



Invalidity of Arbitration Agreement Under the United Arab Emirates Law

بطلان اتفاق التحكيم في ضوء قانون الإمارات العربية المتحدة

by

HEBA ZAIN TOUHBOUB

**A dissertation submitted in fulfilment
of the requirements for the degree of**

MSc CONSTRUCTION LAW AND DISPUTE RESOLUTION

at

The British University in Dubai

**Dr. Abba Kolo
September 2017**

DECLARATION

I warrant that the content of this research is the direct result of my own work and that any use made in it of published or unpublished copyright material falls within the limits permitted by international copyright conventions.

I understand that a copy of my research will be deposited in the University Library for permanent retention.

I hereby agree that the material mentioned above for which I am author and copyright holder may be copied and distributed by The British University in Dubai for the purposes of research, private study or education and that The British University in Dubai may recover from purchasers the costs incurred in such copying and distribution, where appropriate.

I understand that The British University in Dubai may make a digital copy available in the institutional repository.

I understand that I may apply to the University to retain the right to withhold or to restrict access to my thesis for a period which shall not normally exceed four calendar years from the congregation at which the degree is conferred, the length of the period to be specified in the application, together with the precise reasons for making that application.

Signature of the student

COPYRIGHT AND INFORMATION TO USERS

The author whose copyright is declared on the title page of the work has granted to the British University in Dubai the right to lend his/her research work to users of its library and to make partial or single copies for educational and research use.

The author has also granted permission to the University to keep or make a digital copy for similar use and for the purpose of preservation of the work digitally.

Multiple copying of this work for scholarly purposes may be granted by either the author, the Registrar or the Dean of Education only.

Copying for financial gain shall only be allowed with the author's express permission.

Any use of this work in whole or in part shall respect the moral rights of the author to be acknowledged and to reflect in good faith and without detriment the meaning of the content, and the original authorship.

Abstract

This dissertation discusses the Invalidity of Arbitration Agreement Under the United Arab Emirates Laws, as arbitration agreement is considered as the foundation stone of the arbitral process. Therefore, it is important to discuss the arbitration agreement and highlight the main conditions that help the parties to establish a valid arbitration agreement, it focus mainly on the cases that the parties should maintain to avoid having invalid agreement and in result a challenge of the arbitration award, which will delay the arbitral process and the enforcement of the arbitration award.

This paper also includes arbitration and arbitration agreement definition, the features of arbitration as well as the differentiations between arbitration and other dispute resolution mechanisms such as mediation.

The paper also aims to highlight the role the national courts in terms of the application of the invalidity of the arbitration award by presenting the procedures to submit such application to the court. Moreover, a recommendation to develop the efficiency of the court role regarding the invalidity of the arbitration award has been presented.

This thesis addressed slightly the arbitration under the arbitration centers in the United Arab Emirates.

ملخص الرسالة العلمية

تتناول هذه الرسالة العلمية بطلان اتفاق التحكيم في ضوء قانون دولة الإمارات العربية المتحدة، حيث يعتبر إتفاق التحكيم الركيزة الأساسية للعملية التحكيمية، لذلك من الأهمية بمكان مناقشة أهم الشروط الواجب توافرها والتي تؤدي لوجود إتفاق تحكيم صحيح ونافذ، وكذلك تناولت الدراسة بشكل أساسي العوامل والحالات الواجب تجنبها من قبل الأطراف لتفادي بطلان اتفاق التحكيم وبالتالي الطعن بحكم التحكيم وبالنتيجة ماطلة إجراءات التحكيم وإطالة إجراءات تنفيذ حكم التحكيم وعدم فاعلية العملية التحكيمية.

كما تضمنت هذه الرسالة تعريف التحكيم بوجه عام وتعريف إتفاق التحكيم، وخصائص التحكيم وتمييز التحكيم عن غيره من وسائل تسوية المنازعات الأخرى كالوساطة.

كما تهدف الأطروحة إلى تسليط الضوء على دور المحاكم الوطنية في طلب بطلان حكم التحكيم بسبب بطلان إتفاق التحكيم وتناول الإجراءات المتبعة لتقديم الطلب ودور المحكمة المختصة، كما تم إقتراح بعض التوصيات لزيادة فعالية دور المحكمة في طلب إبطال حكم التحكيم.

تناولت هذه الدراسة أيضاً بشكل بسيط التحكيم ضمن مراكز التحكيم في دولة الإمارات العربية المتحدة.

Acknowledgment

First, I would like to thank god for giving me the power and strength to write this thesis.

I highly appreciate the usual and continuous support, assistance of my supervisor Dr. Abba Kolo.

I would like to the British University in Dubai for the great program which helped me to develop my personality and career, and gain experience.

Special thanks to my family, my father who encourages me to study, learn and educate, my mother who always prays for me to be a successful person, and my husband who always supports me.

Thank you

Table of Contents

Acknowledgment.....	3
Introduction.....	5
Chapter One.....	9
1. Brief Background.....	9
2. Definition of Arbitration.....	11
3. Characteristics of Arbitration.....	12
4. The difference between Arbitration and other methods of Dispute Resolution.....	16
Chapter Two.....	20
1. Arbitration Agreement.....	20
2. Definition of Arbitration.....	21
3. Legal Nature of Arbitration Agreement.....	21
4. Types of Arbitration Agreement.....	22
Chapter Three.....	28
1. Invalidity of Arbitration Agreement.....	28
2. Lack of the Agreement Pillar.....	29
3. Lack of Subjective Conditions	31
4. Lack of Objective Conditions.....	33
5. Lack of Formal Conditions	36
Chapter Four	37
1. Judicial Control over the Invalidity of Arbitration Agreement.....	38
2. Invalidity of the Arbitration Award.....	40
Conclusion.....	43
Bibliography	45

ARBITRATION AGREEMENT INVALIDITY IN THE LIGHT OF UNITED ARAB EMIRATES LAWS

Introduction

Arbitration is a unique way of settling disputes; the reason as to why I use the term unique when referring to arbitration is because it's a method which parties to the dispute are ought to have agreed before the dispute arises. That's the focus of this dissertation will be on the issue of the arbitration agreement, the agreement to arbitrate is the backbone of this unique method of resolving disputes. Basically, arbitration is governed by the agreement of the parties, the parties will have to decide the venue, the language to be used as well as the number of arbitrators just to mention a few.

Due to international trade, commerce and investments, arbitration is gaining momentum as it is practiced as the most preferred method of settling disputes among people of different nationalities. Arbitration agreements have become an important and desirable part of most business contracts all over the world due to the number of features of arbitration that differentiate it from other dispute settlement mechanisms. These include the simplicity of the procedures, flexibility, the opportunity for parties to select the experts and specialist arbitrators who will resolve their disputes, especially in terms of disputes that involve technical nature such as construction disputes. Besides there is an issue of confidentiality, which enables the parties to keep their private information away from the public hearings in litigations that usually arise before the courts.

Arbitration agreement is considered the foundation stone of the arbitration process. Therefore, a number of the legislation in the different legal systems stresses the importance of having a valid arbitration agreement. The authority of the arbitrators is derived from the arbitration agreement first before they apply the rules of any arbitration center or court at which they will use as the seat of arbitration. If the arbitration agreement is null and void, the arbitral tribunal will not be able to do anything since they will be lacking jurisdiction under such circumstances. If it is established that the arbitration agreement is a voidable one, just like any other agreement there will be room for the parties to make it a valid arbitration agreement since that was their intention at the time of signing the agreement. In both cases, the subjective and formal conditions should be met in order to ensure the validity of the arbitration agreement and to avoid invalidity of the arbitration award.

Research Questions

The most important thing to do when the parties want to have their disputes settled by arbitration is to have a valid arbitration agreement, without which there will be no arbitration. A valid arbitration agreement can be a separate agreement which the parties sign to that effect but in most business agreements, it is included in those agreements just as a clause and it will still be valid as long as it does not violate other laws. An arbitration agreement can be invalid if there was any sort of incapacity among the parties to the agreement, if the subject of the matter was also an illegal one, which makes the whole agreement invalid including the agreement to arbitration as a means of settling disputes.

Therefore, this dissertation seeks to investigate the invalidity of Arbitration Agreement under UAE law in order to highlight the importance of having a valid arbitration agreement. In doing so, it addresses the following questions:

- a). what are the elements and basic requirements to ensure validity of arbitration agreement to achieve valid arbitration?
- b). what are the grounds that can be used by the parties to challenge the arbitration award based on the invalidity of arbitration agreement?

Arbitration agreements can be successfully challenged under most legal systems and arbitration rules which specify the cases under which the agreement to arbitrate can be challenged. Parties are allowed to challenge the agreement to settle under arbitration rules as well as the arbitral award can also be challenged on the grounds of invalidity of the arbitration agreement. Furthermore, the rules and laws as well as the precedents that are used to refer to when challenging the arbitration agreement and the arbitration award in terms of invalidity are not clear and are a bit confusing and allows the parties to postpone the enforcement of arbitration award to delay enforcement and to avoid in some cases the attachment might be imposed by national courts on their assets, therefore parties may seek challenging the arbitration award.

Additionally, in some cases parties will try to take advantage of their right to challenge the arbitration agreement and the arbitration award especially in terms of invalidity of arbitration agreement to delay and avoid the enforcement of the award in which such actions might delay the arbitration process and enforcement of the award, in which such actions may decrease the efficiency of the arbitration process.

It is known that in most arbitration rules and laws, the national court has very limited or no role in the nullification application or the challenge of the arbitration award; its role is limited into the extent to review the cases set out by the law or the cases related to public order of the state and to double check the procedures has been undertaken by the arbitral tribunal. Moreover, the judge's role is limited to discuss the nullification of an arbitration agreement and the arbitration award, the basis of those powers which the parties can still challenge. Each and every country has got its own

laws which are applicable and as we know laws are not static, they do change as time change and new laws are promulgated to that effect. There are local laws which are applicable in the UAE and also some international laws which were adopted so as to make it easy to deal with issues that involve other countries. There are international laws which are used as the yardstick of arbitration such as the New York Convention and The Model Law.

Most of the countries apply the Model Laws, which states that arbitration should only be between parties who are signatories to the written arbitration agreement. What it means is that the arbitration agreement can only be valid if it's in some form of communication which provide a record , such as letters, telex, telegrams just to mention a few of the types of documents which are in writing.

For the writings to constitute a valid legal arbitration agreement there must be a defined legal relationship between the parties to the said communication. Besides being in writing, the subject matter must be capable of settlement by arbitration. The governing law should be the choice of the parties to the agreement. Regardless of having successfully chosen the governing law, the venue and stating the number of arbitrators, an arbitration clause can still be regarded as defective, if inconsistency, uncertainty and inoperability is established.

