New York Convention stated the foreign award enforcement might be rejected, if “The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case.”⁸¹

The Riyadh Convention will refuse the enforcement as stated in Article 37 (d) “If the litigants have not been served subpoenas in the proper manner.”⁸²

The Gulf Cooperation Council Arab countries (Regional Agreement) will refuse the enforcement. “Where the judgment is a default judgment, and the defendant was not properly notified of the case or the judgment.”⁸³

The Arab League Convention would refuse enforcement “if the parties had not been duly summoned to appear”.⁸⁴

The UAE Civil Procedure Code, the award might be implemented if the enforcing court has verified that “Adversaries in the lawsuit on which the foreign judgment was passed were summoned and duly represented.”⁸⁵

⁷⁹ Mohamed Al Marzooqi Dissertation, BUID, CLDR, May-2013 accessed on

⁸⁰ Emmanuel Gaillard, Domenico di Pietro, Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice, Cameron May Ltd. p. 683-686

⁸¹ New York Convention Article V (1) (b).

⁸² Article 37 (d) of Riyadh Convention.

⁸³ Article 2, 2 (b) An agreement on the Enforcement of Court Judgements in the Gulf Cooperation Council Arab countries.

⁸⁴ Article 3 (d) of Arab League Convention.

⁸⁵ Article 235 (2) (c) of the Code of Civil Procedure

The Same rule applied by international institutions like the ICC⁸⁶, LCIA⁸⁷, and the GCC Commercial Arbitration Centre⁸⁸, UNICTRAL Rules⁸⁹.

In the New York Convention the due process forms part of public policy, Therefore its absence from Article V (1) (b) overlays among the public policy security of Article V (2) (b).⁹⁰ The parties can claim lack of due process under both provisions as In Hebei Import & Export Corp [China] v. Polytek Engineering Co. case where the court stated that “[i]t has become fashionable to raise specific grounds in [...] Article V.1(b) [...], which are directed to procedural irregularities, as public policy grounds (Article V.2(b)). There is no reason why this course cannot be followed”.⁹¹, numerous courts have followed this method⁹².

The shortage of proceeding due process is the most significant ground the losing party depend on resisting enforcement⁹³. The following section addresses three main issues of shortage in arbitration proceedings due process: Law controlling the shortage in arbitration procedure due process; Lack of accurate notification; Unfair hearing and not able to presenting the case.

2.2.2.1 The Law Controlling the Shortage in Arbitration Proceeding Due Process

The controlling law for the shortage in arbitration procedure due process may be different to arbitration seat. Therefore, which is a law enforcing court to apply?

Article V (1) (b) of the New York Convention, is undecided which law should govern the issue. Three opinions have approved on the issue by state courts and writers:

1. The first opinion supports that Article V (1) (b) proves out a sincerely applicable international law in the absence of due process which is adequate in itself as a

⁸⁶ Article 20 (5) of ICC Rules.

⁸⁷ Article 22 (1) (e) of LCIA Arbitration Rules.

⁸⁸ Article 23 of the GCC Commercial Arbitration Centre Rules of Procedure.

⁸⁹ UNICTRAL Rules, article 24 (3).

⁹⁰ Julian D. M. Lew and other, op cit. Para 26-82.

⁹¹ Hebei Import & Export Corp [China] v. Polytek Engineering Co. [1998] 1 HKLRD 287 (Court of Appeal Hong Kong 1998).

⁹² V(2)(b) - 1958 New York Convention Guide, newyorkconvention1958.org/index.php?

⁹³ Albert van den Berg, op cit. p 297.

usual of a due process supported by Albert van den Berg, Julian D. M. Lew, and others⁹⁴.

2. The second opinion to take law designated by the parties or in the absence the law of arbitration⁹⁵.
3. The third opinion proposes the legislation of the place of enforcement to be used and this applied by a large number of national courts, for example, Dubois & Vanderwalle v Boots Frites BV and Irvani v Irvani [2000]⁹⁶, and favored by some authors.⁹⁷

Accordingly, the courts in these situations may reject execution of a foreign arbitral award if there has been a breakdown of due process by their state regulation. Article 21 of UAE CPC stated that “The rules relating to jurisdiction, and all procedural matters, shall be ruled by the law of the state in which the action is brought or in which the procedures are carried.”⁹⁸

In the case of Hebei Import & Export Corp v Polytek Engineering, the court agreed with law selected by the parties as well as their private law.

Egypt court of cassation⁹⁹ examined a due process breach, under the New York Convention Article V (1) (b), by the law selected by the parties, which was Swedish law. Therefore enforcing courts in the UAE should be:

1. Add appropriately addressed the issue of due process by the law selected via parties to oversee the arbitration process or the arbitration seat law.
2. Recommended to use the seat law of arbitration once the lack of due process is elevated.

⁹⁴ Albert van den Berg, op cit. p. 298; Julian D. M. Lew and other, op cit. para 26-81.

⁹⁵ Julian D. M. Lew and other, op cit. para 26-81

⁹⁶ Dubois & Vanderwalle v Boots Frites BV, Paris Court of Appeal, YBCA,1999.; Irvani v Irvani, English Court of Appeal ,2000, Lloyd’s Rep. 412.

⁹⁷ Alan Redfern and other, op cit. para 10-40

⁹⁸ Article 21 of the UAE Civil Transactions Code.

⁹⁹ Egyptian Concrete Company & Hashem Ali Maher v. STC Finance & Ismail Ibrahim Mahmoud Thabet & Sabishi ,27 March 1996, Court of Cassation.

Egypt - 1958 New York Convention Guide, www.newyorkconvention1958.org/index.php.

2.2.2.2 Lack of accurate notification

The implementation of a foreign award will be rejected by the courts if accurate notification not been given in a particular form, a particular language, within the time frame, the arbitrator name to be disclosed and arbitration language.

The UNCITRAL Model Law stated the requirement of the notification “(1) Unless otherwise agreed by the parties:(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee’s last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver”¹⁰⁰.

In the UAE it is evident that there are no mandatory needs about the notice, as it is simply stated that “the arbitrator shall, without the need to comply with the rules provided under this Law in respect of serving of notices, notify the parties to the dispute of the date of the first hearing scheduled for consideration of the dispute and the venue.”¹⁰¹ Arbitration can be proceeded with one party as stated in Article 208 (2) “A decision may be issued on the basis of the documents submitted by only one of the parties to the dispute if the other party fails to submit his documents within the time specified”¹⁰² the losing party cannot reject the enforcement if he knew of the arbitration.

Exceeding the time limit to issue the award is one of the entire usual bases for rejection of enforcements in the UAE courts.¹⁰³

This time limit clearly stated in Article 210¹⁰⁴ of CPC stated “If the parties to the dispute did not specify in the arbitration agreement a date for the issue of the award, the arbitrator should pass his award within six months from the date of the first arbitration session; otherwise, any of the parties shall be entitled to refer the dispute to the court or, if a suit has already been filed, to proceed with the same before the court.”

¹⁰⁰ The UNICTRAL Rules Article 3 (1).

¹⁰¹ The UAE Code of Civil Procedure Article 208 (1).

¹⁰² The UAE Civil Procedure Code Article 208 (2).

¹⁰³ Mohamed Al Marzooqi Dissertation, BUID, CLDR, May-2013

¹⁰⁴ Article 210 of the UAE Civil Procedure Code

The court must not disregard agreed timing by the parties or the requirement of applicable law, and the short period limit is not a breach of due process, a quick determination of disagreement is one of the primary functions of arbitration.¹⁰⁵ In the case of Seller v Swiss Buyer and case of Dutch Carters Ltd v Francesco Ferraro¹⁰⁶. The nomination of an arbitrator within one week was not a rejection of due process as per New York Convention Article V (1) (b).

The UAE Article 208 of CPC,¹⁰⁷ has given arbitrator liberty to fix time limit also Article 213 and Article 214 and Article 216¹⁰⁸ specify different time limits.

The UAE Code of Civil Procedure clarified the notes in Article 208¹⁰⁹ and stated that “1. Within a maximum period of thirty days from the acceptance of his appointment, the arbitrator shall, without the need to comply with the rules provided under this Law in respect of serving of notices, notify the parties.....”. Similar provisions are contained in the ICC Rules.¹¹⁰

AbuDhabi and Dubai Court of Cassation clarified the necessities for notification to be applied in arbitration procedures are altered to those used in trial as follow:

- **Abu Dhabi Court of Cassation**¹¹¹ stated that: “Whereas it is well settled under the precedents of this court that Article 212 of the Civil Procedures Law stipulated that the arbitrator is not compelled - as per the basic rule - to observe the proceedings procedures applicable in the cases filed before courts; but he has to observe the procedures provided for in the arbitration chapter as well as the definite procedures agreed between the litigants, and he has also to respect the rights of defense by enabling each litigant to submit its requests and defenses, and to prove its allegations and negate the facts that the other opponent party attempts to prove, and taking actions against the litigants, and that the criterion for the invalidation of the arbitrator's award due to breaching the proceedings procedures is that it award departs from the basic rules of litigation procedures.”

¹⁰⁵ Albert van den Berg, op cit. p. 304; Julian D. M. Lew and other, op cit. Para 26-83.

¹⁰⁶ Seller v Swiss Buyer, Switzerland Court of Appeal 1971, IV YBCA 309, 310.

¹⁰⁷ Articles 208 of the UAE Civil Procedure Code.

¹⁰⁸ Article 213, 214 and 216 of the UAE Civil Procedure Code.

¹⁰⁹ The UAE Code of Civil Procedure Article 208.

¹¹⁰ The ICC Rules Article 3 (2).

¹¹¹ Cassation Court of Abu Dhabi, Recourse No. 834/2010 (251) of 30 December 2010

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- **Dubai Court of Cassation**¹¹² stated that: “After the arbitrators have been nominated, they must specify in the first of the records of their hearings the day on which the dispute was brought before them, and they must, within a period no longer than 30 days from the date of their appointment, notify the parties of the date of the first hearing specified for the consideration of the dispute. Such date shall be regarded as the date of the first hearing in the arbitration, and that is the date from which the period specified by agreement or by law for the issuing of the award. It is not necessary that the first hearing in the arbitration or any subsequent hearings should be held in the presence of the parties. It is permissible for all of the hearings to be held in their absence, provided that the arbitrators have given them the opportunity to submit all of their applications and arguments and defenses and memoranda and documents, and to have sight of all of the applications and the defenses of the opposing parties, so that they may take any steps to oppose all of them. ... The basic rule in arbitration is that it is conducted in secret, and the hearings thereof are not held in public unless a contrary agreement is made. The procedures are less rigorous and prescriptive than the procedures in litigation before the courts. The only essential that it is necessary to ensure in arbitration procedures is the principle that the parties should have the complete right of opposition to each other, and that the right of argument should not be prejudiced. Unless a contrary agreement has been made, the rules and procedures laid down in the chapter relating to the attendance or absence of the parties in the Law of Civil Procedures do not apply in the absence of one or all of the parties before the arbitrators. The arbitrators are in charge of the conduct of the proceedings in the arbitration, and of examining the merits and making a determination of the dispute in the light of the memoranda and documents submitted to them by the parties. One of the objects sought to be achieved by a recourse to arbitration is flexibility, and not being bound by the rules as laid down in the Law of Civil Procedures, with the exception of those rules laid down in the chapter dealing with arbitrations”.

