Formation of the Arbitral Tribunal

تشكيل هيئة التحكيم

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ABSTRACT

This thesis aims at shedding a light on the mechanism of formation of arbitral tribunal in institutionalized or sole arbitration, whereas there is a recent trend of party autonomy in formation of Arbitral Tribunals, whereas human nature is subject to some defects, therefore the study tackles the roles of the arbitrating parties, court and arbitral tribunals to face any shortcoming in formation of Arbitral Tribunal, in case the parties fail to appoint an arbitrator or reject the arbitrator on account of his violation of the principle of neutrality or independence or removal of arbitrator or his resignation as well as in cases of death and consequent procedures of appointment of an alternative arbitrator.

This thesis encompass a comprehensive study which throw a light on the formation of Arbitral Tribunal in English Arbitration Act 1996 as being the law which embraces the common law and in turn the study referred to French Law, this embraces the continental law, as well the study shed a light on the Emirates Law as being the local law, notably Dubai managed to become a crucial center for international trade.

This study reduce the rules which includes the principles, requirements and procedures for formation of arbitral tribunal in leading international commercial arbitration centers in Dubai, DIFC-LCIA, being a joint venture between DIFC and LCIA (a local court incorporated under common law.

Whereas the study cannot be complete only by reviewing leading renowned arbitral centers in the world and the rules governing formation of arbitral tribunals, therefore I have reviewed ICC Rules, AAA Rulers, in addition to UNCITRAL Model Rules.

The quality of Arbitral Process is linked to selection of a good arbitrator, as the entire process heavily relies upon a good arbitrator, therefore I have dedicated special chapter to survey the opinions of international arbitrators with different local and international backgrounds by making interviews with seven arbitrators in order to reach to a conclusion that there is no optimal arbitrator, given the fact that each case has special nature different from other cases, therefore there is special requirements governing selection of the appropriate arbitrator, there is disparity

between theory and practice in connection with the principles relied upon in selection of a good arbitrators, the foremost of which is a thorough knowledge of substantive and procedure rules governing the case and the ability of the arbitrator to take the appropriate decision, enforceability of award and that the award should be free from formal and substantive defects in addition to a variety of factors which has been brought into consideration in this study.

Towards the end of this thesis, I have submitted some recommendations which will be important insights and input to improve the quality of arbitral process and to improve the quality of a good arbitrator in UAE and in Dubai in particulars as the region is in a need of local arbitrators who are aware of the culture prevailing in the region and the public policy as well as having wide ranging international background and experience.

تسعى هذه الأطروحة إلى إلقاء الضوء على آلية تشكيل هيئة التحكيم في كل من التحكيم المؤسسي والتحكيم الفرد، حيث يظهر جلياً سمو مبدأ سلطان الإرادة في عملية أنشاء هيئة االتحكيم، وحيث أن الطبيعة البشرية يعتريها القصور، فقد تناولت الدراسة أيضا دور: الأطراف، القضاء والمؤسسات التحكيمية لمواجهة أي خلل في تشكيل هيئة التحكيم في حال عدم اتفاق الاطراف على تعيين المحكم أو رفضه أداء مهمة التحكيم أو ردة لمخالفتة مبدا الحيدة والاستقلال أوعزله أو إستقالته وكذلك في حالة الوفاة، ومن ثم إجراءات تعيين المحكم البديل.

وقد تناولت هذه الإطروحة دراسة شاملة تضمنت ألقاء الضوء على تشكل هيئة التحكيم في كل من قانون التحكيم الانجليزي 1996 باعتبارة القانون الذي يعتنق (القانون العام)، وفي المقابل القانون الفرنسي الذي يعتنق (القانون المدني)، وسلطت الضوء على القانون الاماراتي باعتبارة القانون المحلي وحيث أن دبي استطاعت أن تتبوأ مركزاً عالمياً مهما للتجارة الدولية، فقد تم أستعراض القواعد التي تتضمن أسس، شروط وإجراءات تشكيل هيئة التحكيم لدى أبرز مراكز التحكيم الموجودة في دبي ومن ضمنها، مركز دبي العالمي للتحكيم ("DIAC") ومركز "DIFC-LCIA") وهو مشروع مشترك بين قواعد محكمة لندن للتحكيم الدولي وبين محكمة مركز دبي المالي العالمي(وهي محكمة محلية انشات بموجب قانون خاص يحكمها القانون العام).

وحيث أن الدراسة لا تكتمل إلا بإستعراض دور المؤسسات العالمية الاكثر شهرة في العالم والقواعد التي تحكمها في تشكيل هيئة التحكيم فقد تم إستعراض تلك القواعد في كل من، المحكمة الدولية للتحكيم ("ICC") والاتحاد المريكي للتحكيم(" AAA") , بالاضافة الى قواعد التجارة العالمية اليونسيترال("UNCITRAL").

وحيث أن جودة عملية التحكيم برمتها تعتمد بالدرجة الأولى على المحكم الجيد، فقد إرتايت ان أفرد بابا خاصا لإستطلاع رأي محكميين عالميين ذوو خبرة متنوعة وواسعة عالميا ومحليا من خلال اعداد لقاءات وإجراء حوارات مع سبعة محكميين وصولا لنتيجة مؤادها أنه لا يوجد محكم مثالي، لكل قضية طبيعة خاصة تختلف عن الاخرى وبالتالي متطلبات خاصة تحكم اختيار المحكم المناسب، وتباين الواقع العملي عن النظري في الاسس التي يعتمد عليها في اختيار المحكم. إختيار المحكم الجيد يعتمد على عدة عوامل أهمها ضرورة معرفتة التامة بالقواعد الاجرائية والموضوعية التي تحكم الدعوى، وقدرته على إتخاذ القرار المناسب بالاضافة الى قابلية قراره للتنفيذ وخلوه من العيوب الشكلية والموضوعية بالاضافة إلى عوامل اخرى تم التطرق اليها بالتفصيل في محتوى هذه الرسالة.

وحيث أن لكل بداية نهاية، فقد إستعرضت في نهاية هذه الأطروحة بعض التوصيات التي قد تسهم في تحسين جودة عملية التحكيم وإختيار المحكم الجيد في دولة الامارات وتحديداً في دبي، لحاجة المنطقة الى محكميين محليين على دراية كاملة بالثقافة التي تحكم المنطقة والنظام العام بالإضافة الى ضرورة تمتعهم بخبرات عالمية واسعة .

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List of Abbreviations

UAE	- United Arab Emirates
DIAC	- Dubai International Arbitration Center
ADCCAC	- The Abu Dhabi Commercial Conciliation and Arbitration Center
DIFC	- Dubai International Financial Court
DIFC LAW	- Law No. 1 of 2008 Arbitration Law
DIFC-LCIA	- Dubai International Finance Center-London Court of International Arbitration
UNCITRAL	- United Nations Commission on International Trade Law
LCIA	- London Court of International Arbitration
ICC	- International Chamber of Commerce
CCCA	- Center for Commercial Conciliation & Arbitration
DCC	- Dubai Chamber of Commerce
CPC	- Civil Procedural Code, United Arab Emirates Federal Law No. 12 of 1992
Act	- English Arbitration Act 1996
AAA	- American Arbitration Association
CCP	- Code of Civil Procedure, French Law
WIPO	- The World Intellectual Property Organization
EU	- European Union Law

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1.0. Introduction

Arbitration is defined as the process by which disputing parties appoint a third party (essentially comprising of an individual or individuals well versed and qualified to handle issues related to the dispute before them) to resolve the conflict by exercising jurisdictional mandate that the parties have conferred on the arbitrator[1]. The arbitrator refers to "a neutral person to whom a disputed matter is submitted for arbitration"[2]. The arbitrator who is the third party helps in resolving the conflict in his/her private capacity but not as a holder of a public office. Such dispute resolution mechanism depends mainly on private agreement and the resulting decision has res judicata effect. Res judicata means that the disputing parties cannot use the same evidence that was used in the resolution of the conflict to raise similar issues in law courts since the matter is considered to be resolved and all claims settled unless new evidence emerges concerning the issues that were previously raised.[3] In other words, the decision by the arbitrator marks the end of the conflict raised by the parties after duly considering all the available evidence. If the governing law and jurisdiction referred to in the disputed agreement requires the parties settle their dispute through Arbitration, the aggrieved party would be required to refer its case to the Arbitration Centre. Additionally, upon commencement of the arbitration proceedings, the disputing parties will be required to sign a Term of Reference or an Arbitration Deed thereby expressly consenting to resolve the dispute through arbitration and authorizing the Arbitral Tribunal to preside and conduct the proceedings. The process of arbitration must therefore involve arbitrators and the composition of the arbitrators requires an arbitral tribunal.

1.1. Problem Statement

Even though many individuals and organizations continue to use arbitration as an effective method of resolving conflicts, divergent views and opinions have emerged concerning who should be included in the arbitral tribunals and how the arbitral tribunal should be

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[1] Poudret, Jean-François, Sebastian Basson, Stephen Berti, and Annette Ponti. *Comparative Law of International Arbitration*. London: Sweet & Maxwell, 2007. Print.

[2] Judge Advocate General's School (United States. Army), & United States. (1971). *The Army Lawyer*. Harlottesville, Va: Judge Advocate General's School. p. 56.

[3] Lal, J. (1981). *The Code of Civil Procedure, 1908*, e. Granthalaya Report Ver. 2.0, Library of High Court, Srinager High Court, Sep. 17, 2012.

constituted under different rules, regulations and laws that govern many jurisdictions. The need to have a standard definition for the composition of an arbitration tribunal and the process to be followed in order to constitute such an arbitral tribunal has been exacerbated by globalization that has triggered the need to resolve international conflicts between parties who come from different geographical regions having alien legal, cultural or religious practices. Such diversity has also been reflected in the constitutional differences that govern all countries in the world. While people have the freedom to migrate, trade, and interact, disputes are inevitable and common occurrences in their daily lives.

1.2. Introduction of Arbitration and Arbitrators

International arbitration is very important in commerce. Arbitration is encouraged across the globe to the neutrality provided by the firm. The parties in dispute do not involve the courts from their respective countries and this makes it easier to resolve the dispute. Besides enhancing the good relationship between the disputants, the parties in dispute are also able to obtain enforcement of the Final Award [4].Arbitral Awards are enforceable unless grievous procedural irregularities were involved in the process under which they were awarded or if they are contrary to public policy as provided for in Article V2 section (b) of UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. The parties also enjoy a high level of confidentiality concerning the arbitration process and this helps in ensuring the corporate image of the entities involved and the reputation of either of the disputants is not negatively affected. The issue of confidentiality can also be expanded during the arbitration process to ensure that the witnesses as well as experts are also covered. Litigation takes a long time to resolve disputes, whereas disputes are resolved relatively faster in case of arbitration. The disputants can freely choose their arbitrators provided they have the right qualifications and expertise to settle the dispute. Such a privilege is not available under litigation. While some people use appeals to drag a case in court for many years, the final award issued by the Arbitral Tribunal is not only final but also binding on the disputing parties. However, the successful party may be required approach the court in order to ratify the arbitration award against the unsuccessful party.[5]

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[4] Moses, M. L. (2012). *The Principles and Practice ofInternational Commercial Arbitration.* Cambridge: Cambridge University Press.

[5] Moses, M. L. (2012). *The Principles and Practice of International Commercial Arbitration.* Cambridge: Cambridge University Press.

Despite these numerous merits of arbitration, several demerits also exist. One of these demerits includes the minimal use of discovery that reduces the claimant's chance of meeting the case's burden to proof. Though appeals may be misused to prolong the duration in which a dispute is settled, lack of it as in the case of arbitration closes the door for correcting an erroneous decision that violates a certain law or that contradicts the actual facts. The parties that use arbitration in resolution of disputes lack coercive powers especially when a party fails to comply fully with the arbitrators' decision. The arbitrators have no power to impose any fine on such non-compliant party and some disputants end up in court seeking its help to get coercive powers. Unlike the case of litigation, arbitration cannot consolidate several claims where several parties are involved. The situation becomes more complicated if a party in that particular dispute rejects the idea of using an arbitration process to resolve the dispute. Representation of the parties' interests is sometimes doubtful especially where the arbitral tribunal's composition lacks gender as well as ethnic diversity.[6]

The World Intellectual Property Organization (WIPO) has listed several issues that must be prioritized in the arbitration process. One of the issues includes the flexibility of the procedural framework. This means that the parties can agree to amend the procedural framework that would guide the arbitration process. Bureaucratic interventions as well as tedious and time-consuming formalities should not impede the proceedings of the tribunal. The other important issue the arbitral process is that the cases must be actively managed with great care where deadlines should be properly tracked and efficient communication is encouraged. Thirdly, the handling of the dispute under arbitration should be characterized by high levels of efficiency. Fourthly, high levels of expertise should be evident in the entire arbitration process for it to be successful. Finally, the process should be handled by people with high levels of integrity for the process and its outcomes to be fair. The arbitrators must be impartial and independent in order to safeguard the integrity of the arbitration process.[7]

The issue of impartiality is clearly spelt out in the English Arbitration Act 1996 as one of the key principles of arbitration. Under the English Arbitration Act 1996, "the object of

[6] Moses, M. L. (2012). *The principles and practice of international commercial arbitration*. Cambridge: Cambridge University Press.

[7] WIPO Arbitration Center., & World Intellectual Property Organization. (2004). *Guide to WIPO arbitration*. Geneva: World Intellectual Property Organization.

arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense".[8] The Act also provides high levels of freedom for the parties concerning the best method that their disputes can be resolved without violation of public interests.

1.3. Quality of Arbitrators

The choice of arbitration method gives the parties a chance to focus on the choice of arbitrators. The reason is that "the success of any arbitration depends on the experience, integrity and quality of the arbitrators"[9]. In other words, the parties must ensure that they choose arbitrators who are well qualified and experienced to understand and deal with the dispute judiciously and issue an enforceable arbitral award. Choosing 'the right arbitrators' is not an easy process and several factors need to be considered while conducting he exercise. Parties must study the arbitrators' background, determine whether the prospective arbitrator is or has been associated in any manner with the dispute or the opposing party, their academic backgrounds, as well as their prior appointments of similar tasks. In other words, the arbitrators' personalities as well as background are very important in determining the outcomes of the arbitration process.[10] This explains why nominating the most suitable arbitrator(s) is termed as the most essential step in the process of arbitration.[11]

The choice of the arbitrator relies heavily on three issues. One of them is the choice between ad hoc and the institutional arbitration.[12] Arbitration is said to take place whether a permanent institution for arbitration is involved in the process or not. The permanent arbitration institution or stipulated ad hoc are the only available possibilities to the parties in dispute. The parties must therefore choose between the two by considering juridical, political, psychological, as well as sociological issues.

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[8] Merkin, R., & Flannery, L. (2014). *Arbitration Act 1996*. CRC Press.

[9] Van den Berg, A. J. (Ed.). (2005). *New Horizons in International Commercial Arbitration and Beyond* (Vol. 12). Kluwer Law International, p. 275.

[10] In Giorgetti C. (2014). *Litigating International Investment Disputes: A Practitioner's Guide*, p. 145

[11] WIPO Arbitration Center., & World Intellectual Property Organization. (2004). *Guide to WIPO Arbitration*. Geneva: World Intellectual Property Organization.

[12] Sarcevic, P. (1989). *Essays on international commercial arbitration*. London: Graham & Trotman/M. Nijhoff., p. 32.

1.3.1. Institutional Arbitration Method

Under the institutional arbitration method, the role of administering the arbitral process conducted by an institution that specializes in arbitration. The institution sets rules that act as a framework under which the arbitration process takes place. It may also impose some penalties to penalize any party that fails to adhere to these rules.[13] Examples of such arbitration institutions include the International Chamber of Commerce (ICC), the Dubai International Arbitration Centre (DIAC), and the London Court of International Arbitration (LCIA).[14] The parties draft a clause for arbitration as part of the contract that binds them after which they pass on the particular dispute to a competent arbitration institution that will undertake the arbitration process.[15]

The institutional arbitration method has several advantages over the ad hoc method. First, the parties engage an institution that has already established and tested its pre-established rules and this prevents delay in the initiation of an arbitral process. The institution provides all the required logistics as well as administrative assistance such as case management. The institution also presents the disputing parties with a copy of list of arbitrators with undisputable qualifications from which to choose. The institution also encourages any party that may be reluctant to increase its commitment to the process and resolve the dispute as soon as possible. The arbitration clause as well as the procedure for arbitration is even drafted with the assistance of the institution and this saves time.[16] The parties may even choose to use the draft clause of the institution mutatis mutandis to save time. Furthermore, the institutions provide wide rage of experts from different regional as well as social backgrounds and this increases the chances of selecting a skilled and highly experienced arbitrator to suit the parties in dispute. The role of appointing the arbitrators from those in the institution is however played by the institution after the parties nominate their choices. The institution may therefore fail to endorse an arbitrator who

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[13] Rovine, A. W. (2008). *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2007*. Leiden: Martinus Nijhoff Publishers.

[14] Horne, R., & Mullen, J. (2013). *The Expert Witness in Construction*.

[15] Bělohlávek, A. J. (2013). *Borders of Procedural and Substantive Law in Arbitral Proceedings: (Civil Versus Common Law Perspectives)*. New York: Juris.

[16] McIlwrath, M., & Savage, J. (2010). *International Arbitration and Mediation: A practical Guide*. Austin: Wolters Kluwer.

has been nominated by the parties on account of necessary competence as well as impartiality. The institutional staffs are usually available to offer any assistance to the parties in addition to the appointed arbitrators as may be required. The award issued by the arbitral tribunal is not only final but also binding on the parties and neither party can appeal the tribunal's decision unless a procedural irregularity or the final award exceeds its permitted scope and jurisdiction. In ensuring that an Arbitral Tribunal makes no mistake whose rectification would be impossible, the institution scrutinizes that draft award generated in the process of arbitration before the issuance of the final award. According to the English Arbitration Act 1996, the court cannot intervene on those matters that lie within the Act's scope. The only exception is on those matters that the English Arbitration Act 1996 requires the court to come in especially when the parties disagree. Before the issuance of the final award, any party dissatisfied with the decision may appeal to another tribunal. The outcome of the appeal may be to confirm the previous arbitral award, set it aside or even amend it.[17]

While the institutional arbitration method has several merits over the ad hoc method, it has several demerits. It is costly especially when the parties have to meet the administrative fees. It involves high level of bureaucracy. The institution may set timeframes that may be unrealistic for the parties to respond.