In the United Arab Emirates there is a well-known established and now famous arbitration center which has gained popularity for its efficiency in the Middle East and the GCC. The arbitration center which is situated in the DIFC has dealt with a lot of cases with the support of the laws of the UAE which are also used to support the DIFC Rules, such as the UAE Civil Procedure Law No 11 of 1992.

Significance of the research

Since arbitration agreement is the foundation stone of the arbitral process it is important to study and highlight the elements that will lead to achieve a valid arbitration agreement, so the parties may avoid disputes, delays and high cost. Moreover, failure to achieve the main purpose of their contractual relation. Therefore, when the parties to agreement tries to include a valid arbitration agreement in their main contract the likelihood of disputes will be very low. And they will save time and money.

Judges and lawyers will be benefiting as well from minimizing the cases of invalidity of arbitration agreement since most of the invalidity of arbitration agreement are due to the incapacity of parties, for example due to the person who signed the main agreement is not authorized which means he is not authorized to sign on arbitration agreement in such case both agreements will be invalid.

The above case will affect the parties and courts and lawyers will waste time in appointing experts to double check authorities for the parties.

Moreover, there is no specific researches has been focused into this particular subject.

Methodology

In this study, I adopted the doctrinal search which describes and analyze the legal system. I highlighted the legal system in United Arab Emirates which regulates arbitration and arbitration agreement, I analyzed and referred to related cases, and provided recommendations that can be taken into consideration by the stakeholders to avoid the implications of the gaps that the legal system includes and might arise due to such gaps under laws, regulations and rules which regulates arbitration in United Arab Emirates.

Structure

I divided this study into four main chapters as follows;

First Chapter Namely Arbitration which discussed brief on arbitration background, definition and features and differentiations between arbitration and other similar dispute resolution mechanisms.

Second Chapter: in this chapter, I focused mainly on arbitration agreement definitions, types, and legal nature of the Arbitration Agreement.

Third Chapter: I analyzed the invalidity of arbitration agreement I referred to the general rules in UAE Civil Transactions LAW considering that arbitration agreement is considered as an agreement therefore the general rules which governs contracts should be applied to arbitration in agreement spicily in terms of capacity of parties and the writing requirement.

Fourth Chapter: I explained the role of the court in terms of the application of the invalidity of arbitration award application and the court role in such procedures.

CHAPTER 1

1. Brief back ground of arbitration

Giving a brief back ground of arbitration is not an easy task at all due to the fact that no author is certain of the exact date when it came to be practiced. According to the famous authors Redfern and Hunter in the book *International Arbitration*, the Fifth Edition, in which they described the historical background as follows, "... a history would be like trying to put together an immense jigsaw puzzle, with many of the pieces missing and lost forever."¹

The reason as to why these learned authors would prefer to call the history of arbitration as a jigsaw puzzle with missing pieces is because the history dates back more than 2,500 years. Back then the rules and laws were not written down even if they were practiced successfully in communities; as a result such history is not easy to come by. Arbitration has been described differently by different authors and historians but all of them with the same view point that it was a method of settling disputes which dates back to Stone Age.

Arbitration has been described as an "apparently rudimentary method of settling disputes, since it consists of submitting them to ordinary individuals whose only qualification is that of being chosen by the parties."² The same principle of choosing the arbitrator is still applicable and is one of the reasons why arbitration is gaining momentum in today's business transactions.

According to Mustill, in the old days, people would submit to arbitration, not because of any legal sanction, but because this was what was expected of them in their respective communities within which they carried on their day to day business: "...it can be said with some confidence that the dispute resolution mechanisms of the post-classical mercantile world were conducted , and drew their strengths from, communities consisting either of participants in an individual trade or of persons enrolled in bodies established under the auspices and control of geographical trade centers.

Such communications gave birth to the implicit expectations and peer group pressures which both shaped and enforced the resolution of disputes by an impartial and often prestigious personage..."³

¹ Redfern and Hunder on *International Arbitration* Fifth Edition, Student Version [2009] page 4

² Fouchard, *L'Arbitrage Commercial International* (Litec, 1965), 1,30,and 31 (translated by the authors)

³ Mustill, 'Is it a bird...' in *Reymond , liber Amicorum* (Litec, 2004),209

“Disputes in pre-Islamic Arabia were resolved under a process of arbitration (of sorts)...this was voluntary arbitration, an essentially private arrangement that depended on the goodwill of the parties”⁴. The same principles which are applicable today, the issue of arbitration being a voluntary and private process were even there way before the establishment of the centers which we now have in different nations worldwide.

In addition, Arabs, pre-Islam, had an arbitration system, Perhaps the most important example that indicates the existence of arbitration pre-Islam is the event of the Black Stone when a disagreement arose between the people of Quraish about carrying the Black Stone. They resorted to the Prophet (PBUH), who took off his robe, placed the Black Stone on it and asked all representatives of Quraish to hold the edges of the cloak. Accordingly, the dispute about who was eligible to carry the Black Stone was resolved.

The early Greeks also knew arbitration, as there was a permanent Council of arbitration for settling disputes that arose between Greek micro-states. Moreover, Roman law contained provisions related to arbitration within the private law, although they did not recognize international arbitration because they denied the equality of states⁵.

Arbitration continued as a means of resolving disputes between parties, but it has been affected by social and economic development. It was applied in the middle ages within the framework of the international family in Christian Western Europe, where the Catholic Church used it to settle disputes among Christians⁶.

Arbitration was also adopted by local European communities to resolve their disputes. It was also utilized to resolve disputes that arose between barons and kings in feudal society. By the time of the industrial revolution in the nineteenth century, international trade had acquired a prominent position in modern international relations.

The increase in products led to international trade which as a result led to unmatched international conflicts in the course of seeking new markets at which to sell the surplus products. At the same time, each country retained its old markets for such purposes, so the subsequent overlapping and complication of international trade relations emphasized the need to develop arbitration to address international trade disputes. Over time, the international commercial arbitration rules evolved as a means of resolving international trade disputes, as represented in various international treaties.

⁴ Lessons from the Shari’ah (2004) 20 Arb Intl 104

⁶ Nicholas Walter, 'Religious Arbitration in the United States and Canada' [2012] Santa Clara Law Review 500, 505-5015

The most important treaty is the New York Convention of 1958 on the recognition and execution of the provisions of foreign arbitration awards, and the European Convention on International Commercial Arbitration that was concluded in Geneva in 1961, as well as the convention on the Settlement of Investment Disputes between the host country and foreign investors of 1965 which set out rules concerning the applicable law on arbitration proceedings unless the parties agree otherwise.

The standard law for International Commercial Arbitration of the United Nations Commission on International Trade Law issued in 1985, which was embraced by many arbitration authorities, which is considered a unified application of international arbitration in terms of proceedings. Several positive pieces of legislation have simulated the standard law of International Commercial Arbitration, including the Egyptian Arbitration Law No. 27 of 1994, and the UAE Arbitration Law No. 31 of 2001, with provisions based on the Egyptian Arbitration Law 1994, just to mention a few of the countries which resolve disputes by means of arbitration and which have enacted their own arbitration rules and regulations and established their own centers.

2. Definition of Arbitration

Arbitration can be defined as a method in which individuals, states and corporations to a contractual relation may rely on to resolve their dispute⁷.

The Dubai Court of Cassation defined arbitration in one of its judgments as an agreement whereby, by one or more people agree to refer the dispute that arose or may arise in the execution or performance of their obligations, arbitrators can rule therein instead of referring the matter to court⁸.

Also, the Dubai Court of Cassation defined arbitration as an exceptional method for settling disputes. Its structure deviates from the regular method of litigation and it is limited to the will of the arbitration parties in connection to what they are bringing before the arbitrator⁹.

It can be said that according to the above definitions that the will of the parties which used to establish the arbitration as a method of settling the dispute. The parties to the agreement are the one who has the decision to select and choose their arbitrators and a suitable venue for the seating of the dispute settlement rather than relying on the jurisdiction of a court to settle their dispute. The will of the parties can be sufficient unless their will is in compliance with the requirements of law and their agreement is a valid arbitration agreement, such as complying with the writing

⁷ Nigel Blackby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration* (fifth edition edn, Oxford, USA) 1

⁸ Dubai Court of Cassation: case number 410/2011 date 25/11/2012

⁹ Dubai Court of Cassation: case number 181/2011 date 18/3/2012

requirement, the capacity of the parties, their intention and also having an independent clause to that effect.

3. Characteristics of Arbitration

Arbitration possesses several characteristics that make it more favorable and important in most business agreements, parties prefer arbitration as compared to the court system as a way of resolving their differences and in these disputes, that arise during the performance of their obligations and even after the period of their agreed business transaction. Some of its most important characteristics are as follows:

a. Neutrality and Enforcement

Unlike any national courts, arbitration is being used in national disputes as well as international disputes simply because of its neutrality. The parties to the dispute are given that opportunity that no any other court of law can offer them. They have the right to choose a neutral venue, that is the place or the seat for the settlement of the dispute and also they are given the powers to choose a neutral tribunal. As to the issue of the tribunal, they also have the right to choose whether the tribunal will consist of a single arbitrator or they will have to choose two and then the chairman to make it a panel of three arbitrators. There is no national court where you can go and say I am choosing this judge to settle my dispute, so as such the parties usually prefer arbitration compared to courts.

The issue of neutrality also plays an important part when the dispute is between two parties from two different countries. In such cases a neutral arbitrator who is not a national of any of the two parties involved will be chosen because of the principle of neutrality. For example, a construction dispute between a construction company from the Oman as the main contractor and another construction company from India as the subcontractor for a construction project in Dubai. Already in this example there are three different countries involved as such if we are to apply the laws of the country in which the dispute arise UAE laws and courts will be used to solve the dispute. When we are to solve the dispute through arbitration we will have to make a choice of the laws and the seat of arbitration. For instance, in this case the parties can agree in their arbitration clause that in case of any dispute we will submit our disputes to the arbitration center in Saudi Arabia and the laws of Saudi Arabia will be applicable and that clause will be a valid clause as a neutral venue to both parties. Besides having a neutral venue they can also want a neutral arbitrator, they can agree to an arbitrator from the United States of America by so doing there will be no issues of bias to deal with.