¹¹² Cassation Court of Dubai, Recourse No. 157/2009 of 27 September 2009

The arbitrator's name if not disclosed which may have led not to enforce the award basis of New York Convention Article V (1) (b), as in *Danish Buyer v. German (F.R.) Seller* case¹¹³, The law, shows that if the parties did not reach a decision on a precise process, or the arbitrators determine the process, the arbitrators are merely obliged by the needs enclosed in the Civil and Commercial Procedure of the UAE¹¹⁴.

The arbitration language to be agreed by parties otherwise court may not enforce the award as in cases of *Seller (China) v Buyer* and I (1992) XVII YBCA as it was not as per Article V (1) (b) of New York Convention. The arbitrators can choose the arbitral language except where the parties have decided otherwise as in Article 212 (6) of CPC, which ¹¹⁵stated “Unless otherwise agreed by the parties to the dispute, the award shall be in the Arabic language; otherwise, the award shall, at the time of filing, be accompanied by a legalized translation thereof”.

2.2.2.3 Unfair Hearing and Not Able to Presenting the Case

One of the objectives of a due process needs to guarantee a fair trial given to the parties¹¹⁶. The New York Convention Article V (1) (b) is the greatest established thought for due process, as it provides the right to a party for proper notice to be given and capability to communicate his case. Nevertheless, in the another agreements and state laws, the idea of due process purely interests the party's entitlement to be properly summoned and adequately represented. It would be a serious irregularity if the parties to arbitration were unable to present their case as per New York Convention.¹¹⁷

The US court rejected execution of the award¹¹⁸ in the case of *Generica Limited. V Pharmaceuticals Basics*. The US court stated “It proof that a party was unable to present his case ... that a party was not given the opportunity to be heard at a meaningful time and in a meaningful manner... Therefore, an arbitral award should be denied or vacated if the party challenging the award proves that he was not given a meaningful opportunity to be heard as our due process jurisprudence defines it. ... it is clear that an arbitrator

¹¹³ *Danish Buyer v. German (F.R.) Seller*, Germany, Koln, 10 June 1976, IV Y. B. COM. ARB. 258 (1979).

¹¹⁴ The UAE Code of Civil Procedure Article 212.

¹¹⁵ Article 212(6) of the UAE Civil Procedure Code.

¹¹⁶ Alan Redfern and other, op cit. Para 10-39; Julian D. M. Lew and other, *Comparative International Commercial Arbitration*, 2003, Para 26-81.

¹¹⁷ Di Pietro, Domenico, and Martin Platte, M., op cit. p.151

¹¹⁸ *Generica Limited v Pharmaceuticals Basics Inc*, No. 96-4004, Court of Appeals US 1997.

must provide a fundamentally fair hearing ... A fundamentally fair hearing is one that meets the minimal requirements of fairness – adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.”

If one of the parties requested re-open, the hearing with new information which is not new evident, refusal of such request does not establish a lack of due process. However, if there is a claim of forgery of any paper, or if any criminal event happens, arbitrator to suspend the procedure until this point is clear¹¹⁹.

The arbitrator in the UAE should **hear witnesses under oath** as per CPC Article 12¹²⁰.

The evident presented can be by document or by oral not like litigation in national courts; the same apply in UAE except parties agreed otherwise¹²¹.

The award can be rejected if the party not been provided the **opportunity to remark** on an expert’s finding selected by the arbitrator as in the case of Paklito Investment Limited v Klockner East Asia Limited¹²². Similarly, the case where reports are given to the arbitrator lacking the other group having been given the opportunity to **present its dispute** as in the case of Rice Trading Ltd v Nidera Handelscompagnie BV¹²³, or without informing it off counter claims as in the case of Portuguese Company A. v Trustee.¹²⁴

The arbitrator should exchange received document to all parties and allow the parties to present and defend their claims throughout arbitration proceedings¹²⁵. Consequently, if the arbitrator did not follow this basis the award may not enforce.

If one of the parties refuses to participate in the proceedings as an excuse for blocking the arbitration, he cannot refuse the award enforcement. Commentators¹²⁶ and national courts¹²⁷ have recognized this opinion in UAE the court follows the same method and the same apply under the Model Law¹²⁸.

¹¹⁹ Article 209 (2) the UAE Code of Civil Procedure.

¹²⁰ Article 211 of the UAE Code of Civil procedure

¹²¹ Article 212 (1) of the UAE Code of Civil Procedure

¹²² Paklito Investment Ltd. v. Klockner East Asia Ltd. Hong Kong Supreme Court ,1993.

¹²³ Rice Trading (Guyana) Ltd. v. Nidera Handelscompagnie BV, Yearbook XXIII (1998) pp. 731-734 (Netherlands Court of Appeal no. 24).

¹²⁴ Portuguese Company A V Trustee in bankruptcy of German Company X reported in Y.B. Comm. Arb. XII (1987) pp. 486–87, Germany No. 28.

¹²⁵ Di Pietro, Domenico, and Martin Platte, M., op cit. p.153

¹²⁶ See Albert van den Berg. op cit. Para 26-88; Garnett, R, and Gabriel, H. and Waincymer, J. A Practical Guide to International Commercial Arbitration, (Ocean Publications, Dobbs Ferry NY 2000), p. 105

¹²⁷ see Fitzroy Engineering Ltd. v. Flame Engineering Ltd., No. 94-C- 2029, 1994 U.S. Dist. LEXIS 17781; SA v T. Ltd (1990) XV YBCA 509 (Swiss Federal Tribunal, 12 January 1989) 512.

¹²⁸ Model Law, Article 25.

The issues of **impartiality and independence** of the arbitrator are ultimate ethics of legal proceedings¹²⁹. It is a principle of natural justice, as stated in the English Act of 1996 Section 1¹³⁰ and United Nation Universal Declaration of Human Rights (UDHR), Article 1¹³¹ stated that: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

It is suggested that if a party has an objection relevant to the lack of due process and it is his duty to raise that objection during the arbitration, as long as he was aware of the relevant fact.¹³² Otherwise, an enforcing court might bear in mind that the party has given up its entitlement to resist enforcement as in *Minmetals Germany GmbH v. Ferco Steel Ltd, Qinhuangdao Tongdo Enter. Dev. Co. v Million Basic Co and Intern. Standard Elec. v. Bidas Sociedad Anonima*.¹³³

To allow a party to raise a lack of due process for the first time at the stage of enforcement would breach the objective and the intent of the New York Convention, as well as, in general, undermining the effectiveness of arbitration.¹³⁴

In the UAE, Article 207 permits the parties to confront the arbitration award before issuing¹³⁵. Individuals are capable to raise objection at any stage, especially if it is public policy as individuals have no right to waive it¹³⁶.

The due process violation might not lead to a rejection of enforcement, unless the irregularity had an effect on the award as in *Hebei Import & Export Corp [China] v.*

¹²⁹ Andrew Tweeddale and Keren Tweeddale, op cit. p. 415

¹³⁰ Section 1 of the English 1996 Act

¹³¹ United Nation Universal Declaration of Human Rights (UDHR), Article 1.

¹³² Julian D. M. Lew and other. para 26-89; Di Pietro, Domenico, and Martin Platte, op cit. p.158; Garnett, R., op cit. p.105

¹³³ *Minmetals Germany GmbH v. Ferco Steel Ltd* (1999) 1 All E.R. (Comm.) 315; *Qinhuangdao Tongdo Enter. Dev. Co. v Million Basic Co.* (1994) XIX YBCA 675 (Hong Kong Supreme Court, 5 January 1993) 676-77; *Intern. Standard Elec. v. Bidas Sociedad Anonima*, 745 F. Supp. 172 (S.D.N.Y. 1990).

¹³⁴ See Lew, J., Mistelis, L. and Kroll, S., op cit. para 26-89; Di Pietro, D. and Platte, M., op cit. p.158.

¹³⁵ The UAE Code of Civil Procedure Article 207.

¹³⁶ The Civil Procedure Code Article 14 and 84 (1).

Polytek Engineering Co.¹³⁷, and supported by some commentator like Albert van den Berg.¹³⁸

The due process violation alone will not spontaneously; the enforcement court will scrutinize the violation of due process to be confident that such an anomaly in the process has disturbed the award.

In overall, these important values are (1) admiration for the right to defense; (2) the fairness of the gatherings; (3) the gathering to be aware; and (4) impartiality of the tribunal.¹³⁹

¹³⁷ Hebei Import & Export Corp [China] v. Polytek Engineering Co. [1998] 1 HKLRD 287 (Court of Appeal Hong Kong 1998) pp300-1; K. Trading Company v Bayerischen Motoren (2005) YBCA 568 (German Court of Appeal, 32 September 2004) 572-73.

¹³⁸ Albert van den Berg, op cit. p .301-2

¹³⁹ The UAE Code of Civil Procedure Article 212.; also see Federal Cassation Court of UAE, 2004, Verdict No: 831.; Cassation Court of Dubai Verdict No: 537.

3. Chapter 3 Invalidity of Arbitration Agreements

The defendant can resist the foreign arbitration award enforcement in UAE court by proving that the arbitration agreement is invalid as per the New York Convention. Which states that enforcement may be refused if “the parties to the arbitration agreement were.... or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the legislation of the country where the award was made.”¹⁴⁰

In the same manner, enforcement may be refused under the Riyadh Convention “if the award was made by a void agreement to arbitrate or one that has expired.”¹⁴¹ Moreover, the Arab League Convention contains a similar provision “if the verdict passed was not in pursuance of a conditional Arbitration Agreement.”¹⁴²

The provision of the judgment enforcement is not explicitly mentioned in the Convention. Nevertheless, the invalidity of arbitration agreements can be a ground for resisting enforcement as it against public policy.

The main aim of the parties to have an arbitration agreement to avoid the litigation and proceed with the arbitration¹⁴³. The court will not enforce proven invalid arbitration agreements by losing the party¹⁴⁴.

The issue of which law appropriate controls the legitimacy of a tribunal contract has provided growth to the significant discussion, equally in theory and in practice¹⁴⁵. In UAE due to the nonappearance of provisions regarding which laws oversee the validity of the tribunal contract, the enforcing court will depend on Article 10 and 22¹⁴⁶. The conflict of law provisions will govern the arbitration agreement. The contractual obligation will follow Article 19 of the Civil Transaction Code, which state that: “(1) Contractual obligations, as to the form and subject matter, shall be governed by the law of the state of the joint domicile of the two contractors if they have one domicile. However, if they have

¹⁴⁰ Article V (1) (a) of the New York Convention.