1.3.2. *Ad Hoc* Method

Under the ad hoc method of arbitration, no institution is involved. The parties decide and agree on the arbitration aspects such as how many arbitrators they will involve, how they will appoint them, the law that will be applicable in the arbitration process, as well as the procedure for the arbitration process.[18] Therefore the parties must cooperate to ensure that an arbitral process is flexible, inexpensive, as well as fast. Due to its cost effectiveness, ad hoc method is the most suitable for cases with smaller claims and where the parties are less wealthy. Unlike the case of institutional arbitration method, ad hoc method is also flexible.[19] However, It is important

[17] Moses, M. L. (2012). *The Principles and Practice of International Commercial Arbitration*. Cambridge: Cambridge University Press.

[18] Paulsson, J., & Freshfields. (1999). *The Freshfields Guide to Arbitration and ADR: Clauses in International Contracts*. The Hague: Kluwer Law International.

[19] Dollery, B., Crase, L., & Johnson, A. (2006). *Australian Local Government Economics*. Sydney: UNSW Press.

to note that the parties' willingness determines whether the process of arbitration will be successful or not.

Disputing parties decide upon the applicable laws regarding the arbitration procedure and the laws applied to the case merits by executing a Term of Reference or Arbitration Deed for the proceedings of the arbitration.

As mentioned above, Ad hoc arbitration refers to arbitration that does not follow the rules of an arbitral institution[20]. The parties may have consented on the established rules including the UNCITRAL Rules or may not have agreed on any. In case they disagree on set of rules, the arbitration occurs only under the framework of the arbitration law f the venue of arbitration. The UNCITRAL Rules are widely accepted for ad hoc arbitration[21]. The UNCITRAL Rules have a mechanism for designating an appointing authority necessary to prevent the national courts from intervening in the arbitration. The system prevents one institution from serving as the default UNCITRAL appointing authority. In the case, the arbitration is not conducted under a set of rules; the parties take the challenge to the national courts according to the arbitral law of the venue of arbitration.

1.4. Disqualifying or Challenging Arbitrators

If the trust is compromised, there are provisions to challenge the arbitration process largely known as challenge or disqualification of arbitrators. Challenging a member of the tribunal disrupts an ongoing arbitration process as it shifts the focus to the tribunal itself[22]. Thus, therefore, makes important the choice of the arbitration and disqualifying process. Under the institutional system, the institution conducts the disqualifying process, and it is often supervised. For the ad hoc, the parties and arbitrators are often left to their own devices, and the courts have an obligation to resolve the disruption of the arbitral process.

If the arbitral law draws on the Model Law, then a two-step process is initiated. The arbitral tribunal decides the challenge, and in case the party does not agree with the decision, he

[20] Koch, C. (2003). Standards and Procedures for Disqualifying Arbitrator. *Journal of International Arbitration, p.* 333.

[21] Koch, C. (2003). p. 334.

[22] Koch, C. (2003). p. 325.

can apply within 30 days to the state of courts for determination[23]. Under the ICSID Rules, the challenged arbitrator engaged in the determination process and if he is the only one involved, he decides upon himself. The parties cooperate thus ensuring an inexpensive and flexible process.

When the arbitration follows institutional rules, an institution or a special body has a mandate to determine the challenge. The institution creates the rules, which provide a framework guiding the process. Also, the institution can also impose penalties to a party that contravenes the set rules. These arbitration institutions include the DIAC, ICC, and LCIA among others[24]. The parties involved create a clause for arbitration, which specifies their contract after which they forward the dispute to the competent institution to conduct the arbitration process[25]. Under the ICC and LCIA rules, the decision is usually made by their respective courts. The challenge proceedings are not adversarial rather they have an administrative character. All parties are given a chance to give their views on the challenge, but cannot appear before the institution to defend their position[26]. The institutional method has several advantages. It provides a renowned institution with established rules, thus preventing delays[27].

[23] Koch, C. (2003)., p.334.

[24] Koch, C. (2003), p.333.

[25] Juliana, D.M., Mistelis A.L., & Kroll, M.S. (2003). *Comparative International Commercial Arbitration,* New York: John Wiley & Sons. p, 3.

[26] Koch, C. (2003), p.325.

[27] Juliana, D.M., Mistelis A.L., & Kroll, M.S. (2003). p. 13.

2.0. Literature Review

2.1. Freedom of choosing arbitrators

Disputants freely choose the arbitrators they feel have the right qualifications and expertise to settle the dispute.[28]This was observed in a court case of Jivraji vs. Hashwani.[29] The parties' freedom to point out an arbitrator to be appointed was upheld on 27th July 2011 by UK Supreme Court in Jivraji vs. Hashwani.[30] The appeal court highly criticized the previous court decision because it was claimed that a clause in the joint venture that was agreed upon was void and did not comply with the regulations that implemented the equality laws in the EU. The agreement on joint venture between Hashwani and Jivraji composed on considerable interests of business in North America, Asia as well as Europe. The agreement stated that the arbitration should be presided over by a three-arbitrator panel with the seat of arbitration at London. The arbitrators should be highly respected in Ismailii community lead by Aga khan. Each party appointed an arbitrator while the third party was the HH Aga khan president in the national council of United Kingdom.

Towards the end of 1980s and the beginning of 1990s, Mr. Hashwani and Mr. Jivraji contributed in forming an arbitration panel in accordance with some disputes whereby the three arbitrators were highly respected by the Ismaili community. Some of the disputes were resolved by the arbitral process but other disputes were not solved. In the year 2008, Hashwani chose an arbitrator as per the arbitration clause, although the chosen individual sir Antony Coleman was a retired judge who did not belong to the Ismaili community. The lawyers of Mr. Hashwani articulated that the agreement of parties no longer bound the parties when choosing an arbitrator from the Ismaili community. According to recent legislation view, this could result to unlawful discrimination of religion. This was not agreed upon by Mr. Jivraji who was for the fact that parties would agree lawfully that arbitrators are appointed only from the Ismaili community and the UK courts should determine arbitrators from other communities. The regulations of employment equality in UK in 2003 were implemented and it stated that it was against the law for employers to discriminate employees during their employment on basis of their religion or

[28] Akıncı, Ziya. *Arbitration Law of Turkey: Practice and Procedure*. Huntington, N.Y: Juris, 2011. Print.

[29] West Law. (2014). West Law Gulf – summary page.

[30] *Jivraj v Hashwani 2009 EWHC 1364* Comm 26 June 2009.

their beliefs and all persons should get equal treatment without any favor. In accordance to this employment was all about a service contract of doing work. Discrimination was therefore against the law particularly if it was based on religion or on beliefs because to many employers religion and beliefs were part of the employees' occupational requirements.

The implementation of this UK law led to the EU Council Directive 2007/78/EC on 27th November 2008 and applied to the EU-wide and its main purpose was establishing general framework to combat discrimination regarding employment as well as occupations on the basis of religion and belief as well as disability, sexual orientation in addition to age.[31]The requirements of employment were reflected in the English law legislation. Similarly, the EU law focuses on legislation that prohibits discrimination based on nationality, gender, and race. The legislation of the English law also complies with this. Some of the separate legislation pieces regarding discrimination on a number of grounds were repealed by the UK recently. Therefore, it leads to the implementation of Equality Act in 2010, which composed of additional general discrimination prohibition on any of the various grounds of discrimination. In addition, concerning discrimination as well as occupation, all the states in EU as well as UK passed legislation that prevents discrimination on various grounds such as religion or beliefs. Many of the countries outside EU do not follow such legislation whereby there are equality laws that prevent discrimination on some grounds. The appeal court decision in Hashwani v. Jivraji rendered the arbitration invalid due to the breach of the anti-discrimination law that has the potential impact on the arbitration clauses referring to beliefs as well as religion. Particularly, it is stated that clauses as well as constitutional rules concerning the international arbitration that often make provisions concerning the arbitrators' nationality that arbitrators should be appointed from nationality of either parties. If the decision of the appeal court is left unchallenged, it was feared that a number of legislation clauses that specified London to be the arbitration seat would be declared void because of breaching the anti-discrimination laws. This could as well apply in regard of clauses that specify that the arbitration seat should be anywhere else in the EU as well as in different jurisdictions.

For these reasons, the LCIA and ICC are some of the two mostly used institutions of arbitration that undertook unusual steps that interfered with the proceedings of the Supreme

[31] Rechel, Bernd, ed. *Minority Rights in Central and Eastern Europe*. Vol. 54. Taylor & Francis, 2010.

Court.[32] The decisions of the Supreme Court are based on the court central finding that the association between the parties in addition to the arbitrators should not be compared with the connection between an employer as well as employee. However, in most cases the terms are usually construed thus laws aimed at regulating the occupational situation or unemployment situation are not applicable on arbitrators. Particularly, unlike employees and individuals maintained to carry out services, the arbitrators do not depend on the parties. This is because after an arbitrator is appointed, the arbitrator will be removed only under circumstances that are exceptional and where the actions of the arbitrator are beyond the control of parties. Supreme Court determines from where the arbitrator is appointed from even when equality legislation applies to arbitrator selection. The court decided that the provision and the arbitrators are required by the court to come from the Ismaili community is a true occupational requirement. This is so due to the parties' justification in agreement with the agreement on the arbitral procedure that they are confident about. The Supreme Court decisive nature has led to certainty in the UK position as well as parties' freedom to Fchoose London as the arbitration seat.[33]

2.2. Arbitral Tribunal Formation under the UAE Law

Over the last few decades, the UAE has experienced tremendous growth characterized by its growth into a global center for international commerce[34]. With the influx of international investment, the need for dispute resolution mechanisms have become increasingly important for complex commercial disputes along with providing confidence to international investors (Ibid, 2013). Quite certain, international investors in the region may not prefer to settle complex commercial disputes in UAE Courts considering that proceeding are conducted in Arabic with the outcome married with uncertainty[35].

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[32] McIlwrath, Michael, and John Savage. *International Arbitration and Mediation: A Practical Guide*. Austin: Wolters Kluwer, 2010. Print.

[33] *Jivraj v Hashwani 2009 EWHC 1364* Comm 26 June 2009.

[34] Mistelis, L A., & Shore, L. (2013). *The World Arbitration Reporter: International Arbitration Institutions*, New York: Oxford Publishers, 4.

[35] Mistelis, L A., & Shore, L. p 4.

The UAE arbitration proceedings are conducted within individual emirates via the commerce as well as industry chambers (although the parties can exercise their freedom to chose another institution to hear their dispute if they so wish,

Currently, arbitration in the UAE is governed by a small number of articles set out in Law No. 11 of 1992 ("the CPC').

Article 204 of the Civil Procedures Law provides for arbitrators' appointment.[36] According to the said Article, if any dispute arises between parties concerning arbitrators' appointment or if the arbitrators agreed upon fail to perform the work assigned to them , or abdicates their work or the arbitrators have been refused or there exists an impediment which prevents them from performing their duties and there does not exist an agreement between the disputing parties, then the court which has the jurisdiction to hear this issue will appoint necessary arbitrators as requested by any of the parties. The arbitrators that the court appoints cannot exceed the number agreed by the respective parties during the commencement of the process of resolving the dispute.[37] The decision of the court may fail to be contested in all manners whatsoever.

Article 206 stipulates a number of legal mandatory requirements, restricts certain persons from acting as an arbitrator including the followings: the arbitrator must not be minor, legally incapacitated, has criminal sanction depriving him from his civil rights or have been bankrupt. There are no special educational requirements to act as an arbitrator in UAE, once the person meets the requirement mentioned above and is impartial and independent. the arbitration provisions of the CPC doesn't prescribe any limitation regarding the number of the arbitrators, even though the number must be odd where there are more than one Arbitrator.

In Case No.169/2009, the Cassation Court of Dubai clarified the issue concerning the appointment of the arbitral tribunal. The court decision stated that the parties "may agree to nominate one or more arbitrators to determine the dispute arising out of the contract, or one

[36] The UAE Civil Procedure Code, Federal Law No. (11) of 1992 Chapter Three.

[37] The UAE Civil Procedure Code, Federal Law No. (11) of 1992 Chapter Three.

specified in the subsequent arbitration deed"[38].The parties also have the freedom to determine the sum of the arbitrators to be involved in the arbitration process.

The conditions for arbitrators' disqualification have been defined under the UAE Law: The federal CPC in Article 207(4) explains that an arbitrator may fail to be disqualified if there are no reasons arising or coming up after his or her appointment. A disqualification request is based on similar grounds under which any judge can be dismissed if he or she does not qualify to pass judgment. The court having jurisdiction to put the dispute into consideration files the disqualification request within a five-day period. The parties are notified about the arbitrator from the time the disqualification reason arose or when disqualification was known. In these events, disqualification request may fail to be given if judgment has been passed by the court already or if the pleadings and hearings are already concluded.[39]

A good example of a challenge of arbitrators' appointment in UAE was witnessed in the case of Injazat Capital Limited and Injazat Technology Fund B.S.C. v Denton Wilde Sapte & Co (a firm) when an action was filed by the claimant before a first instance court in Dubai against companies.[40] An order was requested by the claimant that AED1, 253,528 was expected to be paid by the claimant together with the interest as well as the final certified value of the payment certificate. In the pleadings, the relief sought to the court was to appoint an arbitrator to settle the dispute between parties which was amended by the respondent. The Respondent requested the Court, that the claimant's request should be dismissed on grounds that the Dubai court did not have jurisdiction to hear the dispute because the construction performance contract was executed in the Emirate of Sharjah.

On 28th December 2006, the Dubai First Instance Court ordered the appointment of an accounting expert. The accounting expert was to conduct the duties of an arbitrator and be responsible for dispute resolution that arose between parties. This judgment was appealed by the respondent in accordance with Article 204(2) of the Civil Procedures Law of UAE. Additionally, this decision was appealed by the respondent at the cassation court. Therefore, a memorandum of

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[38] Abdallah, S. & El Mahdy, M. (2012). Dubai: Challenging The Appointment Of An Arbitrator. <<http://www.tamimi.com/en/magazine/law-update/Section-6/november-3/dubai-challenging-the-appointment-of-an-arbitrator.html>>.

[39] The UAE Civil Procedure Code, Federal Law No. (11) of 1992 Chapter Three.

[40] West Law. (2014). West Law Gulf – Summary Page.

defense was filed by the claimant. It was urged by the respondent that the appeal court made a mistake during its reasoning. The respondent referred to the pleas in the Dubai first instance court in Dubai. The respondent's pleas included the following. The court did not have the jurisdiction of determining the request of claimant because the contract of construction was executed in Sharjah. That arbitrator's appointment was not correct and needed to be revoked. It was further urged by the respondent that the appeal court had determined the inadmissibility without having the proper examination of the arguments that were forwarded for support. The position of the respondent was that the judgment that the appeal court issued was defective.

In this case, the Cassation court held that the arguments of the respondent had no grounds. According to the Cassation court, orders that appointed the arbitrators were not to be appealed. The cassation court also pointed out that the unchallengeable principle judgment failed to extend to other matters like pleas concerning judgment or the lack of court jurisdiction, rejecting the requests to have the arbitrator appointed or judgment to have other preliminary questions determined upon which request adjudication to appoint or to replace the arbitrator becomes dependant. However, it is impossible to appeal the judgment for an arbitrator's appointment. The meaning of unchallengeable judgment concept according to the legislator as stated in Article 204(2) of the UAE Civil Procedure Law is that it is impossible to appeal to the court that appoints the arbitrator. This goes against the general rule that allows judgment appeal by methods that are allowed by the law. It may not be necessary to file appeals against the judgment issued in accordance with Article 204(2) of the UAE Civil Procedures Law which are concerned with appointment and replacement of the arbitrator. The unchallengeable judgment principle is not concerned with other matters like pleas concerning the judgments that determine other questions on adjudication request to replace and appoint the arbitrator is dependent. It is possible to appeal judgment on this category. The appeal by the companies was dismissed by the cassation court that emphasized that the decision to replace and choose an arbitrator in as required under Article 204(1) of the UAE Civil Procedure Code enjoys the protection of unchallengeable judgment principle as stated by Article 204(2).

Arbitration clause that specifies the arbitrators' appointment method clearly prevents the parties from requesting the court to make such appointments. This was evident in a court case involving a contractor and a subcontractor. The parties signed a contract with the contractor who subcontracted the construction work to a subcontractor. At least 89 percent of subcontractor price

was paid to the subcontractor who completed only 30 percent of the construction work and delayed completion of the remaining work despite being notified on several occasions. For this reason, the contractor was held responsible by the owner of the project as well as the consulting engineer. It was proposed by the contractor that he was going to negotiate with the subcontractor about the financial statement but the subcontractor refused the proposal. The contractor then sued the subcontractor and sought for an order that directed the subcontractor to go on with the arbitration according to the given terms. After the contractor failed to come to an agreement with the subcontractor to move to the arbitration, legal action was commenced by the contractor. The subcontractor pleaded that the court did not have jurisdiction to hear the case due to the presence of an arbitral clause in the parties' agreement. However, the subcontractor's plea was dismissed by the Court. The court also dismissed the appointment of arbitrators for parties giving a directive that arbitrators should appoint a third arbitrator to be responsible for presiding over arbitration tribunal aimed at resolving the dispute according to the subcontract as well as the law. In the appellate court, it was appealed by the subcontractor as well as the contractor that there was no appeal filed in accordance with Article 204(2) of the UAE Civil Procedures Law. The plea was dismissed by the appeal court. The appeal court decided to have the lower court decision overturned on the legal merits and make a new ruling that the legal action will not be entertained by the appeal court because of arbitration clause.