Besides the issue of neutrality there is also an issue of enforceability of the judgment, that private judgment which will have been issued by the neutral private arbitral tribunal must be a binding decision to both parties to the dispute. For the award to be enforceable I quote my favorite author, he has this to say “If the award is not carried out voluntarily, it may be enforced by legal proceedings- both locally (that is to say, in the place in which it was made) and internationally, under such provisions as the New York Convention.”¹⁰

The provisions of the New York Convention are applicable in most countries that arbitration is practiced because it is one of the most important International Rules of arbitration. The New York Convention was the convention of June 10, 1958, the convention was about the recognition and enforcement of foreign arbitral awards and it was first signed by the United Nations and other countries adopted it and apply its rules.

“An agreement to arbitrate carries with it an agreement not only to take part in any arbitral proceedings, but also an agreement to carry out any resulting arbitral award.”¹¹ If the parties don’t agree or left out the part to be bound by the outcome of the arbitration, the arbitration agreement will be a waste of time and it will be pointless to submit to such a procedure which will end up as useless. As a result, parties must agree to carry out the award; this is done as a precautionary measure in most agreements.

The ICC Rules, for example states: “Every Award shall be binding on the parties. By submitting the dispute to arbitration under these rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.”¹²

Usually it is easy when the arbitral award is then made enforceable by a competent court; this is to be done by the winning party through the courts of the losing party. This will be done in the country of the losing party, where the losing party resides or has its place of business or in any other court where the losing party has assets that may be attached.

“The UAE has treaties with various countries for judicial cooperation and recognition of judgments. The UAE is also a signatory to the Riyadh Convention to which several Arab countries have acceded. The Riyadh Convention has provisions relating to inter alia, recognition and enforcement of judgments rendered in Member States. In relation to a judgment from a state that

¹⁰ Nigel blackby, constantine partasides, alan redfern, martin hunter, *Redfren and Hunter on International Arbitration* (fifth edition edn, Oxford , USA) 29

¹¹ Nigel blackby, constantine partasides, alan redfern, martin hunter, *Redfren and Hunter on International Arbitration* (fifth edition edn, Oxford , USA) 29

¹² Nigel blackby, constantine partasides, alan redfern, martin hunter, *Redfren and Hunter on International Arbitration* (fifth edition edn, Oxford , USA) 29

is a signatory to the Riyadh Convention or to one with which the UAE has a treaty, the jurisdiction of the court of origin generally will not be reviewed (subject to particular exceptions that may be provided for in the relevant treaty). The party seeking enforcement must apply to register the judgment by producing a duly certified and legalized copy of the judgment together with proof that it is enforceable under the law of the country of origin.”¹³

What author R Clark was trying to say is that for an International arbitration award to be applicable in another country, that same award must have been enforceable in the country in which the award was entered. Otherwise one cannot enforce an invalid award or an award which was entered and later rendered unenforceable in the country of origin that same invalid award can never be valid because it’s now in a foreign country.

b. Simplicity and flexibility of the procedures

Arbitration is characterized by the simplicity and flexibility of its procedures. The parties to a dispute determine the procedures and, if they fail to agree on the specific procedures, then an arbitral tribunal may choose arbitration proceedings that it deems appropriate, at its discretion. The arbitral tribunal enjoys a broader freedom than the court regarding the settlement of disputes, such as notifications, the management and organization of hearings. The presenting of evidence and communicating with the parties to a dispute and other issues, provided that they ensure the basic process of settling the dispute is guaranteed to parties involved, especially with regard to the principle of freedom of defense and confrontation between the parties. Unlike in the courts where there are restrictions which are imposed by the provisions of law so that, if its rulings contradict those provisions, then they would be vitiated and subject to appeal even if they were suitable to the circumstances of the case¹⁴.

c. Confidentiality

The general rule is that the court depends on its procedures at an open hearing as a general principle unless the court decides, upon its discretion or upon the request of a litigant, to make this secret in order to maintain public order, morals or the sanctity of the family¹⁵.

There are other considerations than those above-mentioned, however, required to maintain the confidentiality of the proceedings, especially for traders, as such publicity might lead to the

¹³ Richard Clark , *The Dispute Resolution Review* , Third Edition 2011

¹⁴ Nigel blackby, constantine partasides, alan redfern, martin hunter, *Redfren and Hunter on International Arbitration* (fifth edition edn, Oxford , USA) 31-33

¹⁵ Kyriaki Noussian , *Confidentiality in International Commercial Arbitration Comparative Analysis of the English, US, German, French Law* (first edn,Germany) 20-35

revealing of their professional secrets or economic position, which might harm them and its severity could exceed their loss of the suit. Accordingly, we find that the litigants in commercial disputes prefer to resort to arbitration as the arbitration system enables them to maintain their secrecy, that has become the most important arbitration landmark and its main attraction in addition to considering it as among the arbitration norms that must be observed in both domestic or international arbitration, even if the legal rules in the national legislation do not state that.

It should be mentioned that the Civil Procedures Law No. (11) Of (1992) lacked any clear reference to the necessity of complete confidentiality during arbitration, however all international arbitration rules such as Arbitration Act 1996 and the international arbitration centers such as DIAC and DIFC stated that the parties to a dispute shall keep the arbitration proceedings completely confidential. Moreover, it includes provisions that arbitration award cannot be published or disclosed to any third party unless otherwise a written consent obtained by the parties to the arbitration.

d. Fast Proceedings and Costs of arbitration

The flexibility and simplicity of arbitration proceedings enable the process to be fast and the decision can be issued within a very short space of time so that the parties can maintain their business interests. Yes the proceedings of arbitration can be fast but there are a bit more expensive than the normal court process. The early rules of arbitration of the ICC, for instance, envisaged that an award would be made within 60days from the date of signature of the Terms of Reference that is according to Article 23 of the 1955 Rules. Nowadays the average time for a final award to be rendered is 12 to 24 months.¹⁶

Where International arbitration is in question the cost is even more expensive than the domestic arbitration. In arbitration proceedings the parties to the dispute are the ones who pay for the fees and the expenses of the arbitrators. Unlike the salaries of the court judges which are not paid by the litigants. A lot of payments may be required in arbitration, “In major arbitration, it may be thought necessary (or desirable) to appoint a secretary or registrar to administer the proceedings. Once again a fee must be paid. Finally it will be necessary to hire rooms for meetings and hearings, rather than making use of the public facilities of the courts of law.”¹⁷

Arbitration is private process hidden from public scrutiny and as such keeping it from the public makes it even more expensive. Even though the process is costly more and more cases are dealt with under arbitration because of the reasons which according to the authors of the book on international arbitration, I quote what they said “But the fees and the expenses of the arbitrators

¹⁶ ICC Rules , Article 23 of 1955

¹⁷ Nigel blackby, constantine partasides, alan redfern, martin hunter, *Redfren and Hunter on International Arbitration* (fifth edition edn, Oxford , USA) 35

and of the arbitral institutions, the charges for room-hire, court reporters and so forth may be a drop in the ocean as compared to the fees and expenses of the parties' legal advisers and expert witnesses. In a major arbitration, these may easily run into millions or even hundreds of millions of dollars."¹⁸

There are many reasons for this, including the following though not limited to these facts that I will mention here. In arbitration proceedings, usually huge sums of money are often at stake, there is also the issue of increased professionalism of lawyers, accountants and other professionals who will be involved in the arbitral process, with the determination to leave no stone unturned, just to mention a few.

As for the issue of the cost of arbitration we can easily conclude that arbitration is usually preferred by those that are involved in those businesses that are worth a lot of money and those that have a reputation to protect. Yes it's a way of resolving disputes but this way of solving disputes has freedom which the parties involved will have to fork out a bit much more than the usual.

e. Specialist expertise and knowledge

Arbitration allows the choice of an arbitral tribunal with specialist experience and knowledge in the field of activity that is associated with the dispute. This often suits litigants, as some contracts are of a technical nature, such as construction contracts, and the disputes require specialists with a specific expertise to understand the nature of the dispute. If these cases were to be brought before the regular court, the judge may in some cases lack the required technical knowledge, so the need to appoint an expert could consequently prolong the term of the litigation, accordingly leading to wasted time and incurring greater expense.

4. The difference between Arbitration and other methods of Dispute Resolution

There are various systems and methods available for resolving and settling disputes between litigants. They are similar to arbitration in certain aspects and different in others. In this section, I will outline these systems and how they are similar to or differ from arbitration.

¹⁸ Nigel Blackby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration* (fifth edition edn, Oxford, USA) 35

a. Expert determination

Expert determination is one of the means that is used to resolve disputes under the alternative dispute resolution and as such it produces a binding decision. The expert is there to make assessments, evaluation and certification. According the Redfern and Hunter, “An expert may be asked to value a house or a block of flats; to assess the price of shares in a private company or a professional partnership; or to certify the sum payable for the work done by a building or engineering contractor. But the work of the expert extends beyond this traditional role into that of a ‘decision –maker’-someone whose determination of a dispute may well put an end to it.”

The fact that the expert produces a binding decision it means that, the decision of an expert will be final and binding on the parties to the dispute. Once an expert has decided on a certain issue in dispute that issue will be regarded as solved and it will have to be enforced.

The difference between arbitrators and experts is that the latter express their opinion after considering the subject in light of their expertise; as well he/she does not comply with certain procedures and specific dates. On the other hand, once the expert becomes a decision maker there and then the expert will be in the same position as the arbitrator. The arbitrator and the expert are both in the field of dispute resolution.

The other difference is that the arbitrators are being regarded as immune from liability for negligence in carrying out their functions. Besides that the arbitral award is directly enforceable, both nationally and internationally, under treaties such as the New York Convention. On the other hand the decision of an expert is only binding contractually but it will need to be enforced by legal proceedings.

In addition to that whatever opinions issued by the expert are binding to the parties if they agree to the expert determination but they have to go before a judge for it to be enforceable, whilst whatever is issued by the arbitrator is a decision that shall settle the dispute, become binding on the parties and its directly enforceable there is no need for it to go for legal proceedings.

b. Conciliation

Conciliation is another method of settling disputes which falls in the category of alternative dispute resolution. Some people tend to confuse conciliation with another method of settling disputes called mediation. The conciliator is the person who handles the conciliation process, the conciliator holds certain powers which allow him/ her to draw up and propose the terms which he thinks and believe would present a fair settlement between the disputing parties. For conciliation to be effective first the parties to the dispute are supposed to have agreed that should a dispute arise between them, they will settle it by conciliation. The parties can agree before or after the dispute has arisen to settle by conciliation, it can also be part of an agreement.