¹⁴¹ Article 37 (b) of the Riyadh Convention.

¹⁴² Article 3 (b) of the Arab League Convention.

¹⁴³ Alan Redfern and other, op. cit. Para 3-1.

¹⁴⁴ Julian D. M. Lew and other, op cit. paras 7-5 to 7-32 and 7-34 to 7-58.

¹⁴⁵ Julian D. M. Lew and other, op cit. para 6-26; Di Pietro, Domenico, and Martin Platte, op cit. p. 144; Gaja, Giorgio, International Commercial Arbitration: New York Convention, Dobbs Ferry, 1978, p.1

¹⁴⁶ Articles 10 and 22 of the UAE Transaction law.

a different place of residence, the law of the state in which the contract is made shall be applicable, unless the two parties to the contract agree or if it is evident from the circumstances that another law is intended to apply another law.¹⁴⁷ The Article gives priority to the parties' selection of law, and, in the absence of such a choice; the court will use the joint domicile law or the contract seat law.

The key provision is Article 23 of the Civil Transaction Code (CTC), regarding the private international law, which stated: "Principles of the private international law shall be observed where no express provision appears to exist in the preceding Articles regarding cases of conflicts of law."¹⁴⁸ The DIFC International Sale Goods Contracts Law is partially similar to the Vienna Convention and when DIFC law applies then relevant English law will be used.¹⁴⁹

Also, there are some exceptions to the above CTC rules, indifference, certain state legislation deals precisely with this subject, for illustration Act 1999 section 48 of the Swedish Arbitration stated that "Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties. Where the parties have not reached such an agreement, the arbitration agreement shall be governed by the legislation of the country in which, by the agreement, the proceedings have taken place or shall take place. The first paragraph shall not apply to the issue of whether a party was authorized to enter into an arbitration agreement or was duly represented."¹⁵⁰

The foreign law if it the applicable law then it should not be used, if it is conflicting to morality or public policy¹⁵¹. Therefore, the provisions mentioned above can be used, for the foreign awards enforcement in the UAE; once a claim is required in state provisions controlling the foreign awards enforcement or in the international agreements whichever contain no precise substantive inconsistency rules or regulations determining the use of the appropriate law.

The New York Convention Article V (1) (a) state that the arbitration agreement not being "valid under the law to which the parties have subjected it or, failing any indication

¹⁴⁷ Article 19 of the UAE Civil Transaction Code.

¹⁴⁸ Article 20 of the UAE Civil Transaction Code.

¹⁴⁹ Choice of Law in respect of contracts in the United Arab, repository.essex.ac.uk/.../1/Final%20Draft_Thesis.

¹⁵⁰ Swedish Arbitration Act 1999 s.48

¹⁵¹ Article 27 of the UAE civil code

thereon, under the legislation of the country where the award was made.”¹⁵² Similarly, the Model Law Article 36 (1) (a) (I) stated “(I) a party to the arbitration agreementthe said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the legislation of the country where the award was made”.¹⁵³

The party is free to select the law which governs the validity of the arbitration contract and in the lack of such selection, then the law of the place of the arbitration will be the governing law.

The prevailing view supported by some commentators¹⁵⁴ and used by some courts¹⁵⁵ recommends that the law controlling the main agreement likewise controls the arbitration contract except the parties have decided contrary. As illustration, in *Sonatrach Petroleum Co (BV) v Ferrell International Ltd*, an English Court stated that “Where the substantive contract contains an express choice of law, but the arbitration agreement contains no separate choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract.”¹⁵⁶

The grounds for invalidity of an arbitration agreement are similar to any standard agreement, in that the necessities for the finalizing of an agreement should be satisfied. In overall, these needs are separated into the official needs or substantive legitimacy. The lack of any of these needs will annul the arbitration contract, and accordingly permit a court to decline a foreign award enforcement.

The official bases are a requirement for the arbitration contract to be in writing or proved in writing is required by UAE¹⁵⁷ as stated “No agreement for arbitration shall be valid unless evidenced in writing”, and New York Convention stated, “Each Contracting State shall recognize an agreement in writing...”¹⁵⁸. The basis for the writing requirement is to ensure that parties indeed agreed to solve any dispute arisen by arbitration¹⁵⁹, Julian D. M. Lew recommended that “the writing requirement should be interpreted dynamically in

¹⁵² New York Convention, Article V (1) (a)

¹⁵³ The Model Law Article 36 (1) (a) (i)

¹⁵⁴ Alan Redfern and other, op. cit. pp. 157-158; Gaja, G., op cit. p.1; Di Pietro, Domenico, and Martin Platte, op cit. p.144

¹⁵⁵ *German Shipping Co. v Japanese Shipyard*, reported (1990) XV Y.B. Comm. Arb. 455.; *Italian company v. German (F.R.) firm*, V Y.B. COM. ARB. 262 (1980).

¹⁵⁶ *Sonatrach Petroleum Co (BV) v Ferrell International Ltd* [2002]1 All ER,627.

¹⁵⁷ The UAE Code of Civil Procedure Article 203 (2).

¹⁵⁸ New York Convention, Article II (2)

¹⁵⁹ Alan Redfern and other, op. cit. para 3-7

the light of modern means of communication.”¹⁶⁰ In the case of *Tradax Export SA v Amoco Iran Oil Co Swiss*¹⁶¹, the Court followed this method.

The United Nations¹⁶² recommendation confirms the following: “Considering the wide use of electronic commerce, taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, as subsequently revised, particularly with respect to Article 7, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts, and taking into account also enactments of domestic legislation, as well as case law, more favorable than the Convention in respect of formal requirements governing arbitration agreement, arbitration proceedings and the enforcement of arbitral award, Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards.”

The Model Law and New York Convention require the contract be signed. Some commentators view this as a disadvantage as compared to other law which does not consider the signature as a requirement.¹⁶³

Under Shari’a law, an oral agreement is valid¹⁶⁴. The CPC established that the contract is valid or enforceable if it agreed electronically¹⁶⁵. About the Practical basis of inadequacy of the arbitration agreement, Alan Redfern highlighted that nonexistence of the agreement, a clear lawful connection among parties and arbitrability are the Substantive grounds of invalidity of the arbitration¹⁶⁶. The Civil Transaction Code Articles 167 to 189 covers the defect of agreement¹⁶⁷ it could be challenging for the falling gathering to achieve in obtaining rejection of the execution if the request of inaccuracy of the arbitration contract laid individual on his substandard agreement.

The UAE law describing the legal relationship between the parties requires that “The subject of the dispute shall be specified in the terms of reference or during the hearing of

¹⁶⁰ Julian D. M. Lew and other, op cit. para 7-10.

¹⁶¹ *Tradax Export SA v Amoco Iran Oil /Switzerland / 07 February 1984 / Tribunal Fédéral*

¹⁶² United Nations Commission on International Trade Law, interpretation of Article II, paragraph 2, and Article VII, paragraph, www.uncitral.org/uncitral/.../2006recommendation.h.

¹⁶³ [unctad.org/en/Docs/edmmisc232add39_en. pd](http://unctad.org/en/Docs/edmmisc232add39_en.pdf)

¹⁶⁴ Dr. Md. Abdul Jalil, ijbssnet.com/journals/Vol.1_No.2.../14.pdf.

¹⁶⁵ The UAE Federal Law No. 1 Articles 7 and 11.

¹⁶⁶ Alan Redfern and other, op. cit. paras 3-07- 3-24

¹⁶⁷ The UAE Civil Transaction Code Articles 167 to 189.

the suit, even if the arbitrators were authorized to act as amiable compositors; otherwise the arbitration shall be avoided.”¹⁶⁸ The Dubai Cassation Court confirmed that “all disputes arising out of or in connection with this contract shall be settled by arbitration.”

¹⁶⁹

3.1 Arbitrator exceeded its jurisdiction

The Arbitrator exceeded its jurisdiction is a basis for refusing foreign awards Enforcement. Under the UAE law which is similar to the New York Convention Article V (1) (c). Which permits the court to reject the implementation of a foreign arbitration award if the losing party shows that “the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matter submitted to arbitration can be separated from those not so submitted, that part of the award which contains decision on matter submitted to arbitration may be recognised and enforced.”¹⁷⁰

Article 37 (c) of Riyadh Conventions,¹⁷¹ Article 3 (c) of the Arab League Convention¹⁷² stated that foreign award enforcement could be rejected “if the arbitrators were not competent under the agreement to arbitrate, or the law under which the award was made.” Article 216 of the UAE civil procedure code¹⁷³ stated that the award may be rejected if the arbitrator “exceeded the terms of reference.”

If the arbitrator not finalizes all the claims requested by the parties the award will be incomplete or *infra petita* and may be possible to claim extra award as in Article 33 (3) of the UNICITRAL Model Law as stated “Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral

¹⁶⁸ The UAE Code of Civil Procedure Article 203 (3).

¹⁶⁹ Cassation Court of Dubai, decisions No. 48. and decisions No. 91.

¹⁷⁰ New York Convention Article V (1) (c).

¹⁷¹ Article 37 (c) of Riyadh Convention.

¹⁷² Article 3 (c) of Arab League Convention.

¹⁷³ Article 216 of UAE civil procedure code.

proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.”¹⁷⁴

If the arbitration agreement expressly excluded this power¹⁷⁵, an arbitrator may exceed its authority by awarding extra-contractual remedies not contemplated or determined by the parties’ agreement, despite his objection as in the case of *Millicom International VN. V v Motorola Inc and Proempres Panama*.¹⁷⁶ A further example was a case where the tribunal had reduced an award more than the amount claimed.¹⁷⁷

Where the parties have participated in the arbitration without objecting to the arbitrator deciding on a particular issue, they are deemed to have consented to the arbitrator's decision on the subject-matter, and this would weaken the case for rejecting enforcement of the award based on the ground that the arbitrator exceeded its powers.

The second part of the New York Convention Article V (1) (c) indicates that the arbitrators exceeded their authority if the award “contains decisions on matters beyond the scope of the submission to arbitration.” This category can be described as *ultra petita*, in which a tribunal award partly exceeds jurisdiction. As in *General Organization of Commerce and Industrialization of Cereals of the Arab Republic of Syria. v. S.p.a. SIMER (Società delle Industrie Meccaniche di Rovereto)* case where the arbitral tribunal decided a claim in the technical matter which was not part of the agreement.¹⁷⁸

Another example is where a third party makes an award and court held that an arbitrator exceeded its power when it made an award against someone who was not a member to the arbitration contract. Therefore, the award was not enforceable against the third party but was enforceable against a party to the arbitration contract.¹⁷⁹

There could be fractional execution if just part of the award exceeds the arbitrator’s authority. Article V (1) (c) provides that the award can be enforced in part “if the decisions on the matters submitted to arbitration can be separated from those not so submitted.” In

¹⁷⁴ Article 33 (3) of the UNICITRAL Model Law

¹⁷⁵ *Parsons & Whittemore Overseas Co v RAKTA* pp 976-77.