2.2.1 Arbitral Tribunal Formation under DIFC Law

The DIFC Law no.1 of 2008 arbitration law explains the following in relation to the required number of arbitrators.[41] Parties have the right of determining how many arbitrators shall preside over the proceedings required an arbitral tribunal to have an odd number of arbitrators. . If such determination does not exist, the arbitrator number should be one. Furthermore, in the appointment of arbitrators, Nationality reasons should not be used to preclude any person from becoming arbitrator unless otherwise agreed. If agreement on the total number of arbitrators to be involved in the arbitral process does not exist, the arbitrators' appointment will depend on the total number of required arbitrators who will be involved in the dispute resolution. For instance, if there are three arbitrators in the arbitration, one arbitrator will be appointed by each party and

[41] DIFC. (2008). Arbitration Law. As Amended By Law No.1 for 2013 N.<<http://www.difcarbitration.com/arbitration/arb_law/index.html>>.

third arbitrator will be chosen by the arbitrators that the parties have appointed. If an arbitrator is not appointed by a party within thirty days after request, or there is disagreement between arbitrators on choosing a third arbitrator within thirty appointment days, appointment should conducted upon the party request. Failure of parties to agree on a sole arbitrator in thirty days after one of the party has requested the other party to appoint, the DIFC Court shall appoint the arbitrator after either of the parties request.[42] Where the two parties are entitled by the arbitration to have an arbitrator appointed, the DIFC Court[43] shall have the arbitrator appointed without any party's nomination regardless of the dispute parties if two or more arbitrators are required and if the parties do not agree on the same. In such cases, the arbitrators represent the disputed parties' two different sides. On one side for the arbitral tribunal is the respondent and the other is the claimant. In the circumstances stated in paragraph (c), Article 17 of the DIFC Arbitration Law of 2008, arbitration agreement will be applied in all purposes as the parties' written agreement for the arbitral tribunal appointment by DIFC Court. The DIFC Court may be applied by the party to take measures where the procedure for making the appointments that the parties agree and a party does not act according to the procedures or a party, or the two arbitrators do not come to an agreement as expected in the procedures.[44] The same request can also be made when an institution or any other third party does not perform all the functions that are entrusted in line with the stipulated procedures. Such request for the intervention of the DIFC Court is not applicable if the appointment procedure agreement provides alternative means for having the appointment secured. Decisions on matters that Paragraph 3 and 4 /Article 13 entrust to DIFC Court will not be appealed. Paragraph 3 provides remedies in case the parties do not have any written agreement on how the appointments should be made while paragraph 4 provides remedies for appointing arbitrators in case the procedure laid down by the parties is not followed and disagreement ensues.

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[42] Almutawa, A. M., & Maniruzzaman, A. F. M. (2014). The UAE's Pilgrimage to International Arbitration Stardom: A Critical Appraisal of Dubai as a Centre of Dispute Resolution Aspiring to Be a Middle East Business Hub. *Journal of World Investment and Trade, 15.*

[43] University of London. (1994). *Yearbook of Islamic and Middle Eastern Law.* London: Kluwer Law International., p. 387.

[44] DIFC. (2008). Arbitration Law. <<http://www.difcarbitration.com/arbitration/arb_law/index.html>>.

While appointing an arbitrator, the DIFC Court should consider the arbitrator's qualification needed by the parties' agreement. In case of one or three arbitrators' appointment, it is advisable to nominate arbitrators of a nationality different from that of the disputing parties as this ensures that Arbitral Tribunal remains independent and impartial in their decision.

While nominating a prospective arbitrator, the prospective arbitration has an obligation to the Centre and the nominating party to disclose any circumstance that may raise justifiable doubts regarding the impartiality as well as the independence of the arbitrator. From the time of his acceptance of his appointment, the arbitrator will be under a continuous obligation to disclose any circumstances without delay to the parties in addition to arbitral institutions that administer arbitration that render him unfit to preside over the arbitration proceedings. An arbitrator that has been appointed by a party can be challenged by the same appointing party for reasons that he may be aware of those appointments by the arbitrator.

Paragraph 3 of Article 17 states as follows:

(3) If and to the extent that there is no agreement, (a) in an Arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint an arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the DIFC Court of First Instance; or (b) in an Arbitration with a sole arbitrator, if the parties do not agree on the arbitrator within thirty days of one party requesting the other to do so, he shall be appointed by the DIFC Court of First Instance on the request of either party; (c) where the Arbitration Agreement entitles each party to nominate an arbitrator, the parties to the dispute number more than two and such parties have not all agreed in writing that the parties in dispute represent two separate sides for the formation of the Arbitral Tribunal as claimant and respondent respectively, the DIFC Court of First Instance shall appoint the Arbitral Tribunal without regard to any party's nomination; (d) in such circumstances as set out at paragraph (c) of this Article, the Arbitration Agreement shall be treated for all purposes as a written

agreement by the parties for the appointment of the Arbitral Tribunal by the DIFC Court of First Instance.[45]

The parties have the freedom of agreeing on an arbitrator challenging procedure in accordance with paragraph 3 of Article 19. If this agreement is absent, parties with the intention of having the arbitrator challenged shall in 15 days after being aware of arbitral tribunal constitution or after being aware of circumstances pointed out in Article 18 (2), a written statement containing the challenge reasons is send to arbitral tribunal Centre.

Paragraph 2 of Article 19 of the Arbitration Law of 2008 states that:

(2) In the absence of such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the Arbitral Tribunal or after becoming aware of any circumstance referred to in Article 18(2), send a written statement of the reasons for the challenge to the Arbitral Tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the Arbitral Tribunal shall decide on the challenge.[46]

Unless the challenged arbitrators withdraw from his office or no objection from the other party to the challenge, The Arbitral Tribunal shall decided on the challenge. If parties agree upon a challenge in any procedure or when the procedure in accordance with paragraph (2) of the Article previously mentioned are unsuccessful, it can be requested by the challenging party that the challenge be decided by DIFC Court. In this case, such appeals must be filed within a month's time after receiving the notice of challenge rejection decision. The decision would not be appealed. While the request is still pending, arbitral tribunal may have the arbitral proceedings continue as well as make the award.[47]

If the arbitrator becomes unable to perform his duties as a matter of fact and law or fails to act without unreasonable delay, if he withdraws from his office or if the parties consent on the termination, his mandate shall be terminate, DIFC court shall have an exclusive jurisdiction to decided on the termination of the mandate in the absence of such agreement or if an argument

[45] DIFC. (2008). Arbitration Law. <<http://www.difcarbitration.com/arbitration/arb_law/index.html>>.

[46] DIFC. (2008). Arbitration Law. <<http://www.difcarbitration.com/arbitration/arb_law/index.html>>.

[47] DIFC. (2008). Arbitration Law. <<http://www.difcarbitration.com/arbitration/arb_law/index.html>>.

remains pertaining to any of these grounds. A substitute arbitrator shall be appointed according to the rules that were applicable, unless otherwise agreed by the parties.[48]

2.2.2 Formation of the Arbitral Tribunal Under Dubai International Arbitration Center "DIAC" Rules

The DIAC is a leading arbitration institution in Dubai. It began as arbitration for DCC dating back to 1994 where it operated as the CCCA[49] (Ibid, 2013). The new DIAC rules came into operation from 2007. The Ruler of Dubai approved them, replacing earlier rules covering commercial conciliation. Originally formulated in English, they were later translated to Arabic. The DIAC was created to cater for commercial arbitration, create a pool of international arbitrators, and promote dispute settlement though arbitration. It aims to provide impartial dispute resolution[50].

The DIAC Rules provides guidelines in resolving all disputes related to the formation, interpretation, invalidation, termination nullification, and performance of the contract. In Article 8, the DIAC allows that parties to establish the number of conciliators. If both sides disagree on the size of arbitrators, the Tribunal will comprise of one arbitrator except when they consider the three members as appropriate[51]. Article 9 specifies the appointment of Tribunal member. All arbitrators are expected to remain impartial and independent of the parties. They are not allowed to act an advocates or advice any party involved in the arbitration. Further, when the Arbitration Agreement allows each party to select an arbitrator, the agreement is taken as an agreement to select an arbitrator under established Rules.

When the parties consent to allow the Claimant to nominate an arbitrator, but the Claimant fails in the specified period, the Center has mandate to select an arbitrator guided by the Rules[52]. If the parties allow the Respondent to nominate an arbitrator, but the Respondent fails in the specified time, the Center can proceed to appoint an arbitrator. For a three-member

[48] Article 21 DIFC Arbitration Rules No.1 of 2008.

[49] Mistelis, L A., & Shore, L. p 4.

[50] Mistelis, L A., & Shore, L. p 4.

[51] DIAC Arbitration Rules. (2011). *Dubai International Arbitration Center Rules 2007 Introductory Provisions.6.*

[52] DIAC Arbitration Rules. (2011), p6.

Tribunal, each party nominates one arbitrator and forwards to the Center. Further, if the parties disagree on the procedure to select Chairman, the nominated arbitrators agree to select a third arbitrator as Chairman prior to confirmation and appointment by the Center. However, if the nominated arbitrators disagree on a third arbitrator, the Chairman position is taken by the Center[53]. The Center has mandate to appoint all arbitrators based on the method of appointment. The center can decline to appoint any proposed nominee if it determines the nominee to be lacking in impartiality, or independence. The Center requests the party to make available a new nomination within 21 days after receiving the notification. If parties fail to nominate an arbitrator or the Center rejected the nominated arbitrator, the center will have a mandate to select an arbitrator.

However, before the Center makes an appointment, each prospective arbitrator is expected to make available a complete CV along with Statement of Independence as prescribed by the Center. Then, each arbitrator has a duty to disclose to the Center along with other Tribunal members any circumstances that may arise during the arbitration process. Prospective arbitrators are also expected to make available a written confirmation of their desire to serve based on the specified Rules. In making a determination to select an arbitrator, the Center considers the transaction, circumstances of the dispute, location, language, number of parties, as well their nationality[54].

Article 10 provides guidelines on the nationality of arbitrators. In essence, when have distinct nationalities, the Chairman is chosen from a different nationality distinct from parties involved unless two parties of different nationality make a written agreement on the proposed arbitrator. Any person who occupies citizenship of two of more countries is regarded as a citizen of each country. Article 11 provides guidelines where multiple parties are involved. In such situation where the dispute is referred to a three-arbitrator Tribunal, both the multiple Respondents and Claimants are mandated to jointly nominate an arbitrator and forward to the Center for an appointment. However, when a joint nomination is lacking, and parties disagree on the appropriate method, the Center has a final mandate to appoint the Tribunal and to

[53] DIAC Arbitration Rules. (2011), p6.

[54] DIAC Arbitration Rules. (2011), p7.

designate one of the arbitrators as Chairman. In doing so, the Center considers the Arbitration Agreement, which guides on the required number of arbitrators. Article 12 provides guidelines on expedited formation[55]. Any party can make a written application to the Center requesting for the quick formation of the Tribunal along with the appointment of any replacement. The application is copied to other parties specifying grounds for such request. The Center has mandate to adjust the allocated time limit.

Article 13 covers revocation of arbitrator's appointment. In the case, the arbitrator makes available a written notice outlining his desire to resign, or compelling circumstances makes it impossible to participate, the Center may proceed to revoke his appointment. The Center has mandate to determine the compensation to be allocated to the former arbitrator services. Further, when any arbitrator deliberately violates the Arbitration Agreement, fails to observe impartiality, or engages in the arbitration with a reasonable diligence, the Center may consider him unfit. Any party can challenge an arbitrator if he doubts the independence or impartiality of chosen arbitrator. The challenge period is 15 days after the formation of the Tribunal or later within 15 days after learning of the shortcomings[56]. If the confronted arbitrator does not surrender or all parties consent to the challenge, the Center will have a mandate to make a determination on the challenge.

Article 14 specifies the replacement of arbitrators. The Center has full discretion to determine whether to follow the set appointment process if it considers replacing the arbitrator. If the Center decides to have a party to nominate a replacement, the party is expected to do so in 21 days after being notified. At the elapse of this period, the Centers appoint the replacement arbitrator. The reconstituted Tribunal makes a determination regarding the extent, which prior proceedings will be repeated. Article 15 provides allows the majority to continue with the proceedings[57]. Other arbitrators have the power to proceed on written notice of the other parties' failure of refusal to engage in the arbitration process. The written notice is made available to the Center. However, if the other parties want to discontinue to proceedings, they must make

[55] DIAC Arbitration Rules. (2011), p 7.

[56] DIAC Arbitration Rules. (2011), p 8.

[57] DIAC Arbitration Rules. (2011), p8.

available a written notice to the Center of their determination. In such a case, they are expected to forward the matter to the Center for revocation of the defaulting arbitrator appointment along with a replacement arbitrator. Article 16 specifies the Executive Committee to execute the function of the Center.

2.2.3 Formation of arbitral tribunal under "DIFC-LCIA

Created in 2008 and based on the DIF, the DIFC-LCIA Center has grown to be a renowned institution for resolving disputes[58]. It combines the best of DIFC, and LCIA ensuring a remarkable dispute resolution process. Much of the rules tend to follow the LCIA though with little changes to reflect the new DIFC-LCIA[59]. The rules are applicable and compatible with the civil & common law. DIFC-LCIA provides a comprehensive framework that allows international business community including international arbitrators and lawyers to execute arbitration with efficiency and confidence. In this sense, the DIFC-LCIA promotes the UAE as a leading dispute resolution center for many international commercial disputes[60].

Under the DIFC-LCIA, all arbitrators observe impartiality and independence[61]. In essence, the parties are not supposed to act as advocates or advice each other. Prior to the LCIA appointment, the arbitrator is required to present to the DIFC-LCIA Registrar with a resume and agrees to the set costs. After agreeing to a set cost, the arbitrator then signs a declaration that binds his impartiality and independence. The parties also involved have a duty to disclose any issues to the LCIA or any Tribunal member, and other parties involved. This is done after at the declaration or before the arbitration is concluded[62]. The LCIA appoints the Tribunal after receiving DIFC–LCIA Registrar response. The LCIA then proceeds with to form the Tribunal regardless of whether the response is missing, incomplete or late. Unless agreed otherwise, or the LCIA endorses a 3-member tribunal, a sole arbitrator is appointed.

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[58] Mistelis, L A., & Shore, L. (2013). p. 5.

[59] Mistelis, L A., & Shore, L. (2013). p. 5.

[60] Mistelis, L A., & Shore, L. (2013). p.5.

[61] The DIFC-LCIA Arbitration Rules, (2008), p.4.

[62] The DIFC-LCIA Arbitration Rules, (2008), p.5.

The LCIA Court is the only court that has a mandate to appoint arbitrators. It appoints arbitrators using any particular method consented by involved parties. To select the arbitrators, the LCIA Court considers the transaction, its location, language, and nationality along with the nature and underlying dispute circumstances. Article 6 presents information on the arbitrators nationality. When the parties have different nationalities, the Chairman or sole arbitrator of the Tribunal will have a different nationality. It is considered that the nationality of parties may control party interests. Article 7 provides guidelines on the party and other nominations[63]. When the parties consent to appoint the arbitrator then such agreement provides ground of nominating an arbitrator. Further, the LCIA has the final authority to appoint a nominee, but can refuse to appoint on a determination that the person is not suitable, or impartial or independent.

When parties allow a third party to nominate an arbitrator, and the nomination fails to occur within a set period, the LCIA has a mandate select an arbitrator. The LCIA Court would also not accept any late nomination. Also, when the arbitration request does not have a nomination where parties consented to have a third person or Claimant to select an arbitrator, the LCIA Court has mandate select an arbitrator. Article 8 provides guidelines when three or more individuals are involved[64]. When the Arbitration Agreement grants each party to select an arbitrator, but two of more parties differ on the nominee, the LCIA Court assume mandate to select the Tribunal without considering any prior nomination. In such cases, the Arbitration Agreement is treated to be an Arbitral Tribunal.

Article 9 provides guidelines on expedited formation. After the arbitration commences or in exceptional urgency any party can write to the LCIA requesting the expedited creation of the Arbitral Tribunal[65]. In such situation, a written application is made to the LCIA Court and copies distributed to all parties. The written application must specific the ground for such agency in the creation of the Arbitral Tribunal. Also, the LCIA Court may abridge any time limits guiding the creation of the Arbitral Tribunal, but not other limits. Further, Article 10 specifies the revocation of arbitrator's appointment. In the case any arbitrator submits a written notice to resign, with

[63] The DIFC-LCIA Arbitration Rules, (2008), p.5.

[64] The DIFC-LCIA Arbitration Rules, (2008), p.5.

[65] The DIFC-LCIA Arbitration Rules, (2008), p.5.

copies made available to other parties making it difficult to be available, the LCIA determines to revoke the arbitrator appointment and in effect appoint another. The LCIA has a mandate to decide the compensation for the former arbitrator services as it considers appropriate. When the arbitrator deliberately violates the Arbitration Agreement and fails to remain impartial or engages in the proceedings with reasonable diligence, the LCIA may consider him unfit. The arbitrator is also subject to challenge by any party who has a justifiable doubt pertaining his independence or impartiality.

Further, a person who wants to challenge an arbitrator is required to do within fifteen days after the creation of the Arbitral Tribunal. He can also challenge the arbitrator later after having proof that shows the unfitness of the arbitrator. Further, if the challenged arbitrator fails to withdraw or other parties consent within 15 days, the LCIA has mandate to make a determination. Article 11 provides guidelines on nomination, well as replacement of arbitrators. When the LCIA makes a determination that the nominated person is unsuitable, or lacks impartiality and independence, the LCIA has complete mandate to determine whether to abide by initial nominating process[66]. When the LCIA Court decides to allow the parties to nominate another person, the parties are expected to do so within 15 days after which the LCIA selects a replacement arbitrator. Further, Article 12 specifies that majority power have mandate to continue with the proceeding[67]. As outlined, when any arbitrator or 3-member Tribunal does not participate in the proceedings, the other two have the power to continue with proceedings. In this sense, the absence of a third party will not deter the proceedings.

To determine whether to proceed, the other two arbitrators are mandated to consider a third party explanation for failing to participate and make reasons without his involvement. However, when the two other parties agree not to continue with the arbitration without the involvement of a third party, they are expected to send a written notice to all parties including the LCIA. Also, the two arbitrators are expected to refer the issue to the LCIA, which will revoke the third arbitrator appointment and subsequent replacement.

[66] The DIFC-LCIA Arbitration Rules, (2008), p.6.

[67] The DIFC-LCIA Arbitration Rules, (2008), p.6.

The right to an independent and impartial judge also exists in arbitration. While parties can agree to settle a dispute through a private adjudicatory mechanism, they still enjoy protection[68] . Considering that, the arbitration is a form of adjudication it is necessary to ensure that the result be because of an impartial process. In addition, the parties involved should perceive the process as fair particularly to the losing party[69]. In essence, justice should prevail and be seen to have been done. At the same time, for the parties to accept the decision, they must be confident that those passing the judgment are doing so with a fair and open mind[70].