Conciliation presumes the existence of an actual or probabilistic dispute between two or more parties, and conciliation aims to end this dispute through relinquishment of each party to a part of his claims in a manner that shall allow resolve the dispute between them, the conciliation does not create new rights, but rather reveals the rights of the parties¹⁹ .

Arbitration resembles conciliation in that the basis of each of them is the tendency of the will of the parties of litigation to settle this dispute away from the judiciary, i.e. Their pillar is will and this will can be a precedent to the arising of dispute or subsequent thereof. If the agreement was lacked, then there is no arbitration nor reconciliation, as well their scopes is the same where it not permissible to arbitrate in matters that may not be conciliated viz. in the matters related, for examples, to the personal status or public order.

Despite the similarities between arbitration and conciliation but there are many differences and distinctions between them, represented in that the parties in the conciliation concede all or some of their rights in order to reach a resolution to the dispute established between them.

While in the arbitration, the parties delegate the matter of resolving the dispute to a person(s) (an arbitrator(s)) to assume the matter of resolving the dispute for the favor of a party based on evidence or proofs they shall submit. In addition to that the reconciliation, in general, is established between two litigants without resorting to a third party, unlike arbitration in which the parties resort to the arbitrator(s) to decide in the dispute.

The conciliator is just there to guide the parties to the dispute in an impartial and independent manner while the parties try to resolve their dispute. According to the UNCITRAL Conciliation Rules, a conciliator may disclose the substance of any factual information he or she receives, in order that the other party have the opportunity to present any explanation which he considers appropriate.²⁰ Conciliation is considered to have come to an end either when a settlement is achieved or when it appears that no settlement is possible. So usually when parties agree to conciliation, they will also agree that if conciliation fails they will proceed to arbitration. In other words what it means is you can start with conciliation as method of settling a dispute and then go for arbitration but you cannot start with arbitration and then go for conciliation

c. Mediation

Mediation is defined as the process of interference in the dispute or in the negotiation process by a third party who try to help the parties reach a settlement the parties accept to that it will be carried out by a neutral third party who does not have the authority or power of decision-making

¹⁹ Richard Clark , *The Dispute Resolution Review* (Thirdedn, Gideon Robertson, UK) 835,836,838

²⁰ Article 10 of the UNCITRAL Conciliation Rules

with the intention only of helping the parties to reach their own agreement acceptable by its parties and focus inly their commercial aspects more than their legal aspects²¹.

Mediation considered as an effective dispute resolution mechanism under common law jurisdiction as it can provide the parties with an effective solution to their dispute. Mediator carries out his tasks that may require identifying the nature of the dispute and the point of view of the parties about the nature of the dispute and basic controversial issues. Perhaps engage in direct negotiations with them and transfer the views of each party to the other party in a neutral way, and at an appropriate stage the mediator may suggest possible solutions to the disputed issues²².

The mediator's duty is manifested as the convergence of points of views of the parties to the dispute, to reach an amicable resolution for the dispute. In order to achieve that purpose the mediator may meet the parties to the dispute and deliberate with them about the subject of their dispute, their claims, and pleas. The mediator may meet each party separately and take the appropriate actions upon his discretion so as to approach the views, claims, and may also express his views, evaluate the evidence, present legal methods, the precedents and other measures that shall facilitate the mediation process.

And mediation resembles arbitration as both are a means of settling disputes through the agreement of parties to the disputes, and shall not be carried out unless by the interference of a neutral third party to reach a resolution to the dispute of the parties.

Despite the similarities between mediation and arbitration, there are essential differences between the two systems, as the mediator's role is limited to helping the parties reach a solution to their dispute and to focus on the commercial aspect between the parties rather than the legal issues. The mediator's approach to settling disputes is of viewing and proposing solutions, but the mediator does not have the power of decision-making, while the arbitrator's role is the pronouncement of a binding and final award that resolves the dispute between the parties²³.

d. Mini-Trial

Mini-trial is an alternative method for resolving disputes whereby the parties agree to refer the dispute to a committee, and usually the number of its members who usually is not a judge is three persons and each party choose one of them and the two shall choose a Chairman of the Committee. The Committee shall hear the statements submitted by the parties and evidence of each party briefly and quickly, and thereafter, a draft settlement agreement shall be prepared by the committee

²¹ Richard Clark, *The Dispute Resolution Review* (Thirdedn, Gideon Robertson, UK) 845

²² Abigail Powel, 'Mediation in the UAE' [2011] (Law Update),3,4<http://www.tamimi.com/en/magazine/law-update/section-6/july-august-1/mediation-in-the-uae.html>

²³ Clare Raven, 'Mediation in the UAE' [2009] Hadeef&Partners, 2,3.

and presented to the parties, consequently; either an accordance of consent is concluded between the parties on the draft of agreement and to sign it or else to be rejected.

Mini-trial prepare the parties to practice their dispute before mock court as if a lawsuit has been already filed before the court.

Thus, the mini-trial is similar to arbitration that both resolve the dispute by referring to a third party their dispute; in addition to that parties will hear the evidence, statements and arguments of the other party, moreover the committee will base its decision on the submissions made by the dispute parties.

Accordingly; it shall resolve the dispute. But despite this similarity between the mini-trial and arbitration, only the essential difference between them is that the mini-trial after hearing of evidences and testimonies by the committee, it shall prepare a draft of settlement agreement and the parties shall have the right to accept or reject this agreement.

Whilst in arbitration after hearing of the evidences, arguments by the parties before the arbitral tribunal and ending of the arbitration hearings and discussion, the arbitrator(s) shall pronounce a final award in the dispute, which is binding to the parties.

“Finally, a mini-trial differs from other forms of ADR in that it is usually conducted after formal litigation has already been undertaken. Parties to a lawsuit generally stipulate to “stay” pending litigation (put a hold on further advancement of the litigation) until the mini-trial is concluded. Thus, mini-trial does not, in and of itself, represent an alternative forum for the resolution of a dispute (such as arbitration), but rather it represents a pre-trial alternate attempt to settle the matter before lengthy trial begins. The outcome of the mini-trial is generally confidential and advisory only, and the parties may proceed to trial if settlement negotiations fail.”²⁴

This chapter has discussed the Alternative Dispute Resolution methods and distinguished them from arbitration. Chapter two focuses on the definition, legal nature and types of arbitration agreements.

²⁴ <https://arbitration.uslegal.com/mini-trials/mini-trials-distinguished-from-other-forms-of-adr/>

Chapter 2

1. Arbitration Agreement

Arbitration Agreement is the foundation stone of the arbitration process, as it is the source of authority and power of the arbitral tribunal to decide and adjudge in the dispute, so the dispute shall not be brought before the arbitrators unless there is an agreement between the concerned parties. For the purpose of this research I will divide this part about arbitration agreement in to two sections. In the first part I will look at the definition of arbitration and the legal nature, then in the second part I will deal with the types of arbitration agreements.

2. Definition of arbitration agreement and its legal nature

An agreement between the parties to a legal relation provided that they shall refer to arbitration for all or some specific disputes that arose or may arise between them in connection to such relationship, either contractual or non-contractual²⁵.

As well the arbitration agreement is defined as such contract that the parties shall agree by its virtue to bring the current dispute or the dispute that may arise in the future in the occasion of execution a specific contract before the arbitrators instead of bringing it before the State's court²⁶.

Arbitration agreement has been defined in DIAC rules as "Arbitration Agreement" means an agreement in writing by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them; an Arbitration Agreement may be in the form of an arbitration clause or in the form of a separate contract²⁷."

Other scholars have defined it as the agreement concluded between litigants or those who may in future litigate in order to resolve their disputes by means of arbitration. As per their agreement, the litigants shall give up resorting to the court to settle their disputes and abide by the rules, laws and procedures of arbitration.

²⁵ Jean Poudret Sebastian Besson , *Comparative Law Of International Arbitration* (Second edn, Sweet&Maxwell , UK) 121,122,123

²⁶ Nigel blackby, constantine partasides, alan redfern, martin hunter, *Redfren and Hunter on International Arbitration* (fifth edition edn, Oxford , USA)

²⁷ Art.1 DIAC Rules; Art. 7(1) UNCITRAL Model Law 1985.

I would like to conclude from the aforementioned definitions that the arbitration agreement is an agreement in which the parties agree to comply by its virtue to concede resorting to the court and referring all or some of arise disputes or those which may arise between them in the occasion of executing specific legal relationships. This agreement may be prior or after the arising of the dispute and it will still be a valid arbitration agreement.

We note that the under the UAE Civil Procedures Code arbitration agreement is not defined. However, it stated that the arbitration agreement is a written agreement containing the referential of the current or future disagreements to the arbitration whether the name(s) of the arbitrator(s) is (are) mentioned in the agreement or not. Referring to Civil Procedures Law No (11) of 1992 we find that the legislator, despite he did not define the arbitration agreement only he set out a separate article contained a set of Rules in the Law to treat the specific provisions of arbitration agreement²⁸.

3. The legal nature of the arbitration agreement:

The legal nature of the arbitration agreement is specified by a set of characteristics which I will briefly state as follows:

1. Arbitration agreement is considered as one of the Nominated Contracts
Arbitration agreement is deemed as one of the nominated contract as several ligations undertook to name it and regulate its provisions²⁹.
2. Arbitration agreement is considered as one of bilateral contracts
The origin that the arbitration agreement shall establish mutual obligations over its parties by bringing the dispute that arose between them or what disputes may arise in the future before arbitration and not resorting to the regular court. Notwithstanding; it is supposed that the arbitration agreement shall be binding to either one party without the other party in case of agreeing thereupon.
3. Arbitration agreement is considered as Contract of Exchange
Each party in arbitration agreement shall receive a return for what may be given to the other party as both shall receive a feature of resorting to arbitration for its various advantages and characteristics and avoiding resort to court.

²⁸ Civil Procedures Code No (11) of (1992) Article 203

²⁹ Civil Procedures Law No (11) of (1992) Article

4. Arbitration agreement is considered as formal contract

The formal contract is the contract that just consent is insufficient rather it is a must to draft the contract in a specific form determined by law. Whereas under Civil Procedure Law its stipulates nullity in case of failure to write the arbitration agreement, accordingly; thus, the arbitration agreement shall be deemed a formal contract, writing is a condition for its conclusion and not only to prove it³⁰.