¹⁷⁶ See *Millicom International VN. V v Motorola Inc and Proempres Panama, SA* (2002) XXVII YBCA 948 (SDNY 28 March 2002) pp 954-59.

¹⁷⁷ *Seller v Buyer* (2004) XXIX YBCA 742, Germany Court of Appeal 2001, 744 and 746; *X v X*, Germany Court of Appeal 1999, pp 644-6.

¹⁷⁸ *General Organization of Commerce and Industrialization of Cereals of the Arab Republic of Syria. v. S.p.a. SIMER (Società delle Industrie Meccaniche di Rovereto)*.

¹⁷⁹ *Fiat S.p.A. v. The Ministry of Finance and Planning of the Republic of Suriname*. US District Court SD NY, 1989.

this regard, the Convention attempts to find a balance between the losing party's right to resist enforcement where the tribunal exceeds its jurisdiction and the winning party's right to seek enforcement where the award was within the terms of the arbitration agreement.

In one case, the court noted that separation could be made simpler and thus granted partial enforcement.¹⁸⁰ Another example is where the arbitral tribunal rules against a third party. In such a case the court refused to enforce the award against the third party who was not a party to the arbitration contract, but did enforce it against the party to the arbitration agreement.¹⁸¹ That principle is also adopted precisely under the Riyadh Convention, where it stated that "the request for enforcement may cover the entire [award] or only one of its parts, provided it is possible to separate them."¹⁸² Thus, by analogy, the court can apply the concept of partial enforcement as long as it can separate the wrong part from other parts of the award. The law in UAE contains no provisions concerning the partial annulment. Nevertheless, the courts have adopted this principle in the context of enforcing an award.¹⁸³

3.2 Award not binding

The Award not binding another ground for not enforcing the foreign award is where the losing party proved that the award is not binding or annulled or suspended.

Under Article V (1) (e) of the New York Convention, award can be rejected if the losing party proved that¹⁸⁴ "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." The Arab League¹⁸⁵ and Riyadh¹⁸⁶ Conventions state that

¹⁸⁰ General Organization of Commerce and Industrialization of Cereals of the Arab Republic of Syria. v. S.p.a. SIMER (Società delle Industrie Meccaniche di Rovereto).

¹⁸¹ Fiat S.p.A. v. The Ministry of Finance and Planning of the Republic of Suriname. US District Court SD NY, 1989.

¹⁸² Riyadh Convention, Article 32.

¹⁸³ Dubai Cassation Court Decision No. 307 dated 30/11/2002 available at < www.mohamoonju.com >.

¹⁸⁴ Article V (1) (e) of the New York Convention.

¹⁸⁵ Article 3 (f) of the Arab League Convention.

¹⁸⁶ Article 37 (b) of the Riyadh Convention.

an application for enforcement may be rejected “if the arbitrators’ decision is not final in the state in which it is given.”

The enforcement will be denied if the disagreement was the subject matter of an earlier ruling rendered and acquiring re-judicial,¹⁸⁷ or “If the dispute in respect of which the judgment required to be executed is issued is the subject matter of a suit currently heard by one of the courts of the state where the judgment is required to be executed between the same litigants, is related to the same right in terms of its subject matter and grounds, and such suit has been filed prior to the date of referring the dispute to the court of the state in which the judgment is issued”.¹⁸⁸

In UAE the execution is issued, but only if the award or “Judgment or order had obtained the full degree by the law of the issuing court”.¹⁸⁹ It is also stipulated that the award “Provisions of the preceding Article shall apply to the arbitration decision passed in foreign countries. Arbitration decisions must be passed on a matter which may be decided on by arbitration according to the law of the country and must be enforceable in the country it was passed in”.¹⁹⁰

The adjective ‘binding’ under the New York convention is mainly aimed at replacing the term “final” in the 1927 Geneva Convention, which, stated “The party relying upon an award or claiming its enforcement must supply, in particular: - (2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 (d), in the country in which it was made”.¹⁹¹ Some courts interpreted the term “final” to mean that the winning party was obliged to seek some leave for enforcement (e.g., Exequatur) in the nation where the award was completed as a requirement of execution in the country where execution was required.¹⁹² This structure leads to what is known as the “double exequatur.” To avoid such problems, the New York Convention sought to abolish this practice by merely referring to a binding, rather than a final award.¹⁹³ To accomplish this,

¹⁸⁷ Article 2 (c) of the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications.

¹⁸⁸ Article 2 (d) of the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications.

¹⁸⁹ The UAE CPC Article 235 (2) (d).

¹⁹⁰ The UAE CPC Article 236.

¹⁹¹ The Geneva Convention Article 4 (2), 1927.

¹⁹² Di Pietro, Domenico, and Martin Platte, op cit. p.165; John Savage and Emmanuel Gaillard, Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, para 1677; Andrew Tweeddale and Keren Tweeddale, op. cit., p. 420; Albert van den Berg, op cit. p.333.

¹⁹³ United Nation(UN) Doc. E/CONF. 26/SR. 17 p3.

the Convention moved the liability of confirmation from the party seeking enforcement to the party opposing enforcement.¹⁹⁴ There is a consensus among commentators and courts that the term ‘binding’ does not need the winning party first to get permission for execution in the nation where the award was made.¹⁹⁵

3.3 Irregularities in arbitrator composition and Arbitral Procedure

The Irregularities in arbitrator composition and Arbitral Procedure are grounded on which loser party can claim the rejection of execution of a foreign award in UAE is if there was an irregularity in the composition of the arbitral tribunal. This provision is not available under the UAE CPC law, but is available in Article 44 of DIFC Arbitration Law 2008 and Article V (1) (d) of the New York Convention¹⁹⁶, which states: “the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.”

The article gives priority to party agreements regarding the arbitration tribunal composition and arbitration procedure¹⁹⁷ and in the absence of a party agreement on the arbitration tribunal composition the seat law will be taken¹⁹⁸, the party agreement will be taken even if it conflicts with the law of arbitration place¹⁹⁹

However, the enforcing court may refuse such a defense based on any of the following four reasons:

1. The violation being minor²⁰⁰ e.g. Where the same arbitration organization changes its name from the agreed name in the arbitration agreement.

¹⁹⁴ John Savage and Emmanuel Gaillard. op cit. para 1677.

¹⁹⁵ Albert van den Berg, op cit. p.338; Gaja, G., op cit. p.4; Alan Redfern and other, M., op cit. pp 454, 467, 468; John Savage and Emmanuel Gaillard, J. op cit. para 1677. For court decisions see, e.g., Walter Banci S.a.s. v. Bobbie Brooks Inc., Court of Cassation, Italy, 1980.; the English High Court in Rosseel N. V v Oriental Commercail & Shipping Company Ltd (1991), UK QBD Com Ct 1990, 628; Gaetano Butera v Pietro & Romano Pagnan 299.

¹⁹⁶New York Convention, Article V (1) (d).

¹⁹⁷ John Savage and Emmanuel Gaillard, J. op cit. para 1702; Gaillard, E. and Di Pietro, D. op cit. p.730; Gaja, G., op cit. p.3.; see also X v X (2006) XXXI YBCA 640, Germany Court of Appeal 30 Sept 1999, 646-6.

¹⁹⁸ UN Doc. E/CONF. 26/SR.3, 4.

¹⁹⁹ Di Pietro, Domenico, and Martin Platte, op cit. p.161; John Savage and Emmanuel Gaillard, J. op cit. para 1702; Gaja, G, op cit. p 3. Albert van den Berg, op cit. p 324-31. See also, Joseph Muller A.G. v Sigval Bergesen (1984) IX YBCA 437, (Swiss Supreme Court 1991) pp.439-40.

²⁰⁰Shenzhen Nan Da Industrial and Trade United Co Ltd v. FM International Ltd [HK] / 1991 No. MP 1249.

2. Under application of the doctrine of estoppel²⁰¹, such as where the arbitrator selected from a different organization list than the agreed organization list, and a party did not protest throughout the arbitral proceedings. Another example is where the arbitrator was not able to speak German as had been agreed.²⁰²
3. Some court followed the seat law and not an arbitration agreement as in *Associated Bulk Carriers Ltd v Mineral I. E. of Bucharest*,²⁰³ and *Conceria G. De Maio & F. snc v. EMAG AG* cases²⁰⁴, while another court gives priority to party agreement on the seat law²⁰⁵.
4. Where the court considers that the parties have later (tacitly) consented to the modification of the configuration of the arbitral tribunal.²⁰⁶

Irregularities in Arbitral Procedure is the second ground under Article (1)(d) for non-enforcement if the arbitrator not followed agreed procedure by the parties or no agreement the rule of the seat “arbitral procedure” will cover all proceeding aspect²⁰⁷. Therefore, in practice, courts will deal with widely different claims of violation of procedure for example:

1. Failure to deliver an award within time limits imposed by agreement or by applicable procedural rules.
2. Inability to make a reasoned award.
3. Failure to apply agreed procedural rules.
4. Failure to conduct the arbitration in the agreed arbitration seat.
5. Inability to deal with or reject explicitly any request relating to evidentiary matters.

Does every violation of procedure, then lead to a refusal to enforce the award?

It has been noted that Article V (1) (d) contains a weakness because as stated by John Savage and Emmanuel Gaillard²⁰⁸ “it provides no criteria enabling the determination of which procedural rules are sufficiently important to justify the rejection of execution of

²⁰¹ *Tongyuan International Trading Group v Uni-Clan* [2001] 4 Int.A.L.R. N-31, quoting Redfern, A., and Hunter, M., op cit. para 10-43 footnote 105.

²⁰² *X v X*, 2004, XXIX YBCA 673, Germany Court of Appeal 20 Oct 1998, 675-76

²⁰³ *Associated Bulk Carriers Ltd v Mineral I. E. of Bucharest* (1984) IX YBCA 462 (US District Court 30 Jan 1980) pp 463-64.

²⁰⁴ *Conceria G. De Maio & F. snc v. EMAG AG*, Court of Cassation, Italy, 20 January 1995, XXI Y.B. COM. ARB. 602 (1996).

²⁰⁵ *Rederi Aktiebolaget Sally v S.r.l Termarea* (1979) IV YBCA 249, Court of Appeal, Italy 1978, 295-96.

²⁰⁶ See Int'l Arb. L. Rev. 2006, N-61 (Naumburg Court of Appeal, Germany), where the court considered the conclusion of the contract with the arbitrator as consent to the composition of the arbitrator.