2.3 Formation of Tribunal under English Arbitration Act 1996

Chapter 23 of the Arbitration Act 1996 provides a framework for the formation of a tribunal[71]. Article 15 provides guidelines on the arbitral tribunal. As outlined, the parties have the freedom to select the size of arbitrators to serve on the tribunal[72]. They also decide whether to have a chair or umpire. When parties consent to have two arbitrators, the agreement allows the need for the Chairman. If members disagree, the tribunal consists of two people. Article 16 provides guidelines for appointing arbitrators. Parties have freedom to choose their method of appointing arbitrators and chair[73]. However, if they disagree, there are guidelines to be followed. For a tribunal with a sole arbitrator, parties are obligated to select an arbitrator within 28 days[74]. If a tribunal comprises of two arbitrators, then each party is obligated to select one arbitrator within 14 days. For a 3-member tribunal, each party is obligated to appoint one arbitrator within 14 days[75]. Then the selected arbitrator appoints a third arbitrator to serve as chair. For a tribunal

[68] Koch, C. (2003). Standards and Procedures for Disqualifying Arbitrator. *Journal of International Arbitration,* 325.

[69] Koch, C. (2003), p.325.

[70] Mistelis, L A., & Shore, L. (2013). p.6.

[71] Arbitration Act. (1996). Arbitration Act 1996, Chapter 23, p. 1.

[72] Arbitration Act. (1996), p.9.

[73] Arbitration Act. (1996), p.9.

[74] Arbitration Act. (1996), p.9.

[75] Arbitration Act. (1996), p.9.

comprising of two arbitrators along with an umpire, then each party is mandated to appoint one arbitrator within 14 days.

The two selected arbitrators then appoint an umpire, and if they disagree, they can seek substantive hearing to do so. Further, Article 17 provides guidelines on power when there is a default to select a sole arbitrator. When one party selects his arbitrator, but the other party fails, the one who has selected his arbitrator is obligated to present a notice to the defaulting party a proposal to select his arbitrator to serve as sole arbitrator[76]. In case the defaulting party does not present his arbitrator within seven days after being issued with the notice, then the other party is obligated to select his arbitrator as to serve sole arbitrator. After selecting the sole arbitrator, the defaulting party after notifying the other party can write to the court that may revoke the appointment. Article 18 provides guidelines for the selection procedure. The parties have the freedom to determine the next course of action if the selection process fails. When appointment fails, any party after notifying other parties can apply to court to enforce its powers[77].

The court is obligated to provide directions regarding the appointment, facilitate the creation of a tribunal through its appointments, revoke initial appointments, as well as make appointments by itself[78]. The court agreement is binding like that made by parties. However, there is room to appeal during the court leave. Article 19 affirms that the court has to consider the agreed qualifications. When exercising its power regarding the appointment and failure of appointment, the court is obligated to consider the agreed qualifications for arbitrators[79]. Article 20 provides guidelines on Chairman. When the parties consent to have a chair, they have the freedom to deliberate and identify the functions on how they will make decisions, orders, as well as awards[80]. However, if they disagree, all or majority of arbitrators will take charge of the prescribed chair functions.

[76] Arbitration Act. (1996), p.9.

[77] Arbitration Act. (1996), p.10.

[78] Arbitration Act. (1996), p.10.

[79] Arbitration Act. (1996), p.10.

[80] Arbitration Act. (1996), p.10.

Further, the chair view shall prevail if there is no majority of unanimity. Article 21 provides guidelines on umpire. If parties consent to have an umpire, they have the freedom to determine umpire functions. However, if they disagree on umpire functions, then the umpire is obligated to attend proceedings and receive similar materials supplied to other arbitrators. Further, the umpire is obligated to make decisions, orders, as well as awards. If arbitrators disagree and fail to notify or any of the arbitrator does not join to give a notice, then any party to can write to the court. The court is mandated to order the umpire to replace other arbitrators as tribunal, but the court decision is appealable.

Article 22 provides guidelines on decision making in case the chair or umpire is lacking. Parties have freedom to consent on how to make decisions, orders, as well as ward[81]. However, if they disagree than the majority assumes the chair functions. Article 23 provides guidelines revoking arbitrator's authority. Authority can be revoked if parties agree to it[82]. If they disagree, arbitrators may not lose his authority except by parties act jointly or an arbitral or any person with powers vested upon him by parties. Further, parties must consent in writing about the revocation. However, courts power is unaffected by these actions.

Article 24 provides guidelines on courts power to remove arbitrators. Any party to the proceeding can write to the court requesting the removal of an arbitrator when in doubt of arbitrator's impartiality, qualifications and capability or has failed to ensure proper proceedings or allocate an award[83]. While the application is pending, the tribunal has mandate to continue dispatching its duties. The court has the freedom to remove the arbitrator as it deems fit based on the available evidence. Further, the arbitrator has room to voice his views before the court. The decision is appealable during the court leave.

Article 25 provides guidelines on the arbitrator resignation. The parties have the freedom to determine the consequences after an arbitrator resigns including compensation[84]. If the parties

[81] Arbitration Act. (1996), p.11.

[82] Arbitration Act. (1996), p.11.

[83] Arbitration Act. (1996), p.12.

[84] Arbitration Act. (1996), p.13.

disagree, the resigning arbitrator can write to the court for compensation. When satisfied, the court can grant compensation. However, there is room to appeal during the court leave. Article 26 provides guidelines when an arbitrator dies[85]. In such as case the arbitrator's authority ceases. If one party involved in the selection of an arbitrator dies, the arbitrator authority remains unless agreed by parties. Article 27 provides guidelines for filling vacancy[86]. When an arbitrator is out of office, parties have the freedom to determine how to fill the vacancy, include previous proceedings and effect of ceasing to be in office. If they disagree, Article 16 and 18 will hold[87]. A new tribunal has obligations to determine how previous proceeding should be.

2.4 Arbitral Tribunal Appointment Under the French Arbitrator Act

According to Article 1508 of the French Arbitration Act, an arbitration agreement may designate the arbitrator(s) or provide for the procedure for their appointment, directly or by reference to the arbitration rules or to the procedural rules. Pursuant to Article 1452 of the Act, two scenarios shall arise if disagreement between the parties on the procedure to appoint the arbitrator persists. Firstly, where appointment of one arbitrator is expected and if the partiers have not agreed on an arbitrator to be appointed, the person administering the arbitration shall appoint the arbitrator. If there is no such person, an acting judge makes the appointment. Secondly, where a three-member arbitral panel is to be made, each party will appoint one arbitrator and the third arbitrator will be appointed by the two appointed arbitrators. Whenever one party does not appoint an arbitrator within thirty days following receipt of the appointment request or the two nominated arbitrators within 30 days from the date of accepting their mandate fail to nominate a presiding arbitrator, the person responsible for administering the arbitration shall appoint the arbitrator. If there is no such person an acting judge shall make the appointment.

According to Article 1453 of the French Arbitration Act, states that if there are more than two disputing parties and they fail to agree upon the procedure to agree upon the procedure to constitute the arbitral tribunal, the person responsible for the administration of arbitration shall appoint the arbitrator. If no person with such qualifications exists, an acting judge makes the

[85] Arbitration Act. (1996), p.13.

[86] Arbitration Act. (1996), p.13.

[87] Arbitration Act. (1996), p.14.

appointment. Article 1454 of French Arbitration Act requires that all the disputes associated with arbitral tribunal's constitution should be resolved amicably. If parties do not agree, the person responsible for the administration of arbitrators shall appoint the arbitrator or an acting judge will appoint such a person if the administrator is unavailable. Article 1456 explains that the arbitral tribunal's constitution will only be complete after the arbitrators mandate acceptance. As of the date of acceptance, the tribunal should be seized of dispute. Prior to mandate acceptance, any circumstances that may affect the arbitrator's independence or his/her impartiality should be disclosed by the arbitrator. The arbitrator should also disclose any such circumstances arising after the acceptance of the mandate have been made. Disagreement of parties on the arbitrator's removal, the person with the arbitrator administration responsibility should appoint the arbitrator or the judge acting with the arbitration support should do the appointment within a thirty-day period following the fact disclosure or fact discovery.[88]

In domestic as well as international arbitration, parties have the freedom of determining how many arbitrators should be appointed directly or through reference to the rules of arbitration. This is in accordance with Article 1444 and Article 1508 of the Code of Civil Procedure (CCP). Moreover, the number of arbitrators in a domestic arbitration must be odd. Therefore, when the appointment of arbitrators consists of an even numerical value, another arbitrator should be appointed to make the number odd according to Article 1451 of the CCP. Few requirements are imposed by the French laws on arbitrators whereby none of them is related to the professional qualification or the nationality of the arbitrator. Specifically, it is provided in the CCP that natural persons with full capacity will act as the arbitrators in the proceedings of domestic arbitration. The legal persons will only administer arbitration if they are designated in the agreement of arbitration according to Article 1450 of the CCP. There is no such provision in the application of international arbitration. Independence as well as impartiality requirement is laid down by CCP that are applicable in domestic as well as international arbitration (Article 1456, CCP). If the arbitrator fails to meet all these requirements, this can lead to the removal of an arbitrator. According to the French law, the arbitrator appointment procedures should not be specified by the parties. As mentioned above, parties are allowed to refer to ad hoc as well as institution rules. If there are no specific procedures or any arbitral rules, it is provided in the CCP

[88] In P. Billiet, P., & Association for International Arbitration. (2013). *Class arbitration in the European Union.* Page 40.

of France that the person with the arbitrator administration responsibility shall appoint the arbitrator whether such arbitrator is domestic or international. Under such cases, two situations arise. First situation is where parties agree that a sole arbitrator should decide the parties' dispute, and where the parties do not agree on the person to be appointed as the arbitrator, the person with the arbitrator administration responsibility shall appoint the arbitrator or the judge acting with the arbitration support will do the appointment. The second situation is where parties agree that three arbitrators should decide the parties' dispute. The arbitrators will be appointed by each party and the two appointed arbitrators will then appoint the third arbitrator upon the lapse of thirty days after receiving the appointment request. When the two arbitrators do not agree on appointing the third arbitrator in thirty days period after accepting the appointment request, the person with the arbitrator administration responsibility shall appoint the arbitrator or the judge acting with the arbitration support will do the appointment. This is provided for under Article 1452 of the CCP.[89]

There can be difficulties arising in a multiparty arbitration when two or more parties are involved in a dispute. There may be a lack of equal opportunity that each party gets when participating in the selection process. This undermines the fairness as well as equity principal. Such a situation arose in Dutco Case whereby arbitration was carried out under the rules of International Commercial Arbitration. At that time, it was considered that ICC was going to have the situation solved where two parties were required to appoint a sole arbitrator (who was eventually appointed by the correspondents but under protest).[90] Additionally the respondent required that the resulting award be annulled before French court. However, the holding of court de cassation[91] that needed multiple defendants who were to nominate a sole arbitrator jointly was against the principle of public policy of equality between parties and this condemned the practice of ICC. It is provided in the CCP Article 1453 of France that, where two or more parties to a dispute differ on the arbitral tribunal's constitution, the person with the arbitrator administration responsibility shall appoint the arbitrator or when such people are unavailable, the judge acting

[89] Bouchardie, N. & Tran, C. (2013). Arbitration in France.

[90] Born, G. B. (2014). *International Commercial Arbitration – Second Edition. Three-Volume Set.* S.l.: Kluwer Law International.

[91] Eng, S. (2005). *Law and Practice.* Stuttgart: Steiner., p. 24.

with the arbitration support will do the appointment. Additionally, following the decision of Dutco, the ICC rules were amended along similar lines, ICC Arbitration Rules 2012.[92]

It is only possible to remove an arbitrator if the parties agree unanimously. The rule under Article 1456 provides that the person responsible for the arbitral administration or an acting judge shall decide on the issue of removing an arbitrator when parties are unable to give a unanimous consent. The application shall be made in a month's time after the disclosure or the discovery of facts concerning the issue.[93]

The following grounds applicable to domestic, as well as international arbitration will be used to challenge an arbitrator on any circumstances affecting the arbitrator's independence as well as impartiality, legal incapacity, resigning or refusing to act. Lack of consent from the parties to have the arbitrator removed on the above grounds would mean that it is mandatory that the issue is resolved in a month's time after circumstances that lead to challenges are discovered by support judge or the person or the institution that is administering the arbitration.[94]

2.5 Arbitral Tribunal Formation Under the UNCITRAL Rules

Section II, Articles 7-10 of the United Nations Commission on International Trade Law (UNCITRAL) provides for the composition of an arbitral tribunal. Article 7(1) of the UNCITRAL Rules requires three arbitrators to be selected in case the respective parties fail to agree on how many arbitrators should conduct the arbitral process. Before the intervention, the stalemate must have lasted for 30 days since the issuance of the arbitration notice with the parties failing to agree on appointing only one arbitrator to conduct the arbitral process. Despite the provisions of paragraph 1 of Section 7 of the UNCITRAL Rules, one of the parties may ask the appointing authority to appoint a sole arbitrator as the procedures that were laid down in Article 8(2) of the Rules require. This may occur if parties fail to respond to the proposal of appointing one arbitrator within the provided time limit. It may also occur when the concerned parties do not appoint the second arbitrator according to Article 9 or Article 10. Articles 8 and 9 of the Rules provide details of the arbitrators' appointment. According to Article 8 of the Rules, an

[92] Bouchardie, N. & Tran, C. (2013). Arbitration in France.

[93] Bouchardie, N. & Tran, C. (2013). Arbitration in France.

[94] [94] Bouchardie, N. & Tran, C. (2013). Arbitration in France.

appointing authority can come in and appoint one arbitrator in case the parties fail to agree on who should be the arbitrator even after agreeing to engage the services of only one arbitrator. The appointing authority should make the appointment if within 30 days after receipt by all other parties of the proposal to engage a sole arbitrator. The appointing authority will appoint the arbitrator at the earliest and shall refer to the list-procedure stated in Article 8(2) (a-d) unless the parties expressly agree to refrain from referring to the list procedure or the appointing authority in its sole discretion decides that using the procedure of a list is inappropriate for the case.[95] In such a situation, the appointing authority will communicate to the parties a list containing at least three names.[96]

Within fifteen days after receiving the list, the list may be returned by each party the authority in charge of the appointment after the objected names have been deleted and the remainder names are numbered in the party's order of preference. After the expiry of fifteen days, the sole arbitrator will be selected by the authority in charge of the appointment from the provided names that have been returned as the preference order of the parties requires. In any case that the procedure may not lead to successful appointment of the sole arbitrator, the authority in charge of arbitrator's appointment would select the arbitrator. Article 9 states that one arbitrator will be appointed by each party if the tribunal consists of three arbitrators. The appointed arbitrators will be asked to appoint another arbitrator to make the number of arbitrators to three. The third arbitrator becomes the presiding officer leading the Arbitral Tribunal. The two parties are given only thirty days beginning the day when they receive the party's notification to make the arbitrator's appointment. Is only one party meets the deadline, that party that has already made its appointment is allowed under Article 8 of the Rule to as the authority in charge of the appoint to nominate a second arbitrator. Failure of the two arbitrators to appoint a presiding arbitrator after30 days will also require the authority n charge of the appointment to make the appointment. Article 10 (1) of the Rules state that where three arbitrators must be appointed and where there are multiple parties as Claimants or Respondents , unless an alternative method is chosen by the parties of appointment of arbitrators, the multiple parties

[95] United Nations Commission on International Trade Law. (2010). UNCITRAL Arbitration Rule (As revised in 2010).

[96] United Nations Commission on International Trade Law. (2010). UNCITRAL Arbitration Rule (As revised in 2010).

jointly either as the Claimant or the Respondent shall appoint an arbitrator. An agreement between the parties that the arbitral tribunal should comprise of more than three arbitrators, then the arbitrators will be appointed as stated in the method of appointment agreed by the respective parties. If there are failures to have the tribunal constituted under the rules, the appointing authority as requested by one of the disputants will constitute the tribunal and by doing so, it may revoke any appointments made in this respect and appoint or reappoint every arbitrator where one arbitrator will be designated as presiding arbitrator.[97]

Pursuant to Article 11 of the UNCITRAL Rules, a potential arbitrator is expected to disclose any circumstances that might result to justifiable doubts regarding his/her impartiality as well as the independence. The arbitrator from the time of his or her appointment as well as through the arbitral proceedings shall without any delay disclose to the parties in addition to arbitral institution that administers the arbitration proceedings of any circumstance that may raise justifiable doubts on its independence and impartiality. According to Article 12 of the UNCITRAL, an arbitrator's challenged may occur if there exists circumstances that may lead to justifiable doubts regarding the impartiality as well as the independence of the arbitrator. The arbitrator may be challenged by a party that has appointed him or her only for reasons that the party becomes aware of after appointment. If the arbitrator does not act or in a de jure or a de facto event the arbitrator is unable to carry out his/her tasks, the procedures as required under Article 13 concerning the challenge of an arbitrator will apply. Article 13 explains that a party planning to challenge one of the arbitrators will be required to send a legal notice within 15 days from the date on which it was informed about the challenged arbitrator's appointment. All the stakeholders including the disputants, other arbitrators, as well as the challenges arbitrator shall be served with the challenge notice. The notice shall also provide for the grounds of challenge. After a party challenges an arbitrator, the challenge may be agreed upon by all the parties. Upon being challenged, the arbitrator may withdraw him or herself from the office. However, withdrawal from the office shall not be understood to mean that the challenged arbitrator is guilty of the allegations. In case disagreement between parties on the challenge within 15 days from the date of the challenge notice or the arbitrator being challenged fails to withdraw, the party conducting this challenge can choose to have the challenge pursued. In such a case, within

[97] United Nations Commission on International Trade Law. (2010). UNCITRAL Arbitration Rule (As revised in 2010).

30 days from the date of the challenge notice, it shall seek a decision on the challenge from the appointing authority conducting the challenge.[98]

2.6 Appointment of the Arbitral Tribunal Under International Chamber of Commerce (ICC)

As the ICC's arbitration body, the International Court of Arbitration (the "Court") oversees and controls the arbitration process at all stages, while disputes are resolved by arbitrators who are either chosen by the parties or directly appointed by the court. ICC arbitration proceedings are carried out under the ICC Rules of Arbitration. There are no confinements in the ICC framework as to nationality of parties and arbitrators, or place, language or law of arbitration.