4. Types of Arbitration Agreement

The arbitration agreement could be made prior to the dispute as well, it could be made after the dispute has arisen and in both cases, it may be made in various forms and formats according to the following:

First type: Clause upon Arbitration prior the arise of dispute

Arbitration may be agreed upon prior to the arise of dispute as the arbitration agreement could be in a form of a clause in the contract and in such case, it shall be called as arbitration clause or it could be in a separate agreement or to be referred to in another contract containing the arbitration agreement or clause. Each case will be detailed separately as follows:

a. Arbitration Clause

The arbitration agreement will be contained in the form of a clause as to be called arbitration clause and it shall be contained in the original contract that governs the legal relation between the two parties to the agreement and it is the most common case in the practical life. Arbitration clause could be defined as "an agreement contained amongst specific contract provisions, by its virtue the parties decide to resort to arbitration to settle future disputes that may arise about the contract and its execution³¹. Article 203(1) of UAE Civil Procedures Code recognized two forms of arbitration clause, and Dubai Cassation Court decision no 64/Year 2005. Session dated 18 April 2005 in which the court observed that "...and it (arbitration) can be seen as a clause included within a certain contract. This form of arbitration agreement is referred to as the arbitration clause."

It is noted that arbitration clause does not associate to a current dispute but it is related to future dispute; as to say the infliction of this dispute is a probabilistic matter as it is not required to

³⁰ Art.2 (1) DIAC Rules and Art.7(2) UNICTRRAL Model Law 1985

³¹ Omar Khodeir & Ahmad Ghoneim, 'KNOW YOUR TYPE THREE TYPES OF ARBITRATION AGREEMENTS IN A NUTSHELL' [2013] () Law Update <<http://www.tamimi.com/en/magazine/law-update/section-5/june-issue/know-your-type-three-types-of-arbitration-agreements-in-a-nutshell.html>> accessed, and Art.203(1) Civil Procedures Code

stipulate in this case, containing detailed provisions in this clause as specification of the dispute subject.

b. Separate agreement

The arbitration agreement may be separate from the original contract which regulates the relationship between parties so the parties agree after signing the original contract to refer any dispute that may arise as a result of this contract to arbitration. Accordingly, this agreement shall be fully separate from the original contract, and is signed prior to arising of any dispute in its concern. The separated agreement could be in the form of an attachment to the original contract and shall be annexed thereto.

It is worth to mention that the arbitration clause can be gathered together with a subsequent agreement prior to the arise of the dispute, such as the parties may agree in the original contract to refer their disputes that will arise from the implementation of the contract to arbitration and in accordance with the terms and conditions that they would agree upon later. In this case, if subsequent agreement had been concluded, it shall be applied, and if they failed to conclude, the arbitration clause shall not be void and it shall remain established.

As to set out the detailed provisions and conditions, such as the appointment of arbitrators, the proceedings before the arbitral tribunal and the conditions of the arbitration award and otherwise under the Civil Procedures Law, unless it is shown from the will of the parties that the implementation of arbitration clause is associated to the conclusion of a subsequent detailed agreement. In this case, the failure to conclude this agreement shall lead to lack of validity of the arbitration clause and consequently; its abatement.

c. Arbitration Agreement incorporated by reference

Arbitration agreement may be in form of a reference to a document containing an arbitration clause and considering it as an integral part of the original contract, and this is called "arbitration clause by reference. Whereas the original contract decided between the parties may lack an explicit clause for arbitration rather the parties suffice by reference to a former or model contract or document containing common general conditions in the scope of the dealing between them and those contracts or conditions contained arbitration clause such Standard forms of construction contracts such as FIDIC Red Book 1999. In one of its decisions, the Dubai Court of Cessation had confirmed this type of arbitration agreement where it said that it is established that it is enough in the construction contract to contain a reference to the effect that any future disputes between the contractor and the employer are to be settled according to the general conditions of construction

(FIDIC). This, as a result, means that the parties have agreed, by way of referral, on arbitration as a means to settle all disputes arising out of their contract. Accordingly, there is no need to insert a specific paragraph in the contract in question stating arbitration as the means adopted for resolving the contract-related disputes³².

arbitration agreement after the arise of dispute

It is agreed upon arbitration after the arising of dispute in various forms as follows:

Arbitration ‘submission agreement’, it is meant by arbitration stipulation the agreement concluded by the parties after the arising of dispute, and is separate from the original contract, upon which shall the agreement stipulate to refer to arbitration to rule in the actual current dispute in connection to that contract. It is noted that arbitration submission assumes the infliction of dispute which shall differentiate it from the arbitration clause, as well it assumes the existence of a subsequent agreement and separate from the original contract. Usually the arbitration submission agreement contains a precise determination to the subject of dispute and its scope as the milestones of dispute have become evident to the litigants. In its decision in case no no 64/Year 2005 referred to above stated that“.. arbitration, can also be referred to at the time of the occurrence of a dispute between the parties. In the latter case, parties’ agreement on arbitration is named “submission agreement” or “arbitration agreement” .

Therefore; we find in Law No. 11 of 1999 of Civil Procedures Law, that the Law has adopted that in case that it is agreed upon arbitration after the arising of dispute, then it should determine the subject of dispute precisely under the scope of nullity.

The submission agreement must be more detailed unlike the arbitration clause because it is concluded when the parties involved already have the dispute to deal with. It has to state the procedures to be followed, the issues in dispute, and the laws applicable just to mention a few. It is easy to distinguish between the existing and the future dispute as such this type of arbitration agreement was more acceptable than the arbitration clause, in those states that were permitting recourse to arbitration only to existing disputes. What it means is that those states were against the idea of agreeing to arbitrate before the dispute arises. For instance, in countries like Argentina and Uruguay were the submission agreement is still required, whether or not a valid arbitration agreement already exists³³

³² decision no 462/Year 2002/Session dated 2 March 2003]

³³ Bakr A. F. Al-Serhan, The separability of arbitration agreement in the Emirati law, 32 *Arbitration International* (2016) 313]

Arbitration agreement before the Court

The disputing parties may agree after the infliction of dispute and after resorting to the court to refer the dispute brought before the court to arbitration. Those cases where there was no arbitration agreement in existence before the dispute arose between the parties and the parties to the dispute had resorted to the court to settle their dispute and during trial the parties agreed to refer the dispute to arbitration.

It could be agreed to bringing the dispute before arbitration instead of going to the courts such as before the Court of First Instance, Court of Appeal or even Court of Cassation.

Also, in case of arbitration agreement and another party decide to go before the court, the court should decide to cease the course in proceeding. The case, is then referred to arbitration, the court can still reopen the file of the case if the arbitration has been defaulted for any reason. In such cases the trial shall start from the point it reached before and upon the request of one of the parties and as per the provisions and the general rules of Civil Procedures Law.

It is worth to mention that the UAE Law has adopted the principles of accepting that the parties to the dispute can still agree to arbitration even after the arising of dispute. Even if it was brought before the court, the Laws of UAE has approved that the parties may agree on arbitration after the arising of dispute and even if a case associated thereof were filed before any judicial authority.

5. Principle of Separability of the Arbitration Clause

Studying the subject of arbitration agreement shall necessarily require referring to the separability principle. As it is clearly shows from the aforementioned presentation there is a connection between arbitration clause and the original contract concluded by the parties to the contract. Here many questions are then asked as to the effect of the contract to the separate arbitration clause. Does the nullification or revocation is drawn to arbitration agreement, in other words, does the arbitration agreement follow the original contract in presence or absence and validity and invalidity? Or the arbitration agreement is deemed separate than the original contract then it shall be valid and effective even if the original contract was nullified or invalid or terminated.

The traditional theory requires that the arbitration clause is affiliated and follow to this contract, which means that the expiry of the original contract for any reason shall lead to expire and cancel or end the clause included in the contract. Therefore, any disagreement occurred between the parties of the original contract about the contract and its financial effects, it shall not be referred to arbitration, but rather to courts as long as the arbitration clause is no longer exists. The rules of international trade law have deviated from this traditional principle and kept the arbitration clause

existing and valid as long as the nullity or termination or any other reason of the expiry of contract did not affect it.

According to International trade laws and arbitration rules, if the disputes arise from the original contract it shall be settled through arbitration despite the expiry or invalidity of the original contract which is called in this respect the separability of the arbitration agreement from the contract that contained this clause therein. This principle is also applied to the arbitration agreement that is concluded separately from the original contract to settle future disputes due to the unity of cause. As well this principle led to mutual effect which means the nullity of arbitration clause shall not affect the validity of the original contract, as long as it has been duly concluded according to the legal principles³⁴ .

It shall be consequent to this principle that if the original contract was nullified, it may be possible to adhere to the arbitration clause validity, and consequently; proceeding in the arbitration procedures and deciding the dispute by arbitration and not by a court. While if the original contract was valid and the arbitration clause was void, in this case the parties may resort to the national court to rule in the dispute and it may not resort to arbitration due to the nullity of the arbitration clause.

We find that under UAE Civil Procedures Law the law relied on the separability principle in conformity with the modern trends in this concern. It has adopted the principle of separability by adopting the New York convention and the Model Law UNICENTRAL which contained a provision that states that the arbitration clause is deemed a separate agreement from the other clauses of the contract and any effect consequent to the nullity of the contract, its termination or revocation should not affect the arbitration clause it contained therein providing this condition was valid in itself³⁵.

In addition, it can be said that under UAE Law there are number of cases that may not be relied thereupon on this principle absolutely as those cases related to the lack of Capacity, its decrement or existence of defect in mutual consent. In those cases, there should be unity between the contract and the clause contained therein. As we shall attach the legal provision of the clause to the legal provision of the contract as it could not be applied in realistic in my opinion that the defected will, which established the original contract is valid to establish an arbitration agreement (a clause or separated agreement). It would be better if the UAE Law had set exceptions within the Law indicating those cases that we cannot rely on the principle of the separability of arbitration clause,

³⁴ Essam Al Tamimi , *The Practitioner Guide to Arbitration in the Midle East and North Africa* (edn, Excelencia FZ LLC, USA) 483-521

³⁵ Art. 16(1) UNCITRAL Model Law; Art. 6(1) DIAC Rules; Art. 23(2) LCIA-DIFC Rules; Bakr A. F. Al-Serhan, *supra*]

such as; the lack of capacity or the existence of a defect in the mutual consent between the contracting parties, or the Lack of authority to sign on arbitration agreement.

All and above it can be said that the principle of separability is very important principle and critical in the arbitration process. Many legislations, arbitration rules adopted this principle to simplify the arbitration proceedings, this principle can be applied in most arbitration cases. However, it will be impossible to be applied in terms of incapacity of parties or defected will or lack of authorities, as how can the defected will which established the original contract can also establish and conclude a valid arbitration agreement.

In the next chapter, I will discuss the invalidity of arbitration agreement and the lack of conditions of the arbitration agreement, I referred herein to the general rules in the UAE Civil Transaction Code.