²⁰⁷ Gaillard, E. and Di Pietro, D., op cit. p.730; Poudret, J. and Besson, S., op cit. p.840

²⁰⁸ Fouchard, Gaillard and Goldman John Savage and Emmanuel Gaillard, J. op cit. para 1701.

an award in the event that the arbitrators fail to comply with them”. The above weakness compensated by the prevailing view adopted by the courts and authors is that execution of an award should be rejected by a procedural abuse if that abuse caused considerable prejudice to the complaining party or if it was serious.²⁰⁹ In the light of the above view, mere procedural errors on the part of the arbitral tribunal will not usually be sufficient to invalidate or lead to rejection to enforce an award. For example, most courts hold that exceeding the time limit set in an arbitration agreement to render an award is not a sufficient basis to deny enforcement.²¹⁰

Also, the rendering of an award without an oral hearing or making an unreasoned award is not a procedural abuse under Article V (1) (d) where the applicable law did not require such steps.²¹¹ Even where a clear and severe violation of procedure exists, a court may yet enforce by estoppel. Some courts had excluded this defense since the party did not object to the breach of procedure when it occurred, particularly likely when relevant procedural rules require a sufficiently initial objection.²¹²

The following chapter will discuss two grounds under which a court may refuse enforcement of an arbitral award on its motion without the losing party urging it. These are non-arbitrability and public policy.

4. Chapter 4 Non-Arbitrability and Public Policy

4.1 Lack of Arbitrability

The concept of non-arbitrability relays on the restriction by certain national law on the subject which cannot be determined by the arbitrator, even the parties agreed otherwise. Therefore, the contract is essential to be linked to concern substance which could be

²⁰⁹ See, eg, Andrew Tweeddale and Keren Tweeddale, *op cit.* pp.417-18. See also *Licenser (Finland) v Licensee (Germany)*, 2007, Case number 8 Sch 06.

²¹⁰ See, e.g., *Int'l Ass'n of Machinists v Mooney Aircraft, Inc.*, 410 F.2d 681, 683 (5 th Cir. 1969).

²¹¹ See, e.g., *Shipowner v Time Charterer*, Germany Court of Appeal (2002) XXV YBCA 714

²¹² See, e.g., *K. Trading Company v Bayerischen Motoren* (2005) XXX YBCA 568 (Germany Higher Court of Appeal, 23 September 2004)

settled through the arbitration. An arbitration contract deemed binding if it obeys with the necessities regarding arbitrability.

Two types of arbitrability covered in New York Convention:

1. Subjective arbitrability as in Article V (1) (a) concerning to the incapacity of a gathering to go in into the arbitration contract or due to lack of consent as discussed in the previous Chapter.
2. Objective arbitrability such as where the contract is worthless or null and void not in the absence of agreement, but as regards its object, which is conflicting with the law²¹³.

The New York Convention Article V (2) (a) highlighted that arbitration recognition and enforcement can be rejected “if the competent authority in the country where recognition and execution are obligatory finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country”.²¹⁴ A similar condition expressed in the Arab League Convention²¹⁵ and the Riyadh Convention.²¹⁶ which provided that a request for execution may be refused “if the laws of the requested state do not admit the solution of the issue by means of arbitration”. Under UAE law ²¹⁷ “the award must be made in matters which, under the laws of the state of enforcement, are arbitrable ”and “4. The arbitration shall not be permissible in matters, which are not capable of being reconciled”²¹⁸. The non-arbitrable lists in Article 733²¹⁹ stated that “Compromise may not be reached in case it includes any of the following impediments: 1) Extinction of debt in debt. 2) Sale of the food exchanged before its receipt. 3) Deferred Exchange of gold for silver and vice versa. 4) Usury on credits granted. 5) Relieving the debtor from some of the deferred debt, with a view to expediting reimbursement 6) Removal of the deferred debt security from the debtor, against expediting payment with an increment added to it. 7) Beneficial advance payments”.

²¹³ Bernard Hanotiau and Olivier Caprasse, Public Policy in International Commercial Arbitration, (Cameron May 2008), ch 17, 504

²¹⁴ Article V (2) (a) of the New York Convention.

²¹⁵ Article 3 (a) of the Arab League Convention.

²¹⁶ Article 37 (a) of the Riyadh Convention.

²¹⁷ The UAE Code of Civil Procedure Articles 235-236.

²¹⁸ Articles 203(4) of the UAE Code of Civil Procedure.

²¹⁹ Article 733 of the UAE Civil Transactions Code

Also, certain disputes should be determined by the courts as per UAE law, such as Bankruptcy²²⁰, Intellectual Property Disagreements²²¹, Trade agency²²², Anti-dumping²²³, labor disputes²²⁴, banned the use of arbitration in Abu Dhabi, Dubai governments, and federal minister's contracts and to refer to the local court. As an illustration, Dubai Court of Cassation²²⁵ stated selling properties without following the registration requirement as per Law No.13 of 2008 Article 3 is not arbitrable as it is contravening public policy.

The disagreements that are incapable of settlement by arbitration are called non-arbitrability²²⁶, it covers the delicate public policy matters, interests of the party not involved in arbitration and subject that to be dealt by national authority²²⁷, some authors concluded that arbitrability is part of public policy,²²⁸ while others author argued it's a separate basis for rejection of enforcement.²²⁹

The court only will determine if the dispute is non-arbitrable if the public policy matter were involved. The UNCITRAL Model Law and New York Convention contain separate provisions regarding arbitrability²³⁰, to limit the national court's role in determining the scope of the arbitrability. The arbitrability is to be differentiated among the National and International disputes²³¹, as demonstrated in *Scherk v Alberto-Culver Co.*, where the court stated that "a dispute to be found non-arbitrable under a country's domestic law, without necessarily preventing the recognition in that country of a foreign award dealing with the same subject-matter."²³²

²²⁰ Articles 645 of the UAE Federal Commercial Transactions Law No (18) of 1993.

²²¹ Federal Law No (17) for the year 2002 Pertaining to the Industrial Regulation and protection of Patents, industrial Drawings, and Designs, Federal Law No (37) of the year 1992, amended by the Federal Law No (8) of the year 2002 in respect of Trademarks, and Federal Law No (7) of the year 2002 Concerning Copyrights and Neighbouring Rights.

²²² Article 28 of Federal Act No. 14 of the Year 1988, modifying some provisions of the Federal Act No. 18 for the Year 1981 organizing Trade Agencies. See also, the decision of the Federal Court of Cassation of the UAE of June 28, 1994, available at < www.mohamoon-ju.com > (9/10/2009)

²²³ Decree No (7) of 2005 of UAE.

²²⁴ Federal Law No.8/1980 On Regulating Labour Relations Art.154-165.

²²⁵ Cassation Court of Dubai Case No.: 180/2011 date of judgment 12/02/2012.

²²⁶ John Savage and Emmanuel Gaillard, op. cit. para 532

²²⁷ Julian D. M. Lew and other, op. cit. para 9-2.

²²⁸ Albert van den Berg, op cit., pp.360, 368; John Savage and Emmanuel Gaillard op. cit. para 1704; Alan Redfern and other, op. cit. pp. 149, 471.

²²⁹ Antoine Kirry, 'Arbitrability: Current Trends in Europe', 12 Arb Int'l (1996) 373 at 374-379; Homayoon Arfazadeh, Arbitrability under the New York Convention: The Lex Fori Revisited, web.law.columbia.edu/sites/default/.../columbia-arbitration.../04_2001_-_arfazadeh.p.

²³⁰ ILA Final Report 255.

²³¹ John Savage and Emmanuel Gaillard, op. cit. para 1701.

²³² *Scherk v Alberto-Culver Co.* 417, US Supreme Court, 1974.

Many commentators²³³ and courts²³⁴ supported the views to separate the national non-arbitrability from international arbitration.

The UAE courts have changed their approach toward arbitrability. As an early case in Abu Dhabi court²³⁵ stated that “the court of the U.A.E. has exclusive jurisdiction over the subject matter of the implementation of any contract, taking place in the U.A.E. Parties have no power to submit such a dispute to arbitration since this would violate public order”. In a similar manner, a Sharjah Court²³⁶ stated “the rules of comparative law, in this respect, consider that, when an agreement is concluded to arbitrate abroad in a matter originally within the jurisdiction of the domestic courts, the arbitral clause will remain valid in the part where it refers the dispute to arbitration. That part which specifies that arbitration will take place abroad is deemed to be null and void”.

This approach has changed with time as courts become more aware of the arbitration process and increase business with foreign companies, as illustrated in *KK. Marine Co. v. TBB Abu Dhabi Co.*,²³⁷ Where the agreement referred that the dispute to arbitrate in London following English law, the court agreed to arbitrate in a foreign country outside the UAE, and it is not violating public policy.

A Dubai court has adopted a similar approach to accepting foreign arbitration as in *Alam Traders v. Daewoo Gulf East. and Daewoo Cor p. Korea*²³⁸. Where the agreement to import iron to UAE from Korea and as per agreements any dispute to be arbitrated in Korea following Korean arbitration system. The Korean company delayed the god import the other party claim, damage before Dubai Court and requested not to follow the arbitration clause on the ground that it concerns subject related to public policy, the court disagreed with him and supported the agreement and position of the Korean company.

²³³ Di Pietro, Domenico, and Martin Platte, op. cit. p.176; Albert van den Berg, op. cit, pp 360, 368; John Savage and Emmanuel Gaillard op. cit. para 1707; Alan Redfern and other, op. cit. p.148.

²³⁴ *Scherk v Alberto-Culver Co*; *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614 (US Supreme Court 1985).

²³⁵ The Case No.30/77 civil (Abu-Dhabi Court of Appeal), unpublished.

²³⁶ Case No.40/1979 civil, Sharjah Court of Appeal, unpublished

²³⁷ Case No.303/1981 civil, Abu-Dhabi Court of Appeal, issued 6.7.1981, (1982) 31.

²³⁸ *Alam Traders v. Daewoo Gulf East. and Daewoo Cor p. Korea*, Case No.22/1988 issued 17.4.1989 unpublished

4.2 Concept of public policy in UAE

The idea of public policy is vague, and can be understood in different senses.²³⁹ In *Egerton -v- Earl of Brownlow*; HL 1853 case,²⁴⁰ the House considered the character and significance of public policy and stated that public policy “has been confounded with what may be called political policy; such as whether it is politically wise to have a sinking fund or a paper circulation, or the degree and nature of interference with foreign States; with all which, as applied to the present subject, it has nothing whatever to do.’ For these reasons, in our view, the defendants’ point of public policy is wholly unfounded, Public policy is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean ‘political expedience,’ or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an Act is against public policy or not. It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing courts, from the text writers of acknowledged authority, and upon principles to be clearly deduced from them by sound reason and just inference; not to speculate on what is best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become part of the established law, and we are therefore bound by them, but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise.”