Pursuant to Article 1 of the ICC Rules of Arbitration, the International Court of Arbitration is the independent arbitration body of the ICC. The court is the main body empowered to govern arbitration under the ICC Rules of Arbitration, including the investigation and approval of awards rendered. The President of the court has the power to take urgent decisions on behalf of the court, provided that any such decision is reported to the Court at its next session. Further, the Court may assign the power to take certain decisions to one or more committees provided it is reported to the Court. According to the directions of the Secretary General, the Secretariat of the court assists the Court in its work.

The general provisions under Article 11 of the International Chamber of Commerce (ICC) on appointment of arbitral tribunal state that it is mandatory that all arbitrators remain impartial as well as independent of parties that are involved in arbitration. Before appointment or the appointment confirmation, a statement will be signed by the respective arbitrator for acceptance, availability, independence as well as impartiality. The prospective arbitrator shall disclose in writing to the Secretariat all the facts and circumstances of such nature that can question the independence of the arbitrator in the party's eyes and the circumstances that can lead to reasonable doubts of the arbitrator's impartiality. Such written information will be provided by the Secretariat to the parties and a time limit will be fixed for the parties' comments. It should immediately be disclosed in writing by the arbitrator to the Secretariat as well as to the

[98] United Nations Commission on International Trade Law. (2010). UNCITRAL Arbitration Rule (As revised in 2010).

parties the factors and circumstances that are similar to those in Article 11 (2) regarding the impartiality as well as the independence of the arbitrator which may arise during arbitration. The court's decision in relation to the appointment, replacement, confirmation or challenges of arbitrator is final and the reasons for the decision will not be communicated. Arbitrators shall undertake their responsibilities after they have accepted to serve according to the rules. If parties maintain their stands, the arbitral tribunal's composition will be according to the Articles 12 and 13 of the ICC Rules.[99]

The constitution of the Arbitral Tribunal is explained in Article 8 of the ICC Rules. The sole arbitrator or the three arbitrators shall decide on the dispute. Where the parties fail to agree upon the number of arbitrators to be appointed, a sole arbitrator shall be appointed by the International Court of Arbitration (the court), unless the Court is of the opinion that the situation is such that warrants the appointment of a three-member Arbitral Tribunal. The Claimant shall nominate an arbitrator within15 days of receipt of a notification of the court's decision. An arbitrator will also be appointed by the respondent within 15 days after receiving the Claimant's nomination notification. If an arbitrator is not nominated by a party, the court shall conduct the appointment. Where the parties agree to have a sole arbitrator to resolve the dispute, the parties shall nominate a sole arbitrator pending the confirmation of the Court. If the parties fail to nominate a sole arbitrator within 30 days from the date of receipt of the arbitration request by the Claimant, or within such additional time as may be allowed by the Secretariat, the Court shall appoint a sole arbitrator.[100]

Several scenarios occur in appointments of three arbitrators. The parties may agree to have the sole arbitrator nominated by request as well as answer for confirmation where the parties agree to have the three arbitrators solve the dispute. If the parties do not nominate the arbitrator, the court will do the appointment. A third arbitrator acting as the President of the arbitral tribunal should be appointed by the court unless other procedures were agreed by the respective parties for such appointment whereby the nomination will be subject to confirmation pursuant to Article 9. If these procedures do not result in a nomination within thirty days from the date of confirmation or any additional time that parties or the court agree upon, the court will

[99] International Chamber of Commerce. (2012). ICC Rules of Arbitration: ICC Rules of Arbitration are used worldwide to resolve business disputes through arbitration. The current Rules are in force as from 1 January 2012.
[100] International Chamber of Commerce. (2012). ICC Rules of Arbitration: ICC Rules of Arbitration are used worldwide to resolve business disputes through arbitration. The current Rules are in force as from 1 January 2012.

appoint the third arbitrator. Where the claimants or the respondents are multiple and where three arbitrators are to solve the dispute; the multiple claimants together with the multiple respondents shall have an arbitrator nominated for confirmation in accordance with Article 10. Where an additional party is joined, and where three arbitrators are to resolve the dispute, the additional party may jointly with the claimants or the respondents nominate an arbitrator subject to confirmation in accordance with Article 10. When there is no joint nomination in accordance with Article 10 (1) or Article 11(2) as well as where parties have failed to agree on the constitution of arbitral tribunal, each member of the arbitral tribunal may be appointed by the court and shall designate one of them to act as the President. Under such a case, the court will have the freedom to choose any individual that the court regards to be suitable to be an arbitrator according to Article 19 when the court considers appropriate.

In confirmation as well as appointment of arbitrators, the prospective arbitrator's residence, nationality as well as other relationships with the countries of which the parties or the arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules shall be considered by the Court. This will be applicable where the arbitrators are confirmed by the Secretary General according to Article 9 (2). The Secretary General shall confirm the sole arbitrators, Presidents of the arbitral tribunal as well as co-arbitrators from the persons nominated by the parties provided that the statement they have submitted has no qualification concerning the impartiality as well as the independence or that a qualified statement regarding impartiality or independence has not given rise to objections. If the Secretary General is of the opinion that a co-arbitrator, sole arbitrator or president of an arbitral tribunal should not be confirmed, the matter shall be submitted to the Court. Where the arbitrator is to be appointed by the court, it shall make the appointment upon receipt of a proposal from a National Committee or Group of the ICC that it considers appropriate. If the Court does not accept the proposal or the National Committee or the Group of the ICC does not submit its proposal within the stipulated time period, then the Court shall repeat its request and require another National Committee or Group of the ICC that it considers appropriate or alternatively, directly appoint any person whom it regards as suitable. A person may be appointed by the court directly if he/she is regarded suitable under three conditions. The first condition is when one or more parties is a State or claims to be State entity. The second condition is when the court considers to appoint an arbitrator from territory or from a country where there is no national

committee or the ICC Group. The third condition is when the president certifies to the Court that there exist circumstances which necessitate a direct appointment. The fourth is when the President of the arbitral tribunal or the sole arbitrator belongs to a different nationality than that of the parties. However if the circumstances are suitable and the parties involved do not object within the given time limit that the court has fixed, the President of the arbitral tribunal or the sole arbitrator [101] may be chosen from a country of which either party is a national.

An arbitrator can be challenged when it is alleged that he or she lacks impartiality or lacks independence and shall be carried out via submission of written statement to the Secretariat which specify the circumstances as well as the facts on which the challenge is based. A challenge is only admissible when it is submitted by the party within a month's time from the date when the party received the appointment notification or the arbitrator's confirmation or within a month's time since the date the party conducting the challenge became aware of the facts and circumstances on which the challenge is based. The admissibility and the merits of the challenge will be decided by the court after the Secretariat has afforded an opportunity to the concerned arbitrator, for the parties in addition to other arbitral tribunal members to comment within an appropriate time period. The parties in addition to the arbitrators shall be informed about the comments.[102]

An Arbitrator shall be replaced upon his death and the court has discretion to decide whether or not to follow the original nominating process, the court may also decide that the remaining arbitrators shall continue the arbitration taking into consideration the view of the remaining arbitrators and such other matter, when an arbitrator is to be replaced, the Arbitral Tribunal shall decide if and to what extent prior proceeding shall be repeated.

The Arbitrator shall be replaced also upon the acceptance by the court of the arbitrator's resignation, upon acceptance by the court of a challenger, upon the request of all parties and on the court initiative when it decides that he is not fulfilling his duties in accordance with the rules as well as misconduct during the proceeding and the violating of the other duty impose by law or institution or he is not fulfilling his function within the time limits[103].

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[102] International Chamber of Commerce. (2012). ICC Rules of Arbitration: ICC Rules of Arbitration are used worldwide to resolve business disputes through arbitration. The current Rules are in force as from 1 January 2012.

[103] Article 12, Section 2 ICC Arbitration Rules.

Both Lack of independence and impartiality recognize by the majority of arbitration laws and rules as justifiable reasons for a challenge[104], English and Us Law in most cases require that there is a "serious danger" of a lack of impartiality. According to Article 11(2) ICC rules "a challenge of an arbitrator, whether for an alleged lack of independence or otherwise"This provision grant the court unlimited discretion to remove an arbitrator for whatever ground it seems appropriate.

2.7 Appointment of an Arbitration Tribunal Under American Arbitration Association ("AAA")

At either of the party's request or upon the initiative of American Arbitration Association (AAA) an administrative conference can be conducted by the AAA in person or through telephone with parties and the party representatives. Issues such as selection of arbitrator, dispute mediation, potential information exchange, hearings table as well as any administrative matter can be addressed in the conference.[105] There may be mutual agreement between the parties where arbitration takes place. Disputes concerning the arbitration locale that AAA should decide are to be submitted to AAA as well as to other parties in 14 days from the AAA case initiation date or a date that AAA has established. Disputes concerning the locale should be solved as follows. When the arbitration agreement of parties is silent regarding the locale and if parties do not agree on the locale, the place of arbitration will be determined by the AAA subject to the arbitration power after the appointment to decide finally about the locale. When the arbitration agreement of parties needs a particular locale, the parties may change the locale upon agreement or the arbitrator may determine upon an agreement that laws applicable needs different locale therefore the locale should be specified in the arbitration agreement. If the locale reference as specified in the arbitration agreements seems to be ambiguous, and parties fail to agree to a

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[104] Julian D.M.Lew,Loukas A. .Mistelis,Stefan Michael Kroll, Comparative International Commercial Arbitration, 2003 p. 223.

[105] American Arbitration Association (AAA). (2013). Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes).

particular locale, the locale will be determined by the AAA subject to the arbitrator's power who will determine the specific locale finally.[106]

At the sole discretion of the arbitrator, the arbitrator will have full authority to carry out the special hearings needed for the purpose of document production or at the locale if it is important as well as helpful to this process. If an arbitrator is yet to be appointed by the parties and the parties are yet to provide other appointment methods, the following method should be used to appoint the arbitrator. An identical list containing ten names of individuals who were selected from National Roster will be sent simultaneously to all the parties in dispute by AAA (it is decided by AAA that it is appropriate to have a different number). Parties are required to select arbitrators from the submitted list as well as advice AAA of their agreement. If the parties are not able to agree on an arbitrator, each disputed party will have 14 days since the transmittal date to strike the objected names, to number the names left out in preference order as well as to give back the list to AAA. The selection list must not be exchanged by the parties. If either of the parties fail to give back the list in the specified time frame, the persons named in the list will be considered acceptable to the party. From among the approved persons on the two lists and according to the mutual preference designated order, AAA will pick an arbitrator who is willing and ready to take up the role of arbitration. If the parties do not agree on the named persons, when the acceptable arbitrators fail to act or if appointment cannot be conducted from the list submitted due to any reasons, AAA will assume the power to appoint from the National Roster members without submission of other lists. Unless it is agreed otherwise by the parties, all arbitrators may be appointed by AAA when there are two or many claimants or many respondents.[107]

If the parties agree to name an arbitrator or have a specific arbitrator appointing method that must be followed, the appointment notice shall contain the name as well as the arbitrator's address. Upon the appointing party's request, a list of National Roster members will be submitted by AAA from which the parties can nominate an arbitrator. When the parties agree that they should name a sole arbitrator, the name of the selected arbitrator must meet Section R-

[106] American Arbitration Association (AAA). (2013). Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes).

[107] American Arbitration Association (AAA). (2013). Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes).

18 standards regarding the impartiality as well as the independence unless parties come to an agreement in accordance with Section R-18 (b) that the arbitrators appointed by a party should be neutral and must meet the standards.[108] If the arbitration agreement requires the parties to nominate the arbitrator within a specified time period and the parties fail to do so, the AAA shall appoint the arbitrator. If the parties do not specify the time period to have the arbitrator appointed, the party shall be notified by the AAA to have the arbitrator appointed. If 14 days elapses after sending the notice and the party fails to appoint the arbitrator, the appointment will be made by AAA.[109]

In accordance with Section R-13 where either the arbitrators were appointed directly by the parties or AAA appointed the arbitrators, and the parties authorized the arbitrators to appoint a chairperson within the specified time period and appointment is not done within the given timeframe or within the additional time frame, the chairperson will be appointed by AAA. If the parties do not specify the time period to have the arbitrator appointed, the parties shall be notified by the AAA to have the arbitrator appointed. If 14 days elapses after sending the notice and the party fails to appoint the arbitrator, the appointment will be made by AAA. If parties agree that the chairperson shall be appointed from the National Roster, the arbitrators appointed by the parties will be furnished with a list of arbitrators selected from the National Roster by the AAA and the chairperson shall be chosen from this list in accordance with Section R-12. Where parties belong to different nationalities, the party may request AAA or through the AAA initiative, that the arbitrator to be appointed by AAA shall not come from the same country that of the party. The parties shall make such request prior to the time period specified for the appointment of the arbitrator in accordance with the parties' agreement or according to the set rules. If the arbitrator number is not specified in the arbitration agreement, a sole arbitrator shall hear and determine the dispute, unless AAA in accordance with its discretion, points out that the three arbitrators are to be appointed. Parties may forcefully request three arbitrators or request AAA to consider its discretion concerning the number of arbitrators to be appointed to the

[108] American Arbitration Association (AAA). (2013). Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes).

[109] American Arbitration Association (AAA). (2013). Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes).

particular dispute.[110] If there is any request to have the number of arbitrators changed due to an increase or due to a decrease in the claim amount or different claim, AAA must make the necessary changes after consulting with other arbitration parties within seven days of receiving the claim amount change notice. If parties fail to agree to have the arbitrator numbers changed, this will be determined by AAA. Any individual appointed or to be appointed as an arbitrator will be required to inform the parties together with their representatives of the circumstances that may result to any justifiable doubts regarding the impartiality as well as the independence of the arbitrator. This includes the bias or personal interests or financial interests due to arbitration or the past relations with parties as well as their representatives reported to AAA. Such obligation will be effective during the arbitration period. If the party or the party representative does not comply with the rules, it could lead to waiver of the right to object to the arbitrator according to Rule R-41 of AAA. After receiving this kind of information from the arbitrator or from other sources, the information shall be communicated by AAA to the parties, provided AAA thinks it is appropriate to pass the information to the arbitrator as well as others. Information disclosure according to Section R-17 does not indicate that arbitrator should consider that disclosed information will impact on the impartiality or the independence of the arbitrator.[111]

All arbitrators must be impartial as well as independent. They should carry out their duties with good faith as well as diligence. The arbitrators can be disqualified for lack of independence or lack of impartiality, inability to perform or refusal to perform the assigned duties with diligence as well as good faith. Upon a part's objection to have the arbitrator continue with his or her service, the AAA through its initiative shall make the determination whether to disqualify the arbitrator under the above grounds and the parties will be informed of the conclusive decision made by AAA.[112]

If an arbitrator is unable or unwilling to perform the duties of the office, The AAA may appoint substitute arbitrator in accordance with the applicable provisions of AAA rules, and the

[110] Born, G. B. (2014). *International Commercial Arbitration – Second Edition.Tthree-Volume Set*. S.l.: Kluwer Law International.

[111] American Arbitration Association (AAA). (2013). Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes).

[112] Platte, M. (2002). When Should an Arbitrator Join Cases?. Arbitration International, 18(1).

panel of Arbitrators on its sole dissection shall decide whether to repeat part or all prior hearing.[113]

[113] Article R-20 Vacancies American Arbitration Association (AAA). (2013). Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes).

3.0 Methodology

In order to understand the practice involved in arbitration and how the parties appoint arbitrators, interviews were conducted with arbitrators who understand the process of international arbitration. Due to the involving nature of their work and time constraint that would not be adequate to interview many arbitrators, only four interviews were conducted. The participants were selected based on their profiles in the LinkedIn social media and the interviews were conducted using Skype. The participants included 2 males and two females in additional the interviews were conducted face to face with three Arbitrators.

3.1 The Choice of Unstructured Interview

The interviews were not structured in any way because the researcher sought to get the opinions of different arbitrators on different matters that could not be covered with each and every participant in the study. The researcher however ensured that the interviews revolved around the selection and appointment of the arbitral tribunal in different jurisdictions. Key among the things that the researcher sought to understand was whether the arbitrators actually followed all the procedures and processes that are laid down in these rules and laws that govern the arbitration process. Once an interview was conducted with one participant, the researcher went through the notes that were taken during the interview in order to identify the main points and issues that the participant presented. This also helped in identifying those issues that were yet to be addressed. Once such issues were identified, they were presented to the next participant. This method prevented repetition of the issues that were already addressed by the previous participants and created a better opportunity to seek clarification or opinions of the issues that the previous participant raised in the previously concluded interview.

3.2 Data Collection Method

The researcher conducted the interviews using two forms of social media that included LinkedIn and Skype.

3.2.1 LinkedIn

LinkedIn was used in identifying the participants since this social network site brings together people with diverse professional backgrounds. The target population included those people whose profile indicated that they once worked as arbitrators. The researcher went a step

further to find out how long the identified individuals worked as arbitrators. The main aim of doing so was to ensure that the participants had a working experience of at least 5 years as arbitrators. This would ensure that the information that the researcher received from the participants was authentic and could be relied upon in making valid conclusions. Once the researcher was satisfied with the qualification of a participant, a message was send to the individual requesting him/her to participate in the study. Even though the researcher sought to include only seven participants, twenty arbitrators were identified and messages were sent to them. The reason was that the researcher wanted to ensure that those participants who would positively reply to the request would not be less than seven. The researcher also understood that some of the targeted participants may receive the messages too late while other may choose to ignore or decline to participate in the study. In order to ensure that the number was capped at seven, the participant followed the rule that would ensure that the first seven targeted participants who would respond positively and take part in the study would be included.

3.2.2 Skype

The researcher used Skype to carry out the actual interviews. The choice of Skype was based on its cost effectiveness and ability to be used in private areas where there would not be interruptions. It was also chosen because of its ability to communicate with the participants when the researcher and the participant could actually see each other. This helped in examining the facial expression and determining whether the participants' comments could be relied upon or not. It also created a sense of seriousness that was important in winning the confidence of the participants. During the interview process, the researcher made notes that would be used in preparation of the report.

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4.0 Interview Results

4.1 Interview with the First Arbitrator

The First Arbitrator was James Abbott who is one of the renowned and experienced arbitrator. In the interview, he explained how parties can effectively select arbitrators whenever there is a commercial dispute especially when it is international in nature.

a) How can parties appoint arbitrators effectively for an international arbitration?