Chapter 3

1. In validity of Arbitration Agreement

Just like any other agreement, arbitration agreement is treated the same, it has to meet the formal validity requirements otherwise it will be invalid. Although most of researches and writings I learnt about dealt with the issue of Arbitration agreement nullity throughout examining the lack of the subjective conditions of capacity, object and cause as well as lack of the formal conditions represented in the writing. However, my comprehension of the Articles texts No (128-2011) of Civil Transaction Code of 1985 has motivated me to deal with this Chapter by examining lack of contract pillar which is the mutual agreement, then lack of general subjective conditions which are the capacity, object, cause, and the special conditions which are determination of the dispute subject-matter, then lack of formal conditions of writing and that is in accordance with the following details:

2. Lack of the Agreement Pillar

The contract pillar is the availability of mutual consent represented in the connection between the offer and acceptance, namely, the mutual approval. According to Article (129) of UAE Civil Code states that the contract is agreed once the offer is connected with acceptance, and subject to specific conditions of the contract conclusion established by law.³⁶

The agreement to arbitrate whether it is a clause or separate is deemed as any contract whereas it necessitates the availability of offer and acceptance and it requires the consent of its parties to approach to the Arbitration system to settle their current, existing and specific disputes (Arbitration separate agreement) or the probable or unspecific (Arbitration clause) to enter into the Arbitration agreement.

The expression of the will of each party to the agreement to arbitrate must be well-matched with the expression of the other party. Therefore, the general rules should be applied in terms of the expression of the will at the time of signing the arbitration agreement and at the time when that agreement become effective and applicable to a dispute. The lack of the will of the parties to submit to the Arbitration system to settle their disputes will result invalidity of Arbitration agreement whether a clause or a separate agreement.

³⁶ Article 129 of UAE Civil Code umber (5) of year (1985

Should the agreement to arbitrate takes the form of a clause in the contract the negotiations about it will be done upon discussing the contract details and specifications, and pursuant to the clause the resolution of disputes arising from the said contract shall be subject to the Arbitration in the future, namely, the mutual consent and agreement of both of parties contains the original contract and the Arbitration clause together. Consequently, the Arbitration clause doesn't require a special consent and will by the parties thereto, nevertheless if the agreement to arbitrate is concluded in accordance with a special agreement between both parties out of the contract which created the legal relationship of their transactions, in this case it shall be subject to a special Arbitration agreement. The mutual consent is fulfilled in this case by the approval of parties for the Arbitration principle as a subject to the Arbitration agreement (separate agreement) and by their signature to this agreement³⁷ .

Nonetheless if it is referred to a standard contract or an international convention or other document including the Arbitration clause, the mutual consent shall become valid if the will of the parties directed to a referral to Arbitration clause in a special form or if the referral is general and the parties are aware with the Arbitration clause in the said contract referred thereto or they can know and can be aware about this clause.

If the availability of a mutual consent of the two parties will be sufficient to enter into the contract, it is not enough for its validity, as the mutual consent must be valid, namely, free from will defects. So, if the Arbitration agreement is concluded pursuant to a will defect, it shall not be valid and consequently revoked. Additionally, if one of the parties was forced to agree upon the Arbitration agreement and such defect was proofed, in this case the agreement shall be nulled, invalid, and can't become effective and enforceable unless the party or his representative approves such will defect or corrected that.

It can be said that if one of the parties made a mistake, the agreement in this case won't be binding upon the party who made the mistake which vitiates his consent. therefore, he is entitled to either terminating or authorizing it.

It can be said that if one of the parties is deceived and the deceit is connected with grave deception and this is proven, the deceived party shall have the right to terminate the contract. In regard with the law applicable to the mutual consent availability, its validity and nullity in the Arbitration agreement-clause or stipulation-, it may be unlike the law applicable to the original agreement. So the reference of verification of the mutual consent availability, its validity, being free from flaws

³⁷ Paul D. Friedland , *Arbitration Clauses for International Contracts* (second edn, Juris Net LLC, USA)

shall be the law which the Arbitration agreement is subject thereto. This is either the law of will or the mutual country of the Contract if they are related to the same country or the country law in which the contract has been made if they are from different countries.

3. Lack of the Subjective Conditions:

Arbitration agreement, as it is considered one of the nominal Contracts, requires some several general subjective conditions, which are the capacity, the object and the cause, as well as special subjective condition which is determination of the dispute subject-matter, and I will deal with the lack of each one of these conditions in this chapter in accordance with the following detail:

3.1.Lack of Capacity Condition

Capacity of the parties is considered one of the subjective conditions of Arbitration agreement; the required capacity is the capacity to perform obligations and rights. Article No. (203) of Civil Procedures Law states that Arbitration agreement shall not be concluded unless it is concluded by a normal person or a legal person who can exercise his rights, and Arbitration shall not be concluded in matters which are not permitted to be conciliated about³⁸ which means that that only a person - whether natural or legal - that has capacity to dispose of its own rights may enter into an agreement to arbitrate³⁹.

The capacity of performance is the capacity of a person to exercise his own rights, in other words it is the capacity of a person to take a legal action and to perform obligations. This matter was treated in the juristic explanations under a title of capacity of performance. The capacity of the normal person is perception and discretion and being legally able to perform obligations, discretion is considered a necessary condition for a person to be able to take a legal action by will to make a legal effect.

³⁸ Article 203(4) provides

³⁹ Case No. 321/Judicial Year 19, ruling of the Abu Dhabi Court of Cassation of 25 April 1999; and Case No. 273/2006, ruling of the Dubai Court of Cassation of 4 February 2007) referred to in Annotation Federal Law No. 11 of 1992 on the Civil Procedures: Part Three – Arbitration by Gordon Blanke, Baker & McKenzie.Habib Al Mulla

So the capacity of performance is graded with the gradation of discretion whereas it grades with discretion in terms of availability, absence and decrease, if the discretion is absent, the capacity of performance will be absent. If discretion is imperfect, the capacity of performance will be imperfect, if it is perfect, the capacity of performance will be perfect.⁴⁰

The crucial factor of determining the person's capacity is the time of concluding the Arbitration agreement, not before or after this, because the person's capacity may be affected from time to time. For the purpose of knowing the applicable law in the matters of capacity, it should be referred to the personal law of the agreement parties, the personal law is determined in accordance to Article No. (1/11) of UAE Civil Code in the country of the person's nationality, since this Article states as follows:

“The country law of persons' nationalities shall be applicable to the persons' civil status and their capacity...etc.” Consequently, if a normal person concludes an Arbitration agreement and he hasn't the capacity, his performance will be invalid pursuant to the general rules included in UAE Civil Code.

Concerning a person with lack of proper capacity, the underage perceptive persons' performance shall be either absolute conferring benefit performance. In this case his action/ performance is considered valid, or absolute harmful (tort) and in this case his action shall be invalid or it relies on sanction of the guardian or the caretaker or the person with imperfect capacity when he reaches legal age.

With regard to an Arbitration agreement concluded by a person with defective capacity, one can say that Arbitration is an exceptional system and the Court has a limited interpretation and interference in the Arbitration agreement, and the agreement to arbitrate requires the legal capacity. Then it mustn't be permitted to arbitrate the disputes which one of their parties has an imperfect capacity whether the agreement is concluded by him directly, by his guardian, caretaker or curator unless otherwise expressly necessitated by a text and by the conditions prescribed thereof.

⁴⁰Nigel blackby, constantine partasides, alan redfern, martin hunter, *Redfren and Hunter on International Arbitration* (fifth edition edn, Oxford , USA) 95-97

With due respect to this opinion, the researcher believes that despite of the Arbitration system specialty, it is better that the Arbitration agreement is subject to the general rules included in the Civil Code for the person with imperfect capacity to differentiate between three cases in this respect. If the Arbitration is absolute useful for the perceptive underage, it shall be true. If it is absolute harmful, it shall be invalid. If it is in between usefulness and damage, it shall depend on the sanction of guardian, caretaker, curator or the incompetent person when he reaches legal age⁴¹.

Civil Procedures Law No. (11) Of year 1992 permitted the normal persons to conclude Arbitration agreement as well as the legal persons. The capacity is determined for the legal persons within the limits of their documents or the limits established by the law⁴², - moreover, a managing director of a limited liability company is usually presumed to have special authority to sign arbitration agreement and there should a specific authorities to enable the said person to sign the arbitration agreement; either in the Memorandum Article of Associations or in a separate Power of Attorney⁴³.

The legal persons are such as the country, municipalities, Companies, Association and the private Institutions founded in accordance with Law. It's worth mentioning that the public legal persons may conclude Arbitration agreement in any civil dispute or commercial dispute whatever the legal relationship nature of the dispute subject-matter is whether Contractual or non-Contractual dispute.

4. Lack of the Object Condition

The object of Arbitration agreement is the subjective relationship which causes or expects to cause a dispute needed to be resolved. This is the dispute subject-matter, whereas the object of Arbitration agreement must be permitted to be settled by Law throughout Arbitration. We find that the UAE Law has stated in Article No. (203) of Civil Procedures Law No.(11) of year 1992 that Arbitration may not be done in the matters on which are disallowed to be conciliated.

⁴¹ean Poudret Sebastian Besson , *Comparative Law Of International Arbitration* (Second edn, Sweet&Maxwell , UK) 232, 233

⁴³ Article 237 of UAE Commercial Companies Code

As for the matters disallowed to be conciliated on and consequently it shall not be arbitrated, they are the matters pertaining to the personal status including many matters such as those in connection with the persons' status, capacity's and guardianship upon them, including the matters of marriage, divorce, kinship, custodianship, alimony, succession and the will.

Concerning the personal status related to the financial interests, they are the matters permitted to be conciliated and then they are permitted to be arbitrated such as the matters in connection with determining the amount of alimony of the wife or one of the relatives. It also shall not conciliate on the penal matters in terms of determining the criminal's accountability of the charge against him or determining the applicable legal text to the committed criminal. The bankruptcy is also considered one of the matters disallowed to be arbitrated, in addition to the disputes relating to enforcement procedures or its validity or nullity. Additionally, it shall not arbitrate in intellectual property rights; however, Arbitration may be allowed in case of requesting indemnification for encroachment and its financial exploitation. Arbitration may not also done in the matters pertaining to the general system of jurisdiction control and supervision over them since standard general rules apply to them, consequently the penalty of Arbitration award issued in the non-arbitrable matters is invalid⁴⁴.