Article 3 of the UAE Civil Transaction Code stated that²⁴¹ “Public order shall be deemed to include matters relating to personal statuses such as marriage, inheritance, and lineage,

²³⁹ Public Policy Exception Under the New York Convention: History, Interpretation, and Application, Anton G. Maurer, p 276

²⁴⁰ *Egerton -v- Earl of Brownlow*; HL 1853.

²⁴¹ Article 3 of the Civil Transaction Code

and matters relating to sovereignty, freedom of trade, the circulation of wealth, rules of private ownership and the other rules and foundations upon which society is based, in such manner as not to conflict with the definitive provisions and fundamental principles of the Islamic Shari'a.”

The public policy can exclude claims of the foreign law award by a local court in UAE as per Article 234 (2) (f) of the Code of Civil Procedure if the award breaches the rules of public policy and good morals²⁴². Arab League Convention Article 3 (e) affords that demand for performance could be rejected “if the arbitrators’ decision includes anything considered to be of public order or public morals in the state requested to carry out the execution.”²⁴³ Whereas the Riyadh Convention Article 37 (e) affords that such a demand can be rejected “if the award is contrary to the Moslem Shari’a, public policy or good morals of the signatory state where enforcement is sought”²⁴⁴. It characterizes the advantage of simple value selections of the local public above the procedural request of the encounter of law procedures.²⁴⁵ The local court judge should balance between protecting public policy and execution of foreign award except if the award breaches the certain essential principle of justice, the certain predominant idea of respectable morals, and certain established belief of public weal as in the case of Fotochrome, Inc., Debtor-appellant, v. Copal Company.²⁴⁶ It may differ from state to another.²⁴⁷ Certain international courts may understand public policy as to guard only local concern²⁴⁸ because it touches each part of the law practically in different means,²⁴⁹ and its content varies from nation to nation and from period to period.²⁵⁰ The New York Convention did not define and discussed the interpretation of ‘public policy’; the ILA Committee (International Commercial Arbitration Committee of the International Law Association) did not pursue to describe the concept.²⁵¹

²⁴² Article 234 (2) (f) of the Code of Civil Procedure.

²⁴³ Arab League Convention

²⁴⁴ Riyadh Convention

²⁴⁵ Christoph Schreuer, *The ICSID Convention: A Commentary* (CUP 2009), 2nd edition.

²⁴⁶ *Fotochrome, Inc., Debtor-appellant, v. Copal Company, Limited, Claimant-appellee*, 517 F.2d 512 (2d Cir. 1975)

²⁴⁷ Albert van den Berg, *op cit.* p 360

²⁴⁸ Alan Redfern and other, *op. cit.* p. Arbitration 459.

²⁴⁹ Di Pietro, Domenico, and Martin Platte, *op. cit.* p.179.

²⁵⁰ Lew, Mistelis and Kroll, *op. cit.* para 26-117.

²⁵¹ ILA Committee on International Commercial Arbitration, at www.ila-hq.org, accessed on

The ICSID Convention has stopped the matter by rejecting public policy completely from its scope. The countries ratified New York Convention are not in agreements of its meaning not only English language but also in other languages²⁵²

Under the New York Convention, the recognition and enforcement afford that the award may be rejected “if the competent authority in the country where recognition and enforcement are sought finds that... the recognition or enforcement of the award would be contrary to the public policy of that country.”²⁵³ The New York Convention Article V (2) (b) states that an implementing court might drop execution if it discovers that acting so would infringe the public policy of the nation where execution is wanted. It refers to the good faith of contracting countries and allowing some vagueness to continue.²⁵⁴ With a wide loophole for rejection of an award.²⁵⁵ It has also referred to the public policy of the enforcing countries.²⁵⁶ A different term used for the same thought, like the international public policy, order public, public interest, transnational public policy, public order, public policy and public morals.²⁵⁷ The reason that no agreements on the definition since it lawful outlines is formed by the perspective of national anxiety. “Public policy is a relative concept dependent on the judgment of the legal community and that public policy can change through time.”²⁵⁸ Such as Mark Wakim stated, “the construction of public policy by national courts turns on legal interpretation as much as it does on political, sociological, and even religious matters.”²⁵⁹ It may be fastened with the Shari’a.²⁶⁰

The Model Law drafting committee recommended clarification of the meaning of the public policy as “The expression “international public policy” is used in these Recommendations to designate the body of principles and rules recognised by a State,

²⁵² Bernard Hanotiau and Olivier Caprasse, Public Policy in International Commercial Arbitration, (Cameron May 2008)

²⁵³ The New York Convention Article V (2) (b).

²⁵⁴ Elana Levi-Tawil, EAST MEETS WEST: INTRODUCING SHARIA INTO THE RULES GOVERNING INTERNATIONAL ARBITRATIONS AT THE BCDR-AAA.

²⁵⁵ Margaret L. Moses, The Principles and Practice of International Commercial Arbitration, Cambridge University, second edition, 2012, p218.

²⁵⁶ Alan Redfern and other, op. cit.p 456.

²⁵⁷ Bernard Hanotiau and Olivier Caprasse, Public Policy in International Commercial Arbitration, (Cameron May 2008).

²⁵⁸ Public Policy as a Limit to Arbitration and its Enforcement, Karl-Heinz Böckstiege.

²⁵⁹ Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East, Mark Wakim.

²⁶⁰ Abdul Hamid EL-AHDAB, General Introduction on Arbitration in Arab in ICCA Handbook, Kluwer 1993.

which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy).²⁶¹, substantive related to arbitration award contents and procedural public policy related to the procedure which award issued.

²⁶² Both approaches of classifying public policy can function simultaneously. The international public policy can be either procedural or substantive.²⁶³ Consequently, the expressions ‘order public’ and ‘public policy’ are regularly applied interchangeably and progressively viewed as synonymous.²⁶⁴ It is uncertain as to what degree ‘order public’ however, stays broader than public policy now.²⁶⁵

The parties to foreign arbitration to select the seat and country of enforcement of award very carefully and preferable if the chosen countries have a similar approach toward public policy. Normally the condition of public policy is not the issue rather the method of implementation.²⁶⁶ In *Wilkinson v Osborne* [1915]²⁶⁷, the public policy defined as “some definite and governing principle which the community as a whole has already adopted either formally by law or tacitly by its general course of corporate life, and which the courts of the country can therefore recognize and enforce.”

4.3 National law and Concept of Public Policy

Article V (2) of New York Convention does not order national courts but offers the court preferring to conclude and use the public policy exclusion. Almost all jurisdictions, in the case of uncertainty will enforce the award by applying the New York Convention. For

²⁶¹ International Law Association (ILA) Resolution Recommendation 1(c) and ILA Final Report 253.

²⁶² International Law Association (ILA) Resolution Recommendation 1(c) and the examples in Recommendation 1(d)

²⁶³ International Law Association (ILA) Resolution Recommendation 1(c) and ILA Final Report 253.

²⁶⁴ International Law Association (ILA) Final Report 251.

²⁶⁵ European Public Policy—A Black Box? 17 J. Int'l Arb. 73 (June 2000) Christoph Liebscher.

²⁶⁶ Arbitration in Yemen, Hamid G. Gharavi, Lara Karam, (2006) 17 ICC International Court of Arbitration Bulletin.

²⁶⁷ *Wilkinson v Osborne* [1915] HCA 92; (1915) 21 CLR 89, High Court of Australia.

instance, in the case of *Intrafor Cofor v. Gagnant*,²⁶⁸ it was held that “a breach of domestic public policy, assuming that it has been established, does not provide the grounds of which appeal against a ruling granting enforcement in France of a foreign arbitral award.” Nevertheless, certain courts apply national public policy as in cases of *Sarhank Group v. Oracle Corporation*²⁶⁹. Also, the discussion can vary in the same jurisdiction between different court levels,²⁷⁰ resulting in delay and the misperception of enforcement of the intentional award basis for public policy.

The basis for Article V (2) is to keep the core moral principles and public order of the enforcing state,²⁷¹ and public policy necessity to be ruled by the law of the enforcing nation.²⁷²

The New York Convention provision was to challenge the execution of foreign arbitration awards on the international, not national public policy ground.²⁷³

In UAE and GCC Public policy can be used as a tool to avoid of foreign arbitration award therefore in states' codes specifying that differences concerning state organizations must not be arbitrated²⁷⁴. Mainly the subject of Sovereignty and the national interest which must not be revealed to other Countries. The rationale behind this decision for a long time the Middle East was under the influence of Western colonialism, and it saw these countries as a concession to foreign interests controlling the wealth of country by law and rule which they have no control.

4.4 International public policy

In international commercial arbitration when parties required recognizing or enforcing the award using foreign law to country enforcement law, it is significant to differentiate

²⁶⁸ *Intrafor Cofor v Gagnant*, Court of Appeals judgment (12 March 1985), [1985] Rev Arb 299.

²⁶⁹ *Sarhank Group v. Oracle Corporation*, United States / 14 April 2005 / U.S. Court of Appeals, Second Circuit 02-9383.

²⁷⁰ Public Policy as a Limit to Arbitration and its Enforcement, Karl-Heinz Böckstiege.

²⁷¹ Albert van den Berg A.J., “The New York Arbitration Convention of 1958 towards a Uniform Judicial Interpretation”, (Netherlands 1981).

²⁷² Many authors affirm this view. See, e.g., Born, G, op. cit. pp.2831-33; Alan Redfern and other, op. cit. p.472; John Savage and Emmanuel Gaillard op. cit. para 1710; Di Pietro, Domenico, and Martin Platte, op. cit. p.180; Merkin, R., op. cit. para 19.58; ILA Committee on International Commercial Arbitration.

²⁷³ Andrey Ryabinin, *Procedural Public Policy to the Enforcement and Recognition of Foreign Arbitral Awards*.

²⁷⁴ See Chapter 4 Arbitration law and Practice in the UAE at pp.138- 139

among national public policy and international public policy.²⁷⁵ As what can affect the relations on the public policy on the State level may not be necessarily the effect in international. Therefore, some substances in international public policy cases are lesser than in the National instances. The difference is due to the different drive of National and international dealings.²⁷⁶ Also, Gaillard, Goldman, and Fouchard determine that “not every breach of a mandatory rule of a host country could justify refusing recognition or enforcement of a foreign award. Such refusal is only justified where the award contravenes principles which are considered in the host country as reflecting its fundamental convictions, or as having an absolute, universal value.”²⁷⁷ Court support of this division in *Kersa Holding Co v Infancourtage* case, for example, states that “According to the [New York] Convention, the public policy of the state where the arbitral award is invoked is ... not the internal public policy of that country, but its international public policy, which is defined as being “all that affects the essential principles of the administration of justice or the performance of contractual obligations,” that is, all that is considered ‘as essential to the moral, political or economic order’ ...”²⁷⁸

Contrariwise, some are not clear on the meaning,²⁷⁹ while others recommended transnational public policy, not international public policy as considered by National law. Dolinger stated that “establishes universal principles, in various fields of international law and relations, to serve the higher interests of the world community, the common interests of mankind, above and sometimes even contrary to the interests of individual nations.”²⁸⁰ The relevance to international arbitration reflected in Article V (2) (b) of the New York Convention Where enforcement is sought; then the international public policy should be that place²⁸¹. The transnational public policy concept has many criticized by different authors.²⁸² The use of the difference between international and national public

²⁷⁵ Audley Sheppard, Transnational Dispute Management, <http://www.transnational-dispute-management.com>.