To begin the interview, he was asked to explain how parties can select arbitrators effectively for an international arbitration. According to him, parties should only select arbitrators who will help in ensuring that the arbitral process is not only maintained but also promoted to ensure that the parties are able to resolve their disputes effectively. The selection of the arbitral tribunal according to the First Arbitrator determines whether the process of arbitration will be trustworthy or not. He explains that the main goal of parties in conflict is to ensure that an arbitral process is transparent and this according to him can only be achieved if the process of selecting the arbitral tribunal is transparent. He states that an arbitrator who is selected without conducting due diligence stands a high chance of tainting the entire arbitral process. In this case, parties should understand well how arbitration is conducted especially within the international arena for them to make proper decisions on how best they can appoint arbitrators who can properly represent them in the entire process of dispute resolution. One of the things that the parties must consider before making any appointment is the individual's motivation to preside over an arbitration process. It is important for the arbitrators to have that desire to maintain dispassionate as well as detached panelists who can preside over and conduct the dispute successfully. Many parties who seek to use arbitration process in resolving international disputes are mainly those whose deal at stake is great. In this case, they are reluctant to consider compromise as a possible way of resolving the conflict. Before they make the decision to engage in an arbitration process, they conduct numerous consultations that involve not only legal experts but also arbitration consultants. They must therefore be sure that the issue of the sum of money at risk is large enough to warrant the use of arbitration process. In this process of consultation, experienced arbitrators express their interest in the case.

b) Why do some parties prefer arbitral process to other methods of dispute resolution?

The parties who prefer arbitration process to court system as well as mediation have diverse reasons. One of the greatest fears is that these two methods of dispute resolutions may pass their judgment that may never be enforced especially where foreign jurisdiction that does not recognize the award is involved. In many cases, arbitration awards are not only highly recognized across the world but also easily enforced as compared to awards that are received through either a court process or through mediation. In the case of Armada (Singapore) Pty Ltd v Gujarat NRE Coke Limited[114], a question was put forward to determine whether awards resulting from the constitution of an arbitral tribunal without following the arbitration agreement were unenforceable in the Australian legislation on international arbitration. The case demonstrated that Australia, like many other countries, enforce foreign awards on arbitration. The case demonstrated how important it is to draft an arbitration agreement especially when it comes to enforcing foreign awards that resulted from an arbitration process. Ensuring that the arbitration agreement is followed word by word to avoid a situation where one of the parties may challenge the decision made by the arbitral tribunal and render the award unenforceable is crucial. These parties that commonly use arbitration are also comfortable that their dispute is being resolved by people who have adequate knowledge and experience concerning the industry in which they operate. The reason is that they are more likely to consider the industry's commercial realities and this will make it easy for them to weight the issues in a manner that will be fair and just as compared to other industries across the globe. According to the first subject, the use of an arbitration process ensures that the parties avoid court's prejudices as well as analysis that may be superficial or even overly legalistic. Arbitration process is also preferred to other methods of dispute resolution because of its confidentiality. Is also attracts less costs and its use in resolving disputes takes a shorter time. The First Arbitrator however warns that such advantages should not blind the parties because they are usually highly exaggerated.

c) How is the process of selecting the arbitrators actually done?

Once the parties confirm that they cannot negotiate and resolve their dispute, a legal counsel usually begins the arbitration process. The legal counsel who is usually a lawyer begins the process in a manner that will promote the interests of the clients. The counsel must however adhere to all the rules as well as the ethical standards that should govern the entire procedure.

[114] Armada (Singapore) Pty Ltd (Under Judicial Management) v Gujarat NRE Coke Limited [2014] FCA 636

When the party appoints the arbitrator, the search of an individual who is strictly impartial or who is very neutral is not usually the case in actual essence. The parties however tend to focus so much on those individuals who have the right qualities that will most probably assure them of proper understanding of their viewpoints and who will not only be appreciated but also whose viewpoint will most probably prevail. The parties therefore seek to appoint arbitrators who will be easily persuaded by their arguments to an extent of becoming proponents to these arguments. The First Arbitrator is of the opinion that the theory of selecting an arbitrator differs significantly from what actually happens when the parties make their appointments. According to him, it would be a lie to claim that an arbitral tribunal consists of people who are utterly objective, aloof, as well as impartial since the arbitral team is not chosen by a neutral party. It is also untrue to say that the parties do not play any role in the arbitration process whether directly or indirectly because they appoint arbitrators and give them a responsibility with an objective to achieve. Such utopian exercise of appointing arbitrators, according to the First Arbitrator, cannot be relied upon by the parties and cannot be attractive to the disputants in any way. According to him, arbitration processes in practice and in theory are quite different.

d) How is the process of selecting the arbitrators supposed to be done?

According to the First Arbitrator, the process of how an arbitrator should be chosen and how the arbitrator is chosen in practice differ significantly. In many instances, parties are directed by arbitration clauses that require them to select an arbitral tribunal that is tripartite. In such a situation, the parties have equal rights of appointing one arbitrator before they delegate the task of appointing the chairperson of the tribunal to the arbitrators they have already chosen. In the event where the arbitrators chosen by the parties disagree on the appointment of the chairperson, they are supposed to seek the help of an arbitration organization of their choice or seek a court directive on this effect. Many parties seek to know the background information of the arbitrators before they appoint them. Such information includes their qualifications and experience in presiding over arbitration processes, their nationality, their language command, their technical knowledge, their availability, and their appropriateness of their skills in resolving the dispute. These attributes, according to the First Arbitrator, are important but should not be the main focus. According to him, the most important guiding principle should be the personal qualities of the arbitrators. Such qualities include their management skills, their ability to make decisions, their competence in procedural matters, and their ability to judge effectively.

Neutrality of the chosen arbitrators may be good but it is not good to concentrate on neutrality at the expense of other important aspects because this would weaken the arbitrators' assessment that is mainly based on other qualities aforementioned and not neutrality. According to him, an arbitrator should not necessarily be unknown to the parties in dispute or even the counsel of the parties. The most important issue that they should emphasize is their independence. The parties should be able to differentiate independence from neutrality. The First Arbitrator however insisted on the importance of openness in the selection process because it encourages the parties to investigate the contact of the arbitrators for the process.

4.2 Interview with the Second Arbitrator

In another interview, the Second Arbitrator was Christopher Mainwaring Taylor. He is an experienced lawyer and Arbitrator. He is also highly experienced having working with different organizations as an arbitrator began by explaining what disputants actually look for when appointing arbitrators.

a) What do disputants actually look for when appointing arbitrators?

According to him, parties have no business in appointing strictly neutral parties. On the contrary, they seek to appoint people who are highly rational and people who can manage to control the decision of the arbitral tribunal as much as possible. They seek to choose an arbitrator who can pick those points that the other members of the arbitral tribunal put across, appreciate them and use their personal experience to turn them to their favor and indirectly support their views that are also the views of the appointing authority. According to him, a good arbitrator includes a person with an unimpeachable integrity and who is able to choose a member or members of his arbitral tribunal especially the chairperson who will only increase his confidence level through out the process of arbitration. Such a person will always ensure that he prevails over his colleagues.

b) What are the main traits that the party must look for before they appoint an arbitrator?

According to the Second Arbitrator, an arbitrator who lacks credibility especially in the company of his colleagues in the arbitral process is not worth to be appointed. Among other traits, the Second Arbitrator identifies four main traits that the parties must always look for whenever they appoint an arbitrator to represent their interests in the arbitral tribunal.

A good arbitrator must be an expert in that industry within which the dispute falls. This ensures that the arbitrator understands the issues well. It also ensures that he is accorded the due respect by the other members of the arbitral tribunal. An arbitrator who lacks adequate knowledge on the industry in question has little or no influence in the process of making the final decision and this will disadvantage the party in that he/she represents.

A good arbitrator must also have a highly forceful personality. In this case, the arbitrator must be able to be convinced by the correctness of the position of the party that he/she represents. This will ensure that he fully understands what he stands for, which will be an added advantage in persuading the other members of the arbitral tribunal to take a similar position. He should therefore be able to overcome the contradictory opinions of the other members of the arbitral tribunal.

A good arbitrator must also be able to understand the implication of the dispute on commercial matters. As a result, he/she must be well versed with commercial customs that govern that particular industry and all those practices that are involved. This will make it easier for the arbitrator to appreciate the consequences of the decision that the arbitral tribunal makes. Consequently, the arbitrator must be able to appreciate the fairness of a decision that the arbitral tribunal may make to the party whose interests he/she represents.

Finally, the arbitrator, according to the Second Arbitrator, must be able to understand and appreciate all evidential rules as well as procedures for him/her to contribute effectively in the arbitral process. He must understand the pertinence as well as propriety concerning admission and evidences that are presented before the tribunal. The attitude of an arbitrator is very important. Arbitrators must be people who appreciate rule of law and all procedures involved in the process.

c) Should an arbitrator be a lawyer for him/her to perform effectively?

While it is believed that arbitrators are people who may not necessarily be lawyers, arbitration in domestic disputes would be best carried out by people who are experienced in international arbitration where they practiced as lawyers. This will give the party that appoints the arbitrator a big advantage over the other party. Those people who have ever dealt with procedural issues find it easier to handle issues between themselves and the disputants in the cases where they are appointed as arbitrators.

d) To what extent should documentary evidence be pursued in order to arrive at a fair decision?

The arbitrators should be able to work with limited documentary evidence and this means that the arbitrator must be able to use the most relevant materials and present as evidence in support of his views rather than presenting immaterial documents. The use of too many documents, according to the Second Arbitrator, is a potential threat to justice and the arbitrator should know what evidence needs to be presented and that which is immaterial. According to the Second Arbitrator, discovery volume and documents volumes are very different when it comes to admitting them into evidence. This is similar as in the case of court cases where the quality of the evidence determines the verdict. In arbitration, this issue of failing to take quality of evidence into consideration is rampant. The arbitrator should be in a position to identify and examine the documents that presents a certain issue that is before the tribunal. This should be done for all the materials that are presented on that particular matter regardless of how many documents they are. In order to come up with a verdict based on all the evidence presented, more time is used in examining the evidence. Some organizations use tactics in ensuring that damaging documents are not disclosed and the arbitrator should be able to unearth such schemes. Many people, according to the Second Arbitrator trust their lawyers or business entities in voluntarily disclosing all documents that the tribunal can use in order to arrive at a fair decision. Such expectations are unrealistic because almost all businesses or persons who are involved in such a case do not reveal all information especially that is incriminating and that may be used against them. It is therefore upon the arbitrator to ensure that all the evidence that is presented before the tribunal is closely examined and scrutinized. Without going through all the documents and disclosing all the available evidence as presented by the parties, the tribunal cannot arrive at a conclusion that would not only be unfair but would not meet the required threshold for the required integrity level. One of the important skills that an arbitrator needs to learn is how to select a suitable chairperson who is also referred to as the presiding arbitrator.

e) Is there any role that the parties' counsels play in the selection of the chairperson?

While in theory it is believe that the parties in conflict should maintain their neutrality and should not participate in the process of selecting the chairperson, this is not usually the case when it comes to the practitioners. The practitioners in arbitration know very well and understand that an arbitrator plays a very decisive role in the arbitral process. It is therefore

important for the arbitrator to have good skills that would match the influence of the opponents who will seek to ensure that the proposals of the party that he/she represents sails through without much difficulties. The arbitrator must also propose to nominate a candidate whom he/she feels will represent the wishes of his/her client. The arbitrator should also be able to oppose objectively the candidate whom the opponent proposes for the position of the chairperson. The issue of neutrality of the parties is therefore theoretical and not practical. Just as in the case of appointing the arbitrators, the process of appointing the chairperson should be transparent and open. Despite the fact that the chairperson is proposed by one of the arbitrator representing one party, he/she is expected to be impartial as well as neutral. The arbitrator needs to appoint a person whom they know and the appointment should be purely based on merit. The qualifications of the chairperson are very important. The input from the parties' counsels is vital in ensuring that the arbitrators are relieved from the vetting burden since the counsels can do it on their behalf. The absence of the parties' counsel makes the process of selecting the chairperson easier because less time and resources are used. There is also less risk of selecting unqualified individuals who may also be conflicted. Whenever the appointment of a chairperson of the arbitral tribunal does not seem to be supported by the parties, controversy may arise that may even be followed by challenges in courts for the arbitral award to be revoked. This is a possible consequence of appointing a neutral person as the chairperson where the parties have no say even through their counsels. The views of the parties should not be ignored when appointing the chairperson of the arbitral tribunal since such a move tarnishes the integrity as well as the authority that has been vested upon the arbitral tribunal. It also brings about increasing tensions that result from high level of mistrust that yield no benefits to either of the parties.

4.3 Interview with the Third Arbitrator

The third Arbitrator was Chelsea Emerson who is specialist on legal matters concerning both construction as well as engineering. She is a woman who works with an Australian construction company. She is well versed with matters concerning infrastructure as well as energy resources. She has working experience in resolving construction disputes through the use of mediation, arbitration, expert determination, as well as court processes. She has also worked on numerous instances in resolving cross border disputes as well as international arbitrations in commerce in Australia as well as in the Asia Pacific. According to the Third Arbitrator, a

transparent arbitral process is very important in dispute resolution. The arbitrator, whom the party appoints, must be someone who would win the confidence of his/her client. She argues out that arbitration process is adversarial.

a) What should the parties look for when appointing arbitrators?

According to the Third Arbitrator, the selection of an arbitrator must be done without ignoring the body language as well as the personalities of the prospective candidates. Such skills must be used while appointing arbitrators because they play an important role in the determination of the verdict. The use of arbitration involves disputes that may involve huge sums of money and the arbitrators' appointment should be taken seriously by the parties. The services that the arbitrators or the parties should seek from the parties' lawyers do not include advice or opinions on how the dispute should be resolved by how best they can help in putting in place an arbitral team that would help in resolving the conflict amicably.

b) How does theory and practice relate in matters of arbitration?

Contrary to what theorists think, the parties and the arbitrators need to work closely with those lawyers who will sharpen their skills in advocating the positions they hold, providing insight views concerning the business in question, and ensuring that the process flows smoothly without infringing the laws that anchor the arbitral process. This indicates that the theory of arbitration and the practice of the same differ significantly.

c) Between arbitral process and court process, which one would you encourage people to us?

The arbitral process according to her is superior to the court process since the decision or the verdict is made by experts. The dispositions concerning those issues in dispute are primarily driven by the arbitrators' experience in commerce but not by social personal, as well as political interests. The parties are in a good position to select arbitrators who are experts with very high ability that would help in commanding the arbitral proceedings. The parties also choose arbitrators of high level of integrity and who can appreciate their views. Unlike the case of a court process, the parties in arbitral process have very high likelihood of getting proper rewards.

4.4 Interview with the Fourth Arbitrator

The Fourth Arbitrator is a woman by the name Rita Jaballah, she is highly experiences in resolving regulatory disputes here the English law, International law as well as UAE law. She is

a specialist in litigation as well as arbitration. She has also worked as a professor in one of the universities in the US. In the interview, she began by answering the following question.

a) Which is the most important step in any arbitral process?

According to her, the selection of arbitrators is the most important step. The reason is that the arbitrators who are chosen to oversee the arbitral process determine the outcome of the dispute and whether the parties will get justice or not. As a result, she stresses on the importance of making careful selection of the arbitrators. According to the Fourth Arbitrator, arbitrators must be very responsive to the side of the case relating to the client they represent. She described the selection process of arbitrators as a neutral process that has been enhanced.

b) What determines the quality of any process of arbitration?

She states that the arbitrators' fair-mindedness, ability, as well as their experience in arbitration determines the quality of any process of arbitration. The selection process should be based on the arbitrators' responsiveness potential to the case of their clients. This brings the difference when different sets of arbitral tribunals are chosen to preside over the hearing and determination of same case only to come up with very different verdicts.

c) How is the selection process of the arbitrator conducted?

According to her, a case is first filed after which the selection process of arbitrators begins. This is mainly started after holding an administrative conference. During the conference, the parties' counsels state the qualities of the arbitrators who should be appointed to convene the arbitral tribunal and settle the dispute. The counsels need to be well versed with the case of their clients and they should also have high determination in identifying the arbitrator preferences of the parties they represent. This helps them in determining the sex or gender, the age, level of experience, commitments in job, and the profession if the arbitrators who will best handle the case to the satisfaction level of the party. The arbitrators must match with the strengths as well as the weaknesses of the case in question since this will enable the attorneys to help in identifying an arbitrator with the most suitable personalities.

d) Can a party use similar arbitrators to handle different cases?

According to the Fourth Arbitrator, the suitability of an arbitrator depends on the case in question. There is a need to examine the logic chain and find out whether the client has a significant likelihood of winning. This is mainly determined by the factual information that is available to the arbitral tribunal, equities, as well as law. The potentiality of arbitrators must

therefore be determined on the aforementioned basis and whether the arbitrator is appointed to sit in different arbitral tribunal, what matters is his/her capability and ability but not the number of cases in which he/she is engaged in.

e) Why is the chair important to the parties in arbitration process?

The chair is very important as his/her contribution has a great impact on the case's outcome. That is why the chair must have a very strong voice to lead the other members of the arbitral tribunal.

4.5 Interview with the Fifth Arbitrator

Dr. Ramdas Pillai was the fifth arbitrator. He has been as arbitrator for over 20 years and he is therefore highly experienced in matters concerning the arbitral process. He is a Fellow of the Chartered Institute of Arbitrators, London and a Fellow of the Indian Council of Arbitration, New Delhi. He was asked a number of questions that included the following.

a) What type of disputes you involved with as an arbitrator?

In his response, he pointed out that he has worked as arbitrator in many areas. He was however involved mainly in construction disputes, disputes on intellectual property, and other commercial disputes.

b) How was it that you were selected/appointed as arbitrator; would you please explain about the procedures that lead to your appointments?

He explained that his nomination in those instances where he participated in dispute resolution was made by one of the warring parties in most of the cases. Such a disputant either knew him or the selection was based on a list of arbitrators that the disputants received from an arbitration institution. The arbitration institution provided the list of the arbitrators to the disputants upon their request especially where they were unable to agree on the selection process or where they did not know where to get qualified disputants who would adequately represent them in the arbitration process.

c) What are the important criteria in selecting you?

The Arbitrator indicated that the selection criteria used in appointing arbitrators was not easy to explain because it varied from one dispute to another. As a result, he pointed out that many factors were considered before he was selected as an arbitrator. These factors according to him included his expertise on legal issues that were involved in that particular dispute and

whether he was available to take up the arbitration role. Other factors that were considered included whether he had any conflict of interest in the dispute and whether the parties involved in the conflict had faith in him based on his integrity as well as his impartiality.

d) What are the criteria you consider before accepting an appointment?