Furthermore, **Article 733** of the UAE Civil Transactions Code contains a list of matters that cannot be subject to settlement under UAE law, such as *riba al-nasi*(usurious interest) and “all matters which essentially share characteristics that are typically considered in violation of the Islamic Shari'a.”⁴⁵.

4.1.Lack of the Cause Condition:

The cause means the direct purpose of the Contract. The cause of Arbitration agreement is the desire of parties to appeal to Arbitration and put aside the dispute far from the Courts and entrust the arbitrators with the matter.

The cause of Arbitration agreement must be legal and complying with laws and regulations in the United Arab Emirates, it can be said that usually the cause of Arbitration agreement is legal.

⁴⁴ Milos Novovic , *International Commercial Arbitration* (first addition edn, University of Oslo , USA)

⁴⁵ Federal Law No. 11 of 1992 on the Civil Procedures: Part Three – Arbitration by Gordon Blanke, Baker & McKenzie.Habib Al Mulla, supra]

However, in some cases it might be illegal such as if the arbitration agreement is included in a drugs supply agreement or in an agreement that is contradicted with the public policy in United Arab Emirates, as under UAE Law it is allowed to conclude and agree on Arbitration agreement in accordance with limits stated under UAE Laws, moreover, in some cases the cause of the arbitration agreement is legal however, the parties might try to avoid the Law Provisions which had to be applicable if the dispute was settled by the national Courts, in this case the Arbitration will be an illegal, and consequently the application to Arbitration shall be considered illegal.

it can be said that, the cause of using Arbitration and agree on an Arbitration agreement must be legal, valid and complying with the legal system in the state, and if the cause of the Arbitration agreement is not legal in such case the arbitration agreement shall be invalid⁴⁶

4.2.Special Subjective Conditions:

There is a special subjective condition necessary to be available and determined by the parties, in addition to the abovementioned general subjective conditions and requirements, which is the determination of the dispute subject-matter. below the dispute subject matter determination will be discussed.

4.3.Lack of Dispute Subject-matter Determination:

Dispute subject-matter determination is the determination of total exchanged allegations or arguments, claims between the parties. This condition can be found in the process of Arbitration separate Agreement because the dispute could have already happened and raised, there is no issue preventing the dispute determination. It is important to determine the dispute subject-matter whereas it leads to determination of the arbitrators' powers scope, so if they exceed the dispute limits, their awards shall be invalid, in addition such determination will simplify the process for the parties and the arbitral tribunal, the time and cost as well will be less. Therefore, the process will be efficient and effective.

In addition, the Arbitration as a dispute resolution mechanism itself is considered as an exceptional way to avoid the jurisdiction of national courts, and this requires accurate determination of its scope which shows that the parties' desire and wish to avoid and waive their right to approach the national courts and their wish to approach arbitration in specific matters. Non-determination of the dispute subject-matter results in nullity and invalidity of arbitration agreement whereas, it can be said that if the Arbitration agreement is agreed on after the dispute has been arisen although the parties has already submitted their claims and case before national courts and agreed to approach arbitration as dispute resolution mechanism to rule and finalize their

dispute in such case it must determine the dispute subject-matter which is being referred to the Arbitration accurately, otherwise the agreement shall be invalid.

5. Lack of Formal Conditions

most of legislation consider the Arbitration agreement as dispute resolution mechanism considered arbitration as a formal Contract, which cannot be valid unless it has been made in writing and it is made by mutual consent,

it can be said that the Under UAE Civil Procedures Law the Law have requires to write the Arbitration agreement otherwise it shall be invalid, whereas Article (203(2)) of the above-mentioned Law no. (11) of year 1992 states that “No agreement for arbitration shall be valid unless evidenced in writing” which means that is the writing condition is required not as condition to proof the agreement only but for its validity (the arbitration agreement)

The same Article of the above-mentioned Law did not clarify the cases in which the Arbitration agreement must be in writing; for instance, if there is a document signed by both parties, or if it involves exchanged messages and correspondences throughout telegraphs or via fax or telex or other written communication which can be used as proof to prove the agreement . In addition, the referral to provisions of a model/standard Contract or an international convention or any other document involving an Arbitration clause shall be added to the law as this principle has been adopted by different legislations. Furthermore, can arbitration agreement be inferred from silence in response to offer to arbitrate such inquiry might be raised by the parties what if one of the disputed parties after the arisen of the dispute has offered the counter party to approach arbitration and the other party just did not respond to such offer, generally there is no clear cut answer, however, in summarizing of the different views of researches it can be said that as per the general rules under civil law that the silence is considered as acceptance of arbitration. However, others say that since arbitration is expansion of the general rules therefore there should be clear acceptance of approaching arbitration⁴⁷ going back to the written condition, it should be mentioned herein that the civil law countries which considered the referral above-mentioned cases as a written agreement if the referral clearly considers this clause a part of the contract. Moreover, the court decision of referring the dispute to Arbitration in case that both parties agree to arbitration during considering the dispute shall be considered a written Arbitration agreement in my opinion and it can be recommended that this should be adopted by the law.

⁴⁷ Case No. 220/2004, ruling of the Dubai Court of Cassation of 17 January 2005; and Case No. 92/2007, ruling of the Dubai Court of Cassation of 17 June 2007) ; Part Three – Arbitration by Gordon Blanke, Baker & McKenzie.Habib Al Mulla, supra

it is worth to mention that the decision of Dubai Court of Cassation No. (153/2011) which states the following: “The Arbitration agreement must be written, otherwise it shall be invalid, and the Arbitration agreement will be written if it involves a document signed by both parties and if it involves both parties’ messages”.

It can be said that the judicial precedents have adopted the principle of considering the mutual correspondences as written arbitration agreement. Having reviewed the aforementioned, it is notably that the court practices have treated exhaustively the concept of writing and have given an enormous flexibility to what considered an Arbitration agreement.

in addition to the above, the case of referring to a model/ standard contract or an international convention or other document involving an Arbitration clause, the referral must state that the Arbitration clause of the document is a part of the original Contract. As the general referral which implies ignorance of the parties with Arbitration availability can’t be considered having a written mutual consent on the Arbitration clause. It can be said that the purpose of writing the Arbitration is to make the expression of will toward the Arbitration obvious and express to avoid disputes which may be arisen in the future with respect to the availability or unavailability of the Arbitration agreement, i.e. providing evidence. [In the context of Art. II New York Convention, which also requires the arbitration agreement to be in writing and which shows the importance of the written condition of the arbitration agreement in order to avoid disputes and invalidity application⁴⁸. in summary, this chapter discussed the invalidity of arbitration agreement conditions, in capacity, non-written of arbitration agreement, and dispute subject matter determination and the requirement of mutual consent of both parties, all of the aforesaid requirements should be available so that arbitration agreement will be valid otherwise lack of any of the conditions arbitration agreement will be null and void which means invalid and the parties in such case can approach courts to file application for invalidity of arbitration award which will be discussed into details in the next chapter.

⁴⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958: Commentary, edited by Dr. Reinmar Wolff, at PP. 116-117, available at: <http://ssrn.com/abstract=2188252>

Chapter 4

1. Judicial Control over the Invalidity of Arbitration Agreement

Most of legislations and arbitration rules allow the parties to apply nullification application against the arbitration award, in other words challenge the arbitration award due to many reasons one of it due to invalidity of arbitration agreement.

since the Arbitrators derived their duties and powers, authorities from the arbitration agreement and not taken from the legislation but from the arbitration agreement and the parties to dispute, therefore logically, if this agreement is invalid, the basis from which the arbitrator takes his power is null and void and in case of invalidity of the arbitration agreement it is impossible for the arbitrator to rule in such case .

The purpose of having the invalidity of arbitration award application is that the grounds specified by the various legislation for the invalidity of the award will contradict - if available -with the existence of the substance and content of the award in such way that justifies the invalidity of the award and canceled it completely . This method is different from the one that is used to challenge methods established by the judicial judgments and is considered one of the distinguished advantages of the Arbitration award which perform it singlehandedly.

Moreover, and since the arbitral tribunal acting as judge in the arbitral process it has to be mentioned that there has to be a relationship and coordination, collaboration between the arbitral tribunals and the national courts, the arbitral tribunal has a benefit derived from the national courts. When one of the parties to arbitration tries to sabotage the process, the tribunal will only have one option which is to turn to the national courts for rescue, since the national courts will have power. In the case of *Coppee Levalin v Ken-Ren Fertilizers and Chemicals* in which it was said that the concept of arbitration is a consensual process reinforced by the ideas of transnationalism leans against the involvement of the mechanisms of state through the medium of a municipal court. On the other side, there is a plain fact, palatable or not, that it is only a court possessing coercive powers which could rescue the arbitration if it is in danger of foundering.⁴⁹

it means that the national courts are of importance when it comes to the issues of settling disputes in arbitration proceedings. Even when one of the parties disputes the validity of the arbitration

⁴⁹ Lord Mustill in *Coppee Levalin v Ken-Ren Fertilizer and Chemicals* (1994) 2 Lloyd's Rep 109 at 116 (HL)

clause or the agreement as a whole the parties can end up in national courts at the end. Coming closer to home, one would wonder how it is done in the United Arab Emirates since the arbitration is gaining momentum in the UAE and the GCC due to the fact that there is a lot of construction project and deals which is going on. Most of the construction companies and even most companies in the UAE are expatriates and from all over the world and as such they feel more comfortable having their cases settled in arbitration as it is most preferable dispute resolution mechanism. That's why the DIFC Court has been established, but still just like any other arbitration center in the world, the question is still asked, what happens when there is a dispute as to the arbitration agreement or arbitration clause? There is a solution to that problem and the UAE legislators have enacted a law to that effect.

Article (216) Civil Procedure Code states that:

1. The parties to a dispute may, at the time of consideration of the arbitrator's award, request the nullification of the same in the following events:
 - a. If the award was issued without, or was based on invalid terms of reference or an agreement which has expired by time prescription, or if the arbitrator has exceeded his limits under the terms of reference.
 - b. If the award was issued by arbitrators who were not appointed in accordance with the law, or by only a number of the arbitrators who were not authorized to issue the award in the absence of the others, or if it was based on terms of reference in which the dispute was not specified, or if it was issued by a person who is not competent to act as an arbitrator or by an arbitrator who does not satisfy the legal requirements.
 - c. If the award of the arbitrators or the arbitration proceedings become void and such voidness affected the award.
2. A request for nullification of the award shall not be rejected on the grounds of a waiver by a party of its right to the same prior to the issue of the award.⁵⁰

If there is no a valid written Arbitration agreement; if the agreement is invalid; or it lapsed by termination; or its term expired or the award has been pronounced on invalid arbitration agreement; or the arbitration agreement has been signed by person who doesn't have sufficient capacity to do so. One can rely on Article 216 and succeed on challenging the validity of the arbitration agreement, clause or procedure. Once it has been established that there is a violation then the agreement will be null and void. Provide cases in support of this proposition e.g. Case No.