²⁷⁶ Albert van den Berg, ‘Consolidated Commentary’ (2003) XXVIII YBCA 655.

²⁷⁷ John Savage and Emmanuel Gaillard op. cit. para 1711.

²⁷⁸ *Kersa Holding Co v Infancourtage* (1996) YBCA XXI 617 (Luxembourg Court of Appeal 1993) 625.

²⁷⁹ MARK A. BUCHANAN, Public Policy and International Commercial Arbitration, *American Business Law Journal*, September 1988, 511, 514 and 530.

²⁸⁰ Alan Redfern and other, op. cit. p473; Di Pietro, Domenico, and Martin Platte, op. cit. p.181.

²⁸¹ John Savage and Emmanuel Gaillard (eds), op. cit. para 1712.

²⁸² For criticism of this view, see, e.g Redfern, ‘Commercial Arbitration and Transnational Public Policy’ pp 1-2; Gaillard and

policies to “accept a public policy violation in extreme cases only”.²⁸³ Consequently, the law of enforcing state should recognize and point to international public policy.²⁸⁴ In the view of its selfish character, the international public policy is national.²⁸⁵ It frequently guards a specific country’s specific interest, it can, however, prolong to the defense of welfares that are mutual to the international public at outsized.²⁸⁶

The Resolution of the International Law Association (ILA) certifies international public policy as the assessment for governing the excitability of foreign international awards.²⁸⁷ It proposes a restricted refusal of enforcement to the rare ground.²⁸⁸ Consequently, the ILA Resolution on splits international public policy into three classes, essential values relate to morality or fairness that an execution State desires guard even when it is not openly disturbed.²⁸⁹

As they are measured to be appropriately crucial in that State’s particular legal structure²⁹⁰, the state’s critical political, public or financial interests rules the function of enforcement of the public policy²⁹¹. They vary from ordinary compulsory laws that which will not obstruct the arbitration award execution²⁹² and international responsibilities to duties concerning new Situations or international administrations which the execution National has an obligation to recognize; also purposes of United Nations commanding authorizations and international agreements approved by the execution State.²⁹³

Albert van den Berg said that what effects to public policy in international circumstances is not essentially to viewed as affecting to national public policy in circumstances,²⁹⁴ the international, transnational or really international public policy are more restricted than state public policy.

Savage op. cit. paras 1648, 1712; Born, G, op. cit. pp.2837-2838.

²⁸³ Albert van den Berg A.J., “The New York Arbitration Convention of 1958 towards a Uniform Judicial Interpretation”, (Netherlands 1981).

²⁸⁴ Born, G, op. cit. p.2838.

²⁸⁵ MARK A. BUCHANAN, Public Policy and International Commercial Arbitration, American Business Law Journal, September 1988, 511, 514 and 530.

²⁸⁶ Zhilsov, AN, Mandatory and Public Policy Rules in International Commercial Arbitration, Netherlands International Law Review, Vol. 42, 1995, 81, 99-100.

²⁸⁷ See Recommendation No. 1(b) of ILA Resolution.

²⁸⁸ International Law Association (ILA) Final Report 253.

²⁸⁹ Recommendation No. 1(d)(i) of ILA Resolution.

²⁹⁰ Recommendation No. 2(a) of ILA Resolution.

²⁹¹ Recommendations No. 1(d)(ii) and 3(d) of ILA Resolution.

²⁹² Recommendation No. 3(a) of ILA Resolution.

²⁹³ Recommendation No. 1(e) of ILA Resolution; ILA Final Report 257

²⁹⁴ Albert van den Berg, op cit. p 382

4.5 Shari'a law and Concept of Public Policy

The UAE legal system based on the civil law system and Shari'a law measured as an element of public policy. The UAE Civil Transaction Code Article 27 state "it shall not be lawful to apply principles of law designated by the foregoing provisions if such principles are contrary to the Islamic Shari'a or public policy or morals in the UAE."²⁹⁵ However, El-Ahdab stated that, "in Moslem law the concept of public policy is based on the respect of the general spirit of the Shari'a and its sources (the Koran and the Sunna, etc.), and on the principle that "individuals must respect their agreements, unless they forbid what is authorized and authorize what is forbidden."²⁹⁶ The UAE Federal Constitution Article 7²⁹⁷ stated that "Islam shall be the official religion of the Union. The Islamic Shari'a shall be a principal source or legislation in the Union". El-Ahdab and El-Kadi, stated, "as soon as a Muslim becomes a party to the contract, Islamic Law governs the contract, and one must take into account such rules of Islamic law."²⁹⁸ Saleh proposed that an arbitral award that did not apply Shari'a law and not meeting any conditions of the Shari'a, that award is defined as a foreign award.²⁹⁹ El-Kadi highlighted that "the attitude of Islamic Law towards foreign judgments and awards is based on the principle providing that non-Muslims be free to enter into contracts and to have business relations that are valid according to their religions without the need to take into account the concept of prohibition and authorization in Islamic Law."³⁰⁰ El-Ahdab stated that Shari'a must apply if one of the parties to arbitration contract is a Muslim.³⁰¹ It follows that the award is foreign if the Shari'a does not govern it and if the parties to the arbitration are not Muslim since the Shari'a rule does not apply to non-Muslims³⁰². Syed Khalid stated that "An arbitral award is considered foreign if both parties are non-Muslims, even if both are

²⁹⁵ Article 27 of the Civil Transaction Code

²⁹⁶ Abdul Hamid EL-AHDAB, General Introduction on Arbitration in Arab in ICCA Handbook, Kluwer 1993.

²⁹⁷ UAE Federal Constitution Article 7.

²⁹⁸ Omar el- Kadi, L'Arbitrage international entre le Droit musulman et le Droit positif français et égyptien, 1984, 327.

²⁹⁹ Warren G. Wickersham, Benjamin P. Fishburne, Current Legal Aspects of Doing Business in the Middle East: Saudi Arabia, Egypt, and Iran, 3rd Edition 1977, volume 2, p 64-65; Samir Saleh, Commercial Arbitration in the Arab Middle East: Shari'a, Syria, Lebanon, and Egypt Second Edition, 2006, p 8.

³⁰⁰ Omar el- Kadi, op. cit. p 327.

³⁰¹ Abdul Hamid EL-AHDAB, op. cit. p 50.

³⁰² Syed K. Rashid, Alternative Dispute Resolution in the Context of Islamic Law, The Vindobona Journal of International Commercial Law and Arbitration, Vol. 8, No. 1, pp. 95-118, 2004.

residents of the state in which the arbitration is being held.”³⁰³ El-Ahdab has specified that in Islam “the concept of public policy is based on the respect of the general spirit of the Sharia and its sources and on the principle that individuals must respect their clauses unless they forbid what is authorized and authorize what is forbidden.”³⁰⁴ Saleh has claimed that the Islamic public policy may conclude from the Surah al-Nahl.³⁰⁵ Others disagreed with these views and stated that Sharia (Islamic law) should use by all people living in the authority of an Islamic court, irrespective of their religion or nationality.³⁰⁶ This view is in line with the outline of the New York Convention, regarding the location the award will base whether domestic or foreign, and the New York Convention left it to the court to decide. Albert van den Berg stated that “the rule that the New York Convention is always applicable to the recognition and enforcement of an arbitral award made abroad applies even if the award achieved in the other country is considered domestic by the enforcing court.”³⁰⁷ The 1983 Riyadh Convention Article 37 (e)³⁰⁸ stresses that arbitral awards are not to be recognized and enforced between parties wherever any part of the award contradicts “the provisions of the Islamic Sharia, the public order or the rules of conduct of the requested party.” A respondent requested Abu-Dhabi Court in the case of A. A Commercial Co. V. S. Motors Ltd Co. and D. Industrial Ltd Co.³⁰⁹ not to enforce the award as it rendered in a foreign country under a foreign law and it violated the basic standard of Shari’a. The Appeal Court of Abu-Dhabi declared it is a mistake to believe using international treaty or a foreign law is a breach of the Shari’a law, except if the foreign law used to prove it breached the Shari’a principles. Shari’a law can contain the arbitration procedures, as it is capable of progressing to fulfill the requirements of the emerging society. The parties who contract to submit their difference to arbitration outside the U.A.E. would not be in breach of the Shari’a law if the award were within the principle of Shari’a law. The U.A.E. Supreme Court in the case of

³⁰³ Syed Khalid Rashid, “Alternative Dispute Resolution in the Context of Islamic Law”. The Vindobona Journal of International Commercial Law and Arbitration, (2004) 7 VJ (1), 95

³⁰⁴ Abdul Hamid EL-AHDAB, op. cit. p 12.

³⁰⁵ Samir Saleh, op. cit. p 473.

³⁰⁶ Abu Yussef, Badaei El Sanaei, Vol V2,132 and et seq.

³⁰⁷ Albert Jan van den Berg, when is an Arbitral Award Nondomestic Under the New York convention of 1958?

³⁰⁸ Riyadh Convention Article 37(e)

³⁰⁹ A.A Commercial Co. V. S. Motors Ltd Co. and D. Industrial Ltd Co., The Abu-Dhabi Court of Appeal Case No. 10007/1981 unpublished.

International Steel & Contractors Co V. G. Steel Industry Co.³¹⁰ stated that Shari'a law could contain the arbitration procedures, as it is capable of progressing to fulfill the requirements of the emerging society. The parties who contract to submit their difference to arbitration outside the U.A.E. would not be in breach of the Shari'a law if the award were within the principle of Shari'a law. Therefore, the foreign arbitration is not contrary to Shari'a and to enforce the award will not violate Shari'a. Nevertheless, if the parties are merely choosing foreign arbitration to escape from the application of the Shari'a in a matter forbidden by it, in this situation the execution of such an award will be considered contrary to the Shari'a law.

The public policy under Shari'a divided into substantive and procedural.³¹¹ The procedural refers to equal treatment, hearing right and defense right of the parties.