In responding to this question, the Arbitrator indicated that the first thing that he would for him to accept his appointment as an arbitrator was whether he was able to provide services that would facilitate the dispense full justice. As a result, he cited several areas that he would consider. One of them was the subject matter since his effectiveness as an arbitrator relied on whether he had adequate expertise and knowledge on the disputed issues. The other area he would consider, according to him, is the schedule of the arbitral process. This according to him was important to ensure that he had no other commitments that would clash with the arbitral schedule and that would lead to delay or failure to meet deadlines if required to do so. The other area was whether he had any conflict of interest in handling the case. According to him, impartiality is an important element in the arbitral process and he would disqualify himself if anything would likely affect his impartiality no matter how little it may seem. The other was his, cultural competence. According to him, he would only take up such a position if he was in a position to understand any cultural nuances if there were any. The reason was that an understanding cultural nuance would enable him to understand the different perspectives of the dispute and be able to offer make vital contributions to resolving the dispute.

e) In your opinion, what makes a perfect arbitrator?

According to him, there is no person who can be a perfect arbitrator. The reason is that arbitrators come from different backgrounds, cultural, political, linguistic, legal and professional. These backgrounds, according to him, have different influence levels that determine the arbitrators' perception on the dispute. The perceptions are certainly reflected when they are giving their judgment as well as awards. He gave an example of arbitrators whose backgrounds differ where one of them has a background on civil law while the other has a background on common law. When the two arbitrators are asked to give their perception concerning a certain legal issue in dispute, their perceptions differ significantly. He was therefore on the opinion that the decision to choose an arbitrator should be based on whether the arbitrator is able to carry out his/her arbitral functions without fear of any contradiction or favor. He/she should also be able to offer his/her services with the highest level of integrity.

f) What do you think about removal of arbitrator during the process of arbitration?

The Arbitrator pointed out that no arbitrator would be happy if he/she was discontinued from conducting his/her functions as an arbitrator in a case before it is concluded. This indicates that many arbitrators need to be careful to ensure that they are able to arbitrate a case to its conclusion before they accept their appointment. According to him, termination of services of an arbitrator results to huge losses on their part because they not only loose time an money but also their credibility is put into question. He however points out that if the need arises to remove an arbitrator from the arbitral panel before the case is concluded, the arbitrator has no choice. Such actions are taken after the commencement of the arbitral process due to several reasons that are mainly associated with the change of circumstances. Such a change may be the incapability of an arbitrator to discharge his/her duties due to physical, political or mental reasons. There may also be conflict of interest that may emerge after the arbitral process kick off. The stakeholders may also discover facts or circumstances that were either unknown or undisclosed during the time when the appointments were made concerning the arbitrator's suitability or any other reason that may warrant his/her removal.

4.6 Interview with the sixth Arbitrator

Dr. Hussam Al Talhuni was the sixth Arbitrator. He served as the first director of the Dubai International Arbitration Centre (DIAC) since its establishment in May 2013 to June 2010. He has also been a lawyer since 1993, an international commercial arbitrator, and an expert in most types of dispute resolution. As a result, he possesses extensive experience in the field of enforcement of national and foreign arbitral awards in the UAE. The Arbitrator was asked to respond to the following question.

a) In your opinion what makes a perfect arbitrator?

According to him, no person can be a perfect arbitrator. An arbitrator, however, must possess the following skills and ability to add value to international arbitration. An arbitrator must have adequate knowledge concerning the management of the arbitration case. He/she must also have adequate knowledge of the procedures of public policy. He/she must also know and understand the national law that is relevant to the dispute. He/she must also possess adequate knowledge concerning the cultural background relating to the case in question. He/she must be knowledgeable on the language that was used in drafting the arbitral contract and those who have

knowledge of several languages that the disputants use usually have an added advantage and have greater advantage in handling the case. According to him, the arbitrator should also have a comprehensive understanding of the substantive and procedural laws of the land in order to issue an enforceable award.

4.7 Interview with the Seventh Arbitrator

The Seventh Arbitrator was Dr. Reyadh Al-Kabban. His experience as an arbitrator spans for over 40 years where he has managed to serve as a Chairman or Co-Arbitrator in an arbitral tribunal. The questions that he was asked to answer included the following.

a) What type of disputes have you been involved with as an arbitrator?

According to him, he is very experienced in resolving disputes in real estate, commercial, financial disputes, contractual disputes including mergers and acquisitions (M&A) and Maritime disputes.

b) How was it that you were selected/appointed as arbitrator; would you please explain about the procedures that lead to your appointments?

His appointments were based on the procedure that disputants in UAE arbitration centers are expected to follow after initiating any arbitration proceeding. Both parties, required to nominate their respective co-arbitrators. Upon making the nominations, each party is supposed to forward a detailed CV of their nominated co-arbitrator their arbitration center's executive committee. The nominated arbitrator is then informed by the center after which he/she is supposed to communicate about his/her acceptance to the position of a co-arbitrator. Upon accepting the nomination, the nominee issues a certificate to the center indicating that he/she is independent and free from any form of conflict of interest concerning the disputants as described and required by the center.

The nominated arbitrator also issues a confirmation in writing expressing his/her willingness to take up the position and offer his/her services based on the fees that the center decides. In any case that an issue arise after the commencement of the arbitral process proceedings that may compromise the independence, integrity, or impartiality of the arbitrator, he/she should inform all the parties involved including the center. If the parties are unable to nominate their prospective arbitrator or a sole arbitrator as the case may be, upon receipt of a written communication by either party or both parties, the Executive Committee of

the Arbitration Centre shall nominate a co-arbitrator or sole arbitrator. The Executive Committee shall provide the disputing parties with the detailed CV of the nominated arbitrator and seeks in the Parties views in respect of his nomination. If no objections are raised by either party or both parties as the case may be, the nominated arbitrator shall be appointed as the party's arbitrator or the sole arbitrator as the case may be.

According to Dr. Reyadh Al-Kabban, the center Arbitration Centre considers a number of issues to ensure that the arbitral tribunal Arbitral Tribunal is confident enough to handle the dispute in question. Such considerations include the nationality of the Arbitrators, their language and the language of the parties, the arbitration seat, and nature as well as the circumstances surrounding the dispute.

After the submission of all the above mentioned information, the center Arbitration Centre informs the parties about the appointed arbitrator, the parties are then asked to raise any issues of concern in objection of the nominees, if any. If there is no objection to the nominees, the nominated co-arbitrators will be appointed as the respective parties' arbitrators. The appointed arbitrators shall jointly nominate the Chairman of the Arbitral Tribunal. If the Co-Arbitrators are unable to agree on the nomination of the Chairman, the Co-Arbitrators shall inform the Arbitration Centre of the same and the Executive Committee of the Arbitration Centre shall appoint the Chairman of the Arbitral Tribunal. The disputing parties views are sought on the appointment of the Chairman of the Arbitral Tribunal. In the event of no objection raised by either parties, the Executive Committee shall confirm the appointment of the Chairman of the Arbitral Tribunal.

c) What are the criteria you consider before accepting an appointment?

According to Dr. Al-Kabban, his impartiality and independence in the case is the most important criteria that he considers before accepting an appointment as a co-arbitrator or as a Chairman of the Arbitral Tribunal. In this case, he declines any appointment if he has ever acted in favor or against one of the disputants as a counsel or in any other legal capacity.

d) In your opinion, what makes a perfect arbitrator?

According to Dr. Al-Kabban, one can only be a perfect arbitrator if he/she fulfills a number of qualifications. First, such a person must be independent in order to be impartial and follow the due arbitral process as well as all the applicable rules of arbitration. Secondly, the person must possess adequate knowledge of all the facts and details concerning the case, the

claims, party defenses, as well as the allegations raised. Thirdly, the person must use his/her knowledge to give reasonable award within a reasonable period to avoid delay of justice. Fourthly, a perfect arbitrator must be able to apply the respective law in ensuring that the requirements for enforcing the arbitral award are fully complied with. Fifthly, he/she must be in a position to analyze as well as understand the nature as well as the circumstances surrounding the dispute at hand. In this case, he/she is supposed to demonstrate objectivity by lending all the parties a listening ear, reason with them and understand both their submissions as well as their pleadings. In addition, the individual must be able to adhere to the legal restrictions to deliver justice and ensure that the arbitral award issued by the Arbitral Tribunal is legally enforced and ratified in a court of law based on the laws of the land. Finally, a perfect arbitrator must demonstrate a comprehensive understanding concerning the substantive nature as well as the procedural laws for him/her to issue an award that can be easily enforced.

e) What do you think about removal of arbitrator during the process of arbitration?

According to the respondent, an arbitrator becomes unfit to oversee an arbitral process if he/she violates an arbitral agreement that regulates the arbitral process of the dispute at hand. In such a case, the arbitrator may be removed. Similarly, when arbitrator fails to act fairly and with adequate impartiality can also be removed from office. Finally, the arbitrator's inability to conduct or even participate in the process of arbitration by exercising due diligence as well as avoiding any delays as well as expenses that are unnecessary can as well be removed from office.

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5.0 Discussion

As stated in the literature review, the parties to nominate the arbitrators or to appoint the arbitrators of choice have fundamental rights. The *ad hoc* as well as institutional arbitration procedures guide the arbitration process in selecting arbitrators. The selection process is also guided by various laws of national arbitration. The quality of arbitration proceedings depends widely on the chosen arbitrators' skills and their experience.[115] The parties come up with their own mechanism for resolving their dispute and this justifies the presumption that they make their choice with full knowledge of the best resolution mechanism to resolve their disputes. Some people consider the act to over emphasize the selection as well as the appointment of qualified arbitrators for dispute resolution as out of order. Many questions concerning the prospective arbitrators' selection and interviewing arise. Selection as well as appointment of arbitrators is within the parties' control as well as parties' power. The arbitrators appointed by parties are supposed to be very neutral and should adhere to the impartiality standards and disclosure requirements.[116]

5.1 Arbitrator Selection

The key difference between the litigation and the consensual arbitration is that parties are able to select their own judge or arbitrator who will help in resolving the particular dispute. In litigation, any arbitrator who is assigned is accepted by the parties while in arbitration the parties have the responsibility of choosing their arbitrator.117 After making a decision to have a dispute referred to the arbitration, what is important is to choose the best arbitral tribunal. This choice is important for the parties as well as the dispute and it contributes to the reputation as well as the outcome of arbitral process. Thus for a party to make a good choice, it must look at certain clear attributes while choosing an arbitrator. This is important and it depends on what the party wishes to get from this arbitration, much of which depends on whether the particular party is the Claimant or the Respondent. Recognizing the importance of selecting arbitrators, many of the arbitration laws sets aside an award whereby the composition of the Arbitral Tribunal or the

[115] Sarcevic (n 12).

[116] Judge Advocate General's School (n 2)56.

[117] Moses (n 4).

procedure of arbitration was not within the parties' agreement. Failure of the Arbitral Tribunal to come up with an enforceable arbitral award is therefore a huge drawback to any arbitration process and this can only be avoided if the Arbitral Tribunal is properly constituted. It is therefore important to have a well-composed Arbitral Tribunal. The proper composition of the Arbitral Tribunal is an issue that can be waived by parties during the proceeding of arbitration.[118] This is done when the issue or the contest is not raised by parties in order to reserve the parties' rights to have the issue raised at enforcement or during the stage of setting aside. The requirements of this waiver ensure that the parties' rights are not ignored thus frustrating the entire process of arbitration where an arbitral award is not in favor of one of the parties. The proper constitution of the Arbitral Tribunal is a jurisdiction question whereby there is empowerment of Arbitral Tribunal by all the laws of arbitration. Partial immunity is enjoyed by arbitrators in some countries such as Brazil and this nullifies the final award because the award is made by an individual who is unqualified to be an arbitrator. As a result, personal liability issues against the arbitrator may come up particularly where a fraudulent misinterpretation of arbitration laws and process was committed by the arbitrator. This may not have been known by parties during the Arbitration proceeding. The parties therefore rely on arbitration to have their dispute or their differences resolved. The parties start the proceedings by appointing the arbitral tribunal in order to be recognized as well as to enforce an award. Therefore, anything depriving the parties of obtaining an award that is valid at the conclusion of the proceedings is seen to be an anathema thus should be avoided. The Arbitral Tribunal's composition, is one of them and the selection as well as the appointment of arbitrators should be based on the parties' agreement

5.2 Parties' Agreement

The Parties' Agreement is very important in the appointment of the Arbitral Tribunal. As a precondition to achieve an agreement, the Arbitral Tribunal's composition must be agreed upon by the parties. A number of ways are available, through which the parties can agree on this composition.[119] Parties are able to exercise their right by clearly agreeing on the appointment procedure by signing the arbitration agreement. The parties can also achieve this by having an

[118] United Nations Commission on International Trade Law (n 53).

[119] United Nations Commission on International Trade Law (n 53).

agreement on arbitrators as well as how the arbitrators will be appointed. All the laws of arbitration recognize the parties' rights. Appointments that the parties make are valid because this appointment are under the parties seal thus the parties have the responsibility of validly nominating and appointing an authority that can make the needed appointments on behalf of the parties. The parties can chose to make use of an appointment list for the appointment procedure as in the case of institutional arbitration[120].

Arbitrators can be appointed directly by the parties after the parties have a submission agreement. Where laws of institutional arbitration are adopted by the parties without having any express selection or provisions for appointment, the parties can choose the procedure for selection as well as appointment. They can also choose to use unpublished internal rules. This happens because the rules of arbitration in a given institution extend to the parties arbitration agreement. In choosing the rules of arbitration requirement, the parties must have these rules incorporated into the parties' arbitration agreement. The arbitration agreement's express provisions would override as well as apply whenever any provision inconsistence with the rules of mandatory provisions emerges. Some institution rules of arbitration provide that arbitrators can be designated or can be nominated by parties. Any question arising is determined at the point where the institutional rules of arbitration become a part of arbitration agreement. The rules in command will be the applicable. The effective rules that are in force when dispute arises may be provided by arbitral institutions. This means that rules of arbitration are not part of arbitration agreement before a dispute arises and until the arbitration agreement is effective. This also means that the rules in force are the applicable rules when the arbitration agreement is effective. Legal relations between parties as well as arbitration institutions are non-existence before a dispute arise and notifying the arbitration institution about the choice and the institution accepting to have the dispute administered under the institution rules. At the point when the institution accepts to have the dispute administered under its rules, the institution rules of arbitration then becomes effective and also becomes a part of parties arbitration agreement.

As a practical relevant issue, the rules of arbitration of the particular institution are only relevant after the particular institution agrees to have the arbitration administered. The rules will be relevant and operative at that particular time. An Arbitration Institution to which the parties

[120] American Arbitration Association (n 68).

have agreed to refer the dispute to in the Arbitration Agreement can be changed by notifying the institution about such change. The Arbitration Agreement can be amended by mutual agreement of the parties. It is not possible for one party to amend the arbitration agreement. Although the arbitration institution has been mentioned in the parties' arbitration agreement, the arbitration institution is only effective when the institution has accepted and acknowledged that it was appointed and it accepted such an appointment. The arbitration agreement therefore is subject to party amendment and another arbitration institution can be chosen by the parties. In addition, the arbitration institution that was named can refuse to accept this invitation upon notification to have the arbitration administered. The refusal to accept the invitation however does not have the arbitration agreement nullified. The decision of the arbitration institution can be contested by the parties in a court of law and another institution would be appointed by the parties. The parties would be required to have the arbitration agreement amended to have the new appointed arbitral institution accommodated.

5.3 Party Selection

The arbitrator appointment can be agreed upon by the parties. The requirements of selection begin with asking the question on whether parties can select. Arbitrators can be selected by the parties. The arbitrator selection is the process in which persons who are suitable of being an arbitrator are selected. The process involves the nomination, the confirmation as well as the appointment of an arbitrator. There is a minor difference in the selection process of the arbitral tribunal if it constitutes a sole arbitrator or three members.[121] Where the appointment of a sole arbitrator is required by the arbitration agreement, the method or the appointment can be provided by the agreement. The arbitrator who will act may be named as well as appointed in arbitration agreement. The parties conduct as well as get the proposed sole arbitrator's acceptance to act prior to his/her naming in the agreement. Most of the arbitration agreements lack the arbitrators' names. Arbitration agreement may indicate how many arbitrators will be appointed. In the ad hoc proceedings, an appointment authority could be appointed through the arbitration agreement to make the sole arbitrator appointment easy. Guidelines concerning the relevant arbitrator qualifications, skills, expertise as well as other appointment requirements may also be given by the arbitration agreement.

[121] International Chamber of Commerce (n 64).

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Default provisions for the appointment of an Arbitrator are made by arbitration laws and this applies when provisions are not made by the parties. The arbitration UNCITRAL Rules in Article 6 points out that the name of person or persons who will serve as sole arbitrator may be proposed by either party. The system of UNCITRAL envisages the appointment authority presence to function particularly where parties fail to agree on whom to be appointed. Therefore, it is provide in the rules of UNCITRAL that if an appointing authority is not appointed by the parties, the arbitration permanent court secretary general is asked have the appointment authority designated for the parties.122 When the arbitration appointment is entrusted by the parties to appointment authority, the parties will exercise their rights of appointment as well as powers indirectly. The parties are bestowed with the power to appoint whereby the parties delegate this power on appointing authority who on the parties' behalf exercises the power. This appointing authority only acts as a disclosed principal agent when making appointments. The appointing authority has no power to act on its own accord. The Appointing Authority is required to act on behalf of the party. The mandate of the appointing authority is arbitrator appointment. Parties as well as appointees agree upon the terms of appointment. Personal liabilities are not therefore incurred by the appointing authority either to parties or to the arbitrators. In some cases, liabilities may be incurred by the appointing authorities where the appointing authority performs or fails to perform the assigned duties honestly.