⁵⁰ Article 216 of the UAE Civil Procedure Code, Federal Law No 11 Of 1992

101/Judicial Year 19, ruling of the Federal Supreme Court of 17 May 1998), referred to in Gordon Blanke, *supra*.

2. Invalidity and the arbitration award

When can one exercise his/ her right to challenge the validity of an arbitration agreement or procedure? Yes, we are now aware of the fact that an arbitration agreement can be invalid and there are laws in support of the party who wants to challenge the defective clause. In the UAE Article 216 of the Civil Procedure Code, Federal Law No 11 Of 1992 is used to that effect, and UAE courts can help a party to arbitration. Having said this, we will have to look at the timing of the challenge to the so called invalid arbitration agreement or procedure.

Therefore, what will happen if one wait until the issuing of an award and come to challenge the validity of the agreement or the procedure? Both parties are given equal opportunities to challenge the agreement and procedure at the time of the request for arbitration that is the first step when the aggrieved part takes the dispute to arbitration. In *Thyssen Canada Ltd v Mariana Maritime SA and another*, where it was held that a party who takes part in arbitral proceedings and fails to raise an objection as to a serious irregularity affecting the proceedings will lose right to object, unless it can show that at the time it took part or continued to take part in the proceedings it did not know and could not with reasonable diligence have discovered the grounds for the objection.⁵¹

What it means is an arbitration agreement can be an invalid one, but the issue of timing is of great essence and one has to challenge at the earliest possible time. Otherwise the challenge itself will be regarded as an invalid challenge or as a waiver and that the supposed invalid will be treated as valid due to the lapse of time.

It is noteworthy that in the recent decision of *A Rahman Golshani v Iran*, the French Cour de Cassation had, for the first time, specifically referred to and applied the notion of ‘estoppel’ in an international arbitration case. In this case, the Cour de Cassation held that for a party who had itself made a request for arbitration and had participated without any reservation for more than nine years in arbitration proceedings, it was inadmissible on the basis of the rule of estoppel to argue that the tribunal had rendered its decision in the absence of an arbitration agreement or on the basis of an arbitration agreement that is null and void.⁵²

⁵¹ *Thyssen Canada Ltd v Mariana Maritime SA and another* (2005) EWHC 219 [2005]

⁵² *A Rahman Golshani v Iran* (2005) 993, *Global Arbitration Review* (2008) 42.

Invalidity can be there but it has to be dealt with at the right time otherwise an invalid agreement will be treated as a valid one. According to the UNCITRAL Rules and the Model Law, "... the plea as to lack of jurisdiction should be raised at an early stage, not later than in the statement of defense or, with respect to a counterclaim, in the reply to the counterclaim..."⁵³ Even the US case law supports the same idea, that without challenging at the early stage a party will be regarded as have waived its right. That is the party would have agreed to make an invalid agreement treated as a valid agreement.

Res judicata is one of the issues that will make a supposed to be invalid arbitration award a valid award. I will give reference to one of the famous sport arbitration case, "On 28 February 2014, the Regional Court of Munich rendered a decision in the matter opposing German speed skater Claudia Pechstein to the ISU (Judgment of the Regional Court of Munich I, Case Number 37 O 28331/12; the judgment is not final). This decision is sending waves through the sports arbitration community.

In a matter that started as a doping dispute and was brought to the CAS, the Munich Court decision held that arbitration agreements that are included into agreements entered into by athletes in order to enter into a competition are invalid, because athletes have not voluntarily accepted arbitration as a means of dispute resolution. In addition, the Court considered that there was a structural imbalance between athletes and the sports unions because the latter held a monopolistic position.

However, the Court dismissed the case on the merits, holding that the award rendered by the Court of Arbitration for Sport (CAS) had res judicata effect and could therefore not be vacated.

This decision raises once again the often-debated issue of autonomy of the parties in sports arbitration (I). In addition, it raises the interesting issue of whether and under what circumstances an award rendered despite the invalidity of the arbitration agreement has res judicata effect and be enforced (II).

(I). The Munich Court held that because the arbitration agreement was included into an agreement that the athlete had to sign in order to participate in a competition, her ability to refuse this arbitration agreement was limited, and therefore she could not be deemed to have had the choice to enter into it.

This issue touches upon the issue of consent of the parties to arbitration as a means of dispute resolution, an issue that often arises in sports arbitration in the context of arbitration agreements included by reference.

⁵³ UNCITRAL Rules, Article 21 (3)

(II). In an even more surprising twist, despite holding that the arbitration agreement was invalid, the Munich court held that it could not give a ruling on the issue of the doping suspension because *res judicata* had attached to the award. The Munich court considered that *res judicata* was allowed to happen because at the time of the referral to the CAS, the structural imbalance between the parties had been removed: the competition was over and Mrs Pechstein was represented by counsel.

The reason for the Court's ruling is that Mrs Pechstein only raised the question of the invalidity of the arbitration agreement after the award had been rendered to her disadvantage. In other words, she had chosen to proceed with the arbitration proceedings and raised the issue of the potential invalidity only when her claims were rejected in the arbitration...⁵⁴ This is one of my favorite cases on the issue of invalidity and it has the answers to the issue of time as of essence in arbitration cases and it also touches on the issue of the competence of a court.

⁵⁴ [www.http://kluwerarbitrationblog.com](http://kluwerarbitrationblog.com)

- **CONCLUSION**

Conclusively, it Can be said that arbitration is a much effective as the national courts. Yes, the parties to the dispute have to agree to solve their disputes out of the court; but that agreement has to be a valid agreement otherwise it won't be applicable. If we are to trace back the origins of arbitration, it dates back way before the formal courts were established. Back then the Chiefs, Kings and other rulers allowed their subjects to have someone who would try and help the parties to a dispute settle it before it even come before the King. As such we can say arbitration has stood the test of time.

The reason as to why arbitration has stood the test of time, in my own opinion is because of some of the requirements, of making a valid arbitration agreement which are easy to meet. Just like any other valid contract or agreement, it has to be in writing, executed by someone with a sound mind and legal capacity to do so. An arbitration agreement must be legally enforceable, what it means is two criminals cannot agree to settle an illegal deal by way of arbitration.

Arbitration is also gaining popularity especially in the UAE because of its simplicity and flexible procedures. It also offer some sort of privacy and confidentiality to the parties, besides being a bit more expensive and time consuming in certain cases. Disputes are dealt with by experts who will be better qualified in the subject if there is any need of an expert they will be called in to give their expert opinions.

Having said the good things about arbitration process, there is always another side of the coin which we basically have to make mention of in this concluding part as it has been the main reason of this research. That side of arbitration will always make what might have been ought to be perfect an invalid agreement, or a void or voidable process.

The invalidity of the arbitration agreement which is the main focus of this research and as such I will mention a few of the instances in which an arbitration agreement can be invalid. Consent of both parties involved, the knowledge of what they are getting themselves into just to mention a few of the requirements which can make an arbitration agreement which looks valid on its face be regarded as an invalid one. Besides there are also other reasons which can make an invalid agreement be regarded as a valid one such as waiver of the invalidity part and acceptance to be bound to that supposed invalid agreement and also the issue of prescription as to the issue of raising a challenge.

The national courts also do support the arbitration process by enforcing the agreements, the awards or even by giving a judgment as to the validity of an arbitration clause. Also the timing for challenging the arbitration clause must be perfect, as in it has to be as early as is reasonably acceptable in the situation. Delays in raising the challenges of validity can also be regarded as a waiver and acceptance. Waiting till the award has been issued will be affected by the principles of res judicata, despite the invalidity of the arbitration agreement.

- **Bibliography**

- 1. Laws**

- UAE Civil Procedures Code
- UAE Civil Transaction Law
- UNICTRAL Model Law
- DIFC Law
- Court Of Cassation Judgments

- 2. Conventions**

- The New Your Convention

- 3. Acts**

- The Arbitration Act 1996

- 4. Books**

- Nigel blackby, constantine partasides, alan redfern, martin hunter, Redfren and Hunter on International Arbitration (fifth edition edn, Oxford , USA)
- Milos Novovic , International Commercial Arbitration (first addition edn, University of Oslo , USA)
- James A.Schllenberg , Conflict Resolution Theory, Research, and Practice (State University of New York press , USA)
- Kyriaki Noussian , Confidentiality in International Commercial Arbitration Comparative Analysis of the English, US, German, French Law (first edn, , Germany)
- Mark Cato, The Expert In Litigation and Arbitration (first edn, ,)
- Richard Clark , The Dispute Resolution Review (Thirdedn, Gideon Robertson, UK)
- Jean Poudret Sebastian Besson , Comparative Law Of International Arbitration (Second edn, Sweet&Maxwell , UK)
- Essam Al Tamimi , The Practitioner Guide to Arbitration in the Midle East and North Africa (edn, Excelencia FZ LLC, USA)
- Paul D. Fredland , Arbitration Clauses for International Contracts (second edn, Juris Net LLC, USA)
- Jane Jenkines and Simon Stebbings , International Construction Arbitration Law(Kluwer Law, Netherlands)

- 5. Articles**

- Abgail, 'Mediation in the UAE' [Powel] Law Update
- Clare Raven, 'Mediation in the UAE' [2009] HadeF&Partners
- Omar Khodeir & Ahmad Ghoneim, 'KNOW YOUR TYPE THREE TYPES OF ARBITRATION AGREEMENTS IN A NUTSHELL' [2013] () Law Update <<http://www.tamimi.com/en/magazine/law-update/section-5/june-issue/know-your-type-three-types-of-arbitration-agreements-in-a-nutshell.html>> accessed
- rene Welser/Susanne Molitoris, 'The Scope of Arbitration Clauses – Or “All Disputes Arising out of or in Connection with this Contract ...' [2012]

- khadijah Ali and Andrew Massey, World Arbitration Report United Arab Emarites (second edn, Juris Net LLC, UAE)
- Claire Clutterham, ' Doctrines In Support Of Jurisdiction: An Overview' [2012] Law Update
- Dr. Omar Hisham Al-Hyari , 'Challenging an Arbitral Award on Jurisdiction under UAE Law' [n.d.]
- Haider K Afridi and Chatura Randeniy, 'Arbitration procedures and practice in United Arab Emirates: overview' [2016] Practical Law Global Guid