Samir Saleh, nevertheless, did not provide additional explanation on the three fundamentals of procedural public policy under the Shari'a law.³¹² Therefore the principles of Shari'a procedural law are harmonized along the New York Convention's Article V (1) (b) universal norms of due process and fairness.³¹³ Substantive Shari'a public policy concerns with the prohibition of riba (interest or usury) and gharar (uncertain obligation)³¹⁴ which may affect award enforcement. In Saudi Arabia, the riba is prohibited under the Shari'a; Qatar also follows Saudi Arabia as both follow the Hanbali School, and it prohibits the riba.³¹⁵ Nevertheless, Qatar and Oman do not firmly impose the riba in practice,³¹⁶ on another hand in Saudi Arabia some banks deal with interest in paying customers, charging customers, and in investments.³¹⁷ Regarding inflation compensation for liquidated damages,³¹⁸ Dubai court in the UAE and Egypt³¹⁹ follow the

³¹⁰ International Steel & Contractors Co V. G. Steel Industry Co, U.A.E. Supreme Court Case No. 138/10, unpublished.

³¹¹ Richard Harding, Introduction to Arbitration in the Middle East, www.keatingchambers.co.uk/.../2004/rah_intro_arb_mi.

³¹² Samir Saleh, op. cit. p 27

³¹³ Abdul Hamid EL-AHDAB, General Introduction on Arbitration in Arab in ICCA Handbook, Kluwer 1993.

³¹⁴ Haider Ala Hamoudi, Muhammad's Social Justice or Muslim Can't? Langdellianism and the Failures of Islamic Finance, Cornell International Law Journal (2007).

³¹⁵ Samir Saleh, op. cit. p 27; Mark Wakim, op. cit. p 45.

³¹⁶ Kent Benedict Gravelle, Islamic Law in Sudan: A Comparative Analysis, 5 ILSA J. Int'l & Comp. L. 1 (1998-1999).

³¹⁷ John H. Donboli and Farnaz Kashefi, Doing Business in the Middle East: A Primer for US companies

³¹⁸ Enforcement of foreign arbitral awards in Saudi Arabia: grounds for refusal under article (v) o the New York convention of 1958, by Naif S. Al-Shareef, University of Dundee.

³¹⁹ Supreme Court of Egypt Case No 815/52 of May 21, 1990, Unpublished

Hanafi view of the riba but enforce an award that contains interest in the loss calculation. The UAE Commercial Transaction Law No.18 of 1993 in Article 76,77 and 88 recognize and uphold the interest and interest rate. Article 76³²⁰ stated that “A creditor is entitled to receive interest on a commercial loan as per the rate of interest stipulated in the contract. If such rate is not stated in the contract, it shall be calculated according to the rate of interest currently in the market at the time of dealing, provided that it shall not exceed 12% until full settlement”.

The debtor to compensate the creditors for the payment delay as stated in the Article 88³²¹ “Where the commercial obligation is a sum of money which was known when the obligation arose and the debtor delays payment thereof, he shall be bound to pay to the creditors as compensation for the delay, the interest fixed in the Articles (76) and (77), unless otherwise agreed”.

In cassation petition 261 of 1996³²² the Dubai Cassation Court did not follow the lower courts’ verdict on the origin that there was no validation for awarding interest at the rate of 9 % from the date of filing the case in a complete disregard of the parties’ agreement of 15 % rate and stated that the concurrence of the parties might not be ignored except if it conflicting with the public policy. Similarly, in the Judgment No. 190/98323, between a Maltese company which filed a case against the UAE entity over not paying vogue cost. The award issued by Arbitrator ordering UAE company to pay the cost plus interest at 7.75%. Dubai court of the first instance, refused the enforcement on the basis, plaintiffs had not shown the finality of the award and no reciprocity among the country of origin of the award and the UAE, however, discharged the dispute concerning to the illegality of the award for of the provision of interest.

The Federal position illustrated in Cassation Petition 337/17-4-1998³²⁴ stated “it established the presence of court that although interest is principally prohibited (Moharama), however, the necessity imposed by the current banking operations until the same removed, allows awarding interest provided that the rates of interest payable on bank loans should not exceed 12% simple interest, otherwise, it will be regarded as a

³²⁰ Article 76 of the UAE Commercial Transaction Law NO.18 OF 1993.

³²¹ Article 88 of the UAE Commercial Transaction Law NO.18 OF 1993

³²² Cassation petition 261 of 1996.

³²³ Abdullah Kh. Al-Ayoub - American Bar Association
apps.americanbar.org/intlaw/calendar/.../papers/THURS215330ALAYOUB_331.doc

³²⁴ Cassation petition 337/17-4-1998.

compound and therefore prohibited by law, a contravention of the constitutional panel's judgment and contrary to public order".

Normally UAE courts may award interest of 9% for non-commercial transactions and 12% interest in commercial transactions.³²⁵

Therefore, a foreign award with interest can be enforced. Gharar is the second prohibition of Shari'a substantive public policy, which is related to the existence of disagreements in the future relating to assumption and improbability.³²⁶ The prohibition basis is Holy Quran³²⁷ and Sunna. As illustrated in Dubai Court of Appeal No. 514 of 2014³²⁸ spread betting debts arising from speculation and it is prohibited under UAE civil code Article 1021 as betting is ghara or contract of hazard, the court stated the contract is void as it against public policy. Currently, the present and future disagreements in the GCC States allow arbitration contracts.³²⁹

The "refusal of enforcement of foreign arbitration awards in the Arab world on grounds of public policy in general or the Shari'a, in particular, has not been a dominant feature of arbitration in the region."³³⁰ The real obstacle to enforcement of the foreign arbitral award in UAE seems the intervention by the courts with arbitration³³¹ veiled as the protector of the Shari'a and public policy.

Al Tamimi highlighted,³³² "If there is to be an adjustment within Middle Eastern countries in respect of arbitration in general or the interpretation of the relevant New York Convention articles relating to the enforceability of foreign arbitration awards, the adjustment must come either by developing the education standard at the university level or by overhauling the training of judges. It is time to make substantial changes to the way in which the system currently operates in order to improve the judicial system's approach to arbitration and, more importantly, the process by which disputes move through the judicial system".

³²⁵ Cassation petition 225/18-3-1998.

³²⁶ Rohullah Azizi, Grounds for Refusing Enforcement of Foreign Arbitral Awards under the New York Convention (A Comparison of the US and Sharia Law), April 20, 2010.

³²⁷ The Holy Qur'an, Al-Baqara 2:188.

³²⁸ www.tamimi.com/.../law.../spread-betting-debts-arising-from-gambling-contracts-are-...

³²⁹ Mark Wakim, op. cit. p 48-49

³³⁰ Ezrahi, A.M. Arbitration in the Arab Middle-East: a snapshot. Mealey's international arbitration report (King of Prussia, Pa.) 20:11:33-42, 2005.

³³¹ A.F.M. Maniruzzaman, International Commercial Arbitration in the Asia Pacific: Asian Values, Culture and Context, Journal of International Affairs, Vol. 6, No. 3, July-December 2002.

³³² Essam Al Tamimi, Enforcement of Foreign Arbitration Awards in the Middle East.

5. Chapter 5 Conclusion

The international public policy' under the New York Convention refers to narrower than the national and enforcing state's understanding of international public policy.³³³ Consequently, not every national law is part of the international public policy³³⁴. The ILA³³⁵ supported this view.

Not enforcing a foreign award will undermine international business and the arbitration method may collapse³³⁶.

The UAE has become a center of arbitration and the hub of business in the Middle East by having a reputed arbitration center and the DIFC with common law jurisdiction in Dubai, and arbitral awards can be enforced in all UAE as well in other GCC countries. UAE courts seem to have changed their attitude towards refusing enforcement for minor technical reason towards favoring enforcement of foreign arbitration award. The current gap between the practice and policy can be reduced or eliminated by enacting the draft UAE Federal Law for Arbitration, which is the basis of UNCITRAL Model Law 2006. The public policy exception contains both procedural public policy and substantive public policy. It affects the arbitration processes and arbitration awards equally. Accordingly, no longer there is a historical difference between the civil law notion of order public and

³³³ Poudret and Besson Comparative Law 856 & 857

³³⁴ Audley Sheppard, Transnational Dispute Management, <http://www.transnational-dispute-management.com>.

³³⁵ Recommendation 1(c) of /LA's.

³³⁶ "If arbitration awards could not be enforced, the whole system of arbitration would collapse," Crowter, H. Introduction to Arbitration, (London: LLP Publishing, 1998), p 139

public policy in the common law notion. The concept of public policy must be a suitable balance between party autonomy, approving arbitral finality and avoiding unjust awards³³⁷. The New York convention did not give clear direction on the application and clarification of the public policy challenge, which gives flexibility to the execution courts to present a new challenge to avoid execution of the award in the excuse of public policy. The court fluctuated in challenging the award like a pendulum movement,³³⁸ it has varied from not accepting to accepting the arbitration as a dispute resolution mechanism and consequently narrow approach to the public policy challenge. Arfazan stated that “If international arbitration is to remain an activity in the pursuit of international justice, it will have to face many unforeseeable and novel challenges that can only be addressed through visionary leaps in the dark, and for which there would be no better companion than an unruly horse.”³³⁹

The foreign arbitration award exposed to second judicial control. Pierre Mayer³⁴⁰ recommended that: “If it is permissible to disregard the decision of the courts of the seat to hold the award valid, why should it be necessary to abide by their decision in the converse situation, namely when the said courts have set aside the award? International harmony is not more important in one situation than in the other, symmetrical one.”

The annulled awards are not forbidden to be enforced under the New York Convention, even if it regarded as a fault³⁴¹ which can raise a concern and worry among the party to the arbitration agreement,³⁴² and it is entirely outside any arbitration agreement.³⁴³

³³⁷ International Law Association (ILA) Final Report 253.

³³⁸ Albert van den Berg A.J., “The New York Arbitration Convention of 1958 towards a Uniform Judicial Interpretation”, (Netherlands 1981), p.368.

³³⁹ HOMAYOON ARFAZADEH, In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception - ARIA - Vol. 13, Nos. 1-4, 2002.

³⁴⁰ Pierre Mayer, Revisiting Hilmarton and Chromalloy, in INTERNATIONAL ARBITRATION AND NATIONAL COURTS: THE NEVER ENDING STORY 165, 171 (Albert Jan van den Berg ed., 2001).

³⁴¹ Hamid G. Gharavi, The International Effectiveness of the Annulment of an Arbitral Award, Kluwer Law International, Mar 14, 2002.

³⁴² Richard M. Mosk, Ryan D. Nelson, 'The Effects of Confirming and Vacating an International Arbitration Award on Enforcement in Foreign Jurisdictions' (2001) 18 Journal of International Arbitration, issue 4, pp. 463–474.

³⁴³ Wahl, P, In Harmonization and delocalization, Enforcement of Foreign Arbitral Awards Set Aside in their Country of Origin: ‘The Chromalloy Case Revisited’, (1999) 16 (4) Journal of International Arbitration 131,138.

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