In case an appointing authority is not involved, the list-system can be modified by the parties in order to make appointments. According to article 6(3) of the UNICITRAL rules, the list system is well described and how an appointing authority can adopt it. The difference when the appointment authority is lacking is that there is a direct exchange of the list between parties or between party lawyers. The list that contains the names of the arbitrators ranked in their preference order is exchanged simultaneously between the by parties during the list procedure. In case of presence of appointing authority, identical lists will be sent to parties by the appointing authority. The proposed appointees will then be selected by the parties in accordance with the party preference. Names objected would be deleted by the parties where incase of appointing authority involvement. The parties will then have the amended list returned to the appointing authority. An arbitrator will then be appointed by the appointing authority from the lists. In case

[122] United Nations Commission on International Trade Law (n 53).

of recurring names on the two lists the appointing authority may chose such names but this will depend on name ranking on the two lists. Where a party fails to cooperate, it will not be possible for the sole arbitrator to be appointed by a diligent party.[123]

In a three member arbitrator panel or more arbitrators, there is subtle difference made by the law concerning the arbitrator appointment.[124] In a panel where the arbitrators are of an uneven number, an arbitrator is appointed by each party and the two appointed arbitrators will together appoint the third arbitrator who will be the Chairman of the Arbitral Tribunal. The Chairman can be appointed by the parties according to some laws. Others laws require that the chairperson will be appointed by the two arbitrators who were appointed by the parties. Practically, the nominated arbitrators consult with their respective parties on the appointment of the Chairperson. In international arbitration, arbitrators appointed by parties are viewed to be acting as appointing parties agents or party representatives. Many international arbitration principles state that it is the parties' fundamental rights to be consulted upon the appointment of arbitrators in order to ascertain their independence as well as neutrality. Additionally where it is believed by the arbitrators appointed by parties that the appointing parties are not reasonable concerning the nominated chairperson rejection, the nominated chairperson will have independent options on such applicable laws application. In such a case, the relevant law provisions become very important. Where an input from parties is not required by the law, then arbitrators appointed by the parties may not consult with the appointing party. On the other hand, where it is required by the laws that the appointing party has the right to make appointments, it would be impossible for the arbitrators appointed by the parties to disregard the input of the appointing party. This is therefore an issue in a case where arbitrators appointed by parties make an agreement concerning the fees together with the arbitrators' nominated Chairman. The parties in this case can have the nomination approval whereby the parties do not pay the fee. In such a case, a judge may authorize the arbitrators appointed by parties to make the umpire appointment i.e. that the parties had authorized the arbitrators to get to an agreement about the umpire fees thus binding the parties and making it a must that the fees will be paid by the parties.125 Where

[123] American Arbitration Association (n 68).

[124] International Chamber of Commerce (n 64).

[125] American Arbitration Association (n 68).

the Parties entrust the appointment of the chairperson to a third party, for instance to the appointing authority, the two arbitrators are appointed by the parties while the chairperson can be appointed by appointing authority on the parties behalf. The appointing authority can be given the power to have all arbitral tribunal members appointed on the parties' behalf. In whichever the case, the arbitrators' appointment is perceived to be the responsibility of the parties whether directly or whether indirectly.

Under institutional arbitration, the arbitration relationship dynamics change soon after the third party is introduced. The responsibility of the arbitration institution includes acting as the appointing authority as well as undertaking other administrative activities. The arbitration institution's involvement in arbitration varies. Some arbitration institutions also determine as well as pay the fees in addition to the arbitrators' expenses and they provide administrative help too. Administration in these institutions is administered in accordance with rules of UNCITRAL Arbitration of 1976 whereby in some cases the rules had slight modification. Many of the arbitration institutions adopted their independent rules although many of these rules have been influenced from the arbitration rules of UNCITRAL.[126] These rules undergo modification due to changes in the field of arbitration. The main difference concerning is that the rules of the arbitration institutions provide guidelines for arbitrator nominations by parties whom the institutions will then appoint in the terms of the party. These terms includes all the arbitration agreement requirements thus the arbitration agreement gives the arbitration institution the mandate to appoint arbitrators. Since rules of arbitration institutions are a part of the arbitration agreement of the parties, the institution is bound by the instructions stipulated in the Arbitration Agreement. Arbitration institution does not make appointment on parties' behalf but on their behalf. This is not the case in the appointing authority where appointment is on the parties behalf. Parties executing the arbitration agreement contract authorize arbitration institution on the arbitrators' appointment. Even when arbitrators are nominated by the parties for appointment by arbitration institutions, the arbitration institutions has the mandate to appoint the arbitrators according to the institution rules. This ensures that the arbitrators' appointment was without any bias and that the appointed arbitrator is independent of the disputing parties. It is argued that the responsibility for appointing independent, suitable, as well as impartial arbitrators according to

[126] United Nations Commission on International Trade Law (n 53).

the published rules is based on arbitration institution. Sometimes the sole arbitrator as well as the chairperson is appointed by some institutions in an arbitrator panel. The parties are permitted by some rules to come up with recommendations that arbitration institutions may choose. However, it is provided by these rules that arbitration institutions are free to appoint the party nominated arbitrators. The provision provides further that arbitration institutions use their name while appointing arbitrators. Whether the arbitrators are appointed independently by the arbitration institutions or the parties' recommend the arbitrators, the arbitrator appointment is traceable to parties according to the arbitration agreement provisions.127 Arbitration institutions provide an additional assurance on the proper appointment of arbitrators.

5.4 Selection Criteria

The criteria taken into consideration by parties during arbitrator selection are based on the selecting party's goals as well as the participation of the parties in arbitration. Where parties are not interested or where there is no incentive in pursuing arbitration, which is typically considered the position of many respondents, the party may decide that it will not work together with the second party stating that the proceeding are very frustrated. The second party may not meet the deadlines of appointment according to the laws and rules or fail to make appointments. The second party may have the proceedings delayed by extending the time limit on the agreed deadlines. The arbitral tribunal may allow the dilatory tactics of this party in order to jeopardize the final award by depriving the party the opportunity to have its case presented as well as answered while allowing the party opponent to present its case. The dilatory actions of the party may be carefully documented by the tribunal in the party awards as evidence showing that such a party was given the full opportunity to participate in the case proceedings. In such a case, there would be need to have arbitrators appointed by the parties and the arbitrators should be flexible as well as firm enough in order to be able to appreciate as well as provide for the dilatory tactics. A party may want to push out the opponent party from the tribunal process. This happens in most cases when the financial position of the other party is questionable and suspected to be unstable or bankrupt. The financial position of the party must be identified by the arbitrator and this issue should be appropriately dealt with. This requires the sole arbitrator and the chairperson to be very experienced on matters of arbitral tribunal. The experience from the international arbitration

[127] M. R. Engineers (n 19).

involvement would be helpful to the arbitrator in identifying the measures as well as taking the important steps within the applicable laws in addition to the rules. In a three member arbitrator panel, the arbitrators form a team whereby every arbitrator must play his part in the team.[128] Each arbitrator must work with the other arbitrators and tribunal members especially when the members belong to different nationalities as well as legal systems and socio-cultural backgrounds. It is not important that arbitrators appointed by the parties seek to befriend the chairperson. As per the rules of arbitration that there should be an award must be issued by a majority that was concurred by the chairperson. The good or the bad faith of the party concerning international arbitration is supposed to be irrelevant as well as an inconsequential point once the arbitrator has been appointed by the party. This is because upon the appointment of the international arbitrator, whether appointed by party or by other means, is not the appointing party's representative or an agent. The international arbitrator should very neutral and should owe every duty to the involved parties in the particular dispute.

The arbitrators' professional expertise and qualifications depends on the parties' requirements according to arbitration agreement as well as the nature of the dispute.[129] It is not necessary that the arbitrator is a professional in the related field because international tribunals are able to access expert witnesses. Moreover, the nature of the dispute might require a person with the technical skills in the related field. In such a case the professional sole arbitrator in the particular field as well as the experience of international arbitrator are able to have the parties need met. It is argued that when the dispute is technical, a three member arbitral tribunal is highly suitable. This also depends on the proportionality of dispute value as well as complexity. However, in an arbitrator panel, it could be better when the chairperson is a lawyer having arbitral professionalism while party appointees have expertise in the given field. This is important when issues welcome various technical interpretations. The arbitrators' additional requirements will be the arbitrators' persuasion abilities as well as their team spirit. It is necessary to mention that the young people aspiring to be arbitrators are useful in the arbitrators' panel, particularly in disputes concerning the arbitrators' specialization areas. The aspirant arbitrator would bring their professionalism, expertise, fresh ideas as well as enthusiasm to the

[128] International Chamber of Commerce (n 64).

[129] M. R. Engineers (n 19).

arbitral tribunal. They also have time to dedicate to the tribunal proceedings. It is necessary that arbitrator is present. This is not cost effective as well as frustrating to have arbitrators appointed and fail to devote their time to proceedings in spite of their perceived experiences. This is true especially when the arbitrators are experienced in international arbitration but are sometimes constrained to handle many disputes beyond their capacity thus become ineffective and inefficient while dealing with the disputes. For this to be achieved and to assist the arbitrators to determine whether they can afford enough time, parties should have good ideal regarding the time that the entire proceeding will take from the date of case filling to the hearing closure. These projections are helpful to the arbitrators when they are approached to have their availability determined. There are no arbitration proceedings that are surprising to parties nowadays. This is because most of the arbitration agreements are usually pre-disputes and the parties are aware when the relationship between them is broken and the concerned parties try to settle issues between them before the beginning of arbitration proceedings. The presence of arbitration agreement puts the parties on notice when a dispute that is not likely to be settled emerges. The parties are therefore expected to have a projection of the proceeding time.[130] This is important in assisting the prospective arbitrators in making the decision whether to decline or to accept the arbitration offer given to them by the parties. Arbitrators should understand the language used in arbitration proceedings. This assists the arbitrators to have a clear understanding of the dispute as well as the parties' position. This also makes the arbitration proceedings cost effective and minimizes additional expenses and time that could be use in interpretation. The parties' nationality as well as the arbitrators nationality is one of the international arbitration key factors. The international arbitration key factor is that in many cases the party members are of different nationalities. The parties' nationality is taken into account by the ICC during the sole arbitrator as well as the chairperson appointment to the arbitrators' panel.[131] This is essential in arbitration that concerns the state parties. In sensitive disputes concerning the nationality such as foreign investment dispute, appointment of other state nationals that are not involved in the dispute increases the parties' confidence in the arbitration proceeding as well as arbitration outcomes. Selecting the chairperson or the presiding arbitrators

[130] M. R. Engineers (n 19).

[131] Born (n 59).

brings additional issues. Parties may contribute towards the appointment of the prospective candidate. Practically consulting the parties either directly or indirectly via the arbitrators appointed by the parties is important. This relies on who appoints as well as nominates presiding arbitrator. The managerial positions of the nominees may be considered by the parties. This includes the ability of the nominee to manage other arbitrators, the parties as well as the party lawyers, the disputes as well as the procedures and the administrative personnel.

5.5 Selection Process

The prospective arbitrators are interviewed as an international arbitration principle. During the interview the availability, the relationship, the chemistry as well as other specific issues concerning the candidate are reviewed. Arbitrators should be reminded that they would be paid for the services they offer which involve professional skills as well as judgment in addition to their independence as well as impartiality. It is important to meet and talk to the potential candidates before their nomination and appointment. This gives the parties an opportunity to examine the arbitrators. The prospective arbitrator should make enough enquiries in order to be able to make the best decision concerning his or her impartiality, independence, availability as well as disclosure. The arbitrator will be able to answer the parties' questions that are aimed to determine the arbitrators' suitability as well as availability. This communication relies on the case merits that are yet to be discussed. After the prospective arbitrators are interviewed, one arbitrator is chosen for appointment. In the ad hoc arbitration nominee is informed about his or her nomination. After accepting the offer, the appointment will conclude and the opponent party will be notified of the appointee names as well as other details. The same process would be undertaken by the opponent party in appointing its arbitrator as well as giving important notifications. The chairperson will then be appointed by the two arbitrators appointed by the parties. It is not possible to overemphasize the law relevance concerning the arbitration seat in ad hoc arbitration. The relevant law non-mandatory provisions fill the gaps as well as making the default provisions. These provisions are important in cases where the parties have no provisions.

6.0 Conclusion

Even though many people and organization continue to embrace the use of arbitration as one of the methods of resolving conflicts, divergent views and opinions have emerged concerning who should be included in the tribunals and how the tribunal should be constituted under different laws and rules that govern many geographical regions across the world. It is clear that parties as well as their lawyers participating in the international arbitration interview the prospective arbitrators because this is important in the selection process. This is regulated by the arbitration rules, codes as well as laws. Freedom is accorded to the parties by the rules as well as the laws thus parties are able to decide how many arbitrators will be appointed for the proceedings. Such appointments are influence by the procedure that parties adopt. The parties have the right to choose the arbitrators. Default provisions are made by the arbitration laws as well as rules to regulate the issues in case express provisions are not made by the parties.

Arbitration as an alternative dispute resolution mechanism has many advantages over litigation. Such benefits of arbitration include higher neutrality, ability to resolve the dispute as well as enhance the good relationship between he disputants, easily enforceable if no grievous irregularities were involved in the process, and its confidentiality. It also safeguards corporate image, takes a shorter time, and gives parties the freedom to choose the arbitrators as envisaged in the English Arbitration act 1996. Its demerits however include the minimal use of discovery, difficult in correcting an erroneous as a result of lack of appeals, and lack coercive powers. The issues that must be prioritized in the arbitration process include the flexibility of the procedural framework, proper management of cases especially where deadlines should be properly tracked, high efficiency level, effective and efficient communication, expertise level, integrity, impartiality, and independence as envisaged in the English Arbitration act 1996. The Quality of Arbitration depends on several issues that include arbitrators' experience, their integrity, and the quality of their services. This means that the parties should scrutinize the arbitrators' background. Appointment of arbitrators also depends on whether ad hoc or the institutional arbitration process would be used.

A number of important factors emerged from the interview results on appointing arbitrators.

First, parties must carry out background checks concerning the possible arbitrators. They must also examine the individual's motivation to preside over an arbitration process. They must also stick to the draft arbitration clauses. The qualifications of arbitrators in terms of experience, management skills, ability to make decisions, competence in procedural matters, ability to judge effectively, "probably the most important qualification for an International arbitrator is that he should be experienced in the law and practice of Arbitration."[132]

Neutrality and independence must be thoroughly scrutinized. Some of these factors are not strictly adhered to in practice since the parties' legal counsels who are usually lawyers begin the arbitral process. In this case, they seek to promote the interests of their clients even though they do so by adhering to the rules as well as the ethical standards that govern the arbitral process. Practically, parties therefore failed to search for arbitrators who would be strictly impartial or who would be totally neutral. They ensure that they appoint arbitrators who subscribe to their arguments. Such people are those who are highly rational and who can control the arbitral decision as much as possible. They represent the respective party's interests.

Despite the difference between theory and practicality of the arbitral process, several commonalities exist concerning the qualifications and the appointment of the arbitrators. A good arbitrator is able to understand all the issues presented well and as a result, he/she must have adequate knowledge on the industry. Such a person must also have a highly forceful personality and must understand the implication of the dispute on commercial matters. A good arbitrator must also understand evidential rules and as result, such a person must be experienced in international arbitration where he/she practiced as a lawyer. The arbitrator must be able to work with limited documentary evidence, select a suitable chairperson, have adequate skills that match with the influence of the opponents, be able to oppose objectively, and understand the advice of the parties' counsels. The arbitrator must have a positive body language, good personality. His capability, ability, expertise on legal issues, availability, impartiality, objectivity, willingness, independence, and integrity should not be questionable.

Selection of the arbitral panel, that is arbitrators and the chair, is very important in any arbitral process. Once the selection process of the arbitral panel is flawed, the entire process slumps into crisis and the parties can no longer have confidence on the decision that the arbitral panel makes. While the parties may not have adequate information at the time of appointment of

[132] Redfern & Hunter. Law and practice of international commercial Arbitration, (4th) Ed) 2004, Dara 4-47.

the arbitrators that may compromise the integrity of the arbitral process, the arbitrator who compromises the promise should be removed. Even though this may be seen as a drawback to an already ongoing arbitral process, such an action is inevitable in restoring the integrity of the entire process.

7.0 Recommendations:

1. Approval of new UAE Arbitration Law and to make sure before its approval that it rectifies the effects in the previous arbitration law (up to date there is no separate UAE Arbitration Law only there is some provisions and articles which fall within UAE Code of Civil Procedures No. 11 of 1992), and introduction of new articles which rectifies the shortcoming and defect in the old law.

2. The lists which include the names of arbitrators in UAE Courts and in Dubai in particular are in need of reconsideration to find out a mechanism to improve quality in selection of arbitrators as there is no exclusive lists of the names of the arbitrators rather the list fall within what is known as (Lists of Experts and Arbitrators) and there is a difference between an arbitrator and an expert and there ought to be serious and immediate attempts to rectify this defect in order to adopt the mechanism for selection of arbitrators. We are in need of assisting based on accurate and well studied criteria, in order to enhance trust in the efficiency of arbitrators under capabilities as we need arbitrators with local expertise and international reach (Knowledge of laws and culture which prevail in the region and subject matter of the case in addition to a thorough knowledge of public policy and good command of Arabic Language, as well as English language as mandatory requirement and the language in which the arbitration clause is drafter or the underlining contract containing arbitration clause.

3. Certain conditions should be adopted and basic requirements to approve arbitrators and enlist them in the list of arbitrators approved by Arbitration Centers in UAE and make sure that they enjoy local expertise with international standards when registering an arbitrator, a CV should be enclosed along a lists of cases which have been decided by the applicant and include full case numbers and the center should be valid with the names of person as a reference to make sure that the adequate cadres are appointed after having passing an examination to be approved by the center in line with practices of international centers, provided that a registration should be without fees and that the criteria of approval and appointment of approved arbitrator is his / her credentials, and that arbitrators may not be appointed just for joining training courses convened by arbitral institutions and obtaining of

certificates from the center against prescribed fees, and such practice might will lead to appointment of unqualified arbitrators, and consequently compromised the entire arbitral process.

4. Whereas UAE is in need of local arbitrators, therefore some sort of system should be adopted to encourage them and qualify them to work as professional arbitrators by approval of training system (after obtaining the consent of the arbitrating parties and the signature of the trainees on such document) wherein arbitrators after attending hearings would be requested to prepare a report then they will be entrusted with simple cases (which entails a small amounts, given the fact that an experience is obtained by practical experience in addition to personal endeavor to acquire additional skills and encourage the culture of work as arbitrators to develop arbitrations as ADR, as arbitration is not in competition with courts rather support of courts.

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